

REGENT UNIVERSITY LAW REVIEW



SYMPOSIUM: COLLEGE CULTURE, SEXUAL VIOLENCE & DUE PROCESS

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SEXUAL VIOLENCE

Nancy Chi Cantalupo

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BETWEEN FIFTH AMENDMENT PRECEDENT AND
LATIN AMERICAN LAND REDISTRIBUTION

VOLUME 28

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ADDRESS: THE CIVIL RIGHTS APPROACH TO CAMPUS SEXUAL VIOLENCE[†]

*Nancy Chi Cantalupo**

INTRODUCTION

Thank you to the *Regent University Law Review* Editors for inviting me to participate in this conversation. This is a subject that I have spent an extraordinary amount of time discussing and thinking about, and I certainly would not have done that if I did not think it was critically important. I thought that I would talk about my primary area of legal expertise, which concerns Title IX of the United States Education Amendments of 1972,¹ and how it relates to this Symposium's topic of campus sexual violence. Although I have also done significant research on the Clery Act and the administrative due process rights of accused students in sexual violence cases on college campuses, my focus today will be on Title IX.

I will start with some "basics" regarding Title IX. Sexual violence is commonly thought of as a crime in the United States.² However, recent activism has brought to the forefront that sexual violence is also a violation of Title IX (which took the ground-breaking step of prohibiting sex discrimination in education in 1972).³ Sexual violence is considered a severe form of sexual harassment, and sexual harassment has been

[†] This speech is adapted for publication and was originally presented as an address at the Regent University Law Review Symposium entitled "College Culture, Sexual Violence, and Due Process," on October 3, 2015.

* Assistant Professor of Law, Barry University Dwayne O. Andreas School of Law. I thank the students, faculty, and audience members who attended the 2015 Symposium for their questions and comments, and the students of the *Regent University Law Review* for their tremendous assistance in turning my speech into this annotated transcript.

¹ Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)).

² See *Rape and Sexual Violence*, NAT'L INST. JUST. (Oct. 26, 2010), <http://www.nij.gov/topics/crime/rape-sexual-violence/pages/welcome.aspx> (explaining that "sexual violence" encompasses crimes such as sexual harassment and rape).

³ See Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence i–ii (Apr. 24, 2014) [hereinafter OCR Questions and Answers], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (explaining that both private and public schools and universities that receive federal funding must promptly investigate and address sexual violence under Title IX); Dana Bolger, *9 Things to Know about Title IX*, KNOW YOUR IX, <http://knowyourix.org/title-ix/title-ix-the-basics/> (last visited Feb. 23, 2016) (discussing the basics of Title IX on the website of an organization designed to empower students to stop sexual violence).

recognized throughout the globe as a form of sex discrimination for many decades.⁴

With regard to enforcement, most of the attention now is on administrative enforcement by the Office for Civil Rights (“OCR”) because survivors have been filing complaints in droves.⁵ For example, the latest count for universities under investigation is around 130—when the list was first published, less than eighteen months ago, the number was 55.⁶ So there is a great deal of activity going on in this area. But, of course, the ability to bring private lawsuits has also gotten some attention,⁷ and the rates of those filings have gone up as well.⁸

OCR’s agreements with schools that settle complaints tend to be very comprehensive and detailed,⁹ which lead several schools to agree to make significant changes to their procedures recently.¹⁰ As you can see,

⁴ Julie Goldscheid, *Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches*, 28 T. JEFFERSON L. REV. 355, 356–57 (2006); OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENT BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES i–ii (2001) [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE], www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

⁵ See Lyndsey Layton, *Civil Rights Complaints to U.S. Department of Education Reach a Record High*, WASH. POST (Mar. 18, 2015), <https://www.washingtonpost.com/news/local/wp/2015/03/18/civil-rights-complaints-to-u-s-department-of-education-reach-a-record-high/> (noting that the number of complaints soared after the Office for Civil Rights stated that sexual violence is a form of sex discrimination).

⁶ Nick Anderson, *Rutgers: 20 Percent of Undergraduate Women Had Unwanted Sexual Contact*, WASH. POST (Sept. 2, 2015), https://www.washingtonpost.com/local/education/rutgers-20-percent-of-undergraduate-women-had-unwanted-sexual-contact/2015/09/01/33b6d46c-50d4-11e5-933e-7d06c647a395_story.html (noting 130 open Title IX sexual violence investigations); Press Release, U.S. Dep’t of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), <http://www.ed.gov/news/press-release/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> (listing fifty-five institutions with open Title IX sexual violence investigations).

⁷ See, e.g., *How to Pursue a Title IX Lawsuit*, KNOW YOUR IX, <http://knowyourix.org/title-ix/how-to-pursue-a-title-ix-lawsuit/> (last visited Feb. 23, 2016) (noting the private complaint a victim can file if an institution is not complying with Title IX obligations regardless of a complaint with the OCR).

⁸ See Daniel A. Kaufman, José A. Olivieri, & John G. Long, *Can Colleges and Universities be Sued for Sexual Orientation Discrimination and Run Afoul of Title IX?*, NAT’L L. REV. (Jan. 20, 2016), <http://www.natlawreview.com/article/can-colleges-and-universities-be-sued-sexual-orientation-discrimination-and-run> (observing that Title IX claims have become more prevalent).

⁹ See Sara Lipka, *How 46 Title IX Cases Were Resolved*, CHRON. HIGHER EDUC. (Jan. 15, 2016), <http://chronicle.com/article/How-46-Title-IX-Cases-Were/234912> (explaining that the OCR issues two lengthy documents in resolution agreements with schools: the letter of findings which details the investigation and the resolution agreement which details the process and procedure for the school moving forward).

¹⁰ See, e.g., Press Release, U.S. Dep’t of Educ., Michigan State University Agrees to Change Its Response to Complaints of Sexual Harassment, Sexual Violence (Sept. 1, 2015),

there is a lot of activity on the topic of sexual violence, not just in terms of the problem itself, but also in the legal and administrative responses to it. Indeed, there has been a small explosion of attention to this issue on the national scene,¹¹ especially with the major events that have happened in the last eighteen months.¹²

It is clear now that the fight against campus sexual assault is a civil rights movement.¹³ This movement is being led by survivors of campus sexual violence, and they are using Title IX and other civil rights statutes as the flag for their movement.¹⁴ This is particularly clear from the fact that they have chosen names like “Know Your IX” and the “IX Network.”¹⁵ Because of its reliance on federal civil rights laws, the

<http://www.ed.gov/news/press-releases/michigan-state-university-agrees-change-its-response-complaints-sexual-harassment-sexual-violence> (listing changes that include requiring all students to participate in online training on sexual harassment and developing a monitoring program to evaluate campus efforts); Press Release, U.S. Dep’t of Educ., U.S. Department of Education Reaches Agreement with The Ohio State University to Address and Prevent Sexual Assault and Harassment of Students (Sept. 11, 2014), <http://www.ed.gov/news/press-releases/us-department-education-reaches-agreement-ohio-state-university-address-and-prevent-sexual-assault-and-harassment-students> (noting that changes include forming a group of first responders to address sexual violence complaints and developing student online training sessions on bystander intervention); Press Release, U.S. Dep’t of Educ., U.S. Education Department Reaches Agreement with the University of Virginia to Address and Prevent Sexual Violence and Sexual Harassment (Sept. 21, 2015), <http://www.ed.gov/news/press-releases/us-education-department-reaches-agreement-university-virginia-address-and-prevent-sexual-violence-and-sexual-harassment> (documenting changes that include implementing a system for tracking all reports of sexual violence to ensure they are appropriately addressed and providing training on sexual harassment for all students and faculty).

¹¹ See Tovia Smith, *How Campus Sexual Assaults Came to Command New Attention*, NPR (Aug. 13, 2014, 11:27 AM), <http://www.npr.org/2014/08/12/339822696/how-campus-sexual-assaults-came-to-command-new-attention> (explaining that, in recent years, talk about sexual assault “has gone from mostly whispers all the way up to the White House,” resulting in widespread policy changes at most colleges).

¹² See, e.g., CQ PRESS, CAMPUS SEXUAL ASSAULT 926–31, <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2014103100> (providing a comprehensive account of legal and policy-related events about campus sexual assault, including the White House Task Force to Protect Students from Sexual Assault and recent legislation at both the state and federal levels); Max Lewontin, *In Rules on Campus Sexual Violence Education Dept. Emphasizes Training*, CHRON. HIGHER EDUC. (Oct. 20, 2014), <http://chronicle.com/article/In-Rules-on-Campus-Sexual/149521/> (noting the importance of the changes in the new federal rules promulgated under the Clery Act, which took effect in July 2015).

¹³ Gloria Allred, *Gloria Allred: The Battle Over Sexual Assault is the “Civil Rights Movement of Our Time,”* TIME (May 15, 2014), <http://time.com/100055/campus-sexual-assault-gloria-allred/>.

¹⁴ Emanuella Grinberg, *Ending Rape on Campus: Activism Takes Several Forms*, CNN (Feb. 12, 2014, 11:35 AM), <http://www.cnn.com/2014/02/09/living/campus-sexual-violence-students-schools/>.

¹⁵ *Id.*

movement has gotten a lot of attention from the federal government—particularly those agencies like OCR that deal with civil rights issues.¹⁶

The survivor movement and the federal government have primarily focused on civil rights, but the conversation in the media and among the general public has been quite different. In these conversations, there has been a dominant theme that conflates civil rights laws and the criminal justice system. While this discourse treats the two as if they were similar, civil rights laws and the criminal justice system are, in fact, very different.¹⁷

Therefore, my role today is to explain the ways in which campus sexual violence is not just a crime, but also a violation of our civil rights laws. Considering campus sexual violence as a civil rights issue differs from looking at it as a criminal issue in countless ways, but I am going to focus only on the four that I think are most important.

I. DIFFERING GOALS

The first difference between the criminal justice approach and the civil rights approach has to do with the different goals of each system. The civil rights approach is concerned with equality: equal educational opportunities, equal education environments, and equal support for the learning of all students.¹⁸ In contrast, the criminal justice system is focused on keeping the abstract community as a whole safe from violence, and relies on incarceration of criminal actors to protect that community.¹⁹ Because that incarceration needs to be just, and we cannot deprive citizens of their liberty under the Constitution based on crimes that they did not commit, the focus of the criminal justice system is on the defendant's rights²⁰ not on the victim's needs. Indeed, aside from giving testimony in court, the victim is traditionally not really a part of the criminal proceeding.²¹

¹⁶ See *id.* (observing that the federal government has placed many universities under scrutiny because of potential Title IX violations).

¹⁷ See OCR Questions and Answers, *supra* note 3, at 27 (explaining the differences between a criminal investigation and a Title IX civil rights investigation).

¹⁸ See *id.* at 32–33 (describing the measures schools must undertake after a sexual violence allegation); REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 4, at 3–4 (summarizing the extensive obligations schools undertake under Title IX to avoid sex discrimination).

¹⁹ WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW §§ 1.2(e), 1.3(a) (2d ed. 2010).

²⁰ See *id.* § 1.4 (discussing the high evidentiary and constitutional standards that are designed to protect the innocent even if the guilty may go free).

²¹ See Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 849 (1997) (observing that the victim is sometimes excluded from the courtroom to ensure that the defendant has a fair trial).

In contrast, just incarceration is not the focus of an equality-based regime and, therefore, not the focus of the Title IX approach.²² At the outset, this is because schools cannot incarcerate individuals and are not in a position to enforce the criminal law—they are not criminal justice actors.²³ Instead, the civil rights approach focuses on the victim, because the right to be free from sex discrimination is the *victim's* right—one that the victim holds under the civil rights statutes.²⁴ Thus, the civil rights approach focuses primarily on the victim's, not the accused perpetrator's, legal rights.

II. DIFFERING PRIORITIES FOR ADDRESSING VICTIMS' NEEDS

The second difference between the criminal justice and the civil rights approaches to sexual violence naturally arises from the different goals of each system. These different goals have allowed each system to adopt different structures in response to the rights and needs of the individual at the focal point of those goals (in the criminal system, the accused perpetrator, and in the civil rights system, the victim of discrimination).

This is critically important because victims have an extremely wide range of needs after experiencing sexual violence, and the downward spiral that victims can experience if these needs are not met can seriously derail and even ruin their lives.²⁵ The downward spiral starts with serious health problems triggered by the sexual violence, including an increased risk of substance use and re-victimization, as well as a greater likelihood of developing eating disorders, participating in sexual risk behaviors, engaging in self-harm, and committing or attempting suicide.²⁶ For students, those health problems can require time off from

²² OCR Questions and Answers, *supra* note 3, at 27.

²³ LAFAVE, *supra* note 19, §1.4(c) (describing the many actors of criminal justice, including the victim, police officers, prosecutors, juries, and judges).

²⁴ See 20 U.S.C. § 1681(a) (2012) (prohibiting sex discrimination in education programs or activities that receive federal funding).

²⁵ Terry Nicole Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 39, 44–47 (1991) (detailing the possible physical and psychological harms that can affect sexual violence victims long after the initial incident).

²⁶ For in-depth discussions and studies on the consequences of sexual violence on victims see generally, TED R. MILLER, MARK A. COHEN & BRIAN WIERSEMA, U.S. DEP'T OF JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 17 (1996), <https://www.ncjrs.gov/pdffiles/victcost.pdf> (reporting the monetary cost of crime for victims, including statistics on rape and sexual assault); Jay G. Silverman et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, 286 JAMA 572 (2001) (reporting study results that women who experience dating violence are likely to have other serious health risk behaviors); Rebecca Marie Loya, *Economic Consequences of Sexual Violence for Survivors: Implications for Social Policy and Social Change* (June 2012) (unpublished Ph.D. dissertation, Brandeis

school, usually causing a drop in grades and even a decline in overall educational performance.²⁷ The effect on educational performance can then result in economic losses, such as loss of financial aid, tuition dollars, or scholarship money.²⁸ And in the worst cases, the student may drop out or transfer to a less desirable school because of the cumulative effects of the sexual violence.²⁹ The negative impact on future earning potential can be large, diminishing a student's equal employment opportunities as well. Thus, the potential impact on the student's life is great even before they enter the workforce.

Additionally, these dynamics can have a different impact on certain groups of students. For example, first-generation college students are likely to have fewer resources from home than other non-first-generation students, making it more challenging to create the time and space that they need to heal from sexual violence. As a result, these students can unfairly experience an even greater impact on their lives after suffering from sexual violence.

Thus, to halt the downward spiral and re-establish an equal education for the student, the school's focus cannot solely be on punishment for the perpetrator. Under Title IX, the school must provide accommodations for victims whose trauma makes it impossible for them to continue with their education in the same way they did before the violence. These accommodations may include making changes to the victim's housing, working, commuting, and academic arrangements, or obtaining a stay-away order, refunding tuition, as well as providing other types of relief.³⁰ Through providing such accommodations, schools can remedy harms that the victim has experienced by sanctioning the assailant.

Just as this focus on accommodations reflects Title IX's equality goals, the criminal justice system's lack of similar remedies relates back to the goals of the criminal law. Because the criminal law does not seek to re-establish equality for the victim as Title IX does, it is not structured to provide accommodations or assistance comparable to Title

University) (on file with author) (finding sexual violence caused negative economic consequences and altered educational attainment, occupation, and earnings).

²⁷ See Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 396 (2005) ("The end result for victims is falling grades, prolonged school absence, and for many, eventual school drop out or failure. Simply put, sexual assault is a significant barrier to equal education for young women today.").

²⁸ Anna Kerrick, *Justice is More than Jail: Civil Legal Needs of Sexual Assault Victims*, ADVOCATE, Jan. 2014, at 40.

²⁹ *Id.*

³⁰ OCR Questions and Answers, *supra* note 3, at 32.

IX. The criminal justice system is simply not set up to make a victim whole in the way that civil rights laws can.³¹

III. DIFFERING CONTROLS OVER INVESTIGATORY DECISIONS

The third difference centers on who decides whether an investigation of a victim's report will occur. Almost every case processed by the criminal justice system will involve an investigation, and police and prosecutors will more than likely dictate the course of that investigation.³² Police and prosecutors decide to advance very few sexual violence cases through the full criminal process.³³

It is also clear that few survivors give police or prosecutors the chance to make that decision at all.³⁴ Instead, the vast majority of survivors will use the "victim's veto." This is a phenomenon identified and explained by Professor Douglas Evan Beloof of Lewis and Clark Law School, who says that "[t]he individual victim of crime can maintain complete control over the process only by avoiding the criminal process altogether through nonreporting."³⁵ Although Professor Beloof discusses crime victims generally, thirty years of social science research on campus sexual violence shows that the reasons provided by Professor Beloof for the prevalence of the victim's veto are highly relevant to campus sexual violence survivors.³⁶ Those reasons include the survivor's desire to maintain privacy, a concern that reporting the incident may do them more harm than good, and a skepticism that the system will be able to solve many of these cases.³⁷ Those same concerns are present with incidents of sexual violence on college campuses.

Equally evident in the victim's veto are victims' concerns about treatment from systems in which they lack the ability to participate or express concern about that participation—to many victims, this is a

³¹ See LAFAVE, *supra* note 19, § 1.3(b) (noting that the purpose of the criminal justice system is to protect the community, not to make the victim whole, as in a tort claim).

³² *Id.* § 1.4(c).

³³ Tamara F. Lawson, *A Shift Towards Gender Equality in Prosecutions: Realizing Legitimate Enforcement of Crimes Committed Against Women in Municipal and International Criminal Law*, 33 S. ILL. U. L.J. 181, 188–90 (2008).

³⁴ See Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 147 (2012) (finding that only five to twenty percent of victims will report a sexual assault to law enforcement).

³⁵ Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 306 (1999).

³⁶ Lonsway & Archambault, *supra* note 34, at 159 (explaining that factors such as "poor evidence gathering by police (especially victim interviews), intimidating defense tactics, incompetent prosecutors, and inappropriate decision making by jurors" result in low sexual assault conviction rates).

³⁷ Beloof, *supra* note 35, at 306.

barrier to reporting sexual violence.³⁸ In addition, some victims may reject involvement with any system based on what they see as the retributive justice model used by the criminal justice system.³⁹

All of these factors lead to the important third difference between the criminal justice system and the civil rights approach. Whereas police and prosecutors dictate the course of the investigation in a criminal case—indeed, they decide whether the case is investigated at all—Title IX allows survivors to decide.

Title IX permits this decision through the two-path reporting system that OCR established last year when it released its *Questions and Answers on Title IX and Sexual Violence*.⁴⁰ This system is similar to the restricted and unrestricted reporting system used in the military for many years with significant success.⁴¹ With two choices of how to report, survivors can essentially make the decision whether to initiate an investigation. If a victim wants to initiate an investigation, he or she can make an official report to a responsible employee or to the Title IX coordinator. The Title IX coordinator would subsequently have to investigate, unless the victim explicitly requests that there be no investigation and the Title IX coordinator grants that request. If the student changes his or her mind, there are multiple factors that the Title IX coordinator should consider when the student requests confidentiality after filing an official report.⁴²

There is also a confidential path, which allows a victim access to the services and accommodations for healing,⁴³ but will not result in an investigation unless the victim later decides to report to a responsible employee or to the Title IX coordinator.⁴⁴ In the military system, this process would be described as turning a restricted report into an

³⁸ *Id.*; see also Colleen Murphy, *Another Challenge on Campus Sexual Assault: Getting Minority Students to Report it*, CHRON. HIGHER EDUC. (June 18, 2015), <http://0-chronicle.com.library.regent.edu/article/Another-Challenge-on-Campus/230977> (noting the white faces of the college sexual assault movement and other factors that create barriers to reporting for minority women).

³⁹ Beloof, *supra* note 35, at 306; LAFAVE, *supra* note 19, § 1.5 (explaining that criminal law has favored a retributive or “just deserts” approach since the 1960s).

⁴⁰ See OCR Questions and Answers, *supra* note 3, at 21–22 (describing the relevant factors in weighing a student’s request for confidentiality versus after an official report has been made to a responsible employee or directly to the Title IX Coordinator).

⁴¹ See *Reporting Options*, MYDUTY.MIL, <http://www.myduty.mil/index.php/reporting-options> (last visited Feb. 24, 2016) (discussing the two reporting options available for sexual assault victims in the military).

⁴² OCR Questions and Answers, *supra* note 3, at 21 (including factors like risk of additional acts of sexual violence, whether a weapon was involved, means of obtaining relevant evidence, and age of the students involved).

⁴³ *Id.* at 24.

⁴⁴ See *id.* at 22 (noting that a student who initially requests confidentiality may later request a full investigation).

unrestricted report,⁴⁵ which is commonly done.⁴⁶ For instance, statistics on restricted and unrestricted reporting in the U.S. military academies from 2014–2015 show that survivors switched their reports from restricted to unrestricted in as many as twenty-seven percent of cases in some years.⁴⁷ Such switches are possible in the Title IX system as well and are likely already occurring since OCR released the FAQs in 2014.

Thus, by providing victims with options, such as whether to initiate an investigation (through choosing a confidential or non-confidential path) and when any investigation will be launched (by switching from a confidential disclosure to a non-confidential report), Title IX places key procedural decisions regarding cases into victims' hands. This empowering approach contrasts sharply with the lack of control most victims experience in the criminal justice system.

IV. DIFFERING PROCEDURAL RIGHTS FOR VICTIMS

The factors that lead to the third difference between the Title IX and criminal approaches are likewise linked to the fourth and final difference. Indeed, the social science research, Professor Belooof's analysis regarding the victim's veto, and the success of the military's dual-path reporting system suggests that victims who use the official Title IX reporting path to initiate an investigation will likely make their decision by considering how the investigation and the relevant procedural rules will operate.

This consideration is significant because the criminal justice system and the civil rights approach provide very different procedural rights for victims. Title IX uses procedures that treat both the complainant and the accused as equal parties to the proceeding.⁴⁸ I have termed this approach "procedural equality" and it is drastically different from how the criminal law treats accused assailants and victims.⁴⁹

The criminal justice system's drastic *inequality* mainly derives from the victim's lack of party status in the criminal proceeding. In a criminal case, the victim is merely a complaining witness. The victim enters the courtroom, gives testimony as to what happened, and then may not be

⁴⁵ *Military Reporting Options FAQ*, DEP'T DEF. SAFE HELPLINE, <https://www.safehelpline.org/reporting-options.cfm> (last visited Feb. 24, 2016).

⁴⁶ DEP'T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES, ACADEMIC PROGRAM YEAR 2014–2015, APPENDIX D: STATISTICAL DATA ON SEXUAL HARASSMENT AND ASSAULT 16 (2015) http://sapr.mil/public/docs/reports/MSA/APY_14-15/Appendix_D_Statistical_Data.pdf.

⁴⁷ *Id.* (showing the percentages of converted reports from 2007–2015).

⁴⁸ See OCR Questions and Answers, *supra* note 3, at 26 (listing the equal procedural requirements provided to both parties).

⁴⁹ See Cellini, *supra* note 21, at 849 (noting the various procedures developed to protect defendants and that no comparable body of law has developed to protect victims).

allowed to remain in the courtroom for the rest of the trial.⁵⁰ The prosecutor does not represent the victim, and therefore the victim does not receive equal procedural rights, such as the access to evidence or privacy protections that the defendant receives.⁵¹ Because the victim has no party status, the victim also no right to appeal.⁵² The prosecutor represents the state, and the state may have (and often does have) very different interests from the victim.⁵³

In stark contrast to the procedures in criminal court, Title IX requires that victims and accused students be treated as equal parties to a grievance proceeding. This requirement is clearly stated in OCR guidance: “While a school has flexibility in how it structures the investigative process, for Title IX purposes, a school must give the complainant any rights that it gives to the alleged perpetrator.”⁵⁴ Therefore, if a school chooses to provide accused students with rights that the criminal law provides *only to defendants*, it must give student complainants the same rights—at the same level—as those guaranteed to the accused.⁵⁵

⁵⁰ See ARK. CODE ANN. § 16-90-1103(a) (LexisNexis, LEXIS through Reg. Sess. & 1st Extraordinary Sess.) (excluding victim from proceedings when “necessary to protect the defendant’s right to a fair trial”); UTAH R. EVID. 615(d) (LexisNexis, LEXIS through Dec. 1, 2015) (sequestering victim witnesses from proceedings unless the “prosecutor agrees with the victim’s presence”); Cellini, *supra* note 21, at 849. *But see* 18 U.S.C. § 3510 (2012) (prohibiting district courts from sequestering victim witnesses during the trial of the accused); ALASKA STAT. § 12.61.010 (LexisNexis, LEXIS through 2015 1st Reg. Sess. and 1st, 2d, and 3d Spec. Sess. 29th State Leg.) (listing the right of a crime victim to be present during any prosecution).

⁵¹ See *infra* notes 58–59 and accompanying text.

⁵² 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3902.1 (2d. ed. 1991).

⁵³ See RUSSELL L. WEAVER ET AL., PRINCIPLES OF CRIMINAL PROCEDURE 5–6 (4th ed. 2012) (noting the policies and authorizations that affect federal and state prosecutors in practice); Cellini, *supra* note 21, at 851 (observing that prosecutors aim to use time and resources efficiently, which closely relates to defense attorneys’ objectives of certainty in the outcome rather than the victim’s desire for justice).

⁵⁴ OCR Questions and Answers, *supra* note 3, at 26; *see also* Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Sexual Violence 11 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (noting that the parties must have equal opportunities in the school’s Title IX investigation and hearing).

⁵⁵ Under Supreme Court precedent, schools in fact have a wide range of choices in what procedural rights to give accused students; at most, schools must give the accused student notice and an opportunity for a hearing because campus disciplinary procedures are administrative and not criminal proceedings. *See Goss v. Lopez*, 419 U.S. 565, 579 (1975) (holding due process in school discipline minimally requires some notice and opportunity for a situation-appropriate hearing); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (repeating that due process is flexible and its procedure depends on each situation); Nancy Chi Cantalupo, “Decriminalizing” *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 513–14 (2012) (discussing these cases and the sufficiency of procedural rights in detail).

Another stark contrast between the civil rights approach and the criminal approach can be seen in their different standards of proof. Civil rights systems require a preponderance standard,⁵⁶ which gives as equal as possible presumptions of truth telling to both parties. On the other hand, the criminal justice system requires proof “beyond a reasonable doubt”—a standard that gives heavy presumptions in favor of the accused.⁵⁷

Because the criminal law presumption weighs heavily in favor of defendants, the criminal standard can be taken, and many victims do in fact take it, as a widespread societal belief that victims lie. Sexual violence cases are often credibility contests;⁵⁸ so a process that builds a strong presumption in favor of the accused can be seen as a symbol that society believes victims are much more likely to lie than the accused perpetrators. The presumptions in favor of the accused suggest that society must build safeguards against that lying into the very structure of our criminal process.

Such procedural rules are manifestly unequal. First, creating a presumption in favor of one side or the other is, by definition, treating the parties unequally. Additionally, in the context of anti-sex-discrimination civil rights laws, a systematic assumption that victims lie is also a form of gender stereotyping,⁵⁹ which is an additional equal rights violation under all of our civil rights statutes prohibiting sex discrimination.

It is also important to remember that the preponderance standard is used in the vast majority of cases in our legal system.⁶⁰ This includes

Additionally, many criminal due process rights have been rejected repeatedly by courts when judging the fairness of campus disciplinary proceedings. Cantalupo, *supra* at 515 nn. 144–49 (listing cases that have challenged procedures such as discovery, voir dire, appeal, the right to an attorney, and admissibility). Thus, courts have never given accused students *criminal* due process rights in school disciplinary proceedings because it is impossible for schools to incarcerate accused students. Instead, courts have limited the required rights to *administrative* due process rights, and then only in certain cases. Further discussion of this topic, however, is a subject for another day.

⁵⁶ *E.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983).

⁵⁷ *E.g.*, *In re Winship*, 397 U.S. 358, 363 (1970).

⁵⁸ See Wendy Murphy, *Campus “Safety” Bill Endangers Rape Prosecutions*, FORBESWOMAN (May 17, 2012, 12:19 PM), <http://www.forbes.com/sites/womensenews/2012/05/17/campus-safety-bill-endangers-rape-prosecutions/#1d57cb847c5d> (commenting that a higher standard of proof than the preponderance standard creates a presumption that the word of the victim is less credible than the defendant).

⁵⁹ See RANA SAMPSON, U.S. DEP’T OF JUSTICE OFFICE OF CMTY. ORIENTED POLICING SERVS., ACQUAINTANCE RAPE OF COLLEGE STUDENTS 11–12 (2013), http://www.cops.usdoj.gov/html/cd_rom/inaction1/pubs/AcquaintanceRapeCollegeStudents.pdf (explaining how female stereotypes lead to the belief among college men that “most rapes are false reports”).

⁶⁰ See *Judicial Business 2014*, U.S. COURTS (Sept. 30, 2014), <http://www.uscourts.gov/statistics-reports/judicial-business-2014> (showing that the number

the enforcement of all other civil rights statutes in both lawsuits and administrative proceedings, and in school disciplinary proceedings for all student misconduct, not just misconduct involving sexual violence.⁶¹ And it is the preponderance standard that is used in the vast majority of civil court cases, including those that would be brought by students against their schools for either Title IX violations or for allegations of due process violations on the part of the school.⁶²

Thus, using a different evidentiary standard in campus sexual violence cases under Title IX, would essentially be saying that victims of sexual violence should be treated unequally compared to all other cases and compared to all other students in our system. While this may be justified when an accused individual could be incarcerated, it is not justified in a school context where imprisonment is not possible.

CONCLUSION

For now, I hope that I have sufficiently summarized the reasons why the civil rights approach to addressing campus sexual violence is so different from the criminal law and why those differences are so important. Thank you.

of filings for criminal defendants represented less than a third of all federal case filings in 2014).

⁶¹ Ali, *supra* note 54, at 8, 11.

⁶² See, e.g., *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 360 (3d Cir. 2005) (describing the preponderance of the evidence standard in a Title IX case); *Williams v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 363 (6th Cir. 2005) (same); *Bernard v. E. Stroudsburg Univ.*, No. 3:09-CV-00525, 2016 WL 755486, at *1, *34 (M.D. Pa. Feb. 24, 2016) (same).

NO CLASH OF CONSTITUTIONAL VALUES: RESPECTING FREEDOM AND EQUALITY IN PUBLIC UNIVERSITY SEXUAL ASSAULT CASES

*William E. Thro**

We hold these truths to be self-evident, that all . . . are created equal, that they are endowed by their Creator with certain unalienable Rights¹

INTRODUCTION

Although some may doubt whether the Declaration is a constitutional document,² the words that invented America define our core constitutional values of equality and freedom.³ In Lincoln’s words, our nation was “conceived in Liberty, and dedicated to the proposition

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¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

² As Professor Strang explained:

Scholars across the ideological spectrum have argued for a unique role for the Declaration of Independence in constitutional interpretation. These scholars’ arguments fall into two general categories: (1) the Declaration is the “interpretive key” to the Constitution’s text’s meaning; and (2) the Declaration is itself part of the Constitution.

Lee J. Strang, *Originalism’s Subject Matter: Why the Declaration of Independence is Not Part of the Constitution*, 89 S. CAL. L. REV. (forthcoming April 2016) (footnotes omitted).

³ As Justice Thomas, joined by Justice Scalia, explained:

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that “all men are created equal” and “endowed by their Creator with certain unalienable Rights,” they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

. . . .

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One’s liberty, not to mention one’s dignity, was something to be shielded from—not provided by—the State.

Obergefell v. Hodges, 135 S. Ct. 2584, 2639–40 (2015) (Thomas & Scalia, JJ., dissenting).

that all . . . are created equal.”⁴ The Constitution itself implicitly reflects those values.

Yet, there is always a degree of tension between equality and freedom. For example, equality prohibits discrimination against homosexuals⁵ and requires same-sex marriage,⁶ but freedom prohibits the prescription of political orthodoxy⁷ and requires respect for those who disagree on religious grounds.⁸ Similarly, in the context of student sexual assault on a public university campus, equality requires the institution to remedy the sex discrimination against the victim/survivor⁹ by disciplining the perpetrator; freedom requires extensive due process protections before the alleged perpetrator can be disciplined.¹⁰

Unfortunately, when confronted with sexual assaults on campus, public institutions frequently have ignored equality.¹¹ Following the

⁴ Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in JARED PEATMAN, *THE LONG SHADOW OF LINCOLN'S GETTYSBURG ADDRESS* xvii, xvii (2013) (Bliss Copy).

⁵ *Romer v. Evans*, 517 U.S. 620, 634–36 (1996); see also *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution . . . neither knows nor tolerates classes among citizens.”).

⁶ *Obergefell*, 135 S. Ct. at 2604–05. To be sure, substantive due process rather than equality formed the basis for the Court’s opinion, but the value of equality seemed to inform the substantive due process analysis.

⁷ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁸ *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (stating that the Free Exercise Clause “requires government respect for, and noninterference with, the religious beliefs and practices of our Nation’s people”).

⁹ Some may think it is not appropriate to refer to the complaining witness as the victim/survivor until such time as there has been a formal finding of a sexual assault. See, e.g., *State v. Devey*, 138 P.3d 90, 95–96 (Utah Ct. App. 2006) (holding that referring to a complainant as a victim during the trial may constitute reversible error in some cases). While this is technically true, the reality is that virtually every complaining witness sincerely believes he/she is a victim of sexual assault. Regardless of the veracity of that belief, these individuals need support and counseling. Accordingly, this Article refers to all complaining witnesses as victims/survivors.

¹⁰ Since the landmark decision in *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), it has been clear the Constitution requires due process before a public university expels a student or imposes a lengthy disciplinary suspension. E.g., *Goss v. Lopez*, 419 U.S. 565, 576–78 n.8 (1975); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633–35 (6th Cir. 2005). It is not enough that the university believes the student committed sexual assault; these allegations must be proven in a proceeding that comports with due process.

¹¹ See Janet Napolitano, “Only Yes Means Yes”: An Essay on University Policies Regarding Sexual Violence and Sexual Assault, 33 YALE L. & POL’Y REV. 387, 387 (2014) (stating that increased awareness of sexual assault on campuses highlights the need for public institutions to significantly improve their procedures for responding to this problem); Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 214–17 (2011) (reviewing instances in which schools have failed to appropriately respond to allegations of sexual assault).

decline of the *in loco parentis* doctrine, universities have tolerated a student-life culture that emphasizes heavy drinking and casual sex.¹² Such an environment does not prevent sexual assault and, indeed, indirectly encourages it.¹³ When students have come forward with allegations of sexual assault, campus officials often failed to: (1) provide adequate psychological counseling; (2) grant accommodations, such as changes in class schedule or housing; or (3) prevent retaliation by the alleged perpetrator's supporters.¹⁴ If a victim/survivor wished to pursue justice against an alleged attacker, the university often simply referred them to the criminal justice system, where police and prosecutors would not pursue ambiguous cases.¹⁵ If the school initiated student disciplinary proceedings, it was often a horrific experience for the victim/survivor.¹⁶ Sadly, at some institutions, the alleged perpetrator's status as an athlete or the child of a wealthy donor apparently influenced the decision to pursue discipline or the sanction involved.¹⁷

Given the inadequate responses of institutions to the problems of sexual assault, advocates and policy makers justifiably demand universities do more. Quite simply, public schools have a moral and *constitutional* obligation to change the culture so that sexual assault is less common, support victims/survivors, and facilitate victims'/survivors' pursuit of justice.¹⁸ Trustees, administrators, and faculty members must do more. Yet, while there is a broad consensus that equality requires more,¹⁹ some might believe public institutions must choose between equality and freedom. They may believe that pursuing justice for victims/survivors requires abandonment or a significant diminishment of

¹² See Oren R. Griffin, *A View of Campus Safety Law in Higher Education and the Merits of Enterprise Risk Management*, 61 WAYNE L. REV. 379, 383 (2016) (noting how students are generally treated as adult consumers and are "free to engage in various activities at their own discretion").

¹³ CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 2-5-2-8 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (noting that substance abuse and prior consensual sexual activity are major risk factors for sexual assault).

¹⁴ See Cantalupo, *supra* note 11, at 214–16 (describing instances in which university officials failed to provide appropriate support, protection, or accommodations for sexual assault victims, or failed to act at all).

¹⁵ See Nancy Chi Cantalupo, "Decriminalizing" *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 487–88 n.28 (2012) (noting that many institutions' sexual assault reporting guidelines emphasize contacting police).

¹⁶ Cantalupo, *supra* note 11, at 214–16.

¹⁷ DAVID E. BERNSTEIN, LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW 123 (2015).

¹⁸ See discussion *infra* Part II.

¹⁹ See Cantalupo, *supra* note 15, at 517–18 (discussing the need for institutions to develop procedures that go beyond simply punishing offenders).

due process protections,²⁰ or that protecting the rights of accused students means further trauma for victims/survivors²¹ or, worse, allowing rapists to go free.²²

This is a false choice. There is no clash of constitutional values.²³ The Constitution does not require public institutions to choose between equality and freedom.²⁴ To the contrary, the Constitution *requires* a public university to honor both principles. Indeed, preferring equality over freedom or freedom over equality is a constitutional violation.²⁵ The purpose of this Article is to demonstrate how a public institution *must* respect both equality and freedom in the context of a student sexual assault case.

In undertaking this purpose, this Article conspicuously avoids a direct discussion of the United States Department of Education's Office for Civil Rights' ("OCR") recent guidance on Title IX sexual assault cases.²⁶ The Article takes this course of action for several reasons. First,

²⁰ See Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. F. 359, 366 (2015) (discussing how required procedures for sexual assault investigations and increased pressure on institutions to punish offenders increases the risk of unfair tribunals).

²¹ See Complaint at 4–10, *Doe v. Univ. of Ky.*, No. 5:15-cv-00296-JMH (E.D. Ky. filed Oct. 1, 2015), ECF No. 1 (alleging that a university violated Title IX when it allowed the accused three appeals and four hearings, causing a "sexually hostile environment" for the victim/survivor).

²² See Annie Kerrick, *Justice Is More Than Jail: Civil Legal Needs of Sexual Assault Victims*, THE ADVOCATE, Jan. 2014, at 38, 38 (noting the difficulty of prosecuting sexual assault under the criminal legal standard, resulting in low conviction rates).

²³ As a practical matter, the American Association of University Professors has reached the same conclusion. See AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE HISTORY, USES, AND ABUSES OF TITLE IX 2–3 (2016), <http://www.aaup.org/file/TitleIX-Report.pdf> (draft report) (arguing that it is possible to combat sexual assault and sexual harassment without compromising freedom of speech and academic freedom).

²⁴ For an earlier articulation of this theme, see William E. Thro, *The Heart of the Constitutional Enterprise: Affirming Equality and Freedom in Public Education*, 2011 BYU EDUC. & L.J. 571, 572 (2011).

²⁵ Compare *United States v. Morrison*, 529 U.S. 598, 620 (2000) (stating that gender discrimination by public institutions violates the Equal Protection Clause unless the discrimination substantially serves an important government interest), with *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (stating that school disciplinary procedures must comport with the Due Process Clause).

²⁶ Any university that receives federal funds for any purpose is subject to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012), and its implementing regulations, 34 C.F.R. § 106 (2015), which prohibit discrimination on the basis of sex in educational programs or activities operated by recipients of federal financial assistance. On April 4, 2011, the OCR issued a Dear Colleague Letter to set out its view of the obligations of institutions receiving federal financial assistance under Title IX and its implementing regulations. Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Sexual Violence (Apr. 4, 2011) [hereinafter Dear Colleague Letter], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. That Dear Colleague Letter "explains that the requirements of Title IX pertaining to

for public institutions, the prohibitions and requirements of the Constitution trump any obligations under Title IX.²⁷ A public institution's first obligation is to the Constitution, not Title IX or the collegial epistles of the Assistant Secretary of Education for Civil Rights.²⁸ Second, although there is Supreme Court dicta stating Title IX is both broader and narrower than the Equal Protection Clause,²⁹ the better statutory interpretation is that Title IX, like Title VI, is coextensive with the Equal Protection Clause.³⁰ In other words, for the college that is a constitutional actor, the constitutional obligations and the statutory obligations are the same. Put another way, if Congress were to repeal Title IX, public institutions would still have the same obligations. Third, while the OCR may attempt to enforce its Dear Colleague Letters,³¹ the private right of action to enforce Title IX does not extend to regulations or guidance that go beyond the statutory mandate.³² Indeed, under the Supreme Court's precedent, a private

sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence." *Id.* at 1.

On April 24, 2014, additional guidance was issued by the OCR entitled "Questions and Answers on Title IX." Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (Apr. 24, 2014) [hereinafter OCR Questions and Answers], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. Proposed regulations pursuant to the Violence Against Women Act were issued June 20, 2014, and final regulations were issued on October 20, 2014. Violence Against Women Act, 79 Fed. Reg. 62,753 (Oct. 20, 2014) (to be codified at 34 C.F.R. pt. 668).

²⁷ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (stating that the Constitution trumps any laws to the contrary).

²⁸ "Title IX likely does not give OCR the authority to dictate the nature of university disciplinary proceedings. No cases suggest that an investigation of an allegation of sexual assault on campus must adhere to anything like the guidelines OCR is imposing on colleges." BERNSTEIN, *supra* note 17, at 129.

²⁹ *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 256 (2009).

³⁰ Title IX is modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7 (2012), and the "two statutes operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). Indeed, Title VI and Title IX are to be interpreted in the same manner. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694–96 (1979). Because Title VI is coextensive with the Equal Protection Clause, *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003); *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992), Title IX must also be coextensive with the Equal Protection Clause. Thus, any Title IX claim is also a constitutional claim for violation of the Equal Protection Clause.

³¹ "[E]ven if OCR had followed proper procedures, the content of the letter likely violates the Due Process Clause of the Constitution by requiring universities to deprive their students of ordinary due process considerations when putting an important right, their right to pursue and finish their college education, in jeopardy." BERNSTEIN, *supra* note 17, at 129–30.

³² See *Alexander v. Sandoval*, 532 U.S. 275, 285–86 (2001) (holding that a failure to comply with regulations that exceed the scope of Title VI is not actionable).

plaintiff can recover under the deliberate indifference standard of *Davis v. Monroe County Board of Education*³³ and *Gebser v. Lago Vista Independent School District*,³⁴ but cannot recover for conduct contrary to the latest pronouncements from the Washington bureaucracy.³⁵ Fourth, although the courts have universally held that public universities waive sovereign immunity for Title IX damages claims based on the statute by accepting federal funds,³⁶ that waiver does not apply to any new conditions imposed by the OCR.³⁷ Fifth, as senior OCR advocates conceded in congressional testimony, the guidance of the Dear Colleague Letters is not binding on any institution, regardless of whether it is public or private.³⁸

This Article has three parts. Part I briefly discusses the nature of constitutional values. All constitutional provisions restrict the sovereign discretion of government. Sometimes these restrictions prohibit the government from acting; sometimes these restrictions require the government to act. Part II explores the constitutional value of equality and its meaning in the context of public university sexual assault cases. In brief, the constitutional value of equality requires public universities to take certain actions. Part III extensively examines the constitutional value of freedom in the context of public university sexual assault cases. Quite simply, given the stakes for a student accused of sexual assault, extensive due process protections are required. Specifically, there must be a strict separation of roles, a fair hearing, and meaningful appellate review.

³³ 526 U.S. 629, 633 (1999).

³⁴ 524 U.S. at 277.

³⁵ As Professor Bernstein stated:

The Supreme Court itself has stated in the context of Title IX that at least when university officials are sued for allegedly not properly intervening in student-on-student harassment “courts should refrain from second guessing the disciplinary decisions made by school administrators.” School officials “must merely respond to known peer harassment in a manner that is not clearly unreasonable.”

BERNSTEIN, *supra* note 17, at 129 (quoting *Davis*, 526 U.S. at 648–49).

³⁶ David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 234 (2005); *see also, e.g.*, *Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 555 (7th Cir. 2001); *Pederson v. La. State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000); *Litman v. George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999).

³⁷ *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602, 2606 (2012) (stating that legitimate uses of the spending power require voluntary acceptance of terms accompanying federal grants and recipients cannot be surprised with post-acceptance conditions).

³⁸ Joseph Cohn, *Second Department of Education Official in Eight Days Tells Congress Guidance Is Not Binding*, THE TORCH (Oct. 2, 2015), <https://www.thefire.org/second-department-of-education-official-in-eight-days-tells-congress-guidance-is-not-binding/>.

I. NATURE OF CONSTITUTIONAL VALUES

Advocating the ratification of the Constitution, Madison observed, “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”³⁹ Madison’s words recognize the fallibility of human nature, but more significantly, describe the nature of a written constitution. A written constitution establishes the parameters of the government, but also limits the government.⁴⁰ In effect, all constitutional provisions are limitations on the government’s sovereignty—its discretion to pursue a particular end by a particular means.⁴¹ Thus, without a constitution, the government possesses nearly unbridled freedom to pursue its desired means and ends. A constitution limits this unbridled government discretion.

These limitations on sovereign discretion take two forms—prohibitions and requirements. The national Constitution illustrates the point. Many constitutional clauses expressly prohibit certain actions; other provisions require—at least implicitly—government to act in a particular way.⁴² Some clauses contain both a prohibition and a requirement for affirmative governmental action. For example, the Free Exercise Clause prohibits government from punishing particular beliefs,⁴³ but also mandates a religious exemption from otherwise

³⁹ THE FEDERALIST NO. 51, at 269 (James Madison) (George W. Carey & James McClellan eds., 2001).

⁴⁰ *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967).

⁴¹ For example, state constitutions generally require the legislature to establish a public school system of a particular quality. William E. Thro, *Judicial Humility: The Enduring Legacy of Rose v. Council for Better Education*, 98 KY. L.J. 717, 725–26 (2010). In the absence of such a state constitutional provision, state legislatures would have absolute discretion whether to pursue the end of a public school system and to choose the means of achieving that end. See Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 358–59 (2011) (arguing that state legislatures, by default, have all power not given to the federal government and are thus constrained, not enabled, by specific grants of power in state constitutions).

⁴² Compare U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”), with U.S. CONST. amend. XVI (“The Congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”); U.S. CONST. amend. XX, § 2 (requiring Congress to meet at least once per year).

⁴³ As the Supreme Court explained:

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” The free exercise of

applicable laws in some circumstances.⁴⁴ Similarly, the Equal Protection Clause not only requires heightened scrutiny for discrimination based on immutable characteristics,⁴⁵ but also requires the government to act affirmatively to eliminate the present-day effects of past discrimination by the government.⁴⁶

While Americans are familiar with the idea of constitutional provisions as prohibitions, they are less familiar with the notion of constitutional provisions that impose requirements on government to act in a particular way.⁴⁷ Yet, the requirements are just as essential to our constitutional order as the prohibitions. In order to fully realize our constitutional values, it is not enough that government be restrained; it is essential that government be commanded to act.

Having explained how constitutional provisions limit a public institution's sovereign discretion by imposing both prohibitions and requirements, this Article now turns to a specific discussion of both equality and freedom in the context of public university sexual assault cases.

II. EQUALITY

Like all constitutional values, equality limits the discretion of a public institution. In some instances, that limitation is a prohibition—

institutions cannot confer or deny a benefit simply because of a student's

religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 876–77 (1990) (citations omitted).

⁴⁴ Compare *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (holding that the ministerial exception makes federal discrimination statutes inapplicable to the employment decisions of religious organizations concerning their ministerial employees), with *Smith*, 494 U.S. at 877–78 (stating that religious conduct is not exempt from generally applicable laws).

⁴⁵ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (stating that race-based distinctions are subject to strict scrutiny).

⁴⁶ *Freeman v. Pitts*, 503 U.S. 467, 485 (1992).

⁴⁷ Compare Abner S. Greene, *What Is Constitutional Obligation?*, 93 B.U. L. REV. 1239, 1241–42 (2013) (arguing that the Constitution creates certain duties for public officials), with Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1008–10 (2011) (discussing how the Constitution restricts the various branches of federal and state government).

race, sex, or other immutable characteristic.⁴⁸ In other contexts, that limitation is a requirement—institutions must ensure all students are free from assault, harassment, and other forms of discrimination.⁴⁹ In the context of sexual assault involving students, it is not enough for the institution to prohibit sexual assault or discipline the perpetrators; institutions are required to take measures to prevent sexual assault and lessen its impact on individual students.⁵⁰ Specifically, public universities must (1) change the culture, (2) support victims/survivors, and (3) facilitate victims'/survivors' pursuit of justice.⁵¹

A. Change the Culture

The constitutional value of equality requires institutions to change the culture. Universities must prevent sexual assaults. It is not enough to say that students believe a campus is safe;⁵² the institution must do everything in its power to eliminate sexual assault. This affirmative obligation to change the culture takes several forms.

First, public universities must fully understand their campus climate and the extent of the campus sexual assault program. Quite simply, policymakers must understand the extent of the problem before creating a solution. Although there have been a variety of surveys utilizing different methodologies,⁵³ the University of Kentucky's Campus

⁴⁸ *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (race); *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (sex); *Bernal v. Fainter*, 467 U.S. 216, 219–20 (1984) (alienage).

⁴⁹ *See* Brian A. Snow & William E. Thro, *Still on the Sidelines: Developing the Non-Discrimination Paradigm Under Title IX*, 3 DUKE J. GENDER L. & POL'Y 1, 14–16 (1996) (discussing the obligation of institutions to take affirmative steps so that both sexes feel welcome).

⁵⁰ Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 52 (2013); Rosenfeld, *supra* note 20, at 369.

⁵¹ As explained *infra* notes 67–72 and accompanying text, the Constitution requires public institutions to facilitate victims'/survivors' pursuit of justice, but it does not require certain policy choices prescribed by the OCR guidance.

⁵² *See, e.g.*, Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX and VAWA*, 15 GEO. J. GENDER & L. 563, 565 (2014) (explaining that Jeanne Clery and her parents believed that Lehigh University was a safe campus prior to her being raped and murdered in her residence hall).

⁵³ *See* DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT iii–iv, 56, 71–72 (2015), https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report_on_the_AAU_Campus_Climate_Survey_on_Sexual_Assault_and_Sexual_Misconduct.pdf (summarizing survey methodologies and rates of sexual assault at institutions within the American Association of Universities).

Attitude Toward Safety (“CATS”) survey, which was mandatory for all students, arguably represents the best and most comprehensive model.⁵⁴

Second, public schools must educate their communities about what is and is not acceptable. Individuals must understand that sexual contact of any type requires consent.⁵⁵ Because alcohol impairs judgment and inhibitions, everyone must recognize the necessity of proceeding cautiously when one or both participants in a sexual encounter have been drinking.⁵⁶ While a public institution cannot diminish an adult’s right to engage in consensual sexual activity,⁵⁷ the institution, in the exercise of its power of government speech, can certainly discourage the casual hookup climate that pervades many campuses.⁵⁸

Third, public universities must implement programs to reduce sexual assaults.⁵⁹ Increased police presence at campus events is an obvious start, but law enforcement has only limited effectiveness. Law enforcement must be supplemented with bystander intervention programs, such as Green Dot, whereby individual students take steps to prevent incidents where both parties are intoxicated or one individual appears to be taking advantage of another.⁶⁰ Additionally, institutions

⁵⁴ UNIV. OF KY., CAMPUS ATTITUDES TOWARD SAFETY PRESIDENT’S REPORT: 2015 (2015).

⁵⁵ Rosenfeld, *supra* note 20, at 363–64.

⁵⁶ Dunn, *supra* note 52, at 575.

⁵⁷ Lawrence v. Texas, 539 U.S. 558, 578 (2003).

⁵⁸ Under the government speech doctrine, a public entity may advance its own views and criticize opposing views as long as it does not punish those other views. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245–46 (2015); Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009).

⁵⁹ Indeed, changing the campus culture regarding sexual assault should be part of the university’s enterprise risk management efforts. For a discussion of how enterprise risk management can enhance campus safety, see Griffin, *supra* note 12, at 395–401.

⁶⁰ The University of Kentucky, which has been a national leader in the development of the Green Dot program, describes the program as follows:

The Green Dot strategy is a comprehensive approach to the primary prevention of violence that capitalizes on the power of peer and cultural influence across all levels of the socio-ecological model. Informed by social change theory, the model targets all community members as potential agents of social change. It seeks to engage them, through awareness, education and skills-practice, in proactive behaviors that establish intolerance of violence as the norm, as well as reactive interventions in high-risk situations—resulting in the ultimate reduction of violence. Specifically, the program proposes to target socially influential individuals from across community subgroups. The goal is for these groups to engage in a basic education program that will equip them to integrate moments of prevention within existing relationships and daily activities. By doing so, new norms will be introduced and those within their sphere of influence will be significantly influenced to move from passive agreement that violence is wrong, to active intervention.

Violence Intervention and Prevention Center, U. KY., http://www.uky.edu/StudentAffairs/VIPCenter/learn_greendot.php (last visited Feb. 27, 2016).

should make sure campus pathways are well-lit and secure; further, institutions should ensure that taxis or public transportation are readily available.⁶¹

Fourth, public universities must require all faculty members and every staff member who regularly interacts with students to report any incident of sexual misconduct.⁶² Indeed, given the faculty role in shared governance and the degree of regular close interaction with individual students, faculty members have a special obligation to assist the institution in changing the culture of sexual assault.⁶³

B. Provide Greater Support for Victims/Survivors

When these tragic events occur, the constitutional value of equality requires public institutions to support victims/survivors.⁶⁴ Reporting is going to be painful, but a university can make it as painless as possible. Specifically, a public school must make abundant resources available to the survivors—whether it is relocation of residence, schedule adjustments, medical assistance, or psychological counseling.⁶⁵ Of course, the institution must ensure the alleged perpetrator or the alleged perpetrator's friends and allies do not retaliate against the victim/survivor.⁶⁶

⁶¹ See Michael C. Griffaton, *Foreward is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimization*, 43 CASE WESTERN RES. L. REV. 525, 588–89 (1993) (noting that an institution can be penalized for failing to adequately light campus pathways, secure building doors, or provide appropriate campus escort services).

⁶² See Griffin, *supra* note 12, at 404–05 (discussing the need for faculty to report incidents of sexual violence).

⁶³ See *id.* at 403–05 (discussing the unique role faculty can play in promoting campus safety).

⁶⁴ As part of its constitutional obligations under the Equal Protection Clause, a public institution should encourage victims/survivors to report the acts against them to the police and should support the student after the report. However, the OCR guidance takes a different view. As Professor Bernstein explained:

A logical solution, if federal intervention is indeed necessary, would be for OCR to mandate that universities encourage students who complain of sexual assault to report the assault immediately to the police, and that universities develop procedures to cooperate with police investigations. Concerns about victims' well-being when prosecutors decline to pursue a case could also be adjudicated in a real court, as a student could seek a civil protective order against her alleged assailant. OCR could have mandated or encouraged universities to cooperate with those civil proceedings, which in some cases might warrant excluding an alleged assailant from campus.

BERNSTEIN, *supra* note 17, at 124–25.

⁶⁵ Dear Colleague Letter, *supra* note 26, at 15–16.

⁶⁶ *Id.* at 16.

C. Facilitate Victims'/Survivors' Pursuit of Justice

The constitutional value of equality requires institutions to facilitate the survivor's pursuit of justice.⁶⁷ Under both the Equal Protection Clause and Title IX, once a public institution learns of a sexual assault, it must respond in a manner that is not clearly unreasonable.⁶⁸ At a minimum, this means that the institution must establish some sort of mechanism, independent of the criminal justice system, which allows the university to determine whether alleged perpetrators⁶⁹ are guilty of sexual assault and, if so, to punish them.⁷⁰ While the university satisfies its constitutional and Title IX obligations simply by establishing such a system,⁷¹ the OCR's guidance requires public institutions to do more.⁷² In particular, the OCR requires all institutions to use a lower standard of proof and to reduce the stress on victims/survivors.⁷³ Both of these are discussed below.

1. Use a Lower Standard of Proof

In the criminal justice system, a conviction for sexual assault requires the prosecution to prove every element of the offense beyond a

⁶⁷ Unfortunately, universities have failed in this respect. As Professor Bernstein explained:

[C]ampus disciplinary proceedings have often mishandled complaints of sexual assaults, usually erring on the side of the alleged perpetrator. In some cases, university officials have conspired to get an accused person off the hook, perhaps because he was a star athlete, or the child of a well-connected alumnus, or because the university wanted to avoid bad publicity by denying that an assault took place. More often, though, the problem is that the campus disciplinary rules were established to deal with relatively minor campus offenses such as cheating on exams, underage drinking, and the like, and the system is not competent to address serious violent crime.

BERNSTEIN, *supra* note 17, at 123–24.

⁶⁸ See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 644–47 (1999) (holding that deliberate indifference to “known acts of student-on-student sexual harassment” may create liability for recipients of federal funding).

⁶⁹ Although the focus of this Article is sexual assaults allegedly committed by students, a university has the same obligations with respect to sexual assaults allegedly committed by faculty or staff. Indeed, an institution may wish to use the same system to establish guilt and punishment regardless of the status of the alleged perpetrator.

⁷⁰ Henrick, *supra* note 50, at 52.

⁷¹ The Constitution merely requires a reasonable system. See *supra* note 68 and accompanying text. Title IX and its implementing regulations do not require more. See *supra* note 30 and accompanying text.

⁷² See Dear Colleague Letter, *supra* note 26, at 1–19 (describing extensive procedural requirements for institutional responses to sexual assaults); OCR Questions and Answers, *supra* note 26, at 1–3 (providing additional procedural guidance for institutional responses to sexual assaults).

⁷³ Dear Colleague Letter, *supra* note 26, at 11, 16–17.

reasonable doubt (99% certainty).⁷⁴ In circumstances where there is a degree of ambiguity or significant delays in reporting, it will be difficult for prosecutors to meet this high burden of proof.⁷⁵ Consequently, many sexual assaults are never prosecuted or result in acquittals or hung juries.⁷⁶ Such outcomes, while required by due process, do not appear to result in justice for the victim/survivor. The rapist still goes free.

However, if a student disciplinary system uses a lesser standard, such as clear and convincing evidence (75%), or, as the OCR guidance mandates, a mere preponderance of the evidence (50.01%),⁷⁷ then the likelihood that a perpetrator will be found guilty presumably increases dramatically. Although some have argued that the use of a preponderance of the evidence standard violates due process,⁷⁸ this is not necessarily so.⁷⁹ An institution can utilize preponderance of the evidence and still satisfy due process by providing for: (1) strict separation of the investigatory, prosecutorial, adjudication, and appellate functions; (2) a fair hearing with adequate procedural safeguards, including participation of counsel, full disclosure of evidence, a presumption of innocence with the institution assuming the burden of proof, and some form of cross-examination; and (3) meaningful appellate review.⁸⁰

⁷⁴ *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (stating that the Constitution requires application of the reasonable doubt standard for all criminal convictions).

⁷⁵ Kerrick, *supra* note 22, at 38.

⁷⁶ *See id.* (noting that only about two percent of sexual assaults result in conviction and incarceration).

⁷⁷ Dear Colleague Letter, *supra* note 26, at 11.

⁷⁸ Henrick, *supra* note 50, at 62.

⁷⁹ Although the preponderance of the evidence standard would be utilized in any constitutional claim against a university official or a Title IX case against a public university, *see, e.g.*, *Lore v. City of Syracuse*, 670 F.3d 127, 149 (2d Cir. 2012) (noting that a plaintiff alleging a claim under 42 U.S.C. § 1983 must prove each element of the claim by a preponderance of the evidence); *Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 363–65 (6th Cir. 2005) (stating that the standard of proof under 42 U.S.C. § 1983 and Title IX is a preponderance of the evidence), there are important distinctions between a suit against a university official or the university itself and a student disciplinary proceeding. Most significantly, the student disciplinary proceeding might not involve the extensive due process protections provided by civil courts. Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 BYU EDUC. & L.J. 1, 19–25 (2003).

⁸⁰ *See, e.g.*, Comment, *The Due Process Implications of Ohio's Punitive Damages Law—A Change Must be Made*, 19 DAYTON L. REV. 1207, 1230 (1994) (“[T]he Due Process Clause does not require ‘clear and convincing evidence,’ especially when a ‘preponderance of the evidence’ standard is supported by the procedural and substantive protections of adequate guidance and appellate review.”); Note, *The Process That Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-On-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1641 (2012) (“At least two federal courts . . . have found that procedural due process requires a standard no lower than preponderance of the evidence . . .”).

Indeed, the civil courts use a preponderance of the evidence standard to adjudicate claims under the federal civil rights statutes.⁸¹

If an institution does utilize a lower standard of proof, then the threshold for actually initiating the prosecution is also lowered. Although criminal convictions require proof beyond a reasonable doubt (99%), a prosecution can be initiated merely by showing probable cause (50.01%).⁸² If a student disciplinary conviction requires only a preponderance of the evidence (50.01%), then a prosecution can be initiated by something less than a preponderance of evidence; perhaps the appropriate standard is reasonable suspicion.⁸³

2. Minimize the Stress of the Disciplinary Proceeding

Regardless of the standard of proof used, a disciplinary proceeding is going to be an extraordinarily stressful and traumatic event for the victim/survivor.⁸⁴ At a minimum, the victim/survivor will have to recount the events of a sexual encounter that, at least in the victim's/survivor's view, was nonconsensual. In other words, it was rape. To the extent a public institution can minimize the stress of the ordeal, it should do so.⁸⁵

One measure to minimize the stress is to screen the victim/survivor from the alleged perpetrator during the hearing.⁸⁶ Although courts allow

⁸¹ See *Walker v. England*, 590 F. Supp. 2d 113, 136 (D.D.C. 2008) (holding that the burden of proof in a Title VII case is a preponderance of the evidence). Of course, litigation in civil courts has full discovery, FED. R. CIV. P. 1, 26, subpoena power, FED. R. CIV. P. 1, 45, active participation by counsel, Bach, *supra* note 79, at 23–24, cross-examination by the lawyers rather than by the hearing officer, *id.* at 20, and formal rules of evidence, FED. R. EVID 101, 1101(b). To the extent the 50.01% preponderance standard makes incorrect outcomes more likely, all of the other factors make incorrect outcomes less likely.

⁸² *Kaley v. United States*, 134 S. Ct. 1090, 1097 (2014); see also *Costello v. United States*, 350 U.S. 359, 363 (1956) (“An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits.” (footnote omitted)).

⁸³ See *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (“[R]easonable suspicion’ is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence . . .”).

⁸⁴ See Karen Oehme et al., *A Deficiency in Addressing Campus Sexual Assault: The Lack of Women Law Enforcement Officers*, 38 HARV. J.L. & GENDER 337, 347 (2015) (stating that it is typical for victims of sexual assault to experience posttraumatic stress, anxiety, depression, sleeping and eating disorders, and other negative emotional consequences). Individuals struggling with posttraumatic stress experience distress when recounting the event that caused the symptoms. *Symptoms of PTSD, ANXIETY & DEPRESSION ASS’N OF AM.*, <http://www.adaa.org/understanding-anxiety/posttraumatic-stress-disorder-ptsd/symptoms> (last updated Aug. 2015).

⁸⁵ While such measures are wise policy, they are not constitutionally required.

⁸⁶ As the OCR explained:

If a school uses a hearing process to determine responsibility for acts of sexual violence, OCR does not require that the school allow a complainant to be present for the entire hearing; it is up to each school to make this determination. But if the school allows one party to be present for the entirety

such measures in the criminal context in only the most extraordinary circumstances,⁸⁷ there is no due process violation if such measures are utilized in the student disciplinary context.⁸⁸

III. FREEDOM

Like equality, freedom limits the discretion of a university. It prohibits a state university from punishing students for freedom of expression or engaging in unreasonable searches and seizures. In other contexts, it requires certain procedural safeguards.

Unlike the legal traditions of other cultures, the Anglo-American-Australasian legal tradition has required procedural due process before government deprives an individual of life, liberty, or property.⁸⁹ Due process prevents arbitrary governmental action, but it is ultimately a search for truth—did the individual actually do the action for which he is accused?⁹⁰ All doubts are resolved in favor of the individual.⁹¹ The focus

of a hearing, it must do so equally for both parties. *At the same time, when requested, a school should make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time. These two objectives may be achieved by using closed circuit television or other means.* Because a school has a Title IX obligation to investigate possible sexual violence, if a hearing is part of the school's Title IX investigation process, the school must not require a complainant to be present at the hearing as a prerequisite to proceed with the hearing.

OCR Questions and Answers, *supra* note 26, at 30 (emphasis added).

⁸⁷ See *Maryland v. Craig*, 497 U.S. 836, 850 (1990) (“[A] defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”).

⁸⁸ See *Cloud v. Trs. of Bos. Univ.*, 720 F.2d 721, 724–25 (1st Cir. 1983) (allowing partitions in a private university disciplinary proceeding); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 29 (D. Me. 2005) (“There is no due process violation from the partition and location of the Complainant during her testimony.”).

⁸⁹ Compare Roger Alan Boner & William E. Kovacic, *Antitrust Policy in Ukraine*, 31 GEO. WASH. J. INT’L L. & ECON. 1, 6 (1997) (describing the lack of due process in the Ukraine), and Haibo He, *The Dawn of the Due Process Principle in China*, 22 COLUM. J. ASIAN L. 57, 93 (2008) (stating that China does not have a tradition of due process), with Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1211–12 (2005) (describing the distinctive Anglo-American tradition of due process), and Belinda Wells & Michael Burnett, *When Cultures Collide: An Australian Citizen’s Power to Demand the Death Penalty Under Islamic Law*, 22 SYDNEY L. REV. 5, 19 (2000) (describing the application of due process in South Australia and its roots in English history).

⁹⁰ See David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 473 (1992) (“[T]he search for truth is the reason the Constitution protects the right to confrontation, the right to compulsory process and the right to put on a defense.”).

⁹¹ Henry L. Chambers, Jr., *Reasonable Certainty and Reasonable Doubt*, 81 MARQ. L. REV. 655, 658–59 (1998).

is on preventing false convictions.⁹² As Blackstone noted, it is better for ten guilty men to go free than for an innocent man to be imprisoned.⁹³

To be sure, a student disciplinary hearing is not a criminal trial. Yet, since the landmark decision in *Dixon v. Alabama State Board of Education*,⁹⁴ it has been clear the Constitution requires due process before a public university expels a student or imposes a lengthy disciplinary suspension.⁹⁵ It is not enough that the university believes the student committed sexual assault; the university must prove these allegations in a proceeding that comports with due process.⁹⁶

While the exact contours of due process depend upon the context, the stakes are enormously high when a student is accused of sexual assault.⁹⁷ A student who is expelled for sexual assault will find it difficult to enroll at another institution.⁹⁸ Indeed, in some states, the

⁹² To the extent the OCR epistles encourage institutions to ignore due process, the OCR epistles seem to promote an attitude of avoiding false acquittals rather than false convictions: it is better that an innocent student be expelled than to allow a rapist to escape punishment.

⁹³ See 2 WILLIAM BLACKSTONE, COMMENTARIES *358 (“[B]etter that ten guilty persons escape, than that one innocent suffer.”).

⁹⁴ 294 F.2d 150, 158–59 (5th Cir. 1961) (holding that due process requires notice and an opportunity to be heard before a student is expelled from a public college for misconduct).

⁹⁵ *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633–37 (6th Cir. 2005) (collecting cases and analyzing the amount of process due in student disciplinary cases).

⁹⁶ Unfortunately, institutions often fail in this regard. As Professor Bernstein observed:

[M]ost campus tribunals ban attorneys for the parties (even in an advisory capacity), rules of procedure and evidence are typically ad hoc, and no one can consult precedents because records of previous disputes are sealed due to privacy considerations. Campus “courts” therefore have an inherently kangarooish nature. Even trained police officers and prosecutors too often mishandle sexual assault cases, so it’s not surprising that the amateurs running the show at universities tend to have a poor record.

BERNSTEIN, *supra* note 17, at 124.

⁹⁷ As the Supreme Court explained:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, 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 finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

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

⁹⁸ Robert B. Groholski, Comment, *The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process Law*, 19 N. ILL. U. L. REV. 739, 754–55 (1999); James M. Picozzi, Note, *University Disciplinary Process: What’s Fair, What’s Due, and What You Don’t Get*, 96 YALE L.J. 2132, 2138 (1987); Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for “Fundamental Fairness” in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 683 (2001).

student's transcript will carry a scarlet letter notation that the student was expelled for sexual assault.⁹⁹ Given the potential liability for admitting a known sex offender, it will be difficult for students to transfer to other institutions.¹⁰⁰ In the Southeastern Conference, an athlete who is disciplined for sexual assault is ineligible to play at any other conference school.¹⁰¹ Since no athletic program wants to be known for utilizing sex offenders, it is only a matter of time before other conferences or the NCAA itself adopts a similar rule.

Given the enormous stakes for accused students, due process in the sexual assault context requires (1) a strict separation of investigative, prosecutorial, adjudication, and appellate roles; (2) a hearing with adequate procedural safeguards; and (3) meaningful appellate review.

A. Strict Separation of Roles

The nature of humanity is clear. In theological terms, "all have sinned and fall short of the glory of God."¹⁰² In contemporary psychological terms, everyone—yes, everyone—has unconscious biases that color their attitudes and reactions to others.¹⁰³ Quite simply, individual humans are flawed and cannot be trusted to pursue interests other than their own or reach conclusions free of bias.¹⁰⁴

Our constitutional system recognizes the propensity of humans to pursue their own interests rather than the interests of society as a whole.¹⁰⁵ Sovereignty is divided between the states and the national

⁹⁹ VA. CODE ANN. § 23-9.2:18 (LexisNexis, LEXIS through 2015 Reg. Sess.); Tyler Kingkade, *New York Poised to Become Second State Requiring Sexual Assault Offenses on Transcripts*, HUFFINGTON POST (June 18, 2015, 12:01 PM), http://www.huffingtonpost.com/2015/06/18/new-york-sexual-assault-transcripts_n_7606196.html.

¹⁰⁰ See Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players Is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 617, 634–35 (2003) (explaining the liability that universities are exposed to because of student sexual harassment and suggesting that this may make them more cautious regarding which students they accept).

¹⁰¹ SOUTHEASTERN CONFERENCE RULES 4.1.19.

¹⁰² *Romans* 3:23 (English Standard Version).

¹⁰³ See HOWARD J. ROSS, EVERYDAY BIAS: IDENTIFYING AND NAVIGATING UNCONSCIOUS JUDGMENTS IN OUR DAILY LIVES 3–4 (2014) (arguing that all humans are fraught with bias).

¹⁰⁴ *Id.* at 4; *Romans* 3:9–18 (English Standard Version).

¹⁰⁵ See MARK DAVID HALL, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 14–15, 20 (2013) (explaining the early influence of reformed thought, which embraced the belief that man has a depraved nature); Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293, 295 (Michael W. McConnell et al. eds., 2001) (describing the Calvinist view of the total depravity of man and stating that men cannot be trusted); William E. Thro, *A Pelagian Vision for Our Augustinian Constitution: A Review of Justice Breyer's Active Liberty*, 32 J.C. & U.L. 491, 491–92, 504 (2006) (arguing that if a nation assumes humanity's corruption, it will create a distrustful constitution).

government;¹⁰⁶ each sovereign divides its power among the legislative, executive, and judicial branches.¹⁰⁷ Power is diluted rather than concentrated. Similarly, our criminal justice system acknowledges the possibility that individuals may abuse their power; it disperses authority among multiple individuals and contains structural safeguards to prevent abuse of power.¹⁰⁸ A prosecutor must obtain a grand jury indictment or preliminary hearing finding of probable cause.¹⁰⁹ A single juror can prevent a finding of guilt.¹¹⁰ A guilty verdict, but not an acquittal, is subject to appellate review.¹¹¹ The authority to imprison an individual is never concentrated in an individual.¹¹² While neither our constitutional system nor our criminal justice system operates perfectly, avoiding concentrations of power and authority makes it more likely that society, rather than a faction,¹¹³ will prevail and only the guilty will go to jail.

The same principles must apply when a public university confronts an allegation of sexual assault. The individuals who investigate the allegation must not be involved in the decision to prosecute, the determination of guilt, or the appellate review. The individuals who determine whether to initiate disciplinary proceedings or whether to negotiate some sort of “plea bargain” must not be involved in the investigation or the adjudication of guilt. The individuals who determine whether the student is, in fact, responsible for sexual assault must not be involved with the investigative phase, the decision to charge, or the appellate review. The appellate panel must have no involvement in the investigation, prosecution, or hearing.¹¹⁴

¹⁰⁶ THE FEDERALIST NO. 46, at 242–43 (James Madison) (George W. Carey & James McClellan eds., 2001).

¹⁰⁷ THE FEDERALIST NO. 51, at 268 (James Madison) (George W. Carey & James McClellan eds., 2001).

¹⁰⁸ See, e.g., Bertrall L. Ross II, *Reconciling the Booker Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 CARDOZO PUB. L., POL’Y & ETHICS J. 725, 758 (2006) (describing the separate roles given to the judge and the jury); James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 656 (1976) (discussing different procedural safeguards in our criminal justice system).

¹⁰⁹ *Thirty-Ninth Annual Review of Criminal Procedure: 2010*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 223, 239, 247 (2010).

¹¹⁰ *Burch v. Louisiana*, 441 U.S. 130, 134 (1979) (holding that there is a constitutional right to a unanimous jury if the jury only has six members).

¹¹¹ U.S. CONST. amend. V, § 1.

¹¹² See Ross, *supra* note 108, at 758–59 (noting that the judge and jury have different functions so that one entity does not have all the power).

¹¹³ THE FEDERALIST NO. 10, at 45–48 (James Madison) (George W. Carey & James McClellan eds., 2001).

¹¹⁴ In other words, the entire process should be like the classic television show *Law & Order*. The “detectives” should investigate the crime, the “district attorneys” should

B. Hearing with Adequate Procedural Safeguards

While the strict separation of roles is essential, the centerpiece of due process will be the hearing.¹¹⁵ Although the “Due Process Clause is implicated by higher education disciplinary decisions[,] . . . [t]he amount of process due will vary according to the facts of each case.”¹¹⁶ Notice and an opportunity to be heard are “the most basic requirements of due process,” but student disciplinary hearings “are not criminal trials, and therefore need not take on many of those formalities.”¹¹⁷ At the hearing “the accused has a right to be present for all significant portions of the hearing,” but “hearings need not be open to the public.”¹¹⁸ “[N]either rules of evidence nor rules of civil or criminal procedure need be applied.”¹¹⁹ In fact, “witnesses need not be placed under oath.”¹²⁰ An accused individual generally has the right to make a statement and present evidence and to call exculpatory witnesses.¹²¹ As long as a public university meets the constitutional standards, it need not follow its own internal procedures and rules in order to satisfy its constitutional obligations.¹²²

prosecute, the “juries” should decide guilt, and the “supreme court” should review every aspect of the trial.

¹¹⁵ In its epistles, the OCR has suggested that hearings are unnecessary and it is possible to handle sexual assault cases with a single person serving as detective, prosecutor, judge, and jury. OCR Questions and Answers, *supra* note 26, at 25. With all due respect to the OCR, the Constitution does not permit the “single investigator” model for public institutions. *C.f.* Defendants’ Brief in Opposition to Plaintiff’s Motion for Emergency Temporary Restraining Order/Preliminary Injunction at 4–5, *Doe v. Pa. State Univ.*, No. 4:15-cv-2072 (M.D. Pa. filed Dec. 11, 2015), ECF No. 38 (explaining Penn State University’s use of the single investigator model); Order at 1–4, *Doe v. Pa. State Univ.*, No. 4:15-CV-02072 (M.D. Pa. Oct. 28, 2015), ECF No. 12 (granting a temporary restraining order to prevent a student’s expulsion based on the single investigator model). A public institution must provide a hearing.

¹¹⁶ *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633–34 (6th Cir. 2005) (citations omitted).

¹¹⁷ *Id.* at 635.

¹¹⁸ *Id.* (citing *Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1389 (W.D. Mich. 1983)).

¹¹⁹ *Id.*; *see also* *Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir. 1987) (holding that a student disciplinary hearing is not required to follow the formal rules of evidence); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 73 (4th Cir. 1983) (same).

¹²⁰ *Id.*

¹²¹ *Id.* at 636.

¹²² *Riccio v. County of Fairfax*, 907 F.2d 1459, 1469 (4th Cir. 1990) (noting that violations of federal due process are to be measured by federal standards, not by a state’s standard); *Bills v. Henderson*, 631 F.2d 1287, 1298 (6th Cir. 1980) (“[P]rocedural rules created by state administrative bodies cannot, of themselves, serve as a basis for a separate protected liberty interest.”); *Bates v. Sponberg*, 547 F.2d 325, 329–30 (6th Cir. 1976) (“It is not every disregard of its regulations by a public agency that gives rise to a cause of action for violation of constitutional rights. Rather, it is only when the agency’s disregard of its rules results in a procedure which in itself impinges upon due process rights that a federal court should intervene in the decisional processes of state

Nevertheless, in a situation in which a finding of guilt has significant adverse consequences for the accused students, the hearing must include certain procedural safeguards.¹²³ Specifically, in the sexual assault context, due process requires (1) access to counsel; (2) access to all inculpatory and exculpatory evidence; (3) the burden of proof be placed on the university; and (4) some form of cross-examination. Each of these attributes is discussed below.

1. Attorneys

While a public university is not required to provide an attorney for a student accused of sexual assault,¹²⁴ the institution cannot prohibit the student from seeking legal counsel,¹²⁵ nor can the university prohibit an attorney from being present at the hearing and offering advice as a *passive* participant.¹²⁶ However, due process does not necessarily require the *active* participation of attorneys in the hearing.¹²⁷

institutions.”); *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972) (holding that a university’s violation of its own procedures did not amount to a violation of federal due process).

¹²³ Of course, the hearing should take place before one or more impartial individuals. If a university uses multiple persons as the finders of fact (the jury), then the institution should consider using a legally trained individual as the presiding officer (the trial judge). If the institution uses a presiding officer, then the presiding officer should rule on evidentiary issues and ensure the hearing flows smoothly.

¹²⁴ *Lassiter v. Dep’t of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 25 (1981) (“The pre-eminent generalization that emerges from this Court’s precedents on an indigent’s right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.”).

¹²⁵ *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (noting that “at most the student has a right to get the advice of a lawyer”); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988) (noting that a student is not forbidden from obtaining legal counsel before or after the disciplinary hearing); see *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 464 (S.D.N.Y. 2015) (reaffirming *Osteen*); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 582 (E.D. Va. 1996) (noting that procedures that afforded the student the opportunity to consult with an attorney outside of the disciplinary hearings were adequate).

¹²⁶ *C.f. Osteen*, 13 F.3d at 225 (holding that when the student may also face criminal charges, “it is at least arguable that the due process clause entitles him to consult a lawyer, who might for example advise him to plead the Fifth Amendment”); *Gabrilowitz v. Newman*, 582 F.2d 100, 107 (1st Cir. 1978) (holding that when criminal charges are also pending, a student must be allowed to have an attorney present during the disciplinary hearings to provide advice, but the attorney does not have to actively participate in the student’s defense).

¹²⁷ *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 636 (6th Cir. 2005) (“Ordinarily, colleges and universities need not allow active representation by legal counsel or some other sort of campus advocate.”); see also *Osteen*, 13 F.3d at 225 (noting that during a disciplinary hearing, “the lawyer need not be allowed to participate in the proceeding in the usual way of trial counsel, as by examining and cross-examining witnesses and addressing the tribunal”); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 74 (4th Cir. 1983) (holding a student received due process even though a practicing attorney did not conduct

In most instances, being able to seek legal counsel prior to the hearing and having the lawyer present at the hearing will suffice.¹²⁸ Legal cases rarely turn on a devastating cross-examination at trial or a brilliant answer in appellate oral argument;¹²⁹ legal cases generally turn on comprehensive preparation for trial and lucid persuasive briefing on appeal.¹³⁰ A lawyer can thoroughly prepare his client for a student disciplinary hearing and can script opening and closing statements as well as direct examination. Moreover, cross-examination often can be anticipated and counsel can provide on-the-spot advice.

To be sure, there may be instances where due process requires the active participation of attorneys.¹³¹ For example, if the accused student cannot present a defense without engaging in self-incrimination for subsequent criminal proceedings, the attorney must be allowed to actively participate.¹³² Similarly, if the accused student is incapable of participating in a particular aspect of trial, the lawyer must be allowed to take over.¹³³

2. Evidence

As explained above, due process is designed to ensure the correct result. In order to ensure the correct result, the accused student must have access to all inculpatory and exculpatory evidence.¹³⁴ There should be no surprises at the hearing.

his defense because two student-lawyers consulted extensively with the student's attorney throughout the proceedings).

¹²⁸ See *supra* notes 124–27 and accompanying text.

¹²⁹ Joseph W. Hatchett & Robert J. Telfer, III, *The Importance of Appellate Oral Argument*, 33 STETSON L. REV. 139, 139–41 (2003) (observing that while oral argument may change a judge's mind, statistically it only occurs in a small percentage of cases); Craig Lee Montz, *Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases*, 28 OHIO N.U. L. REV. 67, 69 (2001) (noting that "over 80 percent of the time jurors reach their ultimate verdict during or after the opening statements").

¹³⁰ 3-72 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 72.01 (Matthew Bender 2015); Ruggero J. Aldisert, *Perspective from the Bench on the Value of Clinical Appellate Training of Law Students*, 75 MISS. L.J. 645, 648–49 (2006).

¹³¹ *Flaim*, 418 F.3d at 636 (noting that due process may require allowing a student to have counsel if the procedures are extremely complex or if the school has counsel).

¹³² See *id.* (noting that students have the right to counsel when facing criminal charges for the same incident).

¹³³ See *id.* (noting that an accused student has the right to "make a statement and present evidence," and that counsel may be required to achieve these ends when the proceedings are complex or the charges are serious).

¹³⁴ See Lisa M. Kurcias, Note, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1210–11 (2000) (stating that criminal procedural rules require the government to produce all material and exculpatory evidence upon request). Schools should apply the same rules to disciplinary proceedings.

While this proposition may seem obvious, it presents special problems in the context of the victim's previous sexual history. "Over the last few decades, almost all American courts have limited the extent to which accused rapists can bring in the sexual past of an alleged victim. This ensures that rape trials are not in effect also putting the victim on trial."¹³⁵ If public universities follow the same approach as the applicable state law, then there is no due process problem. However, to the extent universities impose restrictions that go beyond the federal rules of evidence¹³⁶ or applicable state law,¹³⁷ there is a due process problem.¹³⁸

3. Burden of Proof

Due process requires a presumption of innocence.¹³⁹ The accused student need not make any statement or put on any evidence. Rather, the public university has the responsibility of proving, by the preponderance of the evidence or some higher standard, the student's guilt.¹⁴⁰

¹³⁵ BERNSTEIN, *supra* note 17, at 125.

¹³⁶ FED. R. EVID. 412.

¹³⁷ See Pamela J. Fisher, *State v. Alvey: Iowa's Victimization of Defendants Through the Overextension of Iowa's Rape Shield Law*, 76 IOWA L. REV. 835, 835 n.1 (collecting rape shield laws from most states).

¹³⁸ The OCR guidance forbids the consideration of the victim's/survivor's sexual history with anyone other than the accused student. OCR Questions and Answers, *supra* note 26, at 31. However, as Professor Bernstein observed:

[N]o jurisdiction has adopted a blanket rule excluding *all* sexual history evidence not involving the accused. Such evidence is occasionally highly relevant, and a blanket rule would deprive the defendant in such cases of a valid defense.

Imagine, for example, that a video circulates around a college campus showing a man and a woman engaging in what most people would consider a degrading sex act for the woman. The woman then files a complaint with the university, claiming she was sexually assaulted. During the investigation, the woman claims she would never voluntarily consent to such a degrading act. The accused, however, locates four men willing to testify that they engaged in the exact same act with the accuser, and it was fully consensual. One of them even has his own video of the interaction. Under the OCR guidelines, the student accused of sexual assault would not be allowed to present that evidence.

BERNSTEIN, *supra* note 17, at 125–26.

¹³⁹ This proposition is obvious to anyone familiar with our nation's legal tradition, but the OCR guidance "implies that the school should not start the proceedings with a presumption of innocence, or even a stance of neutrality. Rather, university officials should assume that any complaint is valid and the accused is guilty as charged." *Id.* at 126.

¹⁴⁰ See Barton L. Ingraham, *The Right to Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly*, 86 J. CRIM. L. & CRIMINOLOGY 559, 562–63 (1996) (noting that although the prosecution in a criminal case has the burden to prove all the elements of the crime charged, the defendant in a criminal case has no burden of proof).

Moreover, this burden of proof is on the public institution, not the victim/survivor. Although some insist victims/survivors have “procedural equality,”¹⁴¹ the governmental actor cannot transfer its responsibilities to a private individual.¹⁴² The matter is not *Victim/Survivor v. Alleged Perpetrator*; the matter is *Public University v. Alleged Perpetrator*. It is the public university that has the constitutional and legal obligation to remedy known incidents of sex discrimination, including sexual assault.¹⁴³ It is the alleged perpetrator who violated the university’s rules.

The burden of proof must remain with the public university even when the state¹⁴⁴ or the university¹⁴⁵ has adopted an “affirmative consent” standard.¹⁴⁶ Although affirmative consent policies seem to require the alleged perpetrator to put on evidence that the victim/survivor actually did consent,¹⁴⁷ requiring the alleged perpetrator

¹⁴¹ Nancy Chi Cantalupo, *Address: The Civil Rights Approach to Campus Sexual Violence*, 28 REGENT U. L. REV. 185, 193 (2016).

¹⁴² Transferring the burden of proof to the victim/survivor has the practical effect of requiring the victim/survivor to make opening and closing statements, question witnesses, and cross-examine the alleged perpetrator. Imposing such a burden on a victim/survivor contradicts the notion that universities should minimize the stress and burdens on the victim/survivor. Indeed, in many contexts, it seems cruel to the victim/survivor.

¹⁴³ See *supra* Part II.

¹⁴⁴ E.g., CAL. EDUC. CODE § 67386 (West, Westlaw through 2015 Reg. Sess. & ch. 1, 2015–2016 2d Exec. Sess.) (requiring universities to adopt an affirmative consent policy); N.Y. EDUC. LAW § 6441 (McKinney, Westlaw through L.2015, ch. 1–589) (same).

¹⁴⁵ E.g., *Sexual Violence: Consent*, OHIO ST. U. OFF. STUDENT LIFE, <http://studentconduct.osu.edu/page.asp?id=42> (last visited Feb. 1, 2016) (defining affirmative consent standard); *Investigation Process*, U. KAN. STUDENT AFF., <https://studentaffairs.ku.edu/investigation-process> (last visited Feb. 1, 2016) (same); *Offenses*, MIAMI U. POL’Y LIBR., <http://blogs.miamioh.edu/miamipolicies/?p=2122> (last visited Feb. 1, 2016) (same).

¹⁴⁶ See Letter from Susan Kruth, Senior Program Officer, Legal and Pub. Advocacy, Found. for Individual Rights in Educ., to Catherine Lhamon, Assistant Sec’y for Civil Rights, Office for Civil Rights (Nov. 24, 2015) [hereinafter FIRE Letter], <https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-catherine-lhamon-november-24-2015/> (arguing that the affirmative consent standard impermissibly places the burden of proof on the accused).

¹⁴⁷ As Professor Lave explained:

When I was a public defender, I used to always remind jurors that because the [burden of proof] was on the prosecutor, I could literally say nothing, and still, if the D.A. didn’t prove the case beyond a reasonable doubt, they would have to acquit. But with affirmative consent, the accused *must* put on evidence. If the university proves by a preponderance of the evidence that a sex act happened, the student has violated the university code of conduct *unless he can convince the fact finder that the complainant consented*.

Tamara Rice Lave, *Affirmative Consent and Switching the Burden of Proof*, PRAWFSBLAWG (Sept. 3, 2015, 11:33 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/09/affirmative-consent-and-switching-the-burden-of-proof.html>.

to put on evidence of affirmative consent violates due process.¹⁴⁸ Indeed, in the criminal context, “[t]he State is foreclosed from shifting the burden of proof to the defendant . . . ‘when an affirmative defense . . . negate[s] an element of the crime.’”¹⁴⁹

4. Cross-Examination

In general, “the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases.”¹⁵⁰ Indeed, the OCR’s guidance strongly discourages cross-examination.¹⁵¹ Yet, “[s]ome circumstances may require the opportunity

¹⁴⁸ See Memorandum and Order at 10–11, *Mock v. Univ. of Tenn. at Chattanooga*, No. 14-1687-II (Tenn. Ch. Ct. Aug. 4, 2015) (holding that requiring a student accused of sexual assault to prove that the complainant consented violates due process).

¹⁴⁹ *Smith v. United States*, 133 S. Ct. 714, 719 (2013) (quoting *Martin v. Ohio*, 480 U.S. 227, 237 (1987) (Powell, J., dissenting)); see also FIRE Letter, *supra* note 146 (discussing cases in which courts have held that the burden of proof must not be placed on the defendant).

¹⁵⁰ *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988); see also *Crook v. Baker*, 813 F.2d 88, 98–99 (6th Cir. 1987) (holding that there was no deprivation of due process despite the accused’s inability to examine and cross-examine witnesses at a disciplinary hearing); *Nash v. Auburn Univ.*, 812 F.2d 655, 663–64 (11th Cir. 1987) (holding that students were not denied due process when they were required to direct their cross-examination questions to the chancellor, rather than the witness); *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) (“The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.”).

¹⁵¹ The 2011 Dear Colleague Letter provided:

OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.

Dear Colleague Letter, *supra* note 26, at 12. The OCR’s subsequent April 29, 2014 guidance further provided:

F-5. Must a school allow or require the parties to be present during an entire hearing?

Answer: If a school uses a hearing process to determine responsibility for acts of sexual violence, OCR does not require that the school allow a complainant to be present for the entire hearing; it is up to each school to make this determination. But if the school allows one party to be present for the entirety of a hearing, it must do so equally for both parties. *At the same time, when requested, a school should make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time. These two objectives may be achieved by using closed circuit television or other means.* Because a school has a Title IX obligation to investigate possible sexual violence, if a hearing is part of the school’s Title IX investigation process, the school must not require a complainant to be present at the hearing as a prerequisite to proceed with the hearing.

F-6. May every witness at the hearing, including the parties, be cross-examined?

to cross-examine witnesses, though this right might exist only in the most serious of cases.”¹⁵² Given the seriousness of the allegations and the potential repercussions for the accused, due process should require *some form* of cross-examination in public university sexual assault cases.

However, the cross-examination does not have to take the form of leading questions asked in a hostile or bullying manner. As the Supreme Court explained, “[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.”¹⁵³ Despite the portrayal of cross-examination in film and television, it is possible to test the believability and truth of testimony without reducing the witness to tears or eliciting a dramatic confession. Although trial attorneys strive to perfect the technique of leading questions, the veracity and accuracy of a witness’s testimony can be questioned and refuted without leading questions.¹⁵⁴ Instead, cross-examination can take place through the hearing officer or by requiring advocates to ask more open-ended questions.¹⁵⁵

C. Meaningful Appellate Review

“Courts have consistently held that there is no right to an appeal from an academic disciplinary hearing that satisfies due process,”¹⁵⁶ but

Answer: OCR does not require that a school allow cross-examination of the witnesses, including the parties, if they testify at the hearing. But if the school allows one party to cross-examine witnesses, it must do so equally for both parties.

OCR strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence. Allowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment. A school may choose, instead, *to allow parties to submit questions to a trained third party (e.g., the hearing panel) to ask the questions on their behalf. OCR recommends that the third parties screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.*

OCR Questions and Answers, *supra* note 26, at 30–31 (emphasis added).

¹⁵² *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 636 (6th Cir. 2005); *see also* *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (holding that the right to cross-examine in school disciplinary hearings may be allowed if the case rests on the credibility of the testimony); *Lipsett v. Univ. of P.R.*, 637 F. Supp. 789, 813 (D.P.R. 1986) (holding that the right to cross-examine is not absolute and depends on circumstances), *rev’d on other grounds*, 864 F.2d 881, 915 (1st Cir. 1988).

¹⁵³ *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

¹⁵⁴ While the inability to ask leading questions lessens the advocate’s control of the witness, an advocate can elicit the same information without leading.

¹⁵⁵ One possibility is to allow the accused student to submit questions to the hearing officer and then to allow the hearing officer to ask the questions. As long as the hearing officer does not change the substance of the question, the hearing officer may rephrase the question.

¹⁵⁶ *Flaim*, 418 F.3d at 642; *see also* *Smith ex rel. Smith v. Severn*, 129 F.3d 419, 429 (7th Cir. 1997) (“Due process does not require review by a school board.”); *Winnick v.*

granting an appeal allows the university to correct “any such error that might have occurred, even in proceedings satisfying due process.”¹⁵⁷ As the Supreme Court observed, “[t]he risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.”¹⁵⁸ In the context of a sexual assault disciplinary proceeding, the consequences of an erroneous conviction are severe,¹⁵⁹ especially given the comparatively small cost to appeal. Thus, even though no court has explicitly ruled that an appeal is required, the Constitution would seem to require an appeal.¹⁶⁰

Such an appeal must be meaningful and not a mere rubber stamp.¹⁶¹ Like any enterprise run by human beings, “[d]isciplinary hearings, of course, are not flawless.”¹⁶² This is particularly true when the standard of proof is preponderance of the evidence rather than clear and convincing evidence or beyond a reasonable doubt.¹⁶³ The appellate tribunal must carefully examine whether the accused had access to all the evidence, enjoyed the presumption of innocence, and was able to meaningfully cross-examine witnesses in some form. While the tribunal

Manning, 460 F.2d 545, 549 n.5 (2d Cir. 1972) (“Winnick had no constitutional right to review or appeal after the disciplinary hearing which satisfied the essential requirements of due process.”); *Foo v. Trs. of Ind. Univ.*, 88 F. Supp. 2d 937, 952 (S.D. Ind. 1999) (holding that if the proceeding satisfies due process requirements, an appeal is not necessary).

¹⁵⁷ *Flaim*, 418 F.3d at 642.

¹⁵⁸ *Goss v. Lopez*, 419 U.S. 565, 580 (1975).

¹⁵⁹ *See, e.g.*, VA. CODE ANN. § 23-9.2:18 (LexisNexis, LEXIS through 2015 Reg. Sess.) (requiring that a notation be placed on a student’s transcript if the student is suspended or expelled for sexual assault); SOUTHEASTERN CONFERENCE RULES 4.1.19. (forbidding student athletes who are disciplined for sexual assault to play at other conference schools).

¹⁶⁰ As a practical matter, it is difficult for a public university to argue an appeal is unnecessary. Federal trial judges, who face appellate review of every decision, will likely be extremely skeptical of such an argument and not inclined to defer to the public university.

¹⁶¹ The OCR guidance also allows the victim/survivor to appeal if the hearing results in a finding of innocence. *See* Dear Colleague Letter, *supra* note 26, at 12 (“If a school provides for appeal of the findings or remedy, it must do so for both parties.”). While allowing the victim/survivor or the university to appeal a finding of innocence is counter to the norms of our criminal justice system, such a practice, on its face, does not violate due process. Of course, there may be circumstances where a reversal of a finding of innocence violates due process.

¹⁶² *Flaim*, 418 F.3d at 642.

¹⁶³ As Justice Harlan explained:

If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

In re Winship, 397 U.S. 357, 371 (1970) (Harlan, J., concurring).

should review findings of fact for clear error, the appellate review for all legal conclusions should be de novo.¹⁶⁴

Should the appellate tribunal conclude that there is a reversible error, then the finding of responsibility must be vacated.¹⁶⁵ If the public institution believes it can obtain a conviction in a second hearing,¹⁶⁶ then the institution should pursue a second hearing.¹⁶⁷

CONCLUSION

Humanity is inherently sinful, and public university administrators are inherently human. Sometimes their sins are sins of omission—they ignore a culture that promotes sexual assault, provide no support for victims/survivors, and are ambivalent to victims'/survivors' pursuit of justice. Sometimes their sins are sins of commission—they expel alleged perpetrators in proceedings that are biased, procedurally inadequate, and never subject to independent scrutiny. Whether the sins are omission or commission, the actions are still sins.

The Constitution prevents sin by limiting the sovereign discretion of government officials, including public university administrators. The constitutional value of equality *requires* school officials to change the culture, support victims/survivors, and facilitate victims'/survivors' pursuit of justice. The constitutional value of freedom *prohibits* institutional actors from expelling a student without due process. In the sexual assault context, due process means: (1) strict separation of the investigative, prosecutorial, adjudicative, and appellate functions; (2) a hearing with adequate procedural safeguards including access to counsel, access to all inculpatory and exculpatory evidence, placing the burden of proof on the university, and allowing some form of cross-examination; and (3) meaningful appellate review.

Although there is tension between equality and freedom, there is no clash of constitutional values. University administrators are not forced to choose between sins of omission and sins of commission. Indeed, the

¹⁶⁴ This is the standard utilized by federal appellate courts. *See, e.g.*, *Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d 1348, 1359 (Fed. Cir. 2007) (holding that legal conclusions are reviewed de novo); *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005) (same).

¹⁶⁵ Failure to vacate the decision violates due process. *See Chapman v. California*, 386 U.S. 18, 44 (1967) (Stewart, J., concurring) (noting that “[r]eversal is required when a conviction may have been rested on a constitutionally impermissible ground, despite the fact that there was a valid alternative ground on which the conviction could have been sustained”).

¹⁶⁶ At a second hearing, the fact finders should be a different group of people than those who participated in the first hearing.

¹⁶⁷ Given the institution’s obligations under the Equal Protection Clause and Title IX, the institution may well have an obligation to conduct a second trial. *See Cohen, supra* note 36, at 255–56 (arguing that Title IX “require[s] institutions to take affirmative steps in certain situations”); *supra* Part II.

Constitution requires public officials to respect both equality and freedom. Constitutional actors must avoid both sins of omission and sins of commission. They must strive to live up to the founding propositions of the American nation—that all are created and endowed by their Creator with certain freedoms.

ELIMINATING A HOSTILE ENVIRONMENT TOWARDS COLLEGES AND UNIVERSITIES: AN EXAMINATION OF THE OFFICE FOR CIVIL RIGHTS' UNCONSTITUTIONAL PROCESS AND PRACTICES

*Farnaz Farkish Thompson**

INTRODUCTION

One hundred and forty sexual assault investigations at 124 colleges and universities.¹ The numbers are startling, but the handling of these investigations by the United States Department of Education's Office for Civil Rights ("OCR"), many of which began more than one year ago,² is also troubling. In 2014, the average OCR investigation of a sexual assault at a college or university lasted 1,469 days, or approximately four years.³ Five prominent Democratic United States Senators expressed concern over the backlog of OCR investigations and wrote to the United States Secretary of Education: "[I]t is alarming that many institutions have had investigations open more than three years."⁴

Many of these lengthy investigations will eventually conclude with a Hobson's choice for the college or university that is a recipient of federal financial assistance. To resolve alleged violations of Title IX identified during the investigation, the recipient must either (1) enter into a resolution agreement designed to address any alleged violations *prior* to receiving actual notice of them or (2) refuse to voluntarily enter

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¹ Tyler Kingkade, *124 Colleges, 40 School Districts Under Investigation for Handling of Sexual Assault*, HUFFINGTON POST (July 24, 2015, 2:06 PM), http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault_55b19b43e4b0074ba5a40b77. The United States Department of Education's Office for Civil Rights ("OCR") has the authority to investigate post-secondary institutions (colleges and universities) that are recipients of federal financial assistance under Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex. 20 U.S.C. §§ 1681(a), 1682 (2012); 34 C.F.R. §§ 106.1, 106.2(a), 106.2(i) (2015).

² Kingkade, *supra* note 1.

³ *Id.*

⁴ Letter from Dianne Feinstein, Al Franken, Tim Kaine, Amy Klobuchar & Mark R. Warner, U.S. Senators, to Arne Duncan, Sec'y of Educ., U.S. Dep't of Educ. 1–2 (Dec. 12, 2014), <http://www.virginia.edu/sacs/2014/references/REF6.pdf>. OCR had ninety Title IX sexual violence investigations open when the senators sent this letter. *Id.*

into such a resolution agreement.⁵ The latter results in OCR declaring an impasse in negotiations⁶ and publicly issuing a letter of findings without a resolution agreement.⁷ A recipient that refuses to endorse a resolution agreement also risks losing all or part of its federal financial assistance⁸ and being misperceived as callous and unconcerned about sexual violence.

OCR's current procedures and practices in investigating colleges and universities ("recipients") are unnecessarily adversarial and punitive when both OCR and the recipient share the same goal of creating a safe learning environment for students.⁹ The students at a college or university under investigation will benefit from OCR identifying issues early in its investigation and allowing a recipient to quickly remedy alleged issues before OCR concludes its investigation, particularly when investigations may last four or more years.¹⁰ The real victims of a lengthy investigation followed by an adversarial process are the students, and they deserve a better process. This Article analyzes the constitutional infirmities in OCR's current procedures and practices and offers two viable solutions. Part I describes OCR's current procedures for its investigations. Part II discusses how these procedures deprive a

⁵ See *infra* Parts I.A–B.

⁶ See *infra* note 43 and accompanying text.

⁷ See *infra* note 45 and accompanying text.

⁸ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CASE PROCESSING MANUAL art. VI, § 601 (2015) [hereinafter CPM] (explaining the process OCR follows for initiating an administrative action); 34 C.F.R. §§ 100.8, 100.13(f), 106.71 (2015) (granting the authority to effect compliance by suspending, terminating, or refusing to grant federal financial assistance). Federal financial assistance encompasses:

(1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

Id. § 100.13(f).

⁹ See Letter from Terence R. McAuliffe, Governor, Commonwealth of Va., to Arne Duncan, Sec'y of Educ., U.S. Dep't of Educ. 1–3 (Aug. 14, 2015), <http://apps.washingtonpost.com/g/documents/local/letters-about-the-sexual-violence-investigation-at-u-va/1784/> (noting the unduly adversarial and punitive nature of OCR's current procedures).

¹⁰ See Dara Penn, Comment, *Finding the Standard of Liability Under Title IX for Student-Against-Student Sexual Harassment: Confrontation, Confusion, and Still No Conclusion*, 70 TEMP. L. REV. 783, 791–92 (1997) (explaining that because of the long administrative delays, student-victims "are unable to benefit from eventual institutional Title IX compliance because they graduate, relocate, or transfer to other schools by the time any institutional changes are effectuated").

recipient of procedural due process or actual notice of the alleged violations and a meaningful opportunity to be heard. Part III analyzes how OCR's current process violates the Spending Clause with respect to public colleges and universities. This Part also reveals that OCR is finding recipients in violation of its guidance documents and not necessarily in violation of Title IX or its implementing regulations. Part IV offers two solutions to a college or university currently under investigation.

I. OCR'S CURRENT CASE PROCESSING MANUAL AND PRACTICES

The OCR Case Processing Manual ("CPM") provides the procedures to investigate and rectify complaints, compliance reviews, and directed investigations.¹¹ OCR may initiate an investigation under Title IX after a proper complaint is filed.¹² OCR may also initiate an investigation under Title IX after OCR decides to initiate either a compliance review or a directed investigation.¹³ OCR may initiate a compliance review when, during the process of investigating a complaint, "OCR identifies new compliance concerns involving unrelated issues that were not raised in the complaint or issues under investigation."¹⁴ OCR may also periodically initiate a compliance review without any complaint being filed against a recipient¹⁵ or may fold the investigation of a particular

¹¹ CPM, *supra* note 8, at 2.

¹² 20 U.S.C. § 1682 (2012); 34 C.F.R. §§ 100.7(a)–(c), 106.71 (2015); *see generally* CPM, *supra* note 8, §§ 101–10, 301 (prescribing the procedure for evaluating complaints and for initiating an investigation following receipt of a valid complaint). A recipient first receives notice that a complaint was filed against it when OCR decides to open a case for investigation. *Id.* § 109. The notification letter to the recipient does not include the identity of the complainant unless OCR determines that disclosure of the complainant's identity is necessary to resolve the complaint and the complainant endorses a consent form to disclose his or her identity. *Id.* § 103. The letters of notification to the complainant and the recipient contain a statement of "OCR's jurisdiction with applicable regulatory citations," the allegations that OCR is investigating, and "[i]nformation about OCR's Early Complaint Resolution ["ECR"] process." *Id.* § 109. OCR offers ECR to the parties only if OCR determines that ECR is appropriate and both parties are willing to proceed with this resolution option. *Id.* § 201. OCR may also offer to resolve a complaint through the Rapid Resolution Process ("RRP") for "substantive areas determined by OCR to be appropriate for such resolution." *Id.* § 207. A complainant, however, must sign a consent form to disclose his or her identity before OCR proceeds with RRP. *Id.* Only a complaint, and not a compliance review or directed investigation, may be resolved through ECR and RRP. *Id.* §§ 201, 207.

¹³ CPM, *supra* note 8, §§ 301(b), 402.

¹⁴ *Id.* § 301(b).

¹⁵ *Id.* § 401; *see also* 34 C.F.R. § 100.7(a) (stating that periodic compliance reviews may be conducted to determine whether recipients are in compliance with the regulations of Title VI of the Civil Rights Act of 1964); *id.* § 106.71 (incorporating by reference the procedural provisions of Title VI of the Civil Rights Act of 1964 into Title IX of the Education Amendments of 1972).

complaint into a compliance review.¹⁶ Lastly, OCR may conduct a directed investigation when a report or other information, such as a news article, indicates possible noncompliance with Title IX, and “the compliance concern is not otherwise being addressed through OCR’s complaint, compliance review or technical assistance activities.”¹⁷

This Article focuses on the process to resolve complaints, compliance reviews, and directed investigations under CPM Section 302, which results in a resolution agreement without a letter of findings,¹⁸ and CPM Section 303, which results in a resolution agreement accompanied by a letter of findings.¹⁹ Under CPM Sections 302 and 303, OCR will issue a resolution letter, but under CPM Section 302, the resolution letter will not contain any findings of noncompliance.²⁰ For purposes of this Article, “resolution letter” refers to a resolution under CPM Section 302, and “letter of findings” refers to a resolution under CPM Section 303.

A. CPM Section 302 Resolution Agreement Reached During an Investigation

Prior to the conclusion of OCR’s investigation, a recipient may request to resolve any allegations or issues in a complaint, compliance review, or directed investigation by voluntarily entering into a resolution agreement.²¹ OCR may, in its discretion, resolve any allegations or issues during the course of an investigation unless OCR has obtained sufficient evidence to support a finding of noncompliance about a particular allegation or issue by a preponderance of the evidence.²² Once OCR has obtained sufficient evidence to support a finding of noncompliance, the current CPM requires OCR to issue a letter of findings for each particular allegation or issue.²³

OCR may enter into a “mixed resolution,” or a resolution under CPM Sections 302 and 303 for investigations that concern multiple

¹⁶ CPM, *supra* note 8, § 110(k).

¹⁷ *Id.* § 402.

¹⁸ *Id.* § 302.

¹⁹ *Id.* §§ 303–04.

²⁰ *Id.* § 301(c). *Compare id.* § 302 (stating that “[a] copy of the resolution agreement will be included with the resolution letter,” but not requiring the inclusion of findings of noncompliance), *with id.* § 303 (stating that a letter of findings will be provided to the parties when OCR determines whether there is sufficient evidence to support a finding of noncompliance).

²¹ *Id.* § 302.

²² *Id.* (“Where OCR has obtained sufficient evidence to support a finding under CPM subsection 303(a) (insufficient evidence) or CPM subsection 303(b) (violation) with regard to any allegation(s), OCR will not resolve the allegation(s) pursuant to CPM Section 302, but will proceed in accordance with the appropriate provisions set forth in CPM Section 303.”).

²³ *Id.* § 303(b).

allegations and issues, where the investigation “has found a violation with regard to some allegations and issues and/or insufficient evidence with regard to other allegations and issues, and/or where there are some allegations and issues that are appropriate to resolve prior to the conclusion of the[] investigation.”²⁴ The letter accompanying a mixed resolution includes “the allegations and issues for which OCR has made a finding[]” of “either [a] violation or insufficient evidence”; this letter also includes the “issues that are being resolved prior to the conclusion of the investigation.”²⁵

If OCR determines a resolution agreement is appropriate prior to the conclusion of its investigation, OCR will share the proposed terms of the resolution agreement with the recipient and inform the complainant, if any, “of the recipient’s interest in resolution.”²⁶ The resolution agreement requires the recipient to take “[s]pecific acts or steps” to address OCR’s compliance concerns²⁷ and, in a mixed resolution, to address the identified violation(s).²⁸ For a resolution wholly under CPM Section 302, a recipient may negotiate with OCR to reach a final resolution agreement within thirty calendar days (or less at the discretion of OCR) from the date when the recipient receives the proposed terms of the agreement.²⁹ OCR may choose to suspend its investigation during the negotiation period.³⁰ If the recipient and OCR do not reach a final agreement by the thirtieth day, then OCR will resume its investigation no later than the thirty-first day after negotiations begin.³¹ This thirty-day period for negotiation cannot be reinitiated.³² For a mixed resolution, OCR proceeds in accordance with CPM Section 303, which provides for a ninety-day negotiation period.³³

If the recipient and OCR reach a final resolution agreement wholly under CPM Section 302, then OCR issues a resolution letter, which includes a statement of the case, but no finding of a violation.³⁴ After

²⁴ *Id.* § 301(d).

²⁵ *Id.*

²⁶ *Id.* § 302.

²⁷ *Id.* § 304.

²⁸ *Id.* § 301.

²⁹ *Id.* § 302(a).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* §§ 301–03.

³⁴ *Id.* § 302. The statement of the case in a resolution letter includes information such as “each allegation and issue investigated to date supported by any necessary explanation or analysis of the evidence,” “[t]he outstanding areas that OCR would have to investigate in order to reach a determination regarding compliance,” “[t]he date of the recipient’s expression of interest in resolving the complaint,” “OCR’s basis for entering into the resolution agreement,” and “[a]n explanation of how the terms of the agreement are

entering into a resolution agreement, the recipient undergoes a monitoring period in which OCR confirms that the recipient is fulfilling its obligations under the agreement.³⁵ A monitoring period typically lasts three or more years, and the most recent resolution agreements from 2014 and 2015 typically do not specify when the monitoring period ends.³⁶

Although nothing in the CPM precludes OCR from sharing the resolution letter with the recipient prior to the recipient's endorsement of the final resolution agreement, OCR publicly issues the resolution letter with an accompanying press release after the recipient endorses the final resolution agreement.³⁷ The recipient usually receives the resolution letter a few hours before the letter is publicly issued.

aligned with the allegations and issues investigated." *Id.*; e.g., Letter from Thomas J. Hibino, Reg'l Dir., Region I, Office for Civil Rights, U.S. Dep't of Educ., to Dorothy K. Robinson, Vice President & Gen. Counsel, Yale Univ. (June 15, 2012) [hereinafter Yale Univ. Resolution Letter], <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027-a.pdf>.

³⁵ CPM, *supra* note 8, art. V. OCR concludes the monitoring of a resolution agreement only after it "determines that the recipient has fulfilled the terms of the resolution agreement and is in compliance with the statute(s) and regulations(s) . . . at issue." *Id.*

³⁶ Compare Resolution Agreement, Harvard Law Sch., Complaint No. 01-11-2002, at 10 (Dec. 23, 2014), <http://www2.ed.gov/documents/press-releases/harvard-law-agreement.pdf> ("[T]he monitoring period of this Agreement will extend for three years, or until, if later, such time as OCR determines that [Harvard University and Harvard Law School] have fulfilled the terms of this Agreement . . ."), with Resolution Agreement, Mich. State Univ., OCR Docket Nos. 15-11-2098 and 15-14-2113, at 21 (Aug. 28, 2015) [hereinafter MSU Resolution Agreement], <http://www2.ed.gov/documents/press-releases/michigan-state-agreement.pdf> ("OCR will not close the monitoring of this Agreement until OCR determines that the University has fulfilled the terms of this Agreement and is in compliance with the regulation implementing Title IX . . ."), and Voluntary Resolution Agreement, S. Methodist Univ., OCR Case Nos. 06112126, 06132081, and 06132088, at 15 (Nov. 16, 2014), <http://www2.ed.gov/documents/press-releases/southern-methodist-university-agreement.pdf> (same), and Voluntary Resolution Agreement, Tufts Univ., Complaint No. 01-10-2089, at 16 (Apr. 17, 2014) [hereinafter Tufts Univ. Resolution Agreement], <http://www2.ed.gov/documents/press-releases/tufts-university-agreement.pdf> (same).

³⁷ For example, four days after Yale University entered into a resolution agreement, OCR issued the resolution letter with an accompanying press release. Voluntary Resolution Agreement, Yale Univ., Complaint No. 01-11-2027, at 6 (June 11, 2012) [hereinafter Yale Univ. Resolution Agreement], <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027-b.pdf>; Yale Univ. Resolution Letter, *supra* note 34, at 1 (issuing the resolution letter on June 15, 2012); Press Release, U.S. Dep't of Educ., U.S. Department of Education Announces Resolution of Yale University Civil Rights Investigation (June 15, 2012), <http://www.ed.gov/news/press-releases/us-department-education-announces-resolution-yale-university-civil-rights-investigation>.

B. CPM Section 303 Investigative Determination

If OCR concludes its investigation, then OCR must determine by a preponderance of the evidence whether there is sufficient evidence to support a conclusion of noncompliance.³⁸ When sufficient evidence exists to make a finding of noncompliance, OCR prepares a letter of findings and proposed resolution agreement.³⁹ Even though nothing in the CPM precludes OCR from sharing its letter of findings with the recipient prior to the negotiation of the resolution agreement, OCR does not share the letter of findings with the recipient until after the recipient “voluntarily” enters into a final resolution agreement.⁴⁰ OCR publicly issues the letter of findings with an accompanying press release, and the recipient typically receives the letter of findings only a few hours before the letter is publicly issued.⁴¹

A recipient may engage in negotiations to reach a final resolution agreement with OCR within ninety calendar days from the date when the recipient receives the proposed resolution agreement.⁴² If OCR and the recipient do not reach a final agreement within ninety calendar days, OCR will issue an impasse letter on the ninety-first day, informing the recipient that “OCR will issue a letter of finding(s) in 10 calendar days if

³⁸ CPM, *supra* note 8, § 303.

³⁹ *Id.* § 303(b). OCR’s letter of findings includes a statement of the case, and this statement provides: a description of “each allegation and issue investigated and the findings of fact for each, supported by any necessary explanation or analysis of the evidence on which the findings are based”; “[c]onclusions for each allegation and issue that reference the relevant facts, the applicable regulation(s), and the appropriate legal standards”; and an “explanation of how the terms of the agreement are aligned with the allegations and issues investigated and are consistent with applicable law and regulation(s).” *Id.*; e.g., Letter from Meena Morey Chandra, Dir., Region XV, Office for Civil Rights, U.S. Dep’t of Educ., to Kristine Zayko, Deputy Gen. Counsel, Mich. State Univ. 25–35, 39–40 (Sept. 1, 2015) [hereinafter MSU Letter of Findings], <http://www2.ed.gov/documents/press-releases/michigan-state-letter.pdf>.

⁴⁰ CPM, *supra* note 8, § 303. For example, three days after Michigan State University entered into a resolution agreement, OCR issued its letter of findings. MSU Resolution Agreement, *supra* note 36, at 21 (signing the agreement on August 28, 2015); MSU Letter of Findings, *supra* note 39, at 1 (issuing the letter of findings on September 1, 2015).

⁴¹ See Press Release, U.S. Dep’t of Educ., Michigan State University Agrees to Change its Response to Complaints of Sexual Harassment, Sexual Violence (Sept. 1, 2015), <http://www.ed.gov/news/press-releases/michigan-state-university-agrees-change-its-response-complaints-sexual-harassment-sexual-violence> (announcing that the OCR resolved an investigation against Michigan State University after the university entered a resolution agreement); *supra* note 40.

⁴² CPM, *supra* note 8, §§ 303(b)(1), 303(b)(2)(i) (“OCR may end the negotiations period at any time prior to the expiration of the 90-calendar day period when it is clear that agreement will not be reached . . .”).

a resolution is not reached.”⁴³ If the recipient enters into a resolution agreement at this or at any other juncture, then the recipient will undergo monitoring until OCR confirms the recipient is fulfilling its obligations under the agreement.⁴⁴ If there is no agreement during this ten-day period, OCR publicizes a letter of findings on the eleventh day.⁴⁵ The recipient must enter into a resolution agreement within thirty calendar days of the date of the letter of findings; otherwise, OCR will issue a letter of impending enforcement action.⁴⁶

C. OCR's Administrative Enforcement Action

“When OCR is unable to negotiate a resolution agreement,” OCR may either “(1) initiate administrative proceedings to suspend, terminate, or refuse” federal financial assistance from the recipient “or (2) refer the case to [the Department of Justice] for judicial proceedings.”⁴⁷ An administrative proceeding conducted by a Department of Education administrative law judge will likely provide a friendlier forum for OCR than a federal district court. Accordingly, this Article describes the administrative proceeding, which OCR has not had reason to initiate in over twenty years.⁴⁸ The administrative proceeding is lengthy, cumbersome, and involves many layers of review before the recipient receives a final agency action.

An administrative hearing through the Department of Education's Office of Hearings and Appeals is similar to, but less formal than, a hearing before a federal district court.⁴⁹ To initiate the administrative

⁴³ *Id.* § 303(b)(2)(ii). The impasse letter is not publicly issued. Additionally, if the recipient does not respond to the proposed resolution agreement within thirty calendar days of receipt, then OCR may issue an impasse letter, informing the recipient that “OCR will issue a letter of finding(s) in 10 calendar days if a resolution agreement is not reached within that 10-day period.” *Id.* § 303(b)(2)(i).

⁴⁴ *Id.* art. V.

⁴⁵ *Id.* § 303(b)(3).

⁴⁶ *Id.* § 303(b)(3). After the letter of impending enforcement action is issued, OCR must approve any resolution agreement that the recipient proposes. *Id.* § 305.

⁴⁷ *Id.* art. VI.

⁴⁸ Indeed, one of the last administrative hearings that directly addressed a compliance review under Title IX began on May 25, 1989, and concluded on April 30, 1992. *In re Capistrano Unified Sch. Dist.*, Docket No. 89-33-CR, 1992 EOHA LEXIS 1, 1-4 (1992) (investigating Title IX in the employment context); *see also In re Birmingham City Sch. Dist.*, Docket No. 86-IX-6, 1989 Ed. Civ. R. Rev. Auth. LEXIS 9, 9 (1992) (investigating Title IX in the context of athletic opportunities).

⁴⁹ *See* 34 C.F.R. §§ 100.6-0.11, 101.1-1.131, 106.71 (2015) (setting forth the procedures for an administrative hearing). The hearing will be held at the office of the Department of Education in Washington, D.C., unless the Department official concludes that it is more convenient to hold the hearing elsewhere. *Id.* § 100.9(b). The parties to the proceeding include the recipient and the Assistant Secretary for the Office for Civil Rights. *Id.* § 101.21. An amicus curiae may also participate in the hearing if it files a petition to participate and that petition is granted. *Id.* § 101.22(a). All pleadings, correspondence,

hearing, OCR sends the recipient a notice of opportunity for hearing within thirty days of the notice of the deferral action.⁵⁰ OCR uses a preponderance of the evidence standard in such administrative hearings.⁵¹ The hearing examiner is either an administrative law judge whom the agency appoints or an administrative law judge from another agency if the agency lacks sufficient staff.⁵² The designation of the hearing examiner states whether the hearing examiner makes an initial decision or “certif[ies] the entire record including his recommended findings and proposed decision to the reviewing authority,” who may be the Secretary of Education or any person acting pursuant to authority delegated by the Secretary.⁵³

The initial decision of a hearing examiner becomes final if no exceptions are filed within twenty days, and constitutes the “final agency action” under the Administrative Procedure Act.⁵⁴ If the hearing examiner makes a recommended decision, or if exceptions are filed to a hearing examiner’s initial decision, the reviewing authority must review the decision and issue its own decision, which constitutes the “final agency action” under the Administrative Procedure Act.⁵⁵

1. Secretary of Education’s Discretionary Review

If the Secretary of Education has not personally made the final agency action, a party may request that the Secretary review the final

exhibits, transcripts, exceptions, briefs, and other documents filed in the proceeding constitute the exclusive record for decision, commonly referred to as the “administrative record.” *Id.* § 101.92. The administrative record is public. *Id.* §§ 101.2, 101.91.

⁵⁰ CPM, *supra* note 8, § 601. The recipient of federal funding must be afforded an opportunity for hearing prior to the suspension, termination, or refusal to grant federal financial assistance. 34 C.F.R. §§ 100.8(c), 106.71. The recipient may file a response within twenty days after service. *Id.* § 101.52.

⁵¹ Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Sexual Violence 11 (Apr. 4, 2011) [hereinafter DCL on Sexual Violence], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

⁵² 34 C.F.R. § 101.61 (citing 5 U.S.C. §§ 3105, 3344 (2012)).

⁵³ *Id.* § 101.62, 100.13(d). The Civil Rights Reviewing Authority (“CRRA”) typically serves as the reviewing authority, but there is currently no standing CRRA body. ARTHUR L. COLEMAN & JAMIE LEWIS KEITH, A PRIMER ON OCR: THE RULES, THE REGULATIONS, AND THE STRATEGIES FOR EFFECTIVELY ADDRESSING COMPLAINTS OF DISCRIMINATION FILED WITH THE U.S. DEPARTMENT OF EDUCATION’S OFFICE FOR CIVIL RIGHTS 9 n.46 (2012), http://www-local.legal.uillinois.edu/nacua12/presentations/3A_Handout.pdf; *see also* U.S. Department of Education Principal Office Functional Statements, U.S. DEP’T EDUC., http://www2.ed.gov/about/offices/list/om/fs_po/om/oha.html (last updated Oct. 14, 2015) (explaining the nature and responsibilities of the CRRA as a “body appointed by the Secretary” to review decisions of administrative law judges).

⁵⁴ 34 C.F.R. § 101.104(a); *see also* 5 U.S.C. § 704 (“[A] final agency action for which there is no other adequate remedy in a court [is] subject to judicial review.”).

⁵⁵ 34 C.F.R. § 101.104(b); *see also* 5 U.S.C. § 704 (explaining which agency actions are subject to judicial review).

decision.⁵⁶ The Secretary may accept or refuse a request, in whole or in part.⁵⁷ If a party fails to request the Secretary's review, it does not constitute a failure to exhaust administrative remedies for purposes of procuring judicial review.⁵⁸ The Secretary may also review the final decision at his discretion.⁵⁹

2. Letter from Secretary to Legislative Committees

If the administrative proceeding results in an express finding that the recipient has failed to comply with Title IX, then the Secretary must file with the House and Senate committees "having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds" for the suspension, termination, or refusal to continue federal financial assistance.⁶⁰ Thirty days after the Secretary's report to these committees, the order suspending, terminating, or refusing to continue financial assistance becomes effective.⁶¹

3. Federal District Court Action under the Administrative Procedure Act

Once the final agency action is rendered, the recipient may file an action in federal district court to challenge this action.⁶² The reviewing court will set aside agency actions, findings, and conclusions that are

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;

⁵⁶ 34 C.F.R. §§ 100.10(e), 101.106.

⁵⁷ *Id.* § 101.106.

⁵⁸ *Id.*

⁵⁹ *Id.* § 100.10(e).

⁶⁰ 34 C.F.R. § 100.8(c); *see also* 42 U.S.C. § 2000d-1 (2012) (requiring a written report to be filed with the appropriate House and Senate committees for an action terminating or refusing to grant or continue federal financial assistance to any program or activity).

⁶¹ 34 C.F.R. § 100.8(c).

⁶² 42 U.S.C. § 2000d-2; *see also* 5 U.S.C. §§ 702-04 (2012) (granting the right of judicial review for "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action," and describing which agency actions will be subject to judicial review); 34 C.F.R. § 101.104 (describing what constitutes a final agency action). The reviewing court or agency may postpone the effective date of any action to suspend, terminate, or refuse to grant federal financial assistance pending conclusion of the judicial proceeding. 5 U.S.C. § 705. A lawsuit for declaratory or injunctive relief may be filed against the federal officer or officers responsible for compliance, namely the Secretary of Education and Assistant Secretary for the Office for Civil Rights in their official capacities. *Id.* § 702.

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.⁶³

This lengthy and costly administrative proceeding, which may result in another lengthy federal district court proceeding, discourages many recipients from pursuing legal action and instead forces these recipients to tolerate the constitutional infirmities in OCR's process.⁶⁴

II. OCR'S PROCEDURES DENY A RECIPIENT PROCEDURAL DUE PROCESS

Terence McAuliffe, the Governor of the Commonwealth of Virginia, recently wrote to Secretary of Education Arne Duncan to express concern “that the process used by OCR has fundamentally shifted from being a constructive, cooperative attempt to resolve any Title IX issues into an adversarial action that has denied [a] [u]niversity . . . the very basic requirements of due process—adequate notice and an opportunity to be heard by an impartial tribunal.”⁶⁵ Both of Virginia's United States Senators agreed in a separate letter to Secretary Duncan that “[t]he Governor's letter raises serious procedural questions that could affect the accuracy of [OCR's] investigation.”⁶⁶ Lack of due process was the crux of the Governor's and Senators' concern, and Governor McAuliffe articulated the manner in which OCR's process currently deprives a recipient of due process when he wrote:

OCR has not and will not give the [u]niversity . . . an ability to challenge either OCR's legal conclusions or factual findings *before* OCR publicly issues a Letter of Findings. While there is a formal process to challenge these findings, it is only after the Letter of Findings has been made public, and in which the [u]niversity . . . would be in a defensive posture. At the same time, it is my understanding that the [u]niversity . . . has been asked to, nevertheless, agree to a settlement with OCR, even though it has never been provided with written findings to support what OCR has concluded.⁶⁷

⁶³ 5 U.S.C. § 706.

⁶⁴ See Ellen J. Vargyas, Commentary, *Franklin v. Gwinnett County Public Schools and its Impact on Title IX Enforcement*, 19 J.C. & U.L. 373, 384 (1993) (reasoning that although universities can defend Title IX cases through litigation, defending them in courts and other forums “can result in heavy economic losses including damages in addition to the costs of litigation”).

⁶⁵ Letter from Terence R. McAuliffe to Arne Duncan, *supra* note 9, at 1.

⁶⁶ Letter from Tim Kaine & Mark R. Warner, U.S. Senators, Commonwealth of Va., to Arne Duncan, Sec'y of Educ., U.S. Dep't of Educ. (Aug. 25, 2015), <https://assets.documentcloud.org/documents/2501863/letters-about-the-sexual-violence-investigation.pdf>.

⁶⁷ Letter from Terence R. McAuliffe to Arne Duncan, *supra* note 9, at 2.

The Governor's letter addressed OCR's investigation of a particular university,⁶⁸ but OCR's process for every recipient of federal financial assistance is the same. No law, regulation, or rule precludes OCR from sharing its resolution letter or letter of findings with a recipient before the recipient enters into a resolution agreement.⁶⁹ OCR, however, provides the recipient with the resolution letter or the letter of findings only *after* the recipient "voluntarily" enters into a resolution agreement.⁷⁰

A recipient must endorse a resolution agreement without actual notice of any alleged violations, even though the resolution agreement is supposedly tailored to remedy the alleged violations OCR identified during the course of its investigation.⁷¹ Although OCR may orally share a summary of its findings, OCR's process places recipients in an untenable position—a recipient must either (1) endorse a resolution agreement without actual notice of the alleged violations or (2) reach impasse; wait ten days; endure the stigma of receiving the letter of findings, which is publicly issued on the eleventh day; and, upon receipt of the letter of findings, promptly enter the thirty-day period towards an enforcement action.⁷²

OCR's process violates the minimal requirements of procedural due process—notice and a meaningful opportunity to be heard—under the rubric articulated by the United States Supreme Court in both *Mathews v. Eldridge*⁷³ and *Mullane v. Central Hanover Bank & Trust Co.*⁷⁴ The Supreme Court has long acknowledged that "a corporation is a 'person' within the meaning of the equal protection and due process of law clauses"⁷⁵ and "rejected [the] argument that 'the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of *natural* not of artificial persons.'"⁷⁶ "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard

⁶⁸ *Id.* at 1.

⁶⁹ Even the CPM that OCR publishes does not forbid OCR from providing the resolution letter to a recipient prior to the recipient entering into a resolution agreement. *See supra* notes 37, 40 and accompanying text.

⁷⁰ *See supra* notes 37, 40 and accompanying text.

⁷¹ *See supra* notes 34–40 and accompanying text.

⁷² *See supra* notes 42–47 and accompanying text.

⁷³ 424 U.S. 319, 332–35 (1976).

⁷⁴ 339 U.S. 306, 314–15, 319 (1950).

⁷⁵ *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936) (citing *Covington & Lexington Tok. Co. v. Sandford*, 164 U.S. 578, 592 (1896)).

⁷⁶ *Old Dominion Dairy Prods., Inc. v. Sec'y of Def.*, 631 F.2d 953, 962 n.19 (D.C. Cir. 1980) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 780 n.16 (1978)).

are essential.”⁷⁷ A recipient’s good name, reputation, and honor are at stake throughout OCR’s process, and a publicly issued, erroneous resolution letter or letter of findings may cause irreparable harm.⁷⁸

A. Procedural Due Process under *Mathews*

In *Mathews*, the Supreme Court considered the following three distinct factors to adjudicate a denial of due process claim against a federal official: (1) “the private interest that will be affected by the official action”; (2) “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 (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”⁷⁹

With respect to the first consideration, OCR’s administrative action to suspend, terminate, or refuse to grant federal financial assistance severely affects a recipient’s educational mission.⁸⁰ A recipient cannot make a well-informed decision whether to enter into a resolution agreement without actual notice of the alleged issues or violations. Additionally, publicly issuing the resolution letter or letter of findings without first giving the recipient an opportunity to review it for accuracy may harm the recipient’s reputation, which is difficult to reestablish.⁸¹

The risk of erroneously depriving a recipient of federal financial assistance is difficult to gauge because OCR has not initiated an administrative enforcement proceeding against a recipient in recent history.⁸² Such an administrative proceeding, however, is lengthy, onerous, and may involve various levels of administrative review, including a review by the Secretary of Education.⁸³ Accordingly, the government’s cost to initiate such a proceeding and the recipient’s cost to defend itself are significant.⁸⁴

The risk of harming a recipient’s reputation is great when a recipient is not provided with the resolution letter or letter of findings

⁷⁷ *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972) (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

⁷⁸ See Anonymous, *An Open Letter to OCR*, INSIDE HIGHER ED (Oct. 28, 2011), <https://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students> (explaining that a university’s efforts to comply with OCR standards might all be lost in public critique as a result of a public investigation, “or, even worse, having the ‘letter of agreement’ OCR makes public displayed for all to read”).

⁷⁹ *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

⁸⁰ Penn, *supra* note 10, at 792.

⁸¹ See *supra* note 78 and accompanying text.

⁸² See *supra* note 48 and accompanying text.

⁸³ See *supra* notes 49–63 and accompanying text.

⁸⁴ Vargyas, *supra* note 64, at 384.

prior to entering into a resolution agreement. At the recent conclusion of a compliance review, the Assistant Secretary for the Office for Civil Rights explained that she withdrew a letter of findings “purely for accuracy reasons.”⁸⁵ She explained her reasoning as follows: “The reason I withdrew it is I don’t stand by it. . . . I’m a neutral arbiter. I need to go where the facts lead me.”⁸⁶ Inaccuracies and errors may be easily avoided if OCR provides a recipient with actual notice of the alleged issues and violations in advance because both OCR and the recipient share the same interest in accuracy.⁸⁷

Additional procedural safeguards could include sharing a draft resolution letter or draft letter of findings prior to, or contemporaneous with, sharing the proposed resolution agreement with the recipient.⁸⁸ Such a procedural safeguard would afford the recipient an opportunity to review the letter and rebut any false allegations or factual inaccuracies during the negotiation period. This procedural safeguard would also allow OCR to substantiate and reassess its findings before finalizing its letter and before initiating an administrative proceeding.⁸⁹ If the recipient identifies any errors and OCR changes its letter, the recipient should receive a copy of the revised letter. The recipient should also have the opportunity to review the final resolution letter or letter of findings before entering into a resolution agreement.

OCR would bear virtually no additional administrative burden in providing both the draft and final resolution letter or letter of findings to the recipient before the recipient entered into a resolution agreement. OCR should have prepared a draft of such a letter before sharing the

⁸⁵ Nick Anderson, *In Secret Letter, Feds Sternly Criticized U-Va. For Handling of Sexual Violence*, WASH. POST (Mar. 5, 2016), https://www.washingtonpost.com/local/education/in-secret-letter-feds-sternly-criticized-u-va-for-handling-of-sexual-violence/2016/03/01/297e9b3a-d728-11e5-9823-02b905009f99_story.html.

⁸⁶ *Id.*

⁸⁷ A factually accurate record will only help OCR potentially prevail in such a proceeding. *See supra* notes 49–63 and accompanying text.

⁸⁸ For example, the Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”) provides a federal contractor with a notice of violation letter (which is not publicly issued) and an opportunity to respond to the allegations in this letter before entering into a conciliation agreement, which is comparable to a resolution agreement. OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, U.S. DEP’T OF LABOR, FEDERAL CONTRACT COMPLIANCE MANUAL 264–65 (2013). The federal contractor thus has the opportunity to bring any inaccuracies to OFCCP’s attention before entering into a conciliation agreement or before any referral to the Solicitor of Labor for possible enforcement proceedings. *Id.* at 282–83.

⁸⁹ *See Tufts Reaffirms Commitment to Title IX Compliance*, TUFTS U. CTR. FOR AWARENESS, RES. & EDUC., <http://oeo.tufts.edu/sexualmisconduct/tufts-reaffirms-commitment-to-title-ix-compliance/> (last visited Jan. 28, 2016) (expressing disappointment that OCR did not inform the university of its findings of possible violations before the university entered a voluntary resolution agreement, despite the fact that the university was cooperative in working with OCR throughout the investigation).

proposed terms of the resolution agreement because the resolution agreement is tailored to address issues or violations that OCR identified during its investigation. OCR may orally and generally share alleged issues or violations from a draft letter during negotiations concerning the resolution agreement, but oral statements do not always translate into the same written finding.⁹⁰ A recipient may better ascertain the validity and accuracy of OCR's claims through a written copy of the resolution letter or letter of findings.⁹¹ Additionally, counsel for the recipient may better advise a client whether to endorse a resolution agreement after evaluating and assessing the alleged issues or violations in a resolution letter or letter of findings.

B. Procedural Due Process under Mullane

The Supreme Court addressed procedural due process in *Mullane*, in which it considered whether “notice [was] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁹² In considering the constitutional sufficiency of notice that a trust company provided to beneficiaries, the Supreme Court held:

[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.⁹³

In *Mullane*, the trust company only gave the beneficiaries notice of a petition for a binding and conclusive judicial settlement by publication in a nearby newspaper.⁹⁴ The Supreme Court held that such notice was insufficient “[a]s to known present beneficiaries of known place of residence” because the trust company should have “reasonably

⁹⁰ See *Tufts Reaffirms Commitment to Title IX Compliance*, *supra* note 89 (stating that OCR declared the university to be out of compliance with Title IX despite the fact that during a four-year investigation, OCR never indicated that the university's policies were out of compliance and even affirmed the university's progress and compliance).

⁹¹ See *id.* (explaining that the university was not informed of its noncompliance until it signed a voluntary resolution agreement).

⁹² *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); see also *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (holding that notice was “reasonably calculated to give [a party] actual notice of the proceedings and an opportunity to be heard” when the party was domiciled in the state, had actual notice, and was personally served while outside the state).

⁹³ *Mullane*, 339 U.S. at 315 (citations omitted).

⁹⁴ *Id.* at 309.

calculated” that notice to the beneficiaries by mail to their address was circumstantially required.⁹⁵

Similarly, OCR could easily provide actual notice of any alleged issues or violations to a recipient by sharing a copy of the resolution letter or letter of findings at the same time as the proposed resolution agreement. OCR’s current process is a mere gesture because any oral generalizations or summaries of the resolution letter or letter of findings are subject to change.⁹⁶ For example, Tufts University voluntarily entered into a resolution agreement with OCR because “OCR consistently affirmed [its] progress and current compliance with the law.”⁹⁷ According to Tufts:

At no time before we signed the April 17 Voluntary Resolution Agreement did OCR indicate that it found the University’s *current* policies out of compliance with Title IX. . . . It was not until April 22—after we signed the Voluntary Resolution Agreement—that OCR informed us of its serious and . . . unsubstantiated finding. Given the extensive collaborative efforts to reach that Agreement, we are disappointed by the department’s course of action. Our repeated requests to speak with OCR in Washington about this new finding have been unsuccessful.⁹⁸

OCR’s investigation at Tufts began with one student’s complaint filed in June 2010; OCR concluded its investigation four years later with a letter of findings, issued on April 28, 2014, which also served as a letter of impending enforcement action.⁹⁹ OCR found that Tufts’ failure to respond appropriately to the student’s written complaint of sexual harassment subjected her to a sexually hostile environment.¹⁰⁰ Upon

⁹⁵ *Id.* at 318–19.

⁹⁶ See Rachel Axon, *Tufts University Disputes Feds’ Noncompliance Claim*, USA TODAY (Apr. 29, 2014, 9:34 PM), <http://www.usatoday.com/story/news/nation/2014/04/29/tufts-university-office-for-civil-rights-sexual-assault/8490931/> (stating that OCR allegedly represented to the university that its current policies were compliant with Title IX, prior to issuing a letter of findings declaring the university’s current policies noncompliant); *cf.* Press Release, U.S. Dep’t of Educ., U.S. Department of Education Finds Tufts University in Massachusetts in Violation of Title IX for its Handling of Sexual Assault and Harassment Complaints (Apr. 28, 2014), <http://www.ed.gov/news/press-releases/us-department-education-finds-tufts-university-massachusetts-violation-title-ix-> (stating that the university’s changes were important improvements, but were insufficient to comply with Title IX).

⁹⁷ *Tufts Reaffirms Commitment to Title IX Compliance*, *supra* note 89; see also Tufts Univ. Resolution Agreement, *supra* note 36, at 1–3 (stating that Tufts University voluntarily complied with OCR and had taken several steps to address OCR’s concerns).

⁹⁸ *Tufts Reaffirms Commitment to Title IX Compliance*, *supra* note 89.

⁹⁹ Letter from Thomas J. Hibino, Reg’l Dir., Region I, Office for Civil Rights, U.S. Dep’t of Educ., to Anthony P. Monaco, President, Tufts Univ. 1–2 (Apr. 28, 2014) [hereinafter Tufts Letter of Findings], <http://www.ed.gov/news/press-releases/us-department-education-finds-tufts-university-massachusetts-violation-title-ix-its-handling-sexual-assault-and-harassment-complaints>.

¹⁰⁰ *Id.* at 2.

learning of this finding, Tufts revoked its voluntary resolution agreement for approximately eleven days and later reentered the same resolution agreement.¹⁰¹ Any recipient may face the same challenge that Tufts faced with OCR's current process; oral notice of any alleged issues or findings is effectively no notice.

III. OCR'S CURRENT PROCESS VIOLATES THE SPENDING CLAUSE

Although a private recipient of federal financial assistance, such as a private university, may have stronger grounds for a procedural due process argument,¹⁰² a public recipient, such as a public university, may also argue that OCR's practices violate the Spending Clause of the United States Constitution.¹⁰³ The Supreme Court has repeatedly acknowledged that Title IX was "enacted pursuant to Congress'

¹⁰¹ See Letter from Tony Monaco, President, Tufts Univ., to Univ. Cmty. (May 9, 2014), <http://president.tufts.edu/blog/2014/05/09/affirming-tufts'-commitment-to-sexual-misconduct-prevention/> (stating that Tufts "reaffirmed [its] commitment to the voluntary agreement" on May 8, 2014); Tyler Kingkade, *Tufts University Backs Down on Standoff with Feds over Sexual Assault Policies*, HUFFINGTON POST (May 9, 2014, 5:09 PM), http://www.huffingtonpost.com/2014/05/09/tufts-sexual-assault-title-ix_n_5297535.html (stating that Tufts revoked its commitment to the voluntary resolution agreement on April 26, 2014); *Tufts Reaffirms Commitment to Title IX Compliance*, *supra* note 89 ("[O]n April 26, [2014], we regretfully revoked our signature from the Voluntary Resolution Agreement.").

¹⁰² Although due process typically protects persons from government action, public universities and colleges should make arguments similar to those presented in this Article about fundamental fairness, which is equated with due process. See *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (equating procedural due process with fundamental fairness); *Daniels v. Williams*, 474 U.S. 327, 331–32 (1986) (stating that the Due Process Clause promotes fairness by requiring the government to follow appropriate procedures).

¹⁰³ U.S. CONST. art. I, § 8, cl. 1. A private college or university may also make an argument similar to the Spending Clause argument presented in this Article, but this Article focuses on the constitutional infirmities in OCR's process and practices. A private college or university should argue that OCR cannot measure a recipient's compliance with Title IX against OCR's guidance because the recommendations in the guidance documents are not legislative rules that carry the force and effect of law. See *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020, 1024 (D.C. Cir. 2000) ("It is well-established that an agency may not escape the notice and comment requirements by labeling a major substantive legal addition to a rule a mere interpretation." (citation omitted)); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 587–88 (D.C. Cir. 1997) (explaining the distinction between interpretive rules and substantive rules and stating that substantive rules have the "force of law"); *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54, 2015 U.S. Dist. LEXIS 124905, at *24–25 (E.D. Va. Sept. 17, 2015) ("Allowing the Department of Education's Letter to control here would set a precedent that agencies could avoid the process of formal rulemaking by announcing regulations through simple question and answer publications. Such a precedent would be dangerous and could open the door to allow further attempts to circumvent the rule of law—further degrading our well-designed system of checks and balances.").

authority under the Spending Clause.”¹⁰⁴ When Congress acts under the Spending Clause, it essentially “generates legislation ‘much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.’”¹⁰⁵ The Supreme Court has held:

The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the “contract.” There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, [the Supreme Court] enable[s] the States to exercise their choice knowingly, cognizant of the consequences of their participation.¹⁰⁶

OCR’s process and practices violate the Spending Clause because its publicly issued letters of findings reveal that OCR is finding recipients in violation of its guidance documents and not in violation of express, unambiguous conditions that Congress authorized through Title IX or its implementing regulations.¹⁰⁷ Although OCR acknowledges “the contractual nature of Title IX,”¹⁰⁸ it unlawfully imposes recommendations in its guidance documents as conditions on recipients. Examples of such unlawfully imposed conditions include, but are not limited to: (1) OCR’s requirement that a recipient adopt the preponderance of the evidence standard to evaluate complaints of sexual

¹⁰⁴ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999); *see also* *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (stating that conditions on awards of federal funds under Title IX are attached by Congress under its spending power).

¹⁰⁵ *Davis*, 526 U.S. at 640 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

¹⁰⁶ *Pennhurst*, 451 U.S. at 17 (citations omitted).

¹⁰⁷ *See* Letter from Joel J. Berner, Reg’l Dir., Region I, Office for Civil Rights, U.S. Dep’t of Educ., to Martha C. Minow, Dean, Harvard Law Sch. 3 n.3 (Dec. 30, 2014) [hereinafter *Harvard Letter of Findings*], <http://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf> (“The applicable legal standards described [in this letter of findings] are more fully discussed in OCR’s 2011 Dear Colleague letter on Sexual Violence . . .”).

¹⁰⁸ Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66,092, 66,092–93 (Nov. 2, 2000). After the Supreme Court established the knowledge standard for hostile environment claims in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) and *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998), OCR sought to revise its 1997 Sexual Harassment Guidance, and published a notice in the Federal Register to request comments. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES i–ii (2001), www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. OCR allowed notice and comment prior to issuing its 2001 Revised Guidance, which was promulgated as final policy guidance and not as a regulation. *Id.* at ii.

harassment and sexual violence¹⁰⁹ and (2) OCR's use of a different knowledge standard for hostile environment sexual harassment claims than the Supreme Court's standard in *Davis v. Monroe County Board of Education*.¹¹⁰

Neither Title IX nor the implementing regulations require a recipient to use the preponderance of the evidence standard to evaluate complaints of sexual harassment.¹¹¹ However, in its letter of findings OCR requires "the recipient [to] use a preponderance of the evidence standard for investigating allegations of sexual harassment, including sexual assault/violence."¹¹² The requirement of a preponderance of the evidence standard does not appear in Title IX or its implementing regulations and is only found in OCR's 2011 Dear Colleague Letter on Sexual Violence.¹¹³ Nonetheless, OCR finds a recipient who fails to adopt the preponderance of the evidence standard in violation of Title IX and its implementing regulations.¹¹⁴

¹⁰⁹ See *infra* notes 111–14 and accompanying text.

¹¹⁰ Compare *Davis*, 526 U.S. at 650 ("[F]unding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."), with *infra* notes 115–19 and accompanying text.

¹¹¹ See Lavinia M. Weizel, Note, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1617, 1641–42 (explaining that federal courts have disagreed over what procedural due process and Title IX require for student disciplinary hearings); see also *Smyth v. Lubbers*, 398 F. Supp. 777, 799 (W.D. Mich. 1975) (suggesting that schools should use the higher standard of clear and convincing evidence to protect students' due process rights). But see DCL on Sexual Violence, *supra* note 51, 10–11 (arguing that the preponderance of the evidence standard is consistent with Title IX because the Supreme Court has applied this standard in litigation of civil rights claims).

¹¹² Harvard Letter of Findings, *supra* note 107, at 3–4; see, e.g., Letter from Taylor D. August, Reg'l Dir., Region VI, Office for Civil Rights, U.S. Dep't of Educ., to R. Gerald Turner, President, S. Methodist Univ. 4 (Dec. 11, 2014) [hereinafter SMU Letter of Findings], <http://www2.ed.gov/documents/press-releases/southern-methodist-university-letter.pdf> (requiring the recipient's Title IX grievance procedures to include "the evidentiary standard that must be used (preponderance of the evidence) in resolving a complaint"); Letter from Timothy C.J. Blanchard, Dir., N.Y. Office, Office for Civil Rights, U.S. Dep't of Educ., to Christopher L. Eisgruber, President, Princeton Univ. 6 (Nov. 5, 2014) [hereinafter Princeton Letter of Findings], <http://www2.ed.gov/documents/press-releases/princeton-letter.pdf> ("[I]n order for a recipient's grievance procedures to be consistent with the Title IX evidentiary standard, the recipient must use a preponderance of the evidence standard for investigating allegations of sexual harassment, including sexual assault/violence."); MSU Letter of Findings, *supra* note 39, at 6 ("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."); Tufts Letter of Findings, *supra* note 99, at 5 ("[T]he recipient must use a preponderance of the evidence standard for investigating allegations of sexual harassment/violence.").

¹¹³ DCL on Sexual Violence, *supra* note 51, at 10–11.

¹¹⁴ E.g., Harvard Letter of Findings, *supra* note 107, at 7.

Similarly, OCR acknowledges that its knowledge standard for hostile environment sexual harassment (the “constructive knowledge standard”) differs from the Supreme Court’s standard (the “actual knowledge standard”) in the following manner:

While the Supreme Court in *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999), requires *deliberate indifference* by the recipient to “*severe and pervasive*” harassment of which a recipient had *actual knowledge* to establish liability for damages under Title IX, shortly after those decisions were issued, OCR clarified in its 2001 Guidance that a recipient’s failure to respond promptly and effectively to *severe, persistent, or pervasive harassment* of which it *knew or should have known* could violate Title IX for . . . administrative enforcement.¹¹⁵

OCR applies the constructive knowledge standard as “the standard for administrative enforcement of Title IX,”¹¹⁶ even though this standard only appears in guidance documents and is not a legislative rule with the force and effect of law.¹¹⁷ Ironically, OCR justifies the constructive knowledge standard as opposed to the actual knowledge standard because “[c]onsistent with the Title IX statute, [OCR] provide[s] recipients with the opportunity to take timely and effective corrective action before issuing a formal finding of violation.”¹¹⁸ This justification, however, fails because OCR currently does not provide a recipient with the opportunity to take timely and effective corrective action before issuing a formal finding of violation under Section 303 of the current

¹¹⁵ Letter from Anurima Bhargava, Chief, Civil Rights Div., U.S. Dep’t of Justice & Gary Jackson, Reg’l Dir., Seattle Office, Office for Civil Rights, U.S. Dep’t of Educ., to Royce Engstrom, President, Univ. of Mont. 5 n.8 (May 9, 2013), <http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf> (emphasis added).

¹¹⁶ DCL on Sexual Violence, *supra* note 51, at 4 n.12; *e.g.*, Harvard Letter of Findings, *supra* note 107, at 3–4 (applying the constructive knowledge standard to determine Title IX compliance); MSU Letter of Findings, *supra* note 39, at 4–5 (same); Princeton Letter of Findings, *supra* note 112, at 2–3 (same); SMU Letter of Findings, *supra* note 112, at 2–3 (same); Tufts Letter of Findings, *supra* note 99, at 2–3 (same).

¹¹⁷ See *supra* notes 103–08 and accompanying text.

¹¹⁸ Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66,092, 66,095–96 (Nov. 2, 2000). OCR acknowledged:

The *Gebser* Court rejected a constructive notice, or “should have known” standard, as the basis for imposing monetary damages because of its central concern that a recipient should not be exposed to large damage awards for discrimination of which it was unaware. This aspect of the *Gebser* opinion, however, is not relevant in our enforcement actions in which recipients voluntarily take corrective action as a condition of continued receipt of Federal funds. Moreover, as stated previously in the section entitled “Title IX Compliance Standard,” under [OCR’s] administrative enforcement, recipients are always given actual notice and an opportunity to take appropriate corrective action before facing the possible loss of Federal funds.

Id.

CPM.¹¹⁹ Although OCR could arguably adopt a constructive knowledge standard for administrative enforcement of Title IX hostile environment sexual harassment claims by promulgating a regulation through notice-and-comment rulemaking, it has not done so.

Mandating compliance with recommendations in guidance documents clearly violates the Spending Clause.¹²⁰ In *Pennhurst State School & Hospital v. Halderman*, the Supreme Court held that Congress acting pursuant to its spending power did not condition a grant of federal funds on a state's agreement to assume the cost of "providing 'appropriate treatment' in the 'least restrictive environment' to their mentally retarded citizens," even though Congress expressly included the provision of such treatment in the Developmentally Disabled Assistance and Bill of Rights Act.¹²¹ In comparison to more specific provisions of this Act, the Supreme Court held that the express provision of such treatment was a general statement of "findings," which "represent[ed] general statements of federal policy, not newly created legal duties."¹²² If Congress's express provision of particular treatment in a statute was "too thin a reed"¹²³ to create legal duties in *Pennhurst*, OCR's guidance documents, which are actually statements of federal policy, constitute a mere fig leaf.

Additionally, the ambiguity and uncertainty in OCR's guidance documents run counter to the principle in *Pennhurst* that Congress must speak with a clear voice and impose a condition in unambiguous terms.¹²⁴ In February 2015, the Task Force on Federal Regulation of

¹¹⁹ See *supra* notes 37–40 and accompanying text.

¹²⁰ See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2606 (2012) ("As we have explained, '[t]hrough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or "retroactive" conditions.'" (alteration in original) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981))); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) ("[I]f Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequence of their participation.'" (second and third alteration in original) (quoting *Pennhurst*, 451 U.S. at 17)); *Pennhurst*, 451 U.S. at 17 ("The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." (citations omitted)); *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997) ("Language which, at best, only implicitly conditions the receipt of federal funding on the fulfillment of certain conditions is insufficient to impose on the state the condition sought.").

¹²¹ *Pennhurst*, 451 U.S. at 18–19.

¹²² *Id.* at 22–23.

¹²³ *Id.* at 19.

¹²⁴ *Id.* at 17 ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."); see also *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640–41 (1999)

Higher Education, created by a bipartisan group of United States Senators, raised concerns about the lack of clear guidance contained in OCR's guidance documents.¹²⁵ The Task Force reported:

In at least one case, a guidance document meant to clarify uncertainty only led to more confusion. A 2011 "Dear Colleague" letter on Title IX responsibilities regarding sexual harassment contained complex mandates and raised a number of questions for institutions. As a result, the Department was compelled to issue further guidance clarifying its letter. This took the form of a 53-page "Questions and Answers" document that took three years to complete. Still, that guidance has raised further questions. Complexity begets more complexity.¹²⁶

Even the President of the University of California, who is a former Governor and Attorney General of Arizona and a former United States Secretary of Homeland Security, has publicly stated that OCR's guidance documents "left [campuses] with significant uncertainty and confusion about how to appropriately comply after they were implemented."¹²⁷ If both a bipartisan legislative task force and the President of the University of California find OCR's guidance unclear, then a state is certainly "unable to ascertain what is expected of it."¹²⁸

States have not voluntarily and knowingly accepted the requirements in OCR's guidance documents.¹²⁹ "Though Congress' power to legislate under the spending power is broad, it does not include

(holding that the scope of liability in private damages under Title IX is limited by the Spending Clause's requirement that Congress be unambiguous).

¹²⁵ TASK FORCE ON FED. REGULATION OF HIGHER EDUC., RECALIBRATING REGULATION OF COLLEGES AND UNIVERSITIES 1 (2015), <https://www.acenet.edu/news-room/Documents/Higher-Education-Regulations-Task-Force-Report.pdf>.

¹²⁶ *Id.* at 12.

¹²⁷ Janet Napolitano, "Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault, 33 YALE L. & POL'Y REV. 387, 395 (2015). For example, Janet Napolitano addresses the paradox of OCR's requirement to honor a complainant's request for confidentiality while also investigating a complaint:

The 2011 Dear Colleague Letter and the 2014 Questions and Answers document place strong emphasis on a victim's ability to control the process by requesting confidentiality or requesting that an investigation not be pursued. Yet paradoxically, OCR also states that campuses must still investigate a complaint even when a complainant does not want an investigation, which is inconsistent with respecting the complainant's request not to pursue an investigation. Campuses must notify victims of their various reporting options, but they cannot require a victim to report the crime to law enforcement and cannot reasonably delay an investigation to accommodate a law enforcement investigation.

Id. at 399 (footnotes omitted).

¹²⁸ *Pennhurst*, 451 U.S. at 17; see *supra* notes 126–27 and accompanying text.

¹²⁹ Since OCR's 2001 guidance, OCR has not requested comment on its sexual harassment and sexual violence guidance documents. Napolitano, *supra* note 127, at 394–95 n.26.

surprising participating States with postacceptance or ‘retroactive’ conditions.”¹³⁰ Any recommendation in OCR’s guidance documents that exceeds Title IX and its implementing regulations and that OCR enforces as a requirement constitutes such a retroactive condition. A recipient’s compliance should be evaluated through the express and unambiguous conditions in Title IX, the implementing regulations, and relevant case law instead of evolving guidance documents. Otherwise, OCR succeeds in imposing retroactive conditions without Congress’s authorization.

IV. TWO SOLUTIONS

Unless OCR changes its current process and practices, recipients who do not want to enter a resolution agreement before receiving a letter of findings have two primary options: (1) request a resolution under CPM Section 302 (“Section 302 resolution”), which precludes a letter of findings, or (2) if OCR proceeds under CPM Section 303, file a lawsuit for declaratory and injunctive relief against the Secretary of Education and Assistant Secretary for the Office for Civil Rights in their official capacities.

A. Section 302 Resolution

Recipients may wish to request a Section 302 resolution early on during OCR’s investigation because the CPM does not permit OCR to resolve any allegations or issues where OCR has obtained sufficient evidence to support a finding of violation.¹³¹ Although OCR will not issue a letter of findings for a Section 302 resolution, OCR will issue a resolution letter, which describes “each allegation and issue investigated to date supported by any necessary explanation or analysis of the evidence.”¹³² The recipient should request a copy of the resolution letter before entering the resolution agreement, even if OCR is likely to deny such a request. A Section 302 resolution should not be perceived as an admission of noncompliance because all recipients currently enter into a resolution agreement to resolve investigations.¹³³ Nonetheless, the resolution agreement should expressly state that the recipient does not admit a violation of Title IX or its implementing regulations.¹³⁴

¹³⁰ *Pennhurst*, 451 U.S. at 25.

¹³¹ CPM, *supra* note 8, § 302.

¹³² *Id.*

¹³³ *Id.* §§ 302, 304.

¹³⁴ *E.g.*, Yale Univ. Resolution Agreement, *supra* note 37, at 1 (“OCR has not made a finding of noncompliance and this Resolution Agreement has been entered into voluntarily by the University and does not constitute an admission that the University is not in compliance with Title IX and/or its implementing regulation.”).

B. Declaratory and Injunctive Relief

Where a resolution under CPM Section 302 is not available, a recipient may request a mixed resolution under CPM Sections 302 and 303.¹³⁵ A mixed resolution and a resolution wholly under Section 303 of the CPM will result in a publicly issued letter of findings.¹³⁶ When OCR sends a recipient the resolution agreement, a recipient has ninety days to negotiate the terms of the resolution agreement.¹³⁷ During these ninety days, or preferably during the ten-day period after impasse,¹³⁸ a recipient may pursue a legal challenge against OCR.

A recipient may file an action under 28 U.S.C. § 1331 for the violation of rights, privileges, and immunities under the Due Process Clause¹³⁹ and, if the recipient is a public recipient, the Spending Clause,¹⁴⁰ to receive injunctive and declaratory relief under the Declaratory Judgments Act.¹⁴¹ A federal district court may enjoin OCR from publicly issuing the letter of findings and require OCR to give the recipient actual notice of the alleged violations before voluntarily entering a resolution agreement.¹⁴² For a public recipient, a federal district court may enjoin OCR from evaluating the recipient's compliance based on requirements found only in guidance documents that exceed Title IX, the implementing regulations, and case law.¹⁴³ A recipient should request a declaratory judgment on the same grounds.¹⁴⁴

¹³⁵ See *supra* notes 22–24 and accompanying text.

¹³⁶ See *supra* Parts I.A–B.

¹³⁷ CPM, *supra* note 8, § 303(b)(1).

¹³⁸ *Id.* §§ 303(b)(2)–(b)(3).

¹³⁹ U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law”); *id.* amend. XIV (“No state shall . . . abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law”); see 28 U.S.C. § 1331 (2012) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”); *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976) (explaining that the interest of an individual to continue to receive statutory benefits is a property interest subject to the due process protections of the Fifth and Fourteenth Amendments).

¹⁴⁰ See *supra* Part III.

¹⁴¹ 28 U.S.C. §§ 2201–2202 (2012).

¹⁴² See *infra* Part IV.B.2.

¹⁴³ See *infra* Part IV.B.2.

¹⁴⁴ A recipient should seek a declaratory judgment: (1) requiring a recipient to enter into a resolution agreement prior to giving the recipient actual notice of the alleged violations violates the Due Process Clause; and (2) with respect to a public recipient, mandating a recipient to adhere to requirements found only in OCR's guidance documents that exceed Title IX or its implementing regulations violates the Spending Clause.

1. Standing

To establish standing to sue prior to an administrative proceeding,¹⁴⁵ a recipient should submit a written request to OCR for the letter of findings when the recipient receives the resolution agreement.¹⁴⁶ OCR will decline sharing the letter of findings at this juncture and may give an oral preview of its findings.¹⁴⁷ Although the CPM describes when a recipient will receive a letter of findings,¹⁴⁸ a recipient should confirm in writing that OCR will not provide the recipient with the letter of findings until after the recipient enters into a resolution agreement. A recipient should also confirm in writing the basis for any oral findings.¹⁴⁹ A recipient should take particular note of any finding that is based solely on a guidance document and not on Title IX, its implementing regulations, or case law. For example, such a letter should confirm whether OCR will make a finding of a hostile environment based on the constructive or actual knowledge standard.

These confirmatory letters help establish: (1) an actual injury, (2) “a causal connection between the injury and the conduct” underlying the plaintiff’s claim, and (3) a likelihood that the injury will be “redressed by a favorable decision” of the court.¹⁵⁰ A recipient should incorporate its confirmatory letters by reference into the complaint to establish OCR’s refusal to provide the recipient with the letter of findings and OCR’s intention to find the recipient in violation of requirements found only in guidance documents that exceed Title IX, its implementing regulations,

¹⁴⁵ A party is typically required to exhaust its administrative remedies prior to invoking the power of a court for judicial review. *Sims v. Apfel*, 530 U.S. 103, 107 (2000). But “[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.” *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 201 (1983) (quoting *Reg’l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974)). Additionally, where the issue presented is a purely legal issue that does not require factual development, the matter is ripe for judicial review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). The constitutional infirmities in OCR’s process and practices present such legal issues.

¹⁴⁶ The ninety-day negotiation period begins on the date when the recipient receives the proposed resolution agreement from OCR. CPM, *supra* note 8, § 303(b)(1).

¹⁴⁷ *See id.* § 303(b)(2) (providing that OCR’s letter of findings will be issued on the eleventh day if an agreement is not reached in the ten-day impasse period).

¹⁴⁸ *Id.*

¹⁴⁹ In drafting these confirmatory letters, a recipient should be mindful of the Federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), as well as any applicable state FOIA.

¹⁵⁰ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)). Pursuant to Article III, Section 2 of the United States Constitution, federal courts only have jurisdiction over actual cases and controversies, and a case of actual controversy is a prerequisite to a declaratory judgment. U.S. CONST. art. III, § 2; *see* 28 U.S.C. § 2201 (2012) (“In a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration . . .”).

or case law. The complaint should also incorporate by reference other relevant publicly issued letters of findings to demonstrate that OCR imposed the same or similar recommendations found only in guidance documents as mandatory conditions on other recipients.¹⁵¹ The recipient's confirmatory letters, in addition to OCR's other letters of findings, will establish the causal connection between the constitutional injury and OCR's actions.

A recipient's injury-in-fact is the denial of due process caused by a lack of actual notice of alleged violations and the unlawful imposition of conditions that Congress has not authorized. With respect to an injunction, this injury is most imminent during the ten-day period after the letter of impasse is issued. During the ninety-day period after the resolution agreement is issued, a recipient's failure to enter into the agreement results in the issuance of a letter of impasse.¹⁵² Ten days after the letter of impasse is issued, however, OCR will publicly issue the letter of findings, commencing the thirty-day period before OCR begins to initiate an enforcement action against the recipient.¹⁵³

Without a favorable decision by the court, the recipient will not receive actual notice of alleged violations or issues before entering into a resolution agreement, and its compliance will be measured against the requirements in guidance documents and not against congressionally authorized conditions in Title IX and its implementing regulations. Additionally, the recipient will be forced to endure a lengthy, onerous administrative proceeding, which itself constitutes an injury-in-fact.

2. Preliminary Injunction

To receive a preliminary injunction, a recipient must allege facts in the complaint, not just cursory statements or legal conclusions, to establish that the recipient "is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."¹⁵⁴

A recipient has a clear and convincing probability of success on the merits of its Due Process and Spending Clause claims for the reasons described in Sections II and III of this Article. With respect to a

¹⁵¹ Even though OCR may argue that a recipient was on notice through publicly issued letters of findings to other recipients, those recipients' decision not to challenge the constitutional infirmities in OCR's process and practices does not waive the recipient's right to bring such a constitutional challenge.

¹⁵² CPM, *supra* note 8, § 303(b)(2)(i).

¹⁵³ *Id.* § 303(b)(3).

¹⁵⁴ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also* *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346–47 (4th Cir. 2009) (reaffirming the standard set by *Winter*).

recipient's due process argument, OCR will likely argue that a recipient may elect to reach impasse; receive the letter of findings, which is publicly issued at this juncture; and enter into a resolution agreement during the thirty-day period prior to the enforcement action against the recipient. This argument contravenes OCR's implementing regulations, which require OCR "to the fullest extent practicable [to] seek the cooperation of recipients in obtaining compliance . . . [and to] provide assistance and guidance to recipients to help them comply voluntarily."¹⁵⁵ Such an argument also offends fundamental fairness, which is equated with due process.¹⁵⁶ The purpose of Title IX is to prevent sex discrimination—not to subject recipients to public ridicule, scorn, and blame. Recipients are partners in this mission, where the safety of the students is the first priority. A recipient should request that OCR file a copy of the letter of findings under seal because the letter likely contains personally identifiable information of students or factual details about a particular case sufficient to identify a particular student in violation of federal privacy laws.¹⁵⁷

In opposition to a public recipient's claim under the Spending Clause, OCR is likely to argue that a court must defer to an agency's permissible interpretation of a statute,¹⁵⁸ but this argument fails for two reasons. First, a court accords such deference only when ambiguity exists in a statute or regulation,¹⁵⁹ but the recipient's argument would not be based on any such ambiguity in Title IX or its implementing regulations. For example, the argument that OCR cannot use a knowledge standard for hostile environment sexual harassment that deviates from the Supreme Court's standard does not concern any ambiguity in Title IX. Indeed, the term "hostile environment sexual harassment" only appears in Supreme Court case law interpreting Title IX, and not in Title IX or its implementing regulations.¹⁶⁰ Thus, OCR's constructive knowledge standard for hostile environment sexual harassment claims is not an interpretation of Title IX or any other statute, but a reinterpretation of Supreme Court precedent. Similarly, no ambiguity exists in Title IX or its implementing regulations about the

¹⁵⁵ 34 C.F.R. § 100.6(a) (2015).

¹⁵⁶ See *supra* note 102 and accompanying text.

¹⁵⁷ See *generally* Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2012); 34 C.F.R. pt. 99.

¹⁵⁸ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) (stating that when congressional intent "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

¹⁵⁹ *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) ("[D]eference is warranted only when the language of the regulation is ambiguous.").

¹⁶⁰ See *supra* Part III.

standard that a recipient must use to evaluate a complaint of sexual harassment or sexual violence because Title IX and its implementing regulations do not require any particular standard.¹⁶¹ Second, “[i]t is axiomatic that statutory ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States’ receipt of federal monies in the manner asserted.”¹⁶² Any alleged ambiguity might help establish that Congress did *not* speak unambiguously or with a clear voice and further support a claim under the Spending Clause.

In the absence of preliminary relief, a recipient will be deprived of due process and subjected to unconstitutionally imposed conditions. Additionally, a complainant may be eagerly awaiting the resolution of a lengthy investigation, which may be prolonged by a lengthy administrative proceeding. In these circumstances, the “balance of equities tips in [the recipient’s] favor,”¹⁶³ especially if the recipient expresses voluntary willingness to comply with Title IX and its implementing regulations. Inasmuch as Title IX concerns safety, a prompt and equitable resolution between OCR and a recipient benefits the public.¹⁶⁴

CONCLUSION

OCR’s current procedures and practices deprive a recipient of procedural due process and, for a public recipient, violate the Spending Clause. Until OCR changes its current procedures, a Section 302 resolution benefits both OCR and the recipient and, more importantly, a recipient’s students. A Section 302 resolution allows OCR to more promptly conclude its investigation, decreasing the backlog of investigations. Such a resolution also allows a recipient to quickly address any issues in its compliance with Title IX. Most importantly, a Section 302 resolution will expediently resolve any issues that may affect other students in the future.¹⁶⁵

¹⁶¹ The Code of Federal Regulations only requires a recipient to “adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.” 34 C.F.R. § 106.8(b).

¹⁶² *Va. Dep’t of Educ. v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997).

¹⁶³ *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 346–47 (4th Cir. 2009) (stating the four-prong test for obtaining a preliminary injunction).

¹⁶⁴ If the recipient is a public recipient, then taxpayers’ money will be used to defend the public recipient in any protracted administrative proceeding.

¹⁶⁵ A Section 302 resolution, however, does not resolve the Spending Clause claim. Ultimately, a legislative solution to the Spending Clause claim is best.

CAN WE SECURE THE HALLOWED HALLS OF ACADEME?

*Denis Binder**

INTRODUCTION

Once upon a time, life in the Academy was seemingly casual.¹ Education exists in a different environment today.² Our colleges and universities have weathered storms, survived natural disasters, and shown great resiliency in overcoming a myriad of challenges. Today, campuses regularly deal with crime. Violent threats to the campus community may reflect four different, but often overlapping, sources: (1) normal street crime, such as robberies, muggings, batteries, sexual assaults, and automobile thefts, which spill over onto the campus; (2) similar risks, but arising from within the campus;³ (3) academic or relationship disappointments, which may initially seem random in nature, but are in fact directed at specific victims; and (4) truly random acts of mass violence. The third and fourth scenarios are often

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¹ For example, all I had to produce upon appointment to my first faculty position in 1972 were transcripts from the universities I attended. Social security numbers became student ID numbers at two universities, and later my Massachusetts driver's license number. The student IDs served only to check books out of the library. I shut the office door to protect students' privacy when they went over exams. University policies on alcohol and drugs were much more relaxed than they are now.

² The potential crises facing institutions far exceed criminal activity; however, this Article will concentrate on criminal activity. Potential crises can include natural risks, such as earthquakes, flooding, hurricanes, tornadoes, or severe winds. *See, e.g.*, Marty Roney, *Alabama Students Sift Through Rubble*, MONTGOMERY ADVERTISER, Apr. 28, 2011, (NEWS) (describing the aftermath of a major tornado hitting the University of Alabama). Institutions may also confront communicable diseases, ranging from meningitis to pandemics. *See, e.g.*, Paul Phillips, *Drexel Student Who Died from Meningitis Reportedly Had Contact with Princeton Football Players*, DAILY PRINCETONIAN, Mar. 23, 2014, at 1 (describing how a Drexel University student who died carried the same strain of meningitis as students from Princeton, where a meningitis outbreak was ongoing). Fire is a constant threat. *See, e.g.*, Alexis Kreisler, *'After the Fire' Speakers Come to Campus*, INFORMER: U. HARTFORD, Sept. 24, 2015, at 1 (describing a presentation by survivors of a dorm fire at Seton Hall University, located in South Orange, New Jersey, in 2000).

³ Sexual assault on college campuses, the major focus of the 2015 Regent University Law Review Symposium, is one example of campus crime. *See, e.g.*, Benjamin Wermund, *Study Ties Football Game Days to Rapes*, HOUS. CHRON., Jan. 5, 2016, § B, at 1 (discussing a correlation between increased rape reports, college football game days, and the importance of the game).

accompanied by suicides.⁴ Recent tragedies, highlighted by Columbine High School,⁵ Virginia Tech,⁶ Sandy Hook Elementary School,⁷ and Umpqua Community College,⁸ demonstrate the issue of campus security.

As this series of mass campus shootings and other tragedies highlights,⁹ we need to worry specifically about random acts of mass violence. Campus security measures to avert these threats would be easier to implement if we could identify a commonality between the incidents. The challenge is compiling a comprehensive list of incidents, even though several major sources currently exist.¹⁰ Unfortunately, studies show that identifying a commonality is not possible and that threats come from a variety of sources.¹¹ Assailants of random acts of violence include students, staff, alumni and other former students, family members, and those with no known connection to the college.¹² Men are most often the perpetrators, but women have occasionally been assailants.¹³ The crimes occur in classrooms, dormitories, parking lots, campus open space, and various structures.¹⁴ They even spread off-

⁴ Lauren Smith, *Major Shootings on American Campuses*, CHRON. HIGHER EDUC., Apr. 27, 2007, at A19.

⁵ Two students attacked the school with guns and bombs, leaving dozens dead and wounded. *School Shooting May Have Killed as Many as 25*, WALL STREET J., Apr. 21, 1999, at A1.

⁶ A student killed thirty-one people in a dormitory and an academic building. *At Least 31 Dead, 28 More Wounded; Shooter Is Dead*, RICHMOND TIMES DISPATCH, Apr. 16, 2007, at X-1.

⁷ A lone gunman killed twenty-seven students and faculty members at an elementary school. Denis Hamill, *A Peaceful Town In Shock*, N.Y. DAILY NEWS, Dec. 15, 2012, at 13.

⁸ In October 2015, numerous students were killed in a shooting at Umpqua Community College in southern Oregon. Dirk Vanderhart et al., *Gunman Attacks Oregon College*, N.Y. TIMES, Oct. 2, 2015, § A, at 1.

⁹ One of the first generally recognized random acts of mass violence on a college campus occurred in 1966 when Charles Whitman entered the top of a twenty-seven-story tower at the University of Texas at Austin, and then opened fire, killing sixteen and wounding thirty. Smith, *supra* note 4. This tragedy seemed an isolated anomaly for decades.

¹⁰ *E.g.*, RAYMOND H. THROWER ET AL., OVERVIEW OF THE VIRGINIA TECH TRAGEDY AND IMPLICATIONS FOR CAMPUS SAFETY, THE IACLEA BLUEPRINT FOR SAFER CAMPUSES 10–11 (2008), http://www.iaclea.org/visitors/PDFs/VT-taskforce-report_Virginia-Tech.pdf; Smith, *supra* note 4; *Rampage Killings Fast Facts*, CNN (Dec. 3, 2015), <http://www.cnn.com/2013/09/16/us/rampage-killings-fast-facts/>.

¹¹ DIANA A. DRYSDALE, U.S. SECRET SERV., WILLIAM MODZELESKI, DEPT OF EDUC., ANDRE B. SIMONS, FED. BUREAU OF INVESTIGATION, CAMPUS ATTACKS: TARGETED VIOLENCE AFFECTING INSTITUTIONS OF HIGHER EDUCATION 24–26 (2010) [hereinafter CAMPUS ATTACKS], <http://www2.ed.gov/admins/lead/safety/campus-attacks.pdf>.

¹² *Id.* at 16.

¹³ *Id.* at 15.

¹⁴ *Id.* at 13–14.

campus.¹⁵ Most involve broken relationships and a broad category we can refer to as “academic disappointments.”¹⁶ Many assailants have psychological problems, and some have been off their medications or missed counseling sessions.¹⁷ Guns are the primary weapons of choice, but knives, automobiles, hammers, explosives, and other blunt objects have also been used.¹⁸

Even before the shooting at Virginia Tech, criminal activity caused increasing concerns on college campuses. Examples of criminal acts at the nation’s colleges and universities¹⁹ include homicides,²⁰ sexual assaults,²¹ thefts,²² kidnappings,²³ arson,²⁴ pranks,²⁵ athletic and fraternity

¹⁵ *Id.*

¹⁶ *Id.* at 18 (listing factors that include retaliation; response to academic stress and failure, sexual violence, dismissal or sanctions; and needing attention).

¹⁷ See THROWER ET AL., *supra* note 10, at 9 (citing inconsistent treatment for the shooter’s mental problems as one causal factor in the Virginia Tech shooting).

¹⁸ CAMPUS ATTACKS, *supra* note 11, at 17.

¹⁹ I will normally refer to institutions of higher education by the inclusive word “colleges.” A wide variety of institutions can be included in the classification “colleges,” including universities, colleges, community colleges, and adult schools. See CAMPUS ATTACKS, *supra* note 11, at 5 (defining institutions of higher education as postsecondary institutions, including four-year and two-year colleges).

²⁰ Campus killings are not a recent phenomenon. For example, on January 18, 1961, a professor and graduate student were talking in the professor’s office at Berkeley, when John Harrison Farmer, an intruder, shotgunned to death the professor and wounded the student. GLENN T. SEABORG & RAY COLVIG, CHANCELLOR AT BERKELEY 678–79 (1994). Earlier in 1960, a rejected suitor shot to death his former girlfriend in the main library at Berkeley, and then wounded himself. *Id.* at 678. The assailant had previously been forced to withdraw from Berkeley because of threats he made against her. *Id.* at 503. The shooting was viewed as a “singular” act at the time. *Id.* at 504. Similarly, acts of violence by teenagers also go back decades: A teenager left his Long Beach home on the morning of August 24, 1965, and drove approximately 190 miles to a hill overlooking Highway 101 by Santa Maria, and then started shooting at passing cars, killing three and wounding others before killing himself. *Reida v. Lund*, 96 Cal. Rptr. 102, 103 (Ct. App. 1971).

²¹ CAMPUS ATTACKS, *supra* note 11, at 7.

²² *Id.*

²³ See *Relyea v. State*, 385 So. 2d 1378, 1380 (Fla. Dist. Ct. App. 1980) (describing a suit by surviving parents of two students abducted from a campus parking lot and subsequently murdered).

²⁴ For example, two former students pled guilty to arson and witness tampering for a dorm fire that killed three freshmen at Seton Hall University in New Jersey on January 19, 2000. Ronald Smothers, *2 in Plea Deal 7 Years After Fatal Seton Hall Fire*, N.Y. TIMES, Nov. 16, 2006, § A, at 1. To prevent deaths from fires, a common precaution is to ensure smoke detectors and sprinkler systems are operational. *Id.*

²⁵ For instance, tear gas was released in a high school bathroom: the fumes traveled through the ventilation system, resulting in dozens of hospitalization and disrupted final exams. Joel Rubin, *Tear Gas Disrupts High School*, L.A. TIMES, June 17, 2004, at B3. Elsewhere, a University of California at Riverside dropout phoned in a bomb threat attempting to cancel the commencement ceremony. Sara Lin, *Dropout Status Led to Bomb Threat, Police Say*, L.A. TIMES, June 22, 2007, at B1.

hazing,²⁶ vandalism,²⁷ and eco-terrorism.²⁸ Many of the crimes are fueled by alcohol or illicit drugs.²⁹ Schools have been sued for alcohol-induced tragedies³⁰ and for alleged negligence in failing to take steps to prevent students from committing suicide.³¹ Criminal acts, committed by individuals both within and outside of the campus community, affect all types of campuses: public and private; research and non-research; urban, suburban, and rural; religious and secular; large and small.³² Criminal activity is endemic in society and in higher education. Thus, no campus can be crime free. The issues facing universities today range from anticipating, and hopefully forestalling, risks on campus to the nature and extent of the response efforts when an unfortunate event materializes. Typically, colleges have responded by significantly tightening campus security.³³

²⁶ See, e.g., *Furek v. Univ. of Del.*, 594 A.2d 506, 509 (Del. 1991) (describing a student's suit following a hazing incident); *Knoll v. Bd. of Regents*, 601 N.W.2d 757, 760 (Neb. 1999) (detailing a hazing incident of an underage pledge). Fraternities are a regular problem for universities. See *Jackson State Univ. v. Upsilon Epsilon Chapter of Omega Psi Phi Fraternity, Inc.*, 952 So. 2d 184, 185 (Miss. 2004) (describing an incident where fraternity members were involved in an altercation over spitting on a monument).

²⁷ Matt Stevens, *Rivalry High Jinks Start Up Early*, L.A. TIMES, Nov. 15, 2014, at AA3 (discussing vandalism of statues on the campuses of rival schools).

²⁸ Eco-terrorism is a risk for colleges today: for example, animal rights activists claimed to have flooded the house of a UCLA professor back in 2007. Larry Gordon, *Animal Rights Group Says It Flooded Home*, L.A. TIMES, Oct. 30, 2007, at B1; see also Richard Monastersky, *Animal Researchers' Homes Are Attacked*, CHRON. HIGHER EDUC., Mar. 7, 2008, at A1 (describing a physical assault against a researcher on the porch of his home, allegedly by animal rights activists).

²⁹ See Lindsay S. Ham & Debra A. Hope, *College Students and Problematic Drinking: A Review of the Literature*, 23 CLINICAL PSYCHOL. REV. 719, 724–25 (2003) (describing problems associated with college drinking that include criminal activity).

³⁰ See *Bradshaw v. Rawlings*, 612 F.2d 135, 136–37 (3d Cir. 1979) (describing a suit by a student injured in a car accident where the driver became intoxicated following a class picnic); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 305, 312 (Idaho 1999) (advancing the theory that the University should have known that alcohol was being served to minors since representatives were provided to supervise the fraternity party); *Beach v. Univ. of Utah*, 726 P.2d 413, 414 (Utah 1986) (summarizing a suit of a student who was injured when she fell from a cliff while intoxicated on a university field trip).

³¹ See, e.g., *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 605 (W.D. Va. 2002) (suit alleging the college failed to take adequate precautions to prevent a student from hurting himself); *Jain v. State*, 617 N.W.2d 293, 294 (Iowa 2000) (arguing that failure to inform parents of a student's prior suicide attempt constituted a breach of duty); *White v. Univ. of Wyo.*, 954 P.2d 983, 984–85 (Wyo. 1998) (arguing that university officials failed to adequately monitor suicidal student or notify parents of prior suicide attempt).

³² Smith, *supra* note 4 (briefing incidents that have occurred at small rural colleges like Appalachian State; larger universities in rural areas, like Virginia Tech; and major universities in large urban areas, like University of Texas at Austin).

³³ BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, CAMPUS LAW ENFORCEMENT, 2004–05, at 2–3 (2008), <http://www.bjs.gov/content/pub/pdf/cle0405.pdf> (noting the percentage increase of full-time staff on university police forces). For example, colleges have adopted

The prevention, mitigation, and effective response to an emergency can be divided into three stages: (a) pre-incident, (b) incident, and (c) post-incident.³⁴ This Article argues for the implementation of preventative and response efforts to incidents of mass violence. Colleges should have a viable Emergency Action Plan (“EAP”) in place before an incident of mass violence occurs.³⁵ Negligence and potential liability surrounding random violence may be based on the failure to initiate reasonable care to forestall an incident or failure to take reasonable steps to minimize the foreseeable impacts.³⁶ But we need to distinguish between the exercise of reasonable care to forestall or minimize a reasonably foreseeable risk,³⁷ versus the response to an emergency: the presence or absence of an EAP, the quality of an EAP, and adherence to the EAP.³⁸ We must also assume that even with the greatest exercise of care, some incidents cannot be prevented.³⁹

zero tolerance policies for alcohol, drugs, and guns and also required electronically keyed cards for entrance into many buildings, such as dorms. In fact, automated access control has become the standard on campuses around the country. THROWER ET AL., *supra* note 10, at 7. Perhaps these measures are responsible for the decrease in violent and property crime rates on college campuses. REAVES, *supra* at 10 (noting that violent crime dropped nine percent from 1994 to 2004 and property crime rates decreased thirty percent).

³⁴ Post-incident needs are outside the purview of this Article, but they are key elements in business continuity plans. Accounting for faculty, staff, and students after a tragedy, as well as providing counseling for the survivors, family members, bystanders, and others, are common elements of post-incident planning. One of the greatest issues in the immediate aftermath and confusion of an emergency is accounting for people. Assigned reporting locations, phone numbers, and websites can facilitate the process. Occupational Safety and Health Administration (“OSHA”) regulations require plans to include procedures that account for personnel. 29 C.F.R. § 1910.38(c)(4) (2015). The University of California Berkeley has a locator system where the faculty, staff, and students can post their status after an emergency. VA. TECH, SECURITY INFRASTRUCTURE WORKING GROUP REPORT: PRESIDENTIAL WORKING PAPER 19 (2007), [hereinafter SECURITY INFRASTRUCTURE REPORT], <http://cra20.humansci.msstate.edu/Security%20Infrastructure%20Working%20Group.pdf>.

The emphasis of this Article on preventative and response actions does not minimize the importance of post-incident planning; any institution needs to resume operations. For a sample checklist of post-incident actions, see Wendy B. Davis, *The Appalachian School of Law: Tried But Still True*, 32 STETSON L. REV. 159, app. at 167–70 (2002).

³⁵ Even the International Association of Campus Law Enforcement Administrators (IACLEA) recommends that institutions should develop simple EAPs to control incidents. THROWER ET AL., *supra* note 10, at 5. The National Incident Management Systems (NIMS) could serve as a framework to manage the incidents. *Id.*

³⁶ See *infra* Part I.A.

³⁷ See *infra* Part I.B.–I.D.

³⁸ See *infra* Part II. The purpose of EAPs is to be able to respond as soon as the threat materializes. Denis Binder, *Emergency Action Plans: A Legal and Practical Blueprint “Failing to Plan is Planning to Fail”*, 63 U. PITT. L. REV. 791, 791–92, 793 (2002) [hereinafter, Binder, *Emergency Action Plans*].

³⁹ See *id.* at 792 (describing the wide variety of incidents that can happen no matter how carefully organizations prepare).

We may not yet be able to predict, much less control, the courses of earthquakes, hurricanes, tornadoes, and similar forces of nature, but we sufficiently appreciate their risks such that reasonable steps should be taken to minimize these foreseeable risks, including the impacts. Some of these risks provide a period of warning, such as blizzards, hurricanes and tornadoes, while others, such as earthquakes, provide no warning at all. Care in design, construction, maintenance, operations, and inspections should be taken and even perhaps warnings issued based on the combination of foreseeable risk and potential consequences.⁴⁰

The corollary applies to college campuses. While we cannot protect everyone and everything against every conceivable threat in our large, complex society, the primary goal should be to prevent incidents from arising in the first instance. Even with the best of care and even exceeding reasonable care under the circumstances, structures fail, systems malfunction, natural hazards materialize, and crazed individuals commit random acts of mass violence.⁴¹

The procedure for reacting to a disaster is just as critical in minimizing the resulting damages as the care that was exercised to prevent the incident.⁴² Even though a school may be unable to forestall an attack, the question of liability remains.⁴³ And the nature and quality of any response might still be subject to judicial scrutiny.⁴⁴ If the inevitable incident occurs at an institution, prompt implementation of an

⁴⁰ See, e.g., *Hayashi v. Alameda Cty. Flood Control & Water Conservation Dist.*, 334 P.2d 1048, 1052–53 (Cal. Dist. Ct. App. 1959) (holding landowner negligent in maintaining erected structure on land, resulting in injury to another); *Barr v. Game, Fish & Parks Comm'n*, 497 P.2d 340, 343 (Colo. App. 1972) (holding dam owner liable for negligence in designing dam with inadequate emergency spillway); *Johnson v. Burley Irrigation Dist.*, 304 P.2d 912, 915 (Idaho 1956) (finding the defendant negligent for failing to take certain precautionary measures in pest removal that caused flooding); *Shell v. Town of Evarts*, 178 S.W.2d 32, 34–35 (Ky. 1944) (finding liability in faulty construction that resulted in property damage); *Gutierrez v. Rio Rancho Estates, Inc.*, 605 P.2d 1154, 1156 (N.M. 1980) (holding that the issue of whether a dam owner is liable for operating dam such that it flooded another's property is a question of negligence and not of strict liability); Binder, *Emergency Action Plans*, *supra* note 38, at 813 (concluding disaster response plans are just as important as preventative measures).

⁴¹ Binder, *Emergency Action Plans*, *supra* note 38, at 792. Structures have design limits: buildings can tolerate only so much seismicity, while dams, levees, and reservoirs can withstand only so much precipitation and flooding. They will fail when design limits are exceeded. Structures cannot be earthquake-proof or impervious to hurricanes or tornadoes, but they should survive within their design limits.

⁴² *Id.* at 813.

⁴³ See *Commonwealth v. Peterson*, 749 S.E.2d 307, 308 (Va. 2013) (describing a wrongful death suit brought by two estate administrators of victims who died in the 2007 Virginia Tech shooting).

⁴⁴ See *Sanders v. Bd. of Cty. Comm'rs*, 192 F. Supp. 2d 1094, 1115 (D. Colo. 2001) (scrutinizing the response of police and emergency teams in the midst of the Columbine High School Shooting).

EAP may minimize or mitigate the impacts, reduce reaction time, and facilitate recovery. Therefore, this Article is not about campus security for more traditional crimes, such as sexual assaults, but draws upon the lessons learned from these cases for principles in the broader security arena for preventative and response efforts to random acts of mass violence.

I. THE DUTY OF REASONABLE CARE AND PREVENTATIVE EFFORTS

Schools have a duty to anticipate, foresee, and act reasonably with preventative measures in regard to random acts of mass violence.

A. *General Duty to Protect*

A series of cases beginning in the 1980s have recognized the duty of colleges to protect their students from criminal activity.⁴⁵ This duty is based upon the reasonable foreseeability of the risk coupled with exercising reasonable care in responding to the risks.⁴⁶ Courts use several approaches in determining foreseeability that can give rise to liability. Homicides on campus by themselves will not give rise to liability on the part of the university.⁴⁷ As for the approaches: one option is the “totality of the circumstances” test applicable to owners and occupiers of land where all relevant circumstances surrounding the incident are considered.⁴⁸ This test is essentially one of the ordinary rules of negligence.⁴⁹ Courts using this test examine a number of factors, including the nature, conditions, and location of the land, as well as prior similar incidents, with reasonable foreseeability as the typical standard.⁵⁰ Another standard is that of heightened foreseeability, which is based on the idea that any crime is at least somewhat foreseeable and the law should not require landlords to become insurers against any

⁴⁵ Nieswand v. Cornell Univ., 692 F. Supp. 1464, 1469 (N.D.N.Y. 1988); Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1194 (Cal. 1984); Mullins v. Pine Manor Coll., 449 N.E.2d 331, 335–37 (Mass. 1983); Miller v. State, 467 N.E.2d 493, 494 (N.Y. 1984).

⁴⁶ Delta Tau Delta v. Johnson, 712 N.E.2d 968, 973–74 (Ind. 1999); *see also* Peguero v. Tau Kappa Epsilon Local Chapter, 106 A.3d 565, 567 (N.J. Super. Ct. App. Div. 2015) (holding that gunfire was not a reasonably foreseeable occurrence at a fraternity party). Determining the duty of reasonable care may be a question of fact. A.W. v. Lancaster Cty. Sch. Dist. 0001, 784 N.W.2d 907, 911 (Neb. 2010).

⁴⁷ *See* Severson v. Bd. of Trs. of Purdue Univ., 777 N.E.2d 1181, 1199 (Ind. Ct. App. 2002) (holding that homicide is not a substantive due process violation because there is not a constitutional right to be protected from the violent acts of another).

⁴⁸ *Delta Tau Delta*, 712 N.E.2d at 973–74.

⁴⁹ DAN B. DOBBS, THE LAW OF TORTS 878 (2000).

⁵⁰ *E.g.*, Maguire v. Hilton Hotels Corp., 899 P.2d 393, 399–400 (Haw. 1995); Sharp v. W.H. Moore, Inc., 796 P.2d 506, 509 (Idaho 1990); Tenney v. Atlantic Assocs., 594 N.W.2d 11, 17 (Iowa 1999); Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1030 (N.J. 1997); McClung v. Delta Square Ltd. P’ship, 937 S.W.2d 891, 899, 901 (Tenn. 1996).

criminal act.⁵¹ The final approach primarily examines prior similar instances and has been adopted mainly by California courts.⁵²

In light of these approaches, case law also reflects the principle that intervening criminal acts do not necessarily supersede the negligence of an owner or occupier for failure to exercise reasonable care to reduce the threat.⁵³ In one instance of foreseeability on a college campus, the Supreme Judicial Court of Massachusetts affirmed a \$175,000 verdict against the college for a sexual assault.⁵⁴ The college initially claimed that it had no duty to protect against criminal acts of third parties.⁵⁵ Yet the court found a duty based upon—(1) established social values and customs: colleges customarily exercise diligence to protect resident students' well-being; and (2) the premise that once an actor voluntarily assumes a duty, it must perform the duty with due care.⁵⁶ The court reasoned that “[a]dequate security is an indispensable part of the bundle of services” afforded students.⁵⁷ The court questioned the security measures in effect at the time.⁵⁸ The kidnapping and rape commenced between 4:00 and 4:30 a.m.⁵⁹ The exterior gate was left unlocked, a security guard observation post lacked full visibility, and a single key system was used.⁶⁰ Dormitory door locks could be easily picked since no deadbolt locks or chains were used, and there was no way to verify that a security guard was diligently patrolling on his assigned rounds.⁶¹

Cases of colleges failing to act reasonably in light of foreseeability span the country. In one California case, a student was climbing a stairway in a parking lot when an assailant jumped out in broad daylight from behind bushes that had been left “unreasonably thick and

⁵¹ *Bd. of Trs. v. DiSalvo*, 974 A.2d 868, 872 (D.C. 2009).

⁵² *Peterson v. S.F. Cmty. Coll. Dist.*, 685 P.2d 1193, 1201–02 (Cal. 1984); *infra* Part I.B.

⁵³ *See, e.g., Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477, 478 (D.C. Cir. 1970) (holding that an apartment landlord owed a duty to tenants to protect common areas); *Holley v. Mt. Zion Terrace Apts., Inc.*, 382 So. 2d 98, 101 (Fla. Dist. Ct. App. 1980) (holding that an independent criminal act does not relieve landlord of liability when failure to prevent criminal act leads to liability); *Seibert v. Vic Regnier Builders, Inc.*, 856 P.2d 1332, 1338 (Kan. 1993) (finding that liability of a landowner for criminal acts of third parties may arise if the risk of criminal acts was reasonably foreseeable); *Trentacost v. Brussel*, 412 A.2d 436, 440–41 (N.J. 1980) (discussing that the foreseeability of harm is crucial in determining existence a duty).

⁵⁴ *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 333, 334 (Mass. 1983).

⁵⁵ *Id.* at 334.

⁵⁶ *Id.* at 335–36.

⁵⁷ *Id.* at 336.

⁵⁸ *Id.* at 338.

⁵⁹ *Id.* at 334.

⁶⁰ *Id.* at 334, 338.

⁶¹ *Id.* at 338.

untrimmed.”⁶² The student claimed that the college failed to maintain the foliage or generally warn students of the known dangers.⁶³ The court agreed, finding the property was maintained in such a way “so as to increase the risk of criminal activity.”⁶⁴ The school had a duty to keep the campus “free from conditions which increase the risk of crime.”⁶⁵ Foreseeability of the risk, coupled with prior similar incidents, created the duty.⁶⁶

In a New York case, a coed was raped at 6:00 a.m. on Sunday at knifepoint in a dorm.⁶⁷ The university failed to keep the ten entrance doors to the dorm locked and the court held this was a breach of the university’s duty and a proximate cause of the rape.⁶⁸ Elsewhere, the Supreme Court of Maine held that sexual assault was foreseeable in a college dorm.⁶⁹ The university, therefore, had a duty to reasonably caution and instruct students on actions to improve personal safety.⁷⁰ The Supreme Court of Florida held that a university had a duty to use reasonable care in assigning an internship to a graduate student when the school knew that the internship was at an unreasonably dangerous location.⁷¹ In one Nebraska case that involved the stabbing of a man by a student who had been harassing the victim’s wife, the University of Nebraska had failed to follow up on earlier complaints against the assailant.⁷² The Nebraska Supreme Court followed the totality of the circumstances test in holding a duty existed.⁷³ The court viewed violence as reasonably foreseeable in a harassment situation once there is confrontation.⁷⁴ The exact risk need not be foreseeable; it is sufficient

⁶² Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1195 (Cal. 1984).

⁶³ *Id.* at 1202.

⁶⁴ *Id.* at 1200.

⁶⁵ *Id.* at 1201.

⁶⁶ *Id.* at 1201–02.

⁶⁷ Miller v. State, 467 N.E.2d 493, 494 (N.Y. 1984).

⁶⁸ *Id.* at 495, 497.

⁶⁹ Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1050 (Me. 2001).

⁷⁰ *Id.*

⁷¹ Nova Se. Univ., Inc. v. Gross, 758 So. 2d 86, 89 (Fla. 2000). The student was abducted, robbed, and sexually assaulted. *Id.* at 88. The internship was a mandatory practicum. *Id.* at 89.

⁷² Sharkey v. Bd. of Regents, 615 N.W.2d 889, 893, 895 (Neb. 2000), *abrogated by* A.W. v. Lancaster Cty. Sch. Dist. 0001, 784 N.W.2d 907 (Neb. 2010).

⁷³ *Id.* at 901–02. *But see* A.W., 784 N.W.2d at 917–18 (holding that foreseeability is not a factor to consider when deciding whether a duty existed, but rather is a factor in determining negligence).

⁷⁴ *Sharkey*, 615 N.W.2d at 901.

that the risk be “one of the kinds of consequences which might reasonably be foreseen.”⁷⁵

Finally, the Indiana Supreme Court also followed the totality of the circumstances test in holding that a fraternity owed a duty of reasonable care to a coed who was sexually assaulted in the fraternity house.⁷⁶ Hosts owe a duty of reasonable care under the circumstances to a guest, which includes protecting the guest from criminal acts of third parties.⁷⁷ “[T]he lack of prior similar incidents will not preclude a claim where the landowner knew or should have known that the criminal act was foreseeable.”⁷⁸

The risks of liability can be high for an institution that does not exercise reasonable care or have preventative measures. Jury verdicts two to three decades ago send a warning to any university with inadequate security.⁷⁹ Response efforts in an unfolding tragedy are often subject to criticism and post-tragedy analyses will usually show points at which different responses could have mitigated or prevented the tragedy.⁸⁰ Inadequate security can be shown by a number of factors, including the absence of guards, poorly trained guards, inadequate number of guards, inadequate lighting, inadequate patrolling, and the absence or poor placement of checkpoints.⁸¹ The adequacy of security will

⁷⁵ *Id.* As previously indicated, foreseeability is no longer part of the Nebraska test for duty, *supra* note 73. However, this case is still illustrative of the broader point that foreseeability is relevant to the liability analysis.

⁷⁶ *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 969–70, 973 (Ind. 1999). This case involved a couple of similar instances and a memo from the national fraternity warning about rapes and sexual assaults in fraternity houses. *Id.* at 970, 973. *But see* *Rogers v. Sigma Chi Int'l Fraternity*, 9 N.E.3d 755, 761 (Ind. Ct. App. 2014) (finding no duty to protect where an assault was held to be unforeseeable under the facts).

⁷⁷ *Delta Tau Delta*, 712 N.E.2d at 971, 973.

⁷⁸ *Id.* at 973.

⁷⁹ For example, a Pine Manor College student won a jury verdict of \$175,000, later reduced by the trial judge to \$20,000, against the college for failing to provide adequate security on its campus to prevent her rape. *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 333, 338 (Mass. 1983). Additionally, a University of Southern California coed won a \$1.6 million verdict against a university for failing to adequately secure an off-campus dorm; she was raped at knife point in 1988. *University, Blamed in Rape, Is Told to Pay Victim*, N.Y. TIMES, Mar. 29, 1992, § 1, at 18. On the other hand, a court recognized that a general concern about security does not require preparation for the worst possible scenario absent sufficiently specific threats. *See* *Nola M. v. Univ. of S. Cal.*, 20 Cal. Rptr. 2d 97, 107–08 (Ct. App. 1993) (stating that because the expert witnesses's testimony failed to address specific measures that could have prevented the incident, causation was not proved even though college's security was insufficient).

⁸⁰ *See Mullins*, 449 N.E.2d at 338–39 (noting different points in time at which security precautions could have prevented the crime).

⁸¹ *See* *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993) (stating that whether security guards were absent is a factor to consider); *Mullins*, 449 N.E.2d at 338 (listing the deficiencies that the jury could have found in the number of guards, the placement of the guards, and the system that ensured guards were qualified).

normally be a question of fact.⁸² The sad reality is that, regardless of the level of security, if a tragedy has occurred, a strong argument can be made that security was inadequate.⁸³

Foreseeability, with the benefit of hindsight, is a very potent weapon for plaintiffs.⁸⁴ Foreseeability is even easier to demonstrate with past incidents, memos in the student's file, and recollections of erratic behavior.⁸⁵ Federal statutes may well facilitate a victim's ability to establish prior similar circumstances. For example, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act")⁸⁶ requires all colleges and universities receiving federal funds to timely report on-campus crimes⁸⁷ and publish their security and crime-reporting policies.⁸⁸

B. Random Acts of Mass Violence and Terrorism

Unlike more general crime, the issue of foreseeability is not so clear-cut in cases of random acts of violence. Rules applicable to other types of criminal activity may be inapplicable with random acts of mass violence and terrorism. Even though this should not be the case,⁸⁹ California courts have recognized this lack of foreseeability in a series of cases.

⁸² See, e.g., *Nieswand v. Cornell Univ.*, 692 F. Supp. 1464, 1468–69 (N.D.N.Y. 1988) (holding that the issue of whether there is a duty to provide adequate security is an issue of material fact).

⁸³ See *Saelzler v. Advanced Grp.* 400, 23 P.3d 1143, 1148 (Cal. 2001) (detailing plaintiff's argument that more security guards could have prevented the assault); *Lopez v. McDonald's Corp.*, 238 Cal. Rptr. 436, 439 (Ct. App. 1987) (noting plaintiff's argument that a security guard could have prevented the massacre).

⁸⁴ *Ingram v. Howard–Needles–Tammen & Bergendoff*, 672 P.2d 1083, 1090–91 (Kan. 1983) (affirming jury verdict that defendant was liable for negligence because injury was foreseeable).

⁸⁵ See *Isaacs v. Huntington Mem'l Hosp.*, 695 P.2d 653, 663 (Cal. 1985) (holding that trial court erred in excluding evidence of prior events that could have probative value in proving foreseeability).

⁸⁶ 20 U.S.C. § 1092(f) (2012). Significantly, the Clery Act neither creates a private cause of action nor establishes a standard of care. § 1092(f)(14)(A).

⁸⁷ § 1092(f)(3). Many states have similar statutes. Bonnie S. Fisher et al., *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61, 62 (2002). For example, Kentucky's Michael Minger Act requires timely reporting of campus crimes. KY. REV. STAT. ANN. § 164.9481 (West, Westlaw through 2015 Reg. Sess.). As an example of noncompliance, Eastern Michigan University violated the Clery Act by failing to report the murder of a student, resulting in a \$350,000 fine, the largest since passage of the Act. Sara Lipka, *Eastern Michigan U. to Pay \$350,000 Fine for Clery Act Violation*, CHRON. HIGHER EDUC. (June 6, 2008), <http://chronicle.com/article/Eastern-Michigan-U-to-Pay/41112>.

⁸⁸ § 1092(f)(1) (detailing the required policy disclosures relating to topics such as off-campus student organizations, underage drinking, and emergency response).

⁸⁹ See *infra* Part I.C.

Ann M. v. Pacific Plaza Shopping Center,⁹⁰ an otherwise traditional landlord and tenant security case, has been very influential in subsequent mass violence cases.⁹¹ The facts of the case are as follows: A tenant's employee was sexually assaulted at a store in a strip mall at 8:00 a.m.⁹² Incidents of robberies, shoplifted items, and a transient pulling down women's pants had occurred at the mall in the past.⁹³ Although the proprietor recorded instances of crimes generally, he had no record of these particular events or other violent crimes.⁹⁴ Foot-patrol security guards were not hired because of prohibitive costs.⁹⁵

The California Supreme Court recognized the landlord's duty to "take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures."⁹⁶ However, this duty did not extend to the rape at issue primarily because no prior similar incidents had occurred to create a high degree of foreseeability.⁹⁷ A duty will seldom be proven without prior similar instances.⁹⁸ The court thereby approached foreseeability through the rule of prior similar instances to decide that the landlord owed no duty to the plaintiff.⁹⁹ The court cautioned: "[R]andom, violent crime is endemic in today's society. It is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable."¹⁰⁰ The court noted that the obligation to provide patrols was not clearly established.¹⁰¹ Finally, the court concluded that a high degree of foreseeability was necessary to find that a landlord's duty includes hiring private police forces.¹⁰²

Years later, the California Supreme Court continued to follow *Ann M.* in deciding that liability will rarely be imposed on a landowner for intervening criminal acts absent prior similar incidents.¹⁰³ In *Wiener v.*

⁹⁰ 863 F.2d 207 (Cal. 1993).

⁹¹ See, e.g., *Wiener v. Southcoast Childcare Ctrs., Inc.*, 88 P.3d 517, 525 (Cal. 2004) (applying the balancing test established by *Ann M.* to a case of mass violence); *Kadish v. Jewish Cmty. Ctrs. of Greater L.A.*, 5 Cal. Rptr. 3d 394, 400, 402 (Ct. App. 2003) (same).

⁹² *Ann M.*, 863 P.2d at 209–10.

⁹³ *Id.* at 210.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 212.

⁹⁷ *Id.* at 216.

⁹⁸ *Id.* at 215.

⁹⁹ *Id.* at 215–16. The dissent argued that the prior similar incidents test applied by the majority was the wrong test because *Isaacs v. Huntington Memorial Hospital*, 695 P.2d 653 (Cal. 1989), had rejected that test and had adopted a different test. *Id.* at 216.

¹⁰⁰ *Id.* at 215.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Wiener v. Southcoast Childcare Ctrs., Inc.*, 88 P.3d 517, 525 (Cal. 2004).

Southcoast Childcare Centers, Inc. a driver intentionally drove his large Cadillac into a daycare center, killing two children and injuring others.¹⁰⁴ A four-foot-high fence enclosed the playground, which was located nearby a busy street.¹⁰⁵ The fence met code requirements, but it was argued that a sturdier fence could have prevented the tragedy, and that a vehicle could foreseeably leave the street and crash into the daycare center.¹⁰⁶ The court noted that random acts of violence should not result in liability.¹⁰⁷ The landowner's duty is "to maintain land in [one's] possession and control in a reasonably safe condition."¹⁰⁸ The court recognized that "it is difficult if not impossible in today's society to predict when a criminal might strike. Also, if a criminal decides on a particular goal or victim, it is extremely difficult to remove his every means for achieving that goal."¹⁰⁹ The brutal criminal act was viewed as so bizarre and outrageous as to be inconceivable;¹¹⁰ indeed, it could not be anticipated under any circumstances.¹¹¹

If proving foreseeability is difficult, California courts are also hesitant to impose liability for failure to prevent random acts of violence. In one scenario, a rabid anti-Semite entered a daycare facility and started shooting, wounding three children, one teenager, and an adult.¹¹² He exited the center and subsequently killed a postal worker.¹¹³ He chose the community center because it lacked security protections;¹¹⁴ it "had no locks on the entry door, no security guards, and no emergency evacuation plan."¹¹⁵

In the case arising from this incident, *Kadish v. Jewish Community Centers of Greater Los Angeles*, the plaintiffs argued that a duty existed

¹⁰⁴ *Id.* at 519–20.

¹⁰⁵ *Id.* at 519.

¹⁰⁶ *Id.* at 521.

¹⁰⁷ *See id.* at 522 (affirming the rule and assertion from *Ann M.*).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 524.

¹¹⁰ *Id.* at 525. Another example of a bizarre and outrageous act is the case of *People v. Abrams*, No. G028529, 2003 WL 1795626 (Cal. Ct. App. Apr. 4, 2003). The assailant had stopped taking his medications. *Id.* at *4. The jury rejected the assailant's insanity defense even though a long history of paranoia and psychosis was presented. *Id.* at *6–7. The assailant stated after the tragedy that "[h]e had been planning to 'get even' for five years by 'executing innocent people.'" *Id.* at *5. He focused on killing as many children as possible "because that 'makes more news.'" *Id.* A jury convicted the assailant of two counts of homicide and seven counts of attempted murder. *Id.* at *1.

¹¹¹ *Wiener*, 88 P.3d at 525.

¹¹² *Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274, 1279 (C.D. Cal. 2006), *aff'd*, 565 F.3d 1126, 1145 (9th Cir. 2009); *Kadish v. Jewish Cmty. Ctrs. of Greater L.A.*, 5 Cal. Rptr. 3d 394, 396 (Ct. App. 2003). These cases stem from the same incident.

¹¹³ *Ileto*, 421 F. Supp. 2d at 1280.

¹¹⁴ *Kadish*, 5 Cal. Rptr. 3d at 396.

¹¹⁵ *Id.*

based upon foreseeability: both the general foreseeability of risk around the world to Jewish facilities and the foreseeability caused by vague threats of violence made around the time of the incident.¹¹⁶ No liability was found.¹¹⁷ Violent criminal assaults of this nature were not reasonably foreseeable, and ambiguous threats of violence are insufficient to create a duty.¹¹⁸ This is because “[a] general concern about security, absent a sufficiently specific threat, does not require an organization to prepare for the worst imaginable scenario.”¹¹⁹ The court dismissed the case on the grounds that “the violent criminal assault was not reasonably foreseeable, and imposing liability based on vague threats of violence, absent prior armed assaults or other incidents of a similar nature, would impose an unfair burden on the organization.”¹²⁰ The court reasoned that society does not blame a property owner when a crazed gunman strikes.¹²¹ Thus, the dangers “were not sufficiently specific so as to require that security measures be adopted to prevent a maniac from shooting children at a summer camp.”¹²² This threat was unforeseeable.¹²³

The court’s reasoning echoed the earlier case of *Lopez v. McDonald’s Corp.*,¹²⁴ in which the court held that when a gunman killed twenty-one and wounded eleven at a McDonald’s in California, the unforeseeability of the crime required that negligent liability be restricted.¹²⁵ At first glance, the plaintiffs presented a strong case of foreseeability: several crimes had previously occurred at the restaurant, including grand theft, petty theft, robbery, vandalism, and numerous assaults and batteries.¹²⁶ Even a private security consultant had recommended to the McDonald’s corporate offices to hire security guards for the location.¹²⁷ The response

¹¹⁶ *Id.* at 402–03. Because of the widespread threat of violence, Jewish organizations called the summer of 1999 a “summer of hate.” *Id.*

¹¹⁷ *Id.* at 395.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 403.

¹²⁰ *Id.* at 395.

¹²¹ *Id.* at 405.

¹²² *Id.* at 403.

¹²³ *Id.* at 406. Vague threats are not sufficiently specific. The court recognized: The circumstances of Benjamin’s injury were unique, shocking and . . . unforeseeable. It remains a part of everyday life that people enter and exit unlocked, unguarded facilities operated by various organizations. Children continue to go to camp. Despite the efforts of an organization to protect individuals on its premises, a crazed bigot who has declared ‘war’ on a particular group in society may find a way to breach security measures.

Id.

¹²⁴ *Id.* at 404.

¹²⁵ *Lopez v. McDonald’s Corp.*, 238 Cal. Rptr. 436, 438 (Ct. App. 1987).

¹²⁶ *Id.* at 439.

¹²⁷ *Id.*

was: “We don’t want to spend any money. There is no problem, we don’t need it anyways.”¹²⁸ Two months later the assailant entered the restaurant with a semi-automatic rifle, a semi-automatic pistol, and a twelve-gauge shotgun.¹²⁹ His murderous rampage ended when a police sharpshooter fatally wounded him.¹³⁰

The critical factor of foreseeability was that while general criminal activity might well have been foreseeable at this site, the prior crimes had no relationship to a purposeful homicide.¹³¹ The assailant’s acts and motives were unrelated to the area’s crime wave:

Rather, the likelihood of this unprecedented murderous assault was so remote and unexpected that, as a matter of law, the general character of McDonald’s nonfeasance did not facilitate its happening. [The assailant’s] deranged and motiveless attack, apparently the worst mass killing by a single assailant in recent American history, is so unlikely to occur within the setting of modern life that a reasonably prudent business enterprise would not consider its occurrence in attempting to satisfy its general obligation to protect business invitees from reasonably foreseeable criminal conduct.¹³²

The question was not whether a fast food restaurant had a duty to protect patrons against criminal acts, but rather whether it had a duty to protect “against once-in-a-lifetime massacres” based on the foreseeability of such an event.¹³³ The court listed a series of recent mass killings in America.¹³⁴ The problem is determining what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath, or the psychotic.¹³⁵ The court was concerned that an onerous

¹²⁸ *Id.*

¹²⁹ *Id.* at 439.

¹³⁰ *30 Years Since the San Ysidro McDonald’s Massacre*, CBS8 (July 18, 2014, 12:51 PM), <http://www.cbs8.com/story/26054271/30-years-since-the-san-ysidro-mc>.

¹³¹ *Lopez*, 238 Cal. Rptr. at 445.

¹³² *Id.* (citations omitted).

¹³³ *Id.* at 441.

¹³⁴ [T]he following major mass murders had been committed in the United States during recent history: (1) August 1, 1966, 16 people were killed and 31 wounded by a rifle-sniper firing from the University of Texas tower in Austin; (2) August 10, 1986, 14 postal workers were killed and six others wounded in Edmond, Oklahoma; (3) February 19, 1983, 13 Chinese-American businessmen and gambling dealers were shot dead in a Seattle Chinatown gambling club; (4) September 25, 1982, 13 people were killed in a shooting rampage in Wilkes-Barre, Pennsylvania by a state prison guard; (5) September 6, 1949, 13 people were killed by a World War II veteran who went berserk in Camden, New Jersey; (6) January 1958, 11 people were killed by two individuals during a spree in Lincoln, Nebraska; (7) April 15, 1984, 10 people died in New York City’s “Palm Sunday Massacre”; and (8) July 14, 1966, eight nurses were slain in their Chicago apartment by Richard Speck.

Id. at 447 n.9 (citations omitted).

¹³⁵ *Id.* at 447. In making this statement, the court referred to an earlier decision, *Noble v. Los Angeles Dodgers, Inc.*, involving assaults by intoxicated fans in a parking lot

burden would be imposed on both the restaurant and the community by trying to protect against heavily armed murderers.¹³⁶

Another example of California's reluctance to impose liability in incidents of mass violence is the case of *Moncur v. City of Los Angeles*, which involved an airport bombing in a coin-operated storage locker at Los Angeles International Airport.¹³⁷ The locker was in an area accessible to the public.¹³⁸ Plaintiffs claimed negligence against the city for failing to take adequate safety measures.¹³⁹ They argued that the city should have searched persons using the lockers, which were outside the security zone.¹⁴⁰ Based on a lack of foreseeability and specificity in the complaints, the court refused to assign liability for the bombing.¹⁴¹

In California, therefore, the test for foreseeability and liability is not a vague general risk, but a specific one. The standard generally comes down to reasonable conduct in light of a specific, foreseeable risk, often based on prior similar incidents of mass violence.¹⁴² It is important to note that opinions differ on this standard: for instance a federal district court in Colorado held that a mass shooting in a theatre could be foreseeable and give rise to a cause of action.¹⁴³ The theatre chain was aware of the risk of an active shooter for the midnight premieres of *The Dark Knight Rises* and had increased security at many theaters for the

after a baseball game. 214 Cal. Rptr. 395, 396 (Ct. App. 1985). While 52,000 fans attended the game, there were only sixty-nine security personnel on the premises that night. *Id.* at 398. Nevertheless, the court held that the Dodgers were not liable because no causal connection could be proven between the team's negligently inadequate security and the plaintiff's injury. *Id.* at 399.

¹³⁶ *Lopez*, 238 Cal. Rptr. at 447; *see also* *Thai v. Stang*, 263 Cal. Rptr. 202, 207 (Ct. App. 1989) (holding that business owners have no duty to protect against drive-by shootings because the degree of foreseeability is too low).

¹³⁷ *Moncur v. City of Los Angeles*, 137 Cal. Rptr. 239, 240 (Ct. App. 1977).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 241.

¹⁴¹ *Id.* at 243; *see also* *Faheen v. City Parking Corp.*, 734 S.W.2d 270, 271-73 (Mo. Ct. App. 1987) (using reasoning similar to *Moncur*, the court found that defendant-owners and managers of an apartment complex had no duty to protect against third-party criminal acts because they were not the insurers of an invitee's safety, crime is foreseeable in any place at any time, and the public policy considerations of fairness weighed against the existence of a duty).

¹⁴² *But see* *Isaacs v. Huntington Mem'l Hosp.*, 695 P.2d 653, 659 (Cal. 1985) (adopting a totality of the circumstances approach and minimizing the importance of prior similar incidents); Laura DiCola Kulwicki, Comment, *A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule*, 48 OHIO ST. L.J. 247, 256-58 (1987) (explaining California's shift away from strict application of the prior incidents rule to a more flexible doctrine of foreseeability focusing on the complete factual context of each case).

¹⁴³ *Axelrod v. Cinemark Holdings, Inc.*, 65 F. Supp. 3d 1093, 1101 (D. Colo. 2014).

showing.¹⁴⁴ California is not alone though, as courts have generally been reluctant to impose liability upon remote parties in the chain of causation.¹⁴⁵ For instance, two separate federal circuit courts denied liability for manufacturers of ammonium nitrate used in the truck bombs in both the 1993 World Trade Center bombing¹⁴⁶ and the 1995 Murrah Federal Office Building in Oklahoma City.¹⁴⁷ Similarly, while the assailants in other cases may have been influenced by video games or movies, at least one court has refused to impose a duty on these defendants.¹⁴⁸ Nor have parents of assailants typically been held liable in similar situations involving unforeseeable incidents of large-scale violence or mass shootings.¹⁴⁹ Thus, despite varying approaches nationally, foreseeability of an incident of mass violence is only triggered by specific similar instances in the State of California.

¹⁴⁴ *Id.* at 1102.

¹⁴⁵ For example, in *Sigmund v. Starwood Urban Investment*, a son placed a homemade car bomb under his father's car in a parking garage intending to kill him. 475 F. Supp. 2d 36, 38 (D.D.C. 2007). The plaintiff, his half-brother, was severely injured instead. *Id.* at 39. Plaintiff sued the operator of the parking garage for inadequate security. *Id.* at 37–38. A public access was left unrepaired, stuck in an open position for weeks, allowing anyone to enter the garage after closing hours. *Id.* at 39. The son claimed this access provided him with the opportunity he needed to carry out the bombing. *Id.* at 39–40. The District Court held that plaintiff failed to meet the “heightened showing of foreseeability” applied in cases of intervening criminal acts by third parties. *Id.* at 38. Although fifty-nine of the 503 crimes in the neighborhood occurred in parking lots and garages, none were of the nature in this case. *Id.* at 40. Moreover, no evidence existed of previous car bombings, homicides, or assaults with an intent to kill on the premises in the five preceding years, or even within a five block radius of the garage. *Id.* For additional cases on this topic, see for example *Henry v. Merck & Co.*, 877 F.2d 1489, 1497 (10th Cir. 1989) (noting that an employee's illegal actions must be considered in the casual chain of events); *District of Columbia v. Berretta, U.S.A., Corp.*, 872 A.2d 633, 641 (D.C. 2005) (en banc) (“Where an injury is caused by the intervening criminal act of a third party . . . liability depends upon a more heightened showing of foreseeability than would be required if the act were merely negligent.” (quoting *Potts v. District of Columbia*, 697 A.2d 1249, 1252 (D.C. 1997))); *Pecan Shoppe of Springfield, Mo., Inc. v. Tri-State Motor Transit Co.*, 573 S.W.2d 431, 438–39 (Mo. Ct. App. 1978) (refusing to find a common carrier guilty of negligence when a third party caused the criminal act).

¹⁴⁶ *Port Auth. of N.Y. & N.J. v. Arcadian Corp.*, 189 F.3d 305, 314–15 (3d Cir. 1999).

¹⁴⁷ *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 618 (10th Cir. 1998).

¹⁴⁸ *See James v. Meow Media, Inc.*, 90 F. Supp. 2d 798, 800, 803 (W.D. Ky. 2000) (holding a video game manufacturer not liable for the boy's murderous rampage based on the lack of foreseeability even though the boy's actions were similar to a video game he regularly played).

¹⁴⁹ *James v. Wilson*, 95 S.W.3d 875, 887–88 (Ky. Ct. App. 2002) (holding that although parents can be liable for negligence for failure to control their children, the evidence was insufficient to show that the parents of a teenager who shot his classmates knew or should have known that their son was potentially violent).

C. Campuses and Traditional Security Measures

Let us start with a different paradigm today for college campuses: the risks of random acts of violence are known and reasonably foreseeable, but not addressed by traditional security measures. Seemingly random acts of violence (the “going postal” syndrome) can occur anywhere in society: airports,¹⁵⁰ car washes,¹⁵¹ casinos,¹⁵² churches,¹⁵³ government facilities,¹⁵⁴ computer firms,¹⁵⁵ factories,¹⁵⁶ gas stations,¹⁵⁷ housing complexes,¹⁵⁸ malls,¹⁵⁹ postal facilities,¹⁶⁰ Native

¹⁵⁰ In 2002, an Egyptian immigrant ran into a ticket counter at Los Angeles International Airport and opened fire, killing an employee and a passenger waiting in line, and wounding three before a security guard killed him. Andrew Blankstein & Jill Leovy, *Shooting at LAX; FBI Looks for Motive in LAX Attack*, L.A. TIMES, July 6, 2002, at A1.

¹⁵¹ In March 2002, a fired worker shot five people at a car wash in Dallas. Lianne Hart & Lisa Girion, *Many Warning Signs in Shooting Spree*, L.A. TIMES, July 10, 2003, at 13.

¹⁵² An unemployed painter opened fire in the New York-New York Casino in Las Vegas on July 6, 2007, wounding four. Kimi Yoshino & Ralph Vartabedian, *4 Wounded As Gunman Opens Fire in Casino on Vegas Strip*, L.A. TIMES, July 7, 2007, at A10. In another attack, a bomb was placed in a coffee cup on an employee’s car in the Luxor Casino parking lot, killing the employee when it exploded. Steve Friess, *A Question Recurs: How Safe is Las Vegas?*, N.Y. TIMES, Aug. 3, 2007, § A, at 12.

¹⁵³ On August 12, 2007, a gunman killed the pastor and two church elders and wounded five others at a church in Missouri. Associated Press, *Murder Charges Filed in Shooting of Three Leaders of a Missouri Church*, N.Y. TIMES, Aug. 14, 2007, § A, at 15. In 2003, an assailant served coffee laced with arsenic to church members of a Lutheran Church in northern Maine, killing a church elder and ailing fifteen parishioners, then committed suicide days later. Associated Press, *Maine Police End Church Arsenic Investigation*, FOX NEWS (Apr. 19, 2006), http://www.foxnews.com/printer_friendly_story/0,3566,192256,00.html.

¹⁵⁴ On July 23, 2003 a New York City councilman entered City Hall with a political opponent and, after bypassing normal security, the opponent pulled out a gun, killing the councilman. Michael Cooper, *Shooting at City Hall: Overview*, N.Y. TIMES, July 24, 2003, § A, at 1. Elsewhere, a gunman entered the City Hall of Kirkwood, Missouri on February 7, 2008, and killed five people before police were able to subdue him. Susan Saulny & Malcolm Gay, *In Missouri, City Asks What Made Killer Snap*, N.Y. TIMES, Feb. 9, 2008, § A, at 13.

¹⁵⁵ In December 2000, a software tester killed seven people at a Wakefield, Massachusetts internet consulting firm. Hart & Girion, *supra* note 151, at 13.

¹⁵⁶ A racist employee shot five to death in July 2003, including four African-Americans, and wounded nine before killing himself at a Meridian, Mississippi aerospace factory. *Id.*

¹⁵⁷ In early 2002, a thirty-one-year-old Oakland resident was shot in his car at a gas station. Joshunda Sanders, *The Faces Behind the Numbers*, S.F. CHRON., Dec. 29, 2002, at A20.

¹⁵⁸ In 2007, a janitor, dismissed two years earlier, killed his former boss and wounded two others at a Bronx housing project, later surrendering to security officers at the Bronx Courthouse. Cara Buckley, *Ex-Worker Shoots 3 at Co-op City, Killing Old Boss, Police Say*, N.Y. TIMES, Aug. 31, 2007, § B, at 1.

¹⁵⁹ A Bosnian refugee entered the Trolley Square Mall in Salt Lake City on February 12, 2007, and killed six, wounding four others, before being killed in turn by police officers.

American reservations,¹⁶¹ restaurants,¹⁶² supermarkets,¹⁶³ theatres,¹⁶⁴ law firms,¹⁶⁵ Amish schools,¹⁶⁶ and around major cities.¹⁶⁷

Colleges are not immune, but securing a campus is different than securing an enclosed office or factory complex. By their very nature, universities are open centers of learning. The exchange of knowledge is not limited to enrolled students, but offered to the community through extension courses, guest lecturers, visiting scholars, symposia, artistic performances, Internet access, art galleries and museums, library services, and graduate and job fairs, often for free. Athletic events may routinely attract 15,000–100,000 fans.¹⁶⁸

The college community has limited preventative and response options for increasing campus security. Some campuses have scores of

Linda Thomson, *Police Identify Gunman as 18-Year Old Bosnian*, DESERET NEWS (Feb. 13, 2007, 12:00 AM) <http://deseretnews.com/article/content/mobile/0,5223,660195221,00.html>.

¹⁶⁰ An ex-employee, who had left because of psychological problems, killed five at a Goleta, California postal facility in February 2006. Randal C. Archibold, *Ex-Employee Kills 5 Others and Herself at California Postal Plant*, N.Y. TIMES, Feb. 1, 2006, § A, at 13.

¹⁶¹ A student took his grandfather's guns, killed his grandparents, and then swept through a metal detector at the high school on the Red Lake Indian Reservation in Minnesota, fatally shooting seven and injuring fifteen before committing suicide. P.J. Huffstutter & Stephanie Simon, *10 Dead After School Shooting*, L.A. TIMES, Mar. 22, 2005, at A1.

¹⁶² A transient burst into a Denny's restaurant in Pismo Beach, California on March 15, 2006, and killed two while injuring others before committing suicide. Steve Chawkins, *Gunman Opens Fire on Denny's Patrons*, L.A. TIMES, Mar. 16, 2006, at B1. Elsewhere, an assailant drove his pickup truck through the front window of a Luby's cafeteria in Killeen, Texas and then opened fire into the restaurant, killing twenty-two and wounding twenty before killing himself. Thomas C. Hayes, *Gunman Kills 22 and Himself in Texas Cafeteria*, N.Y. TIMES, Oct. 17, 1991, § A, at 1.

¹⁶³ An assailant entered an Albertson's supermarket in Irvine, California and killed two with a three-foot sword before being killed by police. Zaheera Wahid & Bill Rams, *In Tragedy's Wake*, ORANGE COUNTY REG., July 1, 2003, at cover.

¹⁶⁴ A man opened fire in an Owings Mills, Maryland movie theatre on June 16, 2006, killing a patron in a showing before placing his gun on the lobby counter to wait for law enforcement. Hamil R. Harris, *Man Dies in Theatre After Assailant Opens Fire*, WASH. POST, June 18, 2006, at C05.

¹⁶⁵ Angry about a divorce settlement, a deacon shot five people in a law office in Alexandria, Louisiana before being killed by law enforcement. Associated Press, *Man Kills 2, Injures 3 at Law Firm Before He is Killed by Police*, N.Y. TIMES, Oct. 6, 2007, § A, at 12.

¹⁶⁶ An assailant killed five Amish schoolgirls and wounded another five in a one-room schoolhouse in Nickel Mines, Pennsylvania before killing himself. JOHN L. RUTH, FORGIVENESS: A LEGACY OF THE WEST NICKEL MINES AMISH SCHOOL 32 (2007).

¹⁶⁷ A sniper killed nine and critically wounded two in a series of attacks over three weeks in October 2002 throughout the greater Washington, D.C. metro area. Stephen Braun & David Willman, *Sniper Task Force Rolls on Shooting*, L.A. TIMES, Oct. 20, 2002, at 1.

¹⁶⁸ NATIONAL COLLEGIATE ATHLETICS ASSOCIATION, 2014 NATIONAL COLLEGE FOOTBALL ATTENDANCE, http://fs.ncaa.org/Docs/stats/football_records/Attendance/2014.pdf (last visited Jan. 29, 2016).

buildings sprawling over acres of facilities,¹⁶⁹ tens of thousands of students, faculty, staff, administrators, and tens of thousands of doors and windows. As a result, many campuses cannot be run as a barbed-wire high-security prison. While these open campuses cannot be “shut down,” individual buildings might be.¹⁷⁰ The unfortunate reality is that most college campuses cannot be secured in a way that can guarantee to prevent a shooter from coming on campus, especially if the shooter is otherwise authorized to be on the campus and intends to commit suicide following completion of his shooting spree.¹⁷¹ Thus, I submit that it is perhaps even more difficult to secure a college campus against a lone gunman than against a suicide bomber. The gunman can shoot his way through a checkpoint, or move from one location to another to continue his killing ways,¹⁷² but the bomber, no matter how tragic his act, can only detonate the bomb once.

Moreover, the normal means of providing a high level of security will often be ineffective against the mass murderer and terrorist. Visitor registration, badging, armed guards, metal detectors, and video surveillance may reduce incidents of normal criminal activity, but they cannot secure a campus against the random attacker.¹⁷³ While we picture college campuses as physically defined environs with more or less distinct boundaries, many large urban universities such as New York University, Boston University, the George Washington University, and the University of Pittsburgh are integrated into scores of blocks of the community.¹⁷⁴ A fleeing suspect could easily blend into the surrounding neighborhood before any responders could reach the scene. Furthermore,

¹⁶⁹ SECURITY INFRASTRUCTURE REPORT, *supra* note 34, at 6–7 (describing the 4,000-acre, 262-building campus of the University of Maryland at College Park and the 1,000-plus acre, 344-building campus of the University of California at Berkeley). By way of contrast, most high schools and middle schools occupy only one main building with limited points of access.

¹⁷⁰ *Id.* at 2.

¹⁷¹ See CAMPUS ATTACKS, *supra* note 11, at 16 (specifying that the vast majority of campus attacks are committed by students or employees); THROWER ET AL., *supra* note 10, at 10–11 (listing numerous campus shootings that ended in suicide).

¹⁷² For example, Seung Hui Cho, the assailant at Virginia Tech, killed two students in a dorm before moving on to kill more in a classroom building a short time later. THROWER ET AL., *supra* note 10, at 9.

¹⁷³ The high school shooter on the Indian Reservation went through a metal detector and shot to death an unarmed security officer as he continued on his murderous path. Huffstutter & Simon, *supra* note 161. Similarly, the assailant at the Kirkwood City Hall first shot and killed a police officer in a parking lot outside the building, took the officer's revolver, and then entered the council chambers on a murderous rampage. Saulny & Gay, *supra* note 154.

¹⁷⁴ See *New York University Campus Map*, NYU, <http://www.nyu.edu/content/dam/nyu/advertisePublications/documents/nyu-downloadable-campus-map.pdf> (last visited Mar. 11, 2016) (showing campus location in the midst of downtown Manhattan).

if the shooters are disgruntled, disturbed students, faculty, or staff, they likely possess the means to access dorms, classrooms, libraries, and labs. For example, in 1976, a deranged custodian killed seven and injured two at California State University at Fullerton.¹⁷⁵ With thousands of faculty, staff, and students entering and leaving classroom buildings and dormitories daily, an unauthorized person can simply move with the flow.

Colleges are places of learning, and violence is arguably the antithesis of learning. Traditional security measures do not adequately address these circumstances. Campuses are often gun-free zones.¹⁷⁶ However, armed campus security cannot be at all places at all times unless the campus is to become an armed camp. Even in the smaller confines of a high school, an armed officer may be unable to respond to an incident in time to stop it: Columbine High School had an officer on campus at the time the killings began.¹⁷⁷ He responded within a few minutes, but the assailants had already entered the building.¹⁷⁸

While gun-free environs are highly laudatory, they leave potential victims without a means to defend themselves. At Appalachian School of Law in 2002, a former law student shot to death the Dean, a professor, and a student before other students retrieved their guns and subdued him.¹⁷⁹ The International Association of Campus Law Enforcement Administrators supports the arming of campus public safety officers, but not the carrying of concealed weapons by non-public-safety officers.¹⁸⁰ Perhaps concealed-carrying would dissuade attacks, as guns are often an assailant's weapon of choice,¹⁸¹ but the means of killing parallel those of society in general. Automobiles have been used on occasion.¹⁸² Sometimes students have used poison in their attacks.¹⁸³ Knives are also convenient weapons in fights.¹⁸⁴

¹⁷⁵ Smith, *supra* note 4.

¹⁷⁶ Will Buchanan, *Three Years After Virginia Tech Shooting, College Gun Bans Prevail*, CHRISTIAN SCI. MONITOR (Apr. 16, 2010), <http://www.csmonitor.com/USA/Education/2010/0416/Three-years-after-Virginia-Tech-shooting-college-gun-bans-prevail>.

¹⁷⁷ Sanders v. Bd. of Cty. Comm'rs, 192 F. Supp. 2d 1094, 1100 (D. Colo. 2001).

¹⁷⁸ *Id.*

¹⁷⁹ Josh White, *Law School Shooter Pleads Guilty*, WASH. POST, Feb. 28, 2004, at B03. For another example, a lone gunman on December 9, 2007 attacked an evangelical missionary training school in Arvada, Colorado and then a megachurch in Colorado Springs seventy miles away, killing three. Robert D. McFadden, *2 Shootings at Church Sites in Colorado Leave 4 Dead*, N.Y. TIMES, Dec. 20, 2007, § A, at 16. The attack ended when a security guard at the church shot the assailant. *Id.*

¹⁸⁰ THROWER ET AL., *supra* note 10, at 12.

¹⁸¹ CAMPUS ATTACKS, *supra* note 11, at 17.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

Other traditional security measures, such as escorts and lighted parking structures, may reduce criminal activity like muggings and sexual assault, but they may prove ineffective against the crazed killer. Similarly, video surveillance may tell us what is happening in real time, and provide evidence afterwards, but they do not necessarily prevent crime.¹⁸⁵ Additionally, searching thousands, perhaps tens of thousands, of students and faculty as they repeatedly move from place to place on campus might be legal, but is clearly unfeasible on a routine basis. The issue is one of convenience and practicality rather than legality, since courts have upheld searches of patrons entering airports,¹⁸⁶ athletic events,¹⁸⁷ and mass-transit stations.¹⁸⁸

General campus security measures often neglect individuals. Investigative reporters and lawyers will often discover, in hindsight, warning signs that were ignored, as with both David Attias at Santa Barbara¹⁸⁹ and Cho Seung-Hui of Virginia Tech.¹⁹⁰ These signs often point to psychological disturbances in the killer.¹⁹¹ What is obvious in hindsight, though, is often not so clear until the tragedy unfolds.¹⁹² For example, it may become apparent after the tragedy that the psychologically disturbed had gone off his or her medications. Additionally, these signs are often more characteristic and reflective of

¹⁸⁵ *Study Shows Surveillance Cameras Reduce Crime, In Some Cases*, HOMELAND SECURITY NEWS WIRE (Sept. 26, 2011), <http://www.homelandsecuritynewswire.com/study-shows-surveillance-cameras-reduce-crime-some-cases>.

¹⁸⁶ *United States v. Marquez*, 410 F.3d 612, 614 (9th Cir. 2005); *United States v. Edwards*, 498 F.2d 496, 499–500 (2d Cir. 1974).

¹⁸⁷ *Johnston v. Tampa Sports Auth.*, 530 F.3d 1320, 1322 (11th Cir. 2008).

¹⁸⁸ *MacWade v. Kelly*, 460 F.3d 260, 263 (2d Cir. 2006).

¹⁸⁹ See Joe Mozingo & Jenifer Ragland, *Other Students Saw Signs of Trouble*, L.A. TIMES, Feb. 26, 2001, at B1 (discussing conversations Attias had with classmates prior to the incident, including once claiming he was a prophet, and other erratic behavior). In 2001, Attias drove his car into a crowd of people on a street, killing four and wounding another and afterward declared himself the “angel of death.” Steve Chawkins, *David Attias, Driver Who Plowed into Crowd, to Leave Mental Hospital*, L.A. TIMES (Sept. 5, 2012), <http://articles.latimes.com/2012/sep/05/local/la-me-attias-20120905>.

¹⁹⁰ See Amy Gardner et al., *Panel: Va. Tech Failed to Respond to Cho Warning Signs*, WASH. POST (Aug. 30, 2007, 11:50 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/30/AR2007083000759.html> (discussing that Cho displayed signs of mental instability as early as childhood).

¹⁹¹ See Matthew Lysiak, *Charleston Massacre: Mental Illness Common Thread for Mass Shootings*, NEWSWEEK (June 19, 2015, 6:17 AM), www.newsweek.com/charleston-massacre-mental-illness-common-thread-mass-shootings-344789 (connecting the warning signs Adam Lanza displayed before the Sandy Hook tragedy with his diagnosed mental illnesses).

¹⁹² See Maria Konnikova, *Is There a Link Between Mental Health and Gun Violence?*, NEW YORKER (Nov. 19, 2014), www.newyorker.com/science/maria-konnikova/almost-link-mental-health-gun-violence (discussing one school-shooting assailant who was described as a popular student athlete and a “good kid” prior to the incident, but shortly after was described as “full of angst” and “anguished”).

those who do not in fact pose a threat to others. Considering the hormonal changes, academic disappointments, stress, insecurity, and broken relationships that many teenagers experience, some reclusive or rebellious reactions are understandable. Yet, when a reaction to such events escalates to mass violence, it seems totally irrational and is arguably unforeseeable.¹⁹³

This is because normal thought processes and norms of reasonable conduct do not apply to these assailants. Aside from the terrible act itself, intentionally mowing down students with a car at the University of North Carolina at Chapel Hill and then calmly dialing 911 to turn oneself in¹⁹⁴ is inexplicable. Likewise, engaging in one round of shootings and then taking time off to mail a video to a broadcasting company prior to returning to a second, more horrific killing spree¹⁹⁵ sets a new standard of irrationality. Such irrational acts cannot often be reasonably foreseen and even if they are, normal preventative measures may not be enough to deter the psychologically disturbed.¹⁹⁶

If a chain is only as strong as its weakest link, then preventative measures and EAPs may be only as effective as the weakest human element—the students. Some students will be apathetic, overly trusting, naïve, egocentric, or ignorant of risks; some may be intoxicated or on drugs.¹⁹⁷ Others will be sleep-deprived, resulting in the potential for great errors of judgment. A common security problem, which may easily

¹⁹³ For example, a University of Pennsylvania law student shot his neighbors, two Drexel University bio-engineering students, believing them to be terrorists. *Pennsylvania Law Student Accused of 'Terrorist' Shooting*, FOX NEWS (Feb. 2, 2007), <http://www.foxnews.com/story/2007/02/02/pennsylvania-law-school-student-accused-terrorist-shooting.html>. A former Iowa physics graduate student responded to losing a research prize by shooting and killing three professors, an associate vice president for academic affairs, and a staff member. Michel Marriott, *Gunman in Iowa Wrote of Plans in Five Letters*, N.Y. TIMES (Nov. 3, 1991), <http://www.nytimes.com/1991/11/03/us/gunman-in-iowa-wrote-of-plans-in-five-letters.html>. Additionally, a disappointed suitor shot and killed his ex-girlfriend and her roommate in their dorm room. *Nieswand v. Cornell Univ.*, 692 F. Supp. 1464, 1465–66 (N.D.N.Y. 1988).

¹⁹⁴ Brenda Goodman, *Defendant Offers Details of Jeep Attack at University*, N.Y. TIMES (Mar. 8, 2006), http://www.nytimes.com/2006/03/08/national/08carolina.html?_r=0.

¹⁹⁵ M. Alex Johnson, *Gunman Sent Package to NBC News*, NBC NEWS (Apr. 19, 2007, 10:13 AM), http://www.nbcnews.com/id/18195423/ns/us_news-crime_and_courts/t/gunman-sent-package-nbc-news/#.VpshSPkrJQJ.

¹⁹⁶ See *infra* Part I.D.2.

¹⁹⁷ See *Bradshaw v. Rawlings*, 612 F.2d 135, 136–37 (3d Cir. 1979) (deciding whether the college is liable for a student who became intoxicated and subsequently injured other students in his intoxicated state). The fact that college students will sometimes be deceived is illustrated by the case of Azia Kim who passed herself off as a Stanford University student and lived in the dorms for almost an entire academic year. Richard C. Paddock, *Stanford Imposter Also Joined Army ROTC*, L.A. TIMES (May 30, 2007), <http://articles.latimes.com/2007/may/30/local/me-kim30>. She even enrolled in the Army ROTC program at nearby Santa Clara University. *Id.*

defeat basic security, is when students leave doors propped open.¹⁹⁸ Simply, there are so many risks on college campuses for random acts of mass violence that mere articulation justifies the foreseeability of these incidents.

D. Proposed Preventative Measures

In response to these risks, schools should implement preventative measures, though no single approach can eliminate all the risks of random acts of mass violence. But measures can be implemented that will reduce the risks and facilitate response efforts. The academic world is not without tools to provide safety. Available options include pre-screening, response to psychological risks, and emergency planning. These alternatives are non-traditional, but fit squarely into the changing circumstances of today. As the nature of the underlying threat has changed, so too should the response efforts. Thankfully, the underlying strength of our common law legal tradition is its adaptability to changing circumstances.¹⁹⁹

Background checks and EAPs are two measures that fit squarely into fundamental principles of tort law. Part of the essence of negligence in tort law is Judge Learned Hand's famous formula for due care.²⁰⁰ He specified that the legal standard of reasonable care is a calculus of three factors: (1) the risk of an accident occurring; (2) the potential magnitude of harm should the risk materialize; and (3) the availability of alternatives that would prevent the accident.²⁰¹

The standard of care is flexible;²⁰² the duty of care rises as the risk of injury increases.²⁰³ Thus, care and risk are proportional.²⁰⁴ It is

¹⁹⁸ A well-known example is the tragic death of Jeanne Clery, who was killed in her dorm room by an attacker who gained access to the building through three propped-open doors which had been outfitted with automatic locks. Beverly Beyette, *Campus Crime Crusade: Howard and Connie Clery Lost Their Daughter to a Crazy Thief; Now They're Angry and Fighting Back*, L.A. TIMES (Aug. 10, 1989), articles.latimes.com/1989-08-10/news/vw-301_1_campus-crime-statistics.

¹⁹⁹ *Herter v. Mullen*, 53 N.E. 700, 701–02 (N.Y. 1899).

²⁰⁰ See Robert L. Rabin, *Past As Prelude: The Legacy Of Five Landmarks Of Twentieth-Century Injury Law For The Future Of Torts*, in *EXPLORING TORT LAW* 52, 72–73 (M. Stuart Madden ed., 2005) (discussing the context around and importance of the rule from *United States v. Carroll Towing, Co.*).

²⁰¹ *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

²⁰² See *Union Traction Co. v. Berry*, 121 N.E. 655, 658 (Ind. 1919) (explaining that the degrees of reasonable care vary based on the facts and circumstances of the individual case, and are ultimately for the jury to decide).

²⁰³ See *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 768 (La. 1999) (adopting a rule that the degree of reasonable care for businesses owners increases with the gravity of harm).

recognized that “[t]he reasonable person will exercise care commensurate with the danger.”²⁰⁵ As the renowned Prosser and Keeton stated:

[I]f the risk is an appreciable one, and the possible consequences are serious, the question is not one of mathematical probability alone. The odds may be a thousand to one that no train will at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train and the train to signal its approach As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.²⁰⁶

Even though routine security measures may be ineffective against the random mass murderer, colleges can minimize the risk of an attack, or at least its effects. Indeed, even when reasonable care has been exercised, accidents happen and tragedies like random acts of mass violence still occur.²⁰⁷ Reasonable care extends not only to minimizing the risk of an accident, but also to mitigating the impact should an incident materialize.²⁰⁸ Colleges must plan for all types of emergencies, including criminal activity, bio-terrorism, random acts of violence, natural disasters, and pandemics.²⁰⁹ Preventative measures specific to the risk of acts of mass violence include background checks and psychological screenings.

1. Background Checks

Commonly utilized computer screening techniques can be used to exclude students, faculty, and staff who may pose a high risk,²¹⁰ even if

²⁰⁴ See Denis Binder, *Act of God? Or Act of Man?: A Reappraisal of the Act of God Defense in Tort Law*, 15 REV. LITIG. 1, 30 n.151 (1996) [hereinafter Binder, *Act of God*] (listing cases that expressly mention proportionality).

²⁰⁵ DOBBS, *supra* note 49, at 281. Greater risks call for greater caution. *Id.* at 349.

²⁰⁶ W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS §31, at 171 (5th ed. 1984).

²⁰⁷ See Associated Press, *Despite Increased Security, School Shootings Continue*, PBS NEWSHOUR (Feb. 2, 2014, 11:52 AM), www.pbs.org/newshour/rundown/despite-increased-security-school-shootings-continue/ (noting that the increase in security measures at schools have not decreased the rate of school shootings).

²⁰⁸ See Leon Green, *Contributory Negligence and Proximate Cause*, 6 N.C. L. REV. 3, 6 (1927) (explaining that a plaintiff must use reasonable care to mitigate his damages).

²⁰⁹ One of the greatest potential risks to colleges is disease. A large mass of students clustered together in classrooms, dormitories, and cafeterias is a veritable Petri dish for disease. Colleges should have plans for coping with contagion, which may include diagnosis, quarantine, and evacuation.

²¹⁰ See Mary Beth Marklein, *‘An Idea Whose Time Has Come?’: Schools Increasingly Subjecting Applicants to Background Checks*, USA TODAY (Apr. 18, 2007), <http://usatoday30.usatoday.com/educate/college/arts/articles/20070415.htm> (reporting that campuses are using electronic databases to perform background checks on students seeking admission).

they do so at the risk of violating the civil rights of innocent persons.²¹¹ Colleges are increasingly requiring more background information from applicants as a means of screening faculty, staff, administrators, and students. For example, the Common Application, currently used by hundreds of colleges and universities, requires the applicant to disclose any conviction of a crime, even a misdemeanor, and any “school violation leading to probation, suspension, removal, dismissal, or expulsion.”²¹² Other schools have independently adopted similar requirements.²¹³ Background checks are also becoming required for “student athletes,” as universities are becoming more intolerant of inappropriate behavior by athletes.²¹⁴ These background checks are required even for faculty at some public universities, as well as for independent contractors.²¹⁵ Additionally, potential employers, including Chapman University, are increasingly requiring potential employees to agree to a background check.²¹⁶ The applicant may refuse, but at the risk of being denied employment.²¹⁷

Often, criminal checks can be performed very quickly through computers.²¹⁸ The Internet has changed everything on the knowledge

²¹¹ See Lindsay M. Potrafke, Comment, *Checking Up on Student-Athletes: A NCAA Regulation Requiring Criminal Background Checks*, 17 MARQ. SPORTS L. REV. 427, 440 (2006) (discussing the potential privacy issues of background checks for student athletes based on case law).

²¹² Laura Pappano, *Conduct Unbecoming*, N.Y. TIMES (Apr. 22, 2007), www.nytimes.com/2007/04/22/education/edlife/pappano.html?_r=0.

²¹³ See, e.g., *Background Check Requirements*, MARICOPA COMMUNITY C., <http://asa.maricopa.edu/departments/healthcare-education-at-the-maricopa-community/maricopanursing-programs/background-check-requirements> (last visited Mar. 11, 2016) (requiring background checks for all applicants to the nursing program); *General Requirements*, ADVENTIST U. HEALTH SERVS., <http://www.adu.edu/admissions/general-requirements> (last visited Feb. 21, 2016) (requiring background checks for prospective students).

²¹⁴ Potrafke, *supra* note 211, at 427–28.

²¹⁵ E.g., Lindsay Holcomb, *College Will Require Background Checks for Faculty, Staff This Fall*, THE PHOENIX (Apr. 9, 2015), swarthmorephoenix.com/2015/04/09/college-will-require-background-checks-for-faculty-staff-this-fall/.

²¹⁶ See CHAPMAN UNIV., STUDENT EMPLOYMENT HANDBOOK 8, https://www.chapman.edu/faculty-staff/human-resources/_files/student-employment-handbook.pdf (last visited Jan. 24, 2016) (noting a requirement of background checks for potential employees that may apply to students).

²¹⁷ See Adam Tanner, *This Woman Didn't Get Hired Because She Refused an Invasive Background Check*, FORBES (Oct. 8, 2014, 8:46 AM), <http://www.forbes.com/sites/adamtanner/2014/10/08/this-woman-didnt-get-hired-because-she-refused-an-invasive-job-background-check/#7f9de24c5623> (detailing that a professor's employment offer was withdrawn after she refused a background check).

²¹⁸ See Sarah Jacobsson Purewal, *How to Run an Online Background Check For Free*, PC WORLD, www.peworld.com/article/219593/how_to_do_an_online_background_check_for_free.html (last visited Mar. 11, 2016) (listing methods by which internet users can perform background checks themselves).

front. A simple Google search today can reveal much about an applicant's past. Even when juvenile records are sealed, a computer search can be informative.²¹⁹ However, what happens when something is uncovered, such as a misdemeanor marijuana conviction as an undergrad a few decades earlier, a shoplifting offense four years ago, or a more recent, but isolated, driving-while-intoxicated? Are these simply indicative of youthful indiscretions or do they display serious problems?²²⁰ These searches will only provide information. Ultimately, the institution has to decide the role and processes involved with the disclosed information, including whether the applicant is informed of the unfavorable information.²²¹

2. Psychological Screening

An additional preventative tool is psychological screening, though it must be noted that such screening raises many questions and is by no means completely reliable. Nevertheless, a process with protocols should be in place to identify those who pose a threat to themselves or others. A precarious balance exists between the privacy rights of the individual student and the security needs of society.²²² Several cases raise troublesome questions about the appropriateness of a college's actions in attempting to find that balance.²²³ Any protocol may well be tested in court, but well-thought-out protocols are more likely to survive judicial scrutiny than a seemingly arbitrary and capricious response.²²⁴

²¹⁹ Commonly used search tools today include Google, Yahoo, YouTube and Facebook. Others will undoubtedly arise with the rapid advances in technology.

²²⁰ See *Hallinan v. Comm. of Bar Exam'rs*, 421 P.2d 76, 89 (Cal. 1966) (recounting a history of frequent fights that were viewed as "youthful indiscretions" and not serious character flaws).

²²¹ In a sense, the discovery of information is analogous to the character and fitness investigations of the Bar admission for applicants, but applicants clearly have substantive and procedural due process rights in these proceedings. Brendalyn Burrell-Jones, *Bar Applicants: Are Their Lives Open Books?*, 21 J. LEGAL PROF. 153, 163 (1997). For an additional example of this balance, see Fair Credit Reporting Act, 15 U.S.C. §1681(b) (2012), which explains that the purpose of the Act is to meet consumer needs for information with attention to confidentiality.

²²² Lesley McBain, *Balancing Student Privacy, Campus Security, and Public Safety: Issues for Campus Leaders*, PERSPECTIVES 1–2 (2008), [http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/08_perspective_s\(1\).pdf](http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/08_perspective_s(1).pdf).

²²³ See *Barrett v. Claycomb*, 705 F.3d 315, 318–19 (8th Cir. 2013) (mandating a drug-testing policy for all students who attended a technical college); *R.W. v. Bd. of Regents*, 114 F. Supp. 3d 1260, 1268, 1282 (N.D. Ga. 2015) (challenging the actions of a university during a mandatory psychological screening process).

²²⁴ See *Barrett*, 705 F.3d at 322–23 (holding that because the policy was detailed and the students had advance notice, the university's interest in public safety outweighed the student's privacy interest).

Any psychological screening program has three attributes: (a) identification, (b) reporting, and (c) helping. Upon identification, a process should exist to report these risks to the university. Reporting should be based on observable behavior. While any student, professor, administrator, or staff should be able to report risky, observable activity, the reports should not be anonymous. Finally, the institution should have a program to provide assistance to those who need help and this program should have adequate staffing. This is one of the recommendations that came out of the Virginia Tech tragedy.²²⁵ However, many institutions are now simply expelling or otherwise excluding students perceived to be at-risk.²²⁶ This three-step process seems deceptively simple. The problem is that the process is based upon a large amount of medical uncertainty and judgment calls.

Psychoanalysis is often an art rather than a science.²²⁷ While psychotherapists may be liable for failing to warn a patient's victim that the patient posed a threat to the victim,²²⁸ such diagnoses are very

²²⁵ VA. TECH, WORKING GROUP REPORT ON THE INTERFACE BETWEEN VIRGINIA TECH COUNSELING SERVICES, ACADEMIC AFFAIRS, JUDICIAL AFFAIRS AND LEGAL SYSTEMS 2, 16 (2007) [hereinafter COUNSELING REPORT], http://www.vtnews.vt.edu/documents/2007-08-22_internal_communications.pdf.

²²⁶ Karin McAnaney, Note, *Finding the Proper Balance: Protecting Suicidal Students Without Harming Universities*, 94 VA. L. REV. 197, 217–18 (2008).

²²⁷ The imprecision of psychiatric counseling is shown by a North Carolina tragedy involving an emotionally disturbed student. In *Williamson v. Liptzin*, Wendell Williamson, a University of North Carolina law student, stopped receiving counseling and went off his medications eight months before going on a shooting spree in downtown Chapel Hill, killing two. 539 S.E.2d 313, 311–16 (N.C. Ct. App. 2000). At trial, the jury found him not guilty on grounds of insanity. *Id.* Williamson later filed suit against his psychiatrist for malpractice. *Id.* at 314–15. He had received six counseling sessions over ten weeks with a campus psychiatrist. *Id.* at 315. At the last session, the psychiatrist informed Williamson that he was leaving his position, but encouraged Williamson to continue counseling either back home or with student services. *Id.* at 315–16. He also gave Williamson a prescription for a thirty-day supply of psychiatric medication. *Id.* at 316. A jury awarded Williamson \$500,000. *Jury Awards Williamson \$500,000 in Malpractice Suit*, WRAL.com (Sept. 20, 1998), <http://www.wral.com/news/local/story/129071/>. But the court of appeals reversed, reasoning that the relationship between defendant's acts and Williamson's injuries did not satisfy the tort requirement of proximate cause. *Williamson*, 539 S.E.2d at 324.

²²⁸ *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976) (imposing a duty of reasonable care on the psychotherapist to protect third parties when the psychotherapist knows the patient's risk to others).

The liability theory from *Tarasoff* has been followed by other jurisdictions. *E.g.*, *Evans v. Morehead Clinic*, 749 S.W.2d 696, 699 (Ky. Ct. App. 1988) (holding that a therapist had a duty to protect potential victims); *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 673 N.E.2d 1311, 1328–29 (Ohio 1997) (holding that a psychotherapist had a duty to know the danger of a patient in outpatient therapy); *Emerich v. Phila. Ctr. for Human Dev., Inc.*, 720 A.2d 1032, 1040 (Pa. 1998) (finding a duty to protect third parties); *Peck v. Counseling Serv. of Addison Cty., Inc.*, 499 A.2d 422, 427 (Vt. 1985) (holding that where a therapist could reasonably foresee the risk his patient posed to potential victims, there was a duty to exercise reasonable care to protect the victim);

imprecise. Notably, Cho Seung-Hui, the Virginia Tech shooter, was once committed by a judge for observation and the commitment form specified that he was an imminent danger to himself or others.²²⁹ Yet he was released the next day with instructions to report for counseling, which he failed to do.²³⁰

Profiling assailants of random acts of mass violence could be a solution. But, a 2002 study sponsored by the Secret Service and the Department of Education studied thirty-seven school violence episodes from December 1974 through May 2, 2000,²³¹ and found that no accurate or useful profile existed for the perpetrators of these acts of school violence.²³² Psychological profiling is therefore not the most reliable option. Additionally, it creates two major risks. The first is that most of the students fitting a given profile will not in fact pose a threat of violence.²³³ The other risk is that students who do pose a threat may not share any characteristics of prior attackers and therefore go

Schuster v. Altenberg, 424 N.W.2d 159, 175 (Wis. 1988) (rejecting a per se rule denying liability for failing to warn once negligence and causation is established); see also Brian Ginsberg, *Tarasoff at Thirty: Victim's Knowledge Shrinks the Psychotherapist Duty to Warn and Protect*, 21 J. CONTEMP. HEALTH L. & POL'Y 1, 2 (2004) (noting that cases apply but limit *Tarasoff*, quelling controversy).

The Restatement of Torts also adopts the *Tarasoff* approach. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 41(b) (AM. LAW INST. 2015) (imposing third-party liability for mental-health professionals). The comments survey the literature since *Tarasoff* and conclude:

In sum, *Tarasoff* and its duty of care is not without costs, although they appear in retrospect to be considerably more confined than was initially predicted by the therapeutic community. More difficult to determine, as is always the case with events that are prevented from occurring, are its benefits in terms of protecting third parties from violence. Survey evidence does suggest that another benefit of *Tarasoff* is greater attention by therapists in their counseling relationships to potential violence.

Id. at § 41 cmt. g.

²²⁹ VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH 47 (2007), <https://governor.virginia.gov/media/3772/fullreport.pdf>.

²³⁰ *Id.* at 48–49.

²³¹ BRYAN VOSSEKUIL ET AL., U.S. SECRET SERV. & U.S. DEPT OF EDUC., THE FINAL REPORT AND FINDINGS OF THE SAFE SCHOOL INITIATIVE: IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES 3 (2004), <https://www2.ed.gov/admins/lead/safety/preventingattacksreport.pdf>.

²³² *Id.* at 11. The assailants in the study were all boys and all but two were current students. *Id.* at 15. However, a closer examination shows that a few attacks were by women: for example, a recent instance of a female assailant in such a shooting occurred on February 8, 2008, when a nursing student at Louisiana Technical College shot to death two fellow coeds and then killed herself. Jeremy Alford, *Student Kills 2 and Herself at a Louisiana College*, N.Y. TIMES, Feb. 9, 2008, § A, at 12.

²³³ ROBERT A. FEIN ET AL., U.S. SECRET SERV. & U.S. DEPT OF EDUC., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES 21 (2004), <https://www2.ed.gov/admins/lead/safety/threatassessmentguide.pdf>.

unidentified.²³⁴ Thus, overreaction is a possible consequence of psychological profiling or identification.

Treatment for depression and other psychological disorders is not a key indicator of violent behavior.²³⁵ Absent demonstrated signs of socially unacceptable or criminal behavior, a university should not exclude students who appear “weird” or “neurotic.” Indeed, excluding based on these characteristics of depression or anxiety could result in excluding a high percentage of the student body at many colleges.²³⁶ Furthermore, the overwhelming majority of students who have emotional problems or academic disappointments, are seeking counseling, or are even “off meds” do not pose a threat to themselves or others.²³⁷

Treatment is commonplace, as counseling offices at universities often have a high patient load that is prescribed psychiatric medication.²³⁸ This treatment is mostly for depression. One study by the American College Health Association reported that approximately fifteen percent of college students were diagnosed or had been diagnosed with

²³⁴ *Id.*

²³⁵ Jonathan M. Metzler & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 241 (2015), <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2014.302242>.

²³⁶ See Margarita Tartakovsky, *Depression and Anxiety Among College Students*, PSYCHCENTRAL, <http://psychcentral.com/lib/depression-and-anxiety-among-college-students> (last visited Jan. 24, 2016) (noting the increase in students seeking services for anxiety disorders).

²³⁷ Noam Shpancer, *Mental Health, College, and the Threat of Violence*, PSYCHOL. TODAY (July 30, 2012), <https://www.psychologytoday.com/blog/insight-therapy/201207/mental-health-college-and-the-threat-violence>.

²³⁸ A 2014 study reported that counseling centers saw eleven percent of eligible students. ROBERT P. GALLAGHER, UNIV. OF PITTSBURGH, NATIONAL SURVEY OF COLLEGE COUNSELING CENTERS 4 (2014), http://www.collegecounseling.org/wp-content/uploads/NCCCS2014_v2.pdf. Fourteen percent of all patients were given psychiatric evaluations and twenty-six percent were on psychotropic medication, up from twenty percent in 2003 and nine percent in 1994. *Id.* at 5. Eight percent of the clients were so seriously impaired that they either could not remain in school or could only do so with extensive psychiatric help. *Id.*

A 2006 study at the University of California reported that a quarter of the students seeking counseling services arrived on campus already taking psychoactive drugs. STUDENT MENTAL HEALTH COMM., UNIV. OF CAL., FINAL REPORT 3 (2006) [hereinafter STUDENT HEALTH REPORT], <http://regents.universityofcalifornia.edu/regmeet/sept06/303attach.pdf>.

Studies also show that the caseload is increasing on campuses. From 1995 to 2000, the students seeking counseling services rose forty percent at Columbia University and fifty percent at M.I.T. *Id.* From 1996 to 2002, the increase was fifty-five percent at the University of Cincinnati. *Id.* The Director of Counseling and Psychological Services at Stanford says his service sees about ten percent of the student body each year. Tamar Lewin, *Laws Limit Options when a Student is Mentally Ill*, N.Y. TIMES (Apr. 19, 2007), http://www.nytimes.com/2007/04/19/us/19protocol.html?_r=0.

depression.²³⁹ Another study found that almost one half of all college students were so depressed that they had trouble functioning.²⁴⁰ Indeed, if my former university is any indication, graduate students account for a disproportionately high percentage of those patients who struggle with depression.²⁴¹

Despite these difficulties, a useful component of psychological screening for preventative measures is following up on student treatment and verifying attendance at appointments. This issue is related to instances of depression, and absent constant observation, psychotherapists may be unaware that a patient has stopped taking his prescribed medications; patients missing appointments are scarcely a rare event. For example, one of the major problems uncovered in the Virginia Tech tragedy was that while the assailant's weirdness and scary behavior were well known,²⁴² not one person at Virginia Tech "was fully aware of the extent of the concern about the individual."²⁴³ Even though he was committed for observation, the consulting psychiatrist felt he did not pose a threat and even recommended his release and follow-up counseling.²⁴⁴ But no one at Virginia Tech followed up on the counseling because they did not believe it was their responsibility.²⁴⁵ In response to the resulting violent incident, an internal review recommended the creation of a threat assessment team, which required inclusion of a university law enforcement officer and someone from the Office of Services for Students with Disabilities.²⁴⁶ The team would factually construct a picture of individuals who posed a risk to themselves or

²³⁹ The Am. Coll. Health Assoc., *American College Health Association National College Health Assessment Spring 2006 Reference Group Data Report (Abridged)*, 55 J. AM. C. HEALTH 195, 204 (2007).

²⁴⁰ STUDENT HEALTH REPORT, *supra* note 238, at app. E (detailing a 2003 study by the American College Health Association).

²⁴¹ A Berkeley study of 3,100 graduate students found that approximately fifty percent "experienced an emotional or stress-related problem that significantly affected their well-being and/or academic performance." *Id.* at 5. Almost ten percent had considered suicide in the preceding twelve months. *Id.* at app. E.

²⁴² Two female students filed complaints about Cho, but did not press charges. VA. TECH REVIEW PANEL, *supra* note 229, at 22–23. His English professors were sufficiently concerned that they discussed him. *Id.* at 22, 24.

²⁴³ COUNSELING REPORT, *supra* note 225, at 11.

²⁴⁴ VA. TECH REVIEW PANEL, *supra* note 229, at 23.

²⁴⁵ Claire Sanderson, *April 16 Induces Change at Cook Counseling*, COLLEGIATE TIMES (Mar. 4, 2010, 12:00 AM), http://www.collegiatetimes.com/news/virginia_tech/april-induces-change-at-cook-counseling/article_feOI0bl4-236b-56ab-al33-d29d983cc0ff.html.

²⁴⁶ COUNSELING REPORT, *supra* note 225, at 15–16 (discussing the permanent membership of the Care Team and the suggested overlap with the Threat Assessment Team).

others and ensure follow-up measures for campus safety.²⁴⁷ This recommendation should serve as a model for other colleges.

A separate issue is that students with symptoms of mental illness may not choose to seek treatment. A survey of 2,785 students at the University of Michigan revealed that anywhere from thirty-seven to eighty-four percent of students with symptoms of depressive or anxiety disorder did not seek treatment, even though the university offered free mental health and counseling services.²⁴⁸ While seventy-two percent of students who exhibited signs of major depression recognized they needed help, only ten percent of the surveyed students received therapy.²⁴⁹

In spite of its limitations and risks, institutions are increasingly relying upon psychological screening and diagnosis to suspend or expel students who may appear to pose a threat to themselves or others.²⁵⁰ In essence, schools are adopting and enforcing mandatory-leave policies.²⁵¹ This is not a proper way to help students. For example, a sophomore checked himself into George Washington University Hospital at 2:00 a.m. because he was depressed and considered suicide.²⁵² The university's response was to give him notice that his "endangering behavior" violated the student conduct code and that unless he withdrew, he faced suspension or expulsion.²⁵³ While in treatment, the university banned him from campus.²⁵⁴ Similarly, another student was forced to withdraw from New York University because of depression.²⁵⁵

²⁴⁷ *Id.* at 15–16.

²⁴⁸ *Students With Symptoms of Mental Illness Often Don't Seek Help*, MICH. NEWS (July 30, 2007), <http://ns.umich.edu/new/releases/5913>.

²⁴⁹ *Id.*

²⁵⁰ See Kate J.M. Baker, *How Colleges Flunk Mental Health*, NEWSWEEK (Feb. 11, 2014, 11:13 AM), <http://www.newsweek.com/2014/02/14/how-colleges-flunk-mental-health-245492.html> (discussing the story of a student who was threatened with expulsion from her university after she intentionally cut herself in the shower).

²⁵¹ See Karen W. Arenson, *Worried Colleges Step Up Efforts Over Suicide*, N.Y. TIMES (Dec. 3, 2004), <http://www.nytimes.com/2004/12/03/education/worried-colleges-step-up-efforts-over-suicide.html> (discussing the methods colleges are taking to get students into treatment, including withdrawal); Rob Capriccioso, *Counseling Crisis*, INSIDE HIGHER ED (Mar. 13, 2006), <https://www.insidehighered.com/news/2006/03/13/counseling> (detailing a number of students who have been suspended or expelled after seeking treatment for mental illness).

²⁵² Susan Kinzie, *GWU Suit Prompts Questions of Liability*, WASH. POST, Mar. 10, 2006, at A01.

²⁵³ *Id.*

²⁵⁴ *Id.* A settlement on the issue was reached after the student sued but the terms were not revealed. *GWU Settles Lawsuit Brought by Student Barred for Depression*, WASH. POST (Nov. 1, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/31/AR2006103101193.html>.

²⁵⁵ A freshman spoke about suicidal thoughts to a graduate student at a counseling center; the freshman was subsequently suspended involuntarily while seeking treatment.

Rather than summarily excluding a student from campus, protocols should be in place to determine the appropriate course of action, such as “Interim Suspension, Administrative Disenrollment, Enrollment Denial for Medical Reasons, Disenrollment from a Course[, as well as] Code and Judicial Sanctions.”²⁵⁶ Suspension or expulsion also “create[s] the risk of triggering either an immediate or a delayed violent response unless . . . [they are also] coupled with containment and support.”²⁵⁷

The fact remains that psychological screening is not a simple matter. In addition to the uncertainty of psychological diagnosis and identification, it raises issues of privacy,²⁵⁸ of reporting, and of helping students. Colleges struggle with the implications of students who receive treatment, fail to follow up with treatment, fail to report at all, or face an over-responding university. What is certain is that after the tragic shootings at Virginia Tech, colleges will be much more aggressive in asking potentially violent and suicidal students to leave the school, either temporarily or permanently. But if schools are to implement and respond to psychological screening, they should also have measures to ensure compliance.

II. THE RESPONSE EFFORT

As discussed, a college’s duty to anticipate, foresee, and act reasonably in light of the many risks of campus violence includes the preparation of a viable EAP. Such preparation is just a normal advance in the duties embedded in the common law. But the duty of reasonable care includes both anticipating foreseeable risks and taking reasonable steps to either forestall or minimize their effects should the risk materialize.²⁵⁹

Depending upon their geographical location, colleges must contend with blizzards, earthquakes, fires and wildfires, flooding, hurricanes, ice storms, lightning, power outages, tornadoes, and windstorms. “[T]he defendant who can reasonably be expected to foresee and act upon the danger of a natural force is negligent if he fails to take that force into

Sadia Latifi, *Beyond Finger-Pointing: Addressing College Suicide*, COLUMB. DAILY SPECTATOR (Sept. 18, 2006, 12:00 AM), <http://columbiaspectator.com/?q=node/20823/print>.

²⁵⁶ COUNSELING REPORT, *supra* note 225, at 21. Protocols may already exist for hospitalization, including involuntary hospitalization, as illustrated by the overnight commitment of Cho at Virginia Tech.

²⁵⁷ FEIN ET AL., *supra* note 233, at 64–65.

²⁵⁸ McBain, *supra* note 222, at 1 (noting the issue of disclosing students’ mental health issues and the veritable alphabet soup of federal regulations that affect campus policies and procedures).

²⁵⁹ David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Measures and Precautions*, 36 ARIZ. L. REV. 357, 373 (1994); Green, *supra* note 208, at 6.

account.”²⁶⁰ The reasonable foreseeability of these occurrences creates a duty to employ reasonable care to reduce the risks of a disaster.²⁶¹ The duty of reasonable care extends to all who could be foreseeably injured by the negligence, and not just those in a contractual relationship with the defendant.²⁶² Liability thus extends to any person who could reasonably foresee a risk but fail to exercise reasonable care.²⁶³ For example, where excessive precipitation may result in the overtopping of a dam, the duty of reasonable care may necessitate that the dam owner design the dam with an emergency spillway.²⁶⁴ It may also include the preparation of an EAP with provisions to warn the threatened population.²⁶⁵

The corollary applies to violence on campus: campus emergencies involving criminal acts, suicides, and acts of mass violence and terrorism are just as foreseeable risks as forces of nature.²⁶⁶ While prevention of the incident may not always be reasonably possible, reasonable efforts should be made to minimize the foreseeable consequences. To extrapolate the principle, one high school had a duty at a school-sponsored soccer game to “take appropriate post-injury efforts to avoid or mitigate further aggravation of his injury.”²⁶⁷ Background checks and psychological screening may reduce internal threats from the campus community, but they do not eliminate all risks, because threats also originate from outside the institution; threats may emerge from alumni, parents, and those with no discernible link to the campus.²⁶⁸ The wide variety of assailants and the varying venues make it difficult to

²⁶⁰ DOBBS, *supra* note 49, at 365; *see also* Binder, *Act of God*, *supra* note 204, at 29 n.148 (detailing cases that find defendants liable for negligence after foreseeable forces of nature).

²⁶¹ Indeed, an OSHA guideline recognizes that EAPs “should address emergencies that [an] employer may reasonably expect in the workplace,” including “fire; toxic chemical releases; hurricanes; tornadoes; blizzards; [and] floods.” 29 C.F.R. § 1910.38(e) app. (2015).

²⁶² Binder, *Emergency Action Plans*, *supra* note 38, at 796 n.25 (listing cases where courts found negligence and a duty to third parties).

²⁶³ *See* Barnes & McCool, *supra* note 259, at 373 (explaining that liability arises when reasonable care is not exercised with foreseeable risks).

²⁶⁴ *See* Barr v. Game, Fish & Parks Comm’n, 497 P.2d 340, 343–44 (Colo. App. 1972) (imposing liability for faulty dam construction when a flood was foreseeable).

²⁶⁵ *See* Coates v. United States, 612 F. Supp. 592, 595 (C.D. Ill. 1985) (finding liability for several reasons, including the absence of a plan in cases of emergencies).

²⁶⁶ *See* Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1050 (Me. 2001) (holding a sexual assault on campus was foreseeable, demonstrated by the university’s security measures); *see also* TEXAS A&M UNIV., 12TH MAN EMERGENCY PLAYBOOK 3 (2014), <https://www.tamu.edu/emergency/documents/12thManEmergencyPlaybook.pdf> (outlining the University’s action plan for emergencies, which include an active shooter, a bomb threat, a fire, chemical spills, and natural disasters).

²⁶⁷ *Limones v. Sch. Dist. of Lee Cty.*, 161 So. 3d 384, 391 (Fla. 2015).

²⁶⁸ Eileen Weisenbach Keller et al., *A Model for Assessment and Mitigation of Threats on the College Campus*, 49 J. EDUC. ADMIN. 76, 76 (2011); *supra* Part I.D.

completely secure a campus in advance. The impossibility of forestalling all threats places emphasis on the response efforts, so we must therefore look to reaction times and response efforts.

A. *Emergency Action Plans*

Case law on emergency action planning is still developing, but court decisions so far present a strong case for institutions to prepare EAPs for foreseeable events. In essence, these germinal cases are developing a tort of negligent failure to plan.²⁶⁹

An example of how not to respond occurred at the Maharishi University of Management in Fairfield, Iowa. The incident began when a student attacked another student during class, stabbing him in the face and neck with a pen.²⁷⁰ This initial attack ended when others came to the victim's aid, and the attacker was placed in the custody of a dean who took the attacker back to his apartment.²⁷¹ Yet the dean did not keep a vigilant watch on the attacker, as he was able to leave the apartment.²⁷² Even though the dean eventually located the attacker in the dining hall, he allowed the attacker to socialize with the other students.²⁷³ Suddenly the attacker engaged another student, pulled out a knife from his coat, and stabbed the student to death.²⁷⁴ Allowing a violence-prone student to socialize with other students after an attack was not a proper response.

Similarly, failing to have an EAP has legal consequences, as demonstrated by the failure of Lawn Lake Dam.²⁷⁵ The dam sat in the Colorado Rocky Mountains on land owned by the National Park Service.²⁷⁶ The dam had failed before 6:30 a.m. and within twenty minutes a ranger was sent to warn campers.²⁷⁷ The ranger proceeded in a haphazard manner to warn some of the campers, but not all.²⁷⁸ The flood wave resulted in loss of life and property damage.²⁷⁹ The district

²⁶⁹ See *Bluestone Energy Design, Inc. v. Fed. Energy Regulatory Comm'n*, 74 F.3d 1288, 1293 (D.C. Cir. 1996) (holding that a company could be fined for not filing an updated EAP); *Blow v. DSM Pharm., Inc.*, 678 S.E.2d 245, 249–50 (N.C. Ct. App. 2009) (noting a company's citations for an inadequate EAP though affirming the inadequacy of the plaintiff's pleadings); *Engle v. W. Penn Power Co.*, 598 A.2d 290, 296 (Pa. Super. Ct. 1991) (discussing whether an adequate flood plan existed despite public assurances).

²⁷⁰ *Butler v. Maharishi Univ. of Mgmt.*, 460 F. Supp. 2d 1030, 1032 (S.D. Iowa 2006).

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Coates v. United States*, 612 F. Supp. 592, 594 (C.D. Ill. 1985).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ See *id.* at 595 (noting the spread of the flood waters and death of Terry Coates).

court awarded \$480,000 to the family of a deceased camper because of the government's negligence.²⁸⁰ The government had a duty to prepare an EAP as an exercise of reasonable care because, according to the court, "[i]t is imperative to have a plan in place[:] . . . in such situations there is little time for reflection. Priorities should be established before an emergency arises; otherwise personnel are unprepared to deal with them."²⁸¹

In one instance of mass violence, the failure to plan for emergencies was shown by litigation involving the 1993 World Trade Center bombing.²⁸² On February 26, 1993, a truck bomb exploded in the underground public parking garage of the World Trade Center, killing six and injuring many more.²⁸³ The Port Authority of New York and New Jersey had earlier created a Terrorist Planning and Intelligence Section, which submitted a report in 1984.²⁸⁴ Other reports, stories, and recommendations followed.²⁸⁵ In these plans, the vulnerability of the parking garage received several recommendations for improved security, but these recommendations were not implemented.²⁸⁶ While the victims asserted negligence, the Port Authority claimed a lack of foreseeability for the bombing as a matter of law.²⁸⁷ The court noted the existence of a duty to provide "minimal security precautions against reasonably foreseeable criminal acts by third parties."²⁸⁸ Foreseeability comprised both "what the landlord actually knew, as well as what it reasonably should have known,"²⁸⁹ a variation of the "known or reasonably should have known" standard for negligence. In light of that foreseeability, the proper level of safety measures was a question of fact.²⁹⁰ The court focused the inquiry of foreseeability "on what risks were reasonably to be

²⁸⁰ *Id.* at 595, 597 (finding failures in ranger presence and patrol, failure to warn campers, and failure to have a response plan for emergencies).

²⁸¹ *Id.* at 596. A class action over an oil spill after Hurricane Katrina also evaluated the adequacy of an EAP. *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 601, 604 (E.D. La. 2006). The case was ultimately settled for \$330 million. *\$330 Million Settlement Deal in Katrina Oil Spill*, ENVIRONMENT ON NBCNEWS.COM, http://www.nbcnews.com/id/15004868/ns/us_news-environment/t/million-settlement-deal-katrina-oil-spill/#. VuYGqObfS9Y (last updated Sept. 25, 2006).

²⁸² *In re World Trade Ctr. Bombing Litig.*, 776 N.Y.S.2d 713, 736 (Sup. Ct. 2004), *aff'd* *Nash v. Port Auth. of N.Y. & N.J.*, 856 N.Y.S.2d 583, 598–99 (App. Div. 2008), *rev'd on other grounds*, *In re World Trade Ctr. Bombing Litig.*, 957 N.E.2d 733, 751 (N.Y. 2011).

²⁸³ *Id.* at 716.

²⁸⁴ *Id.* at 718.

²⁸⁵ *Id.* at 718–19.

²⁸⁶ *Id.* at 720–21.

²⁸⁷ *Id.* at 723–24.

²⁸⁸ *Id.* at 734.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

perceived.”²⁹¹ The Port Authority’s own acts, seeking reports and recommendations, demonstrated the perceived risk regarding a terrorist attack on the World Trade Center.²⁹² The Authority had a legal duty to exercise reasonable care to maintain the premises in a reasonably safe condition.²⁹³

The decision was affirmed on appeal.²⁹⁴ The Port Authority did not argue that the blast was unforeseeable, but that as a governmental entity it had no legally enforceable duty to implement any of the recommendations for action.²⁹⁵ The court viewed the Port Authority as a landlord that had a duty “to meet its basic proprietary obligation to its commercial tenants and invitees [by] reasonably . . . secur[ing] its premises, specifically its public parking garage, against foreseeable criminal intrusion.”²⁹⁶ And it rejected the prior-similar-instances test when grounds exist “to infer that the owner was or should have been aware of a real risk.”²⁹⁷ This risk was shown by the Authority’s own studies and reports, including a security consultation by Scotland Yard.²⁹⁸ The relevant criterion is therefore notice, not history, especially in the case of “a distinctly higher order of magnitude than the risks typically at issue in premises security.”²⁹⁹ The opinion essentially merged the balancing factors in Learned Hand’s famous equation with the *Palsgraf* standard of duty.³⁰⁰

In light of these examples, the response effort may arguably be the key to minimizing the many risks of campus violence. Critical factors include (a) preparation of the response plan; (b) periodically updating and testing the plan; (c) communication while executing the plan; and (d) flexibility when an emergency unfolds. An unplanned, uncoordinated

²⁹¹ *Id.* at 735.

²⁹² *Id.* at 736.

²⁹³ *See id.* (stating that a landowner has a duty of reasonable care to maintain his premises in reasonably safe condition).

²⁹⁴ *Nash v. Port Auth. of N.Y. & N.J.*, 856 N.Y.S.2d 583, 598–99 (App. Div. 2008), *rev’d on other grounds, In re World Trade Ctr. Bombing Litig.*, 957 N.E.2d 733, 751 (N.Y. 2011).

²⁹⁵ *Id.* at 586–87.

²⁹⁶ *Id.* at 587–88.

²⁹⁷ *Id.* at 588.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 589.

³⁰⁰ *Id.* at 591 (stating that the duty depends on the nature of the risk, the burden of precautions, and whether the risk was reasonably foreseeable); *see United States v. Carroll Towing Co.*, 159 F.2d 169, 170, 173 (2d Cir. 1947) (establishing that a duty exists if the probability of injury times the gravity of injury is greater than “the burden of adequate precautions”); *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928) (finding a duty exists if the risk is reasonably perceived).

response may succeed, but the odds are against it. The incident at Virginia Tech is illustrative and offers various examples.

1. Implementation of the Plan

A college may be caught totally unaware at the onset of an emergency. One of the hardest tasks in an emergency, as shown by the Virginia Tech tragedy, is to identify the nature of the threat as it is rapidly unfolding.³⁰¹ In addition, the onset of a major emergency may often be met with disbelief followed rapidly by chaos, confusion, panic, rumors, and then finally, indecision and paralysis.³⁰² A major problem, especially at the beginning of the emergency, is information assessment. It is crucial to cut through the fog, assess the situation, prioritize the response efforts, and marshal, deploy, and track critical resources.³⁰³ Still, the response effort, guided by the EAP, should be implemented as soon as possible, preferably within minutes. Response efforts may often involve difficult judgment calls in rapidly unfolding, confusing scenarios where time is of the essence. An EAP may facilitate these efforts.

2. Updating the Plan

An outdated plan may be worse than useless; it might provide a false sense of security as well as result in a waste of time during an emergency and the exercise of avoidable futile actions. The plans should be revised and updated at least annually.³⁰⁴ The ability to disseminate the plan is vital. Thus, an initial step is to periodically verify and update critical contact numbers.³⁰⁵ For example, Virginia Tech discovered a lack of emergency contact information, especially for students—some

³⁰¹ See *Timeline: How the Virginia Tech Shootings Unfolded*, NPR (Apr. 17, 2007, 7:24 PM), <http://www.npr.org/templates/story/story.php?storyId=9636137> (detailing the emails, meetings, and responses, some conflicting, during the violence at Virginia Tech).

³⁰² See VA. TECH REVIEW PANEL, *supra* note 229, at 81, 103, 118 (stating that the response of authorities to the Virginia Tech tragedy produced misinformation, rumors, panic, and confusion).

³⁰³ For example, police at Virginia Tech initially thought the first two shootings at 7:00 a.m. in a dorm were a domestic violence incident, so they spent their initial efforts tracking down and questioning an irrelevant person of interest. *Timeline: How the Virginia Tech Shootings Unfolded*, *supra* note 301.

³⁰⁴ See VA. TECH, INFORMATION AND COMMUNICATIONS INFRASTRUCTURE: CONFIDENTIAL PRESIDENTIAL WORKING PAPER app. at 62 (2007) [hereinafter COMMUNICATIONS INFRASTRUCTURE REPORT], http://www.vtnews.vt.edu/documents/2007-08-22_communications_infrastructure.pdf (suggesting regular review and update of emergency response process to university contacts such as call centers and help desks).

³⁰⁵ See VA. TECH REVIEW PANEL, *supra* note 229, at 15–16 (stating that Virginia Tech now encourages its students to provide their mobile phone numbers to disseminate emergency information). These emergency contacts can be utilized in the post-incident period as well.

information was missing or unreliable.³⁰⁶ Also unavailable were the parents' contact information and home addresses.³⁰⁷ While large-scale or campus-wide exercises may be impractical on a large campus, Virginia Tech utilizes a variety of a common alternatives such as seminars, table-top exercises, and drills for designing, planning, and executing an EAP.³⁰⁸

3. Communications

A critical constraint for the success of an EAP is accessibility, coupled with familiarity of the plan. The EAP should not be restricted to campus security and public safety officers. The broader community, as well as the campus community itself, is at risk and should be informed about what to do in an emergency. A prerequisite is that they must receive timely notice of the emergency. Failure either to prepare an EAP or to have it readily available may well lead to liability and convey a message of indifference.³⁰⁹ A college's EAP should not be a state secret.³¹⁰

As is often the case in a major emergency, cell phone and land line systems become congested, resulting in forced blockages. During the shooting, Virginia Tech experienced a large volume of calls and increased demand on its information technology resources.³¹¹ Other problems arose in the call center established in the immediate aftermath of the tragedy; some of the operators lacked immediate access to the needed information to answer callers' questions.³¹² In addition, as is possible with any diverse student body, many of the incoming calls were not in English, causing a communication problem.³¹³

³⁰⁶ COMMUNICATIONS REPORT, *supra* note 304, app. at 72.

³⁰⁷ *Id.*

³⁰⁸ VA. TECH, CRISIS AND EMERGENCY MANAGEMENT PLAN 24 (2012), http://www.bov.vt.edu/minutes/12-03-26minutes/attach_f_03-26-12.pdf.

³⁰⁹ See *Trepanier v. Ryan*, No. 00 C 2393, 2003 WL 21209832, at *1-2 (N.D. Ill. May 21, 2003) (noting potential liability for the Illinois Governor and Cook County officials in failing to develop an environmental emergency response plan and make it publicly available). Obviously, some facilities, especially biological, chemical, or nuclear, may need secrecy because of potential security concerns, but in general secrecy is an enemy of an effective response.

³¹⁰ For example, Virginia requires every public institution of higher education in the state to have an emergency management plan and certify it in writing to the Department of Emergency Management annually. VA. CODE ANN. § 23-9.2:9 (LexisNexis, LEXIS through 2015 Reg. Sess.).

³¹¹ COMMUNICATIONS REPORT, *supra* note 304, at 1-2 (noting the strain on the Virginia Tech system during the emergency). Prior to April 16, 2007, the largest single *monthly* demand on the website was 455 gigabytes, and on the day of the shooting, demand reached 432 gigabytes in *one day*. *Id.* at 9.

³¹² *Id.* app. at 79.

³¹³ *Id.* at 14.

Today's generation of students live on the internet. Therefore, access to the EAPs should be readily available online. Virginia Tech had prepared a backup, bare-bones homepage and it quickly substituted this page for the regular homepage.³¹⁴ This alternative homepage is a simple contingency step that can be easily maintained at any institution.

Compatibility of communication systems across emergency responders is also important. At Virginia Tech, a compatibility issue existed in the dispatch center where separate headphones had to be used for the 911 emergency calls and the radio communications with responders.³¹⁵ Police, fire, and rescue responders from the responding agencies used incompatible communications systems.³¹⁶ Further, the equipment did not always work for first responders and some structures, including Norris Hall, where most of the shootings occurred, had cell phone dead zones.³¹⁷ Therefore, emergency responders should use a single radio frequency, and dispatch should use a single headset to monitor both the radio frequency and phone calls.³¹⁸

To better convey urgent messages in the future, Virginia Tech is considering installing internal message boards in classrooms and external message boards at the entrance to the campus.³¹⁹ Multiple means exist to notify the campus community. These include emails, instant messaging, text messaging, website postings, podcasting, public address announcements, radio announcements, mass media, personal contacts, subscriber message systems, voicemail, and dedicated cell phone calling and messaging. As for the latter, reverse emergency calls were effective in the 2007 Southern California wildfires to warn residents to evacuate.³²⁰ Information releases should be timely, accurate,

³¹⁴ *Id.* app. at 13.

³¹⁵ *Id.* app. at 38.

³¹⁶ *Id.* app. at 21–22. The responding agencies used incompatible VHF, UHF, and 800MHz radio bandwidths. *Id.* For example, the Blacksburg Fire Department provided the command trailer and used VHF, as did the Virginia Tech Police, but the Blacksburg Police used 800MHz. *Id.* app. at 22–23.

³¹⁷ *Id.* app. at 43.

³¹⁸ The Virginia Tech. Communications Report even makes the recommendation about a single headset. *Id.* app. at 40.

³¹⁹ SECURITY INFRASTRUCTURE REPORT, *supra* note 34, at 32.

³²⁰ Steve Hymon & Duke Helfand, *O.C., L.A. County Lack a Reverse-911 System*, L.A. TIMES (Oct. 25, 2007), <http://www.latimes.com/local/la-me-reverse25oct25-story.html>. An automated phone system, commonly referred to today as a “reverse 911,” was used by the city of San Diego to contact 85,792 homes, providing warning or evacuation calls during the wildfires. *Id.* Separate calls were made by the San Diego Sheriff's Office and San Diego County to reach an additional 337,000 and 171,919 homes respectively. *Id.* Reverse 911 systems are increasingly being adopted to provide timely information. *Id.*

and succinct.³²¹ A simple, but effective message might be along the lines of: “A shooting has occurred in or at [BUILDING] at [TIME]. The current location of the attacker is unknown. Please stay in place and secure your room until further notice.” These communication methods are just a few in a long list of measures colleges should implement.

4. Flexibility

While flexibility may seem the antithesis of planning, the reality is that hardly any incident will unfold as planned. The proverbial fog of war equally applies to domestic emergencies. As President Dwight D. Eisenhower once said, “[p]lans are worthless, but planning is everything.”³²² A different approach is to learn lessons from prior incidents. The tragedies of Columbine and Virginia Tech have led, and will lead, to a reassessment of response efforts.

The perils of strictly following a plan when it is no longer applicable are demonstrated by the tragic shootings at Columbine High School in Colorado on April 20, 1999.³²³ Two students, Eric Harris and Dylan Klebold, started shooting outside the school around 11:17 a.m. and then moved into the school.³²⁴ They committed suicide around 12:15 p.m., which became known to authorities by 12:30 p.m.³²⁵ The tragic toll was twelve students and one teacher killed, and dozens wounded.³²⁶

The first 911 calls came in at 11:21 a.m. and law enforcement officers from the area responded.³²⁷ A teacher, William Sanders, was wounded at 11:40 a.m. and collapsed in Science Room Three of the high school.³²⁸ Constant phone calls detailing the declining health status of Sanders were made to the emergency operators.³²⁹ But not until 4:00 p.m. did the S.W.A.T. team enter Science Room Three.³³⁰ Early in the incident, a command post, staging area, and perimeter had been

³²¹ THROWER ET AL., *supra* note 10, at 5. Timely warnings may, depending on the nature of the emergency, provide time to seek shelter, evacuate, or lockdown. The duty to warn should extend to all those reasonably at risk.

³²² Dwight D. Eisenhower, President, Remarks at the National Defense Executive Reserve Conference (Nov. 14, 1957) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=10951&st=&st1=>).

³²³ Sanders v. Bd. of Cty. Comm’rs, 192 F. Supp. 2d 1094, 1102–03 (D. Colo. 2001).

³²⁴ *Id.* at 1100.

³²⁵ *Id.* at 1102.

³²⁶ *School Shootings Since Columbine High Massacre*, DENVER POST (Dec. 13, 2013, 5:50 PM), http://www.denverpost.com/news/ci_24721063/school-shootings-since-columbine-high-massacre.

³²⁷ Sanders, 192 F. Supp. 2d at 1101.

³²⁸ *Id.*

³²⁹ *Id.* at 1102.

³³⁰ *Id.* at 1103.

established.³³¹ Multiple orders were issued to not permit access to or egress from the facility; the effect was to preclude any escape or rescue efforts.³³² The sheriff's office erroneously deemed the shooting as a situation involving hostages, as opposed to one of high risk.³³³ S.W.A.T. teams conducted a methodical, room-by-room sweep with Science Room Three in the last area reached.³³⁴ At that point, they ordered everyone to leave the room, including those applying pressure to the teacher's wounds—Mr. Sanders's wounds, "heretofore survivable . . . bec[a]me fatal."³³⁵

The resulting lawsuit involved issues of constitutional violations and governmental immunity.³³⁶ The court decided that the actions of the first responders were protected during the first seventy-five minutes of the attack because the "interests of public and officer safety outweighed the rescue needs of the students and staff."³³⁷ Upon learning of the death of the assailants, a time to make deliberate decisions ensued for the responders.³³⁸ The awareness of the teacher's condition and location, coupled with the affirmative actions of blocking access and rescue, displayed a deliberate indifference to the teacher's predicament.³³⁹ Such acts were viewed as reckless and conscience-shocking.³⁴⁰ The lawsuit was subsequently settled for \$1,500,000.³⁴¹ Many schools' response procedures changed after this tragedy.³⁴²

³³¹ *Id.* at 1101, 1112.

³³² *Id.* at 1102–03.

³³³ *Id.* at 1102.

³³⁴ *Id.* at 1103.

³³⁵ *Id.*

³³⁶ *Id.* at 1103–04.

³³⁷ *Id.* at 1114. The tragedy was viewed as a "volatile emergency situation the scope and nature of which was . . . unprecedented." *Ireland v. Jefferson Cty. Sheriff's Dep't*, 193 F. Supp. 2d 1201, 1221 (D. Colo. 2002).

³³⁸ *Sanders*, 192 F. Supp. 2d at 1115.

³³⁹ *Id.* The court distinguished between "emergency action and actions taken after opportunity for reflection," giving deference to decisions in emergency situations. *Id.* at 1114. Calculated indifference may shock the conscience when there is time to deliberate about decisions. *Id.*

³⁴⁰ *Id.* at 1115.

³⁴¹ Karen Abbott & Charley Able, *Sanders Settles Columbine Suit—Daughter of Slain Teacher Agrees to \$1.5 Million Questions Won't Be Answered*, ROCKY MTN. NEWS, Aug. 21, 2002, at 4A.

³⁴² See Manny Gonzales et al., *Schools Take Steps for Security*, ROCKY MTN. NEWS, Aug. 22, 1999, at 36A (noting that after Columbine, many Colorado school districts tightened security measures). Law enforcement training has also changed since Columbine. John Ingold & Marilyn Robinson, *Columbine Transforms Police Tactics*, DENVER POST, Mar. 7, 2001, at A-08.

B. Lessons Learned

Some effective changes to protect against random acts of mass violence can be very low-tech. For example, prior to the second round of shootings at Virginia Tech, the perpetrator chain-locked the main doors to Norris Hall; officers had to shotgun open the doors.³⁴³ Recommendations in the aftermath included changing the locks and accompanying hardware to preclude any future chaining.³⁴⁴ In addition, the locking mechanism on the classroom doors should be changed so as to be lockable from the inside, and installing computer-controlled locking systems should be installed to allow police to lock interior and exterior doors.³⁴⁵

The initial phase of an incident will often be obscured by the proverbial fog of war. At Virginia Tech, initial reports were that it might have simply been a version of a domestic dispute because the victim was female and was last seen with her boyfriend, who owned a gun.³⁴⁶ No broader threat to the greater campus community was perceived, and campus-wide warnings were delayed for two hours.³⁴⁷ If it were a domestic dispute, then broad warnings would have been viewed as an overreaction.³⁴⁸

The decision to close a campus is a momentous act—one which should not be taken casually or cavalierly. The decision seems clear-cut in some circumstances, such as in advance of an impending blizzard or hurricane. However, even these scenarios may include judgment calls, such as a decision by administrators at 4:00 a.m. to close a campus because of the forecast of snow.³⁴⁹ Virginia Tech illustrates the dilemma of over- versus under-reacting. Early in the fall of the academic year, a prisoner escaped near the campus and had killed a hospital guard and a

³⁴³ VA. TECH REVIEW PANEL, *supra* note 229, at 25, 26, 28.

³⁴⁴ SECURITY INFRASTRUCTURE REPORT, *supra* note 34, at 2, 10.

³⁴⁵ *Id.* at 10, 11–12.

³⁴⁶ VA. TECH REVIEW PANEL, *supra* note 229, at 79.

³⁴⁷ *Id.* at 2–3. The sequence went as follows: the first email went out to faculty and students at 9:26 a.m., urging people to be cautious and report suspicious activity. Associated Press, *Text of E-mails Sent to Virginia Tech Students, Staff*, SAN JOSE MERCURY NEWS (Apr. 16, 2007, 9:43 PM), http://www.mercurynews.com/breakingnews/ci_5683346. The initial reports of an additional shooting at Norris Hall came in to 911 operators at 9:45 a.m. *Id.* An email was then sent out at 9:50 a.m. with the subject line: “PLease [sic] stay put,” stating: “A gunman is loose on campus. Stay in buildings until further notice. Stay away from all windows.” *Id.* An email at 10:16 a.m. cancelled classes. *Id.* At 10:52 a.m. another email was dispatched, stating that one shooter was in custody and the authorities were continuing to search for a second shooter. *Id.*

³⁴⁸ VA. TECH REVIEW PANEL, *supra* note 229, at 80–81.

³⁴⁹ Such a reasonable decision may also risk being either an over- or under- reaction in hindsight.

police officer.³⁵⁰ Virginia Tech responded to that event with a limited evacuation, and in the two hours after the initial shootings at Virginia Tech, the university president reflected about that decision.³⁵¹

Another lesson from Virginia Tech is that the campus community looks to the college's website for information. Traffic on the Virginia Tech website jumped up to "150,000 unique visitors per hour" in the aftermath of the shootings.³⁵² Indeed, most universities need to simplify the search process for emergencies on their websites. Yet internet access is not always quick, convenient, or easy, especially when time is of the essence in an emergency or otherwise under stressful conditions—other means of communication need to be utilized.³⁵³

The response to a more recent shooting at the smaller Delaware State University illustrates the value of lessons learned from Virginia Tech. The campus was effectively shut down: Within twenty minutes of the 12:54 a.m. shooting being reported to police, residence hall advisors advised students to stay in their rooms.³⁵⁴ Notices were placed in the dormitories and the university's website by 2:40 a.m., and at 5:00 a.m. the decision was made to cancel classes.³⁵⁵ Simply, colleges need an EAP that is regularly updated and involves communication and flexibility, or face potential liability in instances of mass violence on campus.

CONCLUSION

While we do not expect science to stop natural phenomena—such as earthquakes, hurricanes, or tornadoes—we do expect that reasonable care be exercised to minimize their impacts. So too with random acts of violence, which have migrated to our campuses from society in general. College campuses present a "tempting target" in a country of seemingly infinite threats and targets. The variety of potential assailants, the emotional problems of students, the varied means by which they can execute their random acts of violence, the thousands of colleges, and the tens of thousands of buildings on the campuses make it difficult to prevent these crimes. Even though the specific timing, location, and means of delivery may be unforeseeable and unpreventable, we expect institutions to plan for their eventuality such that if they do occur, the college should have a plan in place which may reduce the toll through reasonable response measures. Such a plan should be an integral part of

³⁵⁰ *Id.* at 80.

³⁵¹ *Id.*

³⁵² Scott Carlson, *Emergency at Virginia Tech Shows the Power of the Web, Says Campus Official*, CHRON. HIGHER EDUC. (Aug. 3, 2007), <http://chronicle.com/article/Emergency-at-Virginia-Tech/30901>.

³⁵³ McBain, *supra* note 222, at 14; *supra* Part II.A.3.

³⁵⁴ Associated Press, *2 Shot at School*, L.A. TIMES, Sept. 22, 2007, at A15.

³⁵⁵ *Id.*

the school's operations. The nature of any emergency will always be different, but to have in place a well-designed, tested, and up-to-date emergency response plan will minimize the threat. We should also expect institutions to take reasonable steps in advance of a tragedy, such as through background checks and follow-up on psychological screening, to reduce the chances of occurrence at their institution.

We should not expect perfection in an emergency response. Just as engineering is an evolving science, often learning from the mistakes and tragedies of the past,³⁵⁶ so too with the practice of emergency responses, which is still in its infancy. Reasonable care, not perfection or strict liability, is the standard. Every major emergency will be unique, and every major tragedy presents lessons for improvement, even if prior lessons may not be totally applicable in any new scenario. But in this way, the duty of reasonable care to minimize a tragedy and its consequences may be fulfilled—by securing the hallowed halls of academe.

³⁵⁶ See HENRY PETROSKI, *TO ENGINEER IS HUMAN: THE ROLE OF FAILURE IN SUCCESSFUL DESIGN* xii (1985) (stating that the process of repeated trial and error is the key to understanding engineering's successes and advancements and unlocking future growth).

YOU HAVE THE RIGHT TO SPEAK BY REMAINING SILENT: WHY A STATE SANCTION TO CREATE A WEDDING CAKE IS COMPELLED SPEECH

INTRODUCTION

The preeminent function of the First Amendment is to ensure “that a speaker has the autonomy to choose the content of his own message.”¹ Often overlooked is the underlying purpose of protecting a speaker’s right to express what he or she believes. Guaranteeing freedom of speech is not only important to preserve self-expression—it is also critical to the continuance of self-government.² If the “free and robust” public discourse paramount to maintaining liberty is stifled, “we the people” cease to exist.³ Thus, preserving speech on public matters and issues is “at the heart of the First Amendment’s protection” and “entitled to special protection.”⁴

Same-sex marriage is one of the most prevalent topics in public debate today.⁵ Much of the collective discourse on same-sex marriage involves its legality.⁶ The cases analyzing the legality of same-sex marriage are not the only lawsuits that garner national attention; there also exists a subset of same-sex marriage cases concerning the First Amendment rights of potential wedding vendors.⁷ These controversies examine whether wedding vendors, regardless of their personal beliefs on same-sex marriage, must use their artistic skills and talents to serve

¹ Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995).

² Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

³ See Riley v. Nat’l Fed’n of the Blind of N.C., Inc., 487 U.S. 781, 791 (1988) (stating that government-directed speech based on good intentions does not advance healthy discussion).

⁴ Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (first quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985); and then quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

⁵ David Masci, *A Contentious Debate: Same-Sex Marriage in the U.S.*, PEW F. (Jul. 9, 2009), <http://www.pewforum.org/2009/07/09/a-contentious-debate-same-sex-marriage-in-the-us/> (“In recent years, the debate over same-sex marriage has grown from an issue that occasionally arose in a few states to a nationwide controversy.”).

⁶ See *id.* (“[I]n the last five years, the debate over gay marriage has been heard in the halls of the U.S. Congress, at the White House, in dozens of state legislatures and courtrooms, and in the rhetoric of election campaigns at both the national state and levels.”).

⁷ See, e.g., Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶ 44 (Colo. App. Aug. 13, 2015) (analyzing the ability of a cake artist to refrain from creating a cake for same-sex wedding ceremony); Elane Photography, LLC v. Willock, 309 P.3d 53, 58–59 (N.M. 2013) (involving a photographer who objected on First Amendment speech and free exercise grounds to provide services for a same-sex commitment ceremony).

homosexual couples who are planning a wedding. Wedding vendors such as photographers, florists, and bakers have been at the center of this litigation in recent years.⁸ Because the Supreme Court constitutionalized same-sex marriage across all fifty states in *Obergefell v. Hodges*,⁹ the number of cases involving First Amendment disputes between wedding vendors and homosexual couples will certainly increase.¹⁰

*Craig v. Masterpiece Cakeshop, Inc.*¹¹ is a recent case concerning such a dispute. Jack Phillips, a devout Christian for approximately thirty-five years, owns and operates a local bakery in Colorado.¹² Phillips considers creating decorative cakes an art and a form of creative expression.¹³ He also believes “he can honor God through his artistic talents” by creating these decorative cakes.¹⁴ Phillips’s bakery creates and sells a variety of baked goods, including wedding cakes.¹⁵ In 2012, a homosexual couple, Charlie Craig and David Mullins, visited the bakery in order to procure Phillips’s services in creating a wedding cake for their impending marriage ceremony.¹⁶

Citing religious beliefs, Phillips declined to create a wedding cake for the couple.¹⁷ Phillips did not, however, refuse to sell other baked items to the couple: “I’ll make you birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same-sex weddings.”¹⁸ Without further discussion, the couple immediately left the bakery.¹⁹ The couple then filed an administrative complaint against Phillips based on Colorado’s public accommodation law,²⁰ claiming that they had been

⁸ Kendra LaCour, Comment, *License to Discriminate: How A Washington Florist Is Making the Case for Applying Intermediate Scrutiny to Sexual Orientation*, 38 SEATTLE U. L. REV. 107, 109–12 (2014).

⁹ 135 S. Ct. 2584, 2607–08 (2015).

¹⁰ James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 980–81 (2011) (“[T]he expanded scope of public accommodation laws makes conflict with First Amendment rights of free speech a virtual certainty.”).

¹¹ No. CR 2013-0008 (Colo. Civil Rights Comm’n Dec. 6, 2013) [hereinafter Initial ALJ Decision], <http://www.adfmedia.org/files/MasterpieceDecision.pdf>, *aff’d*, No. CR 2013-0008 (Colo. Civil Rights Comm’n May 30, 2014) [hereinafter Final Agency Order], <http://www.adfmedia.org/files/MasterpieceFinalAgencyOrder.pdf>, *aff’d*, 2015 COA 115 (Colo. App. Aug. 13, 2015) [hereinafter Court of Appeals Decision].

¹² Court of Appeals Decision, *supra* note 11, ¶ 4.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* ¶¶ 3, 30.

¹⁶ *Id.* ¶ 3.

¹⁷ *Id.*

¹⁸ Initial ALJ decision, *supra* note 11, at *2.

¹⁹ Court of Appeals Decision, *supra* note 11, ¶ 3.

²⁰ COLO. REV. STAT. 24-34-601(2)(a) (LexisNexis, LEXIS through 2015 Reg. Sess.) (“It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse,

discriminated against in the marketplace because of their sexual orientation.²¹ A Colorado Administrative Law Judge (“ALJ”) agreed.²² One of the arguments Phillips set forth was that preparing “a cake for a same-sex wedding is equivalent to forcing [him] to ‘speak’ in favor of same-sex weddings—something [he is] unwilling to do.”²³ While the ALJ recognized that creating a wedding cake required “considerable skill and artistry,” the judge declared that the “finished product” did not constitute protected speech under the First Amendment.²⁴ Thus, the ALJ dismissed Phillips’s Free Speech Clause argument in favor of the public accommodation statute. Colorado subsequently sanctioned Phillips for his noncompliance with the statute, requiring him to provide “comprehensive staff training” on the relevant public accommodation law, “quarterly compliance reports,” and documentation of future patrons denied service.²⁵ Phillips subsequently filed an appeal to the Colorado Civil Rights Commission²⁶ that ultimately failed.²⁷ He also appealed his case to the Colorado Court of Appeals, which affirmed the decision of the Colorado Administrative Court, and has petitioned the Supreme Court of Colorado for writ of certiorari.²⁸

Regardless of one’s personal views concerning same-sex marriage, it is important to recognize this case as a glaring example of an encroachment on the freedom of speech. This Note examines the legal hazards in treating a case involving an individual’s refusal to create a wedding cake for a same-sex ceremony as a public accommodation issue rather than a free speech issue. While this Note uses *Masterpiece Cakeshop* as a template to illustrate the danger in dismissing the free speech argument in this situation, this Note is not intended to serve as a case note on *Masterpiece Cakeshop*. Part One of this Note examines the rich history of the celebratory wedding cake, reviews the expressive activities that the Court has traditionally held to be protected speech

withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . .”).

²¹ Court of Appeals Decision, *supra* note 11, ¶ 6.

²² Initial ALJ decision, *supra* note 11, at *12.

²³ *Id.* at *7.

²⁴ *Id.* at *7–8.

²⁵ Final Agency Order, *supra* note 11, at *2.

²⁶ Notice of Appeal and Petition for Review by Colorado Civil Rights Commission, *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008 (Colo. Civil Rights Comm’n Jan. 3, 2014), <http://www.adfmedia.org/files/MasterpieceAppeal.pdf>.

²⁷ Final Agency Order, *supra* note 11, at *1.

²⁸ Court of Appeals Decision, *supra* note 11, ¶ 112; Petition for Writ of Certiorari to the Colorado Court of Appeals at 19, *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115 (Colo. App. Oct. 23, 2015), <http://www.adfmedia.org/files/MasterpieceCertPetitionCO.pdf>.

under the First Amendment, and demonstrates why a wedding cake should be considered protected speech. Part Two evaluates First Amendment jurisprudence concerning the compelled speech doctrine and illustrates why construing a public accommodation statute to force a culinary artist to create a cake for a same-sex wedding ceremony is compelled speech. Concluding, this Note proposes that using a free speech analysis in evaluating a case concerning a baker declining to create a wedding cake for a same-sex marriage is the constitutionally sound approach that should be utilized by courts that will face this issue in the future.

I. A WEDDING CAKE AS SPEECH

A. *Tradition of the Wedding Cake*

In order to demonstrate that creating and providing a wedding cake to a couple is communicative, it is first necessary to properly understand the tradition of the wedding cake and its historical significance in wedding celebrations. Considering the talent, skill, and time it takes to create a celebratory cake, coupled with the art form's rich background, it is no surprise that many cake bakers consider themselves to be "artists."²⁹ While it is unknown exactly when cake making and decorating first began, it is thought that the practice dates back to as early as 1175 B.C.³⁰ Today, decorated cakes are used to celebrate numerous occasions, such as "weddings, christenings, engagements, anniversaries, birthdays and Christmas."³¹

Among these forms of cake, the wedding cake has perhaps the most meaningful history. During Roman times, a wedding tradition known as "crowning the bride" emerged.³² Following a wedding, small fruitcakes consisting of "rich fruit, nuts and tiny honey cakes . . . would be crumbled over the bride's head" in hopes that she would be abundantly blessed.³³ The cakes were used as symbols to invoke goodwill from the Roman gods for the bride.³⁴ The ingredients of the cake were significant because the foods used to carry out the tradition were historically offered as sacrifices to the gods.³⁵ Thus, even during Roman times, wedding cakes had a greater purpose than mere consumption: they served as an

²⁹ *A Little About Us*, CHARM CITY CAKES, <http://www.charmcitycakes.com/about-us> (last visited Feb. 27, 2016); *About the Cake Artist*, THE CAKE ARTIST, <http://www.thecakeartistnyc.com/about.php> (last visited Feb. 27, 2016).

³⁰ THE ESSENTIAL GUIDE TO CAKE DECORATING 8 (Jane Price ed., 2006).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

integral part of the wedding celebration.³⁶ Eventually, “crowning the bride” was brought to Britain and the wedding tradition continued in various forms as a local custom until approximately 200 years ago.³⁷

Over hundreds of years, wedding cakes evolved with the advancement of culinary art.³⁸ It became a common Western tradition to stack surplus wedding cakes, which at the time were individually served sticky buns coated with almond paste, in order to build a pile of cakes symbolizing prosperity for the couple.³⁹ The cake stack, however, was not merely an exhibition. The newlyweds were expected to participate in the tradition by sharing a kiss over the pile of wedding cakes, once again representing the hope for future blessings.⁴⁰ The cake-stacking tradition serves as the origin of the modern-day three-tiered wedding cake.⁴¹

As confectionary technique progressed, cakes became more grandiose—naturally, this style affected wedding cakes.⁴² At the outset of the tiered cake tradition, only the upper class could afford such an ornate design to celebrate a wedding.⁴³ The celebratory wedding cake continued to develop, and a “three-tiered round cake became traditional, representing the three rings—the engagement, wedding and eternity rings.”⁴⁴ The custom eventually extended to the middle class, thus becoming an even more common symbol at weddings.⁴⁵

Today, the wedding cake has become one of the most notable aspects of the wedding celebration, because the ceremonial cutting of the cake represents “the first task that bride and groom perform jointly as husband and wife.”⁴⁶ After this custom takes place, the newlywed couple feeds the wedding cake to one another to symbolize mutual commitment.⁴⁷ But it is not the cake-cutting ceremony alone that

³⁶ See *id.* (asserting that the “crowning the bride” tradition was a part of local custom for nearly 2,000 years and was viewed as a means to bless the bride’s fertility).

³⁷ *Id.* (“Some [wedding cakes] would be crumbled over the bride, some squeezed through her wedding ring, some eaten by guests and some thrown to the poor folk outside the feast.”).

³⁸ See *id.* (acknowledging that new culinary techniques were used to create extravagant cakes).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 8–9.

⁴² See *id.* at 9 (discussing how new advances and techniques in baking and presentation affected the size, shape, and types of decorations used in creating weddings cakes).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* (using three-tiered cakes because of style, even if the additional dessert was unnecessary).

⁴⁶ SANDRA CHORON & HARRY CHORON, PLANET WEDDING: A NUPTIAL-PEDIA 76 (2010).

⁴⁷ *Id.*

highlights the importance of the wedding cake—the cake itself is “an important and integral part of the wedding along with the wedding dress and the bride’s bouquet.”⁴⁸ In reference to creating wedding cakes for couples, Buddy Valastro, celebrity baker and star of television’s *Cake Boss*,⁴⁹ describes the significance of the symbol:

The cake is the backdrop of the reception and the focal point of hundreds of pictures, so we take great effort to make each confection as exceptional as the event. Weddings are such a special thing . . . and like any wedding professional will tell you, details are the most important thing.⁵⁰

Valastro considers the consultation with his customers the best part of creating a wedding cake.⁵¹ He recognizes that meeting with a person “face to face” makes it easier for him to “get a feel for what the customer would like.”⁵² This fact is significant because it illustrates that Valastro believes that the design of the wedding cake is a personal and individualized representation of the ceremony.⁵³ Recognizing the weight and importance the bride usually places on the wedding cake, the celebrity baker notes: “It is my job to reassure the bride that we will design the cake of her dreams. After all, it’s not just a cake—it’s a moment!”⁵⁴ Thus, one of the most notable bakers in the country identifies the wedding cake as a symbol of celebration for newlyweds rather than a meaningless food item served only for the enjoyment of guests. The wedding cake is more than a generic food item—it is a meticulously crafted piece of art that requires much skill and talent to produce.

B. Traditionally Protected Speech

It has long been understood that the First Amendment protection of speech extends beyond mere words.⁵⁵ Historically, the Court has demonstrated “a profound commitment to protecting communication of ideas,” deeming “pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word” as protected speech under the

⁴⁸ MICH TURNER, WEDDING CAKES 11 (Alison Bolus ed., 2009).

⁴⁹ *About Carlo’s Bakery*, CARLO’S BAKE SHOP, <http://bakeshop.carlosbakery.com/about-carlos-bakery/> (last visited Feb. 27, 2016) (listing the wedding magazines in which the artist and his cakes have been featured).

⁵⁰ Buddy Valastro, *Secrets from the Cake Boss*, HUFFINGTON POST: HUFFPOST WEDDINGS (Oct. 11, 2011, 3:30 AM), http://www.huffingtonpost.com/buddy-valastro/secrets-from-the-cake-boss_b_1004185.html.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See id.* (explaining that he meets with the bride to assure her that the wedding cake will fulfill her dreams).

⁵⁴ *Id.*

⁵⁵ *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“The First Amendment literally forbids the abridgment only of ‘speech,’ but we have long recognized that its protection does not end at the spoken or written word.”).

Constitution.⁵⁶ But these delineated methods of communication are not the only forms of speech protected by the First Amendment. The Court broadly views speech as “the expression of an idea.”⁵⁷

This broad understanding of speech, however, does not permit one to designate every action that he perceives or intends as communication as protected speech.⁵⁸ In *United States v. O'Brien*, the Court rejected the proposition that “all modes of ‘communication of ideas by conduct’” are categorically protected speech under the First Amendment.⁵⁹ The Court stated: “We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”⁶⁰ On the other hand, the Court has also “acknowledged that [some] conduct may be ‘sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[.]’”⁶¹ There is a tension between these two assertions. While not every action committed with the purpose to communicate is speech, some actions are considered speech. The issue, then, is determining what methods used to express an idea invoke the protection of the Free Speech Clause.

In *Texas v. Johnson*, the Court addressed this legal tension.⁶² In determining what kinds of conduct would constitute protected speech under the First Amendment, the Court analyzed “whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”⁶³ Thus, in order for one’s activity to be considered protected speech, a person must have the intent to communicate a message, and it must be likely that the particular message will be understood.⁶⁴ While some expressive activities are easily identified as protected speech under this evaluative approach, other symbols or expressive activities that constitute protected speech may not be as obvious. “[F]orm[s] of quiet persuasion” such as the “inculcation of traditional values, instruction of the young, and community service” are activities that could potentially

⁵⁶ *Kaplan v. California*, 413 U.S. 115, 119–20 (1973).

⁵⁷ *Johnson*, 491 U.S. at 414 (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the *expression of an idea* simply because society finds the idea itself offensive or disagreeable.” (emphasis added)).

⁵⁸ *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Johnson*, 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

⁶² *Id.*

⁶³ *Id.* (alteration in original) (quoting *Spence*, 418 U.S. at 410–11).

⁶⁴ *Id.*

be categorized as protected speech.⁶⁵ Thus, an expressive activity need not be garish in order to be protected under the First Amendment.⁶⁶

Concerning art, the Court takes a different approach in assessing its protection under the Free Speech Clause. Art is a form of expression that the First Amendment unreservedly protects: “It goes without saying that artistic expression lies within this First Amendment protection.”⁶⁷ Thus, the factors that the Court typically applies in evaluating whether conduct falls under the protection of the Free Speech Clause are automatically assumed to exist in the assessment of artistic expression.⁶⁸ Art is a particularly unique mode of communication because it can be used to express and influence multiple aspects of life.⁶⁹ For example, the purpose of political speech is limited to “affect[ing] the public policies and character of the society in which we live.”⁷⁰ Art speech, on the other hand, may delve into several issues, such as topics in the political, religious, and economic realms,⁷¹ by utilizing an atypical delivery of the message being expressed.⁷² Additionally, art is not limited to the tangible; it is used to communicate “extra-ordinary dimensions” of life through the creative “flow of sensory, emotional or intuitional data.”⁷³ Thus, art speech is a remarkable category of protected speech because it can be used to comment on both the rational and intuitive facets of the human psyche.⁷⁴

The Court has also paid special attention to the significance of symbolism as protected speech. In *West Virginia State Board of Education v. Barnette*, the Court underscored the communicative nature

⁶⁵ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring).

⁶⁶ *See id.* (indicating the difficulty in determining protected expressive conduct because of the wide range of activities that qualify for protection).

⁶⁷ *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602–03 (1998) (Souter, J., dissenting).

⁶⁸ Gottry, *supra* note 10, at 971 (“[S]ome modes of expression, such as the arts, are presumed to be expressive—and therefore deserving of protection—without debate.”).

⁶⁹ Edward J. Eberle, *Art as Speech*, 11 U. PA. J.L. & SOC. CHANGE 1, 9 (2007) (“[A]rt offers unique perspectives on human existence, especially nonrational, non-cognitive or non-discursive elements. We are accustomed to thinking of the human being as a rational actor, and there is much of human life that comports with this ideal. For example, law and economics theory is modeled around the ideal of man as rational actor. In free speech theory, the political speech model is essentially built around this ideal. Art, of course, can speak to this rational aspect of life, as it can to political or religious concerns as well.”).

⁷⁰ *Id.* at 6.

⁷¹ *Id.* at 9.

⁷² *See id.* at 11 (observing that art “is imagination made manifest” and often “out of the ordinary”).

⁷³ *Id.* at 9.

⁷⁴ *See id.* (noticing that art can reach various aspects of rational human life, including religious and political concerns).

of symbols.⁷⁵ In analyzing the act of saluting the American flag, the Court stated: “Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.”⁷⁶ Thus, symbolism is categorically labeled as speech because associating one’s self with a symbol constitutes an affirmation of the message the symbol communicates.⁷⁷ Key to this analysis is not only the Court’s affirmation of symbolism as speech, but also its acknowledgment and subsequent treatment of the interplay between personal offense and freedom of speech.⁷⁸ The Court recognized the intimate nature of symbols by declaring how divisive they can be and implicitly rejecting the notion that allegedly objectionable speech is unprotected: “A person gets from a symbol the meaning he puts into it, and what is one man’s comfort and inspiration is another’s jest and scorn.”⁷⁹

Thus, the protection of speech is not contingent on how productive or edifying the message is.⁸⁰ In fact, the Court purports a principal function of the Free Speech Clause to be the exact opposite of cultivating harmony among the public:

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.⁸¹

Clearly, the First Amendment does not protect a person’s right to be unoffended—it protects a person’s right to offend.⁸² Allegedly offensive “speech cannot be restricted simply because it is upsetting or arouses contempt.”⁸³

C. Analyzing a Wedding Cake as Speech

The most frustrating legal aspect of the *Masterpiece Cakeshop* case is the Colorado ALJ’s dismissal of the notion that creating a wedding

⁷⁵ 319 U.S. 624, 632–33 (1943).

⁷⁶ *Id.* at 632.

⁷⁷ *See id.* (asserting that certain religious or political symbols are associated with particular gestures of affirmation).

⁷⁸ *See id.* at 632–33 (observing that an objection to compelled speech was an established principle to the framers of the Bill of Rights).

⁷⁹ *Id.*

⁸⁰ *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) (noting that the First Amendment protects even the expression of offensive or disagreeable ideas).

⁸¹ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

⁸² *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (noting that even outrageous speech deserves protection under the First Amendment).

⁸³ *Id.*

cake is protected speech. The ALJ began the free speech analysis by asserting the First Amendment guarantee to the right to freedom of speech.⁸⁴ The judge recognized that “free speech applies not only to words, but also to other mediums of expression, such as art, music, and expressive conduct.”⁸⁵ The ALJ then acknowledged the “considerable skill and artistry” involved in creating a wedding cake, but definitively claimed that “the finished product does not necessarily qualify as ‘speech.’”⁸⁶

As illustrated above, however, making a celebratory wedding cake is a creative expression deserving of First Amendment protection. In order for a wedding cake to invoke First Amendment speech protection, it would have to satisfy the elements introduced in *Johnson*.⁸⁷ The evaluative method in *Johnson* is key to deciphering whether expressive conduct is in fact protected speech. The first element of this evaluative method, the intent to communicate, is easily satisfied. As Phillips purported in *Masterpiece Cakeshop*, creating a decorative cake is a form of creative expression.⁸⁸ The maker of the wedding cake most certainly intends to produce a symbol celebrating and thus affirming the union of a newlywed couple. Creating a wedding cake is an art form used to represent the collective identity of a couple and has become a critical part of the wedding aesthetic. The second element of the *Johnson* method, the likelihood of the message being understood by its receiver, is also satisfied. Cake making, specifically the creation of wedding cakes, has a significant history in the pastry arts. Historically, the wedding cake has communicated the significance of marriage by symbolizing and celebrating a new union.⁸⁹ Symbolism, as the Court acknowledged in *Barnette*, is “a primitive but effective way of communicating ideas.”⁹⁰ A wedding cake is commonly understood as a celebratory symbol of a marriage.⁹¹ Thus, a wedding cake amounts to protected speech because it is an intentional expression of an idea that is understood by those who view it.

⁸⁴ Initial ALJ Decision, *supra* note 11, at *6–7.

⁸⁵ *Id.* at *7.

⁸⁶ *Id.*

⁸⁷ See *supra* text accompanying notes 63–64 (detailing the *Johnson* elements—that protected speech must be intended to communicate a message and that the message will be understood by others).

⁸⁸ Initial ALJ decision, *supra* note 11, at *3 (“Phillips believes that decorating cakes is a form of art and creative expression . . .”).

⁸⁹ See *supra* Part I.A.

⁹⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

⁹¹ See *supra* text accompanying notes 38–45.

A wedding cake is a highly personalized symbol that both represents and celebrates the unity of a newlywed couple.⁹² The “considerable skill and artistry”⁹³ a baker puts into the creation of a wedding cake is evidence that the finished product is more than a food item. It is a piece of edible artwork that serves as a centerpiece for wedding celebrations, undeniably symbolizing the couple’s commitment to one another.⁹⁴ The creation of such an artwork is in effect an affirmation of the message it represents. This is why future courts that face an issue similar to the one in *Masterpiece Cakeshop* must recognize a wedding cake as protected speech under the First Amendment.

II. A WEDDING CAKE AS COMPELLED SPEECH

A. *Compelled Speech Doctrine*

The principal rule of protection under the Free Speech Clause is that a speaker has the right to choose the ideas and opinions he posits.⁹⁵ Tantamount to this liberty is the ability to choose what not to say:

The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak . . . when others wish him to be quiet. There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.⁹⁶

Thus, the government cannot force silence on a particular topic of public discourse any more than it can force citizens “to modify the content of their expression.”⁹⁷ While there is a practical difference between compelled speech and compelled silence, “the difference is without constitutional significance” for the purposes of the First Amendment.⁹⁸ Mandating speech by way of expression or silence is a violation of freedom of speech because it ultimately alters an individual’s message.⁹⁹

In *West Virginia State Board of Education v. Barnette*, the Court famously established the principle of the right to “speak” by remaining

⁹² See *supra* text accompanying notes 46–48.

⁹³ Initial ALJ decision, *supra* note 11, at *7.

⁹⁴ See *supra* text accompanying notes 46–50.

⁹⁵ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995).

⁹⁶ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (quoting *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968)).

⁹⁷ See *Hurley*, 515 U.S. at 578 (holding that laws which require an individual to change the content of his expression violate that individual’s expressive autonomy).

⁹⁸ *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988).

⁹⁹ See *id.* at 795, 798 (holding a content-based regulation unconstitutional because it compelled speech by altering the content of an individual’s speech without sufficient justification or narrow-tailoring).

silent.¹⁰⁰ In *Barnette*, the West Virginia Board of Education enforced a West Virginia statute requiring public school students to salute the American flag and recite the Pledge of Allegiance.¹⁰¹ If students did not comply with the statute, the school considered it insubordination and worthy of expulsion.¹⁰² If expelled, a student would only obtain re-admission through compliance.¹⁰³ One may argue that the students were not technically compelled to salute the flag or recite the pledge because the government did not literally force them to execute the salute or speak the words. The Court implicitly dismissed this rationalization by asserting: “Here . . . we are dealing with a compulsion of students to declare a belief.”¹⁰⁴ Thus, “[i]f there are sanctions for noncompliance with [a] statute, an impermissible compulsion will be found .”¹⁰⁵

The Court’s analysis in this case is notable for its two-step process in evaluating whether the government is compelling speech. The Court first analyzed the actions the state statute required the students to perform, asserting that saluting a flag and reciting a pledge was “no doubt . . . a form of utterance.”¹⁰⁶ Thus, the established method for determining whether a law unconstitutionally compels speech requires the Court to first analyze “whether a law has the effect of eliciting some sort of expression.”¹⁰⁷ As noted above in Part I.B, the Court in *Barnette* emphasized the significance of symbolism as a mode of communication.¹⁰⁸ With this understanding in mind, the Court found the actions required by the statute to be an obvious form of communication.¹⁰⁹

Next, the Court analyzed the fundamental effect of the compulsory salute and recitation, asserting that these actions are essentially an “affirmation of a belief and an attitude of mind.”¹¹⁰ The Court determined that forcing students to participate in nationalist speech is contrary to the First Amendment, “which guards the individual’s right to speak his own mind.”¹¹¹ In overruling *Minersville School District v. Gobitis*, which held that it was *not* a violation of the First Amendment to

¹⁰⁰ 319 U.S. 624, 642 (1943).

¹⁰¹ *Id.* at 626, 628 n.2.

¹⁰² *Id.* at 629.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 631.

¹⁰⁵ Susan Nabet, Note, *For Sale: The Threat of State Public Accommodations Laws to the First Amendment Rights of Artistic Businesses*, 77 BROOK. L. REV. 1515, 1526 (2012).

¹⁰⁶ *Barnette*, 319 U.S. at 632.

¹⁰⁷ Nabet, *supra* note 105, at 1526.

¹⁰⁸ See *supra* text accompanying notes 75–79.

¹⁰⁹ *Barnette*, 319 U.S. at 630–32.

¹¹⁰ *Id.* at 633.

¹¹¹ *Id.* at 634.

require participation in the “ceremony” of the Pledge of Allegiance in order to be admitted into public school,¹¹² the Court rejected its previous assertion that securing “national security” by compelling “national unity” was constitutional.¹¹³ The Court denounced the argument that, in the name of promoting national security, it was constitutional to compel a child to recite a patriotic pledge.¹¹⁴ This analysis is important because the Court highlighted the hazards of government-compelled speech by revealing its history in other societies:¹¹⁵ limited methods to cultivate unity through compelled speech are enacted but fail,¹¹⁶ public discontent grows as the state’s pressure and methods to attain unity through compelled speech are increased,¹¹⁷ and the dissenters of these initiatives are exterminated.¹¹⁸ The Court recognized that outlining such a tyrannical chain of events in analyzing a case concerning something as seemingly trivial as a West Virginia statute compelling students to salute and pledge was “trite but necessary.”¹¹⁹ The Court underscored that the First Amendment “was designed to avoid these ends by avoiding these beginnings.”¹²⁰ Thus, the second step in analyzing compelled speech is determining “whether the expression amounts to a ‘declaration’ or ‘affirmation’ of belief.”¹²¹

Decades after deciding *Barnette*, the Court handled a similar case involving a New Hampshire statute requiring citizens to display the state motto on their license plates.¹²² In *Wooley v. Maynard*, noncompliance with this state statute resulted in a criminal sanction.¹²³ The Court began its analysis “with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain

¹¹² 310 U.S. 586, 599–600 (1940).

¹¹³ *Barnette*, 319 U.S. at 640, 643.

¹¹⁴ *See id.* (holding that national security, even though a legitimate end, could not be achieved through the violation of the First Amendment by compelling speech).

¹¹⁵ *See id.* at 641 (“Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies.”).

¹¹⁶ *Id.* at 640 (“As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity.”).

¹¹⁷ *Id.* at 641 (“As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be.”).

¹¹⁸ *Id.* (“Those who begin coercive elimination of dissent soon find themselves exterminating dissenters.”).

¹¹⁹ *Id.* at 640–41.

¹²⁰ *Id.*

¹²¹ Nabet, *supra* note 105, at 1526.

¹²² *Wooley v. Maynard*, 430 U.S. 705, 706–07 (1977).

¹²³ *Id.* at 708.

from speaking at all.”¹²⁴ Analogizing the facts in *Wooley* to *Barnette*, the Court concluded that a motto on a license plate was in fact a form of expression, and that forcing citizens to display the motto was an affirmation of the message the motto communicated.¹²⁵ While the Court recognized that fostering state pride was an “acceptable” endeavor, it was adamant not to forsake the Free Speech Clause in order to accomplish such a goal.¹²⁶ The Court asserted that a state’s desire “to disseminate an ideology” does not “outweigh an individual’s First Amendment right to avoid becoming the courier for such [a] message.”¹²⁷ Thus, in *Wooley*, the Court reaffirmed the principle that a person has the right to choose what not to say.¹²⁸

In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, the Court notably asserted that the purpose behind a public accommodation law is irrelevant in determining its constitutionality:

The very idea that a . . . speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment . . . The Speech Clause has no more certain antithesis. While the law is free to promote all sorts of conduct . . . it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.¹²⁹

Thus, regardless of the seemingly noble motivation to “produce a society free of . . . biases,” the government cannot force an individual to speak or adhere to an ideology.¹³⁰

B. A Wedding Cake as Compelled Speech Analysis

As demonstrated by the holdings of the prevailing cases concerning compelled speech, the Court abhors government-coerced expression of an idea. In *Masterpiece Cakeshop*, the Colorado ALJ construed a public accommodation law to compel a baker to create wedding cakes for same-sex marriage ceremonies contrary to his religious beliefs.¹³¹ At the outset of this analysis, it is important to note why the sanctions imposed on Phillips constitute a state-enforced compulsion to speak. In *Barnette*, the

¹²⁴ *Id.* at 714.

¹²⁵ *Id.* at 715 (“Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”).

¹²⁶ *Id.* at 717.

¹²⁷ *Id.*

¹²⁸ *See id.* (holding that the state could not force individuals to display the state motto on license plates).

¹²⁹ 515 U.S. 557, 579 (1995) (citations omitted).

¹³⁰ *Id.* at 578–79.

¹³¹ Initial ALJ Decision, *supra* note 11, at *3–4, *6.

Court implicitly recognized that punishing students for refusing to salute a flag or say a pledge essentially compelled the students to speak.¹³² This is because punishment acts as a motivator in altering behavior.¹³³ The parallel is obvious: punishing an individual for refusing to advance a message is a means to ultimately alter her beliefs. The First Amendment guards the speaker from this government intrusion.¹³⁴ Accordingly, sanctions imposed on Phillips for noncompliance with a public accommodation law¹³⁵ that unlawfully requires him to speak are unconstitutional. While the punishment does not literally force Phillips to create a wedding cake, which is a form of communication,¹³⁶ in effect, it forces him to speak by significantly altering his intended message. Once again, choosing not to speak is a form of communication.¹³⁷

In declining to create a wedding cake for a same-sex marriage ceremony,¹³⁸ Phillips was exercising a fundamental liberty guaranteed him under the First Amendment—the right to choose what not to say. Forcing him to create wedding cakes for same-sex marriage ceremonies is a violation of the Free Speech Clause because it compels Phillips to use his skills and talents to create a piece of art to celebrate, and thus speak in favor of, a marriage. In *Barnette*, the Court set forth a two-step process to evaluate alleged government-compelled speech such as the misconstrued public accommodation law in *Masterpiece Cakeshop*. The first step, which requires determining whether the law in question elicits an actual form of expression,¹³⁹ has already been satisfied by previous analysis: creating a wedding cake is a form of protected speech under the First Amendment and a statute issuing sanctions to create a wedding cake thus elicits speech.¹⁴⁰

The second step outlined in *Barnette* is to determine whether the forced expression amounts to an affirmation of belief.¹⁴¹ The Court in *Barnette* found that compelling students to perform actions such as saluting and pledging essentially forced the individuals to affirm nationalism.¹⁴² Just as the statute in *Barnette* required the students to

¹³² See *supra* text accompanying notes 102–05.

¹³³ See Gerrit De Geest & Giuseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. CHI. L. REV. 341, 343 (2013) (discussing the enforcement of legal norms traditionally done through punishment).

¹³⁴ See *supra* Part II.A.

¹³⁵ See Final Agency Order, *supra* note 11, at *2 (listing the remedial measures Masterpiece Cakeshop “shall take” in light of the Commission’s findings).

¹³⁶ See *supra* Part I.C.

¹³⁷ See *supra* text accompanying notes 96–99.

¹³⁸ Court of Appeals Decision, *supra* note 11, ¶ 3.

¹³⁹ Nabet, *supra* note 105, at 1526.

¹⁴⁰ See *supra* Part I.C; *supra* text accompanying notes 104–05.

¹⁴¹ Nabet, *supra* note 105, at 1526.

¹⁴² See *supra* text accompanying notes 110–21.

affirm an ideology with which they did not agree, the state court's application of the Colorado public accommodation law requires Phillips to accede to a political and religious viewpoint with which he does not agree. Compelling Phillips to create a wedding cake for a same-sex marriage ceremony is essentially forcing him to affirm a belief that he does not support. Thus, the second step of the *Barnette* method is satisfied. While the creation of a wedding cake is not necessarily as blatant as the salute or pledge in *Barnette*, the Court in *Roberts v. United States Jaycees* noted that expressive "form[s] of quiet persuasion" are just as protected as modes of communication that are easily identified as speech.¹⁴³ A wedding cake is perhaps a subtler form of communication, but it is an expression of an idea nonetheless. Coercing an individual to utilize his talents and skills to create a symbol commonly used to celebrate an occasion is essentially forcing him to celebrate the occasion. This is a violation of the principal protection of the First Amendment.¹⁴⁴ In order to preserve self-government, the individual must have the liberty to choose his or her own message.¹⁴⁵

At first glance, a law aimed at fostering harmony amongst the public appears socially and culturally productive.¹⁴⁶ In *Hurley*, however, the Court fervently asserted that the Free Speech Clause prevents the government from interfering with speech for the sake of advancing a favored viewpoint.¹⁴⁷ Thus, the purpose of a public accommodation law, no matter how noble, is irrelevant in determining its legal standing.¹⁴⁸ In *Masterpiece Cakeshop*, the Colorado public accommodation law operated to prevent discrimination based on sexual orientation in the marketplace.¹⁴⁹ On the surface, this ambitious statute seems noble.¹⁵⁰ While the language of a statute itself may not be alarming, the court's *interpretation* of the law can have a detrimental effect on freedom of speech. The problem with statutes like the one in *Masterpiece Cakeshop*

¹⁴³ 468 U.S. 609, 636 (1984) (O'Connor, J., concurring).

¹⁴⁴ See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995) (holding that requiring an individual to alter expressive conduct in the context of a parade violated speaker autonomy that is protected by the First Amendment).

¹⁴⁵ *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

¹⁴⁶ See Initial ALJ Decision, *supra* note 11, at *4 (noting that anti-discrimination laws protect against the cost to society and the hurt caused by discrimination).

¹⁴⁷ *Hurley*, 515 U.S. at 579 (stating that the First Amendment "has no more certain antithesis" than speech restrictions that promote a point of view acceptable to some or all people).

¹⁴⁸ See *id.* (noting that a public accommodation law does not justify the government requiring an individual to promote one idea over another, regardless of how enlightened the government's purpose may be).

¹⁴⁹ Initial ALJ Decision, *supra* note 11, at *4.

¹⁵⁰ *Id.* ("It is a discriminatory practice . . . to refuse [service] . . . because of . . . *sexual orientation* . . .").

is their imminent encroachment on the First Amendment. Essentially, by upholding the statute, the state court held a public accommodation law in higher regard than the First Amendment.

CONCLUSION

In *Masterpiece Cakeshop*, an artist was forced to speak on a topic of public discourse against his will—a clear example of compelled speech. A homosexual couple approached Phillips, a cake artist, in order to procure a wedding cake for a same-sex marriage celebration. In order to provide the couple with a wedding cake for the celebratory event, Phillips would have to utilize his creative and artistic abilities to create, thereby expressing and affirming, a symbol contrary to his religious beliefs. As evidenced by the analysis in this Note, making a wedding cake is a protected form of speech under the Constitution, and forcing a speaker to create a wedding cake by issuing sanctions against him is to compel speech on a public topic.

Public accommodation laws are based on the common-law principle that, without good reason, innkeepers could not refuse service to an individual.¹⁵¹ The rationale is that even though certain businesses are for profit, they still function partially as a public service, which cannot be withheld from public access.¹⁵² In recent history, this narrow principle has strayed far from its original purpose in recent history, trampling on the First Amendment rights of business owners who engage in inherently expressive commerce.¹⁵³ As evidenced by *Masterpiece Cakeshop*, holding public accommodation statutes in higher regard than the First Amendment inflicts massive damage on free speech rights by forcing artists to express and affirm an ideology with which they disagree or suffer civil sanctions.

In order to protect the right to freedom of speech for all, it is critical that future courts dismiss the public accommodation law argument when presented with a case similar to *Masterpiece Cakeshop*. Because of the Supreme Court's pronouncement in *Obergefell v. Hodges* legalizing same-sex marriage, lawsuits involving wedding cake artists exercising their First Amendment rights are sure to follow.¹⁵⁴ The Free Speech analysis is not only the constitutionally sound approach to these cases,

¹⁵¹ *Hurley*, 515 U.S. at 571.

¹⁵² Nabet, *supra* note 105, at 1516.

¹⁵³ *See id.* at 1517 (describing a case in which a photographer was liable for violating public accommodation laws when she refused to photograph a same-sex wedding).

¹⁵⁴ *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2625–26 (2015) (Roberts, C.J., dissenting) (predicting that questions will soon come before the Court involving the conflict between the rights of religious individuals and the new right to same-sex marriage).

but also the prudent choice.¹⁵⁵ In reference to a factually similar case involving the tension between a public accommodation law and an artist's freedom of speech, one scholar states the following:

This Court can rule in favor of [the individual charged with discrimination] on First Amendment freedom of expression grounds, and such a ruling would not block the enforcement of antidiscrimination law when it comes to discriminatory denials of service by caterers, hotels that rent out space for weddings, limousine service operators, and the like

. . . .
This case can therefore be resolved entirely based on the First Amendment freedom from compelled speech.¹⁵⁶

Thus, it is not even necessary to wade into the notoriously murky waters of public accommodation law in order to resolve cases like *Masterpiece Cakeshop*, which involve a creative and artistic expression of an idea. Public accommodation laws can still serve their purpose by preventing discrimination. These statutes cannot, however, override First Amendment protections offered to owners of inherently expressive businesses. The fact that some courts continue to approach cases similar to *Masterpiece Cakeshop* with a public accommodation analysis is evidence of either a misconception of the compelled speech doctrine or favoritism of a particular viewpoint. Whatever the reason for utilizing this method of analysis, it is harmful to First Amendment jurisprudence. Proponents of public accommodations laws must recognize that the statutes can operate in their intended capacity and coexist with the Free Speech Clause:¹⁵⁷ the two legal spheres can and should be reconciled. The First Amendment, however, must be given prominence because free speech protections are at stake.

A common critique of utilizing the free speech argument in cases like *Masterpiece Cakeshop* is that to do so would undermine the "historical purpose of public accommodations laws," which is "to stamp out invidious racial discrimination."¹⁵⁸ The contention is that if courts allow one business owner to employ the Free Speech Clause in order to withhold service from a same-sex couple planning a wedding celebration, such a holding would, in effect, allow another business owner to lawfully

¹⁵⁵ See Eugene Volokh, *Amicus Curiae Brief: Elane Photography, LLC v. Willock*, 8 N.Y.U. J.L. & LIBERTY 116, 119–20 (2013) (explaining the importance of examining the free speech aspect of compelled services, such as photography).

¹⁵⁶ *Id.* at 120.

¹⁵⁷ See *id.* (recognizing the distinction between services that should be protected under the First Amendment because they are expressive and services that should be curtailed by anti-discrimination laws).

¹⁵⁸ Recent Case, *New Mexico Supreme Court Holds that Application of Public Accommodations Law to Wedding Photography Company Does Not Violate First Amendment Speech Protections*: Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013), 127 HARV. L. REV. 1485, 1488 (2014).

discriminate based on race by purporting that performing a service for an individual of a certain race would communicate a message of tolerance with which the owner disagrees.¹⁵⁹ While this hypothetical is worthy of consideration, scholars have noted that courts have “failed to consider a series of countervailing hypotheticals.”¹⁶⁰ For example, must a freelance writer “who brings her services under public accommodations laws . . . be compelled to write a release for Westboro Baptist Church because refusing to do so would be discrimination on the basis of religion?”¹⁶¹ Also, must a similarly situated liberal freelance writer be compelled to write a release for a conservative political action committee?¹⁶² The “logical consequence” of holdings like *Masterpiece Cakeshop* compels business owners to forgo their First Amendment rights in situations such as these.¹⁶³ This type of compelled speech is precisely what the First Amendment is designed to protect against.

Thus, the most prudent way to manage the tension between the Free Speech Clause and public accommodation laws designed to eliminate discrimination is to extend First Amendment protection “only to people who are being compelled to engage in expression.”¹⁶⁴ Artists such as “photographers, writers, singers, actors, painters, and others who create First Amendment-protected speech must have the right to decide which commissions to take and which to reject.”¹⁶⁵ Inherently non-expressive businesses, such as hotels and transportation operators, should not be granted First Amendment privileges in protesting public accommodation laws because these services do not communicate an idea.¹⁶⁶ “[C]reators of expression,” however, should be allowed to exercise their “First Amendment right to choose which expression they want to create.”¹⁶⁷

Regardless of one’s point of view on same-sex marriage, it is necessary to recognize that cases like *Masterpiece Cakeshop* have a profound effect on the speech rights of all individuals. While supporters of same-sex marriage may be tempted to champion the result of the *Masterpiece Cakeshop* holding, it is vital that the real issue of this case be recognized. Both “the people” and the courts must understand that the heart of the issue in *Masterpiece Cakeshop* is not about same-sex marriage. Such a politically, culturally, and emotionally charged topic

¹⁵⁹ *Id.* at 1489.

¹⁶⁰ *Id.* at 1489–90.

¹⁶¹ *Id.* at 1490.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Volokh, *supra* note 155, at 133.

¹⁶⁵ *Id.* at 120.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 118.

often clouds ordinarily sound minds. The heart of the issue in *Masterpiece Cakeshop*, as well as its approaching legal successors, is the individual's right to choose what he desires to say or not say. A speaker must be allowed to affirm or challenge the topics of public discourse—this is the essence of self-government.

The primary function of the First Amendment is to protect the individual's expressive autonomy. This protection, however, is not limited to the messages the individual actively posits. The protection of the First Amendment extends to choosing to remain silent, which includes protecting a baker's desire to remain silent on a public issue, such as same-sex marriage.

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EMINENT DOMAIN AND EXPROPIACIÓN: A COMPARISON BETWEEN FIFTH AMENDMENT PRECEDENT AND LATIN AMERICAN LAND REDISTRIBUTION

INTRODUCTION

Land ownership is fundamental, at the center of life, and often the source of conflict.¹ The Takings Clause of the Fifth Amendment to the United States Constitution protects private ownership of land and permits the government to take land only for public use and with just compensation.² It was within this structure that, in 2005, the United States Supreme Court issued its controversial opinion in *Kelo v. City of New London*, in which the Court permitted a taking from private citizens for purposes of economic development.³ *Kelo* generated a public outcry and prompted several states to enact legislation to protect private property rights.⁴ Though controversial, *Kelo* was the next step in the progression of eminent domain jurisprudence since the Court's 1954 decision in *Berman v. Parker*.⁵ Further, the United States was not the first country to permit takings for economic development. Latin American countries had been permitting governmental takings in the name of economic development for years.⁶

Land in Latin America has played an integral and often divisive role in the political sphere.⁷ Land issues have frequently been at the center of the rise and fall of Latin American governments.⁸ The permissibility of taking land in the name of economic development may

¹ Land is integral to food production, but also central to border disputes. *See, e.g.,* Zach Dyer, *Border Conflict Escalates as Costa Rica Accuses Nicaragua of Excavating Two More Canals in Isla Portillos*, TICO TIMES (Sept. 16, 2013), <http://www.ticotimes.net/2013/09/17/border-conflict-escalates-as-costa-rica-accuses-nicaragua-of-excavating-two-more-canals-in-isla-portillos> (describing political and legal conflict over the dredging of a river between Costa Rica and Nicaragua).

² U.S. CONST. amend. V.

³ *See* 545 U.S. 469, 484, 489–90 (2005); Elisabeth Sperow, *The Kelo Legacy: Political Accountability, Not Legislation, is the Cure*, 38 MCGEORGE L. REV. 405, 405 (2007) (noting that *Kelo* was “denigrated by some as the death of property and hailed by others as the word of God”).

⁴ Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2109, 2115–16 (2009).

⁵ 348 U.S. 26, 36 (1954).

⁶ *See infra* Parts II.B–D.

⁷ *See* Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 TUL. ENVTL. L.J. 69, 70 (2006) (describing the history of land disputes in the Amazon rain forest and Venezuelan-Mexican disputes over ranch land in Latin America).

⁸ *See, e.g., infra* notes 243–47 and accompanying text.

have been a surprise in the United States after *Kelo*, but to those familiar with Latin America, taking land in the name of economic development was very familiar.

This Note compares and contrasts modern American eminent domain jurisprudence with historical Latin American expropriation laws.⁹ This Note uses current American eminent domain jurisprudence to “go back in time” to take snapshot evaluations of expropriation laws in Latin America, specifically in the countries of Mexico, Guatemala, and Chile. The purpose is to provide a comparative analysis of governmental takings between these countries as well as a global context and understanding of *Kelo* and the exercise of eminent domain.

Part One discusses United States eminent domain jurisprudence by detailing *Kelo* and its predecessors as well as providing comparison points to be utilized in Part Two. Part Two details the Agrarian Code of 1934 in Mexico, Decreto 900 of 1952 in Guatemala, and Law 16640 of 1967 in Chile. Because these countries are founded on the civil law, an overview of the history of both indigenous and colonial land systems and a brief history of each country and its legal foundation for each law will be given. Part Two also discusses the implementation of the Latin American laws noted above, focusing on their results and aftermath. Part Two concludes with a comparison and evaluation of the three Latin American laws and American eminent domain cases.

I. THE UNITED STATES

With regard to property owned by non-nationals, the United States has recognized “the right [under international law] of a sovereign state to expropriate property for public purposes” with a duty of compensation and nondiscrimination in the choice of land seized.¹⁰ Compensation may be controversial because “what the expropriated individual will consider just in the circumstances is not necessarily what the seizing nation will consider just.”¹¹ Nonetheless, American jurisprudence determines the appropriateness of foreign expropriation.¹² Valid expropriation must

⁹ *Expropriation*, or *expropiación* in Spanish, is defined as “[a] governmental taking or modification of an individual’s property rights, esp[ecially] by eminent domain.” *Expropriation*, BLACK’S LAW DICTIONARY (7th ed. 1999). This term will be used generally when referring to governmental takings within Latin American countries, but specifically to refer to property taken from non-nationals in the United States, whereas *eminent domain* is used to refer to domestic governmental takings and its relevant jurisprudence in the United States.

¹⁰ Note, *Foreign Seizure of Investments: Remedies and Protection*, 12 STAN. L. REV. 606, 608 (1960).

¹¹ *Id.* at 610.

¹² See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmts. c–d, g (AM. LAW INST. 1987) (stating that the basis for expropriation,

have a legitimate public purpose accompanied by just compensation.¹³ Legitimate public purposes include improving health and aesthetics,¹⁴ reducing land concentration,¹⁵ and revitalizing economic development plans.¹⁶ Such public purposes do not need to guarantee results, but may be improper if an identifiable class of individuals is solely benefited.¹⁷

With regard to property owned by citizens in the United States, the validity of governmental takings starts with the text of the Fifth Amendment, which permits the taking of private property only for “public use” and with “just compensation.”¹⁸ The Supreme Court has interpreted just compensation as the fair market value of “what a willing buyer would pay in cash to a willing seller’ at the time of the taking.”¹⁹

The early Court strictly construed the public use requirement as the limit on the government’s ability to take private property.²⁰ Although what constituted a public use varied with the facts,²¹ under a strict construction, a taking would not be proper unless the public actually used the land.²² Public use was not a property interest; the public was not given a property right, but the government committed to the public use of the property.²³ Proper eminent domain was the right of the state “to take private property for its own public uses, and not for those of another.”²⁴ The necessity of that right would be lost if a state were to take land for another’s private use.²⁵

The modern understanding of what constitutes public use evolved in three cases: *Berman v. Parker*,²⁶ *Hawaii Housing Authority v. Midkiff*,²⁷ and *Kelo v. City of New London*.²⁸ These three cases will be

just compensation, and standard compensation are based on principles in the U.S. Constitution).

¹³ *Id.* § 712.

¹⁴ See discussion *infra* Part I.A.

¹⁵ See discussion *infra* Part I.B.

¹⁶ See discussion *infra* Part I.C.

¹⁷ See *infra* note 58 and accompanying text.

¹⁸ U.S. CONST. amend. V.

¹⁹ *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)).

²⁰ *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896).

²¹ See *id.* at 159–60 (finding a public use in water for irrigation based on a right to a proportional share of water).

²² See *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 416 (1896) (defining public use as broader than a group of “private individuals, voluntarily associated together for their own benefit”).

²³ *Wilson v. New*, 243 U.S. 332, 385 (1917) (Pitney, J., dissenting).

²⁴ *Kohl v. United States*, 91 U.S. 367, 373–74 (1875).

²⁵ *Id.* at 374.

²⁶ 348 U.S. 26 (1954).

²⁷ 467 U.S. 229 (1984).

analyzed chronologically in the following subsections. Under these cases, public use has been used synonymously with public purpose, a term which is defined broadly.²⁹

A. *Berman v. Parker*

The 1954 case of *Berman v. Parker* is the foundation for modern American eminent domain jurisprudence.³⁰ The Court evaluated the constitutionality of an act that Congress passed to address blight in the District of Columbia.³¹ The District of Columbia Redevelopment Act of 1945 declared blighted areas were “injurious to the public health, safety, morals, and welfare” and the taking of property was “necessary to eliminate” blight.³² The challenged Act was passed in 1945 to address poverty, slums, and alley dwelling, which had been problematic in D.C. for decades.³³ The Act was designed to re-plan and redevelop the entire city.³⁴ In one area of the city, surveys revealed, among other deficiencies, that approximately sixty-five percent of homes were beyond repair, fifty-eight percent had outside toilets, and eighty-four percent had no central heating.³⁵ Although the plan included some low- to middle-income housing, urban renewal was a major focus to encourage economic growth.³⁶ By 1950, a plan was developed and ready for implementation.³⁷ Max Morris, the appellant in *Berman*, owned a department store in the targeted area and challenged the constitutionality of the Act as applied to his property.³⁸ His store was commercial property that would be placed under control of a private agency for redevelopment and private use.³⁹

The Court held that the property could be properly taken in accordance with the Fifth Amendment as long as just compensation was received.⁴⁰ The Court viewed the exercise of eminent domain as a

²⁸ 545 U.S. 469 (2005).

²⁹ William Baude, *Takings Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 444, 446 (David F. Forte & Matthew Spalding eds., 2d ed. 2014).

³⁰ Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URB. LAW. 423, 423 (2010).

³¹ *Berman*, 348 U.S. at 28.

³² *Id.* (quoting the District of Columbia Redevelopment Act of 1945, 60 Stat. 790, § 2 (codified at D.C. CODE §§ 5-701 to -719 (1951))).

³³ Lavine, *supra* note 30, at 434–35, 443.

³⁴ *Berman*, 348 U.S. at 29; Lavine, *supra* note 30, at 443.

³⁵ *Berman*, 348 U.S. at 30.

³⁶ See Lavine, *supra* note 30, at 448–49 (describing the intent to build a highway through an urban area to increase assessment values of the land plots).

³⁷ *Berman*, 348 U.S. at 30.

³⁸ *Id.* at 31; Lavine, *supra* note 30, at 451–52.

³⁹ *Berman*, 348 U.S. at 31.

⁴⁰ *Id.* at 35–36.

legitimate and authoritative means to achieve the public purpose of improving the beauty and health of the city.⁴¹ Allowing property owners to object because their “property was not being used against the public interest” would undermine integrated redevelopment plans.⁴² The Court viewed the redevelopment plan as targeting the areas that produce slums in addition to the slums themselves.⁴³ This purpose permitted the taking of property even if it was not classified as blighted.⁴⁴

Thus, the Court allowed the taking of Morris’s store and deferred to a broad understanding of redevelopment within the public purpose standard.⁴⁵ The Court did not consider the success and effect of the redevelopment plan when assessing the legitimacy of the taking.⁴⁶ The Court no longer strictly construed or required a public use, but rather a public purpose that permitted a taking from one private party to another if the goal was an appropriate public benefit, such as improving health and welfare.⁴⁷

B. Hawaii Housing Authority v. Midkiff

In 1984, the Court again considered the public-use prong of the Takings Clause in *Hawaii Housing Authority v. Midkiff*.⁴⁸ In *Midkiff*, the Court evaluated the constitutionality of legislation that transferred title from owners to lessees in an effort to decrease the concentration of land ownership.⁴⁹

Hawaii had a feudal land system that did not include widespread private ownership of land.⁵⁰ Despite several previous attempts to redistribute land, property “remained in the hands of a few.”⁵¹ By the 1960s, the federal and state governments owned forty-nine percent of the land and seventy-two families owned another forty-seven percent.⁵² This concentration of land ownership altered the market, “inflating land prices, and injuring the public tranquility and welfare.”⁵³ The Land Reform Act of 1967 authorized land redistribution by condemning

⁴¹ *Id.* at 33–34.

⁴² *Id.* at 35.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Lavine, *supra* note 30, at 459.

⁴⁶ *Id.* at 461.

⁴⁷ Sperow, *supra* note 3, at 410.

⁴⁸ 467 U.S. 229, 231 (1984).

⁴⁹ *Id.* at 231–32.

⁵⁰ *Id.* at 232.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

residential property and transferring title to the current tenants.⁵⁴ Under the Act, tenants of “single-family residential lots within developmental tracts at least five acres in size” were entitled to ask for condemnation.⁵⁵ Owners would receive the fair market value of their interest.⁵⁶ When negotiations for sale failed, the owners defied arbitration orders and filed suit, seeking to have the Act declared unconstitutional.⁵⁷

The Court upheld the Act, finding that an “attack [on] certain perceived evils of concentrated property ownership” was a legitimate public purpose because it did not “benefit a particular class of identifiable individuals.”⁵⁸ The Court reasoned that when “the exercise of the eminent domain power is rationally related to a conceivable public purpose,” then a compensated taking is not prohibited.⁵⁹ “[T]he perceived social and economic evils of a land oligopoly” were subject to regulation under the state’s police power because the police power is interconnected with the public use requirement.⁶⁰ To satisfy the takings analysis, the legislature only needed to rationally believe the Act would promote the objective and did not have to show it would actually do so.⁶¹ Thus, the Court deferred to the legislature’s determination of what public purposes justified takings.⁶²

After *Midkiff*, the government only needed to articulate a reason rationally related to a conceivable public purpose to justify the taking.⁶³ Thus, “a public use can still be served even if the property ends up in the hands of private individuals.”⁶⁴ Also, the conceivable public purpose is limited only by the scope of the state’s police powers.⁶⁵ These principles were further developed in the next public use case.

C. *Kelo v. City of New London*

The Court’s most recent evaluation of the definition of public purpose occurred in 2005 in *Kelo v. City of New London*.⁶⁶ In *Kelo*, the

⁵⁴ *Id.* at 233. *Midkiff* demonstrates that land concentration and redistribution is not solely a Latin American phenomenon. See *infra* Parts II.A–C.

⁵⁵ *Midkiff*, 467 U.S. at 233.

⁵⁶ *Id.* at 234 n.2.

⁵⁷ *Id.* at 234–35.

⁵⁸ *Id.* at 245.

⁵⁹ *Id.* at 241.

⁶⁰ *Id.* at 241–42.

⁶¹ *Id.* at 242.

⁶² *Id.* at 244.

⁶³ *Id.* at 241.

⁶⁴ Sperow, *supra* note 3, at 411.

⁶⁵ *Midkiff*, 467 U.S. at 242.

⁶⁶ 545 U.S. 469, 477 (2005).

Court evaluated the constitutionality of a city's taking pursuant to a redevelopment plan to encourage economic growth.⁶⁷

The City of New London had experienced “[d]ecades of economic decline” and was classified as a “distressed municipality.”⁶⁸ In response, city officials began to target areas for economic renewal.⁶⁹ With the announcement of a Pfizer, Inc. pharmaceutical facility being built nearby, the Fort Trumbull area was targeted for redevelopment to “creat[e] jobs, generat[e] tax revenue,” and help revitalize the downtown.⁷⁰ The proposed redevelopment “plan was also designed to make the City more attractive and to create leisure and recreational opportunities.”⁷¹ The City had been authorized to purchase properties or exercise eminent domain when sale negotiations failed, and this suit resulted when nine homeowners refused to sell their land.⁷² Unlike the dilapidation D.C. addressed in *Berman*, none of these properties were blighted, but they “happen[ed] to be located in the development area.”⁷³ The taken land would be sold and developed under the New London Development Corporation (“NLDC”), which would implement the City’s development plan.⁷⁴

The Court held the City could legitimately exercise eminent domain to take the individuals’ property.⁷⁵ The Court reaffirmed “that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.”⁷⁶ The Court distinguished the City’s taking from private purposes and pretext public purposes, because the takings were part of a “carefully considered’ development plan.”⁷⁷ The purpose of the plan was not to benefit a class of individuals, but rather to “revitalize the local economy.”⁷⁸ In the use of eminent domain, the Court deferred to legislative assessment of social needs.⁷⁹ The City of New London authorized the “use of eminent domain to promote economic

⁶⁷ *Id.* at 472–73.

⁶⁸ *Id.* at 473.

⁶⁹ *Id.*

⁷⁰ *Id.* at 474.

⁷¹ *Id.* at 474–75.

⁷² *Id.* at 475.

⁷³ *Id.*

⁷⁴ *Id.* at 473–75.

⁷⁵ *Id.* at 489.

⁷⁶ *Id.* at 477.

⁷⁷ *Id.* at 478 (quoting *Kelo v. City of New London*, 843 A.2d 500, 536 (Conn. 2004)).

⁷⁸ *Id.* at 478 n.6 (quoting *Kelo*, 843 A.2d at 595 (Zarella, J., concurring in part and dissenting in part)).

⁷⁹ *Id.* at 482.

development,” which “unquestionably serves a public purpose.”⁸⁰ The Court upheld the taking of private property as part of “an integrated development plan.”⁸¹ The Court also affirmed that the City was not required to guarantee the results of the development plan.⁸²

Kelo established economic development as a valid public purpose.⁸³ The takings on behalf of the City of New London were authorized because the development plan did not benefit a particular class of individuals, and the Court deferred to legislative assessment of a local public need. Further, the locality did not have to guarantee the results of economic development.⁸⁴

Although the text of the Fifth Amendment requires that a taking be for a public use, the Court in *Berman*, *Midkiff*, and *Kelo* facilitated land redevelopment by defining public use to include broad public purposes.

II. LATIN AMERICA

A. Background

The cultural and historical role of property in Latin America reveals a conceptualization of property distinguishable from that in the United States. Due to the vast inequality in the distribution of land that has existed since colonial times, Latin American countries view property as a source of social and economic disparity that may be remedied through governmental intervention.⁸⁵

1. Indigenous and Colonial History

Although there were aspects of private ownership, communal land holding was a common feature of the precolonial indigenous land systems in Latin America.⁸⁶ For the Aztecs in modern day Mexico, the land system was complex because there were several types of land ownership that were treated like private ownership. At the lower end of the hierarchal legal system, commoners may have used and inherited

⁸⁰ *Id.* at 484.

⁸¹ *Id.* at 486–87.

⁸² *Id.* at 487–88.

⁸³ *See id.* at 485 (“[T]here is no basis for exempting economic development from our traditionally broad understanding of public purpose.”).

⁸⁴ States and citizens reacted strongly to *Kelo*’s holding, “probably result[ing] in more new state legislation than any other Supreme Court decision in history.” Somin, *supra* note 4, at 2102. The public widely condemned *Kelo*, and forty-one states initiated some reform in response. *Id.* at 2109, 2115.

⁸⁵ Ankersen & Ruppert, *supra* note 7, at 71.

⁸⁶ *See* M.C. MIROW, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTION IN SPANISH AMERICA 4 (2004) (describing the routine practice of land possession in Texcoco, which included communal ownership).

land with little political review.⁸⁷ Though treated like private property, these lands were essentially communally owned.⁸⁸ Nobles either owned land that was freely alienable or land attached to their political position, which was inalienable.⁸⁹ Land also could be owned for a particular purpose; two such purposes included palace lands or war.⁹⁰ The Inca land system, in modern day Peru, featured more communal ownership than the Aztecs. Either the government or the indigenous religion owned the Inca land, which the people worked collectively.⁹¹ There was a functional exception, as certain political offices held land, which was inheritable given the “hereditary nature of the office.”⁹² Thus, the ability to inherit land depended on the type of land and the status of the owner.⁹³

Spanish colonialism supplanted these complex indigenous land systems and centralized control of “[a]ll aspects of personal property, inheritance, landholding, and commercial activities” under peninsular control.⁹⁴ Land was claimed for and thus owned by the Crown, which granted land to individuals.⁹⁵ The culture of conquest meant private land titles in the colonial era came with conditions: land was granted to individuals, but the claim “often only matured on completing enumerated activities for a period of time on the property.”⁹⁶ “[T]he [Catholic] [C]hurch was an important actor in the holding, distributing, and financing of land.”⁹⁷ The Spanish land system “encourage[d] conquest and reward[ed] favorites of the Crown or those empowered by the Crown to give grants,” which fostered unequal land distribution.⁹⁸ Powerful individuals seized unused, unclaimed, or Indian land to collect large swaths of land.⁹⁹ Despite royal regulations and prohibitions, private ownership often exceeded the limitations.¹⁰⁰ The Catholic Church also held large quantities of land despite royal prohibitions against church land ownership.¹⁰¹ Although there were many royal prohibitions

⁸⁷ *Id.* at 4–5.

⁸⁸ *Id.* at 5.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 6.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 11.

⁹⁵ *Id.* at 63.

⁹⁶ *Id.* at 61.

⁹⁷ *Id.* at 66.

⁹⁸ Ankersen & Ruppert, *supra* note 7, at 80.

⁹⁹ MIROW, *supra* note 86, at 63.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 65–66.

and regulations on land, the Catholic Church and colonizers circumvented or avoided them, with enforcement an ocean away.¹⁰² The prohibitions also went unenforced as the Crown compromised with the landed elite to maintain their allegiance.¹⁰³ Thus, the amassing of land during colonialism “served to extract land from precolonial users and to create a wage labor force out of peasant and subsistence producers.”¹⁰⁴ The Crown unsuccessfully tried to reform the colonial land system, but it began “a legacy of state intervention in land tenure and property rights that continued through independence to present day.”¹⁰⁵

2. Theories of Property in Independence

Following independence from Spain, land in Latin America became further concentrated in the hands of the wealthy as the limited colonial regulations completely dissipated.¹⁰⁶ The concentration came from sale or the spoils of war.¹⁰⁷ The collection of “farm after farm and estate after estate,” called a *latifundio*,¹⁰⁸ gave “individuals ownership and authority over vast regions.”¹⁰⁹ By the twentieth century, “Latin America already had a long and troubled history of state efforts to manipulate property rights to alleviate the conflicts and problems inhering in concentration of land.”¹¹⁰

The inequity of the *latifundio* system provided fertile ground for the rooting of the social function of property doctrine.¹¹¹ The social function of property “challenge[s] the classical liberal [property] conception” in the common law system as “incomplete or unjust.”¹¹² Leon Duguit, a French jurist, first articulated this theory in 1911.¹¹³ The social function of property poses three challenges to the liberal property concept: (1)

¹⁰² *Id.* at 61, 66–67 (stating that colonizers and the Church honored some native land rights, while also taking some land for themselves).

¹⁰³ See Ankersen & Ruppert, *supra* note 7, at 82–83 (describing how the land policy of the Spanish Crown led to inequitable distribution).

¹⁰⁴ Sally Engle Merry, *Law and Colonialism*, 25 LAW & SOC'Y REV. 889, 891 (1991).

¹⁰⁵ Ankersen & Ruppert, *supra* note 7, at 82–83.

¹⁰⁶ MIROW, *supra* note 86, at 150.

¹⁰⁷ *Id.* (noting that chiefs and soldiers of the Venezuelan Republic were granted property formerly owned by royalists).

¹⁰⁸ A *latifundio* is a “[l]arge expanse of land, usually unproductive, in the hands of a single family.” HENRY SAINT DAHL, DAHL'S LAW DICTIONARY/DICCIONARIO JURÍDICO DAHL 305 (4th ed. 2006).

¹⁰⁹ MIROW, *supra* note 86, at 150.

¹¹⁰ Ankersen & Ruppert, *supra* note 7, at 87.

¹¹¹ See *id.* at 88 (describing how the rhetoric of revolutionaries led the way for social reform to take root in state ownership of property).

¹¹² Sheila R. Foster & Daniel Bonilla, *Introduction*, 80 FORDHAM L. REV. 1003, 1004 (2011).

¹¹³ *Id.*

individuals are interdependent, not isolated; (2) interdependence affects property rights; and (3) property rights can serve more than just individual interests.¹¹⁴

The social function of property respects an almost absolute individual property right as long as the individual makes the land productive.¹¹⁵ Should the individual fail his social obligation, the state may intervene with instruments like taxation and expropriation.¹¹⁶ It permits state action to affect social change through property.¹¹⁷ The theory focuses on the interdependence and solidarity of society to dictate that the wealth generated by the individual's productivity should be used to serve the community and make the community productive.¹¹⁸ Although this theory reflects the influence of Socialism, it is distinguishable because the social function of property is not justified by class struggle or state ownership.¹¹⁹ It refuses to allow "land appropriate for agricultural production to remain idle while willing laborers have no place to invest their labor."¹²⁰

Upon independence, the social function of property was incorporated into the constitutions of many Latin American countries.¹²¹ The general standard for expropriation is a "failure to effectively utilize the property for the benefit of society."¹²² Some Latin American constitutions tie this standard to a public purpose standard like that articulated by the United States Supreme Court in its trilogy of public use cases, although the scope of expropriation in Latin American countries is different.¹²³ Thus, the social function of property is tied to and considered a public purpose.

Latifundios were not just large estates; they "govern[ed] the life of those attached to [them] from the cradle to the grave, and greatly influence[d] all of the rest of the country. It [was] economics, politics, education, social structure and industrial development."¹²⁴ In Latin America, large landowners were "the richest and most influential

¹¹⁴ *Id.* at 1006–07.

¹¹⁵ *Id.* at 1005–06.

¹¹⁶ *Id.* at 1005.

¹¹⁷ Ankersen & Ruppert, *supra* note 7, at 88.

¹¹⁸ Foster & Bonilla, *supra* note 112, at 1005, 1007.

¹¹⁹ *Id.* at 1007.

¹²⁰ Ankersen & Ruppert, *supra* note 7, at 96 (comparing the social function of property to Locke's labor theory of property).

¹²¹ Foster & Bonilla, *supra* note 112, at 1008.

¹²² Ankersen & Ruppert, *supra* note 7, at 95.

¹²³ *Id.* at 97.

¹²⁴ F. Tannenbaum, *Toward an Appreciation of Latin America*, in *THE UNITED STATES AND LATIN AMERICA* (H. Matthews ed., 2d ed. 1963), reprinted in *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK*, at 247 (Kenneth L. Karst & Keith S. Rosen eds., 1975).

members of their communities,” with key roles both nationally and locally.¹²⁵ “Their status and income [were] assured through traditional tenure institutions because they control[led] most of the land . . . [and] command[ed] the other resources necessary for efficient production such as water and credit.”¹²⁶

Land and its distribution have therefore been important to the political and economic stability of Latin America.¹²⁷ The legacy of land concentration has created social, political, and economic chasms between landholders and the semi-serfdom of workers, who depended on the landholders.¹²⁸ The social function of property offered the state “a philosophical and juridical basis” to interfere in property rights.¹²⁹

This backdrop of history and theory provides a point of reference and understanding for analyzing the circumstances and laws of Mexico, Guatemala, and Chile. The following analysis is presented in chronological order based on the date of each country’s expropriation laws: Mexico and the Agrarian Code of 1934,¹³⁰ Guatemala and Decreto 900 of 1952,¹³¹ and Chile and Law 16640 of 1967.¹³²

B. Mexico

1. Historical Context

Land reform has had a prominent role in Mexican history as a tool for economic development and increasing political power.¹³³ Prior to 1910, the Porfiriato dictatorship, named after its head, Porfirio Díaz, governed Mexico and benefited and enriched foreigners at the expense of the indigenous people.¹³⁴ However, 1910 brought revolution fueled by

¹²⁵ S. Barraclough & A. Domike, *Agrarian Structure in Seven Latin American Countries*, 42 LAND ECON. 391 (1966), reprinted in LAW AND DEVELOPMENT IN LATIN AMERICA, *supra* note 124, at 253.

¹²⁶ *Id.* Though not exclusively, these large landholders were often foreigners who had acquired the land during dictatorships that favored foreign influence. See RODERIC AI CAMP, MEXICO: WHAT EVERYONE NEEDS TO KNOW 78 (2011) (discussing the Porfiriato in Mexico, whose land policies benefited wealthy foreigners).

¹²⁷ See SUSAN A. BERGER, POLITICAL AND AGRARIAN DEVELOPMENT IN GUATEMALA 1 (1992) (describing how land distribution and Guatemalan agrarian policies were intended to promote modernization and enhance the nation’s political power).

¹²⁸ Robert J. Alexander, *Agrarian Reform in Latin America*, FOREIGN AFF., Oct. 1962, at 191, 191–92, <http://www.foreignaffairs.com/articles/23466/robert-j-alexander/agrarian-reform-in-latin-america>.

¹²⁹ Ankersen & Ruppert, *supra* note 7, at 87–88.

¹³⁰ Código Agrario [CAgr], Diario Oficial de la Federación [DOF] 28-12-1933 (Mex.).

¹³¹ Ley de Reforma Agraria, Decreto 900, 24-06-1952 (Guat.).

¹³² Law No. 16640, Reforma Agraria, Julio 16, 1967, Diario Oficial [D.O.] (Chile).

¹³³ JOHN J. DWYER, THE AGRARIAN DISPUTE 17 (2008).

¹³⁴ AI CAMP, *supra* note 126, at 77–78.

several justifications, including agrarian reform.¹³⁵ As the dust of the Revolution began to settle, a new constitution was ratified in 1917.¹³⁶ This Constitution, which is still in force, became an essential component of the revolutionary rhetoric and legitimized several of its basic principles for the public.¹³⁷ The four most important principles of the new Constitution were its provisions on education, land ownership, labor rights, and the limitations on the Catholic Church.¹³⁸ Article 3 of the Constitution guaranteed an education provided by the state.¹³⁹ Article 123 laid out provisions on labor, such as mandating the maximum workday, forbidding child labor, and requiring a minimum wage.¹⁴⁰ The constitutional provisions on property in Article 27 were important because in 1917 approximately three percent of the population owned more than ninety percent of the arable land.¹⁴¹

Property rights and the principles of land reform are laid out in Article 27.¹⁴² Individual liberties are protected by preventing the

¹³⁵ *Id.* at 81–82. For example, land was the motivating factor for revolutionary hero Emiliano Zapata, an indigenous leader who fought for traditional communal ownership and issued and implemented his own agrarian reform during the Revolution. LAW AND DEVELOPMENT IN LATIN AMERICA, *supra* note 124, at 278–79, 283. During the 1910 Revolution, Zapata issued the Plan of Ayala, which advocated for the *ejidos*—land communally owned by villages. *Id.* at 279. Zapata was not the only revolutionary leader to implement land reform. *See id.* at 280–83 (discussing the land reform efforts of General Venustiano Carranza).

¹³⁶ AI CAMP, *supra* note 126, at 92.

¹³⁷ *Id.* The Constitution established a federal republic similar to the United States, except that the Mexican state was semi-authoritarian with power predominantly residing in the President. *Id.* at 116–17. The centralized authoritative nature of the federal government limited the independence of Mexican states, especially since governors and the President were of the same party. *See infra* note 155. The government democratized over time due to economic issues in the 1980s and the increasing power of another legitimate political party. AI CAMP, *supra* note 126, at 120–21, 126.

¹³⁸ AI CAMP, *supra* note 126, at 93. During colonial times and until the Revolution, the Catholic Church was very economically powerful and previous attempts at land reform had challenged the Church's landholdings. *See id.* at 66 (explaining the reform of Church influence in property control and ownership during the political movements in Mexico during the 1850s); William D. Signet, *Grading a Revolution: 100 Years of Mexican Land Reform*, 16 LAW & BUS. REV. AMS. 481, 489 (2010) (describing the text of the Lerdo Law, which was targeted toward reform of communal organizations that held property under both civil and ecclesiastical corporations).

¹³⁹ Constitución Política de los Estados Unidos Mexicanos, CP, tit. I, ch. I, art. 3, Diario Oficial de la Federación [DOF] 31-01-1917, últimas reformas DOF 11-10-1966 (Mex.).

¹⁴⁰ *Id.* tit. VI, art. 123.

¹⁴¹ E. Flores, *The Economics of Land Reform*, 92 INT'L LAB. REV. 30 (1965), reprinted in LAW AND DEVELOPMENT IN LATIN AMERICA, *supra* note 124, at 262.

¹⁴² Constitución Política de los Estados Unidos Mexicanos, CP, tit. I, ch. I, art. 27, Diario Oficial de la Federación [DOF] 31-01-1917, últimas reformas DOF 11-10-1966 (Mex.).

deprivation of “life, liberty, property, possessions, or rights.”¹⁴³ Yet, interestingly, property originates with the state.¹⁴⁴ Still, land can only be expropriated for reasons of public utility and with indemnification.¹⁴⁵ The state has the right to impose formalities of the public interest upon private property, including the authority to break up *latifundios* and prevent environmental destruction.¹⁴⁶ Minerals and water were declared property of the state.¹⁴⁷ Only Mexicans, as defined by the Constitution, were allowed to acquire land, unless specially permitted by the state, and the Catholic Church was forbidden from acquiring land.¹⁴⁸ The Constitution also laid out principles for the redistribution of large landholdings.¹⁴⁹ The maximum amount of land ownership would be fixed by future laws, expropriation was authorized when holdings exceeded the fixed amount, and bonds would be issued as repayment.¹⁵⁰

The 1910 Revolution birthed a spirit of nationalism among the political elites.¹⁵¹ As contrasted with the previous dictatorship, the new government featured presidents who were very powerful for their term

¹⁴³ *Id.* tit. I, ch. I, art. 14.

¹⁴⁴ *Id.* tit. I, ch. I, art. 27. A similar idea exists in United States state constitutions where the people, as a collective unit, possess the land. *See, e.g.*, S.C. CONST. art. XIV, § 3 (“The people of the State are declared to possess the ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall fail from defect of heirs shall revert or escheat to the people.”); WIS. CONST. art. IX, § 3 (“The people of the state, in their right of sovereignty, are declared to possess the ultimate property in and to all lands within the jurisdiction of the state; and all lands the title to which shall fail from a defect of heirs shall revert or escheat to the people.”).

¹⁴⁵ Constitución Política de los Estados Unidos Mexicanos, CP, tit. I, ch. I, art. 27, Diario Oficial de la Federación [DOF] 31-01-1917, últimas reformas DOF 11-10-1966 (Mex.). *Utilidad* includes a legal meaning of “advantage, benefit, usefulness,” DAHL, *supra* note 108, at 518, which is similar to the legal definition of *public purpose* as “[a]n action by or at the direction of a government for the benefit of the community as a whole,” *Public Purpose*, BLACK’S LAW DICTIONARY (7th ed. 1999).

¹⁴⁶ Constitución Política de los Estados Unidos Mexicanos, CP, tit. I, ch. I, art. 27, Diario Oficial de la Federación [DOF] 31-01-1917, últimas reformas DOF 11-10-1966 (Mex.).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* The Constitution defined Mexicans as those individuals born within the territory and those born in a foreign country to at least one Mexican parent. *Id.* tit. I, ch. I, art. 30. It further provided that naturalized citizens included individuals that received a letter of naturalization from the Secretary of Foreign Relations or any woman married to a Mexican man with a domicile in the country. *Id.*

¹⁴⁹ *Id.* tit. I, ch. I, art. 27 (detailing provision for government allotment and division of land among inhabitants).

¹⁵⁰ *Id.* In preparation for his land reform, Cárdenas slightly modified this provision to include small agricultural property. *Las Transformaciones del Cardenismo*, SECRETARÍA DE DESARROLLO AGRARIO, TERRITORIAL Y URBANO (Aug. 22, 2010), <http://www.sedatu.gob.mx/sraweb/conoce-la-secretaria/historia/las-transformaciones-del-cardenismo> (last visited Jan. 21, 2016).

¹⁵¹ DWYER, *supra* note 133, at 2.

and a “perpetual political organization” (the political party of the Revolution, which was later named the PRI) that held power indefinitely.¹⁵² This was a legacy due in part to the fact that the first leaders under the new Constitution had led the Revolution.¹⁵³

In 1934, Lazaro Cárdenas was elected president, and though he was only meant to be a puppet, Cárdenas was his own man.¹⁵⁴ He built the foundation for a centralized and powerful authoritarian state by establishing a corporatist structure between the political party and organizations of labor, peasants, and some professionals.¹⁵⁵ In following the legacy and importance of land reform in the country, he implemented a new agrarian code in 1934;¹⁵⁶ land distribution remained a problem, with large landed estates accounting for almost eighty-four percent of rural farmland.¹⁵⁷ Cárdenas’s agrarian reform was a campaign promise in response to rural discontent over land distribution.¹⁵⁸

2. The 1934 Agrarian Code

The 1934 comprehensive Agrarian Code contained ten titles.¹⁵⁹ It was believed that land reform undertaken under this Code would be the basis of economic growth because it “would redistribute national wealth, reduce rural underemployment, improve the material conditions and living standards for the nation’s majority, and free the peasantry from its dependence on the rural elite.”¹⁶⁰ The Code established a right and means of restitution for the lands nationalized by Article 27 of the Constitution.¹⁶¹ Lands owned by one individual that bordered population centers were subject to expropriation in proportion to the number of individuals in the village.¹⁶² There were limits on the quantity of people in the population centers that would exclude the lands from being

¹⁵² AI CAMP, *supra* note 126, at 96–97.

¹⁵³ *See id.* at 95–97 (describing the respective regimes of General Álvaro Obregón, General Plutarco Elías Calles, and General Lázaro Cárdenas, all of whom were generals in the Mexican Revolution).

¹⁵⁴ *Id.* at 96, 100. Cárdenas’s former mentor, Calles, who had been elected in 1924, tried to be “the power behind the throne,” but Cárdenas had him forcefully exiled soon after Cárdenas took office. *Id.*

¹⁵⁵ *Id.* at 100–01. Nominees of the National Party of the Revolution, which later became the PRI, won every gubernatorial election until 1989, most local and national legislative positions until the 1990s, and every presidential election until 2000. *Id.* at 96.

¹⁵⁶ *See infra* Part II.B.3.

¹⁵⁷ Signet, *supra* note 138, at 512. These statistics were taken in 1930. *Id.*

¹⁵⁸ DWYER, *supra* note 133, at 79.

¹⁵⁹ Código Agrario [CAgr], tit. I–X, Diario Oficial de la Federación [DOF] 28-12-1933 (Mex.).

¹⁶⁰ DWYER, *supra* note 133, at 80.

¹⁶¹ CAgr, tit. II, cap. I, arts. 20–24.

¹⁶² *Id.* tit. III, cap. I, arts. 34–39.

expropriated.¹⁶³ Individuals with families who worked in and were residents of the population center were given preference for these expropriated lands.¹⁶⁴ The ability to submit *ejido*¹⁶⁵ petitions was extended from peasants in villages to landless rural workers, the *peones acasillados*.¹⁶⁶ There were other exemptions from expropriation, including certain plantations and other limited forms of property.¹⁶⁷ A timeline for possession and dispute resolution was provided, with ultimate dispute resolution given to the President but transmitted by the lower governmental bodies.¹⁶⁸ Private lands could be expropriated without limit as population centers grew or expropriated automatically based on a decree by the Agricultural Department.¹⁶⁹ The Code distinguished between lands of individual ownership, which were worked, and communal ownership, which included natural resources.¹⁷⁰

3. Implementation and Realities of the Code

The Code was very popular domestically. Expropriation fostered economic nationalism so that Mexicans, rather than foreigners, could profit from the land, making Cárdenas a very popular president.¹⁷¹ The Code differed from earlier attempts by providing financial, educational, and technical assistance to those who received land.¹⁷² From 1917 to 1965, 120 million acres of land were expropriated to some 2.2 million

¹⁶³ *Id.* tit. III, cap. II, art. 42, sec. c.

¹⁶⁴ *Id.* tit. III, cap. III, art. 44, sec. a–c.

¹⁶⁵ In Mexico, *ejido* is a loaded word that refers to an agrarian community which has received and continues to hold land in accordance with the agrarian laws growing out of the Revolution of 1910. The lands may have been received as an outright grant from the government or as a restitution of lands that were previously possessed by the community and adjudged by the government to have been illegally appropriated by other individuals or groups; or the community may merely have received confirmation by the government of titles to land long in its possession. Ordinarily, the *ejido* consists of at least twenty individuals, usually heads of families (though not always), who were eligible to receive land in accordance with the rules of the Agrarian Code, together with the members of their immediate [families].

DAHL, *supra* note 108, at 188.

¹⁶⁶ CAg, tit. III, cap. III, arts. 45–46; DWYER, *supra* note 133, at 22.

¹⁶⁷ CAg, tit. III, cap. V, arts. 52, 54.

¹⁶⁸ *Id.* tit. IV, cap. II, art. 74; *id.* tit. IV, cap. III, arts. 75–77.

¹⁶⁹ *Id.* tit. VI, cap. I, art. 99; *id.* tit. X, cap. I, art. 173.

¹⁷⁰ *Id.* tit. VIII, cap. IV, art. 139. The inheritance of rights was even addressed. *See id.* tit. VIII, cap. IV, art. 140, sec. III (stating that the land purchaser must provide a list of people who will replace the purchaser as head of household upon the purchaser's death).

¹⁷¹ DWYER, *supra* note 133, at 83. His decision to nationalize the Mexican oil industry in 1939 made him the most popular president of the twentieth century. AI CAMP, *supra* note 126, at 102–03.

¹⁷² DWYER, *supra* note 133, at 81.

peasants.¹⁷³ Cárdenas gave expropriated land to the *ejidos*, which totaled approximately fifty percent of Mexico's agricultural production during the era.¹⁷⁴ Under the five biggest expropriations from 1936 to 1938, almost 77,000 *campesinos* received land.¹⁷⁵

Restitution was an issue for the expropriated lands,¹⁷⁶ especially those taken from foreign individuals, though the government did pay foreign citizens \$12.5 million for the lands taken during 1927–1940.¹⁷⁷ Vacant or unproductive lands were not the only targets of expropriation; productive lands were also redistributed, which further strained relations with the United States.¹⁷⁸ Relations were strained because foreign-owned lands were often expropriated and the weak Mexican economy made indemnification difficult.¹⁷⁹ However, many of the foreign claims were finally settled in the 1941 Global Settlement.¹⁸⁰

The Agrarian Code successfully redistributed land, increasing the percentage of land owned by the majority population.¹⁸¹ Cárdenas's program set a precedent that other Latin American countries followed.¹⁸² After Cárdenas, successive Mexican presidents implemented versions of agrarian reform.¹⁸³

Cárdenas's reforms radically changed the country's land structure.¹⁸⁴ Despite the success of his agrarian reform, Cárdenas is better known and praised for his nationalization of the petroleum industry in 1939.¹⁸⁵ Under Cárdenas, land reform in Mexico was at its apex; afterwards, land was redistributed with less frequency and

¹⁷³ Flores, *supra* note 141, at 262.

¹⁷⁴ Signet, *supra* note 138, at 522.

¹⁷⁵ *Las Transformaciones del Cardenismo*, *supra* note 150. The Agrarian Code was subsequently amended in 1937 to capture Cárdenas's guidelines by requiring some form of industrialization and investment into the capacity of the new landowners in order to better the development of the community. *Id.*

¹⁷⁶ LAW AND DEVELOPMENT IN LATIN AMERICA, *supra* note 124, at 284.

¹⁷⁷ E. Flores, *Tratado De Economía Agrícola* (1961), in LAW AND DEVELOPMENT IN LATIN AMERICA, *supra* note 124, at 359; DWYER, *supra* note 133, at 209.

¹⁷⁸ DWYER, *supra* note 133, at 1, 81. Relations with the United States were strained when Cárdenas nationalized the railroads in 1937, but relations were especially difficult after the nationalization of oil in 1938. *Id.* at 3–4, 46.

¹⁷⁹ *Id.* at 209.

¹⁸⁰ *Id.* at 232.

¹⁸¹ See *Las Transformaciones del Cardenismo*, *supra* note 150 (stating that more than eighteen million *hectares* were redistributed).

¹⁸² DWYER, *supra* note 133, at 272.

¹⁸³ See *id.* at 267 (stating that successive Mexican officials have “allowed most remaining landowners to keep their holdings and have generally limited the expropriation of foreign-owned property [and] . . . welcomed investments by transnational corporations south of the border”).

¹⁸⁴ *Las Transformaciones del Cardenismo*, *supra* note 150.

¹⁸⁵ AI CAMP, *supra* note 126, at 102–03.

intensity.¹⁸⁶ However, the Agrarian Code had created a new social class of property owners in rural areas.¹⁸⁷ The *ejidatarios*, those who had received redistributed land, were hit hard by the economic crisis of the 1980s.¹⁸⁸ During the 1990s, in an effort to deal with the different demographics, economics, and social life that resulted from previous land reforms, Article 27 of the Constitution was amended, effectively ending the 1910 Revolution's commitment to expropriation.¹⁸⁹ Given the influence of Cárdenas's agrarian reform within Mexico and Latin America, as well as subsequent agrarian developments in Mexico, the Code provides a good point of comparative analysis to United States eminent domain law.

4. Comparing the Code to Eminent Domain

Though popular in Mexico, Cárdenas's Agrarian Code of 1934 would likely not pass the United States eminent domain test. Like the purpose of land redistribution in *Midkiff*, the Code aimed to diminish the concentration of land ownership.¹⁹⁰ The Code also sought to improve the living conditions and standards of the people, which is similar to the public health and welfare purpose in *Berman*.¹⁹¹ In addition, the Code sought to redistribute wealth, decrease peasantry dependency, and reduce employment, all of which could serve as a basis for economic growth,¹⁹² similar to the redevelopment plan in *Kelo*.¹⁹³ A belief underlying the Code was that expropriation would encourage economic growth, which is arguably a legitimate public purpose.¹⁹⁴ However, the beneficiaries of expropriation were explicitly defined and targeted based on their location, which likely qualifies as benefiting an identifiable class

¹⁸⁶ *Una Nueva Estrategia*, SECRETARÍA DE DESARROLLO AGRARIO, TERRITORIAL Y URBANO (Aug. 22, 2011), <http://www.sedatu.gob.mx/sraweb/conoce-la-secretaria/historia/una-nueva-estrategia/> (last visited Jan. 17, 2016).

¹⁸⁷ *La Iniciativa*, SECRETARÍA DE DESARROLLO AGRARIO, TERRITORIAL Y URBANO (Aug. 19, 2011), <http://www.sedatu.gob.mx/sraweb/conoce-la-secretaria/historia/la-iniciativa/> (last visited Jan. 17, 2016).

¹⁸⁸ *Efervescencia Agraria*, SECRETARÍA DE DESARROLLO AGRARIO, TERRITORIAL Y URBANO (Aug. 19, 2011), <http://www.sedatu.gob.mx/sraweb/conoce-la-secretaria/historia/efervescencia-agraria/> (last visited Jan. 17, 2016).

¹⁸⁹ *La Iniciativa*, *supra* note 187. These changes did not go unchallenged. *AI CAMP*, *supra* note 126, at 131. In 1991, President Carlos Salinas modified the Constitution as part of his neo-liberal economic policies, which included the successful negotiation of NAFTA in 1994; however, the Zapatista National Liberation Army ("EZLN") responded by uprising the day the treaty went into effect. *Id.*

¹⁹⁰ *See supra* notes 49, 160 and accompanying text.

¹⁹¹ *See supra* notes 41–42, 160 and accompanying text.

¹⁹² *See supra* note 160 and accompanying text.

¹⁹³ *See supra* notes 66–67, 75–80 and accompanying text.

¹⁹⁴ *See supra* notes 76–80 and accompanying text.

of individuals.¹⁹⁵ These families and workers surrounding the population centers were the desired beneficiaries for the economic development and the reasons for expropriation.¹⁹⁶

There are fundamental differences between Mexican and American conceptions of property that present problems for a comparison of these two systems. These differences facilitated the legality of the Code in Mexico, but would challenge its viability under the requirements of eminent domain. The fact that property rights in Mexico originate in the state and there are inherent limitations to property, not to mention the external limits on ownership,¹⁹⁷ reflects a unique history that is inconsistent with American property norms.

Although compensation is constitutionally required in Mexico, the amount compensated would likely be controversial, because payment would be based on what previous landowners declared on their taxes.¹⁹⁸

For these reasons—specifying beneficiaries and conflicting views of private property—the Agrarian Code of 1934 would not withstand scrutiny under United States eminent domain jurisprudence.

C. Guatemala

1. Historical Context

Guatemala's story mirrors the regional trend of large tracts of land in the hands of a few, maintained by a classification of debt peonage.¹⁹⁹ In the twentieth century, Guatemalan political power was decentralized to the landed elites, who ruled through paternalism and repression until the 1931 government of Jorge Ubico.²⁰⁰ Ubico's reign marked a change in the Guatemalan agricultural system. His dictatorship centralized power, modernized agricultural transport for exporting, and created business ties to the United States.²⁰¹ Guatemala was nonetheless characterized as underdeveloped, "which led to economic exploitation, cultural repression, and political oppression."²⁰² Ubico's authority waned and a revolution in 1944 ushered in a new government that desired to democratize the country.²⁰³ The revolutionary leaders were liberal intellectuals from the

¹⁹⁵ See *supra* notes 76, 161–66 and accompanying text.

¹⁹⁶ See *supra* notes 76, 161–66 and accompanying text.

¹⁹⁷ See *supra* notes 143–45 and accompanying text.

¹⁹⁸ Constitución Política de los Estados Unidos Mexicanos, CP, tit. I, ch. I, art. 27, Diario Oficial de la Federación [DOF] 31-01-1917, últimas reformas DOF 11-10-1966 (Mex.); Alexander, *supra* note 128, at 198.

¹⁹⁹ BERGER, *supra* note 127, at 5.

²⁰⁰ *Id.* at 26.

²⁰¹ *Id.* at 26–27.

²⁰² RICHARD H. IMMERMANN, *THE CIA IN GUATEMALA: THE FOREIGN POLICY OF INTERVENTION* 20 (1982).

²⁰³ BERGER, *supra* note 127, at 16, 40–41, 43.

middle class.²⁰⁴ The new government decentralized political power and the “legislature became a legitimate policymaking force.”²⁰⁵

The 1945 constitutional framers desired to raise the population’s standard of living and to establish equality between Guatemalan nationals and foreign entrepreneurs.²⁰⁶ The 1945 Guatemalan Constitution protected individual rights such as “life, liberty, equality, and security of person, honor, and property.”²⁰⁷ The social function of property was evident, as the primary function of the state was to see “that the fruits of labor benefit preferably its producers and that wealth reaches the greatest number of inhabitants.”²⁰⁸ Although private property was recognized, it was classified as a social function with limitations “determined in the law for reasons of public necessity or utility or national interest.”²⁰⁹ Large landholdings were prohibited, and the law mandated their eventual disappearance, with the land subject to taxation in the meantime.²¹⁰ Expropriation was allowed “[f]or reasons of public utility or necessity or social interest legally proved” and required indemnification.²¹¹

The previous passage of agrarian reform laws was met with resistance from large foreign landholders, sparking internal political controversy and debate, and leaving the laws without force.²¹² By the 1951 elections, it seemed a state-controlled agrarian reform was necessary to ensure the survival of the democratic state threatened by domestic and foreign landholders.²¹³ In 1950, less than one percent of landowners, who were mostly foreigners, owned forty-five percent of the total agricultural land.²¹⁴ Further, the rapidly growing population was poorly distributed, and feeding the population was difficult when not all of the arable land was being used for crops.²¹⁵ Two percent of the population held approximately seventy percent of Guatemala’s land, and

²⁰⁴ IMMERMANN, *supra* note 202, at 37.

²⁰⁵ BERGER, *supra* note 127, at 41.

²⁰⁶ IMMERMANN, *supra* note 202, at 66.

²⁰⁷ CONSTITUCIÓN DE LA REPÚBLICA DE GUATEMALA, tit. III, art. 23, 11-03-1945, translated in AMOS J. PEASLEE, 2 CONSTITUTIONS OF NATIONS 71–108 (1950). The Constitution established Guatemala as a democratic republic that sought to reestablish the Central American Union. *Id.* tit. I, arts. 1, 3.

²⁰⁸ *Id.* tit. IV, art. 88.

²⁰⁹ *Id.* tit. IV, art. 90.

²¹⁰ *Id.* tit. IV, art. 91.

²¹¹ *Id.* tit. IV, art. 92.

²¹² BERGER, *supra* note 127, at 43–47, 49–50.

²¹³ *Id.* at 52–53.

²¹⁴ Ross Pearson, *Land Reform, Guatemalan Style*, 22 AM. J. ECON. & SOC. 225, 225 (1963); see also IMMERMANN, *supra* note 202, at 30 (stating that foreigners owned a majority of the land).

²¹⁵ Pearson, *supra* note 214, at 226.

only a third of the land was arable, with only half of that utilized.²¹⁶ Thus, concentration of land ownership was a serious problem.

In 1951, Jacobo Arbenz was elected president.²¹⁷ Although he was accused of being a Communist, Arbenz was a liberal nationalist with a military background who had popular support.²¹⁸ He came to power seeking to establish Guatemalan autonomy from international political and economic structures.²¹⁹ He mostly maintained the democratic structure handed down to him, but to protect against the control of large landholders, government positions were filled with trusted individuals and local peasants were mobilized through national unions.²²⁰ In 1952, Arbenz passed a radical land reform law, Decreto 900, which fulfilled his campaign promises and was intended to protect the state's autonomy.²²¹ Arbenz's agrarian reform law was passed under the authority of the 1945 Constitution.²²²

2. Decreto 900: Agrarian Reform Law of 1952

Decreto 900 was the result of careful government study and consultation with Latin American economists,²²³ and was "intended to overcome the causes of Guatemala's underdevelopment and to restructure the hierarchical organization of society."²²⁴ The Decreto itself declared that it was born of a need to change the role of property in society and a desire to improve the livelihood of Guatemalans.²²⁵ It was seen as a compromise between private ownership and increasing cultivation,²²⁶ with the express objective of developing the economy.²²⁷ Expropriation under the law required indemnification based on the tax registry and was paid proportionally based on the land actually expropriated.²²⁸ Many types of land were excluded from the land reform,

²¹⁶ IMMERMANN, *supra* note 202, at 28.

²¹⁷ BERGER, *supra* note 127, at 17.

²¹⁸ IMMERMANN, *supra* note 202, at 44, 61.

²¹⁹ *Id.* at 62.

²²⁰ BERGER, *supra* note 127, at 62.

²²¹ *Id.* at 52–53, 64.

²²² Arbenz enacted Decreto 900 in 1952, prior to the nullification of the 1945 Constitution after a 1954 coup. BERGER, *supra* note 127, at 64; Nara Milanich, *To Make All Children Equal is a Change in the Power Structures of Society: The Politics of Family Law in Twentieth Century Chile and Latin America*, 33 L. & HIST. REV. 767, 779–80 (2015) (stating that the Constitution of Guatemala was promulgated in 1945 and later superseded by the 1956 Constitution).

²²³ IMMERMANN, *supra* note 202, at 64.

²²⁴ *Id.* at 66.

²²⁵ Ley de Reforma Agraria, Decreto 900, p. 3, 24-06-1952 (Guat.).

²²⁶ IMMERMANN, *supra* note 202, at 64–65.

²²⁷ Decreto 900, tit. I, art. 3.

²²⁸ *Id.* tit. I, art. 6.

including lands used for productive purposes, like the cultivation of bananas.²²⁹ The uncultivated portions of the large landholdings were subject to and targeted by expropriation.²³⁰ These *latifundios* were subject to expropriation in order to benefit the nation in general, as well as the rural peasants and workers.²³¹ Only Guatemalans had the right to solicit expropriation, with the first claim belonging to the rural peasants and land workers.²³² With production as a goal, grants of expropriated land were conditional, as the *usufructuarios*²³³ lost the land given to them under the expropriation if they had not begun to cultivate within two years.²³⁴ They were also forbidden from giving their right to third parties.²³⁵ There was a hierarchical system for resolving disputes, and the President had the final say.²³⁶ There were also penalties for falsifications under, and impediment of, the reform.²³⁷

3. Implementation and Realities of the Decreto

Despite the stated purposes and form of Decreto 900, its implementation sparked controversy.²³⁸ Arbenz believed it was the government's responsibility to prevent economic chaos so that Guatemalans could enjoy the benefits of the economic improvements.²³⁹ In two years, Decreto 900 had dramatic results by granting land that would have otherwise remained idle to some 100,000 families, or about 500,000 individuals.²⁴⁰ There was progress—food prices were down and buying power had increased—even though Guatemala would still be classified as underdeveloped.²⁴¹

Arbenz and Decreto 900 faced an insurmountable challenge in the

²²⁹ *Id.* tit. II, cap. I, art. 10, sec. d.

²³⁰ *Id.* tit. II, cap. IV, art. 32.

²³¹ *Id.*

²³² *Id.* tit. II, cap. III, art. 25; *id.* tit. II, cap. V, arts. 35–36. The Constitution laid out the requirements for citizenship and nationality. CONSTITUCIÓN DE LA REPÚBLICA DE GUATEMALA, tit. II, arts. 5–20, 11-03-1945, *translated in* PEASLEE, *supra* note 207, at 72–74.

²³³ *Usufructuario* is a “[p]erson who uses and enjoys, [a] beneficiary of a usufruct.” DAHL, *supra* note 108, at 517. A *usufruct*, or *usufructo*, is “the right to enjoy a thing owned by another person and to receive all the products, utilities and advantages produced thereby, under the obligation of preserving its form and substance.” *Id.* at 513.

²³⁴ Ley de Reforma Agraria, Decreto 900, tit. II, cap. VI, art. 38, 24-06-1952 (Guat.).

²³⁵ *Id.* tit. II, cap. VI, art. 39. It was, however, possible for *usufructuarios* to lease their lands with permission from the National Agrarian Department. *Id.*

²³⁶ *Id.* tit. IV, cap. III, art. 75.

²³⁷ *Id.* tit. V, art. 84.

²³⁸ Sasha Maldonado Jordison, *Guatemala on Trial—Rios Montt Genocide Trial: An Observer's Perspective*, 30 CONN. J. INT'L L. 53, 69 (2014).

²³⁹ IMMERMANN, *supra* note 202, at 63.

²⁴⁰ *Id.* at 65–66.

²⁴¹ *Id.* at 67.

U.S. State Department, which had classified Arbenz as a Communist and “confirmed” their suspicions when the lands of an American company, the United Fruit Company, began to be expropriated in 1952.²⁴² Though not specifically a target of Decreto 900, efforts “to bring about social and economic reforms sufficiently comprehensive to reach the two-thirds of the population that had for so long been poor, made a confrontation with the largest landholder inevitable.”²⁴³ United Fruit Company owned more than 500,000 acres of Guatemalan land, only fifteen percent of which was cultivated, with the rest left idle.²⁴⁴ Unfortunately for Guatemala, Arbenz and the nationalist reform fell easily into the era’s broad definition of Communism.²⁴⁵ Thus, with the help of the CIA, a revolution overthrew the Arbenz government in 1954, ending land reform under Decreto 900.²⁴⁶ But the revolution did not end the problems of land distribution or prevent subsequent attempts at land reform.²⁴⁷

In 1956, the regime of Castillo Armas, which replaced the Arbenz government, saw land redistribution as part of a larger development program and implemented a land reform program aimed at changing the agricultural situation slowly over time.²⁴⁸ However, almost one hundred percent of the lands redistributed under Arbenz were returned to their original owners.²⁴⁹ Land remained unequally distributed for the rest of the century, augmented by internal conflicts.²⁵⁰ Today, there is ongoing political and economic tension between elites clinging to their interests and the impoverished Guatemalans grasping for basic subsistence.²⁵¹

²⁴² *Id.* at 68. The United States classified the expropriation negatively, viewing land as quickly and inadequately distributed. Pearson, *supra* note 214, at 227. Programs were criticized for lacking the proper financing to support new landholders and officials were denounced for not following the law. *Id.* at 228. The chaos of land reform in the rural areas aided the revolution’s overthrow of Arbenz. *Id.* However, the authenticity of these perspectives and criticisms is questionable given United States involvement in the country.

²⁴³ IMMERMANN, *supra* note 202, at 75–76.

²⁴⁴ *Id.* at 80.

²⁴⁵ *See id.* at 81 (defining Communism as “anyone who opposed United States interests”).

²⁴⁶ Pearson, *supra* note 214, at 228.

²⁴⁷ *See id.* at 228–29, 234 (discussing the Rural Development Program, a land reform project undertaken by the regime that succeeded Arbenz).

²⁴⁸ *See id.* at 228–29 (“The program was formulated on the principles that . . . any substantial improvement in Guatemalan agriculture would have to come through evolutionary rather than revolutionary processes . . .”).

²⁴⁹ RODDY BRETT, SOCIAL MOVEMENTS, INDIGENOUS POLITICS AND DEMOCRATISATION IN GUATEMALA, 1985–1996, at 114 (Michiel Baud et al. eds., 2008).

²⁵⁰ *Id.* at 113. During the Guatemalan Civil War in the 1970s and 1980s, land distribution was further disrupted, with peasants temporarily leaving lands because of the violence and scorched earth policies. *Id.* at 116–17.

²⁵¹ *Id.* at 114.

Presently, almost fifty-seven percent of Guatemala's cultivable land is held by two percent of the population.²⁵² Arbenz's Decreto 900 is viewed as "[t]he only attempt in Guatemala's history to address this situation,"²⁵³ and the Decreto therefore provides the best, if not the only, law to compare to United States jurisprudence.

4. Comparing the Decreto to Eminent Domain

Decreto 900 would likely pass scrutiny under United States eminent domain jurisprudence. The Guatemalan Constitution recognized expropriation for reasons of public utility, necessity, or legally proven social interests, which is similar to, but more expansive than, the public purpose justification in American takings jurisprudence.²⁵⁴ Expropriation was authorized in order to change the property structure and land concentration that had historically troubled the country, which is similar to the evils of land concentration that motivated the takings in *Midkiff*.²⁵⁵ Similar to the economic development purposes expressed in *Berman*, *Midkiff*, and *Kelo*, the explicit purpose of Decreto 900 was to develop the economy.²⁵⁶ This was to be accomplished by expropriating the uncultivated portions of land, which would then be cultivated under a new owner. The expropriation of only uncultivated lands was limited compared to the Act in *Berman* that authorized takings even if the property was being used for an economically viable purpose.²⁵⁷ Although results do not need to be guaranteed, Decreto 900 made the granting of expropriated land conditional on cultivation.²⁵⁸ The commitment to economic development is also seen in the exemption of profitable agrarian cultivations like banana plantations.²⁵⁹ Although rural peasants and workers received the lands, the law did not redistribute land to specific individuals.²⁶⁰ This classification is similar to the tenants in *Midkiff* who were to receive the titles of their landlords to break up the land oligarchy.²⁶¹

The compensation under Decreto 900 is not explicitly the fair market value established in eminent domain jurisprudence, but is instead based on the amount listed on taxes.²⁶² Arguably, this amount

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ See *supra* notes 18, 211 and accompanying text.

²⁵⁵ See *supra* notes 58–59, 223–25 and accompanying text.

²⁵⁶ See *supra* notes 35, 61–64, 83, 226–27 and accompanying text.

²⁵⁷ See *supra* notes 42–44, 230 and accompanying text.

²⁵⁸ See *supra* note 234 and accompanying text.

²⁵⁹ See *supra* note 229 and accompanying text.

²⁶⁰ See *supra* notes 230–35 and accompanying text.

²⁶¹ See *supra* notes 57–58 and accompanying text.

²⁶² Ley de Reforma Agraria, Decreto 900, tit. 1, art. 6., 24-06-1952 (Guat.).

should be close to, if not the same as, the market value of the property, even if it is not the amount the owner actually listed.

For these reasons—the public purpose of economic development and adequate compensation—Decreto 900 would likely survive the standards of eminent domain jurisprudence.

D. Chile

1. Historical Context

The history of land in Chile echoes that of other Latin American countries, with most of the land being controlled by a few.²⁶³ Large swaths of land lay fallow as owners with appreciable incomes lacked incentive to make the land productive, which “restrict[ed] the market for the country’s urban industries, but also contribute[d] to chronic inflation by restricting agricultural output.”²⁶⁴

Large landholders owned approximately sixty-eight percent of agricultural land.²⁶⁵ Land reform undertaken in the 1950s and 1960s was designed to revitalize productivity and increase Chile’s standing in the international economy, but was generally deferential to individual rights.²⁶⁶ Like other Latin American countries, land reform aimed to change the disparity in landholdings.²⁶⁷ The peasantry within Chile, the United States’ Alliance for Progress, and other international organizations pressured land reform efforts.²⁶⁸ Pressure from the United Nations and the United States reflected the belief that land reform would encourage economic growth and aid development.²⁶⁹ Previous reform laws approved by the Chilean Congress were lauded but lacked clarity on the timing and circumstances of expropriation.²⁷⁰ One, passed in 1962, struggled to be implemented due to issues over jurisdiction and compensation.²⁷¹ However, the 1962 law was a stepping-stone for further land reform efforts in Chile and elsewhere in Latin America.²⁷²

²⁶³ Joseph R. Thome, *Expropriation in Chile Under the Frei Agrarian Reform*, 19 AM. J. COMP. L. 489, 489 (1971).

²⁶⁴ Alexander, *supra* note 128, at 192.

²⁶⁵ Thome, *supra* note 263, at 489.

²⁶⁶ See Jennifer M. Toolin, *Law and Development Theory: A Case Study of the Chilean Land Reform Efforts*, 8 FLETCHER F. 177, 177–78 (1984) (stating that Chilean society experienced an emergent movement that pushed for a greater redistribution of land).

²⁶⁷ *Id.* at 181.

²⁶⁸ *Id.* at 181–82.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 182.

²⁷¹ *Id.* at 182–83.

²⁷² *Id.* at 182, 184.

In 1964, a new president took the reins in Chile—Eduardo Frei.²⁷³ Frei was elected on a populist program with a promise to implement more extensive reform.²⁷⁴ During the campaign, Frei had “committed his future administration to a program[] of state-led land redistribution that would benefit the landless and rural poor households.”²⁷⁵ Frei’s reforms were “radical in both scope and timing.”²⁷⁶ He implemented the first Chilean agrarian reform that challenged individual property rights.²⁷⁷

2. Property in the Constitution

Frei came to power under the Chilean Constitution of 1925.²⁷⁸ In anticipation of the land reform law, Frei amended the Constitution to permit the expropriation of lands that did not meet the government’s social function.²⁷⁹ According to the Constitution, property rights were to be established by law, which dictated the means of acquiring, using, enjoying, and disposing of land, limited only by the land’s social function and the accessibility of land for everyone.²⁸⁰ The social function of property was defined to include the general interest of the nation, public utility and welfare, and the elevation of living conditions for inhabitants, though one could not be deprived of private property without a legal justification, including expropriation as authorized by public utility or social interest.²⁸¹ There was a right of indemnification after expropriation, which was determined based on the value of the property and could be paid in segments for up to thirty years.²⁸² A person’s home was inviolable except for special motives determined by future laws that

²⁷³ *Id.* at 184.

²⁷⁴ *Id.*

²⁷⁵ Antonio Bellisario, *The Chilean Agrarian Transformation: Agrarian Reform and Capitalist ‘Partial’ Counter-Agrarian Reform, 1964–1980*, 7 J. AGRARIAN CHANGE 1, 8 (2007).

²⁷⁶ Toolin, *supra* note 266, at 178.

²⁷⁷ Compare *id.* at 180 (describing agrarian reform under Alessandri as “the first comprehensive, albeit cosmetic, agrarian reform program” that questioned “the sanctity of individual private property”), with *id.* at 186 (describing agrarian reform under Frei as “the clearest ideological break with the old land ownership regime”).

²⁷⁸ See M.C. Mirow, *Origins of the Social Function of Property in Chile*, 80 FORDHAM L. REV. 1183, 1186, 1213 (2011) (stating that a constitution was promulgated in 1925 and was the Constitution of Chile until 1980). The Constitution established a republic. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] ch. I, art. 1, 18-09-1925, translated in GEN. SECRETARIAT, ORG. OF AM. STATES, CONSTITUTION OF THE REPUBLIC OF CHILE: 1925 (AS AMENDED) (1972).

²⁷⁹ Law No. 16615 art. 1, Modifica La Constitución Política del Estado, Enero 20, 1967, DIARIO OFICIAL [D.O.] (Chile); Thome, *supra* note 263, at 499.

²⁸⁰ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] ch. III, art. 10, sec. 10, 18-09-1925 (amended 1967), translated in GEN. SECRETARIAT, *supra* note 278.

²⁸¹ *Id.*

²⁸² *Id.*

would authorize an intrusion on that right.²⁸³

3. Law 16640: Agrarian Reform in 1967

Law 16640 seemed radical, as it clearly broke from the old land tenure system, but it passed with little opposition.²⁸⁴ It was the result of attentive study and collaboration between important “agronomists, sociologists, economists, farmers, and lawyers.”²⁸⁵ The Law utilized “the legal, institutional, and political processes” of previous land reform attempts.²⁸⁶ The Law is complex and long with several complementary statutes, and was designed to be the legal mechanism to end agricultural stagnation.²⁸⁷ In instituting reform, Frei created new tribunals to address the procedural problems of elites avoiding expropriation, which had weakened the old program.²⁸⁸ In Law 16640, there were several important factors of expropriation, including land size and cultivation, payment, as well as targeting those who had previously avoided expropriation by dividing their land among relatives.²⁸⁹ Frei blamed the old land tenure system for the peasants’ poor standard of living, including substandard housing and sanitation, undernourishment, and unemployment.²⁹⁰ The goal set for expropriation was to benefit 100,000 peasants.²⁹¹

The Law expressly reflects a social function of property and authorized the expropriation of certain lands for public utility.²⁹² Land subject to expropriation included large holdings of one owner as well as abandoned or underexploited lands.²⁹³ There were exceptions to expropriation, including a declaration by the President.²⁹⁴ Compensation for landowners was to come from government bonds, with prices based on at least seventy percent of the consumer price index.²⁹⁵ New organizations, such as *el Consejo Nacional Agrario* (the National

²⁸³ *Id.* ch. III, art. 10, sec. 12.

²⁸⁴ Toolin, *supra* note 266, at 186.

²⁸⁵ Thome, *supra* note 263, at 497.

²⁸⁶ Toolin, *supra* note 266, at 184.

²⁸⁷ Thome, *supra* note 263, at 500. The Law provided the framework for land reform in Chile until 1980. Bellisario, *supra* note 275, at 8.

²⁸⁸ Toolin, *supra* note 266, at 185–86. Under Alessandri’s reform, landowners avoided expropriation by implementing their own reform, negotiating limited expropriations, and selling off capital. Bellisario, *supra* note 275, at 9.

²⁸⁹ Toolin, *supra* note 266, at 186.

²⁹⁰ *Id.* at 187.

²⁹¹ *Id.* at 188.

²⁹² Law No. 16640 tit. I, cap. I, art. 2, Reforma Agraria, Julio 16, 1967, DIARIO OFICIAL [D.O.] (Chile).

²⁹³ *Id.* tit. I, cap. I, arts. 3–4.

²⁹⁴ *Id.* tit. I, cap. III, arts. 22–23.

²⁹⁵ *Id.* tit. II, cap. IV, art. 43; *id.* tit. IV, cap. IV, art. 89.

Agrarian Board) and additional agricultural tribunals, were created to implement the reform.²⁹⁶ Further, the land was categorized to designate parcels subject to expropriation.²⁹⁷ Under the Law, the sequence of expropriation would be the governmental taking followed by farm development, and then land redistribution.²⁹⁸

4. Implementation and Realities of the Law

Most large landholders in Chile were not as resistant to land reform as those in other Latin American countries.²⁹⁹ Expropriation of inefficient lands allowed owners to maintain the best lands and reinvest in a system that encouraged capitalism in the countryside.³⁰⁰ Under President Frei, owners commonly offered expropriated lands that had been abandoned or were in a “sorry state” to the government.³⁰¹ Landholders were also more accepting of expropriation, given a unique economic climate due to an unproductive and inefficient agrarian sector and preference for urban and industrial investments.³⁰² Despite the willing participation of some landowners, Frei only expropriated fifteen percent of the land made expropriable under the law, benefiting only twenty percent of the peasants in his original goal.³⁰³

Chile’s next president, Salvador Allende, had to contend with the problems of Frei’s reform, including the new power of midsize landholders.³⁰⁴ Allende was democratically elected as a result of a compromise between the Socialist party that nominated him and Communists and Radicals.³⁰⁵ Agrarian reform under Allende was comparably milder than under Frei, but was crippled by an economic blockade starting in 1971 by the United States, which feared further nationalization and expropriation.³⁰⁶ It is possible that the United States feared Allende’s intent to socialize Chile through democratic means and saw Allende’s reform as implementing that process.³⁰⁷

Those affected by expropriation were the driving force behind the

²⁹⁶ *Id.* tit. VII, art. 135; *id.* tit. VIII, arts. 136–54.

²⁹⁷ *Id.* tit. X, cap. III, art. 172.

²⁹⁸ Bellisario, *supra* note 275, at 8.

²⁹⁹ Compare Jordison, *supra* note 238, at 69 (stating that land reform efforts in Guatemala were internally divisive), with Toolin, *supra* note 266, at 186 (stating that land reform in Chile was generally accepted by all classes).

³⁰⁰ Toolin, *supra* note 266, at 186.

³⁰¹ Bellisario, *supra* note 275, at 11.

³⁰² Toolin, *supra* note 266, at 186–87.

³⁰³ See *id.* at 188 (explaining that while the original goal was to benefit 100,000 peasants, Frei’s reform only benefited 20,000 peasants).

³⁰⁴ *Id.* at 189–90.

³⁰⁵ JOHN L. RECTOR, THE HISTORY OF CHILE 170 (2003).

³⁰⁶ Toolin, *supra* note 266, at 178, 191.

³⁰⁷ RECTOR, *supra* note 305, at 172.

overthrow of Allende's government.³⁰⁸ After a coup in 1973, the military government partially redistributed the expropriated lands of previous governments.³⁰⁹ The new government also restored the privileges of large landholders and restored the *latifundio* system.³¹⁰ They applied neoliberal principles to all facets of Chilean life, which meant privatizing the lands expropriated by the previous governments.³¹¹ The military remained in power until 1990, when a new president was elected for the first time in seventeen years.³¹² As Chile democratized into the twenty-first century, the percentage of peasant farmers decreased due to urbanization and a preference for larger competitive farms in the global market, which made small farms unprofitable.³¹³

Given Chile's history after Law 16640, including Allende's milder reform, the military's undoing of distribution, and the reduction in the number of peasant farmers, Frei's agrarian reform represents a peak for expropriation in Chile. Therefore, the Law represents the best expropriation mechanism in Chile to compare with eminent domain.

5. Comparing the Law to Eminent Domain

Although Law 16640 would likely satisfy United States eminent domain requirements, the property provisions in the Chilean Constitution are broader than eminent domain standards.

Law 16640 was likely undertaken with a legitimate public purpose. The Constitution authorized expropriation for national interest, public welfare and utility, and betterment of living conditions, which are similar to, but more expansive than, the United States' public purpose standard.³¹⁴ The expansive limits on private property in Chile extend beyond Law 16640, which lists only public utility as a justification for expropriation.³¹⁵ Like Mexico and Guatemala, Chilean land reform and subsequent expropriation were undertaken to address the disproportionate holdings of land within the country, which is similar to the rationale behind *Midkiff*.³¹⁶ Further, the Law justified expropriation by blaming the old land system for the impoverished conditions of the countryside, which is analogous to the blight justifying the takings in *Berman*.³¹⁷ Further, Law 16640 was passed to end agricultural

³⁰⁸ Bellisario, *supra* note 275, at 2–3.

³⁰⁹ *Id.* at 5.

³¹⁰ Toolin, *supra* note 266, at 177–78.

³¹¹ RECTOR, *supra* note 305, at 186.

³¹² *Id.* at 211.

³¹³ *Id.* at 230.

³¹⁴ *See supra* notes 18, 280–81 and accompanying text.

³¹⁵ *See supra* note 292 and accompanying text.

³¹⁶ *See supra* notes 58, 160, 225, 287, 290–91 and accompanying text.

³¹⁷ *See supra* notes 41–43, 287, 290 and accompanying text.

stagnation, which is similar to the economic revitalization purpose in *Kelo*.³¹⁸

Compensation of at least seventy percent of market price was required for expropriation under Law 16640, which is likely sufficiently comparable to just compensation.³¹⁹

Law 16640 as an independent law would likely pass the eminent domain test. However, the constitutional amendments that authorized the passage of Law 16640³²⁰ created a broad justification of expropriation that is not reflected in eminent domain jurisprudence. Therefore, although the Law would be upheld under United States eminent domain standards, the Chilean Constitution envisions and authorizes expropriations that would not pass United States constitutional muster.

CONCLUSION

Latin American expropriation laws were generally enacted in response to the amassing of land in the hands of a few that began during colonialism. In Mexico, Guatemala, and Chile, land reform was enacted to address this problem and to encourage economic development. Based on a comparison to contemporary eminent domain jurisprudence, only Decreto 900 of Guatemala would pass the scrutiny required to establish a legitimate public purpose to encourage economic development with compensation for the expropriated lands.

Further, this conclusion provides context for the United States' response to expropriation within these countries. The strained United States-Mexico relations after the Agrarian Code of 1934 are understandable in light of takings that conflicted with eminent domain property norms. The United States economic blockade implemented shortly after Law 16640 of 1967 in Chile was reasonable given the questionable validity of the Law under eminent domain and subsequent developments in Chilean history. However, the United States responded to Guatemala's Decreto 900 by aiding in the overthrow of the government, even though Decreto 900 would likely survive the eminent domain test.

³¹⁸ See *supra* notes 69, 287 and accompanying text.

³¹⁹ See *supra* notes 19, 295 and accompanying text.

³²⁰ See *supra* note 279 and accompanying text.

This comparative analysis provides insight into the similarities, and perhaps more importantly, the differences between property rights and governmental takings in Latin America and the United States. The recognition of the role of these legal concepts in history as a global comparative understanding of governmental takings is important, especially given the impact of expropriation on the relations between the United States and Latin American countries.

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