TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER

We issue this white paper in our capacities as law professors and scholars to support the use of Title IX of the Educational Amendments of 1972 (Title IX) to address sexual violence on college and university campuses. We particularly write to express our support for the Dear Colleague Letter issued on April 4, 2011 (2011 DCL) by the U.S. Department of Education's Office for Civil Rights (OCR) and its guideline that schools use a preponderance of the evidence standard of proof in Title IX grievance proceedings. The preponderance standard is fully consistent with the requirements and spirit of civil rights laws, as well as with OCR's past enforcement of Title IX, including the 1975 regulations and other Title IX guidance documents promulgated by OCR after notice and comment.

I. What We Now Know about Campus Sexual Violence Compelled the Office for Civil Rights to Act

Three decades of research shows epidemic levels of sexual harassment, including severe sexual harassment that may or may not also constitute a crime,[1] at colleges and universities. National surveys in the last two years alone have repeatedly confirmed that more than one in five women undergraduates and approximately seven percent of college men will experience an attempted or completed sexual assault during college.[2] As Vice President Biden has repeatedly stated, these rates of violence are virtually unchanged since the passage of the Violence Against Women Act in 1994, even as other forms of gender-based violence have dropped since VAWA's passage.[3]

The consequences of sexual harassment for victims and their families are very often quite devastating. In fact, evidence shows that many victims are at serious risk of experiencing a downward spiral of damaging health, educational and economic effects, including the following commonly reported consequences of sexual violence[4]:

- Educational Harms
    - Declines in educational performance and drops in grades,[5] exacerbating or increasing the chances of other educational harms

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[1] This white paper will generally use "sexual harassment" to describe this form of sexual harassment, but we recognize that "sexual harassment" as a legal term describes a much broader range of behaviors and is determined based on the totality of the circumstances. We will occasionally also use "sexual violence" to describe conduct that fits the legal definition of sexual harassment but where some form of physical violence has occurred, such as groping, punching or shoving. Finally, when discussing statistics or citing to particular writings, we will use the terms of the authors to describe this conduct.

[2] *See Sexual Assault at Major Universities*, THE WASHINGTON POST (Sept. 21, 2015), https://www.washingtonpost.com/local/education/sexual-assault-at-major-universities/2015/09/20/6ba835de-6004-11e5-8e9e-dce8a2a2a679_graphic.html; Tyler Kingkade, *There's No More Denying Campus Rape Is A Problem. This Study Proves It.*, THE HUFFINGTON POST (Jan. 20, 2016), http://www.huffingtonpost.com/entry/college-sexual-assault-study_us_569e928be4b0cd99679b9ada.

[3] The White House, *Vice President Biden Speaks at the White House Summit on the United State of Women*, YOUTUBE (Sept. 19, 2014), https://www.youtube.com/watch?v=1MyXFYINQsA (at approximately minute 27:00); *see also* The White House, *President Obama Speaks at the Launch of the "It's On Us" Campaign*, YOUTUBE (Sept. 19, 2014), https://www.youtube.com/watch?v=VWzicOS0PqI. *See generally* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (containing Title IV, also known as the Violence Against Women Act).

[4] While we have grouped these effects into separate categories, note that the categories often feed each other, which is why these effects can be described as creating a downward spiral for the victim. Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 Suffolk U. L. Rev. 467, 471-72 (2005).

[5] *See* Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. 2106, (2016), http://www.yalelawjournal.org/feature/gender-violence-costs-schools-financial-obligations-under-title-ix; Cari Simon, *On Top of Everything Else, Sexual Assault Hurts the Survivors' Grades*, THE WASHINGTON POST (Aug. 6, 2014),

- Loss of present and future scholarship funds[6]
- Reduced likelihood of future admission into prestigious graduate programs[7]
- For immigrant students, loss of immigration status[8]
- Class withdrawals[9]
- Delayed degree completion[10]
- Transferring (often to less prestigious) schools[11]
- Dropping out of school[12]
- Academic probation[13]
- Expulsion[14]

- Health Consequences:
  - Alcoholism and substance use/abuse[15]
  - Changed and risky sexual behaviors[16]
  - Depression[17]
  - Panic attacks[18]
  - Eating disorders[19]
  - Post-traumatic stress disorder[20]
  - Pregnancy and Sexually-Transmitted Diseases[21]
  - Self-harm[22]
  - Suicidality[23]
  - Sleep disorders[24]
  - Increased risks of being assaulted again[25]

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https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think/; Carol E. Jordan, *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 TRAUMA, VIOLENCE & ABUSE 191, 196 (2014); Rebecca Marie Loya, Economic Consequences of Sexual Violence for Survivors: Implications for Social Policy and Social Change 94 (June 2012) (unpublished Ph.D. dissertation, Brandeis University), http://pqdtopen.proquest.com/doc/1102751005.html?FMT=AI.

[6] *See* Bolger, *supra* note 5, at 2117; Seidman & Vickers, *supra* note 4, at 479; Loya, *supra* note 5, at 95-96.

[7] *See* Simon, *supra* note 5; Loya, *supra* note 5, at 103.

[8] *See* Loya, *supra* note 5, at 98, 111.

[9] *See* Bolger, *supra* note 5, at 2117.

[10] *See id.* at 2116; Loya, *supra* note 5, at 94.

[11] *See* Bolger, *supra* note 5, at 2108-2109; Loya, *supra* note 5, at 96-100.

[12] *See* Bolger, *supra* note 5, at 2119; Loya, *supra* note 5, at 99.

[13] *See* Bolger, *supra* note 5, at 2108, 2118.

[14] *Id.*

[15] *See* Loya, *supra* note 5, at 27-28 (citing seven previous studies supporting this point).

[16] *See* 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).

[17] *See* Loya, *supra* note 5, at 26 (citing five previous studies supporting this point). *See also* NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER & SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [hereinafter NISVS 2010].

[18] *See id.*

[19] *See* Loya, *supra* note 5, at 81.

[20] *See* Loya, *supra* note 5, at 25 (citing six previous studies supporting this point); NISVS 2010, *supra* note 17, at 1.

[21] *See* Loya, *supra* note 5, at 28; NISVS 2010, *supra* note 17, at 1.

[22] *See* Loya, *supra* note 5, at 81; NISVS 2010, *supra* note 17, at 1.

[23] *See* Loya, *supra* note 5, at 27 (citing four previous studies in support); NISVS 2010, *supra* note 17, at 1.

[24] *See* Loya, *supra* note 5, at 26.

[25] *See* Loya, *supra* note 5, at 28 (citing four previous studies supporting this point).

- Economic Costs
    - Lost tuition from class withdrawals, transferring schools, dropping out of school, academic probation, and expulsion[26]
    - Loss/increased costs of health insurance[27]
    - Greater housing costs from moving or taking other steps to avoid assailant; homelessness[28]
    - Greater transportation costs from moving or taking other steps to avoid assailant[29]
    - Costs of treatment for the health consequences of trauma (see above)[30]
    - Legal costs[31]
    - Lost wages from the additional years spent in school and not in the workplace[32]
    - Potential life-long lower earning potential[33]
    - Unemployment and poverty[34]

A recent editorial by the mother of a student who was raped in her first year of college illustrates the financial toll of such harms by providing a snapshot of the costs to one family, totaling $245,574 *so far*.[35] Since it has been three years since her daughter, now 22, was raped, and her daughter is just now returning to college, the mother anticipates additional future costs stemming from the sexual-trauma-related, life-long health problems with which her daughter still struggles.[36] This figure also does not capture the lost earning potential and delayed societal contributions of a teenager who had a 3.6 GPA before the assault and a string of Fs and Incompletes after the assault, resulting in a two-year leave of absence from school.[37]

The costs that school cultures of masculine sexual aggression and entitlement impose on women, girls and gender minorities compel action, and we applaud OCR for taking such action. Indeed, as an Office *for Civil Rights*, OCR must act to redress the injuries that such a culture disproportionately

[26] *See* Bolger, *supra* note 5, at 2117; Seidman & Vickers, *supra* note 4, at 479; Loya, *supra* note 5, at 204.
[27] *See* Loya, *supra* note 5, at 85, 92.
[28] *See* Bolger, *supra* note 5, at 2116, 2118-2119; Seidman & Vickers, *supra* note 4, at 479; Loya, *supra* note 5, at 75.
[29] *See* Bolger, *supra* note 5, at 2108, 2116; Loya, *supra* note 5, at 75.
[30] *See* Bolger, *supra* note 5, at 2117.
[31] *See* Loya, *supra* note 5, at 41, 77, 188.
[32] *See* Bolger, *supra* note 5, at 2108, 2119; Loya, *supra* note 5, at 80.
[33] *See* Loya, *supra* note 5, at 100-104 (describing economic analyses of education's impact on earning and discussing "life trajectory shifts" for the victims in her study resulting from sexual violence, including major job and career changes, inability to pursue graduate school, etc.).
[34] *See* Bolger, *supra* note 5, at 2108, 2119; Loya, *supra* note 5, at 29, 35, 109-110. Note that many of the consequences listed above tend to have differentially more negative impacts on those who are already in more marginal and vulnerable positions, especially in terms of the economic resources upon which victims and their families can draw in the aftermath of the violence. The fewer of such resources victims or their families can access, the more likely consequences such as unemployment and poverty will result. *See* Loya, *supra* note 5, at 104-110 (discussing differential impacts of sexual violence on victims who are immigrants, women of color and low-wage workers).
[35] *See* Laura Hilgers, *What One Rape Cost Our Family*, THE NEW YORK TIMES (June 24, 2016), http://www.nytimes.com/2016/06/24/opinion/what-one-rape-cost-our-family.html?_r=1.
[36] *Id.*
[37] *Id. See also* Simon, *supra* note 5.

inflicts on certain groups of students based on gender and various intersectional,[38] multidimensional[39] identities. Sexual harassment, violence and predation are a form of gender *discrimination* and must be dealt with as such. Inaction despite this serious problem and the obvious discrimination presented by it would have constituted an abdication of OCR's purpose and responsibilities.

II. The Preponderance of the Evidence Standard of Proof Does What Civil Rights Law is Supposed to Do

The preponderance of the evidence standard is the standard that has always been used to adjudicate discrimination claims. As the 2011 Dear Colleague Letter makes clear, civil rights laws prohibiting discrimination, such as Title IX, consistently use a preponderance of the evidence standard of proof. Other educational civil rights statutes like Title VI of the Civil Rights Act of 1964, which prohibits race discrimination by educational institutions and is also enforced by OCR, use a preponderance of the evidence standard.[40] So does Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment, including sexual harassment.[41] Moreover, the preponderance standard extends to all stages and kinds of actions enforcing civil rights laws: OCR investigations of schools for alleged violations of their obligations under civil rights laws, litigation in court by plaintiffs making similar allegations, and challenges a school may mount against an OCR enforcement action.[42]

The consistency of the 2011 DCL with civil rights legal doctrine means that, had the 2011 DCL indicated tolerance for other standards of proof in sexual violence cases, it would have approved treating sexual violence and harassment victims differently from all other victims of all other discrimination prohibited under our nation's anti-discrimination civil rights laws, and done so without any justification for that differentiation. Because differential treatment by the government without justification is itself a form of discrimination, OCR making such an exception in a specific set of sexual harassment cases, but in no other civil rights matters under its jurisdiction, would have been incompatible with the agency's mission to secure gender equality in education.

By insisting on such equal treatment of sexual harassment complainants, OCR is ensuring that victims of sexual harassment will be treated no worse than victims of racial and other harassment are when they must prove their allegations. Prior to OCR's intervention, some schools' internal policies had adhered to a tradition in the law of treating sexual incidents differently from other forms of discrimination and misconduct.[43] The law's traditional approach to sexualized violence treated women as

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[38] *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991), http://multipleidentitieslgbtq.wiki.westga.edu/file/view/crenshaw1991.pdf; Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817 (1993), http://digitalcommons.law.ggu.edu/ggulrev/vol23/iss3/4/.

[39] *See, e.g.*, MASCULINITIES AND THE LAW (Frank Rudy Cooper & Ann C. McGinley eds., NYU Press 2012); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment*, *in* CRITICAL RACE FEMINISM. A READER (Adrien Katherine Wing ed., NYU Press 2d ed. 2003), http://www.faculty.umb.edu/heike.schotten/readings/Cho,%20Racialized%20Sexual%20Harassment.pdf.

[40] Letter from Fatima Goss Graves, Vice President of Educ. and Emp't at the Nat'l Women's Law Ctr., to Catherine Lhamon, Assistant Sec. for Civil Rights 7-10 (Nov. 21, 2013).

[41] *Id*.

[42] *Id*. Note, as this list shows, that the preponderance standard is not only used in litigation, but is also the standard for OCR's investigations of schools, which generally do not involve litigation.

[43] Legal scholars have documented this different treatment in both criminal and non-criminal laws. *See, e.g.*, Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception* 48 VAL. U. L. REV. 133 (2014); Michelle Anderson, *Diminishing the Legal Impact of Negative Social Attitudes to Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644

inherently untrustworthy and men as not only presumptively innocent, but especially in need of protection from false allegations.[44] While there are difficult evidentiary issues involved in many cases of campus sexual assault, the approach of OCR's critics often reflects the laws' traditional approach. A nuanced appreciation for how difficult it is for either side to establish clearly what happened suggests that the problem of campus sexual harassment requires administrative proceedings to adopt a course different than the criminal law, one that strikes a balance between over-protecting the accused at the expense of victims while providing accused students with ample opportunity and administrative due process protections to contest the case against them.

By contrast, schools traditionally have not appeared to question the use of the preponderance standard of evidence in handling allegations of racial harassment on campus.[45] In a recent prominent case where fraternity students recorded a video of themselves using racial slurs and chanting about lynching African American men, the university expelled two students for "creat[ing] a hostile learning environment for others" within *three days* of seeing the video.[46] Similarly, a review of OCR guidance documents and publicly-available OCR investigation resolutions under Title VI suggest that a preponderance of the evidence standard is the norm for racial harassment.[47] The only OCR investigations we have found documenting schools applying a higher standard have been in cases involving sexual harassment.

Furthermore, had the 2011 DCL approved other standards of proof, it would not only have made sexual violence the only *civil rights* violation not proven by preponderance of the evidence, but would have required sexual violence victims to reach a standard of proof that the vast majority of other complainants in other administrative and civil justice systems do not have to reach. The undeniable reality of our legal system is that deeply important decisions with life-changing effects are overwhelmingly made using a preponderance of the evidence standard. The preponderance standard is the default standard in civil litigation generally. In most states, proceedings using this standard include whether individuals and families are eligible for a range of critical benefits standing between them and severe poverty, whether domestic violence victims can obtain protection orders that evict abusers or limit abusers' custody of shared children, and whether individuals and businesses must pay mindboggling sums of money.

The preponderance standard is also the standard applied to "erroneous outcome" cases brought by male plaintiffs suing their schools under Title IX for allegedly discriminating against them as males in imposing discipline for committing sexual assault. In these cases, courts have not required anything other than the normal civil standard of proof. Courts permit male plaintiffs to prove an erroneous outcome – that they did not commit sexual misconduct – under the normal civil standard.[48] To require

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(2010); Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1 (1996).

[44] *See, e.g.*, Lynn Henderson, *Rape and Responsibility*, 11 LAW & PHIL.127 (1992).

[45] Because Title IX's regulations explicitly adopt Title VI's procedural rules, *see* 34 CFR 106.71 ("The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference"), Title VI cases involving racial harassment are particularly relevant here.

[46] Manny Fernandez & Richard Pérez-Peña, *As Two Oklahoma Students Are Expelled for Racist Chant, Sigma Alpha Epsilon Vows Wider Inquiry*, THE NEW YORK TIMES (Mar. 10, 2015), http://www.nytimes.com/2015/03/11/us/university-of-oklahoma-sigma-alpha-epsilon-racist-fraternity-video.html?_r=0

[47] Wallingford Board of Education, VOLUNTARY RESOLUTION AGREEMENT, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01131207-b.pdf.

[48] *See, e.g.*, Doe v. Brown University, 2016 WL 715794 (D.R.I. Feb. 22, 2016); Doe v. Columbia University, 2015 WL 1840402 (Apr. 21, 2015); Xiaolu Peter Yu v. Vassar Coll., 2015 WL 1499408 (S.D.N.Y. Mar. 31, 2015).

complainants in university disciplinary processes to prove a sexual assault by clear and convincing evidence, but permit disciplined male plaintiffs to succeed on a reverse discrimination claim under the preponderance standard, would create a powerful disincentive for a school to ever decide a close case in favor of a complainant.

Tolerating a different standard from the preponderance standard in cases involving sexual violence or other forms of gender-based harassment would allow schools to provide less legal protection to student victims of sexual harassment than the vast majority of comparable populations involved in civil, civil rights and student disciplinary proceedings, all of which overwhelmingly use the preponderance standard. To name just a few, these groups include: other students alleging other kinds of sex discrimination; students alleging discrimination based on other protected categories, like race or disability; gender-based violence survivors seeking protection orders in civil court; students alleging other forms of student misconduct[49]; and students accused of sexual or any other misconduct who sue their schools in civil court. Therefore, the 2011 DCL, including its clarification regarding the preponderance of the evidence standard, was an appropriate intervention for the chief administrative enforcer of our nation's educational civil rights laws.

III. The Preponderance of the Evidence Standard of Proof Does What Schools Need

The most common place to find standards other than the preponderance standard is in the criminal justice system, where the different evidentiary standards reflect the different goals and methods of the criminal law. The criminal law is concerned with protecting the community's interest in punishing acts that deviate from the criminal law's moral proscriptions. Because violating the criminal law often results in incarceration and is meant to stigmatize the convicted, the criminal system has developed many procedural mechanisms to ensure that judgments are rendered fairly, with a preference for avoiding wrongful convictions even if this risks a large number of wrongful acquittals.[50] Criminal defendants get certain procedural rights, including higher standards of proof, that are aimed at protecting against abuse of the state's greater powers in the proceeding.

Schools simply do not have such coercive powers. They are not empowered to enforce the criminal law, and the most draconian sanction a school can impose on any member who violates its policies is expulsion from the school. Available evidence suggests that the vast majority of disciplinary proceedings, including those for sexual misconduct, result in punishments short of expulsion.[51] Expulsion and even some suspensions can be serious sanctions (even if they do not generally appear to eliminate all educational opportunity),[52] but they simply do not compare to imprisonment or even a minor criminal conviction.

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[49] This inequity would only occur if a school had adopted a preponderance of the evidence standard for all student misconduct or all student misconduct except cases involving sexual harassment. The situation of a school that has adopted a higher standard, such as "clear & convincing" evidence, for all misconduct is addressed in Section III, below.

[50] For a discussion of wrongful convictions and wrongful acquittals in the U.S. criminal justice system, *see* Christopher Slobogin, *Lessons from Inquisitorialism* , 87 S. CAL. UNIV. L. REV. 699, 700-730 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320103.

[51] *See* Nick Anderson, *Colleges Often Reluctant to Expel for Sexual Violence-with U-Va. A Prime Example*, THE WASHINGTON POST (Dec. 15, 2014), https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence--with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e_story.html; http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html.

[52] The press has covered several instances of students suspended or expelled due to being found responsible for severe sexual harassment transferring to other schools to continue their college educations. *See, e.g.*, Tyler Kingkade, *Brandon Austin, Twice Accused of Sexual Assault, Is Recruited By a New College*, THE HUFFINGTON POST (July 28, 2014),

Schools' disciplinary code goals, as articulated by members of the higher education community themselves, are also quite different from those of the criminal law. For instance, in a document published by United Educators, a major educational insurer, and the National Association of College and University Attorneys ("NACUA"), attorney Edward N. Stoner characterizes the central goal of student disciplinary systems as helping "to create the best environment in which students can live and learn… [a]t the cornerstone [of which] is the obligation of students to treat all other members of the academic community with dignity and respect—including other students, faculty members, neighbors, and employees."[53] The NACUA/United Educators report points out that the Model Student Code's principle of treating all students equally "creates a far different system than a criminal system in which the rights of a person facing jail time are superior to those of a crime victim."[54] Therefore, it advises that student disciplinary systems use the preponderance standard of proof.[55] This "model code" explicitly rejects the criminal system as a model for student disciplinary systems,[56] because the goals behind student conduct policies and the differences between those goals and the purposes of the criminal system make thinking about student discipline systems in terms of the criminal law inappropriate and counterproductive.[57] The overriding goal of providing the best environment for students to live and learn means that "*student victims are just as important as the student who allegedly misbehaved*" (emphasis in original),[58] a principle that "is critical" to resolving "[c]ases of student-on-student violence."[59]

Reflecting these established educational system values, most college student disciplinary systems have used a preponderance of the evidence standard for years, and well before the 2011 DCL was released. The studies of which we are aware, despite differing degrees of formality and comprehensiveness, confirm that the majority of higher education institutions had voluntarily adopted a preponderance of the evidence standard for student conduct proceedings for sexual violence cases before OCR issued the 2011 DCL. An August 2011 survey gathered information about the standards of proof used before and after the 2011 DCL.[60] Of the 191 schools surveyed, 168 specified a standard of proof and 80% (136) of those schools used a preponderance standard *prior to* the 2011 DCL. Another study using data collected from a national survey of college and university administrators shortly before the 2011 DCL found that 61% used the preponderance standard, 30% used a clear and convincing evidence

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http://www.huffingtonpost.com/2014/07/28/brandon-austin-northwest-florida_n_5627238.html?&, (discussing a college basketball player who was suspended, along with a teammate, for sexual assault at Providence College, then transferred to University of Oregon, where he was suspended again with two other teammates for another joint sexual assault, and finally went on to attend and play basketball at a third college, Northwest Florida State College); Todd South, *Jury Finds Sewanee and Student at Fault; Awards Student $26,500*, TIMES FREE PRESS (Sept. 3, 2011), http://www.timesfreepress.com/news/news/story/2011/sep/03/jury-finds-sewanee-and-student-fault-awards-50000-/58021/, (noting that a student expelled from University of the South for sexually assaulting a classmate has "continued his education at another college"); James Taranto, *Taranto: An Education in College Justice*, THE WALL STREET JOURNAL (Dec. 6, 2013), http://www.wsj.com/articles/SB10001424052702303615304579157900127017212, (noting a student expelled from Auburn University for violating a prohibition on sexual assault and harassment had transferred to University of South Carolina Upstate and expected to graduate in May).

[53] *See* EDWARD N. STONER II, REVIEWING YOUR STUDENT DISCIPLINE POLICY: A PROJECT WORTH THE INVESTMENT 7 (2000), http://www.edstoner.com/uploads/UE.pdf.

[54] *Id.*

[55] *Id.* at 10 (described as "'more likely than not' standard used in civil situations").

[56] *Id.* at 12-13.

[57] *See id.* at 7-11.

[58] *Id.* at 7.

[59] *Id.*

[60] *See* FIRE: Foundation for Individual Rights in Education, APPENDIX, *available at* http://www.thefire.org/pdfs/8d799cc3bcca596e58e0c2998e6b2ce4.pdf.

standard, and 5% required proof "beyond a shadow of a doubt."[61] This data is consistent with two earlier studies, one by then law professor and now college president Michelle Anderson and one by a team of social scientists funded by the National Institute of Justice.[62] Moreover, in the August 2011 survey, only eight schools changed their standard post-2011 DCL, and of those eight, two had not specified standards of evidence prior to the 2011 DCL so their specification of a preponderance standard may simply have stated the standard already in place.[63] Thus, all available evidence shows that claims that the 2011 DCL did away with supposedly "traditional" standards of proof such as "clear & convincing evidence" are overblown; a substantial majority of colleges and universities were already using the preponderance standard before OCR issued the 2011 DCL.

Claims that the 2011 DCL eliminated a previously allowed *right* to cross-examine witnesses are also unsupported. Courts from the U.S. Supreme Court on down have repeatedly rejected accused students' contentions that their "due process" rights include cross-examination rights. In fact, the Court has specified and approved lower court decisions that due process in school discipline falls short of "a full-dress judicial hearing, with the right to cross-examine witnesses."[64] The Court has made clear that such due process rights are not criminal but *administrative* in nature and therefore do not "require opportunit[ies] to secure counsel, to confront and cross-examine witnesses… or to call… witnesses to verify [the accused's] version of the incident."[65]

The Court's administrative due process precedents for student discipline steer clear of encouraging particular school policies related to student conduct, but OCR's role in ensuring equal educational environments often requires more active policy advice. The 2011 DCL acknowledges this in its language dealing with cross-examination, stating that: "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."[66] Taken together, therefore, the court precedent and the 2011 DCL neither create nor eliminate a right to cross-examination, but articulate policy reasons for why schools should avoid cross-examination directly between student complainants and respondents. Certainly, OCR might ask a school that allows cross-examination to justify that policy choice, particularly if there was evidence that the fear of cross-examination was discouraging numerous victims from reporting sexual violence, but if a school had good, persuasive reasons for allowing cross-examination, nothing in the DCL indicates that OCR would nevertheless find that school in violation of Title IX. Moreover, while the DCL discourages cross-examination between the students themselves, based on OCR's determination that such tactics are more likely to intimidate complainants and discourage reporting than further a search for the truth, nothing in the DCL prevents the students from presenting the hearing board or other fact-finders with questions to ask the other party. In light of what we know about the risk of intimidation and under-reporting where sexual harassment is involved, that approach is more likely to further the truth-seeking goals of the proceedings.

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[61] Angela F. Amar, et al., Administrators' Perceptions of College Campus Protocols, Response, and Student Prevention Efforts for Campus Sexual Assault, 29 (4) Violence and Victims 579, 584-85 (2014).

[62] *See* Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 1000 (2004); Heather M. Karjane et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 122 tbl.6.12 (2002), http://www.hhd.org/sites/hhd.org/files/mso44.pdf.

[63] *See* FIRE, *supra* note 60.

[64] Dixon v. Alabama State Board of Education, 294 F.2d 150, 158 (1961).

[65] Goss v. Lopez, 419 U.S. 565, 583 (1975). *See also* Coplin v. Conejo Valley Unified Sch. Dist., 903 F. Supp. 1377, 1383 (C.D. Cal. 1995); Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 247 (D. Vt. 1994).

[66] *Dear Colleague Letter*, U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS 12 (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/ letters/colleague-201104.pdf.

For some OCR critics, the debate regarding the appropriate standard of evidence and other rules in schools' sexual harassment grievance proceedings is a debate over the appropriate policies for school discipline generally. None of the agency's critics appear to be arguing that OCR should *require* schools to use another standard of evidence, such as "clear and convincing evidence," but merely that OCR should *permit* schools the discretion to adopt such evidence standards if they so choose. The minority of schools seeking to maintain such discretion may seek it because they have adopted such standards for all policy violations, including such infractions as plagiarism, cheating and honor code violations. However, there are critical differences between these kinds of misconduct and sexual harassment and violence. Plagiarism and similar forms of misconduct, including much rude and/or inappropriate behavior, does not usually implicate civil rights laws. They are more of an offense against community norms than another targeted student. Schools are free, or not, to punish those kinds of transgressions, but schools are not free to let sexual harassment go unchecked. With the full weight of sexual harassment caselaw, administrative guidance and most academic commentary behind it, OCR has determined that the most effective and fair way to regulate sexual harassment on college campuses is through a preponderance of the evidence standard. Because plagiarism and similar kinds of student code violations do not implicate civil rights laws, schools that do not wish to adopt a preponderance of the evidence standard for plagiarism need not do so. Schools thus retain their discretionary powers for violations not involving civil rights standards.

IV. The Office for Civil Rights Has Consistently Used the Preponderance Standard Throughout its History of Enforcing Civil Rights Laws, Including Title IX

The 2011 DCL's articulation of the preponderance standard does not constitute a policy change on OCR's part and is a reasonable interpretation of its own regulations consistent with the agency's history of enforcement. The agency's reasonable and weighty substantive justifications for the preponderance standard are consistent with the agency's enforcement history, and therefore not a surprise to those paying attention to civil rights laws, especially the "regulated community" of educational institutions. Title IX has been around for nearly 45 years, and the first regulations, drafted to ensure effective enforcement and published, after notice and comment, in 1975, required recipients to have "prompt and equitable" grievance procedures for handling all kinds of internal complaints of sex discrimination. In 1997, nearly 15 years before the DCL, OCR gave notice of proposed guidance documents, took comments on that draft guidance and published final guidance specifically addressing sexual harassment, including sexual violence.[67] The 1997 *Guidance* was revised in 2001, again subject to notice and comment.[68] Both guidance documents devote entire sections to reminding schools of the regulations' "prompt and equitable" requirements and of OCR's guidelines on what constitutes "prompt and equitable."[69]

Prior to 2011, when OCR investigated schools in cases involving severe sexual harassment, it was interpreting "prompt and equitable" to require a preponderance of the evidence standard. One such investigation was conducted as early as 1995, prior to OCR's first set of guidance documents on sexual

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[67] *See* U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997), http://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html [hereinafter SEXUAL HARASSMENT GUIDANCE].

[68] *See* U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [hereinafter REVISED GUIDANCE].

[69] *Id.*; SEXUAL HARASSMENT GUIDANCE, *supra* note 67.

harassment.[70] In that investigation, OCR found the college's use of a clear & convincing evidence standard as one factor for why the college's procedures in resolving a sexual harassment complaint were not "equitable," stating that "The evidentiary standard of proof applied to Title IX actions is that of a 'preponderance of the evidence.'"[71] Despite OCR having gone on record in 1995 as endorsing the preponderance standard, when both guidances were opened for comment in 1996 and 2000, no commenter objected to using the preponderance of evidence standard or even raised the issue of the standard of proof.[72] Consistent with this history, in 2003 the George W. Bush administration likewise required an institution to adopt the preponderance standard in a sexual assault case.[73]

There are many possible explanations for why the preponderance standard did not appear in the guidance documents even while OCR was using it in its investigations of schools, but at least one likely reason is that the standard did not seem controversial to OCR or the schools and members of the public who commented on the two earlier guidances. This view of the standard as non-controversial is bolstered by its common and appropriate use in civil rights matters, its actual use in Title IX cases of all kinds, and its fit with schools' goals for their student conduct processes. Indeed, the history of OCR's Title IX enforcement strongly suggests that the preponderance of the evidence standard only became controversial when the public conversation about Title IX sexual violence cases began discussing Title IX's sexual harassment prohibition as if it were the same as criminal rape laws.[74] For the reasons stated above, this conflation of Title IX and the criminal law is highly inaccurate and misunderstands not only Title IX but also the guiding principles of student disciplinary systems.

V. Even Though It Was Not New, the 2011 Dear Colleague Letter's Clarification Regarding the Preponderance Standard Was Needed

When viewed in its proper historical context—including the increasing knowledge of the epidemic of sexually harassing conduct among and between students—the 2011 DCL's statements regarding the preponderance of the evidence were needed but not particularly new. If the 2011 DCL came as a surprise to any school it could only have been because that school had not been paying attention either to what OCR had been regulating as sexual harassment or to what was happening on its own campus. As the Assistant Secretary for Civil Rights has pointed out, OCR "Dear Colleague" letters generally try to give schools the information they need to fix any violations before they happen, ideally avoiding a complaint and OCR investigation in the first place.[75] But if a complaint and investigation should occur, the DCLs inform recipients about the standards OCR uses to find violations and resolve them.

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[70] *See* Letter from Gary D. Jackson, Reg'l Civil Rights Dir., Office for Civil Rights, U.S. Dep't of Educ., to Jane Jervis, President, The Evergreen State Coll. (Apr. 4, 1995) (on file with authors).

[71] *Id.*

[72] *See* U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, PREAMBLE TO THE SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997), http://www2.ed.gov/about/offices/list/ocr/docs/sexhar00.html; REVISED GUIDANCE, *supra* note 68, at i – viii.

[73] *See* Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, Office for Civil Rights, U.S. Dep't of Educ., to Jane Genster, Vice President and General Counsel, Georgetown Univ. (October 16, 2003) (on file with authors).

[74] *See, generally*, Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281 (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2720284.

[75] *See* Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, Department of Education, to Honorable James Lankford, Chairman, Subcommittee on Regulatory Affairs and Federal Management, Committee on Homeland Security and Governmental Affairs, United States Senate (Feb. 17. 2016), http://chronicle.com/items/biz/pdf/DEPT.%20of%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf

The Assistant Secretary has further explained that OCR guidance documents are designed to "advise the public of [OCR's] construction of the statutes and regulations it administers and enforces," rather than "requiring recipients and members of the public to discern for themselves solely from the text of the regulations what Title IX requires as applied to particular facts and what actions would result in OCR initiating proceedings to terminate Federal financial assistance…"[76] In other words, the guidance is *descriptive* of what OCR is likely to *actually* do when exercising its enforcement power and investigating a complaint. If an institution follows OCR's guidance, not only will it avoid the loss of federal funding, it is much more likely to avoid potentially very expensive liability from court litigation or the costs of responding to an OCR investigation.[77]

Research confirms that violating Title IX by mishandling sexual violence cases has been quite expensive for schools for quite some time,[78] and that such violations are getting more expensive for schools, not less. For instance, a report by United Educators on claims for campus sexual assault cases from 2011-2013 shows that schools paid $17 million in costs "defending and resolving sexual assault claims."[79] Of these costs, 84 percent, or $14.3 million, were spent on "victim-driven litigation."[80] This is in contrast to a similar report by United Educators on sexual assault-related claims filed from 2005-2010, where schools paid $36 million in costs related to such claims, with only a little over $10 million going to claims by victims (described as "accusers" in the report).[81] Thus, in only about half the time of the earlier 5-year study, institutions' costs based on claims filed by victims alleging Title IX and similar violations have increased by about 43 percent.

In addition, the 2011-13 study shows that schools paid nearly $5 million, half of their total defense costs for all litigation during those years, in costs attached to OCR investigations.[82] If that amount were split between the 55 schools whose names OCR released as under investigation in May 2014,[83] it would

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[76] *Id.*

[77] The standard for private lawsuits holds that a school violates Title IX when it acts with deliberate indifference in the face of actual knowledge of sexual harassment. *See* 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, 234 (2011). This is a much less exacting standard than the standard that OCR uses: when a school knew or reasonably should have known about sexual harassment "that creates a hostile environment, it must take immediate action to eliminate the harassment, prevent its recurrence and address its effects." *Dear Colleague Letter*, *supra* note 66, at 5. Therefore, if a school follows OCR's guidance and takes the steps that OCR advises are designed to "eliminate the harassment, prevent its recurrence and address its effects," that school is extremely likely to be found *not* to have acted with deliberate indifference, thus avoid paying any monetary damages, let alone a large damage amount, in a private lawsuit.

[78] *See* Nancy Chi Cantalupo, *Violating Student Victims' Rights is Expensive*, TIME (May 15, 2014), http://time.com/99697/campus-sexual-assault-nancy-chi-cantalupo/. Much of this research deals with the costs to schools in private lawsuits brought by victims against their schools. However, for the reasons stated in footnote 77, *supra*, if the school followed the advice in OCR's guidance, it would almost certainly also avoid liability in a private lawsuit.

[79] *See* UNITED EDUCATORS, CONFRONTING CAMPUS SEXUAL ASSAULT: AN EXAMINATION OF HIGHER EDUCATION CLAIMS 14 (2015), http://www.bgsu.edu/content/dam/BGSU/human-resources/documents/training/lawroom/Sexual_assault_claim_study.pdf [hereinafter CONFRONTING CAMPUS SEXUAL ASSAULT]

[80] *Id.*

[81] *See* UNITED EDUCATORS, STUDENT SEXUAL ASSAULT: WEATHERING THE PERFECT STORM 1-2 (2011), https://www.edurisksolutions.org/templates/template-article.aspx?id=379&pageid=136.

[82] *See* CONFRONTING CAMPUS SEXUAL ASSAULT, *supra* note 79, http://www.bgsu.edu/content/dam/BGSU/human-resources/documents/training/lawroom/Sexual_assault_claim_study.pdf.

[83] *See U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEP'T EDUC., (May 1, 2014), http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations.

come to about $91,000 per school.[84] By June 2016, there were somewhere between 246 and 315 OCR investigations of sexual violence or sexual harassment-related complaints (depending on how those complaints are categorized) against 196-243 schools.[85] OCR is not initiating these complaints – victims are. At times, critics of the 2011 DCL seem to suggest that OCR has created a problem that schools must then solve, but the problem originates at the schools themselves. The problem is the thousands of students who are assaulted and harassed each year, feel re-victimized by their institutions' handling of their complaints, and who then, logically, ask the civil rights office charged with ensuring equal educational opportunity to help them and students like them find redress. In light of this problem, it is completely logical, rational, and reasonable that an institution of higher education would want *more*, not *less*, guidance about how to protect their students' Title IX rights.

For all of these reasons, the 2011 DCL and in particular its clarification regarding the preponderance standard are fully consistent with the approach of our nation's sexual harassment, anti-discrimination and other civil rights laws. Anything other than a preponderance standard would violate the letter and spirit of Title IX and sexual harassment victims' Title IX rights.

Issued by:

Katharine K. Baker
https://www.kentlaw.iit.edu/faculty/full-time-faculty/katharine-k-baker

Deborah L. Brake
http://law.pitt.edu/people/deborah-l-brake

Nancy Chi Cantalupo
http://www.barry.edu/law/future-students/faculty/staff/ncantalupo.html

Aviva Abramovsky
http://law.syr.edu/profile/aviva-abramovsky1

Jamie R. Abrams
https://louisville.edu/law/faculty-staff/faculty-directory/abrams-jamie

Glen-Peter Ahlers
https://www.barry.edu/law/future-students/faculty/staff/gahlers.html

Nadia B. Ahmad
https://www.barry.edu/law/future-students/faculty/staff/nahmad.html

Marina Angel
http://www.law.temple.edu/contact/marina-angel/

Ian Ayres
https://www.law.yale.edu/ian-ayres

Margaret Barry
http://www.vermontlaw.edu/directory/person?name=Barry,Margaret

Kelly Behre
https://law.ucdavis.edu/faculty/behre/

Linda L. Berger
https://law.unlv.edu/faculty/linda-berger

Khaled Beydoun
http://www.law.udmercy.edu/index.php/facultyastaff/full-time-faculty/item/beydoun-khaled

John Bonine
https://law.uoregon.edu/explore/john-bonine

Hannah Brenner
https://www.cwsl.edu/faculty-staff-and-campus-directories/faculty-and-staff-directory/h/hannah-brenner

[84] The per school cost is likely to be greater because it is unlikely that all of the 55 schools on OCR's May 2014 list were insured by United Educators or that there were many more United Educators policyholders under OCR investigation during 2011-13 than the 55 announced in 2014.

[85] *See* Tyler Kingkade, *There are Far More Title IX Investigations of Colleges than Most People Know*. THE HUFFINGTON POST (June 16, 2016), http://www.huffingtonpost.com/entry/title-ix-investigations-sexual-harassment_us_575f4b0ee4b053d433061b3d.

Jennifer Brobst
http://www.law.siu.edu/our-people/faculty/law-faculty/brobst.html

Lisa E. Brodoff
https://law.seattleu.edu/faculty/profiles/lisa-brodoff

Susan Bryant
http://www.law.cuny.edu/faculty/directory/bryant.html

Erin E. Buzuvis
https://www1.wne.edu/law/faculty-and-staff/faculty.cfm?uid=413

Barbara Bryant
https://www.law.berkeley.edu/our-faculty/faculty-profiles/barbara-bryant/

Eric R. Carpenter
https://law.fiu.edu/faculty/directory/eric-r-carpenter/

Michael J. Cedrone
https://www.law.georgetown.edu/faculty/cedrone-michael-j.cfm

Martha Chamallas
http://moritzlaw.osu.edu/faculty/professor/martha-chamallas/

Sumi Cho
http://law.depaul.edu/faculty-and-staff/faculty-a-z/Pages/sumi-cho.aspx

David S. Cohen
http://drexel.edu/law/faculty/fulltime_fac/David%20Cohen/

Sherman L. Cohn
https://www.law.georgetown.edu/faculty/cohn-sherman-l.cfm

Frank Rudy Cooper
http://www.suffolk.edu/law/faculty/Frank_Rudy_Cooper.php

Bridget J. Crawford
http://www.law.pace.edu/faculty/bridget-j-crawford

Michele Landis Dauber
https://law.stanford.edu/directory/michele-landis-dauber/

Sarah Deer
http://mitchellhamline.edu/biographies/person/sarah-deer/

Margaret M. deGuzman
http://www.law.temple.edu/contact/margaret-m-deguzman/

Rachel E. Deming
https://www.barry.edu/law/future-students/faculty/staff/deming.html

Michelle Madden Dempsey
https://www1.villanova.edu/villanova/law/academics/faculty/Facultyprofiles/MichelleMaddenDempsey.html

Margaret Drew
http://www.umassd.edu/law/faculty/margaretdrew/

Nancy E. Dowd
https://www.law.ufl.edu/faculty/nancy-e-dowd

Barry Hart Dubner
https://www.barry.edu/law/future-students/faculty/staff/bdubner.html

Laura Dunn
https://www.law.umaryland.edu/faculty/profiles/faculty.html?facultynum=1083

Maurice R. Dyson
http://www.tjsl.edu/directory/maurice-r-dyson

Benjamin P. Edwards
https://www.barry.edu/law/future-students/faculty/staff/bedwards.html

Jill Engle
https://pennstatelaw.psu.edu/faculty/engle

Deborah Epstein
https://www.law.georgetown.edu/faculty/epstein-deborah.cfm

Marie Failinger
http://mitchellhamline.edu/biographies/person/marie-failinger/

Taylor Flynn
https://www1.wne.edu/law/faculty-and-staff/faculty.cfm?uid=444

Caroline Forell
https://law.uoregon.edu/explore/caroline-forell

Richard H. Frankel
http://drexel.edu/law/faculty/fulltime_fac/richard%20frankel/

Charlotte Garden
https://law.seattleu.edu/faculty/profiles/charlotte-garden

Theresa Glennon
http://www.law.temple.edu/contact/theresa-glennon/

Leigh Goodmark
https://www.law.umaryland.edu/faculty/profiles/faculty.html?facultynum=982

Michele Bratcher Goodwin
http://www.law.uci.edu/faculty/full-time/goodwin/

Neil Gotanda
http://www.wsulaw.edu/faculty-and-staff/

Anjum Gupta
https://law.rutgers.edu/directory/view/ag912

Lynne Henderson
https://law.unlv.edu/content/lynne-henderson

Carol Izumi
http://www.uchastings.edu/faculty/izumi/index.php

Margaret E. Johnson
http://law.ubalt.edu/faculty/profiles/johnson.cfm

Paula C. Johnson
http://www.syr.edu/coldcaselaw/bios/johnson.html

Deseriee Kennedy
http://www.tourolaw.edu/abouttourolaw/bio.aspx?id=49

Rona Kaufman Kitchen
http://law.duq.edu/faculty/rona-kitchen

Diane J. Klein
http://law.laverne.edu/faculty-and-administration/faculty_administration/klein7/

Cathren Koehlert-Page
https://www.barry.edu/law/future-students/faculty/staff/ckoehlert.html

Laurie S. Kohn
https://www.law.gwu.edu/laurie-s-kohn

Judith E. Koons
https://www.barry.edu/law/future-students/faculty/staff/judithkoons.html

Tamara Kuennen
http://www.law.du.edu/index.php/profile/tamara-kuennen

Susan S. Kuo
http://www.law.sc.edu/faculty/kuo/

Stephen J. Leacock
https://www.barry.edu/law/future-students/faculty/staff/sleacock.html

Nancy Leong
http://www.law.du.edu/index.php/profile/nancy-leong

Catharine A. MacKinnon
http://hls.harvard.edu/faculty/directory/10540/MacKinnon;https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=camtwo

Naomi M. Mann
https://www.bu.edu/law/profile/naomi-m-mann/

Jena Martin
http://www.law.wvu.edu/faculty-staff/full-time-faculty/jena-martin

Tracey L. Meares
https://www.law.yale.edu/tracey-l-meares

Marcia L. McCormick
http://law.slu.edu/people/marcia-l-mccormick

Janis L. McDonald
http://www.syr.edu/coldcaselaw/bios/mcdonald.html

Ann C. McGinley
https://law.unlv.edu/faculty/ann-mcginley

M. Isabel Medina
http://law.loyno.edu/bios/m-isabel-medina

Joan S. Meier
https://www.law.gwu.edu/joan-s-meier

Vanessa H. Merton
http://www.law.pace.edu/faculty/vanessa-h-merton

Seema Mohapatra
https://www.barry.edu/law/future-students/faculty/staff/smohapatra.html

Margaret L. Moses
http://www.luc.edu/law/fulltime/moses.shtml

Karen Musalo
http://www.uchastings.edu/faculty/musalo/index.php

Tracy McGaugh Norton
http://www.tourolaw.edu/AboutTouroLaw/bio.aspx?id=48

Victoria Nourse
https://www.law.georgetown.edu/faculty/nourse-victoria.cfm

Michelle Oberman
http://law.scu.edu/faculty/profile/oberman-michelle/

Maria L. Ontiveros
https://www.usfca.edu/law/faculty/maria-ontiveros

David Oppenheimer
https://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=135

Brian A. Pappas
http://www.law.msu.edu/faculty_staff/profile.php?prof=616

Katherine I. Puzone
https://www.barry.edu/law/future-students/faculty/staff/kpuzone.html

Diane L. Rosenfeld
http://hls.harvard.edu/faculty/directory/10736/Rosenfeld/courses

Susan Deller Ross
https://www.law.georgetown.edu/faculty/ross-susan-deller.cfm

Rosemary C. Salomone
http://www.stjohns.edu/academics/bio/rosemary-c-salomone

Meredith Schnug
https://law.ku.edu/faculty/meredith-schnug

Michael A. Schwartz
http://law.syr.edu/profile/michael-schwartz1

Jodi L. Short
http://www.uchastings.edu/faculty/short/index.php

Gwynne L. Skinner
https://willamette.edu/law/faculty/profiles/skinner/

Catherine Smith
http://www.law.du.edu/index.php/profile/catherine-smith

SpearIt
http://www.tsulaw.edu/faculty/SpearIt.html

Kathryn M. Stanchi
http://www.law.temple.edu/contact/kathryn-m-stanchi/

David A. Super
https://www.law.georgetown.edu/faculty/super-david-a.cfm

Mark Summers
https://www.barry.edu/law/future-students/faculty/staff/msummers.html

Bonny L. Tavares
http://www.law.temple.edu/contact/bonny-l-tavares/

Michelle A. Travis
https://www.usfca.edu/law/faculty/michelle-travis

Valorie K. Vojdik
http://law.utk.edu/people/valorie-vojdik/

Elizabeth Kronk Warner
https://law.ku.edu/faculty/elizabeth-kronk-warner

Robin L. West
https://www.law.georgetown.edu/faculty/west-robin-l.cfm

Danaya C. Wright
https://www.law.ufl.edu/faculty/danaya-c-wright

Frank H. Wu
http://www.uchastings.edu/faculty/wu/index.php

Corey Rayburn Yung
https://law.ku.edu/faculty/corey-rayburn-yung

Lua Kamal Yuille
https://law.ku.edu/faculty/lua-yuille