

A Broad Research-Based Perspective on the Standard of Evidence: Campus Title IX and Beyond

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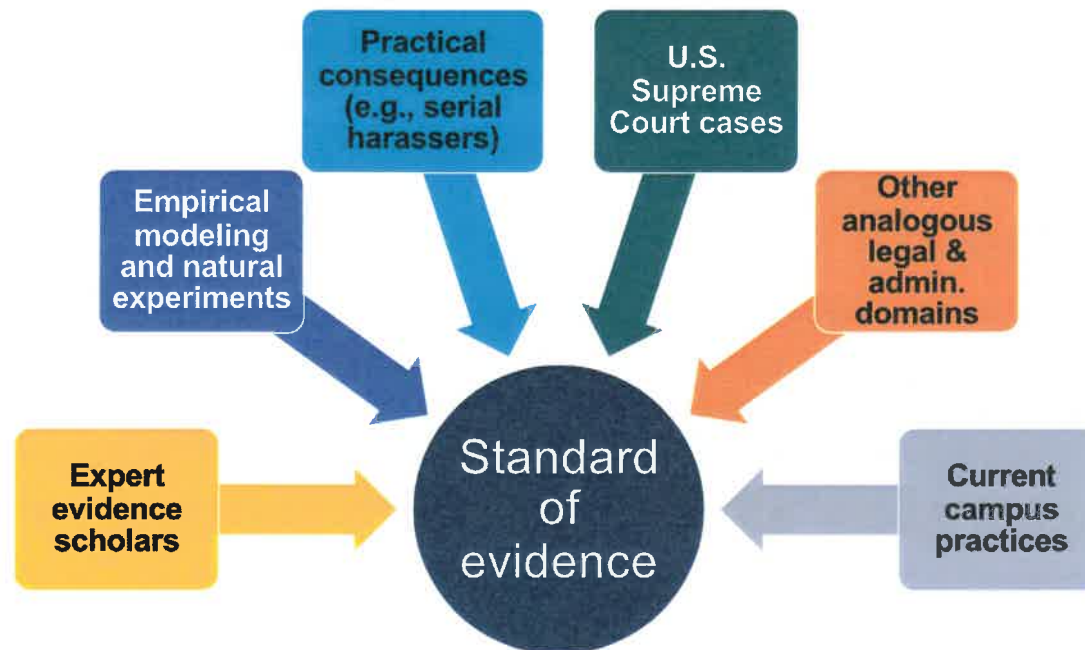


** This presentation reflects my individual research views and is not intended to represent the views of the UCSC administration*

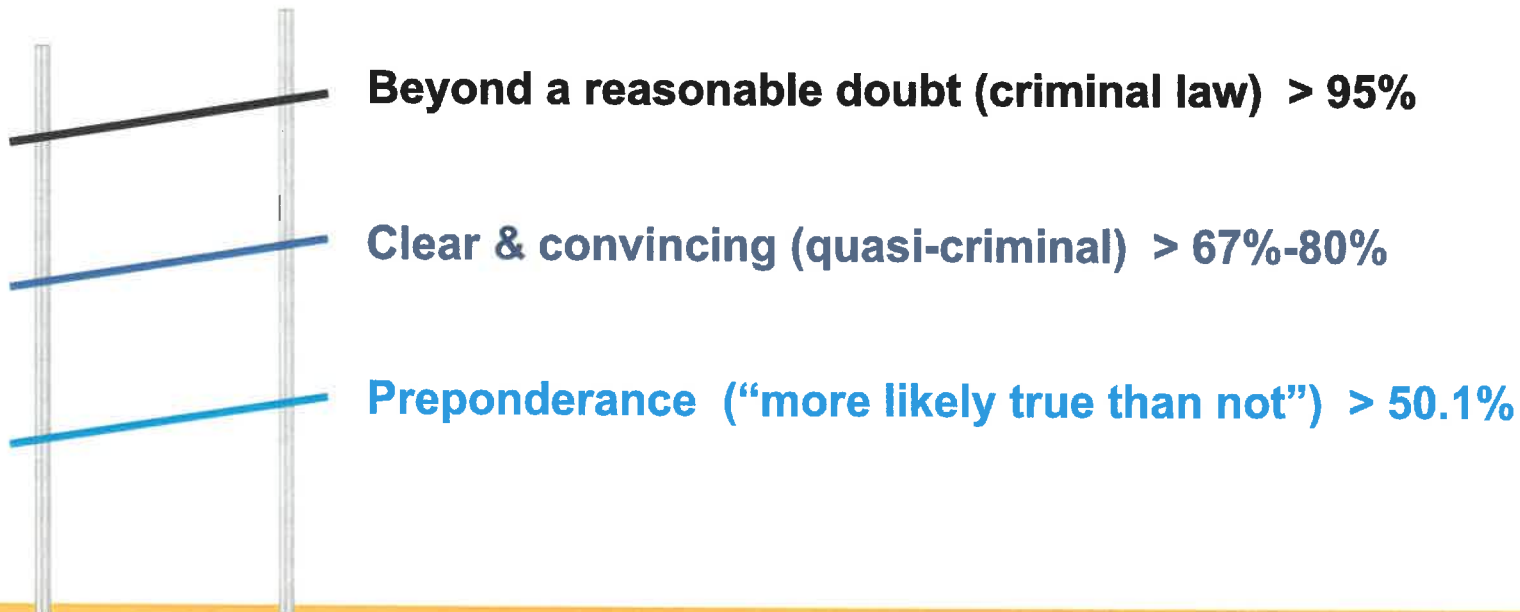


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Approaches in my JCUL article to analyzing the standard of evidence question (POE versus C&C)



Standard of evidence: Decision rules for allocating risk in a variety of settings (such assessments can be expressed roughly as probabilities/confidence levels)



DeVos/OCR's stated rationale for proposed regulation

"We propose adding Sec.106.45(b)(4)(i) stating that in reaching a determination regarding responsibility, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard. The recipient may, however, employ the **preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.** The recipient must also **apply the same** standard of evidence for complaints against students as it does for complaints **against employees, including faculty.**"

"Title IX grievance processes are also analogous to various kinds of civil administrative proceedings, which often employ a clear and convincing evidence standard. See, e.g., *Nguyen v. Washington Dept. of Health*, 144 Wash. 2d 516 (2001); *Disciplinary Counsel v. Bunstine*, 136 Ohio St. 3d 276 (2013)... These cases recognize that, where a finding of responsibility carries particularly **grave consequences for a respondent's reputation** and ability to pursue a profession or career, a higher standard of proof can be warranted."

"The Department does **not believe it would be appropriate to impose a preponderance requirement in the absence of all of the features of civil litigation** that are designed to promote reliability and fairness."

<https://www.govinfo.gov/content/pkg/FR-2018-11-29/html/2018-25314.htm>



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DeVos OCR's proposed Title IX rulemaking

Figure 1: OCR's Proposed "ratchet up discretion" Standard of Evidence Regulation

<i>Other spheres of campus misconduct:</i>	If use <u>POE</u> for student Title IX proceedings	If use <u>C&C</u> for student Title IX proceedings
<i>Serious non-Title IX student misconduct?</i>	Must use same POE standard	May choose POE or C&C standard
<i>Faculty Title IX misconduct?</i>	Must use same POE standard	Must use C&C standard
<i>Serious Faculty non-Title IX misconduct?</i>	Must use same POE standard* ¹⁸	May choose POE or C&C standard

The DeVos/OCR proposed regulations nod in favor of reliable/accurate campus Title IX investigations...but

- “With regard to sexual harassment, the proposed regulations would...: Establish procedural safeguards that must be incorporated into a recipient's grievance procedures to ensure a **fair and reliable** factual determination when a recipient investigates and adjudicates a sexual harassment complaint.”
- Where a reporting complainant elects to file a formal complaint triggering the school's grievance process, the proposed regulations require the school's investigation to be fair and impartial, applying mandatory procedural checks and balances, thus **producing more reliable factual outcomes...**”
- Quoting *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 404 (6th Cir. 2017) (the complainant “deserves a **reliable, accurate outcome** as much as” the respondent)





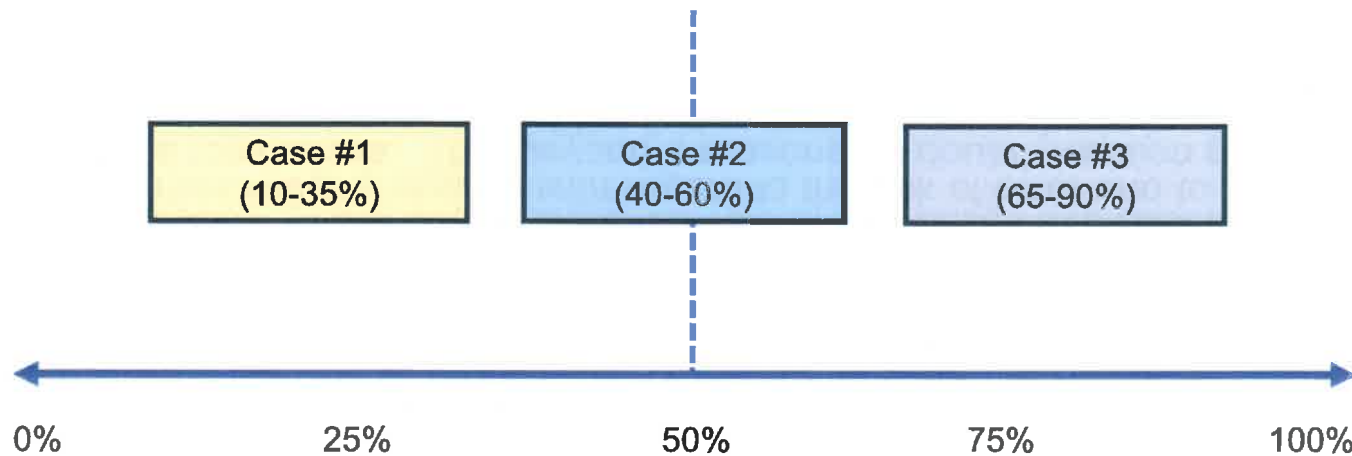
Strong consensus among evidence law scholars: Preponderance of evidence (POE) results in higher cumulative accuracy

- Clermont (2018): “I accept the dominant view that the standards aim at the appropriate error distribution. In particular, the civil standard of preponderance aims at minimizing errors and error costs through the pursuit of accuracy.”
- Sherwin (2002): “Under any standard of proof, there will be a certain number of inaccurate estimates of probability...Some of the erroneous estimates of probability under a clear and convincing standard ... will now produce correct outcomes from the standpoint of truth. But the number of outcomes that fit this description will be overshadowed by the number of wrong outcomes that result from the skewed standard.”
- Sherwin (2002): “A preponderance standard produces the greatest number of correct decisions, within the limits of the court’s factfinding abilities. In contrast, a clear and convincing standard forces courts to make a set of incorrect decisions that they would not make under a preponderance standard....”).
- Clermont (2009): “Instead, requiring high confidence will greatly increase the number of false negatives, even if that strategy limits false positives; actually, low confidence, as long as the found fact is more likely than not, will minimize the expected number of errors.”

Strong consensus among evidence law scholars cont...

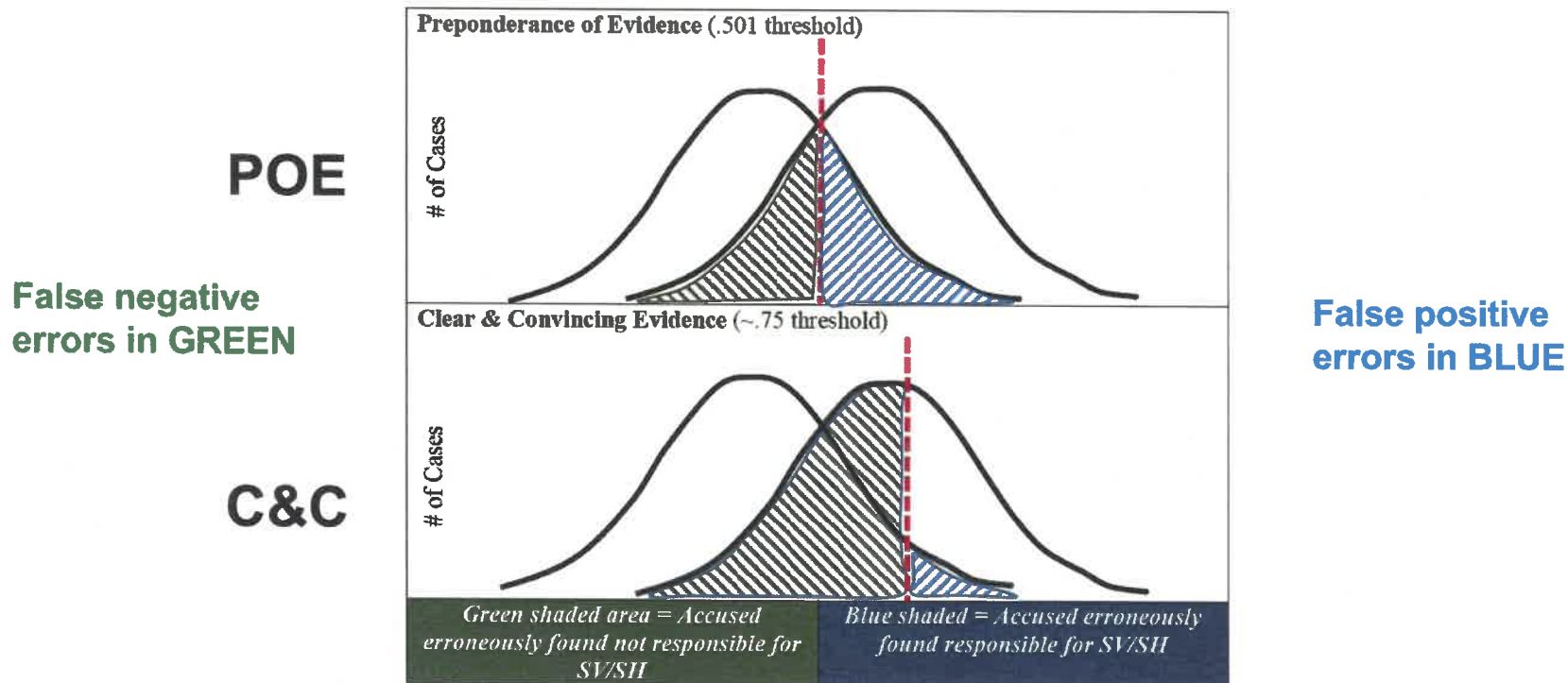
- Allen and Stein (2013): “The general proof requirement for civil cases—preponderance of the evidence—performs an important role in enforcing the law. Under certain conditions, this requirement allows courts to maximize the total number of correctly decided cases.... Other standards of proof are not calibrated to achieve this accuracy—maximizing and welfare-improving consequence.”
- (Kaye 1999) “The use of the more-probable-than-not standard is but one of many legal policies or procedures designed to lower the risk of factually erroneous verdicts. [T]he more-probable-than-not rule in the two-party civil case minimizes the expected number of erroneous verdicts...”
- Pardo (2009): “[T]he ‘preponderance’ rule in civil cases expresses a choice to treat parties roughly equally with regard to the risk of error and to attempt to minimize total errors. The ‘beyond a reasonable doubt’ decision rule in criminal cases—and to a lesser extent the “clear and convincing” rule in civil cases—expresses a choice to allocate more of the risk of error (or expected losses) away from defendants.”

Let's start by thinking about a few individual cases...
(each case has a probability range re allegation being substantiated)

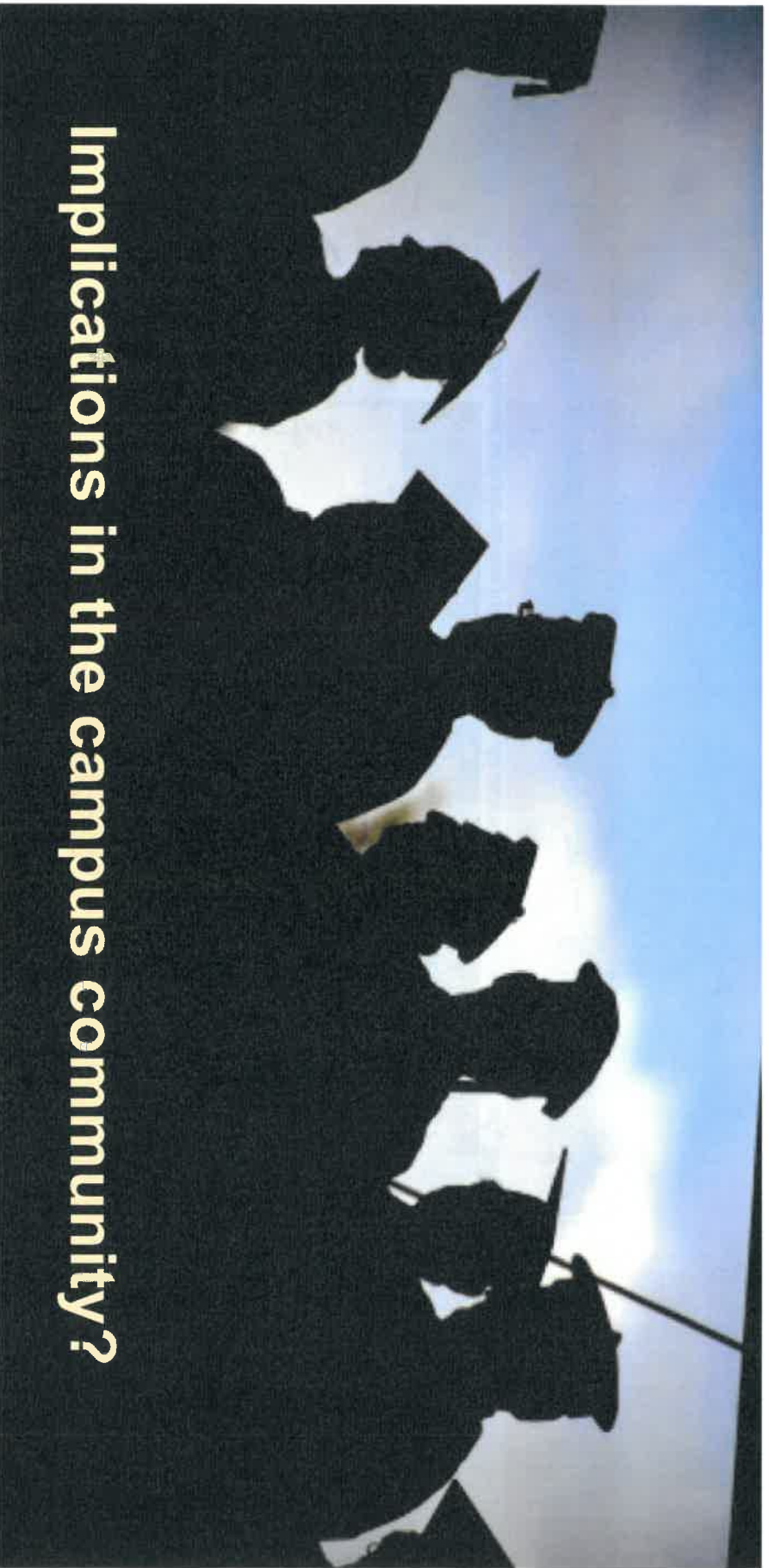


Adapted from R. ALLEN ET AL., ANALYTICAL APPROACH TO EVIDENCE diagram 10-1 (2016)

Who bears the costs of errors? (Type I v. Type II)



Adapted with permission from Allen et al., An Analytical Approach to Evidence (6th ed., 2016)



Implications in the campus community?

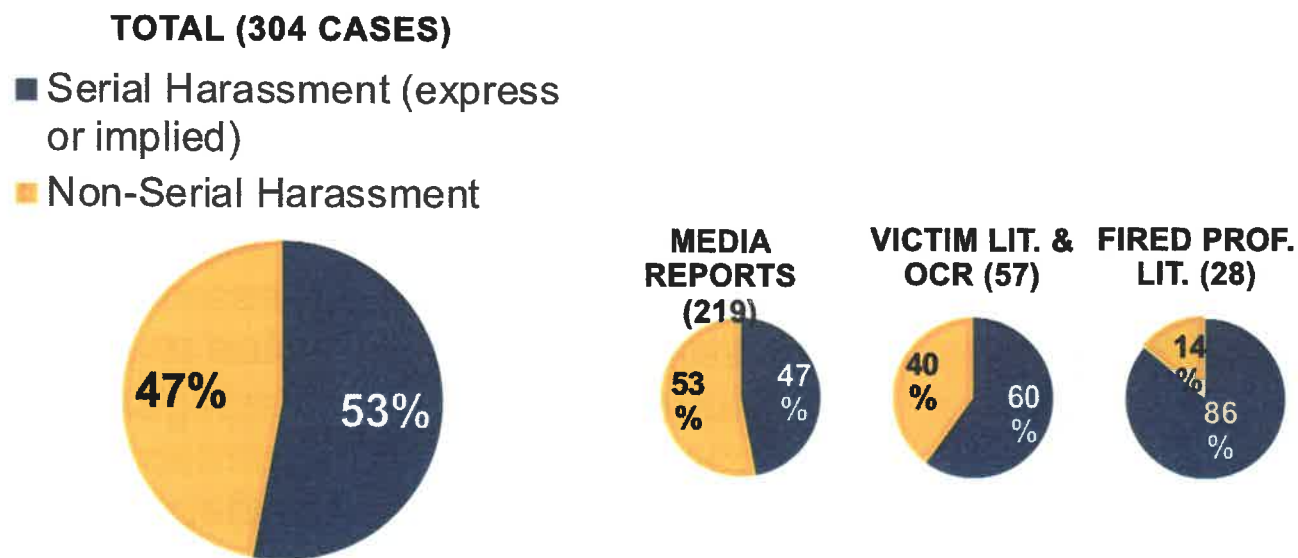
The C&C standard is more difficult and confusing for factfinders to apply (mock jurors, Title IX trainers)

- Social science/mock jury research on C&C: (Stoffelmayr & Diamond 2000; Kagehiro & Stanton 1985; London School of Economics 1973)
- Expert Title IX trainers report that training investigators and hearing panelists on C&C is more difficult because the C&C standard is more vague/subjective and not as intuitive as POE
 - Brett Sokolow, ATIXA
 - Deborah Maddux, Van Dermyden Maddux

Human costs of lower accuracy under the C&C? ... Repeat sexual misconduct among college males

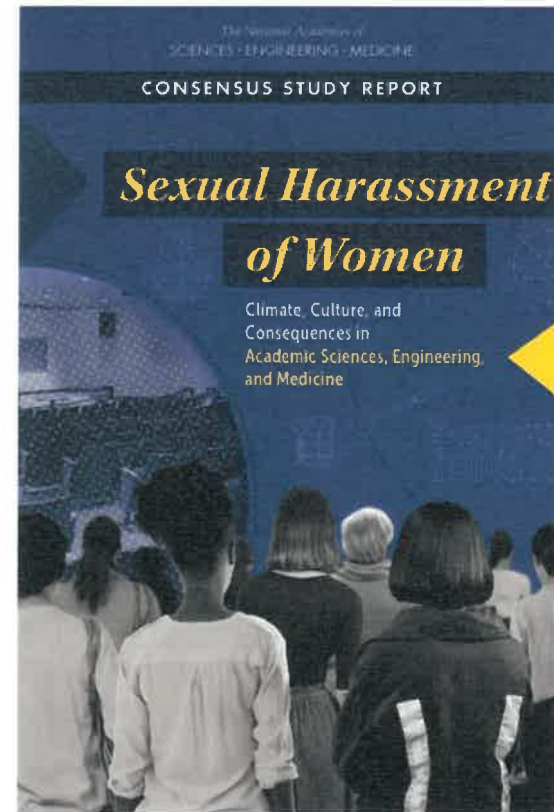
- Zinzow (2015): 68% of men who reported committing sexual coercion and assault were repeat offenders (42% were twice, 22% 3 times, 14% 4 times, 23% 5+ times)
- Swartout et al. (2015) *lower end estimate*, 27% of male college rapists committed rapes over multiple academic years
- Lisak & Miller (2002) *higher end estimate*, among college rapists 63% reported multiple rapes/attempts (average of 5.8)
- Greathouse/RAND (2015)
- Hanson & Morton-Bourgon (2005)

Costs of lower accuracy under C&C in the context of faculty-student sexual harassment: Makes it more difficult for colleges to sanction serial sexual harassers

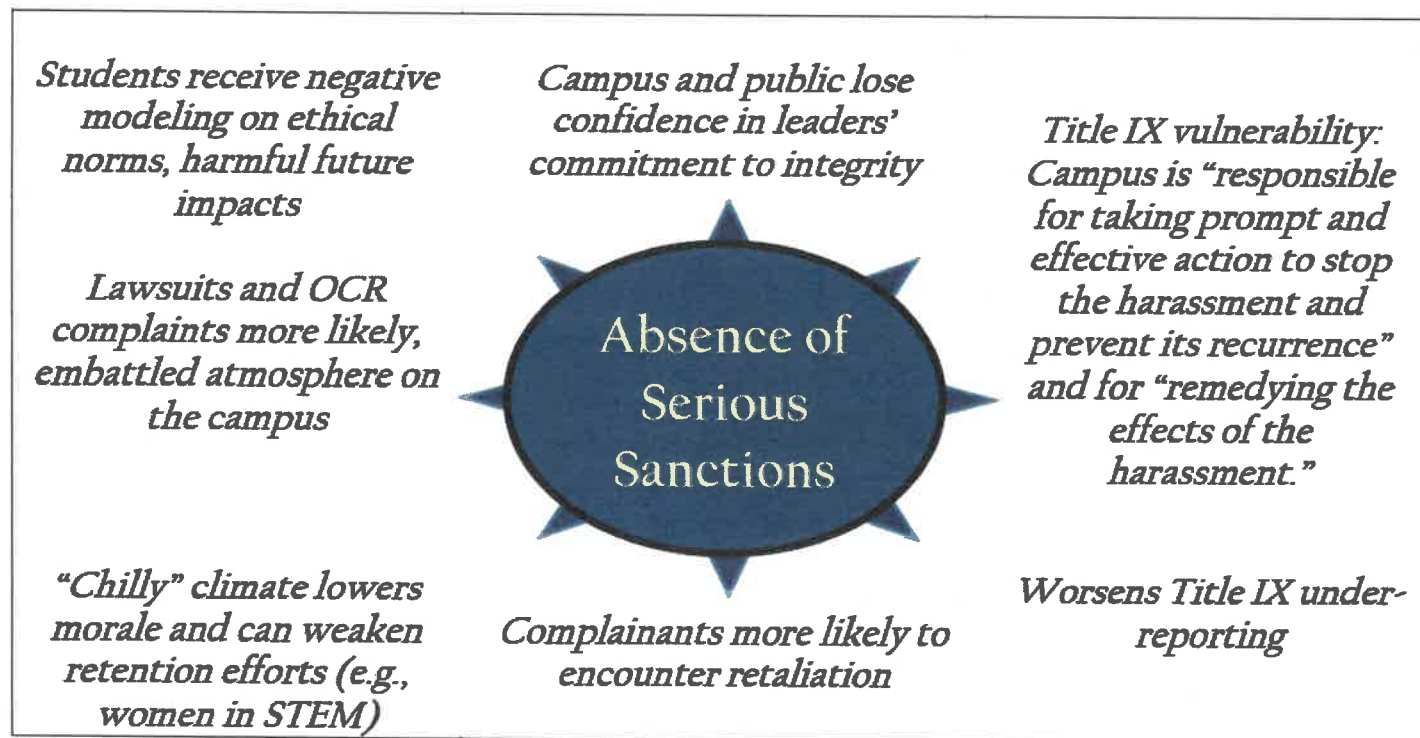


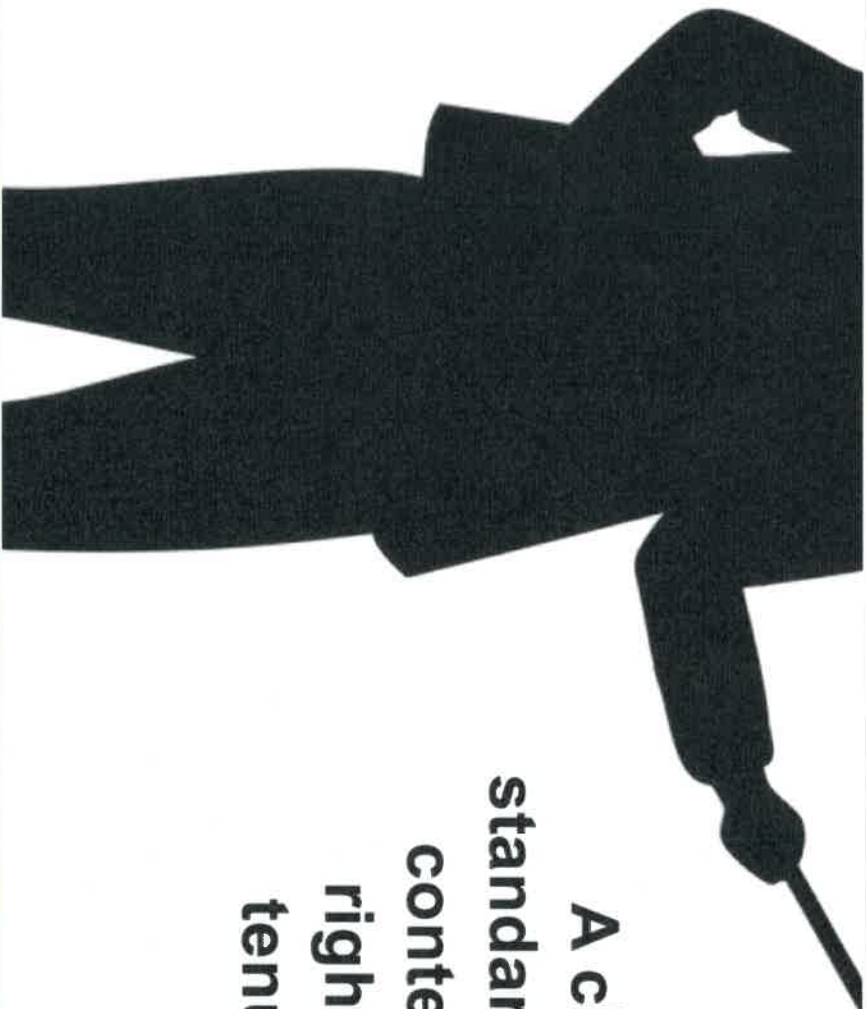
National Academies report (2018)

“There is often a **perceived tolerance for sexual harassment** in academia, which is the most potent predictor of sexual harassment occurring in an organization. The degree to which the environment within academic departments, schools, programs, and institutions reflects an unflinching commitment to the principle that any form of sexual harassment behavior (from expressing any form of gender harassment to making any type of unwanted sexual advance) is unacceptable is a critical factor in determining whether harassment is likely to occur.”



Negative syndrome w/ lack of serious faculty sanctions





**A closer look at the
standard of evidence in the
context of due process
rights and norms for
tenure-track faculty**

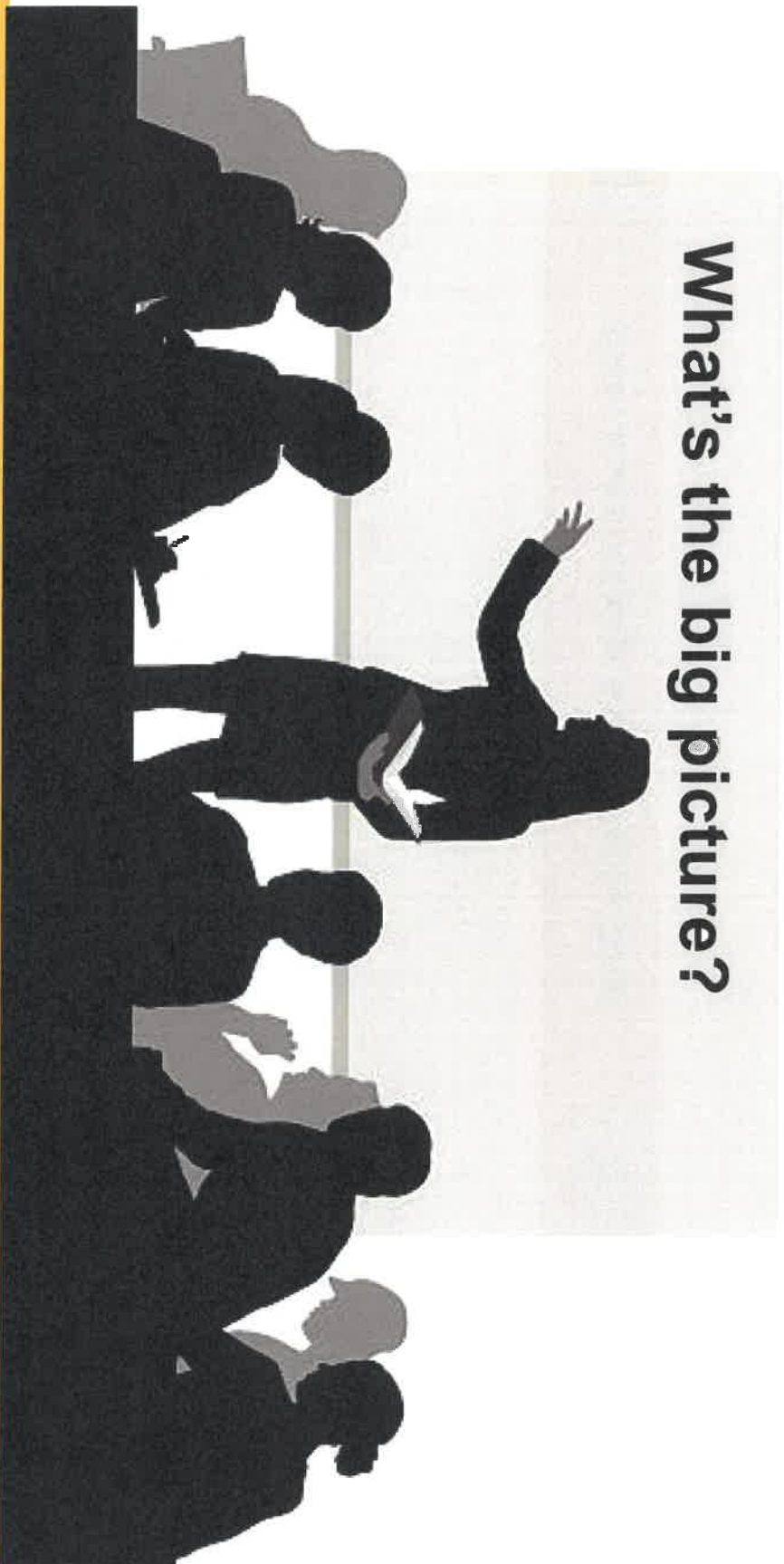
Different Posture of Faculty Title IX Cases

- Tenure decision is a “defining act of singular importance” (*Scharf v. UC Regents*)
- Since SCOTUS cases of *Roth* and *Sindermann*, tenured faculty at public colleges recognized as having property interest and due process connected to expectations of continued employment
- Sexual harassment = moral turpitude, so liberty interest too
- Private colleges largely similar due to employment contracts (state law) and college policies

Academic norms and AAUP guidance

- AAUP 1958 guidance favors C&C standard in all faculty discipline, but not same as core norms in AAUP's 1940 *Statement of Principles on Academic Freedom and Tenure*
- Many universities adopt this AAUP guidance in faculty handbooks and policies, but other colleges (including AAUP affiliates) have the POE standard under collective bargaining agreements
- Upshot: C&C standard in faculty discipline proceedings does not have specific constitutional underpinnings (*Winter v. Penn State*, 2016; *Traster v. Ohio NU*, 2015).... Moreover, where a college hasn't endorsed AAUP's 1958 guidance, courts reject legal challenges by professors (*Murphy v. Duquesne U.*, 2001)

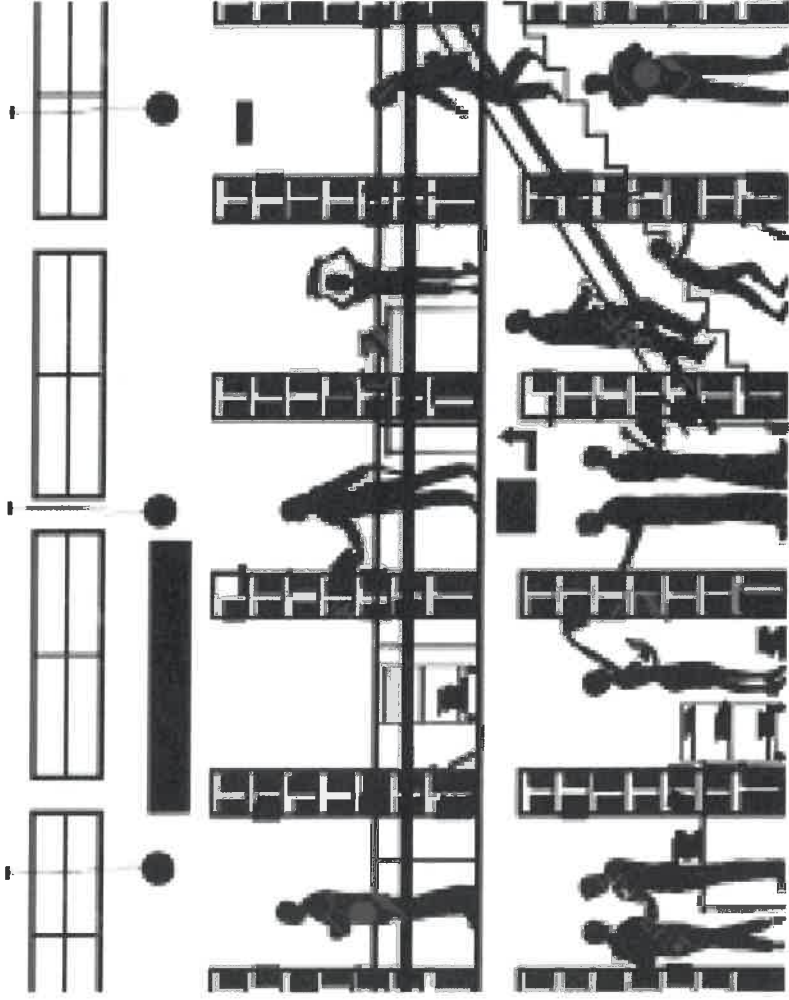
What's the big picture?



Very little case law supports C&C as a legal requirement in Title IX contexts. Is DOE/OCR cherry-picking?

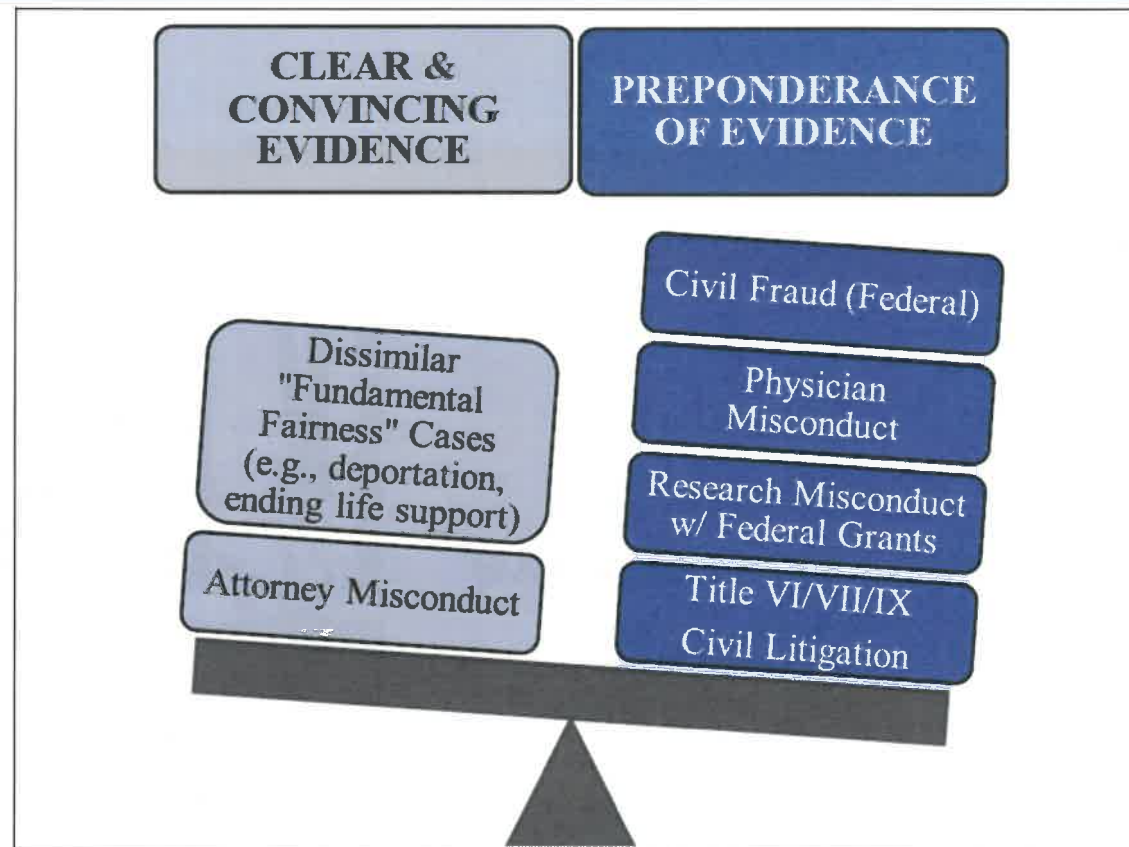
- *Doe v. Brandeis University*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016) (in dicta)
- *Lee v. University of New Mexico*, (D. N.M. Sept. 20, 2018), unpublished ruling
- *Plummer v. University of Houston*, 860 F. 3d 767, 783 (5th Cir. 2017) (Jones, J., dissenting)





**...So let's embark
on a more
systematic
inventory of the
standards of
evidence in related
contexts...**

**Other areas
where C&C or
POE standards
are used**



The Supreme Court's "fundamental fairness" (C&C) cases: very different stakes than campus Title IX cases

- **Parental rights termination** proceedings -- *Santosky v. Kramer*, 455 U.S. 745 (1982)
- **Involuntary civil (i.e., psychiatric) commitment** for an indefinite period -- *Addington v. Texas*, 441 U.S. 418 (1979)
- **Deportation** proceedings -- *Woodby v. INS*, 385 U.S. 276 (1966)
- **Ending medical life support** for a patient in a vegetative state -- *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990)

POE used in civil rights litigation and by OCR, etc.

- Title IX litigation
- Title VI litigation
- Title VII litigation
- Civil cases alleging rape/sexual assault
- “Erroneous outcome” challenges to a campus Title IX finding
- **DOE OCR Case Processing Manual §303** (Nov. 2018)...
consistent in earlier versions and guidance going back to ~1980
- Other federal agencies: EPA Case Resolution Manual (2017),
USDA discrimination complaints, etc...

POE is required in U.S. research misconduct regs covering federal grants... which went through formal notice-and-comment (2000)

- “While much is at stake for a researcher accused of research misconduct, even more is at stake for the public when a researcher commits research misconduct. **Since ‘preponderance of the evidence’ is the uniform standard of proof for establishing culpability in most civil fraud cases and many federal administrative proceedings, including debarment, there is no basis for raising the bar for proof...**”
-- Final Federal Policy on Research Misconduct, 65 Fed. Reg. 76262 (2000)
- Gov’t public list of debarred researchers (stigma risk akin to getting fired or expelled)
- Legal challenges to this POE rule in research misconduct are unsuccessful (*Brodie v. U.S. Dept. H.H.S.*, 796 F.Supp.2d 145, 157 (D.D.C. 2011); *Textor v. Cheney*, 757 F. Supp. 51, 57 n. 4 (D.D.C.1991))

POE used in federal anti-fraud proceedings (False Claim Act)



- Steadman v. S.E.C., 450 U.S. 91, 101 (1981) (SEC discipline case, the Court rejected petitioner's argument that the C&C standard was constitutionally required in an area where Congress endorsed the POE standard);
- Herman & MacLean v. Huddleston, 459 U.S. 375, 389 (1983) (civil enforcement of antifraud provisions of securities law);
- Since 1986 law, no successful legal challenges to POE
- Used to bar or suspend federal contractors (stigma)

3/4 of states use POE in physician misconduct/license cases

Preponderance of Evidence	Clear & Convincing Evidence	Difficult to Categorize
AK, AZ*, AR, CO, CT, DE, DC, GA, GU, HI, IN, IA, KS, KY, ME, MD, MA, MI, MN, MS, MO, NV, NH, NJ, NM, NY, NC, ND*, OH, OR, PA, RI, SC, TN, TX, VT, VI, WI	CA, FL, ID, IL, LA, NE, OK, SD, VA, WA*, WV*, WY	AL, MP, MT, PR, UT

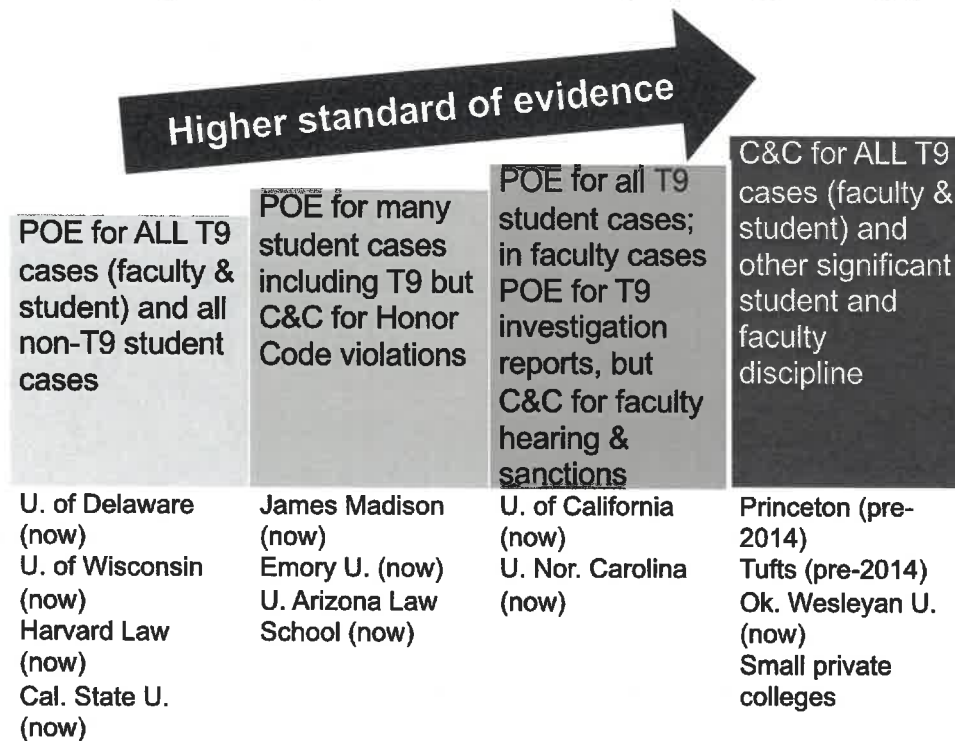


OCR cherry-picks case law by citing *Nguyen v. Washington State Dept. Health* (2001)

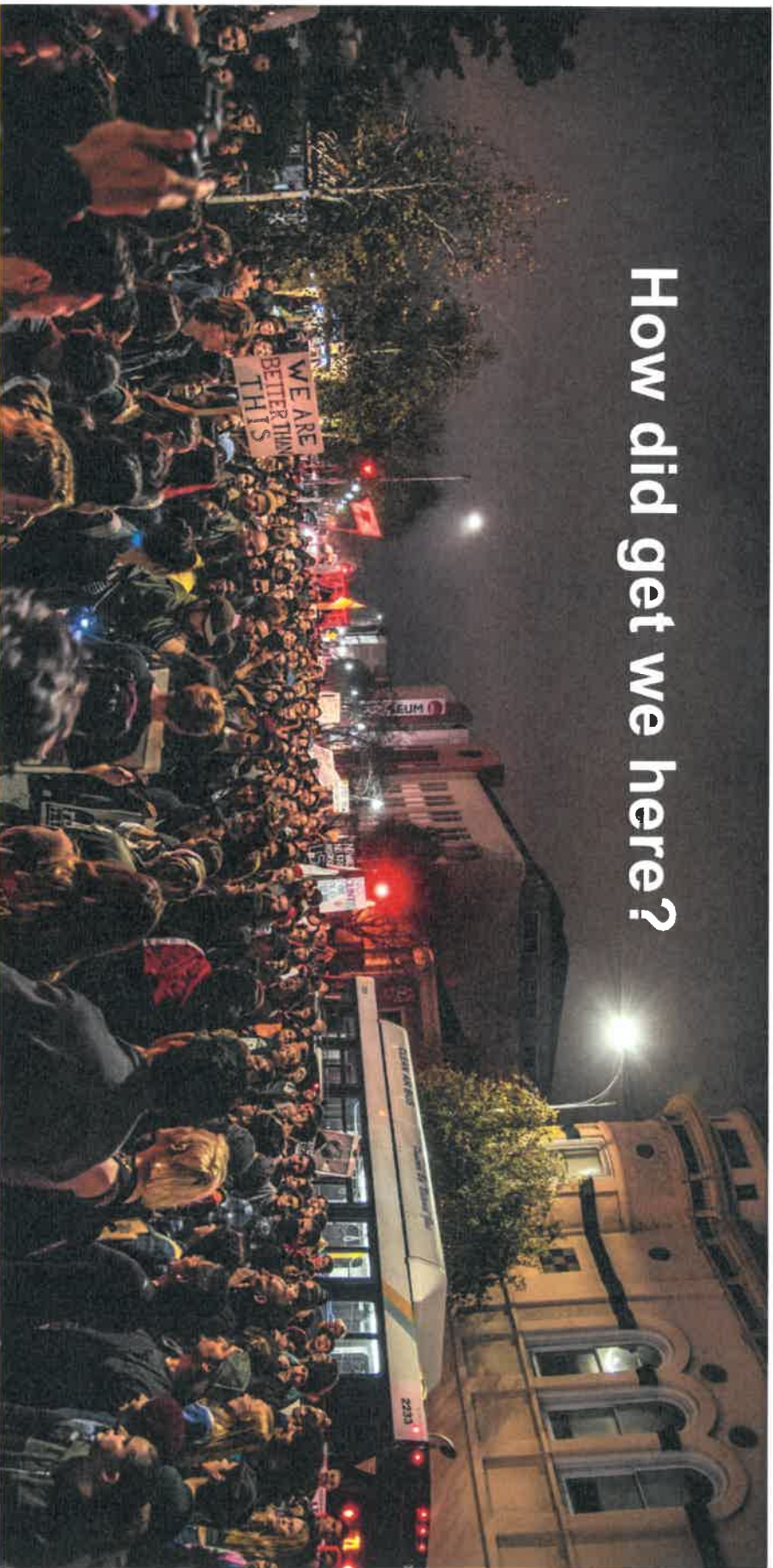
Attorney misconduct/license cases are the one area where the majority rule is the C&C standard

- C&C majority rule at federal level (4th, 5th, 9th, 10th, D.C. Circuits)
 - C&C majority among the states (e.g., Ohio, California)
-
- POE minority at federal level (1st and 2nd Circuits)
 - Some states use C&C in attorney license cases but POE in physician license cases (New Jersey recognizes greater societal interest in protecting “life and health” in the physician context, *In re Polk*, 449 A.2d 7 (N.J. 1982))

Current campus practices (rough typology)



How did get we here?

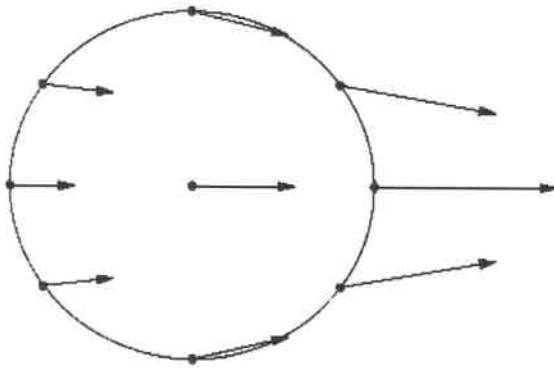


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Our history of “rape exceptionalism” exerts pull on our norms, values and internalized assumptions



- Belief that sexual/gender violence is *sui generis*, and should be treated differently than other types of student misconduct
- Posture of greater skepticism and concern about false reporting (by women) corresponds with added procedural protections
- Deep roots in Anglo-American criminal rape law

-- M. Anderson (2016), A. Brodsky (2017); E. Buzuvis (2017); Cantalupo (2012); M. Anderson (2004)

Harvard... An example of unique procedural hurdles in campus sexual misconduct (pre-DCL)

- New procedures in 2002 after spike in date rape complaints
 - Dean: school not equipped for “he said, she said” complaints
 - Need “independent corroborating evidence” to consider case
 - Also imposed “timely” filing requirement and cautioned board not to take cases with “little evidence except the conflicting statements of the principals”
- Led to an OCR complaint and some reforms in 2002-03