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CONSUMER INVESTMENT IN UNIVERSITY BRANDS

Deborah R. Gerhardt

INTRODUCTION

This article asks whether there is anything behind the curtain of university brands, and if so, where to look for evidence of core values. Universities have become brands fueled by the good, the bad, the ugly and the lucrative. Campus bookstores are filled with licensed merchandise. Brands adorn college sports centers, uniforms, buildings, museums, art performances and professorships. Even orientation weeks are sponsored and provide shopping experiences. Through the sea of merchandise, it can be difficult to discern meaningful differences.

University brands are routinely protected as federal service marks, granted special statutory rights because they identify and distinguish one school from its competition. These marks may be registered with the United States Patent and Trademark Office if the name alone symbolizes the school and distinguishes it from the competition.¹ Distinctiveness based on geography, size and other data do not measure culture. Marks are thought by economic theorists to incentivize quality control.² This incentive mechanism may explain the

¹Associate Professor at The UNC School of Law and graduate of the Case Western Reserve University School of Law. The author would like to thank the participants from the Loyola University Chicago School of Law *Consumer Law Review* Symposium in March 2016. I am also grateful for excellent research assistance from David R. Hansen and Amy L. Schmitz.

² See 15 U.S.C. § 1127 (2006).

² See William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 269 (1987); see also

consumer-producer relationship for products like diapers that are bought repeatedly if the consumer has a positive experience with the product's style, price point and quality.³ Prospective consumers who make a one-time purchase, like a college education, do not have the opportunity to experiment. How can they discern authenticity and quality when schools sell themselves with seemingly interchangeable aspirations? This article proposes that one window into a brand's authenticity is the extent to which its community demands adherence to specific core values in moments of crisis.

The discussion proceeds in four parts. Section I identifies how core values are tested when a university faces a crisis. Often, university leaders find themselves caught in a tug-of-war between community groups advocating for conflicting values. Choices made in those moments may be constrained by historic practices or influenced by community demands. Another option is to make the value choice proactively, so that the most significant value is affirmed apart from a particular incident. Other institutions may forego the opportunity to use the crisis as a defining moment, and simply decide the particular case on its merits irrespective of the fallout. Section I summarizes examples of each scenario. Section II provides two more detailed case studies to illustrate how an engaged community can exert influence over a university brand narrative. The law school deans at University of California Berkeley (Berkeley) and Case Western Reserve University (CWRU) were accused of sexual harassment. In the pre-publicity chapters of both stories, the university leadership teams both struggled to balance loyalty to their leadership team against protecting community members in positions of less power from sexual harassment. Section III begins when the two accusers sued the schools

WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 166-67 (2003).

³ Deborah R. Gerhardt, *Consumer Investment In Trademarks*, 88 N.C. L. REV. 427, 447 (2010).

and the deans, and the two stories became public. Here, the narratives diverge. Comparing these two stories provides a fascinating window into the consumer community as a creative force in determining which core values define a university community. Section IV concludes with a discussion of how the two stories illuminate a window into the nature of campus culture and the authenticity of its professed core values.

I. THE QUALITATIVE CHOICE: CORE VALUES AND ACADEMIC CULTURE

When conflicts arise, university leaders face a host of difficult choices. In moments of institutional transition or crisis, defensible core values may appear to support different outcomes. Loyalty to a leadership team is necessary for an institution to evolve. Conflicts routinely emerge between those who press for change and those who seek to honor tradition. University administrators must make hard choices among constituencies who resist every move, and deans - the mid-level managers on campus - cannot feel free to take risks unless the administration provides genuine support.

Even timing can be problematic. Waiting too long to speak may reflect indecisiveness and an empty moral commitment to any values other than perpetuation of the administration itself. Rushing to judgment is risky because the facts might not turn out to be as they first appear. As Duke University learned at great cost, jumping to conclusions of guilt too quickly may lead to terrible reputational harm to the institution and those implicated in a crisis.⁴ Accusers sometimes lie or identify the wrong person.⁵ One of the Duke lacrosse players accused of rape had a time-stamped ATM receipt proving

⁴ See Peter J. Boyer, *Big Men on Campus*, THE NEW YORKER (Sept. 4, 2006), <http://www.newyorker.com/magazine/2006/09/04/big-men-on-campus>.

⁵ See *id.*

he was not present when the alleged crime occurred.⁶ Failing to show loyalty to its students—by believing the accuser's story—resulted in a public relations disaster and an expensive settlement.⁷ Given this and other cautionary tales, loyalty and trust—when supported by reasonable factual allegations—may motivate a school to stand by a community member even if they are accused of improper conduct towards someone in an inferior position of power. An institution must choose whether to stay loyal to the alleged perpetrator or to its victim. That choice may implicate a complex web of conflicting loyalties between two members of its hierarchical community of administration, faculty, staff, students and town residents.

Loyalty to principles, such as protecting underrepresented minorities or persons in inferior positions of power, is also a force to be considered. Administrators often find themselves caught in a tug-of-war between constituencies. It is in these moments that a university's defining values are tested. History plays an important role as well. Consider the conflict between academic freedom and protecting students from racist speech. The University of Chicago has a proud history of inclusion. From the day its doors first opened, it welcomed women and minorities who were excluded at its peer institutions.⁸ It was the first university to appoint a Jewish president, and then a decade later, was the first to appoint a woman as president.⁹ It also has a proud tradition of academic freedom. Because of its history of taking meaningful action to empower minorities, it can sustain its commitment to academic freedom as well even when some speakers are offensive. To drive home this commitment to both values, the Uni-

⁶ *Id.*

⁷ *Id.*

⁸ See ABOUT: HISTORY, THE UNIV. OF CHICAGO, <http://www.uchicago.edu/about/history/> (last visited Oct. 28, 2016).

⁹ *Id.*

versity of Chicago put a letter in its fall 2016 orientation materials proclaiming its unapologetic commitment to academic freedom.¹⁰ The letter states:

Our commitment to academic freedom means that we do not support so-called “trigger warnings,” we do not cancel invited speakers because their topics might prove controversial, and we do not condone the creation of intellectual “safe spaces” where individuals can retreat from ideas and perspectives at odds with their own . . . ¹¹

By sending this letter apart from any particular incident, the University of Chicago affirmed its core commitment to vigorous academic debate and set community expectations so that if it chooses to permit offensive conduct, the choice will be viewed as necessary to support its core commitment to academic freedom. In this way, the University of Chicago acted in stark contrast to many other schools that are cancelling speakers, sanctioning instructors or banning controversial groups from campus in an effort to shelter those who feel threatened and bullied by offensive speech or conduct.¹² For this reason, acts deemed culturally insensitive, such as offering a yoga class or defending the right

¹⁰ See Pete Grieve, *University to Freshmen: Don't Expect Safe Spaces or Trigger Warnings*, *The Chicago Maroon* (Aug. 24, 2016), <https://www.chicagomaroon.com/2016/08/24/university-to-freshmen-dont-expect-safe-spaces-or-trigger-warnings/>.

¹¹ *Id.*

¹² See Veronica Rocha, *Kanye West-themed frat party at UCLA sparks protests, claims of racism*, *L.A. Times* (Oct. 9, 2015), <http://www.latimes.com/local/lanow/la-me-ln-ucla-blackface-kanye-party-20151008-story.html> (a fraternity and sorority's social privileges were suspended following a protest by black students condemning the party-goers appropriating black culture and wearing blackface); Scott Jaschik, *Too Risky for Boulder?*, *Inside Higher Ed.* (Dec. 16, 2013), <https://www.insidehighered.com/news/2013/12/16/tenured-professor-boulder-says-she-being-forced-out-over-lecture-prostitution> (a tenured professor at

to wear inappropriate Halloween costumes, have been vilified, and speech on both sides of the political spectrum has been silenced

University of Chicago's inclusive history may have given it the liberty to support academic freedom in setting its speech policies. Other communities, with less inclusive histories, may choose to put inclusiveness ahead of free speech. In this way, they can inspire trust by creating a welcoming and safe environment for minorities even if its actions result in harm to other values like free speech.

The University of Oklahoma faced such a situation when a videotape surfaced of a group of students

University of Colorado Boulder, Patricia Adler, says she was forced out after showing a controversial video about prostitution); Anemona Hartocollis, *Yale Lecturer Resigns After Email on Halloween Costumes*, N.Y. Times (Dec. 7, 2013), <http://www.nytimes.com/2015/12/08/us/yale-lecturer-resigns-after-email-on-halloween-costumes.html> (describing a Yale child psychologist and resident adviser who resigned from a semester of teaching after responding to a warning about responsible Halloween attire, by questioning "Is there no room anymore for a child or young person to be a little bit obnoxious, . . . a little bit inappropriate or provocative or, yes, offensive?"); Erik Wemple, *Here's how a sit-in at Smith College approached the media*, Wash. Post (Nov. 20, 2015), https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/11/20/heres-how-a-sit-in-at-smith-college-approached-the-media/?utm_term=.f3695c3993ba (press who did not agree to express their solidarity with the movement were not allowed to cover a protest at Smith College); Katherine Shaver, *Georgetown University to rename two buildings that reflect school's ties to slavery*, Wash. Post (Nov. 15, 2015), https://www.washingtonpost.com/local/georgetown-university-to-rename-two-buildings-that-reflect-schools-ties-to-slavery/2015/11/15/e36edd32-8bb7-11e5-acff-673ae92ddd2b_story.html (Georgetown renamed two buildings that were named after slave owners); Justin Moyer, *University yoga class canceled because of 'oppression, cultural genocide'*, Wash. Post (Nov. 23, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/11/23/university-yoga-class-canceled-because-of-oppression-cultural-genocide/> (a yoga class was cancelled because it misappropriated the culture it came from).

joyfully singing a racist song.¹³ The University was confronted with a difficult choice between two values: freedom of speech and racial equality. The decision could not be made without weighing both values in light of its history and current trajectory. Some prominent scholars stood up for the principle of free speech.¹⁴ The First Amendment prohibits state institutions — like this public university— from punishing people for the content of their speech.¹⁵ On the other hand, the song had a connection to campus traditions of racism the University needed to leave behind in order to attract a diverse community and make them feel valued and safe in the face of dehumanizing speech.¹⁶

The University of Oklahoma's President, David Boren, took decisive action to show which values would prevail under his leadership. Within a week, the University of Oklahoma severed ties with the fraternity, closed its house, and ordered all students living in it to move out within two days.¹⁷ The University expelled the song leaders and took serious disciplinary action against other participants.¹⁸ At a public rally, Boren picked up a bull horn and said: "I have a message for those who have misused their freedom of speech in this way. My message to them is: You're disgraceful. You have violated every principle that this university stands for."¹⁹ Later, he added,

¹³ *President David Boren expels two students for involvement in racist video*, KOCO.com (Mar. 10, 2015) <http://www.koco.com/news/boren-expels-two-students-for-involvement-in-racist-video/31714126> [hereinafter KOCO.com].

¹⁴ See Grieve, *supra* note 10; see also Eugene Volokh, *No, it's not constitutional for the University of Oklahoma to expel students for racist speech*, Wash. Post (Mar. 10, 2015) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/10/no-a-public-university-may-not-expel-students-for-racist-speech/?utm_term=.8fe979ec5bf3.

¹⁵ U.S. Const. amend. I.

¹⁶ See KOCO.com, *supra* note 13.

¹⁷ *Id.*

¹⁸ KOCO.com, *supra* note 13.

¹⁹ *Id.*

"Do I think all these young men are racists in their hearts? Do I think they're proud of what they did? No," Boren said. "Our purpose here is to not brand people with certain words for life. Our purpose is to learn lessons and be held accountable and then move forward with our lives."²⁰

The University of Oklahoma used this negative incident as an opportunity to affirm positive core values. Boren's words created a genuine teaching moment about character and education. He did not brand the fraternity with their bad act, but still took a strong stand against it. In doing so, he engineered a pivotal chapter in the University's history.

Dedication to due process, honor codes and transparent decision making forums are also important values. Law schools teach about the integrity of the truth-seeking mission, and therefore, are often particularly committed to their internal process for making decisions. Faculties train their students to not assign guilt until a jury declares it beyond a reasonable doubt, and many believe they must live by that mantra if they are to teach it.

²⁰ Joey Stipek & Richard Perez-Pena, *Oklahoma Inquiry Traces Racist Song to National Gathering of Fraternity*, N.Y. Times (Mar. 27, 2015), <http://www.nytimes.com/2015/03/28/us/oklahoma-inquiry-traces-racist-song-to-national-gathering-of-fraternity.html>. The Sigma Alpha Epsilon Fraternity issued the following statement: "We are disgusted that any member would act in such a way," the statement said. "Furthermore, we are embarrassed by this video and offer our empathy not only to anyone outside the organization who is offended but also to our brothers who come from a wide range of backgrounds, cultures and ethnicities."; Justin W. Moyer, *University of Oklahoma Fraternity Closed After Racist Chant*, Wash. Post (Mar. 9, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/03/09/university-of-oklahoma-fraternity-suspended-after-racist-chant/>.

Colleges and universities all claim to support inclusiveness and gender equity. From their websites, many schools look remarkably similar: glossy photos display happy and diverse students and faculty. From the consumer perspective, universities may appear reactionary or opportunistic, and the authenticity of professed values may seem difficult to assess.

That veneer is not an accident, and is not necessarily linked to a meaningful choice. Multiple external forces, in addition to web designers and advertising agencies, influence the content of school websites. All schools receiving federal funds must publish anti-discrimination policies that protect students and employees.²¹ The United States government issues form posters so that workplace information about rights against discrimination are generally identical.²² All schools are required by federal law to have statements supporting diversity and inclusiveness.²³ The American Bar Association requires all law schools to take “concrete action” to support racial and gender diversity.²⁴

Consequently, it can be difficult to discern meaningful differences in campus culture. From a cursory review of their websites, the law schools at Case Western Reserve University and University of California, Berkeley appear committed to similar principles of respect for the law, diversity and inclusion.²⁵ During the time

²¹ 34 C.F.R. § 100.4(b) (2000); Civil Rights Act of 1964, 42 U.S.C. §§ 1981-2000h-6 (1964) (“Title IX”); Education Amendments of 1972 20 U.S.C. §§1681-88 (1972) (“Title IX”).

²² EEOC, EEOC-P/E-1, Equal Employment Opportunity is the Law (2009), https://www.eeoc.gov/employers/upload/poster_screen_reader_optimized.pdf.

²³ See 34 C.F.R. § 100.4(b) (2000).

²⁴ *ABA Standards and Rules for Procedure for Approval of Law Schools*, A.B.A. 1, 12 (2015-16), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_aba_standards_for_approval_of_law_schools_final.authcheckdam.pdf.

²⁵ See SCH. OF LAW, CASE W. RESERVE UNIV., HOMEPAGE, <http://law.case.edu>; see also BERKELEY LAW, UNIV. OF CAL., HOMEPAGE, <https://www.law.berkeley.edu>.

period when the two sexual harassment incidents occurred, neither website featured a prominent mission statement articulating distinctive core values. A Google search of each school's name and "mission statement" turned up no results. A similar search through each school's website similarly resulted in no responsive statements that applied to their entire law school community. Nonetheless, on their "About" pages, both law schools said they were committed to diversity.²⁶ Both schools stated they oppose sexual harassment and gender discrimination.²⁷

Yet, websites can articulate values beyond the bare legal requirements. Both CWRU and Berkeley attempted to do so. Under the caption "Proud History," the CWRU School of Law proclaims: "We admitted our first African-American student in our first class in 1892."²⁸ Not many schools can say that from the day their doors first opened, minorities were welcome. In 2015, the UC Berkeley School of Law—on its "About Us" page stated:

we are committed to excellence in education and scholarship, as well as equality of opportunity. We believe we have a responsibility to use our substantial intellectual capital to help solve real-world problems and to create a more just society through clinics, research, and policy engagement. . . . We maintain an environment that nurtures academic and personal growth, respects a diversity of ideas, and stimulates

²⁶ HOME: *About Us*, Berkeley Law, Univ. of Cal., <https://www.law.berkeley.edu/about-us/>; HOME: *Our School, About Us*, Sch. of Law, Case W. Reserve Univ., <http://law.case.edu/Our-School/About-Us>.

²⁷ *Id.*

²⁸ HOME: *Our School, About Us*, Sch. of Law, Case W. Reserve Univ., <http://law.case.edu/Our-School/About-Us>.

independent thought and critical reasoning.²⁹

From these online pronouncements alone, one might conclude that the two schools have a relatively similar commitment to inclusiveness and respect for diverse members of its community. The authenticity of these professed values were tested in the two following stories.

II. TWO STORIES OF LAW DEANS AND SEXUAL HARASSMENT

A case study of two law schools will reveal one way to see whether true distinctiveness between educational institutions still exists, and if so, whether consumers participate in creating it. This discussion uses the term “consumers” to distinguish academic community members from the legal trademark owner and the administrators who form its leadership team. From this perspective, university consumers include faculty, current and prospective students as well as alumni. Students are interested in influencing campus culture and brand meaning because it is their current or imminent life experience. Alumni also have a strong interest in the values associated with their alma mater because it is forever linked with their professional paths as a short hand for their own academic credentials and values. Before internet profiles were ubiquitous, academic credentials were not omnipresent. They appeared on paper resumes at moments of professional transition and were noted by word of mouth but were not omnipresent as they are on social media.³⁰ Facebook, LinkedIn and

²⁹ HOME: *About Us*, Berkeley Law, Univ. of Cal., <https://www.law.berkeley.edu/about-us/>. In 2016, the site was changed to feature a far more distinctive mission statement. <https://www.law.berkeley.edu/about-us/mission-learning-outcomes/>

³⁰ Deborah R. Gerhardt, *Social Media Amplify Consumer Investment in Trademarks*, 90 N.C. L. Rev 1491, 1505-1506 (2012).

professional websites all may include educational brands as proxies for professional quality. They may also serve as central symbols for professional or social engagement with intergenerational communities. The following two stories demonstrate how genuine core values may emerge as a result of consumer action in moments of crisis.

The story of Larry Mitchell begins with Case Western Reserve University's President, Barbara Snyder. In 2007, Snyder came to Case from Ohio State University where she served as a law professor before taking a series of administrative positions.³¹ She had excellent experience in legal education and had reason to fear that CWRU's law school was in free-fall. In 1993, lawyers and judges ranked CWRU law school as the 35th best in the country.³² By 2000, CWRU had fallen out of the top 50.³³ A decade later, the law school had not gained its lost ground.

Soon after Snyder arrived in Cleveland, she asked for the resignation of Gary Simson, a kind and well respected member of legal academia.³⁴ She then spent years searching for someone who would be, as she put it, more talented at "schmoozing." It was a curious and prophetic choice of words. Miriam Webster defines "to schmooze" as "to talk with someone in a friendly way often in order to get some advantage for yourself."³⁵ This word—originating from the Yiddish-- connotes a lack of depth and authenticity. Dictionary.com captures this connotation by defining the word to mean "chat

³¹ Office of the President Home: *President Barbara R. Snyder*, Case W. Reserve Univ., <https://www.case.edu/president/bio.html>.

³² *Best Graduate Schools*, U.S. News & World Rep., 62 (1993).

³³ *Best Graduate Schools*, U.S. News & World Rep., 62 (2000).

³⁴ Karl Turner, *Case Western Reserve law school Dean Gary Simson to resign*, Cleveland.com (Oct. 5, 2008), http://blog.cleveland.com/metro/2008/10/case_western_reserve_law_schoo.html.

³⁵ *Simple Definition of SCHMOOZE*, Merriam-Webster, <http://www.merriam-webster.com/dictionary/schmooze> (last visited Nov. 1, 2016).

idly; gossip.”³⁶

In April 2011, when CWRU hired Larry Mitchell as dean,³⁷ it took an informed risk. Mitchell came to Cleveland with a reputation for seeking intimate conduct with women in inferior positions of power.³⁸ Between 2000-2010, Mitchell married and divorced a twenty four-year-old student, and then an untenured faculty member.³⁹ During Mitchell’s interview at CWRU, the search committee observed Mitchell’s inclination towards substance abuse.⁴⁰ Pam Davis, the dean of the medical school, warned the President and Provost that a man who would have two scotch highballs at an interview dinner would not hesitate to drink more once he had the job.⁴¹ When Mitchell heard about Davis’s reservations, he ridiculed her for being “prude.”⁴²

Trouble began soon after Mitchell arrived. In 2011, Raymond Ku, the Associate Dean for Academic Affairs,⁴³ witnessed Mitchell acting in unprofessional and demeaning ways to women and minorities.⁴⁴ Ku learned that 6 professors and 3 administrative assistants experienced sexual harassment by the dean, witnessed such acts or received reports of harassment, but

³⁶ *Definitions: Schmooze*, DICTIONARY.COM, <http://www.dictionary.com/browse/schmooze> (last visited Nov. 1, 2016).

³⁷ Karen Farkas, *Lawrence Mitchell picked as CWRU law school Dean*, Cleveland.com (Apr. 21, 2011), http://blog.cleveland.com/metro/2011/04/lawrence_mitchell_picked_as_cw.html.

³⁸ See Doug Brown, *Sex, Politics and Revenge: Lawrence Mitchell Was Supposed to Bring Stability to Case Western Reserve University’s Law School, Not Treat It as His Personal Pickup Playground*, Cleveland Scene (May 7, 2014), <http://www.clevescene.com/cleveland/sex-politics-and-revenge-lawrence-mitchell-was-supposed-to-bring-stability-to-case-western-reserve-universitys-law-school-not-treat-it-as/Content?oid=4307875>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Brown, *supra* note 38. .

⁴⁴ *Id.*

were afraid to report their experience for fear of retaliation.⁴⁵ One professor reported that a student confidentially sought her help after the Dean propositioned her for a “threesome.”⁴⁶ Ku learned that Mitchell made a similar proposition to an administrative staff member and his girlfriend.⁴⁷

In the fall of 2011, Professor Raymond Ku told the Provost about the multiple allegations of Mitchell’s inappropriate sexual advances towards women faculty, staff and students.⁴⁸ At the Provost’s request, Ku shared his concerns with Mitchell. Mitchell accused Ku of “disloyalty,” and for that “breach of trust,” he isolated Ku from the decision-making work of the institution, buried him in busy work not within his job description and unsuccessfully tried to get Ku removed as a tenured faculty member.⁴⁹

Ku reported these acts to Marilyn Mobley, CWRU’s Vice President for Inclusion, Diversity and Equal Opportunity.⁵⁰ Mobley told Ku that the Provost did not understand the gravity of sexual harassment. She brought Faculty Diversity Officer John Clocheser into the meeting, and both Clocheser and Mobley agreed that Mitchell’s treatment of Ku was “a classic case of retaliation.”⁵¹ After learning that the CWRU administration intended to back Mitchell, Mobley concluded her investigation by telling Ku that his allegations “may fall under” CWRU’s harassment policy.⁵² No meaningful action was taken to

⁴⁵ *Id.*

⁴⁶ First Amended Complaint with Jury Demand at 21, *Ku v. Mitchell*, No. CV 13 815935 (Ohio Ct. Com. Pl. Oct. 31, 2013) [hereinafter First Amended Complaint].

⁴⁷ Joe Patrice, *Lawrence Mitchell Threesomes and Other Startling Allegations in Affidavit*, Above the Law (May 9, 2014, 1:16 PM), <http://abovethelaw.com/2014/05/lawrence-mitchell-threesomes-and-other-startling-allegations-in-affidavit/5/>.

⁴⁸ First Amended Complaint, *supra* note 46, at 8-10.

⁴⁹ *Id.* at 41-43.

⁵⁰ *Id.* at 59-60.

⁵¹ *Id.* at 18.

⁵² *Id.* at 78.

protect the community from the dean. In October 2013, Ku sued Mitchell and the University.⁵³ Once the lawsuit was filed, the salacious allegations were widely reported in Cleveland and national news media.⁵⁴

A similar story occurred at Berkeley's law school several years later, on July 1, 2015. When Sujit Choudhry became the Dean at Berkeley, Tyann Sorrell was the Dean's Executive Assistant.⁵⁵ In September 2014, Choudhry began touching and kissing Sorrell. Sorrell complained repeatedly to the Dean's Chief of Staff, asking her to intervene and talk to Choudhry. That did not happen, and week by week, the unwanted conduct escalated in frequency and duration. Fearing for her job security and retaliation, Sorrell tried to communicate through her conduct that Choudhry's advances were unwelcome. She stiffened and backed off when he touched or kissed her, hoping the conduct would stop.⁵⁶ After eight months, she had had enough.⁵⁷ On March 19, 2015, she wrote a six-page email to Choudhry explaining that his behavior was unwelcome and made her so uncomfortable that the anxiety was adversely affecting her health.⁵⁸ She suffered from insomnia, hair loss and depression.⁵⁹ After sending this message, Sorrell was afraid to go to the office and face Choudhry.⁶⁰ The Internal Administrator told her that if she did not want to come to work, she must use her

⁵³ See Brown, *supra* note 38.

⁵⁴ First Amended Complaint, *supra* note 46, at 18; Steven J. Harper, *Prominent Law Dean Who's Accused of Sexual Harassment Allegedly Called Himself 'A Dictator,'* Business Insider (Nov. 19, 2013, 12:23 PM), <http://www.businessinsider.com/case-western-dean-allegedly-called-himself-a-dictator-2013-11>.

⁵⁵ See Complaint for Damages at 3, *Sorrell v. Regents of the University of California*, No. RG16806802 (Cal. Super. Ct. Mar. 8, 2016) [hereinafter Complaint for Damages].

⁵⁶ *Id.* at 4-5.

⁵⁷ *Id.* at 6.

⁵⁸ *Id.*

⁵⁹ *Id.* at 5, 7.

⁶⁰ Complaint for Damages, *supra* note 55. at 7.

vacation days and sick leave.⁶¹ Sorrell contacted Berkeley's Office for the Prevention of Harassment and Discrimination,⁶² and on April 6, 2015, she met with Andrea LaCampagne, a Complaint Resolution Officer.⁶³ On May 12, 2015, LaCampagne met with the dean and his attorney. In that meeting, Choudhry admitted he had hugged Sorrell, kissed her, caressed her shoulders and arms from behind while she sat at her desk, squeezed her arm as he passed by her desk, and held her hands to his waist.⁶⁴ Choudhry did not claim that Sorrell consented or initiated intimate contact.⁶⁵

On July 7, 2015, Berkeley's Office for the Prevention of Harassment and Discrimination issued a report concluding: "By a preponderance of the evidence, the Respondent violated the sexual harassment provisions of the UC Policy on Sexual Harassment and Sexual Violence. This report will be forwarded to the Provost's Office for further review under the Faculty Code of Conduct."⁶⁶ For months, not much else happened. Berkeley's Executive Vice Chancellor and Provost Claude Steele disciplined Choudhry by cutting his pay by 10% for one year and insisting he write a letter of apology to Sorrell.⁶⁷ Sorrell met with Steele to ask why the sanction was so lenient, and Steele told her that he "seriously considered terminating the Dean" but did not because "it would ruin the Dean's career."⁶⁸ Knowledge of the events remained limited to those directly involved until March 8, 2016, when Sorrell filed

⁶¹ *Id.*

⁶² *Id.* at 8.

⁶³ Office for the Prevention of Harassment and Discrimination, Berkeley Law, Univ. of Cal., Report of Investigation and Findings 1-2 (July 7, 2015), <https://www.scribd.com/doc/303482592/Choudhry-Investigation-Report-7-7-15-REDACTED>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Complaint for Damages, *supra* note 55, at 32.

⁶⁸ Complaint for Damages, *supra* note 55, at 8.

an eight-count complaint for retaliation and sexual harassment.⁶⁹

Up to this point, both stories sound similar. They begin with the same unfortunate story: two law school deans were accused of sexual harassment and retaliation. Multiple witnesses confirmed the veracity of those lodging the complaints. Both universities conducted internal investigations, and the offices charged with determining the veracity of the complaints affirmed the accuser. Nonetheless, the provosts supported their deans, and they kept their jobs without significant consequences. The unsatisfied complainants filed lawsuits. Immediately, the allegations go public. Here, the narrative paths diverge.

III. ACTION AND INACTION DRIVE TWO UNIVERSITY BRANDS IN DIFFERENT DIRECTIONS

As soon as the complaints were filed and the stories became public, both universities faced choices that would ultimately reflect the depth of their commitment to rooting out sexual harassment. The Berkeley community learned about Sorrell's allegations at a perfect time to show commitment to core values: a week dedicated to hosting admitted students. On Tuesday, March 8, 2016, Sorrell filed an eight-count complaint in California state court.⁷⁰ On Wednesday, Berkeley released a redacted report of the investigation.⁷¹

During the next forty-eight hours, an intergenerational Berkeley community unified in a clear and unequivocal message: the Dean's conduct and the University's response are an affront to our inclusive values. A group of faculty issued a statement asserting, "We take these disturbing allegations extremely seriously. We

⁶⁹ See Complaint for Damages, *supra* note 55.

⁷⁰ Complaint for Damages, *supra* note 55.

⁷¹ *Dean Choudhry Goes on Leave*, Berkeley Law, Univ. of Cal. (Mar. 10, 2016), <https://www.law.berkeley.edu/article/dean-choudhry-goes-leave/>.

emphatically condemn the type of conduct alleged in the complaint."⁷² On Thursday, March 10, 2016, several student organizations jointly issued a statement deploring the administration's choice to protect the Dean and not his victim.⁷³ They criticized the unacceptable value judgments the administration made in doing so.⁷⁴ Furious that the administration chose fidelity to the dean rather than their safety, they stated, "We are outraged and disgusted by the University's deliberate withholding of information concerning the safety of students, staff, and faculty."⁷⁵ The students demanded Choudhry's resignation from the deanship and the faculty, and insisted on an investigation into why Steele protected Choudhry at the expense of Sorrell and other women in the Berkeley community.⁷⁶

Also on March 10, 2016, 450 alumni signed an eloquent and powerful letter enumerating the core values the community holds dear, demanding that the Dean be removed for violating them, and insisting that the University investigate those who enabled him to do so. The

⁷² *Id.*

⁷³ Kyneshawau Hurd & Sloan Patrice Whiteside, *Student Indictment & Demand for Institutional Accountability*, MySafeBerkeley (Mar. 10, 2016), <https://mysafeberkeley.wordpress.com/2016/03/10/student-indictment-demand-for-institutional-accountability/>.

⁷⁴ *Id.*

⁷⁵ *Id.* The Student Statement provides: "On July 7, 2015, UC Berkeley's Office for the Prevention of Harassment and Discrimination (OPHD) concluded a four-month-long investigation of Sujit Choudhry, Dean of the University of California, Berkeley School of Law. OPHD found that Choudhry violated the sexual harassment provisions of the UC Policy on Sexual Harassment and Sexual Violence and he, himself, admitted to the violations. In response, Executive Vice Chancellor and Provost, Claude Steele, lowered Choudhry's salary of \$472,917 by 10% for one year, required him to enter counseling, and instructed him to write a letter of apology to the survivor. In a meeting with the survivor, Steele justified his decision to not terminate Choudhry 'because it would ruin the dean's career, that is, destroy his future chances for higher appointment.'"

⁷⁶ *Id.*

language they used was precise in identifying the principles at stake. The alumni wrote that Berkeley's:

feeble response has betrayed students, the UC Berkeley community, Boalt alumni, and *the values* that we hold dear . . . The university's response is a complete and utter failure . . . to condemn sexual harassment in its community. . . . UC Berkeley, and in particular the law school, is an institution that prides itself on *commitment to gender equity and social justice*, which is the reason many of us specifically chose to attend Berkeley Law. Law school deans should model *the values* of the school that they represent. . . . In light of Choudhry's violation of multiple women at the law school, the notion that he could continue to hold the position of dean is unreasonable, laughable, and insulting — not only to the women in the Berkeley community, but also to the values that brought us to Boalt, *values* that tie generations of alumni together. Given his behavior . . . , he was entirely unfit to hold the position of dean. That the university and the law school had not already reached this conclusion is, quite frankly, alarming.⁷⁷

They demanded that the institution adhere to their shared values, stating:

As long as Choudhry remains at Boalt or the University of California in any capacity, we

⁷⁷ Bay Area News Group, *UC Berkeley alumni call for law school dean Suit Choudhry to be fired*, Mercury News (Mar. 11, 2016), <http://www.mercurynews.com/2016/03/11/uc-berkeley-alumni-call-for-law-school-dean-sujit-choudhry-to-be-fired/> (Emphasis provided).

cannot in good conscience contribute financially to Berkeley Law or to the university. Nor are we comfortable encouraging prospective students to attend Boalt. Let us be clear: We cherished our time at Boalt and consider its faculty members and students to be mentors and friends to this day, and we thus make these demands with heavy hearts. But we cannot recommend our alma mater when it apparently allows a confessed repeat harasser to hold its highest position of power and the university appears to aid him in covering up such blatant misconduct.⁷⁸

One alumnus told a reporter, "I was particularly disappointed because I, like many alumni, chose Berkeley Law because the Berkeley community prides itself on its progressive values, including gender equity. To have something like this happen goes against all the values myself and other alumni hold."⁷⁹

Choudhry resigned the deanship later that day.⁸⁰ On Saturday, March 12, 2016, University of California President Janet Napolitano announced the entire UC system would have a new procedure to deal with sexual harassment claims and Choudhry would be "banned" from campus.⁸¹ This statement must have caught many administration members by surprise because Choudhry had not resigned his tenured position on the Berkeley

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See Teresa Watanabe, *Multiple Sex Harassment Cases Against UC Faculty Prompt New Review Process*, L.A. Times (Apr. 25 2016), <http://www.latimes.com/local/lanow/la-me-ln-napolitano-harass-20160312-story.html>.

⁸¹ *Id.*; Suhuana Hussein & Alexandra Yoon-Hendricks, *Former Berkeley Law Dean Files Grievance Over Disciplinary Process Amid Sex Harassment Allegations*, The Daily Californian (Apr. 25, 2016), <http://www.dailycal.org/2016/04/25/former-dean-berkeley-law-files-grievance-campus-committee-privilege-tenure/>.

law faculty. We can imagine the University of California's counsel cringing when Napolitano made that statement. As a matter of law—it is far from clear that Napolitano had the power to enforce that ban. As a lawyer with years of prominent public service, Napolitano knew exactly what she could and could not do. Like Boren at the University of Oklahoma, she took an unequivocal stand anyway. There were conflicting values at stake. She could have chosen the value of personal loyalty to her dean and provost who are key members of her leadership team. She could have said she needed more time or that she had to respect the process. Instead she chose to decisively affirm the community's values of taking its own findings of sexual harassment far more seriously.

On April 15, 2016, within six weeks of the public outcry, Claude Steele, the Provost who had protected Choudhry, also resigned.⁸² On April 22, 2016, Choudhry filed a grievance asserting that Steele's initial punishment should have completed the matter, and that he should be permitted to retain his tenured position on the Berkeley law faculty.⁸³ While that dispute was being resolved, Choudhry was not present on campus.

Internally, the CWRU story begins in much the same way, except some prominent members of the community knew of the salacious allegations before the lawsuit was filed.⁸⁴ In the spring of 2012, during Mitchell's second semester on campus, he was invited to par-

⁸² Sam Levin, *UC Berkeley Provost Resigns in Wake of Sexual Harassment Scandal Criticism*, *Guardian* (Apr. 15, 2016), <http://www.theguardian.com/us-news/2016/apr/15/uc-berkeley-provost-resigns-sexual-harassment-scandal>.

⁸³ Suhauna Hussain & Alexandra Yoon-Hendricks, *Former Berkeley Law Dean Files Grievance Over Disciplinary Process Amid Sex Harassment Allegations*, *Daily Californian* (updated Apr. 26, 2016), <http://www.dailycal.org/2016/04/25/former-dean-berkeley-law-files-grievance-campus-committee-privilege-tenure/>.

⁸⁴ See Brown, *supra* note 38.

ticipate in a law school diversity summit at the prestigious City Club in downtown Cleveland.⁸⁵ At that event, someone distributed a flyer enumerating questions the community should ask Mitchell about his affairs with a number of women, including students, a local lawyer, alumni and the girlfriend of his administrative assistant.⁸⁶ The flyer also accused Mitchell of joking to faculty that a graduate student "wasn't good for anything but keeping the bed warm."⁸⁷

Perhaps for this reason, the larger CWRU community may not have been surprised when the complaint was filed in October of 2013. Salacious rumors spread through the community. Mitchell continued to serve as Dean while the scandal brewed, and no core value united the community into action. Months dragged on. The University's administration appeared to be guided by loyalty to Mitchell and deference to the legal process. But they did not articulate those values in any meaningful way. Raymond Ku stood alone in support of the women who were afraid to come forward themselves, with no apparent support from his community. If a moral compass was driving anyone other than Ku, it was hard to see. Privately, a handful of individual alumni, faculty or current students wrote or called Ku to express solidarity and admiration for his courage, but the community did not coalesce and speak up for any core values.⁸⁸

On November 6, 2013, CWRU gave Mitchell a paid leave of absence, and on March 1, 2014, Mitchell resigned as dean.⁸⁹ Mitchell was given a paid sabbatical

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Conversation with Raymond Ku (Mar. 14, 2016).

⁸⁹ Vince Grzegorek, *Former CWRU Law School Dean Lawrence Mitchell Was Supposed to Return to CWRU Faculty This Year; Thankfully That Didn't Happen*, Cleveland Scene (Sept. 23, 2015), <http://www.clevescene.com/scene-and-heard/archives/2015/09/23/former-cwru-law-school-dean-lawrence->

during the 2014-15 academic year as well, and media reports indicate that while the community expected him to return in the fall of 2015, “that quietly didn’t happen.”⁹⁰

While the scandal unfolded through the headlines in Cleveland for months, no significant alumni, faculty or student response rallied to either side in support of Ku or the dean. The CWRU administration supported Mitchell and defended the suit on his behalf.⁹¹ In the summer of 2014, Ku’s lawyer filed a motion to compel discovery and was waiting for CWRU’s response.⁹² The University sought an extension of time, and soon after, during the beginning of July the suit was settled.⁹³ Mitchell told a reporter that University administrators “never asked me to turn any documents over to them.”⁹⁴

The settlement terms are confidential, but effective July 1, 2014, Ku was named the Director of the law school’s newly created Center for Cyberspace Law & Policy.⁹⁵ The University gave Mitchell a generous exit. He kept his professorship with tenure at CWRU and Cuyahoga County records indicate that on July 1, CWRU purchased Larry Mitchell’s 5 bedroom home with a glamour bath (the site of the infamous drunken parties with students) for \$525,000.⁹⁶

The litigation left the Cleveland community wondering whether this venerable institution had any

mitchell-was-supposed-to-return-to-cwru-faculty-this-year-thankfully-that-didnt-happen.

⁹⁰ *Id.*

⁹¹ First Amended Complaint, *supra* note 46.

⁹² First Amended Complaint, *supra* note 46.

⁹³ *See* Brown, *supra* note 38.

⁹⁴ *See* Grzegorek, *supra* note 88.

⁹⁵ Mike McKenna, *A Land Purchase CWRU Would Like to Forget*, Observer (Feb. 5, 2015), <http://observer.case.edu/a-land-purchase-cwru-would-like-to-forget/>.

⁹⁶ *Id.*; *see also* Cuyahoga Cty., Warranty Deed, Permanent Parcel #686-30-005 (July 1, 2014), <http://observer.case.edu/wp-content/uploads/2015/02/cwru-mitchell-house-document.png>.

meaningful commitment to gender equity. One newspaper reported that:

“Even after settling the lawsuit, even after Mitchell's leave and then resignation and then departure altogether (which was widely applauded by the law school staff), the trouble remains that according to the tenured professor and Ku's lawsuit, many upper level staff members at CWRU, including the provost, the office of general counsel, and the right-hand man to president Barbara Snyder, heard all of the allegations and not only protected the hand-picked dean, but allegedly authorized Mitchell to dispatch with Ku. The fact that professors then felt uneasy about being able to voice their concerns to the president, board of trustees and others, as documented in the affidavit, in fear that they would land on deaf ears or, even worse, provoke similar retaliation, is damning and alarming.”⁹⁷

Well into 2016, William A. “Bud” Baeslek III remained Provost at CWRU.⁹⁸ When Mitchell became Dean, CWRU's law school had slid to 56 in the rankings.⁹⁹ When Ku filed his complaint, CWRU had fallen to 67, and when Mitchell resigned and Ku's suit was settled, CWRU fell again to 68.¹⁰⁰ While CWRU now cannot escape this history, Larry Mitchell has tried to do what others have done when a brand goes sour. He changed his

⁹⁷ See Grzegorek, *supra* note 88.

⁹⁸ Office of the Provost, *About the Office: Biographical Sketch of W. A. “Bud” Baeslek III*, Case W. Reserve Univ., <https://case.edu/provost/about/bio/>.

⁹⁹ Schools of Law, *America's Best Graduate Schools*, U.S. News & World Rep. (2011).

¹⁰⁰ Schools of Law, *Best Graduate Schools*, U.S. News & World Rep. (2013); Schools of Law, *Best Graduate Schools*, U.S. News & World Rep. (2014).

name to Ezra Wasserman.¹⁰¹

Comparing the timelines reveals an important difference between the two communities and provides a meaningful window into the character of two institutions. In moments of crisis, lawyers may advise caution and advocate inaction until a court of law determines the truth. Both action and inaction present risks. Both schools violated their professed core values by selecting men who engaged in unprofessional conduct towards women and protecting them even after internal investigations suggested that the allegations had merit. The pivot point in both stories comes after the allegations are made public. At CWRU, no faculty, student or alumni community rallied behind specific core values. It is not difficult to imagine the same scenario playing out at Berkeley if it had not been shamed into adherence to its professed values by faculty, alumni and students. The consumers - those who buy and support the educational services-- forced, immediate compliance. While at CWRU the drama lingered for months, at Berkeley, within 48 hours, students, faculty and especially the alumni, made it clear that sexual harassment violated the community's core values.

IV. CONCLUSION

These two stories provide an important window into the salience of core values and the actors who drive them. When prospective students select their school, they are not just determining where they will learn for a few years. They are joining an intergenerational community, and they are choosing the values that will be connected to their name. Now that all educational profiles are online, one's alma mater turns into an important feature of every online personal page. Of course, there is no guarantee that CWRU's or Berkeley's

¹⁰¹ See Grzegorek, *supra* note 88.

next leadership team will provide a safe inclusive environment. However, one thing is clear. New members of the Berkeley community can have some confidence that irrespective of the current leadership, when a community member strays, there will be public outrage and accountability. At Case, not so much.