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The University of California's Faculty Code of Conduct at Fifty:A Procedural and Sociological History of UC's Evolving Ecosystem of Policies, Rules and Norms for Faculty Discipline

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**THE UNIVERSITY OF CALIFORNIA'S FACULTY CODE OF CONDUCT AT FIFTY:  
A Procedural and Sociological History of UC's Evolving Ecosystem  
of Policies, Rules and Norms for Faculty Discipline**

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**ABSTRACT**

The occasion of the 50<sup>th</sup> anniversary of the University of California's *Faculty Code of Conduct* is an opportune time for this unique CSHE paper, which documents the web of policies, rules, procedures, norms and institutional actors related to faculty discipline at UC campuses, including the socio-political context of successful and unsuccessful reform efforts across the decades. Compared to other spheres of college and university governance, rules and norms for disciplining faculty misconduct are less frequently the subject of sustained attention by scholars of higher education. Today's administrative and faculty leaders must be ready to adeptly handle faculty discipline cases for many reasons, including public accountability and trust, stewardship of the conditions for research and knowledge creation, civil rights/legal compliance, deterrence, transmission of ethical norms and values to all present and future members of the academic community, and to ensure that the organizational climate does not discourage talented and diverse students from pursuing careers in the professoriate.

**Keywords:** faculty code of conduct, discipline, misconduct, ethics, professional norms, shared governance, sociology of the academic profession, Academic Personnel Manual, Academic Senate bylaws, Privilege & Tenure committee, Title IX, sexual harassment, research misconduct, conflict of commitment, discrimination (including race, disability, sexual orientation, veteran status), due process, accountability, sanctions, academic freedom, Office for Civil Rights, #MeToo, punctuated equilibrium, UC oath controversy

*The past is never dead. It's not even past.* – William Faulkner

*[T]he values of such [faculty] codes far exceed their original designs.* – Robert M. O'Neil

**I. INTRODUCTION AND METHODOLOGICAL APPROACH**

University of California faculty have been involved in development of policy norms about academic freedom and professional responsibility since the early days of the modern American university, including in the small group that drafted the germinal *1915 Declaration of Principles on Academic Freedom and Academic Tenure* (AAUP, 1915). However, it was not until June 1971 that a

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\* Research affiliate (volunteer), UC Berkeley Center for Studies in Higher Education; Ethics & Compliance Professional, UC Riverside; B.A. and J.D., UC Berkeley. This paper represents my own research views and not those of the UC Riverside (or UC system) administration. This paper is dedicated to the memory of Cynthia Vroom, who served as the designated legal counsel to UCP&T and campus P&T committees for over a decade and who passed away in 2019 (I wish I could have interviewed Cindy for this paper). In full disclosure, and as explained in Section I, I have worked as an administrator on faculty discipline and termination cases in the UC system for many years, but in this paper I make every effort to refrain from discussing “adjudicative facts” in these cases and only reference “legislative facts” that are relevant to broader matters of UC policy and disciplinary procedure. Finally, the research for this paper was performed during COVID conditions, aided by the California Digital Library's Online Archive of California (<https://oac.cdlib.org/>), but with lesser access to some UC library and office archival materials on multiple UC campuses. I thank the CSHE reviewers who commented on this ROPS paper; any errors and omissions are my responsibility.

formal *Faculty Code of Conduct* was first approved by UC and its Academic Senate (University Bulletin, 1971; UC Assembly of the Academic Senate, 1971). The fiftieth anniversary of UC's *Faculty Code of Conduct* (FCC) is an appropriate occasion to better understand the history of UC through the unique lens of its FCC and associated procedures and norms for addressing faculty misconduct. This paper can be described as a particular kind of social history (see Wickberg 2001) and/or a kind of sociology of the academic profession (e.g., Larson 1979, 2018; Brint 2015), in both instances understanding a particular dimension of academic institutions and actors.

In understanding faculty misconduct-related policies as a specific field of social meaning and interaction with its own specialized institutional logic, it is relevant to apprehend the context of where and how much the FCC is conferred legitimacy, and how different kinds of internal stakeholder relationships operate (Montgomery 2015). This includes understanding the intra-faculty relationships within departments (Anderson 1996) and within UC's the Academic Senate (Taylor 1988; Douglass 1998a and 1998b; Simmons 2009) as well as faculty-administrator relationships (Hammond 2003; Kaplan 2006; Reneau & Favero 2015).

Before diving headlong into a history of the FCC, it is important to outline for readers the aims, methods and choices underlying this historical paper. The FCC and associated UC policies, Senate bylaws and campus procedures were and are living documents put into practice by human beings confronting real (and often very difficult) cases and challenges amidst a backdrop of both stasis and change in norms, laws, zeitgeist and external scrutiny. As historian Eric Foner observes, history reveals the struggles among people to define their culturally constructed beliefs as true, both in contemporary accounts and in historical accounts written much later, for "History always has been and always will be regularly rewritten, in response to new questions, new information, new methodologies, and new political, social, and cultural imperatives." (Foner 2002)

In this historical account of UC's FCC, I attempt to document enough of the surrounding sociological context in each decade (within constraints of space and archival verifiability) to provide the reader with a decent sense of verisimilitude connected to various points in time in which policy developments and controversies arose. My efforts to delineate context involve modest ambitions compared to qualitative educational research studies that attempt to establish causal inference by means of "thick" and comprehensive description that overlay intersectional social context of micro- and macro-level events and social structures (see e.g., Anderson & Scott, 2012; Maxwell 2004). In the context of this study of the FCC at America's premiere public university system such "thick" qualitative methods would require a magisterial book-length historical treatment that would be significantly beyond what I offer in this medium-length CSHE paper.

Being up front about the surrounding context of ethical norms – as opposed to merely documenting objective changes in procedural rules -- is especially relevant to a history of faculty conduct codes (see e.g., Braxton 2010). The very nature of faculty misconduct is such that it involves the combustible collision of ethical norms and transgressive behavior. As noted in a general way by sociological theorist Emile Durkheim (1957) and specifically in the case of faculty misconduct (Braxton et al. 2011, citing Durkheim), ethical norms have the greatest salience when those norms are being violated, and the most serious transgressions of inviolable norms are of the kind that will often elicit a stronger sense of moral outrage both within the University community and among the broader public. Or as the pioneering sociologist Robert Merton noted, there can often be a "painful contrast" between norms and actual behavior (Merton 1976:40), and the need to deter, detect and to sanction misconduct for such norm violations underpin the need to have the FCC and related mechanisms and initiatives. (Zuckerman 1988; Braxton and Bray, 2012)

Ethical conduct norms can also collide with what Merton called "counter-norms" (see Anderson 2010), and relevant examples include "open secret" situations where sexual harassment/abuse is known and tolerated in certain tight-knit academic departments (Cantalupo & Kidder 2018; UC Academic Senate UCAADE 2016), faculty ambivalence documented in later sections of this paper to prohibiting faculty-student relationships, faculty criticism of UC's enhanced conflict of commitment policy enforcement compared to the *laissez-faire* "don't ask, don't tell" norms of an earlier era (see Drummond 2003) and conflicts arising from the expansion of health science/medical faculty misconduct enforcement at UC and similar institutions (e.g., Binder et al. 2015, 2016; Rothman 2010).

Moreover, in some additional situations briefly discussed in this paper, there may be a substantial gap between ethical norms/rule definitions within the academy versus the attitudes and intuitive views among the general public and politicians, a fact that

underscores important features of how the shared governance ecosystem around the FCC relies on the close partnership with and collective academic expertise of the Academic Senate so as to align with professional standards and values of academic freedom.<sup>1</sup>

In the context of this revisionist history of ethical norms and behaviors that are imbedded in issues of faculty misconduct, there are some additional concepts I found useful and that may aid the reader's understanding of the wide-ranging material covered in this paper. UC and other premiere American research universities grew and evolved since the mid-twentieth century (Brint 2015; Larson 2018) including UC and many more leading universities adopting formal tenure policies by the 1950s and 1960s (Kerr 2001: 140; Rosenthal 2011) and there were many colleges and universities that adopted faculty codes of conduct in the early 1970s (O'Neil 1974; Carnegie Commission 1971).

Thus, it should not be surprising that likewise academic professionalization around norms of prevention and detection of certain kinds of misconduct – namely sexual harassment/Title IX, research-related misconduct and conflict of commitment/conflict of interest – substantially evolved and matured in recent decades in ways responsive to evolving federal and state legal/compliance obligations and other features of the overall higher educational regulatory, funding and cultural milieu.

Because ethical norms are central to this paper on the FCC, the concept of a “norm cascade” is helpful in understanding the dynamics of how norms evolve over time. The term “norm cascade” originated with Sunstein (1996), and legal scholars apply it to situations where “societies experience sharp shifts in social norms” (Williams et al. 2019:149-50) with relevant examples including the anti-apartheid movement in the 1980s, feminism and later the recent #MeToo shift in attitudes against sexual harassment. Another important example of a norm cascade is the decisive shift in public attitudes/awareness around police misconduct connected to George Floyd's death and the Black Lives Matter movement in 2020.

A norm cascade “begins following a tipping point where a critical mass adopts the new norm, after which the norm becomes internalized and no longer a matter of broad public debate.” (Williams et al. 2019:150). In this paper, a prominent example of such a norm cascade was when the Academic Senate had a strong consensus in the mid-1980s *against* adding FCC provisions prohibiting faculty-student romantic and sexual relationships, then the Academic Senate exhibited a strong consensus *in favor* of adding the very same FCC provisions in the early 2000s. As a second example, comparing faculty leaders' attitudes about the “clear and convincing” standard of evidence in 2001 and 2021 suggest a similar process where a shift in attitudes seemingly reached a “tipping point” within the last few years.

Likewise, administrators' compliance norms related to faculty misconduct are subject to norm cascades and tipping points, and the concept of a norm cascade can be helpful in understanding compliance responses associated with the modern “entrepreneurial” research university (see e.g., Bok 2003; Kirp 2003; Leih & Teece, 2016; Newfield 2019). Namely, leading research universities like UC have developed much more robust protocols, norms and compliance infrastructure (compared to earlier decades) with respect to research misconduct implicating federal grants and enforcement of conflict of commitment and intellectual property policies that regulate outside “moonlighting” research and teaching activities of faculty (e.g., APM-025, APM-671). Recent federal and university compliance attention on unauthorized “foreign influences” on funded research grants/activities (UCOP-ECAS research security symposium, 2021) is a recent example of an administrative norm cascade in the area of research compliance.

Adding to the concept of a “norm cascade” is another term that I admittedly borrow from a very different academic field—I do so because I find it accurately describes a central pattern that became evidence after synthesizing the research materials in this paper. The process of adopting major revisions to the FCC and faculty disciplinary procedures is analogous to “punctuated equilibrium” in evolutionary biology (Gould & Eldredge 1993), as there were long periods of relative stasis punctuated by less frequent/shorter periods of significant (even disruptive) change. Indeed, as will be documented below, the very set of social conditions and pressures that gave rise to the FCC a half-century ago is illustrative of this pattern of abrupt change followed by longer periods of stability.

Over the past fifty years with the FCC, I identify the punctuating periods of major change in policy and procedure as 1968-71, 1997-2003 and 2016-2021, and as such, those three periods are given disproportionate focus in this historical paper. One plausible way to interpret this pattern is that it reflects a general phenomenon of the difficulties of overcoming “status quo bias” (Samuelson & Zeckhauser 1988; Feldman et al. 2020), in which reforming/dislodging the status quo of the FCC and related procedures in

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<sup>1</sup> On the development of UC's related academic freedom policies APM-010 and most recently APM-011 see e.g., Post 2006; Atkinson 2004; Blumenthal & May, forthcoming.

significant ways is unlikely to occur unless there are an atypical combination of pressures and momentum (political, legal, value/norms, leadership activism) within the University's shared governance ecosystem.

To supplement the written source materials cited in this research paper, I also had correspondence and/or interviews with many UC administrative and Academic Senate leaders and committee members with relevant first-hand knowledge of the UC-wide and/or campus-level underlying events and policy reforms documented herein. In alphabetical order, I thank the following: Kayleigh Anderson, Michael Arias, Jocelyn Banaria, George Blumenthal, Susan Cochran, Shasta Delp, William Domhoff, John Aubrey Douglass, Ellen Switkes, Dan Hare, Jodie Holt, Joanne Kozberg, Mary Gauvain, Duncan Mellichamp, David Ojcius, Henry (Harry) Powell, Carole Rossi, Dan Simmons, and Martha Winnacker.

Because it helped promote candor in my interviews, for the most part I do not make specific interviewee attributions for individual observations/points in this paper (again the primary intent of my interviews was to help situate and gain perspective on the written documents driving my analysis).

Finally, at certain points in this paper individual UC disciplinary/termination cases are referenced in connection with policy reform issues and disciplinary norms of the day. In such cases I generally do not refer to the names of the individual faculty members even if widely reported in underlying source documentation such as media reports and official UC responses/documents.<sup>2</sup> In the interest of full disclosure, while I served in the Provost's office and Compliance office at UC Riverside I was involved in assisting with faculty discipline cases over the years (including two cases eventually referred to the Board of Regents for termination), and for reasons of privacy and academic decorum I do not discuss the underlying "adjudicative facts" in those cases.

In this regard I borrow from a cardinal distinction found in the law and legal scholarship (see e.g., Davis 1942; Walker & Monahan 1987) – adjudicative facts are those immediately surrounding the factual disputes of the parties in such cases, and are appropriately distinguishable from "legislative facts" about UC policies and procedures that apply broadly across swaths of disciplinary cases. I discuss such legislative facts connected to individual cases when relevant to UC policy/procedure reforms and disputes (if I declined to do so, it would have lessened the policy and historical utility of this paper in certain sections).

## II. UC'S DECADES BEFORE THE FCC: AN ABBREVIATED HISTORY

After the University of California's "Berkeley Revolution" of 1919 and a series of policy changes at UC intended to repair and instantiate relationships of shared governance with the faculty, the Academic Senate's Committee on Privilege & Tenure ("CPT") was formally established. Interestingly, CPT got off to a slow and cautious start when in response to the very first case referred to it by the President for advice (involving a series of charges brought by a department chair against a faculty member) CPT reportedly preferred to abstain:

At that time the Committee took the stand that it was not in its province to recommend action; it was the President's duty to investigate the case and take such action as he thought best. Then, if dismissal resulted and if the dismissed faculty member felt he had been unjustly treated and made formal complaint, the Committee would proceed with a hearing and investigation, following the precedent so ably set by Committee A of the American Association of University Professors.<sup>3</sup> (Louderback, 1938:355)

Soon thereafter, however, other faculty on CPT came to realize this initial stance was untenable and would "lead to a breakdown of the system" such that in the 1920s and 1930s CPT "considered it its duty to investigate complaints and charges, and hold

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<sup>2</sup> There are a couple exceptions such as where it is necessary to reference the name of a legal cases or where a quote from a university leader's memoir about Senate-Chancellor disagreements fifty years ago would be awkward without mentioning the name that is quoted in the source material.

<sup>3</sup> CPT's initial instinct to mimic the AAUP failed to appreciate an important contextual difference between AAUP's "elective jurisdiction" (using the term loosely) and CPT's role at UC. A hundred years ago, not unlike today, the AAUP's Committee A faced as a matter of practical necessity that it had to efficiently decline to investigate the large majority of less meritorious cases amidst a large number of requests for assistance. In the early days of the AAUP, the Association was only inclined to accept cases where "there was strong presumptive evidence that academic freedom had been breached" and did not "accept jurisdiction over cases that raised any lesser issue" (Metzger 1961:207), and similarly in the modern era the AAUP Committee A closes the majority of complaint requests from faculty at the *prima facie* stage based solely on information provided by the faculty member (Finkin & Post 2009:49). By contrast, at UC CPT was fulfilling a role embodied in the UC Regents' standing orders around which an individual faculty member respondent (and to some extent others) had substantive and procedural due process rights.

appropriate hearings, before administrative action has been taken..." (Louderback, 1938:354-55). The following description of CPT's activities at UC Berkeley for the *Centennial Record of the University of California* is likely more representative of UC campus P&T committee activities by the 1960s:

The Committee on Privilege and Tenure is essentially a judicial committee. If a complaint is brought against any officer of instruction (of whatever grade) or a member of the senate by the administration, the Committee on Privilege and Tenure takes jurisdiction. It examines the charges, hears the parties, and renders its decision. More commonly, a complaint is brought by an officer of instruction that his privileges or tenure have been infringed.... Fortunately, this committee meets seldom; when it does, its duties become very difficult. (Stadtman 1968:289)

During the McCarthyism era in higher education (Schrecker, 1986; Radin 1950) UC's "loyalty oath" controversy had a deep and lasting impact on faculty life at the University and represents the most historically significant faculty discipline-related set of events in the several decades prior to the FCC. In 1950 the Board of Regents voted 12-6 to require faculty and other employees to sign an oath that they were not members of the Communist Party or be fired, and that was soon followed by Regental approval for a so-called compromise that allowed loyalty oath "non-signers to petition for case review by faculty Committee on Privilege and Tenure (CPT)." (Bancroft Library archives, 2007)

The Senate CPT originally recommended that 75 of 81 non-signer faculty be retained, the number of cases winnowed as the weeks progressed, and the Regents balked at CPT's recommendations, took inconsistent votes and ultimately decided to fire all 31 remaining non-signers (Taylor 1988:31; Bancroft Library archives, 2007; Kerr 2001: 139). The California Supreme Court nullified the Regents' extra oath requirement and ordered the reinstatement of the 31 non-signing faculty (a group that included future UC President David Saxon), though the ruling centered on the limit of UC's constitutional autonomy rather than substantive grounds of academic freedom or free speech rights (*Tolman v. Underhill*, 39 Cal. 2d 708 (1952)<sup>4</sup>; see also Petroski 2005).

All told, the loyalty oath crises at UC "ripped apart the tenuous collegiality of shared governance and left a 'lingering enmity'" that set the stage for future conflicts within UC in the 1960s and 1970s (Bowen and Tobin 2015:224; see also Radin 1950). An insightful contemporaneous account came from UC Berkeley law professor Max Radin (in his final piece of academic writing), who warned about the broader import of the then-unfolding UC loyalty oath controversy: "[T]he University of California, because of its size and importance, has a certain exemplary position. Its splendid growth has furthered higher education throughout the country...For these reasons, the difficulty that has arisen between the Regents of that university and the Faculty is not a local and special thing involving merely a particular issue or a particular institution." (Radin 1950:235) Later in this paper I will show where there were/are very different kinds of conflicts and legitimacy challenges that also implicated the national position of the University of California (e.g., sexual harassment and research misconduct).

In the course of gathering historical source materials about UC and 1950s, I came across occasional glimpses of just how different institutional norms were with respect to anti-discrimination protections (or the lack thereof). Similar to the Cold War "red scare" reflective of the loyalty oath, there was a 1950s "lavender scare" pushing gay and lesbian employees out of certain federal and state government jobs (Johnson 2004). At UC a notable example was in 1955 (thirty years before the FCC prohibited sexual orientation discrimination, discussed below), when UCSB's new provost was on a faculty recruitment trip to New York and was arrested on a "morals charge" for allegedly propositioning an undercover male police officer and he abruptly resigned though the charges were later dropped. (Ebenstein 2015:136; Loftin 2012:129-132)

The UCSB Provost condemned what he described as the "character assassination" that forced him to resign at the University. (Loftin 2012; New York Times, 1955) UC President Sproul issued a short statement to the faculty that "No judgment should be passed upon him" but Sproul somewhat incongruously stated that university leaders "as holders of a high public trust must live fully in accord with the moral and ethical standards set by the society they serve." (Academic Senate 1955)

In 1958, a few years removed from the loyalty oath and the due process nadir in academia characteristic of the McCarthyism era, newly appointed UC President Clark Kerr advanced a proposal approved by the Regents codifying "continuous tenure" for faculty,

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<sup>4</sup> The California legislature passed the Levering Act, signed by Governor Earl Warren (though he also voted "no" at the UC Regents meeting to oppose the oath terminations), that applied a similar loyalty oath to all state employees, which the Court in *Tolman* held "totally occupied the field" and preempted the Regents' oath requirement. *Tolman v. Underhill*, 39 Cal. 2<sup>nd</sup> at 710.

with dismissal only for “good cause” after a hearing by the appropriate committee of the Academic Senate (Kerr 2001: 140),<sup>5</sup> which is the precursor to the modern day Regents Standing Order 101.1.<sup>6</sup> More generally this era of Cold War and UC Master Plan investment in higher education in the late-1950s and (especially in) the 1960s was a period of expanded faculty hiring at UC in parallel with the 1960s so-called “golden age” nationally at U.S. colleges and universities (Geiger, 2008) that responded to the “tidal wave” of baby-boomer college students (Douglass, 2010), an expansion that also corresponded with greater professionalization of ethical standards and due process standards in academia.

For example, while in the 1940s and 1950s a small but influential group of thirteen professional associations endorsed the AAUP's 1940 *statement of principles on academic freedom and tenure*, in the 1960s an additional sixty-one associations and educational organizations endorsed this foundational document, more than in any subsequent decade (AAUP, 2019). It was in this period that the AAUP first developed and promoted its procedural guidelines for faculty dismissal proceedings, its statement of ethics and other related policy statements (AAUP, 1958; AAUP 1966; O'Neil 1974:42). UC's faculty and Academic Senate were not a formal signatory to the AAUP's 1940 statement, but later in this paper I document where UC relied upon AAUP policy statements in crafting the FCC.

UC's next notable FCC-related development was Academic Senate Bylaw 140 (reproduced as Appendix B at the end of this paper), which sketched out basic due process standards for faculty “dismissal, suspension, or demotion” cases before P&T and also covered incompetence cases.<sup>7</sup> (UCP&T Annual Report 1963-64) A number of key phrases and concepts found today in the Academic Senate's Bylaw 336 on faculty disciplinary hearings can be traced back to this early forerunner version in Bylaw 140 (e.g., “The hearing need not be conducted according to technical rules relating to evidence and witnesses;” “Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”) The sanction of “censure” is not mentioned in Bylaw 140 (consistent with the interim discipline policy of 1971 quoted further below, censure did not rise to the level of triggering the due process procedural protections in Bylaw 140).

Important for subsequent UC policy and legal developments described later in this paper, Bylaw 140 set forth “substantial evidence” as the standard of evidence (see Appendix A), a standard that at the time<sup>8</sup> and in the more contemporary period is lower than either the “preponderance of evidence” or the “clear and convincing evidence” standards (see Kidder 2020:10). With the reorganization of the Academic Senate into separate campus divisions during the early-1960s Master Plan era (Brown 2010<sup>9</sup>; Douglass 1998a), Bylaw 140 became Bylaw 108 with moderate changes (UCP&T Annual Report 1963-64).

It does not appear from the text that Bylaw 140 or Bylaw 108 were directly adapted from the AAUP's 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings*, which were guidelines that assumed “individual institutions will have formulated their own definitions of adequate cause for dismissal” and were “not intended to establish a norm in the same manner as the [AAUP's] 1940 Statement of Principles on Academic Freedom and Tenure.” (AAUP, 1958)

As for the conditions on the ground in the 1960s (before the FCC) about how UC faculty discipline matters were handled, Fitzgibbon's account highlights acrimony and a relatively low “batting average” of concurrence between campus P&T committees

<sup>5</sup> With wry humor, Kerr noted that in the late-1950s it never occurred to him that a decade later, after Governor Reagan and the Board of Regents fired him as UC President, he would be an early beneficiary of this continuous tenure policy when he returned to his faculty appointment at UC Berkeley over Reagan's objections. (Kerr 2001:140)

<sup>6</sup> In July 2021 the UC Regents Standing Orders (which had a middle status between Regents' policies and UC Presidential policies) were largely rescinded, with the substantive content moving to other policies.

<sup>7</sup> In more recent decades such cases are handled differently under policies APM-075 (termination for incompetent performance) adopted in 2000 (for policy history, see Switkes 2013) and APM-080 (medical separation) adopted in 2008.

<sup>8</sup> See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-87 (1951).

<sup>9</sup> As noted in Professor (later UC Provost) Michael Brown's short history on UC Senate membership: “The history of divisional status and Senate membership is quite interesting. In 1950, the Davis and San Francisco Divisions were formally established but they were initially regarded as committees of the Northern Section of the Senate – and of Berkeley. This changed in 1956 when Berkeley, itself, became a division of the Senate in 1956. It is noteworthy, though, that Davis had been an UC campus as early as 1920 and the faculty at Davis held membership in the Senate at Berkeley. Santa Barbara, though, became part of UC in 1944 but it did not acquire divisional status and Senate membership for its faculty until 1958. In the case of San Diego, however, Senate members were present at La Jolla before that Division was established. And in the cases of Santa Cruz, Irvine and Merced, the Divisions were established soon after the campuses were opened.” (Brown 2010: 14)

and the campus administrations (Fitzgibbon, 1968: 72-74), and is certainly darker than Louderback's portrayal of Senate-Administration concordance and shared governance harmony with the CPT at UC Berkeley in the 1930s.<sup>10</sup> (Louderback 1938:355)

Speaking more generally about conditions at U.S. colleges and universities in the mid-1960s, at a CSHE-sponsored conference spurred by the Berkeley free speech movement, leading academic freedom scholar Walter Metzger observed that American faculty discipline procedures and norms were infirm:

Many institutions of higher learning have dismissal rules so elliptical that procedures must be improvised on each occasion. In other institutions, where the rules are adequate, they are not infrequently circumvented or misused. In my study of the academic freedom and tenure cases, I have not encountered one example of a truly impeccable judicial process within the halls of higher learning, though I admit that I study only the worst miscarriages and my standard of impeccability is high. (Metzger 1965, p. 27)

### III. THE ERA OF VIETNAM WAR PROTESTS AND CONDITIONS GIVING RISE TO THE FCC

Clark Kerr described as follows his unsuccessful attempt when he was UC President in the 1960s (the exact year is unclear) to garner support for adoption of an academic code of conduct:

[A]s president of the University of California, I asked a faculty committee to draw up a code of academic conduct at a time when there were several practical issues of ethical conduct by members of the academic staff. It did so, but the draft was subsequently rejected after a fiery speech at a faculty assembly to the effect that professors were moral persons, and, therefore, whatever they did was ipso facto moral; no code was needed and any attempt at one was an insult. (Kerr 1989:139; See also Carnegie Commission 1971:37, chaired by Kerr)

Writing about the same period, Fitzgibbons' history of the UC Academic Senate includes a brief (and similar) note about the notion of a faculty ethics code:

Senate members on all campuses may be too prone to emphasize rights rather than obligations, privileges rather than duties. Possibly no "code of ethics" such as the houses of Congress have recently been reluctantly considering is called for, but awareness of the problem would seem to be desirable. A Chancellor puts one aspect of the matter well:

As the years go by I am frequently shocked by the apparent unwillingness of faculty members to lay down guidelines on appropriate and inappropriate conduct on the part of academic employees. The prevailing point of view appears to be that a faculty member should not be reprimanded or disciplined for almost anything that he says or does. It seems to me that if faculty members are going to claim a large measure of academic freedom, they ought to take on the responsibility of setting some standards of conduct within which they must operate. (Fitzgibbons 1968:102)

O'Neil's essay on faculty codes of conduct (1974) pushes back somewhat on characterizations like those above contained in the 1971 Carnegie Commission report (when Kerr was the chair of the Carnegie Commission on Higher Education), as discussed below. In any event, as student-led protests and activism against the Vietnam War intensified on UC campuses in the late-1960s, the status quo described above was not sustainable, and tensions both among different groups of faculty and between the Senate and UC and campus administration likewise intensified. An example was an assistant professor and activist William Allen at UCSB, who was arrested in Santa Barbara and who's interim suspension and disciplinary charges were the focus of pitched disagreement between UCSB Chancellor Cheadle and the Senate P&T Committee (Letwin papers, 1970; Kelley 1981:46-56).<sup>11</sup> As David Gardner later described colorfully in his memoir, the "Senate's Committee on Privilege and Tenure ... took the chancellor to task for his 'unwarranted' suspension of Allen prior to a final determination of the charges levied against him. The chancellor rejected

<sup>10</sup> In addition, in 1968 there was one formal termination case of a tenured UC Davis professor that went to the Board of Regents, though I have not come across specific archival documentation on whether that cases involved significant shared governance tensions between the campus Senate and administration. The minutes of the Academic Senate indicate a request from the UC Davis Division to UCP&T in fall 1967 to "request of that Committee a clarification of the procedures by which members of the Senate shall be granted the hearing assured in ... the Standing Orders of The Regents" (UC Assembly of the Academic Senate, 1968).

<sup>11</sup> This tumultuous era at UCSB and the city of Santa Barbara included the burning of the Bank of America building, explosion of a homemade bomb placed at the UCSB faculty club resulting in the horrific death of a janitor (a case that was never solved), multiple rounds of what were then called the "Isla Vista riots" and allegations of police misconduct in connection with protest events.



this argument, and I might add, in language not includable within this account.” (Gardner 2005, p.56; see also Kelley 1981:46-49).<sup>12</sup>

The acrimonious mood and posture of UC in the late-1960s is succinctly described in the minutes of the Academic Assembly's meeting with President Hitch in November 1968:

President Hitch spoke regarding the state of the University. Internally, except for the Cleaver controversy and some budget troubles, the University has never been stronger. Externally, we are embattled and harassed: Proposition 3 lost; the prospects for both capital and operating budgets are bleak; we are sure to run into trouble on a faculty salary increase; Federal grants and contracts are diminishing; we narrowly averted last year and may not avoid this year punitive action by the Legislature. More serious than any of these is possible constitutional revision, which may bring shorter terms for Regents, removal of the University from the Constitution, merger with State colleges or a greatly strengthened CCE (these latter two are suggestions of the Branscomb report). In short, our position outside the academic community has never been weaker. (UC Academic Assembly, 1968)

In this era marked by heightened conflict among Governor Reagan, lawmakers, the Board of Regents and UC faculty and students, by the spring of 1970 a “reconstitution of courses” trend developed in which the assigned class curriculum was supplanted by demonstrations and discussion of America's military involvement and foreign policy, with some younger faculty supporting this reconstitution in their classes (Taylor 1998, 103).

This, in turn, led to numerous complaints by students, parents, politicians and Regents over which President Hitch and the chancellors were “grilled” (Taylor 1998, 103-04). In that period faculty rights and academic freedom scholar Robert O'Neil (a UC Berkeley law professor in the 1960s and early 1970s, and later a president at two other leading public universities) contested the suggestion in the Carnegie Commission report (1971) chaired by Clark Kerr that in not adopting codes prior to 1970 “faculties had eschewed self-regulation,” but he conceded that the “special target” prompting such codes was the “reconstitution” of classes which occurred on many campuses—probably fewer than was believed at the time—in the wake of Kent [State University shootings of college students] and Cambodia [expansion of the war in Vietnam by the Nixon administration].” (O'Neil 1974:41-42) O'Neil's essay also confirms the nexus between the broad national political mood and the adoption of faculty codes of ethics/conduct at many U.S. colleges and universities in 1970-72<sup>13</sup> and how the “reconstitution of classes” trend prompted the AAUP's relatively forceful “freedom and responsibility” statement (O'Neil 1974:42; see also AAUP 1970). The AAUP's freedom and responsibility document contains several powerful statements, including the following:

[T]he faculty needs to assume a more positive role as guardian of academic values against unjustified assaults from its own members. The traditional faculty function in disciplinary proceedings has been to ensure academic due process and meaningful faculty participation in the imposition of discipline by the administration. While this function should be maintained, faculties should recognize their stake in promoting adherence to norms essential to the academic enterprise....

The Association will also consult and work with any responsible group, within or outside the academic community, that seeks to promote understanding of and adherence to basic norms of professional responsibility so long as such efforts are consistent with principles of academic freedom. (AAUP 1970)

The circumstances of the AAUP's freedom and responsibility statement along with McNeil's description of the tense political (and budgetary) environment for faculty in the late 1960s and early 1970s that gave rise to faculty codes of conduct at numerous American universities for reasons of “self-protection” (McNeil 1974:44) are a reminder of the perennial dynamic of self-regulation versus external regulation that will also characterize reform efforts of UC's FCC discussed in the remainder of this paper and that are an important feature of the sociology of the professions more generally. (Larson 1979, 2018; Brint 2015)

<sup>12</sup> Adding to tensions, 1969 was a very difficult State budget year for UC, including voters' rejection of a construction bond in November 1968, and the Public Works Board pulled back funds to UCSB in 1969 earmarked for new academic building construction that were *already appropriated* in the State budget. Many staff/administrative units at UCSB, from campus architects to the Academic Senate staff, had their budgets cut in half in 1969. (Kelley 1981:45, 51) Similarly, O'Neil writes about the political tumult and budget in 1970: “The budget for the University of California academic senate was wholly eliminated at first, and later restored to half its former level. Funds for teaching assistants were reduced drastically, and other budget cutbacks hit the faculties (as their [legislative] sponsors fully intended) where it hurt.” (O'Neil 1974:44)

<sup>13</sup> For example, Stanford University similarly adopted its faculty code of conduct in 1972.

For reasons related to all of the above, by June of 1970 President Hitch “called upon the Senate to develop a code of faculty responsibility. Shortly thereafter he appointed a task force, chaired by Vice President C. O. McCorkle, to draft an interim statement until the Senate developed its own formulation.” (UC Assembly of the Academic Senate, November 1970; see also O’Neil 1974:42-43) UC’s interim 1971 policy drafted by the task force chaired by Chet McCorkle (Hitch’s new vice president, and previous vice chancellor at UC Davis) with four chancellors and four Academic Senate representatives. The interim policy begins with the following background:

There has been no comprehensive policy concerning faculty conduct and the administration of discipline, and this has led in some quarters to the erroneous belief that specific standards do not exist. There are rules and regulations—widely scattered expressions by The Regents, the President, and the faculty—but until now they have not been drawn together. Therefore, it seems appropriate, if misunderstanding is to be dispelled, that a general policy be issued at this time pending a definitive statement of policy which is expected to include a statement of principles of professional responsibility developed and approved by the Academic Senate. (Hitch 1971:73)

A secondary factor, not in what gave rise to UC’s FCC per se, but in the atmosphere of UC faculty concern about professorial *rights* (as well as responsibilities) that shaped the final version of FCC was the concern and criticism of the Regents’ controversial non-reappointment of acting assistant professor (and activist/Communist Party member) Angela Davis in 1970. The Regents vote to end Angela Davis’ appointment was a rejection of the recommendation of the UCLA faculty and Chancellor, and this decision marked the *only time* a UC campus has ever been censured by the AAUP (AAUP Committee A 1971; Van Alstyne 1972:150; Davis 1980:255).

The Angela Davis case was not “disciplinary” in the formal sense<sup>14</sup>, but as the AAUP and many academics within UC saw it, the Regents deployed questionable and selectively-applied non-professional criteria about her professorial “fitness” (Van Alstyne 1972, p.150) and O’Neil described it at the time as an example of could happen with faculty codes “in the wrong hands” and of a “possible return of the McCarthy era.”<sup>15</sup> (O’Neil 1974:44, 49) With this context in mind that also included politicized faculty termination cases at other U.S. universities in 1968-70, UC’s Academic Senate and administrative leaders sought to develop a FCC that joined the statement of professional rights and freedoms with statements of ethical responsibilities and descriptions of unacceptable conduct. (O’Neil 1974:49)

The initial 1971 version of UC’s FCC approved by the President and the Academic Senate contained both a statement of “professional rights of faculty” in Part I and the ethical principles in Part II that anchored forms of unacceptable behavior and that were distilled from the AAUP’s 1966 statement of ethical principles (University Bulletin 1971:154-155) As noted by O’Neil, “The opportunity to reaffirm faculty *rights*, even if joined for the first time with responsibilities, was welcomed in faculty quarters.” (1974:44)

In 1970 the Academic Senate set up a special Senate committee to engage with the Regents (including Governor Reagan) “to explore the matter of political test in appointment and promotion.” (UC Assembly of the Academic Senate, March 1970). Moreover, further below in Section VII I also situate the development of UCLA’s campus disciplinary procedures within this backdrop of faculty sentiments and the Angela Davis case.

The UC interim faculty disciplinary policy that immediately preceded the FCC included an Appendix I that bundled together many sources of UC policy by the Regents, President and the Academic Senate. This interim UC policy approvingly quoted the AAUP’s *Statement on the Academic Freedom of Students* (AAUP, 1965), and in Appendix II it recites the AAUP’s statement on *Freedom*

<sup>14</sup> See e.g., Appendix III note 6 of the UC Interim Policy (University Bulletin, 1970:76). However, adding to the quasi-disciplinary quality, the Regents considered suspending Ms. Davis from teaching until a P&T hearing was conducted (AAUP Committee A 1971: 386).

<sup>15</sup> The Angela Davis case prompted the UC systemwide Academic Senate to vote on a resolution disavowing its earlier 1950 statement (from the oath controversy era) that Communist Party membership was inconsistent with faculty membership at the University (Taylor 1988, 98-102; AAUP Committee A 1971:387). The Academic Senate also authorized UCLA law professors’ involvement in a legal case seeking a declaratory judgment to block the Regents’ action. (Letwin papers, 1969; Espinoza 2017) A taxpayer legal challenge to the Regents’ action, in which Ms. Davis was an intervenor, was ultimately unsuccessful for reasons separate from the merits of the Davis case, and it also set forth important principles of constitutional autonomy and policy-making authority of the Board of Regents. *Regents of the University of California v. Superior Court*, 3 Cal. 3d 529 (1970). For context in reading all these accounts, the Regents non-renewal action occurred *several months before* Angela Davis was later charged with criminal involvement for purchasing guns used by others in a deadly Marin County courthouse shooting in 1970 (she was eventually acquitted) (O’Neil 1974:49) so the later notoriety was not relevant to the Regents’ controversial non-appointment decision.

and *Responsibility* (AAUP, 1970). Appendix III from the interim 1971 policy is reproduced below as Table 1 because it presents a “level set” about various disciplinary actions, delegations and authorizations across UC immediately before formal adoption and approval of the FCC.

**Table 1: Summary of UC Disciplinary Sanctions, Delegations and P&T Hearing Requirements, 1970**

Disciplinary Action	Authority	Authorized Delegation	Opportunity for Prior Hearing Before CP&T	Right to Appeal Disciplinary Action
Written censure	Chancellor	Dean	Not required	Yes
Docking of pay <sup>16</sup>	Chancellor	None	Not required	Yes
Deferral of an impending promotion or merit increase	Chancellor	None	Not required	Yes
Suspension (other than interim suspension with pay)	Chancellor	None	Required	Yes
Demotion (in rank or in salary step)	Chancellor, except in cases of demotion in rank within tenure ranks, from tenure to non-tenure rank, or from overscale to within-scale salary step; in these cases authority rests with The Regents, on recommendation of the President. Chancellor's authority cannot be delegated.		Required	Yes
Dismissal from the employ of the University	The Chancellor has authority to dismiss a non-tenured member of the faculty; authority for dismissal of a tenured faculty member rests with The Regents, on recommendation of the President. Chancellor's authority cannot be delegated.		Required	Yes

#### IV. FORMATION OF THE FCC AND SUBSEQUENT EVOLUTION, 1971-1995

As contextual grounding for the remainder of this paper, below in Table 2 is a timeline documenting formal dismissal/termination action items involving UC faculty that were approved by the Board of Regents, with the campus initial in each case (Davis, Berkeley, etc.) There are only ten such cases dating between 1960 and July 2021 (for additional confirmation in news accounts citing UC sources, see also Coston 2021; Subbaraman 2019, Hoag 2012; Weiss 2000; Iwata 1997), which is one-third of the faculty terminations (31) approved by the UC Regents in the highly controversial “loyalty oath” episode of the early 1950s (see earlier discussion in Section II).

However, keep in mind that both social norms and procedures invite multiple “off-ramps” including the more common outcome of resignation and negotiated resignations, such that these cases that go to termination tend to be unrepresentative along multiple dimensions, including greater seriousness of the conduct and/or degree to which the faculty member subscribes to objectively unreasonable beliefs about vindication (see Cantalupo & Kidder, 2018: 728-740). At least four of the termination cases included one or more violations of the UC sexual harassment policy (1991, 2016, 2019, 2019). In addition, Table 3 presents a similar timeline of the relevant and most important Academic Senate bylaws covering disciplinary hearings and grievances (such bylaws were renumbered several times across the decades).

After adoption of the FCC in 1971 with further refinements approved by the Senate and the Regents in 1974 (UC Academic Assembly 1974:Appendix A), in 1975-76 the Academic Senate made significant conforming changes to Bylaw 112 (renumbered Bylaw 113) to align with the new FCC requirements. (Academic Council 1976) Appendix C reproduces the original Bylaw 112 of

<sup>16</sup> Correspondence from UC President Hitch in the early 1970s suggests that “docking of pay” was for non-performance of specific faculty duties for which a salary was being provided, and at least for that subset of cases docking of pay was not considered disciplinary in nature and was handled on a more expedited basis, though presumably still subject to P&T grievance rules.

the early 1970s. There was considerable campus-level activity in 1971-75 developing procedures that would implement the new FCC and accompanying Senate Bylaws, which are discussed further below in Section VII.<sup>17</sup>

**Table 2: Timeline of Tenured Faculty Termination Cases Approved by the UC Regents, by Campus (1960-2021)**

							SD	
							SC	
D		B			II	R	R	SC
1960	1970	1980	1990	2000	2010	2020		

**Table 3: Timeline of Senate/P&T Disciplinary and Grievance Bylaws (renumbering, branching)<sup>18</sup>**

1960	1970	1980	1990	2000	2010	2020
BL 140	BL 108	BL 113	BL 335	BL 334		
				BL 335		
				BL 336		
				BL 337		
		BL 112 (UCP&T duties)	BL 195			

Consistent with the "punctuated equilibrium" theme announced at the beginning of this paper, after the initial burst of activity with the FCC in the early-1970s, the late-1970s and the 1980s were a period of relative quiet as far as UC-wide policy reform activity around the FCC and faculty misconduct. In fact, an issue that seemed to occupy substantial policy attention in this era at the systemwide Academic Senate level with UCP&T and UCR&J involved questions around the scope and boundary conditions for campus P&T hearings, including if there ought to be elective/supplemental P&T jurisdiction for the grievances and early termination cases with non-Senate faculty members such as lecturers, librarians, and research scientists (UC Academic Senate R&J Legislative Rulings 3.73 and 12.80; UC Academic Council 1976:xiii-xiv; UC Academic Assembly, 1980a and 1980b; UC Academic Senate R&J 1981:33; UCP&T 1984:36)

This focus reinforces the earlier point about how the history of Academic Senate membership (Brown 2010:14) connected to the distinctive origins of each UC campus and the variety of research activities and titles from campuses ranging from the historical land-grant agricultural mission (UCB, UCD, UCR) to the significant health science/health center operations of several other campuses (UCSF, UCSD, UCD, UCLA and UCI).

In the 1980's one theme was the expansion of the FCC to prohibit additional forms and categories of discrimination, including discrimination against those with disabilities (UCP&T 1983:57), veteran status and sexual orientation. As noted below, often there was high agreement among UC administrative and Senate leadership for these changes, but an important departure from that generalization concerned sexual harassment.

The pervasiveness of sexual harassment (particularly the male professor/female student variety) in the norms and attitudes on UC campuses in the 1970s and 1980s can be documented in a variety of ways. However, even the ability to name and identify such conduct as "sexual harassment" was new to the lexicon in academia and other employment settings in the U.S. in the 1970s (see e.g., MacKinnon 1979; Farley 1978<sup>19</sup>), so a detailed excavation of this social history is complicated and beyond the scope of this

<sup>17</sup> UCSB historian Robert Kelley recalls a mixture of disciplinary matters and faculty grievances at UCSB's P&T in 1971-72: "Through 1971-72 a major activity within the Senate and statewide administration was the drawing up of a faculty code of conduct stating what kinds of things professors could not do without suffering disciplinary measures. This led to continued discussion of issues that kept old controversies fresh in memory and hostilities alive. A new prickliness within some departments meant that the Senate's Privilege and Tenure Committee was constantly busy, hearing accusations flung at each other by faculty members still simmering over past conflicts." (Kelley 1981:55-56)

<sup>18</sup> Changes to Bylaws 112 and 113 in 1986 appear to be part of a larger reordering/renumbering of [all Academic Senate Bylaws in 1986](#).

<sup>19</sup> The earliest reference to "sexual harassment" I've come across in archival research is an appendix to a 1971 Yale University report by feminist activists, but I believe that was very rare for the time. A more typical example of the early-1970s is a wide-ranging essay on the barriers of sexism faced by women in academia by Ann Sutherland Harris (1970)—who was affiliated with the National Organization for Women (NOW) and who testified in Congress for what would become Title IX—an essay that only glancingly alludes to themes that would later be called sexual

paper. For perspective, philosopher Miranda Fricker spotlights sexual harassment in the 1970s as an illustrative example of the concept of “epistemic injustice” because social structures/norms of the day made it very difficult for victims of sexual harassment to have access to the conceptual tools to know and understand the social experience of being sexually harassed. (Fricker 2007:149-160)

Here I only briefly touch upon a couple types of evidence (oral histories and survey research) to do a reasonable enough job establishing the social context for present purposes. In her oral history of her years at UC Santa Cruz, professor Helene Moglen -- UCSC's dean of humanities in 1978-83 and by some accounts the first female academic dean in the UC system -- recalled the following about her campus in the 1970s/80s:

The extent of sexual harassment on the campus at that time was unbelievable. It was unbelievable. The worst of it was in the sciences. The most effective work that was done was not done by my committee. It was done by students. I think the fact that we existed and that students could come and talk to us was very important. We did work behind the scenes. We did talk to faculty and if it came to it we would force confrontations. There were faculty who were accused of sexual harassment and there were some faculty who were forced to take time off for some time. There were several people in that situation. But nothing like what should have been done” (Moglen 2013:89; see also Domhoff 2014:169-171)

Second, it turns out that the very first published survey in the U.S. of students about faculty-student sexual harassment was conducted at UC Berkeley in 1978 (co-authored by then instructor and future CSHE affiliate Gregg Thomson and a resourceful undergraduate Donna Benson), with 269 senior undergraduate women (of a random sample of 400) participating in the survey and 27.9 percent of women who entered as non-transfer students (freshmen) reported they had been sexually harassed by at least one male instructor at UC Berkeley (Benson & Thomson 1982:241). Results for senior women transfers were similar, with 31percent reporting sexual harassment by male instructors, split between harassment during their time at Berkeley (15.2 percent) or harassment at the previous institution they transferred from (15.9 percent). (Benson & Thomson 1982:241) The impetus for this survey of UC Berkeley in 1978 is directly connected to the publicized faculty case and student activism described immediately below.

#### 1. *The first OCR complaint at Berkeley and UC sexual harassment procedures, 1978-81*

In 1978 a group of nearly thirty graduate and undergraduate women at UC Berkeley started organizing what became Women Organize against Sexual Harassment (WOASH), a group that was advised by a new Berkeley law student who the previous year was involved as an undergraduate plaintiff in the first-ever lawsuit against a university for alleged faculty-student sexual harassment of female students, *Alexander v. Yale* (C. Reynolds 2019: 100-05; MacKinnon 2016).<sup>20</sup> Many WOASH members alleged sexual harassment by a UCB assistant sociology professor who was up for tenure, and frustration with campus administrative responses led the group to file the (or one of the) first Office for Civil Rights (OCR) complaints in the U.S. “on behalf of ourselves and all female students at the University of California, Berkeley who have been, are currently being, or might in the future be sexually harassed by teaching personnel employed by this institution” (WOASH Complaint, 1979).

At the time, UC Berkeley (like other U.S. colleges) did not have sexual harassment grievance procedures nor a Title IX investigative officer/office, and the options presented to the students were to either non-anonymously file a FCC disciplinary complaint and/or (for lesser conduct) note the concerns on a teaching evaluation. (C. Reynolds 2019; Stommel 2017) At that time, for OCR this was such a “new area of law” that the agency was “in the process of establishing the extent of our jurisdiction in this matter.” (OCR director letter to WOASH, 1979)

UCB commissioned an outside fact-finding report by a UCD professor and in 1980 the assistant professor agreed to a one-quarter suspension without pay in a case that never went to a P&T hearing; the faculty member eventually decided to stay overseas and did not return to Berkeley due to ongoing protests (Harvard Crimson 1980; C. Reynolds 2019; Watanabe 2016b; Stommel 2017). OCR eventually concluded it did have jurisdiction to investigate the WOASH complaint, but it closed the case in 1980 because it

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harassment. (Harris 1970:286). Popularization of the concept and term “sexual harassment” is typically credited to MacKinnon 1979 and Farley 1978.

<sup>20</sup> Ms. Pamela Price (the only African American among the Yale student plaintiffs) alleged *quid pro quo* sexual harassment (a professor propositioned her for sex to improve her grade), which was recognized as a new Title IX cause of action, and the case also led to Yale's adoption of sexual harassment grievance procedures; other student plaintiff's claims were rejected by the court in what would later become known as hostile environment sexual harassment claims. (*Alexander v. Yale University*, 631 F.2d 178 (2d Cir. 1980); MacKinnon 2016; Reynolds 2019)

would only accept complaints from individual students, not from an organization on behalf of partly anonymous students (C. Reynolds 2019:133).

While the WOASH students were frustrated with the “slap on the wrist” outcome for the UCB professor, the campus and OCR complaints by WOASH prompted notable reforms at UC Berkeley and throughout UC during this period. Berkeley created a new half-time faculty administrator position (the precursor of the Title IX director), an advisory committee on Title IX compliance, and Chancellor Bowker’s public statement about sexual harassment in 1980 included a call to review the FCC “to clarify the scope of conduct which is prohibited” (C. Reynolds 2018: 129-132) UCOP vice president of HR Archie Kleingartner named a sexual harassment task force chaired by employee relations special assistant Lubbe Levin-Medlinsky to issue a report and recommendations in Spring 1981. Given the highly dynamic federal environment, the task force’s recommendations were adopted immediately by President Saxon as UC-wide interim guidelines (Saxon, 1981). In addition to grievance procedures, this 1981 task force on sexual harassment made the following recommendation about the FCC:

Although it is unclear whether the Faculty Code of Conduct was specifically developed to deal with cases of sexual harassment, it contains several sections which outline unacceptable and unprofessional forms of behavior which might apply in such cases. A University policy statement on sexual harassment should refer to the applicability of the Faculty Code of Conduct...

The Task Force concluded that the Faculty Code of Conduct, although written with other issues in mind, was broad enough to cover charges alleging sexual harassment and that specific amendment of the Code was probably not required.” (Levin et al., 1981, page 19).

The task force report then highlighted four provisions of unacceptable conduct in the FCC that “can be interpreted to apply to charges of sexual harassment:” responsibilities of instruction (Part IIA 1(d), discrimination against a student (Part IIA 2), using position or powers of a faculty member to coerce or cause harm to a student (Part IIA 3), and forcible detention, threats of physical harm to or harassment or intimidation of another member of the University community (Part IIC 4). (*id.*)

In addition, in 1981 OCR issued its first guidance and definition of sexual harassment in higher education (OCR 1981, quoted in OCR 1987), on the heels of EEOC’s November 1980 guidance to employers.

## 2. *A stalled attempt to reform the FCC around romantic relationships, 1983-86*

The next vignette about proposed changes to the FCC is significant both because it shows an area where UC’s “official” history proved inaccurate and because it involves an enduring policy issue that resurfaced multiple times in subsequent decades. Against the backdrop of significant attention and changes described immediately above regarding sexual harassment, in November 1983 the Assembly of the Academic Senate “adopted a sense motion endorsing the position that faculty members should not become romantically or sexually involved with students in their classes or under their supervision.” (UCP&T 1984) Twenty years later, when similar language was included as a revision to the FCC, the background context was described to the UC Regents as follows:

The origin of the proposed revision to The Faculty Code of Conduct is a 1983 resolution passed by the Assembly of the Academic Senate recognizing that romantic relationships between faculty and students can inflict irreparable damage to the educational environment and must be regarded as a “serious breach of professional ethics and proper standards of professional behavior.” The resolution included instructions from the Assembly to the University Committee on Privilege and Tenure to consider proposing legislation or an addition to The Faculty Code of Conduct in order to give force to the statement of position in the resolution. *However, there is no record of such legislation or amendment to the Faculty Code of Conduct being proposed.* (UC Regents 2003b:4; *see also* UC Regents 2003a:12-13) (*italics added*)

Notwithstanding the above statement, in point of fact and as documented below, UCPT did take up its assignment to propose new FCC language in mid-1980s, but there was considerable ambivalence within UCPT and other quarters of the Academic Senate about tighter rules prohibiting faculty-student relationships, and ultimately the proposal was voted down.

One indicator of this ambivalence is that UCPT’s response to the Levin task force report focused on qualms about the concept of “unwelcome” sexual advances and the view that the faculty member “accused should be able to plead in defense some form of entrapment where an initial advance may have seemed invited or gone unbuffered.” (UCPT Annual Report, 1983) Likewise, the Senate’s Committee on Academic Freedom opined as follows, “One matter involved ... prohibiting romantic involvements of faculty and students. The Committee upon recommendation of one of its members has decided that it would be inappropriate, if not

impossible, to recommend a statewide policy on this subject.” (UCAF Annual Report, 1984) UCPT worked on its assignment to propose FCC language in 1984 (UCPT Annual Report, 1984) and then delivered its proposal the following year while noting the Committee’s internal disagreement:

The UCPT proposed amendment to the *Faculty Code of Conduct* would have prohibited the following (and noted internal disagreement about the recommendation):

5. Engaging in a romantic or sexual relationship with a student under circumstances which may significantly compromise student-faculty relationships, cause discrimination or the appearance of discrimination in grading, references, access to laboratory equipment, or other resources or educational opportunities, or otherwise impair the educational environment.

Although there was disagreement within the current Committee regarding the wisdom of such a proposed amendment, the Committee felt that, in recommending the language proposed above, it was acting in pursuance of the sense motion of the Academic Assembly, November 1983. (UCPT Annual Report, 1985)

In May 1986 UC’s Academic Council voted against (6 aye, 28 nay) the above proposed change to the FCC. (Academic Council, 1986-87:7). Moreover, a motion for a substitute motion offering compromise language prohibiting “engaging in a personal relationship with a student under circumstances which compromise normal student/faculty relationships” also failed by a vote of 15 aye, 17 nay. (*ibid.*) To underscore the specificity of Senate sentiments about not prohibiting faculty-student relationships, at the very same meeting there was a solid consensus in Academic Council (25 aye, 7 nay, 6 abstentions) in favor of adding veteran status, medical condition and sexual orientation to the list of protected categories covered by non-discrimination provisions of the FCC (*ibid.* at 6-7).

The protection against sexual orientation discrimination (recall in Section II of this paper the case of the ousted UCSB Provost in 1955) in UC policy and the FCC was years in advance of commensurate protections nationally (*see also* UC Academic Senate P&T 1984:36-37). Interestingly, in 1986 UCP&T’s position was opposite of where Academic Assembly ended up on both issues (supporting FCC language on romantic or sexual relationships, but opposing additional non-discrimination language).<sup>21</sup>

### 3. Major cases emerge in the 1990s, though FCC policy remained unchanged

At UC Berkeley in the 1990s in the Chancellor Chang-Lin Tien era there were two tenured professor misconduct termination cases, the only such UC termination cases in the 1970s-1990s period (*see earlier* Table 2). In June 1991, coincidentally a few months before the Anita Hill-Clarence Thomas hearings that significantly raised awareness about workplace sexual harassment in the U.S., a UCB associate professor was terminated by the Regents for sexual harassment (Los Angeles Times 1991).<sup>22</sup> This was also the first instance in UC’s history that the most serious sanction was applied in a case of sexual harassment. The progression from Title IX investigations of many student complaints to a P&T disciplinary hearing and then eventual action by the Board reportedly took three years to unfold (Depalma, 1991). Another case involved a Berkeley professor fired in 1996 who refused to teach two assigned courses and thus left enrolled students in the lurch on the first day of class (Lifsher, 1997a 1997b; Iwata 1997), a case where the faculty member’s behavior may also have reflected incompetence (as explained earlier, *see footnote* 7, termination for incompetence became a separate UC policy in 2000, APM-075, *see also* Switkes 2013).<sup>23</sup>

<sup>21</sup> As explained in UCP&T’s annual report, “Finally, [UCP&T] addressed the changes in the Faculty Code of Conduct proposed by the Academic Council. The Committee opposed the proposed new wording in regard to non-discrimination, feeling that the Faculty Code of Conduct is not a legal code but a compendium of ethical behavior which is to be expected in a scholarly community and that the original wording in these sections of the Code was sufficient. The Committee also supported new language related to inappropriate sexual activity by faculty members and recommended that this addition be placed in the Code under types of unacceptable conduct. At the May 6 meeting the Assembly preferred not to follow UP&T’s advice in either of these matters...” (UCP&T 1986:42)

<sup>22</sup> Another notable difference between 1991 and today is that this fired UC Berkeley professor immediately obtained a faculty position at a prestigious university in France. Evidence indicates that in 1991 cultural norms in France were much more permissive/dismissive about sexual harassment of women, including e.g., the French media’s more negative portrayal of the 1991 Anita Hill-Clarence Thomas controversy as illustrative of the “American excesses of feminism” (*see* Saguy 2018:143-144). While there was some scholarly and media concern in the 1990s about “pass the harasser” cases of sexual harasser professors getting rehired at other universities in the U.S. (Leatherman, 1996), policy concern about this issue has grown significantly in recent years in the #MeToo era (Cantalupo & Kidder 2019:2381-94).

<sup>23</sup> As shown below in Appendix B of this paper, the earlier Senate Bylaw 140 in the 1960s before the FCC specifically mentioned “charges of incompetence” but the equivalent Bylaw 335 version in the 1980s and 1990s ([see pp. 95-103](#)) did not have language about incompetence. For

In addition, there were a few other important UC campus sexual harassment cases in 1992-94 discussed immediately below because the underlying “legislative facts” (policy issues) in those cases informed a slate of major FCC and Senate bylaw change proposals a few years later.

## V. CHANGE AND REORGANIZATION IN THE LATE 1990S AND EARLY 2000S

### 1. Overview: An effort at major reforms, in two waves

After the events in 1968-71 that gave rise to the FCC, the next manifestation of the “punctuated equilibrium” theme noted in the introduction to this paper is the high activity period of 1997-2003, when a series of changes and reforms to the FCC and related APM and Senate bylaw provisions were eventually adopted by UC that substantially surpassed any of the reforms of the prior quarter-century. These changes were not internally debated, developed and adopted in one seamless shared governance process, but in two partly overlapping phases that had somewhat different origin points and gravitational centers.

The first phase was an administration-Senate task force established in 1994 at the request of UC President Peltason, Senate Chair Binder and UC General Counsel Holst to review faculty disciplinary procedures (hereinafter “Simmons task force”). This seven-member task force was chaired by UC Davis law professor and 1995 UC Academic Senate Chair Dan Simmons. The letter from Senate Chair Binder set forth the following charge to the Simmons task force: “[T]he committee should review disciplinary procedures in their entirety, identify issues related to the effectiveness of policies and methods of P&T committees in fairly and promptly addressing complaints, and offer proposals for improving and streamlining the process where appropriate.” (Simmons et al., 1997: 30)

The backdrop to these changes and the Simmons task force, according to task force member Mel Beal of the Office of General Counsel was that in the early 1980s there was one P&T disciplinary hearing/case every 12-18 months across the UC campuses, but by 1995 there were eight faculty discipline cases undertaken, with “60-75 percent of UC’s disciplinary cases involve allegations of sexual harassment – the charge generally being that a professor has harassed a graduate student – while a fair amount of the remainder concern scientific misconduct.”<sup>24</sup> (Academic Senate newsletter 1997b:4)

One document that captures the seriousness of the procedural issues and frustrations leading to the Simmons task force is a sober 1994 letter from UC General Counsel Holst that was reportedly the first prompt for the formation of the task force (Academic Senate newsletter 1997b:1) and that described a host of long-simmering problems and suggesting areas where structural reforms were needed. The beginning of Holst’s letter, highlighting problems in three separate P&T cases involving sexual harassment (which echo contemporary #MeToo era policy/procedure strains discussed later in this paper) noted the following problems:

[It] has become apparent that the current process of handling of disciplinary matters involving faculty members is unnecessarily burdensome, all too frequently involves unreasonable delays which compromise the effectiveness of the system, and in some instances may result in dismissal of charges without any determination on the merits. The proposal for appointment of a joint Administration-Senate committee to consider means of improving the faculty disciplinary process is timely and one which I endorse. Attention to these issues is important to assure that individual complaints are fairly handled in a timely manner while avoiding the significant liability exposure for the University which may result if the disciplinary process is unresponsive to the needs and concerns of complainants.

In the past several years, the majority of faculty disciplinary cases that have reached or are about to reach the hearing stage before a privilege and tenure committee have been sexual harassment cases. A few examples will illustrate problems encountered in connection with such cases and others involving charges against faculty members.

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these reasons, it is accurate to classify this mid-1990s case as a disciplinary one (including earlier in the Table 2 timeline) even if incompetence may have been a proximate cause for the behavior. One reviewer with direct knowledge of this case alerted me to the incompetence issue, and another person I interviewed with knowledge of the same case did not mention it though the concept fit with other background details that were mentioned.

<sup>24</sup> Data on disciplinary case trends at UC’s peer universities are generally not available, but as a parallel example, Stanford University first adopted a faculty conduct code and disciplinary procedures in 1972, and in bringing sexual harassment charges against a medical school professor in 1991 Stanford reported at the time, “The case will be the first to go to a hearing before the Advisory Board [equivalent to P&T at UC] since current disciplinary procedures were adopted in 1972.” (Stanford press release, 1991).



In a case involving allegations against a junior faculty member by three women graduate students, the Committee on Privilege and Tenure (P&T) dismissed the charges before a factfinding hearing because the committee believed the complaint was deficient on its face. The Rules and Jurisdiction Committee overruled P&T and ordered that a hearing be held. P&T then held five days of hearing; on the fifth day, the proceedings were aborted because a tape recorder had malfunctioned on the first morning of the hearing. A new committee was convened six months later and finally determined that the faculty member had sexually harassed his students. From the original complaint to imposition of discipline, the matter consumed two and a half years.

In a case now pending, P&T dismissed on procedural grounds the charges of sexual harassment made by a female graduate student against her dissertation advisor. The committee did not address the substantive charges. The Chancellor insisted that a hearing be held, but because the faculty member was on leave, a hearing could not be scheduled for nine months. The complaining graduate student, exasperated by the delay and the negative impact of the delay on her own academic career, filed a Title IX sex discrimination suit. The liability exposure for the University is significant, and a substantial settlement payment is likely.

Another matter marked by unreasonable delay involved charges against a faculty member resulting from conduct while serving in administrative capacity. P&T refused to hear the matter with the result that a special committee was finally required to be established for hearing purposes. (Simmons et al. 1997: Appendix at 33-34)

The cases described in Holst's letter overlap with two of the most important UC Rules & Jurisdiction Committee legislative rulings<sup>25</sup> issued on the topic of faculty discipline, Legislative Ruling 3.93A and 3.93B. Ruling 3.93A is a rejection of P&T's stance in the third case described above, for it confirms as a matter of Academic Senate interpretation that Senate members acting in administrative capacities (e.g., dean, vice provost, department chair, center director) can be subject to disciplinary action not only in their at-will administrative capacity but also under the FCC in a two-step process (one for the administrator appointment, one under the FCC rules connected to the underlying academic appointment).

The contrary interpretation would have resulted in the irresponsible outcome that a Dean removed/sanctioned for sexual harassment in an administrative capacity could return to regular faculty duties (teaching, holding office hours with students, etc.) without any formal basis for sanction or restriction in their faculty role. Language similar to Leg. Ruling 3.93A on faculty administrators and discipline was later added to what became APM-016 in 2001.

Legislative Ruling 3.93B delves into matters of the Chancellor's ultimate decision rights regarding approval of campus disciplinary procedures, authority for pre-hearing investigative fact-finding and the Chancellor/administration's authority to decide that a disciplinary matter should go forward for a P&T hearing (I return to these key governance questions further below in Section VII on campus procedures). It would appear that Leg. Ruling 3.93B (while also possibly bundling several cases/issues together) is connected to the first case referenced in Holst's letter, where P&T was overruled for initially not holding a hearing involving a junior faculty member who sexually harassed female graduate students.

## 2. *Unbundling sections of the Academic Senate's Bylaw and of the FCC*

The Simmons task force concluded that there was a need to reduce confusion about procedures for faculty discipline and grievances in the Academic Senate's bylaws:

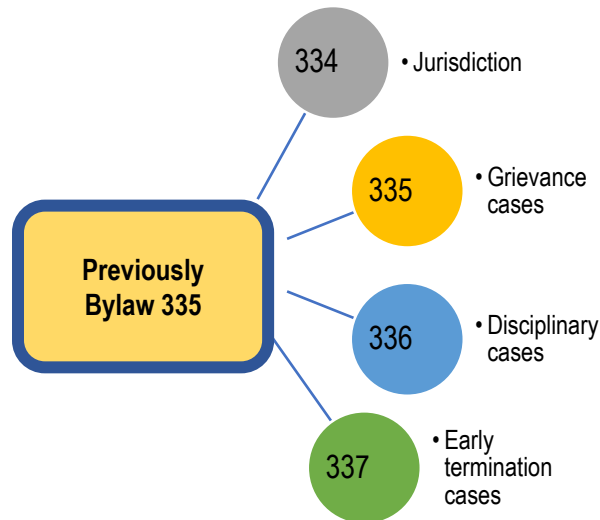
Currently Academic Senate bylaw 335 contains procedures for both faculty discipline and faculty grievance matters. Participants in these matters often confuse the two procedures. We recommend that Academic Senate bylaw 335 be amended to provide only procedures for grievance cases with a new bylaw 336 to contain the procedures for disciplinary cases. (Simmons et al., 1997:15)

UCP&T's work group within the Academic Senate concurred with this analysis, finding that the earlier Bylaw 335 version – which addressed grievances, disciplinary cases and early termination cases “within a single bylaw and with a single set of procedures has led to a great deal of procedural confusion and to ambiguities regarding the difference between faculty grievances and faculty

<sup>25</sup> Such legislative rulings from UCR&J, per Academic Senate Bylaw 206(A), “shall be included in an Appendix to the *Code of the Academic Senate* and shall have the status of Senate legislation until modified by legislative or Divisional action.” This process of UCR&J legislative rulings becoming part of the manual of the Academic Senate dates back to the mid-1960s.

discipline.” (Academic Senate UCP&T annual report 2001; see also UCP&T annual report 2000) The legislation proposed by UCP&T and adopted by the Academic Assembly in May 2001 resulted in a separate Bylaw for P&T’s jurisdiction and for each of the three kinds of cases within its purview<sup>26</sup> (see Figure 1 below).

**Figure 1: Unbundling the Academic Senate’s Bylaw 335 in 1999-2001**



One of the UCP&T work group participants involved in these changes that I interviewed described the Bylaw 334-337 changes as being of “equal importance” to the related APM-015/016 changes, because of the overall clarity it imposed on P&T procedural processes.<sup>27</sup>

Bylaw 334 included two new provisions, one for annual summary (anonymized) data collection from campus P&Ts to UCP&T (Bylaw 334.B) and a meet-and-confer requirement (agreed to between the Senate and UCOP) between the Chancellor and the campus P&T upon notice of the Chancellor’s tentative decision to disagree with P&T (Bylaw 334.C).

Similar to the unbundling of the Senate bylaws, the UCP&T work group saw value in breaking APM-015 into two separate policies. Previously the *University policy on faculty conduct and the administration of discipline* was contained within Section I of the FCC/APM-015, whereas UCP&T recommended that this be marked off in a new separate policy (APM-016) “because it makes sense for disciplinary principles to come before disciplinary procedures.” (UC Academic Assembly 2001:95)

### 3. Standard of evidence for P&T hearings

Since the early 1970s, versions of the FCC and related systemwide Senate P&T procedures did not specify the standard of evidence in faculty disciplinary hearings, nor as best I can tell did 1970s/1980s versions of campus faculty discipline procedures specify a standard of evidence (recall from Section II that in the 1950s/60s the low “substantial evidence” standard of evidence was specified in the Senate bylaw). Elsewhere I have written about the standard of evidence in Title IX and other campus and administrative contexts, so I will not detail those themes here with respect to the function of the standard of evidence in allocating risk of error (false negative versus false positive errors) and the greater cumulative accuracy of the preponderance of evidence standard compared to the clear and convincing evidence standard (see Kidder 2020). Beginning with the Simmons task force, there was a growing recognition of the need to revisit the standard of evidence. In the initial draft circulated in Fall 1995, the Simmons task force recommended the following:

<sup>26</sup> “Early termination” cases can involve Senate or non-Senate faculty (see Bylaw 337.A) and (as confirmed with a couple interviewees for this paper) tend to be even more rare at UC than grievance or discipline cases; early termination procedures are not a focus of this paper.

<sup>27</sup> Another reviewer reminded me of an additional practical motivation: The Bylaws 334-337 were being posted on the web for the first time (rather than in a printed manual, so having duplicate language in Bylaw 335 and 336 was much less of a concern than in the past.

Currently, disciplinary procedures do not describe the standard of proof required to support a recommendation of discipline. The task force recommends the following standard of proof in a disciplinary case--

*The hearing committee must be persuaded by the evidence before it that there is a strong probability that the person upon whom discipline is to be imposed engaged in the conduct as charged.*

This standard is a higher standard than being convinced by a preponderance of the evidence. It is not as strict a standard as being persuaded by clear and convincing evidence or beyond a reasonable doubt. The task force believes that this standard is consistent with the standard that is generally applied by hearing committees. (Simmons et al. Draft Report 1995:15)

The final 1997 version of the Simmons task force that incorporated Senate and administrative feedback modified its standard of evidence recommendation as follows:

The task force originally recommended that the hearing committee be persuaded by the evidence before it that there is a strong probability that the person upon whom discipline is to be imposed engaged in the conduct as charged, which is a lesser standard than clear and convincing evidence. However, commentators complained that such a standard would adopt a requirement that has not been clearly defined by the courts. Some commentators also suggested that a standard higher than a strong probability is required (although others suggested adoption of the preponderance of the evidence standard).<sup>28</sup> (Simmons et al. 1997:14-15)

UCP&T concurred with this recommendation, resulting in the clear and convincing evidence standard being inserted into the new Senate Bylaw 336 for discipline cases (consistent with the AAUP's recommended procedures) while the preponderance of evidence standard specified in the modified Bylaw 335 for Senate grievances.<sup>29</sup> (Academic Assembly 2001:82-88) As noted below in Section VI, the standard of evidence continues to be an important and dynamic area where UC's policy choices (and the AAUP's recommendation favoring clear and convincing evidence) intersect with evolving federal and state civil rights/legal compliance obligations.

#### 4. *Expanding the toolkit of sanctions – emeriti status, reduction in pay and restricting demotions*

In the 1970s-1990s there were only four sanctions for faculty misconduct under the FCC (written censure, suspension, demotion, and dismissal from the employ of the University) and the Simmons task force recommended "that the range of available sanctions be broadened and made more flexible." (Simmons et al. 1997:18) A recommendation from the Simmons task force for a "public censure" sanction was ultimately not adopted, adding a sanction for emeriti (see further below) was adopted, and the UCP&T work group also addressed a new sanction-related policy controversy about demotions that emerged only after the draft Simmons task force report was already circulating. Changes to sanctions as adopted in APM-016 were summarized as follows in the November 2001 Regents item:

The most important change in the proposed APM-016 is the inclusion of two new possible sanctions for faculty. One is the denial or curtailment of emeritus status. Currently, no sanction applies to emeriti. While it is desirable that emeriti remain an integral part of the University community, it is also important that there be a mechanism in place to guarantee and enforce appropriate behavior for emeriti. The other is a reduction in pay (without demotion) for some specified period of time. This allows for a sanction of reduction in pay with or without a sanction of demotion, to allow disciplinary policies to conform to the existing merit system of faculty promotion. (UC Regents item 303, 2001:2)

Both of these new sanctions have continued importance today, including in the contemporary #MeToo academic environment.

<sup>28</sup> As it turns out, the shift in the Simmons task force's recommendation between 1995 and 1997 was a "distinction without a difference" insofar as both California law and the AAUP define clear and convincing evidence as "highly probable." *Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC*, 221 Cal. App. 4th 102, 112-14 (2013); Cal. Civil Jury Instruction CACI No. 201; AAUP 2011 (AAUP's definition of clear and convincing is "highly probable or reasonably certain").

<sup>29</sup> Concurrent with this review process within the Simmons task force and the systemwide Academic Senate, in the late-1990s UCSC's Academic Senate initiated a process to adopt the clear and convincing standard as part of reforms to local campus disciplinary procedures. (UCSC Special Senate Committee, 1997, 1998).

As explained by UCP&T in 2001, under the previous rules “no sanction applied to emeriti” and it is “important that there be a mechanism in place to guarantee and enforce appropriate behavior for emeriti.” (UC Academic Assembly 2001:96) Within the UC system emeritus status is virtually automatic for associate and full professors with sufficient years of service (APM-120), emeriti have certain Senate and departmental rights and privileges at the University (Academic Senate Bylaws 45, 55, 60) and can have part-time teaching appointments in retirement (called “recall” appointments) or “professor of the graduate division” appointments authorized to oversee research grants.

Consequently, a mechanism to deny/curtail emeritus status (which does not affect retirement benefits already earned) was important in a broad range of cases involving retired faculty (e.g., sexual harassment, research misconduct, fraud, theft of intellectual property or conflicts of commitment with outside businesses, bullying). Moreover, it was also not uncommon for faculty facing impending dismissal or other sanctions to retire at the eleventh hour in an effort to evade sanction/and final accountability. For example, in the mid-1990s a disciplinary termination action item was on the agenda for the Board of Regents and the professor resigned the night before the Regents meeting.<sup>30</sup> Such cases can raise related risks around a “retired” faculty member simply obtaining an appointment at another university that is not aware of the confidential disciplinary process underway within UC (see Cantalupo & Kidder 2019:2381-95 regarding “pass the harasser” quandaries). Having a sanction that denies emeritus status is responsive to these situations and concerns.

The desire of the UC Academic Senate to reform the sanction of demotion in the late-1990s (coupled with reviving the sanction of reduction in pay that existed in the 1960s prior to the FCC) requires some unpacking and explanation. As background, it is a longstanding academic norm of the AAUP that demotions in rank should be reserved for cases where a professor’s promotion “is obtained by fraud or dishonesty” (Euben & Lee 2005:286), such as plagiarized scholarly works, publications based on falsified data or other relevant forms of fraud on a scholar’s CV.

Against that backdrop, in the mid-1990s a UCR faculty discipline case arose with disputed facts and allegations of a professor unauthorized augmented income from a foreign university while on a paid sabbatical (APM-740) and engaging in efforts to conceal said conduct (Academic Senate newsletter, 1997a). The campus P&T committee and the Chancellor/President disagreed about both culpability and appropriate sanction, with President Atkinson supporting the Chancellor in imposing a sanction of demotion from full to associate professor, which the Academic Senate regarded as “at least rare, if not unprecedented” within UC (Academic Senate newsletter, 1997a). This UCR case was also being litigated – with the UC Academic Senate taking the unusual step of submitting a letter brief to the court – but as to the substance of the Academic Senate’s concerns in 1997 Senate Chair Duncan Mellichamp described the future problems in such demotion cases as follows:

A demoted professor presumably is well-qualified for the rank and step he attained before demotion.... Thus, when he next chooses to stand for evaluation at the level of his former rank and step ... the campus CAP will have no basis to recommend anything other than a return to his former level. The administration at that point has the authority to accept such a recommendation or reject it. Thus the consequential effect of imposing demotion is twofold: it brings CAP inevitably into the disciplinary procedure, a function it is in no way intended to provide; and it leaves the end point (duration) of the sanction completely to the administration to determine . . . In effect the sanction is completely open ended in that the faculty member may never be allowed to move any higher than the penalty position on the salary ladder... (Academic Senate newsletter, 1997a:6)

In light of the above, amended language to APM-016 was drafted by the UCP&T work group (and later approved by the Regents) as follows: “Demotion as a disciplinary action should be imposed in a manner consistent with the merit-based system for advancement. Generally, demotion is an appropriate sanction when the misconduct is relevant to the academic advancement process of the faculty member.” (UC Regents 2001 item 303). I discuss this issue further below in Sections VII and Appendix A because there are multiple instances (post-2001 reforms) of demotions that do not appear to conform to the APM-016 rule above,

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<sup>30</sup> UC cases involving denial/curtailment of emeritus status are infrequently in the public domain; the earliest one I am aware of is from UC Davis in 2007. Moreover, the unpublished appellate ruling *Khoury v. Regents of the University of California* 2019 WL 4254629 (2019) has what is probably the most detailed discussion of sanctioning emeriti under APM-016, where it comes up as background to the central legal issue of termination. The 2019 *Khoury v. Regents* case is also the first case I am aware of that reached a closely related question, with the court holding, “We agree with the Regents that, under the terms of their Academic Personnel Manual (APM), they are entitled to dismiss retired faculty.” 2019 WL 4254629 at \*1.

which suggests there are pockets of insufficient understanding of the FCC demotion rule and its deeper logic among some UC administrative and Senate stakeholders.

In any event, the reduction in pay sanction was added in APM-016 to a “lower salary without change in rank or step” and with a requirement of specifying the “amount and duration of the reduced salary.” This was intended to increase flexibility and steer demotions toward conformity with academic norms by “allow[ing] disciplinary policies to conform to the existing merits system of faculty promotion.” (UC Regents 2001 item 303:5; see also UC Regents minutes 2001:13)

#### 5. *Causes of lengthy delays at the investigative and hearing stages*

The General Counsel Holst letter quoted earlier highlights risks with delays in multiple faculty discipline cases. Moreover, in the late-1990s misconduct by health science faculty at UCI involved in a high-profile fertility clinic scandal brought to public attention some longstanding difficulties in faculty discipline procedures, including blurry boundaries for investigation between the administration and the campus P&T committee (see Section VII below), resulting in a churn of over four years before two complex research misconduct and fraud cases went from referring charges to P&T to termination votes before the Board of Regents in 2000 (UC Regents Committee on Finance, 2000; Dodge & Geis, 2003)

At that time President Atkinson publicly acknowledged, “Clearly, it takes too long,” and “We are going to focus on reforming our whole process.” (Weiss 2000) Delays in leading to hearings and final discipline is perhaps the most vexing issue addressed in the late-1990s/early 2000s era of reforms. I conclude it is the issue where the process beginning with the Simmons task force and then the UCP&T work group culminating in approved changes in 2001 were least successful in meeting the needs of the moment for substantive reform. As detailed further below in Sections VI and VIII, lengthy delays in faculty discipline procedures continues to be a major issue for UC in the contemporary era, including in response to faculty-student sexual harassment allegations where internal UC policies interface with federal (Title IX) and state laws and civil rights enforcement standards.

The Simmons task force, responding to lengthy delays in faculty discipline investigations and hearing procedures (and the 1994 General Counsel Holst’s letter quoted earlier), viewed delay as a central issue:

The principal recommendation of this report is that the disciplinary process be expedited through the use of a single *formal investigation*. The investigation should be conducted by people with experience in the investigation of faculty disciplinary matters. Discipline cases should be moved to the hearing stage rapidly with a standard of *probable cause* that is lower than the standard of certainty required after a full evidentiary hearing. We make these recommendations in the belief that in a complex matter only an evidentiary hearing will fully provide the basis for a decision in a contested matter. We also recognize that a single investigator will not be able to develop all aspects of a case as thoroughly as an evidentiary hearing. We recognize further that our recommendations may lead to the conduct of hearings in cases that might have been otherwise resolved. However, we strongly believe that great injustice is currently being done to the interests of the *complainant*, the accused faculty member and the university by an overly lengthy and often repetitive series of formal investigations. We also believe that the rapid approach of a hearing within a short time frame of the filing of a *formal complaint* will aid in the negotiated settlement of cases. (Simmons et al. 1997:21)

The primary recommendation of the Simmons task force quoted above eventually found its way into the set of recommended (non-obligatory) provisions in the FCC: “Procedures should be developed which encourage a single formal investigation of the allegations leading to the proposed disciplinary action.” (APM—015.III.B.2) The task force had additional time limit recommendations that were not adopted as proposed in the final changes of 2001, including a time limit for informal review of the complaint and on mediation (30-60 days) and that a hearing should commence within 60 days of notification of formal charges (Simmons et al. 1997:6, 12) In comparison to the Simmons task force the UCP&T work group had a more favorable view about encouraging early resolutions/mediations (UC Academic Assembly 2001:76; UCP&T 2001:2) and so the final language in APM—015.III.B.4 did not mention time limits.

The Senate review process resulted in changing, from 45 days to 90 days the provision in APM—015.III.B.7 the time frame for when a hearing should ideally commence after the notice of proposed disciplinary action. (UC Academic Assembly 2001:156). The final version of APM—015.III.B.7 – and keep in mind that a choice was made to put these in the III.B. “recommended” principles rather than the III.A mandatory principles – read as follows:

In the implementation of all procedures, specific provisions should be made for the time span within which certain actions may or must be taken. Every effort should be made to conform to reasonable, specified time frames. Ideally, a hearing should commence within 90 days of the date on which the accused faculty member has been notified of the intention to initiate a disciplinary proceeding. A faculty member who is entitled to a hearing should not be permitted thereafter to delay imposition of discipline by refusing to cooperate or being unavailable for a scheduled hearing. A hearing shall not be postponed because the faculty member is on leave or fails to appear.

The above text addressed one other scenario responsive to the UCI fertility clinic scandal, where the fact that the faculty fled the U.S. to avoid criminal prosecution also significantly delayed completion of the campus disciplinary hearing process.

#### 6. *A three-year rule on charges, akin to a statute of limitations*

The development of a three-year rule (statute of limitations) on disciplinary charges emerged immediately after completion of the Simmons task force report in 1997, in response to the same controversial UCR sabbatical violation disciplinary case noted above in connection with the demotion sanction. In this UCR case – with disputed facts about what was and wasn't disclosed to (and known by) leading administrators six years earlier and with the death of the dean and chancellor who were percipient witnesses in the intervening time span – Academic Senate chair Mellichamp took the highly unusual step of filing a "letter brief" siding with the professor and against the University in the California superior court case (Academic Senate 1997a).

Both the Senate (the campus P&T committee and then the systemwide Senate chair) and the trial court judge viewed the case as a situation where the equitable doctrine of "laches" applied such that the campus administration should have investigated/charged the misconduct a few years earlier in order to be timely (Academic Senate 1997a; the judge relied on a CSU faculty misconduct case, *Brown v. State Personnel Board*, 213 Cal. Rptr. 53 (Cal. Ct. App. 1985)). Later, the UCP&T work group drafted language that was added to Bylaw 336.B and APM-015.III that no disciplinary action may proceed "if more than three years have passed between the time the Chancellor (or the Chancellor's designee) knew or should have known of the alleged violation and the delivery of the notice of proposed disciplinary action..." (UC Academic Assembly 2001:97; UC Regents action item 303, 2001:4).

In 2005 the Academic Senate further amended Bylaw 336.B.4 to clarify that if a supervisory administrator/employee (e.g., program director, department chair, dean) "has actual knowledge about an alleged violation, then it will be conclusively presumed that the Chancellor or Chancellor's designee should have known" for purposes of the three-year rule (Academic Assembly 2005:11). There were additional clarifications to APM-015 and Bylaw 336.B about the three-year rule in 2017 connected noted below in Section VI of this paper. Moreover, further below in Section VII on campus disciplinary procedures, I discuss how there have been the three-year rule (in combination with other disciplinary rules) precipitated a number of interpretive disagreements and variations among campus P&T committees and between Senate and administrative officials.

#### 7. *Involuntary leave with pay (i.e. interim suspension)*

A provision for interim suspension with pay was part of the FCC from the beginning in 1971 (then in Section III.11), and while the original text was fairly clear that an interim suspension is a pre-disciplinary step, in practice the distinction between suspension as a sanction and an "interim suspension" could get understandably blurred in the minds of many faculty members and administrators. The AAUP's detailed committee report on suspensions (AAUP, 2008) – to use an example beyond UC—toggles between many different definitions of "suspension" and is a reminder of why this is an area where policy understanding can be blurry. As part of the 2001 changes to APM-016 drafted by UCP&T and approved by the Regents, the term "interim suspension" was replaced with "involuntary leave with pay" with additional language clarifying how suspension as a disciplinary sanction is to be distinguished from involuntary leave, which is a precautionary action." (APM-016.II.4; see also Senate UCP&T 2001:99).

Language was also added requiring the administration to file disciplinary charges within ten working days of placing a faculty member on involuntary leave, and this requirement was later shown to be problematic in subsequent years (either making some campuses too reluctant to place a professor on involuntary leave, or by raising other procedural concerns when expedited measures were taken to file a disciplinary complaint or charge within ten days). Further refinement to this rule in 2016-17, which eliminated the ten-day requirement, is described further below in connection with UC's Joint Committee report (UC Vacca & Hare, 2016).

### 8. *Faculty-student relationships and power differentials*

Not long after all of the above changes to Bylaw 336 and APM-015/016 were approved in 2001, the following spring UCP&T revisited the issue of faculty-student relationships, beginning with unanimous approval of a motion to propose that the Senate's earlier *1983 Academic Assembly Resolution on Faculty-Student Relations* (see discussion above in Section IV.2 of this paper) be "added as an appendix to both APM 015 The Faculty Code of Conduct, and to APM 035 Affirmative Action" (UCP&T 2002:2). This policy movement was timely, given that in November-December 2002 a high-profile and rapidly evolving case emerged in which the Dean of the UC Berkeley Law School was accused of sexual misconduct by a female law student, with the Dean simultaneously resigning while claiming the incident was consensual (a claim vigorously disputed by the student's attorney) (Walsh et al., 2002).

The Berkeley Dean case prompted broader conversations about infirmities in UC Berkeley's sexual harassment complaint procedures (see Krieger 2002) and it increased policy attention around consensual relationships and UC's FCC. In this period, the overall policy milieu was also shaped by the U.S. Department of Education OCR's 2001 guidelines for handling sexual harassment allegations, which specified OCR's expectations that universities and K-12 schools include analysis of power disparities in their sexual harassment investigations, including the "power a professor or teacher has over a student." (Office for Civil Rights 2001:7)

At the Regents January 2003 meeting there was general agreement about moving forward with greater codification in the FCC of prohibitions around faculty-student relationships (UC Regents, 2003a:12-14). In this meeting and in other Regents discussions in 2003 both the Senate Chair and the UC administration (e.g., Provost) indicated that what happened to the Academic Assembly's earlier 1983 resolution on faculty-student relationships was an unsolved mystery that existing records could not answer (UC Regents, 2003a:12-14; UC Regents 2003b:4; UC Academic Senate 2003b:49).

This paper shows, aided by better Senate archival records in the Online Archive of California, that the University's "official" history in this respect is *not accurate*, and that a draft language came up for a vote and was decisively voted down by the Academic Assembly in the 1980s. (see earlier discussion in Section IV.2) In any event, when proposed language came up again for a vote after discussion Academic Assembly meeting, things were very different this time, and while there was still internal disagreement, the proposal was endorsed at the May 2003 Academic Assembly meeting by a vote of 12,-3,0. (UC Academic Senate 2003a). Added to the "teaching and students" ethical principle in the FCC (APM-015.II.A) was this powerful language adapted from Yale's faculty handbook:

The integrity of the faculty-student relationship is the foundation of the University's educational mission. This relationship vests considerable trust in the faculty member, who, in turn, bears authority and accountability as mentor, educator, and evaluator. The unequal institutional power inherent in this relationship heightens the vulnerability of the student and the potential for coercion. The pedagogical relationship between faculty member and student must be protected from influences or activities that can interfere with learning consistent with the goals and ideals of the University. Whenever a faculty member is responsible for academic supervision of a student, a personal relationship between them of a romantic or sexual nature, even if consensual, is inappropriate. Any such relationship jeopardizes the integrity of the educational process." (UC Academic Senate 2003a:2; UC Regents 2003b:1-2).

In tandem, added to the types of unacceptable conduct in that section of the FCC were these two provisions (now in APM-015.II.A.7-8):

6. Entering into a romantic or sexual relationship with any student for whom a faculty member has, or should reasonably expect to have in the future, academic responsibility (instructional, evaluative, or supervisory).
7. Exercising academic responsibility (instructional, evaluative, or supervisory) for any student with whom a faculty member has a romantic or sexual relationship. (UC Academic Senate 2003a:3; UC Regents 2003b-c).

These changes to the FCC approved in July 2003 included a footnote to clarify when faculty should "reasonably expect to have in the future academic responsibility"<sup>31</sup> over a student, thus differentiating other situations that would not run afoul of the policy (e.g.,

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<sup>31</sup> This is now in APM-015.II.A.7 note 1: "A faculty member should reasonably expect to have in the future academic responsibility (instructional, evaluative, or supervisory) for (1) students whose academic program will require them to enroll in a course taught by the faculty member, (2)

an assistant professor in biology dates a graduate student enrolled in comparative literature) versus other situations that would foreseeably establish a future supervisory connection (e.g., a professor is dating an alumna and later places him[her/them]self into an evaluative relationship by providing a letter of recommendation for that alumna's graduate school admissions application at the professor's campus).

Finally, the 2003 discussions by the Board of Regents planned for an intended "second step" that would be a broader UC *policy on conflicts of interest created by consensual relationships* that would cover all UC employees. The proposed three-page policy was on the agenda for the March 2004 Regents meeting (UC Regents 2004a, 2004b, 2004c) but was withdrawn from the agenda and never resurfaced. The proposed systemwide consensual relationships policy received significant criticism from multiple quarters within the Academic Senate over a host of implementation challenges. (UC Academic Senate 2003b, 2003c). This situation had the effect of devolving policy development to the campus level in this area, with UC Irvine being the first campus to adopt such a consensual relationships conflict policy (UC Irvine 2005).

Both the changes to the FCC and the consensual relations draft policy were opposed by UC Berkeley's Senate division (UC Academic Senate 2003a, 2003b, 2003c), with some faculty (e.g., Butler 2004) urging unsuccessfully that the newly amended FCC language on faculty-student relationships should be revoked. The dramatic shift in UC Academic Senate faculty attitudes (and vote tallies) from the mid-1980s to 2003 indicates that at some point along the way there was a "norm cascade" (Williams et al. 2019; Sunstein 1996) connected to faculty views about prohibiting faculty-student relationships and there was a deeper awareness of associated power disparities in such relationships.

## VI. THE 2010s TO TODAY: A CRISIS IN CONFIDENCE IN THE BUILD-UP TO #METOO

The decade of the 2010s began with an interesting if seemingly subtle policy change to the FCC that reflected a few years of policy debate in academic higher education circles in response to the U.S. Supreme Court case, *Garcetti v. Caballos* 547 U.S. 410 (2006). *Garcetti* involved a fired district attorney (not a college faculty member) who alleged retaliation, and the Court's 5-4 decision limited the scope of free speech of public employees by ruling that the First Amendment does not protect speech made by public employees *as part of their job responsibilities*, but with the important caveat (responding to the dissenting opinion of three justices) that the Court majority was not reaching the question of faculty speech in an academic context:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching. (547 U.S. at 425)

However, as noted in an AAUP report on *Garcetti*, "In subsequent cases touching on teaching or higher education, however, and then in several cases squarely addressing faculty speech, the lower federal courts have so far largely ignored the *Garcetti* majority's reservation..." (O'Neil et al. 2009:67) One such case involved a UCI faculty member who had sued UC and individual administrative officials many times, in the relevant instance claiming that several officials had voted against a merit increase in retaliation for his speech critical of the UCI administration (*Hong v. Grant*, 403 Fed.Appx. 236 (9<sup>th</sup> Cir. 2010)) UC's lawyers cited *Garcetti* in their efforts to get Hong's case dismissed, which troubled the UC Academic Senate (UC Academic Senate UCAF 2010), and the district court in *Hong* relied upon (and extended) the logic of *Garcetti* to public college faculty notwithstanding the passage quoted above from *Garcetti*. (*Hong*, 516 F.Supp. 2d at 1166-68).

Consistent with the AAUP's recommendation to better codify protection in policy given that academic speech protection in First Amendment jurisprudence was being eroded (O'Neil et al. 2009:84-88), first in intramural debate within the Academic Senate (starting in 2010) and then with concurrence of University counsel and administrative leadership, UC agreed to revise the APM. However, it took years to work out the exact language to the FCC and there was ultimately a decision not to change language in the APM-010 policy on academic freedom (UC Academic Senate UCAF 2010; UCOP APM policy issuance 2013; UC Academic Assembly 2013).

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students known to the faculty member to have an interest in an academic area within the faculty member's academic expertise, or (3) any student for whom a faculty member must have academic responsibility (instructional, evaluative, or supervisory) in the pursuit of a degree."



**Table 4: Summary of Findings and Recommendations of the UC Joint Committee (April 2016)**

Area of Charge	Key findings; key recommendations in italics
(A) Clear explanation of policies, processes for investigation and discipline? (pp. 2-4, 13-19)	<p>In general, APM 015, 016, 150 and Senate Bylaw 336 policies are reasonable and describe key steps in the investigative and disciplinary process. Some campus variation in local procedures, not problematic. Students see lack of explicit language prohibiting sexual violence as a policy gap, although this is subsumed under existing language on prohibited conduct (SH) in APM-015.</p> <p>The adversarial discipline hearing process can be traumatic for complainants, and accommodations needed to reduce stress/trauma.</p> <p>Uncertainty over interface of Title IX and faculty discipline handled by Chancellor's designee, including pre-hearing investigative steps (balance of time costs, trauma informed and due process).</p> <p>High proportion of SVSH cases resulting in early resolution not generally troublesome, but late in process became aware of issues on two campuses that couldn't be addressed in detail in committee report.</p> <ul style="list-style-type: none"> <li>-Add explicit language prohibiting sexual violence to APM-015</li> <li>-Convene Chancellors designees, Senate leaders and Title IX about role clarity</li> <li>-Better integration of Title IX and discipline-related investigations (minimize need for multiple/redundant investigations) and written notifications to the parties about rights and processes, with updates.</li> <li>-Require Chancellor's designee to provide complainant w/ views about appropriate outcomes in the case.</li> </ul>
(B) Clear reporting procedures and mechanisms? (pp. 4-5, 20-21)	<p>All UC campuses have established reporting procedures &amp; mechanisms.</p> <p>Concern by faculty/academics about "responsible employee" obligations.</p> <p>Concern confidential resources (CARE offices) not oriented toward faculty and postdocs as complainants in SVSH matters.</p> <ul style="list-style-type: none"> <li>-Reconsider "responsible employee" designation for postdocs and grad student employees</li> <li>-Conduct targeted outreach regarding confidential resources, anti-retaliation and reporting procedures.</li> <li>-Ensure confidential resource on each campus w/ knowledge of unique challenges of grad students reporting SVSH and retaliation risks.</li> </ul>
(C) Current policies for interim measures during investigations? (pp. 5-6, 22)	<p>Inconsistency on UC campuses regarding Title IX officer working with academic administrators on interim measures in faculty cases.</p> <p>APM-016 involuntary paid leave requirement of bringing charges in 10 days "has proven to be untenable" and strains investigative process.</p> <ul style="list-style-type: none"> <li>-Conduct outreach to key administrators on interim measures.</li> <li>-Amend APM-016 involuntary paid leave section to replace ten-day rule for charges with 5-day rule for providing the reason(s) for leave.</li> <li>-Ensure administrators and P&amp;T are aware of leave grievances to be handled on an expedited basis.</li> </ul>
(D) Legitimacy of criticism of procedures (e.g., 3-year rule, time for a P&T hearing, interim measures)? (pp. 6-8, 22-26)	<p>Confidentiality covers disciplinary process, only Regents termination action is publicly announced.</p> <ul style="list-style-type: none"> <li>-Inform complainants of resolutions, increase transparency about outcomes within legal limits</li> </ul> <p>Critics inaccurately blame Senate process and the respondent faculty for delays in disciplinary proceedings.</p> <ul style="list-style-type: none"> <li>-Rather than arbitrary timelines, develop realistic timeframes based on case experience, standardized timelines after Title IX report</li> </ul> <p>Misunderstanding about "3-year rule": not prohibit charge for older conduct, only restricts time after administration <u>learns</u> of allegation.</p> <ul style="list-style-type: none"> <li>-Train stakeholders about what the 3-year rule "is and is not", bring Bylaw 336.B.4 and APM-015 into "complete alignment" w/ revised language</li> </ul>
(E) Compile data on # of allegations, amount of time for handling cases, and final outcomes? (pp. 8-9, 26-27)	<p>Data from 8 campuses (2012-15) show 141 SVSH allegations, 107 (76%) were unsubstantiated <u>or</u> closed by alternative resolution. 34 cases investigated, 11 were substantiated, and in 10/11 faculty accepted sanction without being formally charges. Only 1 went to hearing.</p> <ul style="list-style-type: none"> <li>-Provide standardized annual data reporting to UCOP</li> <li>-Instruct AP offices to keep indefinite records on discipline &amp; resolutions</li> </ul>
(F) Recommendations for handling future SVSH cases? (pp. 9-11, 28-29)	<p>Committee concludes that existing policies and procedures are "fundamentally sound but that misunderstandings and misinformation sometimes impede full and optimal implementation."</p> <p>Committee recommends specific changes to APM 015-016 and Bylaw 336 as well as changes in procedures (all described above).</p>

The *post-Garcetti* change to UC's FCC was to add under Part I of APM-015 on the professional rights of faculty new language as example number four: "freedom to address any matter of institutional policy or action when acting as a member of the faculty whether or not as a member of an agency of institutional governance." As former Academic Senate Chair Dan Simmons explained to me, "The *Garcetti* language had some serious implications for faculty speaking out against University administration. We had extensive discussions with [President] Yudof and [General Counsel] Robinson about the change. The main issue was how the provision would apply to deans and other at-will senior academic leaders who might publicly criticize their senior executives. The edit may seem modest, but at the time the ramifications seemed significant."

This takes us to UC's final period (2016-2021) of high activity consistent with the "punctuated equilibrium" motif mentioned in earlier sections of this paper. In the years immediately prior to #MeToo—and reflective of the larger policy and political environment that included a growing national anti-sexual violence movement on many U.S. college campuses and the Obama Administration's greater attention on student-focused Title IX enforcement standards with the Department of Education OCR's 2011 and 2014 "Dear Colleague" guidance on Title IX (DOE 2011; DOE 2014; Cantalupo 2016)—there were a major set of changes in UC policy and procedures initiated under President Napolitano (Napolitano 2015).

The President's *Task Force on Preventing and Responding to Sexual Violence and Sexual Assault* issued a set of reports focusing on strengthening student procedures (UCOP Vacca et al. 2014, 2015a, 2015b). Attention on faculty-student sexual harassment/misconduct did not occur in a vacuum, as there were high-profile UC cases widely reported in the media in 2015 and 2016, including three high-profile cases at UC Berkeley that were viewed as unsatisfactorily handled (where the respondents were a renowned astronomer, a vice chancellor for research and a law school dean) and at UCLA a controversial settlement agreement and modest sanction of a historian (see Cantalupo & Kidder, 2019; news accounts include e.g., San Jose Mercury News 2015; Murphy 2015; Asimov 2016; Knott 2016; Watanabe 2016a 2016b; *Takla v. UC Regents* 2015).

A frank and self-critical open letter from UC Berkeley Provost Claude Steele (Steele 2016) reflected the changing environment, and underscored some of the concepts noted earlier in Section I of this paper, including a "norm cascade" (Williams et al. 2019) and a "painful contrast" (Merton 1976:40) between espoused institutional norms against sexual harassment and real-world case outcomes.

In the 2015-16 year the *UC Joint Committee of the Administration and Academic Senate*, co-chaired by Senate Chair Dan Hare and UCOP SVP Sheryl Vacca, looked at how UC campuses managed sexual violence and sexual harassment (SVSH) disciplinary proceedings for faculty respondents (UCOP Hare-Vacca Joint Committee, 2016a). The Joint Committee's final report issued findings and recommendations in six areas, which are summarized in Table 4.

Illustrative of the Joint Committee's findings overall are the first two paragraphs on recommendations focusing on the future:

The Joint Committee has developed specific recommendations in the context of each of the five preceding sections of this report, each of which corresponds with one of the six charges with which it was convened. Those recommendations reflect the Joint Committee's conclusion that existing formal policies and procedures are fundamentally sound but that misunderstandings and misinformation sometimes impede full and optimal implementation. Accordingly, many of the recommendations stress education, training, and outreach to ensure that all members of the University community fully understand the responsibilities and authority assigned to the various individuals in the faculty discipline process. These individuals include Title IX Officers, academic Administrators, and Committees on Privilege and Tenure. Their responsibilities and authority include conducting investigations; determining when alternative resolution, early resolution and/or formal discipline is appropriate; conducting negotiations to reach alternative or early resolution when appropriate; filing charges when discipline proceedings are appropriate; imposing non-disciplinary interim measures on faculty respondents when necessary to protect complainants or the integrity of an investigation pending final resolution; participating in adversarial hearings; and imposing disciplinary sanctions.

In contrast to the scope of its recommendations for education and outreach, most of the Joint Committee's recommendations for changes in policies, procedures, and mechanisms involve modifications of specific items. Thus, the Joint Committee recommends changes in APM - 015, APM - 016, and Senate Bylaw 336 to make the prohibitions on sexual violence, sexual assault, and sexual harassment explicit, to align and clarify timelines when assessing whether the Faculty Code of Conduct has been violated and when commencing the disciplinary process, and to replace the 10-day deadline for filing disciplinary charges after placing a faculty respondent on involuntary leave with more realistic and practical procedures. In addition to

these policy revisions, the Joint Committee recommends that the President direct Council Chair Hare and Provost Dorr to consider the issue of faculty misconduct and how misconduct might factor in review of merit and promotion cases. (UCOP Hare-Vacca Joint Committee, 2016a:28)

In April 2016 President Napolitano accepted the recommendations made by the Joint Committee, but she also expressed dissatisfaction about several areas not adequately covered in the “final” report:

The recommendations as submitted, however, do not yet adequately address other important issues involving the process for investigation, adjudication, and sanctions for faculty sexual violence and sexual harassment cases. In particular, the recommendations do not provide sufficient improvements to ensure that: (1) the investigations in these cases are efficient, effective, and timely, both for the complainant and respondent; (2) the sanctions are proportionate to the seriousness of any substantiated conduct; and (3) cases are handled consistently across all UC campuses. (Napolitano, 2016:2)

The President requested that the Joint Committee reconvene and provide specific recommendation in six areas: 1) methodology for single investigation of SVSH; 2) clear time frames for investigation and adjudication stages in faculty cases; 3) clarify relationships between Title IX offices and P&T committees; 4) structures to support P&T meeting throughout the entire year to curtail undue delays; 5) Reconsider the three-year rule, at minimum “good cause” exception when department chair fails under SVSH policy; and 6) Require each campus to develop a Peer Review Committee to review and recommend proposed discipline and to make final decisions on early resolutions. (Napolitano, 2016:2)

The Joint Committee then issued a supplemental report in the summer responsive to the above requests (UCOP Hare-Vacca Joint Committee, 2016b) aided by discussions with a new subcommittee with representatives from UCOP, Title IX, Senate, AP offices and counsel.<sup>32</sup> Regarding the first area, the Joint Committee pointed out that on some UC campuses there can be “as many as three separate investigations of a single allegation of SVSH before any disciplinary action begins” including the Title IX report, the “probable cause” determination by Chancellor’s designee, or charges committee or ad hoc committee and then finally the P&T hearing (including in some instances a subcommittee of P&T performing investigative steps. (*id.* at 9).

In essence, the Joint Committee was returning to the same underlying challenge that prompted the Senate-Administration Simmons et al. task force twenty years earlier. The Joint Committee further recommended that Title IX conduct the single investigation inclusive of a probable cause determination and also indicate if additional investigation by the Chancellor’s designee may be necessary to determine potential FCC violations. (*id.* at 10-11).

Regarding time frames, the Joint Committee recommended that the Title IX investigation stage could be completed in no more than two months absent a Chancellor approved extension for good cause (*id.* at 15) The Joint Committee commented (somewhat vaguely, perhaps for lack of solid data) on other sources of delay after the Title IX report, and ultimately recommended three months for the Title IX report and then a time limit of two months for the Chancellor’s designee to assess the report, decide to proceed with a charge or early resolution, engagement with the Peer Review committee and mediation efforts, then submit charges to P&T (*id.* at 18 table 2)

The Joint Committee concluded that it “does not believe that it is feasible to complete investigation, disposition, and adjudication within five months” (*id.* at 15) and the report had surprisingly little to say about concrete time limits for scheduling and then holding P&T hearings and for P&T to issue its findings. Finally, the Joint Committee expanded upon its earlier recommendation about clarifying the three-year rule in APM-015 and Senate Bylaw 336 (*id.* at 19-20).

Subsequent changes to the FCC and Bylaw 336 proceeded in two stages, first carrying forward the recommendations of the Joint Committee in 2017 (UC Academic Council 2016; UCOP Dorr, 2017; UC Regents 2017), and a second wave of revisions discussed below in 2018-19 responding to time frame issues that were anticipated by President Napolitano’s response to the Joint Committee report but that came to the forefront of public controversy a couple years later.

In June of 2018 the independent California State Auditor issued a report on UC’s handling of faculty discipline in sexual harassment cases (California State Auditor, 2018), a report that expanded upon criticism of time frames that were earlier anticipated in how

<sup>32</sup> The Joint Committee’s supplemental report was never posted on the UCOP website, which can be confirmed/inferred from a UCOP faculty SVSH-related update communication from [President Napolitano in October 2016](#) and from the UC Academic Senate’s [Senate Source newsletter](#) summary of August 2016.

President Napolitano responded to the Joint Committee report two years earlier. For present purposes, the most salient finding in the State Auditor's report was the following:

Notably, we found that the three campuses we visited—Berkeley, Davis, and Los Angeles—took much longer to discipline faculty in the Academic Senate than they did to discipline staff. On average, the three campuses disciplined staff within 43 days after the conclusion of an investigation compared to 220 days for faculty in the Academic Senate. In addition, the three campuses disciplined faculty inconsistently, especially those faculty who were the subjects of multiple sexual harassment complaints. (California State Auditor, 2018:iii)

The State Auditor pointed out that while the average was 220 days after the Title IX report, "Several faculty cases lasted much longer—310 days and 385 days, for example" (*id.* at 13). The Auditor also found, "Key steps in the Senate faculty disciplinary process do not include time limits. The Academic Senate's bylaws suggest time frames, but these are not requirements." (*id.* at 15). For these reasons the State Auditor recommended that the UC Regents "should ensure the Academic Senate further defines its bylaws with written requirements to take effect June 2019 to establish time frames for faculty disciplinary decisions." (*id.* at 3). For context, this report came in the midst of a churning political controversy in 2017-19 and disagreement between the State Auditor (and state lawmakers) versus the UC Regents and President over concerns about the transparency of the UCOP budget (for news coverage, see *e.g.*, McGreevey 2017; Murphy & Siepel 2017; Emanuel 2019).

The State Auditor's report was reinforced by a February 2018 U.S. Department of Education OCR Title IX investigation involving UC Berkeley, where one of the cases reviewed involved an "early resolution" of faculty-student sexual harassment allegations that was reached 355 days after the student complaint (but before a P&T hearing), with OCR finding the "University was not in compliance because it did not provide the parties with a prompt complaint resolution process." (OCR 2018:21) In June of 2018 the chair of the UC Regents requested that the Academic Senate begin the process to implement the State Auditor's recommendations by July 2019, including the recommendation that absent a good cause extension, the disciplinary hearing should begin within 60 calendar days after the disciplinary charge is filed with P&T (UC Regents 2018). Importantly, as the Senate's UCP&T explained, "The State Auditor's recommendation applied only to hearings involving claims of sexual harassment/sexual violence; however, the system-wide P&T Committee (UC P&T) determined that it would be more efficient to apply the recommendation to all disciplinary hearings." (UC Academic Senate UCP&T 2019: footnote 1)

Within the Academic Senate there was some divergence of views on the wisdom and practicality of the 60-day timeframe for a P&T hearing, but ultimately this and other changes to Bylaw 336 were approved unanimously by the UC Academic Assembly in April 2019 (UC Academic Assembly 2019; UC Academic Senate UCP&T, 2019). Among the related changes approved by the Senate is that the scheduling letter for the hearing goes out to the parties within five days of filing of disciplinary charges (Bylaw 336.C.3), stringent criteria for extension requests of the hearing date (Bylaw 336.E), a quicker process for assigning members of the disciplinary hearing committee, including a "backup pool" over the summer (Bylaw 336.F.1), replacement of the pre-hearing conference with a pre-hearing letter (Bylaw 336.F.2), and a requirement that the P&T hearing issue its findings within 30 days of the completion of the hearing with the hearing transcript and/or post-hearing briefs. (UC Academic Senate UCP&T, 2019)

Finally, there were two other consequential Academic Senate changes to Bylaw 336 considered in 2020 and adopted in 2021 (Senate UCP&T 2020, 2021). First, the standard of proof was changed from "clear and convincing" to "preponderance of the evidence" for SVSH cases but not other FCC cases for reasons related to the growing tension with state and federal SVSH legal requirements, with Bylaw 336.F.8 now stating:

[The] Chancellor's designee has the burden of proving the allegations by clear and convincing evidence, except that for allegations of a violation of the University's policy on Sexual Violence and Sexual Harassment, the Chancellor or Chancellor's designee has the burden of proving the allegations by a preponderance of the evidence.

Twenty years earlier there was strong Senate consensus around adoption of the clear and convincing evidence in Bylaw 336 (Academic Assembly 2001:82-88; Simmons et al. 1997) consistent with traditional AAUP views, and my sense from UC's Vacca-Hare Joint Committee report (2016) and other conversations with Senate leaders is that even a few years ago the clear and convincing standard had solid support among faculty and Senate leaders. After #MeToo and George Floyd/Black Lives Matter in 2019 and 2020, awareness of systemic and institutional bias were more salient considerations in the context of faculty discipline rules (as confirmed by interviews for this paper).

A voice vote on changing the standard of evidence at Academic Assembly in 2021 only received a couple of negative votes. Thus, even with the legal compliance/funding posture<sup>33</sup> overtly motivating the change, I believe this is another important example of an emerging “norm cascade” (Williams et al. 2019) where faculty support for the preponderance standard on equity/fairness grounds has seemingly reached a tipping point while support for the traditional UC (and AAUP) approach is in decline. The inconsistency in standards of evidence for SVSH versus other forms of misconduct is an uncomfortable compromise for many faculty (both those who supported the change and those who would have otherwise preferred continuation of the clear and convincing standard), and this is a dynamic policy space where I believe future deliberations and reform proposals may be likely (e.g., currently a UC President’s work group is reviewing racial discrimination/harassment policies).

The most difficult change in 2021 to Bylaw 336 was the addition of this paragraph to Bylaw 336.F.3:

For cases in which there was a hearing at the Title IX stage regarding violation of the University’s policy on Sexual Violence and Sexual Harassment (“SVSH Policy”), the Hearing Committee shall accept into evidence the record and written determination from the Title IX process. Other evidence, including witness testimony, regarding whether there was a violation of the SVSH Policy will not be permitted unless the Hearing Committee determines before the hearing that the evidence pertains to newly discovered facts or circumstances that might significantly affect the determination of whether there was a violation of the Faculty Code of Conduct and that were not reasonably discoverable at the time of the Title IX process. The P&T Hearing Committee may carry out any investigation it deems appropriate for the determination of a potential violation of the Faculty Code of Conduct.

The above passage combines multiple things, including process improvements (e.g., eliminating P&T’s previous discretion to not admit into evidence the underlying Title IX report in a disciplinary case) and areas of policy and operational concern. The operational concern centers on the middle sentence in the amended Bylaw 336.F.3, which is an effort by UC and the Academic Senate to respond to new mandates in the Trump/DeVos Title IX regulations that took effect in August 2020 (UCOP Title IX, 2020). Under the new procedures there is (1) a Title IX investigation with preliminary findings, followed by (2) a hearing before a neutral hearing officer with limited post-hearing appeal rights; followed by (3) the administration’s decision to file charges leading to a P&T hearing (UCOP Title IX 2020).

In short, the live hearing requirement in the Department of Education regulations does not mesh well with a Senate faculty member’s existing right to a P&T hearing, and efforts to merge these two hearings into one (which seems to many to be the best option) raises a host of other challenges when situated within the architecture of UC’s rules (Senate UCP&T 2020).

At the same time, considerations about SVSH complainants and trauma-informed practice plus risk of duplicative and conflicting hearings weigh heavily in this area. My interviews with knowledgeable stakeholders confirms that the above passage in Bylaw 336.F.3 incongruously reflects all of these considerations and tensions. Notably, the new P&T SVSH hearing process *has not occurred yet* on UC campuses as of October 2021—primarily because the new federal Title IX regulations are interpreted to only apply to cases where the underlying conduct occurred after mid-August 2020 (in combination with common time lags in when complainants come forward, time for an investigation and then a Title IX hearing and appeal, cases resolving before a P&T hearing, etc.). The Trump/DeVos Title IX regulations are being replaced by new regulations under the Biden administration, but it appears there will be a lengthy timeframe for this new rulemaking process to be completed.

## VII. EVOLUTION AND VARIATION IN CAMPUS DISCIPLINARY PROCEDURES

This section highlights some major themes and a few controversies over the decades in campus disciplinary procedures. Within the space constraints of this paper and given the lesser availability of digital archives of campus-level Senate materials, I cannot hope to catalog all the important changes and areas of internal disagreement spanning a half century and ten (initially nine) UC

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<sup>33</sup> As stated by UCP&T: “This change was prompted by the combination of the 2020 Title IX regulations requiring the use of a consistent evidentiary standard for faculty respondents and student respondents for certain SVSH cases, and state law requiring use of the preponderance of the evidence standard in an overlapping set of SVSH cases with student respondents. See 34 C.F.R. § 106.45(b)(1)(vii); Cal. Educ. Code § 67386(a)(3).” (UCP&T 2021)

campuses. As a reference for this discussion, below Table 5 lists the primary faculty discipline procedures document for each UC campus.

Case experience in UC faculty discipline situations can surface many different combinations of disagreements over the interpretation of policy and procedure, including between the administration and the Senate, between campus and UCOP administration officials, among/between university/campus counsel and outside counsel, between different campus Senate committees involved in the same case, between the campus P&T hearing committee and systemwide Senate officers, and so on. Included below in this Section of the paper are some interesting and illustrative examples of shared governance disagreements on campuses since the 1990s that are in the public record and that implicate underlying lessons and principles about the interpretation of UC policy and procedures.

**Table 5: UC Campus Faculty Disciplinary Procedures**

<a href="#">UC Berkeley Faculty Disciplinary Procedures</a>	<a href="#">UC Davis UCD APM 016</a>
<a href="#">UC Irvine Senate Appendix III</a>	<a href="#">UCLA Senate Appendix XII</a>
<a href="#">UC Merced MAPP § 2016</a>	<a href="#">UC Riverside Senate Appendix 5.3</a>
<a href="#">UC San Diego Senate Bylaw 230</a>	<a href="#">UCSF Senate Bylaw 141</a>
<a href="#">UC Santa Barbara Senate Appendix IV</a>	<a href="#">UC Santa Cruz CAPM 002.015</a>

1. *A roadmap of how campus disciplinary procedures evolved, including pre-hearing investigations*

Each UC campus has a distinct history giving rise to its faculty disciplinary procedures, including the governance equilibrium between administration and the Academic Senate. This ranges from UC Berkeley's P&T traditions that grew out of the "Berkeley revolution" a century ago to the dawn of UC Merced opening sixteen years ago as the first new public research university of the twenty-first century in the U.S. On some UC campuses the "locus of authority" (Bowen & Tobin 2015) for faculty discipline procedures is more clearly seated within the Senate and on other campuses more so within the administration.

A bedrock policy and governance principle in this regard is that the Regents standing orders direct that on each campus the Chancellor ultimately has responsibility for campus faculty discipline and corresponding procedures. (Regents Standing Order 100.6(a), now in Regents Bylaw 31) Since the FCC of the 1970s, another key policy anchor for all UC campuses is that "In case of disagreement between the administration and the faculty over the interpretation or application of the Code, conflicts will be resolved on a case-by-case basis, with the fullest consideration given to peer judgments achieved through procedures for discipline." (UC Academic Assembly 1974; current version of APM-016)

A couple concepts noted in the introduction of this paper -- "status quo bias" and "punctuated equilibrium" -- help to situate how disciplinary procedures across the UC campuses evolved in varied ways and settled into certain patterns. When the new FCC was approved in 1971, it marked a brief liminal period in which each UC campus made governance choices about its local disciplinary procedures. Once those disciplinary procedures were set and became routinized within a particular campus milieu and set of policies and practices, it would take an unusual combination of internal and external pressures (below I illustrate a few examples) to overcome status quo bias and bring about major changes in disciplinary procedures on that campus.

While I am not making a causal conclusion -- I cautioned in Section I that causal inference in qualitative educational research is a very "high bar" and beyond the reach of this paper (see *also* Anderson & Scott, 2012) -- it is at least plausible that it may not be entirely coincidental that the two UC campuses that adopted procedures representing the high-water mark for Academic Senate responsibilities for faculty discipline (UCLA and UCSB) are also the two UC campuses that in the year prior to the FCC had the most intense faculty-administration disagreements over governance issues related to the disciplining and dismissal of faculty. Recall the earlier discussion in Section III about the Regents' 1970 decision in the face of strong faculty opposition not to reappoint acting assistant professor Angela Davis based on political party affiliation-related notions of "fitness" (evoking painful memories of UC's loyalty oath controversy twenty years earlier, O'Neil 1974), which resulted in the only time the AAUP has ever formally censured a UC campus (Van Alstyne 1972:150; Davis 1980:255).

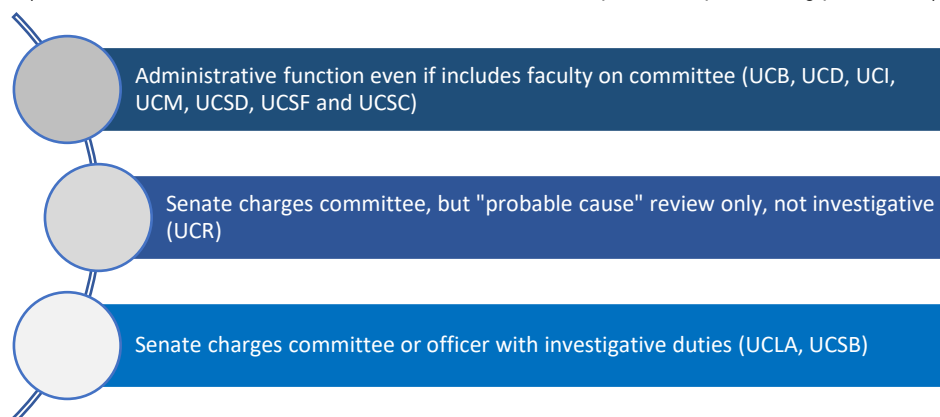
Likewise, Section III of this paper detailed pitched disagreements between the UCSB Academic Senate/P&T and Chancellor Cheadle over faculty disciplinary responses during the tumult of Vietnam era protests and activism (see *also* Kelley 1981:46-56) and other circumstances described below in the early-1990s where the UCSB Academic Senate changed faculty discipline procedures without consent and approval of the Chancellor.

Soon after the FCC was approved, in the spring of 1972 UCLA's Academic Senate formed an ad hoc committee to develop draft procedures, which started out with an effort to secure delegated authority from the Chancellor over essentially the entire disciplinary process (UCLA Legislative Assembly, ad hoc committee, Nimmer and Laties letters, 1972). For UCLA Chancellor Chuck Young, the sticking point was that his office could not "abdicate its ultimate responsibility in the area of discipline" and such that the determinations of the charges committee and P&T should be "designated recommendatory." (UCLA Legislative Assembly, Young letter, 1972) With that proviso and some other changes and compromises, the UCLA Senate and administration agreed to assign to a Senate charges committee the role of conducting factual investigations to determine if there is probable cause for a matter to proceed to a P&T hearing (UCLA Senate Bylaw 95.1 and Bylaw Appendix XI, 1974) Soon thereafter UCR adopted faculty discipline procedures, including a Senate charges committee conducting investigations, that closely tracked UCLA's procedures with some modest adaptations (UCR Academic Senate, ~1975) The UCSB Academic Senate Bylaw 105 establishing a charges officer and charges advisory committee was enacted in 1988, but with COVID-related limits on archival research I was not able to learn more about conditions before that at UCSB or operations of the charges advisory committee in subsequent decades.<sup>34</sup>

And so it was that over the past half-century, UCLA, UCSB and UCR were the three campuses that vested charges committee/officer responsibilities within the Academic Senate (see Figure 2 below), with some variation in the contours of those responsibilities over time (as explained below, the role of UCR's charges committee was narrowed a decade ago). By contrast, the other seven campuses (UCB, UCD<sup>35</sup>, UCI, UCM, UCSD, UCSF and UCSC) did not develop local disciplinary procedures that included a Senate-controlled charges committee. Rather, on these seven UC campuses either an administrative charges committee (often made up of faculty) has a role and/or an administrative official exercises plenary authority to conduct the investigations in pre-hearing disciplinary matters.

**Figure 2: Responsibility for faculty discipline pre-hearing review and investigations at UC campuses**

(\*Title IX and research misconduct are carve-out areas w/ specialized pre-hearing procedures)



One final note about a campus charges committee, whether the Senate or the administrative variety, is that within UC a charges committee is sometimes compared or analogized to a grand jury because of the role of making a "probable cause" determination. (see e.g., UCR&J Leg. Ruling 2.10; UCLA Academic Senate Bylaw Appendix XII; UCP&T 2014:2). But a grand jury is about far

<sup>34</sup> The UCSB Senate Charges Advisory Committee [website](#) indicates there were no members in the 1980s, 1990s and up until 2007, but that could either mean that it was a committee in slumber or (more likely) that the UCSB Senate website does not fully incorporate older archival records.

<sup>35</sup> To avoid confusion, note that UC Davis has what may be a unique structure among the campus P&T committees, with an *investigations* subcommittee and a *hearings* subcommittee (UC Davis Academic Senate P&T; Lane 2018). However, the UCD P&T investigations subcommittee only handles faculty grievances (e.g., Bylaw 335), and not pre-hearing investigations of disciplinary complaints that are the focus of this paper and Figure 2.

more than the standard of evidence, and all things considered, I believe the multiple and important dissimilarities render this analogy unhelpful and apt to mislead stakeholders.<sup>36</sup>

## 2. *Approval authority for campus procedures*

As noted earlier, each campus chancellor has ultimate responsibility for faculty discipline. (Regents Standing Order 100.6(a); see also APM-016). Within the Academic Senate, one of the most important faculty discipline-related legislative rulings by the University Committee on Rules and Jurisdiction is ruling 3.93B on *campus procedures for faculty discipline*, which includes the following guidance to Senate divisions:

While Part III of Section II of Appendix IV [in 2001 this became Section III of APM-015] recommends that "each Division, in cooperation with the campus administration, promptly develop procedures dealing with the investigation of allegations of faculty misconduct," the sole authority for this recommendation is the Assembly of the Academic Senate, and it does not confer on the Divisions a role that is more than advisory nor does it supersede the ultimate authority for the establishment of disciplinary procedures vested in the Chancellor by the Standing Orders and affirmed in Section I of Appendix IV. No disciplinary procedures may therefore be established, through divisional legislation or by any other means, except with the approval of the Chancellor and, as provided for in Section I of Appendix IV, the concurrence of the President. Since procedures need not be identical on every campus, it follows that a Chancellor may reasonably withhold approval of a proposed procedure, even if such a procedure would be consonant with the Code of the Academic Senate, would be consistent with the Standing Orders of the Regents, and may be in effect on another campus. Standing Order 100.6(a) defines the Chancellor's decisions in the administration of the campus, including the administration of discipline, as "final," subject only to the authority of the President and the Regents. (UCR&J Leg. Ruling 3.93B, bold in original)

It is unclear if UC Santa Barbara's disciplinary procedures was one of the prompts for UCR&J's ruling (which is binding on the Academic Senate per Bylaw 206.B), but a few months later UCSB's Rules and Jurisdiction committee nullified the campus disciplinary procedures approved by the Senate in 1991 because the document "was not developed in cooperation with the Chancellor, nor approved by the Chancellor, and is invalid for that reason" (UCSB Senate 1994, R&J legislative ruling D1.94) and thus returned UCSB to the status quo ante set of procedures that had been approved by both the Chancellor and the Senate in 1989.

A different kind of intramural example of conflict over authority and rule interpretation within the Academic Senate was in the late 1960s, just prior to the FCC. The UC Davis division of the Academic Senate sought to have the UC-wide P&T committee designated as providing "what amounts to appellate review" of campus P&T decisions about what form/extent of a hearing ought to be provided under Senate Bylaw 112, but UCP&T rejected the proposal and concluded, "Mistakes in judgment by Divisional committees are possible. No need, however, is shown why this particular Committee function ought to be subjected to an appeal to another Committee." (UC Academic Senate UCP&T 1968:35)

## 3. *Senate-Administration conflicts over pre-hearing investigative responsibilities*

Here are several examples (in chronological order) of UC campus deliberations and/or disagreements related to the theme of locus of authority for investigations and disciplinary complaint evaluation at pre-P&T hearing stages. At UCSC in the late 1990s a special Senate committee on faculty and discipline and redress initially recommended that the charges committee be "changed from an administrative committee to a subcommittee of the Academic Senate's Committee on Privilege and Tenure." (UCSC Special Committee, 1997). However, the proposal not only received opposition from the Chancellor "but from within the Senate: in

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<sup>36</sup> UCR&J Leg. Ruling 2.10 notes in the context of commenting on UCR's charges committee (which soon after dropped the "investigative" part of its charge), "In essence, the Divisional Charges Committee acts as an investigative grand jury with a standard of proof based on evidence of probable cause, while the hearing committee acts as a decisive petit jury with a standard of proof based on evidence of a clear and convincing nature." Likewise, UCLA's procedures define "probable cause" by citing a case involving a criminal grand jury. The analogizing of charges committees to grand juries dates back to the early 1970s in correspondence between the UCLA Academic Senate and the General Counsel's office at UC. In a U.S. criminal grand jury context, the prosecutor has broad discretion (and with it the risk of abusing discretion) (G. Reynolds 2013:106; Kuckes 2004). In addition, in federal grand juries only an authorized prosecuting attorney is allowed to be present, nor does the accused (or the accused's attorney) have the right to inspect reports, memos and other documentary evidence that goes before the grand jury (Diamond 2014; Kuckes 2004). All of these factors are substantially dissimilar from the procedural and power dynamics of a UC faculty case being evaluated by a charges committee.



particular, from P&T” such that the charges committee was kept as an administrative function with faculty appointments to serve run through the Senate’s committee on committees (UCSC Special Committee, 1998).

Second, at UCI after the health science fertility clinic misconduct scandal involving breakdowns in the handling of complex investigation of research misconduct and fraud allegations (e.g., UC Regents Committee on Finance, 2000; Dodge & Geis, 2003) there was agreement by the administration and the Senate to amend disciplinary procedures with the following explanation:

“Under the previous rules, there was confusion about responsibility for investigating allegations of faculty misconduct. The administration often investigated cases before referring them to the Committee on Privilege and Tenure (CPT), but there were no clear administrative rules regarding the nature or scope of these investigations. After the case was filed, CPT was required to conduct a separate preliminary investigation to determine whether there was probable cause to hold a hearing. This second investigation was often redundant and sometimes caused significant delays in the disciplinary process. Moreover, it was considered problematic for CPT to investigate disciplinary charges because CPT was also responsible for holding formal hearings on these charges. For CPT to act as both investigator and adjudicator was thought to create potential due process issues and confusion over CPT’s role. The previous policy also appeared to be inconsistent with systemwide policy as reflected in Standing Orders of the Regents (SOR) 103.2, 103.9, 103.10 and Senate Bylaws 334-337. These systemwide policy statements clearly imply that the investigation of faculty misconduct should be an administrative function, while holding hearings on such charges is an academic senate function to be carried out by CPT.” (UCI Academic Senate Appendix III)

The confusion noted above in these late-1990s UC Irvine cases was compounded by the fact that disciplinary cases and grievances were at that time contained in the same Senate Bylaw (see earlier discussion at Section V.2). A few years after UCI, as the new UC Merced campus was building out its first set of faculty and academic policies and procedures, UCM chose to adopt language that closely tracked UCI’s procedures<sup>37</sup>:

A complaint may be brought under these procedures by any student, staff member, or faculty member of the University of California. Systemwide policy statements clearly imply that the investigation of faculty misconduct should be an administrative function, while holding hearings on such charges is an academic senate function to be carried out by the Committee on Privilege and Tenure. (2008 version of UC Merced MAPP Section 113-1)

Within the last decade UCR and UCLA encountered internal conflicts about the scope of authority for their charges committees. At UCR, after disagreements between the charges committee and the administration, in 2012 the Senate agreed to replace references to “investigation” in the disciplinary procedures and in the bylaw for the charges committee with “inquiry” in order to “clarify that it is not within the purview of the Committee on Charges to conduct a formal investigation.”<sup>38</sup> (UCR Academic Senate 2012; see *also* UCR Chancellor, 2012)

UCLA represents the far more high-profile example about internal stakeholder disagreement about the role of the Senate charges committee. In 2012 a group of concerned faculty approached the UCLA chancellor and provost regarding concerns of racial bias and an inhospitable climate for faculty of color, with the provost agreeing to convene an independent blue-ribbon investigative

<sup>37</sup> This influence from UCI to UCM procedures was confirmed by my correspondence with UCM’s former vice provost of academic personnel.

<sup>38</sup> It is important to distinguish general/colloquial understanding of investigations versus the “judicial” or “quasi-judicial” kind of fact-finding that a P&T disciplinary hearing committee is engaged in. The first FCC approved in 1971 included among the Part III recommendations made by the Academic Senate, “There should be provision, to the maximum feasible extent, for separating investigative and judicial functions. A faculty member who has participated in investigating an allegation of misconduct or in recommending that a charge should be filed should thereafter not participate as a member of the Committee on Privilege and Tenure, in the hearing of that charge.” (University Bulletin 1971:156, Section III.8) This quoted provision is currently found in APM-015.III.B.6. In other words, the work of a campus P&T hearing committee is a “judicial” fact-finding function that is distinguished from how the term “investigative” is typically used in the FCC. For this reason, I believe is was not accurate when the UCR charges committee stated its view in 2011 that it was replacing “investigate” with “inquiry” in its charge was because a “single formal investigation, as recommended by APM-015.III.B.2, is the purview of the Committee on Privilege and Tenure.” (Academic Senate UCR Committee on Charges, 2012) Rather, for purposes of the FCC and campus disciplinary procedures, the term “investigation” should be understood to mean pre-hearing investigation(s). Somewhat related, courts generally recognize UC campus P&T hearings (both disciplinary and grievance varieties) as “quasi-judicial” in nature based on the set of due process provisions involved, which has important downstream implications in legal challenges to P&T findings/recommendations. See e.g., *Choudry v. Regents of the University of California*, 2016 WL 6611067 at \*5 (N.D. Cal. 2016); *Kessler v. Bishop*, 2011 WL 4635117 (N.D. Cal. 2011).

committee that was chaired by retired California Supreme Court Justice Carlos Moreno. (UCLA Chancellor's Office, 2021:1) The resulting "Moreno report" in 2013 made many recommendations and findings (including many important issues such as salary equity and faculty diversity levels that are beyond the scope of the present focus on disciplinary procedures), which included the finding that UCLA lacked sufficient investigation procedures and sanctioning/accountability mechanisms for handling complaints of discrimination by faculty:

We also find that the university lacks a mechanism for impartial investigation of such incidents outside of a formal Academic Senate proceeding. The university currently has no official procedure by which a complaint triggers an informal or formal investigation by a dedicated, impartial official. As noted above, administration officials appear to have instituted the practice of asking the school's Title IX Officer to investigate certain incidents of alleged discrimination, perhaps using as a model the procedure for investigation of sexual harassment complaints brought to the Charges Committee. However, because the Sexual Harassment Officer appears to only investigate discrimination complaints brought to the Charges Committee, there is no mechanism by which the above-mentioned offices or any other campus office that engages in informal dispute resolution regarding such complaints, may directly call upon her services. This compares unfavorably with the university's sexual harassment procedures<sup>39</sup>, which provide for a single office that fields complaints and offers informal resolution options, but also may launch a formal investigation. High-ranking administration officials involved in academic personnel matters told us that they believed that a more professional process in investigations is needed to address incidents of perceived bias and discrimination. We agree....

We find that UCLA's current procedures fail to adequately communicate the consequences that will ensue for those who engage in discriminatory conduct. Many faculty members complained during interviews that administration officials often offered a remedy to faculty of color who had experienced an incident of discrimination, but that the administration rarely if ever meted out punishment to the offending party, even eschewing confrontation of that party altogether. This approach of crafting workarounds and not punishing the individual engaging in discriminatory conduct sends the message that those who violate the university's policies against discrimination will not be punished. Faculty members assert that without an effective deterrent message, a culture of impunity has developed at UCLA....

*The formal Academic Senate processes do not offer a viable solution to these issues. Few complaints and grievances regarding incidents of perceived discrimination reach the Charges or Privilege and Tenure Committees. The process for bringing a formal complaint or grievance can be bewildering to faculty members, and can take months to conclude. Some faculty members who considered instituting proceedings told us that they had concluded they could not afford legal fees for counsel. Other university stakeholders said that they considered the Academic Senate processes to be a last resort for individuals who had nothing to lose, such as a professor who has been denied tenure. In short, the prospect of engaging in the quasi-litigation that characterizes a Privilege and Tenure Committee proceeding deters many faculty members from using that process. (UCLA Moreno Committee 2013:19-20) (italics added)*

The UCLA Moreno report precipitated a UC systemwide Senate-Administration work group report<sup>40</sup> (UCOP Dorr Report, 2013) and a set of meetings between then California Attorney General (and current U.S. Vice President) Kamala Harris and the UCLA Chancellor resulting in a set of reform commitments (UCLA Chancellor's Office, 2021:8). The UCLA administration convened a Moreno report implementation committee, and its subcommittee focusing on the need for a new Diversity Officer role concluded in 2014 regarding the charges committee:

Based on its investigations, the subcommittee endorses the elimination of the Academic Senate's Charges Committee. We have found that the Charges Committee is largely superfluous (given the work conducted now by the Title IX officer and to be conducted by the two new discrimination officers). We believe, moreover, that a streamlined process will be both more

<sup>39</sup> For context, years earlier the U.S. Department of Education OCR found inadequacies in UCLA's Appendix XII faculty discipline procedures in reviewing cases involving sexual harassment complainants and UCLA reached a voluntary resolution agreement that included reforms to Appendix XII (OCR-UCLA 2000).

<sup>40</sup> For disclosure purposes, I served as a consultant to this UC Dorr et al. Senate-Administration work group that moved quickly to produce a report in December 2013, shortly after the October 2013 Moreno Report.

efficient to complainants and signal the University's commitment to fulfilling the letter and spirit of the Moreno Report. (UCLA Chancellor's Office, 2021:Appendix 5)

Some key UCLA Academic Senate committees were opposed to changing the charges committee scope/structure, including P&T and the charges committee (UCLA Academic Senate 2014). Even after the churn of seven years and additional public controversies involving racial equity there remains a somewhat uncomfortable procedural stalemate at UCLA about the division of responsibility between the charges committee and the vice chancellor for equity and inclusion over the handling of discrimination-related allegations against faculty members (UCLA Chancellor's Office, 2021) The UCLA case is a paradigmatic example of "status quo bias" (a theme throughout this paper), just as the converse type of status quo bias would likely make it difficult for a different UC campus with a tradition of administrative responsibility for pre-hearing investigations to suddenly shift those duties to over to the Academic Senate.

#### 4. *Need for legal counsel within P&T/Senate committees*

Over the decades the need to have legal counsel for campus P&T committees (separate from legal counsel to the UC administration) has been repeatedly identified within the Senate (UC Academic Senate UCP&T 1968:35-36; 1982:31; UCP&T letter 2000), and providing counsel for faculty respondents/accused has been considered at various times but was deemed to be unworkable and unwise (Simmons et al. Task Force 1997:12). In the late-1960s UCP&T recognized, "Experience obtained through assisting Divisional Committees under this provision of the By-Law [112] has shown that with both sides usually represented by legal counsel, it is almost necessary to be aided by persons with legal training" and the committee first sought to create a mechanism by which Senate members with legal training (mostly from the UC law schools) could be assigned to campus P&T committees for hearings. This issue re-emerged in the discussions that led to the Simmons et al. task force report in the 1990s:

One of the new ideas the working group has endorsed, suggested by General Counsel Holst, is to have General Counsel's Office have on its staff an attorney whose sole responsibility in disciplinary cases is to counsel Senate P&T Committees. As it is, UC attorneys serve as "prosecution" attorneys for the administration, leaving the Senate with no neutral, expert advice. The notion is that a "firewall" would be established in the General Counsel's office between the P& T attorney and any other attorneys connected to disciplinary cases. The working group thought it would be better to have P&T attorneys be from outside the General Counsel's office, but it agreed that both the General Counsel and outside attorney options should be experimented with beginning this fall. Another Holst idea endorsed by the group was to give P&T committees the option of hiring experienced factfinders, such as professionals from the American Arbitration Association, to run P&T disciplinary hearings, after which the committee would pass judgment in the usual way. Such a change would require extensive Senate review.

Soon thereafter, UC's Office of General Counsel assigned a "firewalled" attorney (first on an experimental basis, later permanent) to provide legal advice to UCP&T and campus P&T committees. One reviewer of this paper reminded me that at first, not all P&T committee availed themselves of this mechanism for legal advice from Senate counsel; in some instances campus committees went to outside counsel (a point that underscores a central theme in this paper about the importance of appreciating how norms develop and are acculturated). Because the client is the holder of attorney/client privilege, at times detailed discussions on legal and procedural matters are included in UCP&T's minutes (e.g., UCP&T 2011b:4)

For nearly two decades this role was primarily handled by one senior counsel, supplemented by "spot" assignments in other P&T hearings as needed. With the substantial changes in UC faculty discipline procedures in recent years (especially the more rapid timeframes in Bylaw 336 adopted in 2019 and corresponding rise in volume of hearings) additional attorneys in UC Legal have been assigned roles to advise campus P&T committees, firewalled from the additional attorneys hired to represent the UC administration in such hearings.

#### 5. *The curious case of the UC Code of Conduct for Health Sciences*

One interesting item I came across in pulling together research materials for this paper were brief references in 2007-08 to a proposed update to a *Health Sciences Code of Conduct* (HSCC), which it appears was ultimately tabled after input from the Academic Senate. The context, as explained in the cover letter to the Senate was that the HSCC "does not supersede the faculty code of conduct [but] is a concise guide to issues that are of particular concern" at the five UC health sciences campuses (Jaffe

2008). The HSCC was part of implementing a \$22.5M settlement agreement between UC and the U.S. Department of Justice for “incorrect billing of faculty physician services” in the late 1990s. (Jaffe 2008; UC Regents 1998)

The HSCC was adopted on the health sciences campuses, with each tailoring additional sections based on local needs, but in the course of the 2008 review the appendix materials indicated that with the first iteration of the HSCC “There is no record of final approval by the academic senate or by the university president.” (Jaffe 2008:57)<sup>41</sup> The proposed revisions in 2008 were a partnership of UCOP clinical sciences and two faculty members appointed by the UC Academic Senate. (UC Academic Senate 2008) In the end, most of the Academic Senate input (especially from UCLA) was negative – including the revisions turning a user friendly document into a more legalistic document, questions about “double jeopardy” vis-à-vis the FCC, and exclusion of physician ethical covenants like the Hippocratic Oath (UC Academic Council 2008) It appears that the substantive content found its way into other campus and UC policies, and by 2013 the UC policy for the Health Science Compliance Plan includes a brief reference to the HSCC that simply cross-references the UC Regents Policy 1111 on statement of ethical values and standards of ethical conduct (UCOP-ECAS 2013:6, citing UC Regents 2005)

#### 6. *Handling research misconduct disciplinary cases on UC campuses*

To contextualize this important topic, a recent National Academies consensus report on reproducibility and replicability of data (2019:84, 102-103) highlights the following regarding research misconduct and retractions:

- a) Analysis focusing on biomedical articles found that over two-thirds of retractions were attributable to misconduct, as opposed to honest error or mistake (Fang et al., 2012)
- b) A wider analysis of retractions of scientific papers found that half of retractions were attributable to misconduct or fraud (Brainard 2018). This same study found that approximately 4 of every 10,000 papers are now retracted, and while the number of journals reporting retractions grew from 44 journals in 1997 to 488 journals in 2016 the average number of retractions per journal has remained essentially flat since 1997 ((Brainard, 2018).
- c) Other researchers found some differences in retraction rates across disciplines (Grieneisen and Zhang, 2012).

Somewhat similar to concerns about disproportionate harm in academia by serial sexual harassers, the National Academies' report concluded “Fewer than 2 percent of authors in the database account for more than one-quarter of the retracted articles, and the retractions of these frequent offenders are usually based on fraud rather than errors that lead to non-replicability.” (National Academies 2019:84)

Having worked over the years as an administrator on multiple research misconduct cases referred to P&T, I offer a few observations. First, a UC campus may go several years in between major research misconduct cases that go to the P&T hearing stage, so on both the administrative and Senate sides there can be a lack of institutional “muscle memory” about the distinctive and technical set of policies, rules and procedures (and substantial attendant workload) that intersect with UC disciplinary procedures in cases where allegations of research misconduct by faculty and other academic researchers implicate federal research funds (e.g., NIH, NSF, HHS, USDA, Defense, Energy).<sup>42</sup>

For example, under Senate Bylaw 336 sanctioning a faculty member for research misconduct (like other misconduct except the narrow 2021 carve-out for SVSH) applies the “clear and convincing” evidence standard, but federal regulations require that the campus final decisionmaker for federal reporting purposes (e.g., Vice Chancellor for Research/Research Integrity Officer or the EVC/Provost) to reach a conclusion under the “preponderance of evidence” standard (Kidder 2020:131, citing 65 Fed. Reg. 76260, 76262 (2000); *Brodie v. U.S. Dep't of Health and Human Services*, 796 F. Supp. 2d 145, 147 (D.D.C. 2011) (affirming preponderance standard in federal research funding debarment context)).

<sup>41</sup> However, elements related to the HSCC in connection with other evolving legal and regulatory mandates are discussed at length in the 2003 *Health Science Corporate Compliance* annual report to the Regents (UCOP Health Sciences 2003).

<sup>42</sup> As noted by Melissa Anderson (2014:4), “The Public Health Service’s Final Rule on policies on research misconduct (U.S. Department of Health and Human Services, 2005) emerged from years of contentious deliberations as to what should and should not be included in the definition of misconduct. Research universities’ policies, procedures, and codes of ethics, which are generally more detailed and expansive than federal policy, are typically aligned with federal statements and regulations.” This alignment explains why many campus research misconduct policies were substantially revised in 2005-07. Illustrative examples of UC campus research misconduct policies/procedures include [UC Berkeley](#) and [UC Riverside](#).

While academic plagiarism cases are hardly simple (Parrish 2006; Sonfield 2014) and can also be intertwined with federal funding/federal rules, the nature of the evidence in such plagiarism cases tend to be orders of magnitude less complicated than data fabrication, data falsification and related kinds of research misconduct cases, with respect to sequestration of research materials (e.g., hard drives, laboratory notebooks and logs, computer files, lab equipment etc. in a manner that maximizing custodian of evidence/reliability considerations).<sup>43</sup>

Another difference is the specific federal procedures for the inquiry committee and investigation committee -- which should involve senior level discipline-specific scientific knowledge/field familiarity from faculty appointed to the investigation committee to a degree that is different from the diversity of departments and disciplines typically found among assigned members a P&T disciplinary hearing. A third important difference is that research misconduct cases intertwined with federal grant funds often become a conflict between the respondent professor and the University on three somewhat overlapping fronts: 1) the UC campus investigation committee process followed by the P&T hearing; 2) the professor possibly contesting the federal agency such as Office of Research Integrity's (ORI) at HHS/NIH or the NSF's Office of Inspector General (OIG) (Kornfeld, 2019) decision about whether research misconduct occurred and warrants federal debarment, which can include appeal to a federal administrative law judge (Parrish 2006); and 3) communications with peer-reviewed journals about potential retraction of articles.

A fourth difference emerges from the third, which is that ORI's public website on debarred researchers and associated watchdog groups (e.g., Retraction Watch blog) and investigative journalism will tend to publicize more details about findings of research misconduct (Kidder 2020:33-34; Kornfeld 2019:375) as compared to some other types of faculty misconduct at UC.

#### 7. *Campus variation interpreting the "three-year rule"*

The circumstances giving rise to the adoption of the three-year rule in 2001, with clarifying adjustments in 2005 and 2017, are described above in Sections V and VI. After multiple high-profile SVSH scandals at UC Berkeley in 2015-16 (including the renown astronomer found to have engaged in serial harassment spanning years) there was additional deliberation about the three-year rule among UC Berkeley administrators and UC graduate students (e.g., Dean Hesse was quoted in the press as saying "it is a very confusing rule," Murphy 2017), and UC Berkeley's official statement in 2015 in the astronomer case mentioned uncertainty in the case because "The process would also be subject to a three-year statute of limitations," Science Magazine, 2015). It is fair to say that the UC Joint Committee on SVSH in 2016 viewed things differently, and believed that the three-year rule was itself not confusing but that the rule was misunderstood by campus community members (see Section VI above), a position I believe is partly accurate but partly too simplistic as explained below and in Appendix A.

My document review and interviews for this paper confirm there were/are some nuances to this issue not addressed in the 2016 Joint Committee's report. Namely, UC Berkeley officials were referring to (and I was independently aware of at the time) an earlier decision by the Berkeley P&T committee, affirmed by UCB Rules & Elections and then allowed to stand in an informal opinion by the systemwide UCR&J in the early 2010s, that dean/chair "counseling memos" to a faculty member facing disciplinary charges should be inadmissible at UCB if issued more than three years before notice of disciplinary charges.<sup>44</sup> By contrast, as I described in a memo to the UCR Academic Senate in 2015 regarding faculty SVSH, racial discrimination/harassment and bullying cases:

In a major UCR disciplinary case involving harassment, the P&T hearing committee permitted some evidence of prior relevant behavior as background evidence and in consideration of appropriate sanctions. Likewise, in a harassment case at another Southern California UC campus the P&T committee agreed that the "continuing violation" doctrine should at least permit consideration of earlier events as relevant background information. But in a serious harassment case at a Northern California UC campus the P&T hearing committee reached the opposite conclusion, and excluded all consideration of prior administrative "counseling memos" to the faculty member in light of the three-year rule and Bylaw 336.D sections 5, 6 and 9. (Kidder 2015:2)

<sup>43</sup> One simplifying difference with plagiarism cases is the prevalence of requiring software such as "[Similarity Check](#)" in the peer-reviewed journal submission process, which scans a manuscript for textual similarity to other published academic papers and web content, much like "Turnitin" plagiarism software for students' papers.

<sup>44</sup> A background difficulty here is that unlike formal legislative rulings, *informal* opinions by UCR&J (and equivalent campus Senate committees) are not "formally binding on the Senate officers and agencies" but are still expected to be "entitled to obedience, credit or acceptance" within the Senate (see UCR&J Leg. Ruling 12.93B) and UCR&J did not post annual reports on the Senate website for the period between [2001 and 2016](#) nor does it normally post informal opinions on the Senate website.

In its deliberations UCP&T similarly reported in 2011-12 regarding the three-year rules in Bylaws 335 and 336: “By comparing local experiences and interpretations, the committee learned that the Bylaws have been interpreted differently in relation to the introduction of older evidence in cases originating from conduct within the designated time period.” (UCP&T 2012:1; *see also* UCP&T 2011a:2; 2011b). Likewise, the UC-wide Moreno report work group recommended looking closer at issues related to the three-year rule (UCOP Dorr Report, 2013:9-10) as did President Napolitano a few years later in response to the Joint Committee report (Napolitano 2016b). I discuss additional suggestions to address three-year rule issues below in the Appendix A.

## 8. Demotion Commotion

As mentioned earlier in Section V, in response to a late-1990s case where a Chancellor's and President's demotion action raised serious policy concerns by Academic Senate leadership, as part of the large-scale changes in 2001 drafted by the UCP&T work group (and subsequently endorsed by Academic Assembly, UCOP and the Regents) tightened the criteria in APM-016 so that, “Demotion as a disciplinary action should be imposed in a manner consistent with the merit-based system for advancement. Generally, demotion is an appropriate sanction when the misconduct is relevant to the academic advancement process of the faculty member.” The text of the approved 2001 Regents action item informing the Regents what they were voting on likewise explains that with these proposed amendments demotions will be appropriate “only when the misconduct is relevant to the academic advancement of the faculty member” (UC Regents 2001 item 303:5; *see also* UC Academic Assembly 2001:96).

Notwithstanding the fairly clear rule articulated in the text and legislative history of APM-016 that intentionally brought UC policy into closer alignment with existing AAUP-endorsed U.S. academic norms,<sup>45</sup> journalism-prompted records released to the public point to sexual harassment sanction outcomes that stray from this demotion rule in APM-016 including a UCSF case where a professor was demoted from full to associate professor for sexual harassment and a case where a UCI professor engaged in a sexual relationship with a graduate student was demoted within the associate professor rank, among other sanctions (UCI 2004 case in Rivenburg, 2007; UCSF complaint file date of 2012 in case in Daily California database, 2016).<sup>46</sup>

A plausible interpretation of why this occurs from time to time (which publicly released records of old case outcomes won't be detailed enough to explain) is that two types of expediency or pragmatism merge and result in a kind of “policy drift.” (Mettler 2014<sup>47</sup>) First, compared to the systemwide leadership level of the Academic Senate, campus P&T committees doing the hard work of holding disciplinary hearings will be less aware of (and have less bandwidth to scrutinize with a fast-approaching deadline for the P&T report after a hearing) the details and internal logic of restrictions on the APM-016 demotion rule. When P&T committees are recommending sanctions, in some cases what may have greater policy and value salience is the near-existential difficulty of coming to terms with recommending the termination of a tenured faculty colleague (*see* Poskanker 2002:216; Cantalupo & Kidder 2019:2371-74; Connell et al. 2011:550), such that demotion becomes an attractive lesser sanction recommendation for the P&T panel either alone or in combination with another sanction like suspension.

From the campus administration's standpoint, in some cases “going along” with such a campus P&T recommendation may be viewed from both a shared governance comity standpoint and litigation perspective as carrying less net risk as compared to being more precise and rigorous about the textual requirements of APM-016. The much earlier demotion case at UCR (Academic Senate newsletter, 1997a) during the President Atkinson era, a case where demotion was imposed for sabbatical related (APM-740)

<sup>45</sup> The point is widely recognized by both AAUP-affiliated authors and other higher education scholars and counsel. *See e.g.*, Euben & Lee 2006:286 (“Institutions on rare occasions demote faculty members from certain ranks or status as a form of discipline. The AAUP generally views reductions in faculty rank, such as from associate to assistant professor, as an inappropriate sanction, except in situations where the promotion had obtained through fraud or dishonesty.”); *Id.* at 86 n.332 (Similar to Senate Chair Mellichamp's 1997 statement quoted earlier in Section V of this paper, Euben & Lee note: “The mechanics of a demotion would seem to raise a number of issues, including what are the conditions to be met to restore the previously held rank—simply the absence of further misconduct or additional academic achievement? If absence of misconduct, for how long?”); Franke 2002:10 (“In 1992 AAUP's Committee A on Academic Freedom and Tenure considered whether reduction of a faculty member's rank was an appropriate sanction and concluded that, except in situations in which the rank may have been obtained through academic fraud, this penalty is not appropriate in the academic community. In the committee's view, a rank earned through scholarly achievement should not be reduced as a disciplinary measure.”).

<sup>46</sup> An instructive contrasting example is a [2017 case](#) involved a UC Merced professor found to have engaged in sexual harassment being reportedly “demoted from an unidentified leadership position,” a description that suggests an appropriate response that does not run afoul of the APM-016 rule because this is presumably referring to an extra “at will” administrative appointment like department chair (or the equivalent within the Senate like a committee chair), and thus does not implicate the professor's underlying academic appointment in the same way.

<sup>47</sup> In the context of long-term policies impacting higher education financial aid and graduation rates, Mettler describes “policy drift” as something that can emerge from “any of three dynamics: policy design effects, unintended consequences, and lateral effects.” (Mettler 2014:14-15)

misconduct and deception, is a reminder that UC upper administration, not just P&T committees, can also be the source of this problematic application of a disciplinary remedy (the UCI case mentioned above may have been in that category too—the record is unclear). I discuss additional ideas to resolve this situation with demotions and policy drift below in Appendix A.

## VIII. CONCLUSIONS AND THE FUTURE

A UC Senate faculty member's right to "the opportunity for a [disciplinary] hearing before the properly constituted advisory committee of the Academic Senate" (UC Regents Bylaw 40.3(b)-(c), formerly in UC Regents Standing Orders 103.2; 103.9) has existed for a century, originating with the reforms of the 1919 "Berkeley Revolution" that codified greater shared governance with the faculty and delineated the duties and powers of the Academic Senate (Fitzgibbon 1968; Stadtman 1968; Louderback 1938) and was codified in the very first version of the FCC in 1971 (Part III.2) and each version of the FCC thereafter (in 2021 it is found in e.g., APM-015.III.A.1-2).

To an extent not fully evident from the written reports and documents reviewed above in this paper, interviews for this paper confirmed that the high-stakes controversies and external civil rights enforcement obligations around faculty sexual harassment cases came closer in the 2015-2019 period to forcing a change that would have removed SVSH fact-finding and discipline from the traditional Senate P&T hearing process into a different fast-tracked administrative adjudication process. In this respect, P&T disciplinary hearings are a concrete manifestation of faculty support for deeply valued principles around academic freedom (and shared governance), which can be "a sacred concept, but, like most good things in life, it must be properly tended to and cherished. Otherwise, the case for its demise will become too strong." (Katyal 2003:5720)

The Academic Senate made some difficult choices in 2019 to finally address the issue of hearing timeframes and Bylaw 336 (after the State Auditor's report referred to the UC Regents, and an OCR finding about UC Berkeley, both in 2018) in ways that had eluded earlier and contemporary joint Senate-Administration task forces (Simmons et al. 1997; Hare-Vacca 2016). Divisional P&T committees continue to work through the substantial challenges of the new rigorous 60-day time frame for holding the hearing after charges are referred to P&T (Bylaw 336.E.1; UC Academic Senate P&T 2019, 2020)

Moreover, the above conditions were before the University's necessary efforts in 2020-21 to comply with the Trump/DeVos DOE Title IX regulations that took effect in August 2020 (regulations that are now slowly being replaced in a new proposed Title IX rulemaking process under the Biden administration DOE). As noted by UCP&T members in their fall 2020 discussions, the new employee hearing requirements articulate with the traditional disciplinary P&T hearing requirements in strained and awkward ways where all the options appear bad—e.g., either eliminating the P&T hearing, or risking duplicate fact-finding hearings, or overlaying/partly merging two hearing fact-finding procedures into one (Title IX + P&T) in ways that lacks elegance and coherence. (UC Academic Senate P&T 2020, 2021)

Widening perspective to the longer historical arc with the UC FCC since its origins in the social and political tumult of the late-1960s, it is striking how later in his scholarly career Clark Kerr, informed by his earlier experience as a UC Chancellor and President, became pessimistic about declining faculty norms and standards of conduct:

Is the academic profession really disintegrating in its ethical conduct?... I once looked upon the colleges and universities as the ethically purest institutions on earth. I regret to say that I have observed what I consider to be a partial disintegration since about 1960, more in some areas and in some institutions than in others... I conclude, regretfully, that the academic profession may, in fact be disintegrating slowly in some aspects of its ethical conduct. (Kerr 1989:155-156)

As Kerr notes at the beginning of that essay, his engagement with the topic of faculty ethics is "not as a scholar drawing on accepted doctrine but more as a participant-observer who has had to make his own way largely *ad hoc* in the midst of controversy drawing on personal observations of good practice." (Kerr 1989:139) While I too am a participant-observer of faculty discipline norms and policies (at the "middle management" level), by way of contrast with *ad hoc* experiences and anecdotes, in this paper my attempt has been to apply through rigorous documentation and systematic study (and however imperfectly) a measure of "sociological imagination" (Mills 1959; Fuller 2006) to the development of UC's rules, norms and procedures for faculty misconduct.

Based on this more systematic procedural review and social history of UC's FCC, a key takeaway is that I cannot share President Emeritus Kerr's pessimism about disintegrating faculty ethical standards. First, this CSHE paper points to compelling reasons to be skeptical of nostalgic accounts of higher UC faculty standards of ethical conduct "back in the day" in the 1960s and earlier, including Kerr's impressions. Notably, in the 1950s and 1960s era preceding Title IX legal protections and the conceptual currency

of “sexual harassment” in U.S. society, the absence of formal ethical conduct structures and the prevalence of patriarchal societal norms made the sexual harassment of female students by male faculty much more of a “regular Tuesday” banality, with the added harm that the social structures and norms in academia and elsewhere in that era manifested the “epistemic injustice” of making it exceedingly difficult for victims of sexual harassment to have access to the tools of knowing and understanding the social experience of being sexually harassed (Fricker 2007:149-160).

Similarly, Kerr’s essay alludes to him going into UC administrative leadership with unrealistically positive views about faculty ethics, which may have contributed to a later sense of disillusionment. These factors are a caution about our human tendency to “imagine the past to remember the future” (Bickel 1970:13)

A second contemporary response to Kerr’s pessimism extends from this wise observation by former Berkeley law professor (and academic freedom scholar) Robert O’Neil soon after approval of UC’s FCC (and contemporaneous adoption similar codes at many other U.S. colleges) a half-century ago:

Faculty codes are principally a response to a specific set of circumstances and pressures [in the Vietnam War period] which, we all fervently hope, will not recur. Yet the values of such codes far exceed their original designs...At the very least, relations among faculty members, and between faculty and administration, have probably been enhanced by the process of drafting a code, if not by the product. By itself a code is not a coda: it cannot end conflicts over faculty responsibility. But a new kind of cohesiveness and a new consensus on basic values has resulted at many universities from the very task of articulating certain principles of which all or most could agree. If such benefits continue, then faculty codes surely have not surpassed their usefulness even if they have outlived their origins. (O’Neil 1974:52-53)

O’Neil’s observations have contemporary reverberations. This paper documents a pattern of “punctuated equilibrium” where there are long periods of stability in FCC rules and norms punctuated by abrupt periods of significant change partly in response to threats to institutional confidence/legitimacy (1997-2003, 2016-2021) that yield large scale changes to faculty disciplinary procedures, rules and accountability norms. Each of these periods of policy reforms, in ways specific to their era, repeat a process of doing the shared governance hard work of ethical policy renewal and instantiation of a “a new consensus” by responding to the “normative dissonance” and “disillusionment gap” (Anderson 2007) that gradually accumulates on issues like sexual harassment/sexual violence and research misconduct during longer periods of policy stasis.

The contemporary period of the past few years at UC and other universities nationwide – even if uncomfortably juxtaposed with an unprecedented cratering of ethical norms in our national politics under the previous U.S. President – reflects such a period of reckoning with a “norm cascade” (Williams et al., 2019) around accountability standards and sexual harassment, including through activities of the National Academies (consensus report 2018) and federal research funding agencies. As someone who has researched and published on hundreds of academic sexual harassment cases (Cantalupo & Kidder 2017, 2018, 2019), comparing norms and rates of faculty misbehavior in the area of sexual harassment today versus ten or twenty years ago, I believe it would be implausible to argue that the academy today appears to be “disintegrating slowly” (as Kerr argues above regarding other dimensions of faculty ethics).

As recently reported by President Drake, the University of California’s scholars produce nearly ten percent of all U.S. research publications. (UC Regents 2021) For this reason, what Professor Radin said about UC’s “exemplary position” seventy years ago—said in different context about the loyalty oath controversy—is also applicable today with accountability standards and the future of UC’s Faculty Code of Conduct. Whether UC is able to uphold the highest standards and norms of accountability, fairness, integrity and ethics in its Faculty Code of Conduct and disciplinary procedures over the next half-century “is not a local and special thing involving merely a particular issue or a particular institution.” (Radin 1950:235) Rather, it is a question of national and international importance for the future of research universities as the cradle of knowledge creation in the U.S. and around the world.

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## APPENDICES

### Appendix A: A few technical observations and suggestions for reform

The aim of this CSHE working paper is not to make sweeping recommendations for major reforms to faculty disciplinary procedures. However, having completed the analytical and archival work for this unique working paper on the FCC's history (informed by years of experience working on a wide variety of faculty discipline matters), I do offer several small and technical observations and recommendations that could be of interest as "shared governance conversation starters" to various UCOP and campus administrative and Senate officials. This modest list of somewhat technical (even esoteric) suggestions about faculty discipline policy interpretation and procedures is not ranked (specific recommendations in bold):

- a) The post-2019 reforms to Bylaw 336 with 60 days to begin the P&T hearing after referral of formal charges (see Section VI above) reportedly adds considerable strain during the summer months, as confirmed in both minutes of UCP&T and my interviews for this paper. UC faculty (typically on nine-month academic year appointments) have research plans and obligations during the summer months (including faculty in federal grant-funded disciplines with effort reporting commitments) that are difficult to mesh with a short notice assignment to a summer P&T hearing panel. **Given the experience under COVID with a large number of P&T zoom hearings going fairly smoothly, it is feasible to have a special multi-campus "summer P&T roster" of UC faculty who know their plans that year will allow for assignment to one or two summer P&T panels by zoom.** This is somewhat similar to how UC Merced's Senate P&T and CAP committees were made up of senior faculty from other UC campuses during the initial growth and maturation period of the Merced campus. Service on "summer P&T" could come to have an understood meaning for purposes of service credit (separate from academic year credit) in faculty merit and promotion files, and might work better among the eight UC campuses on the quarter system academic calendar. Moreover, even a **modest summer stipend (e.g., \$5,000) to faculty members serving on P&T committees holding summer hearings would also help** in recognizing faculty sacrifice in this area that is different than typical academic-year Senate committee service.
- b) Academic Senate [legislative rulings from UCR&J](#) and from the equivalent campus Senate committees (Rules & Jurisdiction, sometimes called Rules, Jurisdiction and Elections, etc.) are a rich if underappreciated source of interpretive guidance related to faculty discipline matters. Here are some difficulties that warrant attention:
  - Unlike changes to the APM or Senate Bylaw 336 where new text replaces/revises old text, R&J legislative rulings are different in nature and **there is not a reliable self-executing mechanism for rescinding or partly rescinding or modifying legislative rulings to keep pace with other developments in UC policy and law.** For example, UCSC's RJ&E legislative interpretation [1996.2.A](#) on faculty romantic relationships has not "aged well" since the 1990s and claims "The Faculty Code does not necessarily incorporate all aspects of sexual harassment law that may apply to faculty relations with students." It is doubtful if the Regents or UCOP (who approve APM-015) would concur with this policy statement about the disjuncture of the FCC and civil rights law. Similarly, UCSC's RJ&E legislative interpretation 1996.2.B. declares that P&T will entertain faculty grievances to "the jurisdiction" of the administrative charges committee in a way that suggests a declaration of policy belief/preference that is at odds with the architecture of the Chancellor's authority under Regental and University policies and pre-hearing investigative procedures as described above in Section VII of this paper.
  - Even legislative rulings with sound policy wisdom can be confusing due to other policy changes. The most important example is UCR&J 3.93B on campus procedures for faculty discipline, since it refers to sections and subparts of APM-015 that were later fundamentally reordered into APM-015 and APM-016 in 2001, making it difficult to properly interpret and evaluate that ruling's hierarchy of authority for which of several policy provisions is controlling when cases arise about apparent inconsistencies or disagreements between the Senate and the administration.
  - Informal opinions and advice of UCR&J and campus R&J committees are not formally binding, but with direction that these opinions within the Senate are still "entitled to obedience, credit or acceptance" (UCR&J ruling 12.93B). However, as noted earlier in this paper UCR&J does not post its informal opinions on the web and has inconsistent practices in the past with large time gaps when it didn't post its annual reports. Likewise, on the campuses it appears that UC Davis Academic Senate is the only one (kudos) with a [robust online archive](#) of the advice provided by its Committee on Elections, Rules and Jurisdiction, while the annual reports from other campuses often lack detail and mention only a



sentence or two about topics of advice/opinions. This creates an uncomfortable “invisible common law” posture that lacks transparency and can further UC stakeholder distrust (e.g., with student complainants). **One solution might be for the UC system Academic Senate to create a single website of scanned campus R&J advice/opinions provided by each Senate division** (with the caveat this raises “be careful what you wish for” possibilities in light of the points immediately above). **Alternatively, UCR&J ruling 12.93B could be modified (or partly rescinded) to align expectations to practical realities**, since past experience shows that annual reports are not a consistent mechanism for reporting on R&J advice as directed by 12.93B.

- c) As noted in Section VII, there is significant variation in application of the three-year rule in Bylaw 336/FCC contexts, particularly with respect to how the rules were/are “interpreted differently in relation to the introduction of older evidence in cases originating from conduct within the designated time period.” (UCP&T 2012:1; *see also* UCP&T 2011a:2; 2011b). Likewise, the UC-wide Moreno report work group recommended looking closer at issues related to the three-year rule (UCOP Dorr Report, 2013:9-10) as did President Napolitano a few years later in response to the Joint Committee report on SVSH (Napolitano 2016b). **It would be helpful if both UCOP and the Academic Senate could issue public interpretive letters on this set of issues (or perhaps a jointly signed letter covering terrain about which they both agree, with attached separate addenda covering areas where they do not agree or where there are open questions)**. Otherwise, the issue comes up occasionally and haphazardly in confidential briefings and findings reports in individual P&T disciplinary hearings – which contribute little to the deeper and long-term goal of intelligible policy stewardship at the University.

Given that the original three-year rule in the FCC and Bylaw 336 were (as stated by then-Senate Chair Blumenthal in 2005 when Bylaw 336 was revised) patterned after a legal statute of limitations, my own personal view is that **policy and civil rights equities favor also allowing flexibility around the three-year rule akin to the “continuing violation” doctrine found in federal and state discrimination and harassment cases.**<sup>48</sup> (*see also* Kidder 2015) Another area where issues can arise around the three-year rule is in complex research misconduct cases, for the multiple reasons noted in Section VII (e.g., sequestration of data, elaborate inquiry committee and investigation committee procedures preceding the P&T disciplinary hearing stage; concurrent activity with federal funding agencies and ORI). Moreover, in both research misconduct cases and discrimination/harassment/bullying cases, it would be beneficial to **have a UC policy interpretation statement indicating a per se rule or as least a strong default presumption that if the accused/respondent faculty member initiated actions that caused significant periods of delay in the disciplinary case** (e.g., requests for time extensions in research misconduct cases; litigation filings to challenge the Title IX report or research misconduct investigation report; counter-grievances), **by virtue of the respondent professor’s election of remedies those periods of delay (1 year, 18 months, etc.) should not be counted against the three-year limitations period. Such a principle of “equitable tolling”** is similar to how doctrines of equitable tolling and “unclean hands” safeguard against and disincentivize strategic delay tactics in parallel legal contexts.<sup>49</sup> Just as the guideline in APM-015.III.B.7 directs that a faculty member should not cause delay in their own disciplinary hearing, so too should a faculty member not be able to evade accountability and perform an end-run around the FCC process by using delay tactics to extinguish the jurisdictional underpinning of a P&T disciplinary hearing. A contrary view would pressure UC administration in the direction of some unattractive and unintended consequences, such as impatience with significant “early resolution” efforts (Bylaw 336.D) and a presumption of denying an accused faculty member’s requests for time extensions in complex research misconduct investigations.

- d) In Section VII of this paper, I document how with the sanction of demotions there are occasional “policy drift” departures from the clear text and legislative history of APM-016 that intentionally aligned UC policy with existing AAUP-endorsed U.S. academic norms.<sup>50</sup> Demotions are appropriate “only when the misconduct is relevant to the academic advancement of the

<sup>48</sup> *See e.g., Morgan v. Regents of University of California*, 88 Cal. App. 4th 52, 65 (2002); *Richards v. CH2M Hill, Inc.* 26 Cal. 4th 798, 823 (2001); *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 112 (2002).

<sup>49</sup> *Kendall-Jackson Winery, Ltd. V. Superior Court*, 76 Cal. App. 4th 970, 978 (1999) (the unclean hands doctrine “demands that a plaintiff act fairly in the matter for which he [she/they] seeks a remedy.”). Smith 2021:1128 (“Unreasonable delay in asserting one’s rights calls forth reliance on the part of others. The danger is that the delay may be deliberate, that is, opportunistic. Again, courts do not like to become instruments of oppression..”).

<sup>50</sup> The point is widely recognized by both AAUP-affiliated authors and other higher education scholars and counsel. *See e.g., Euben & Lee* 2006:286 (“Institutions on rare occasions demote faculty members from certain ranks or status as a form of discipline. The AAUP generally views reductions in faculty rank, such as from associate to assistant professor, as an inappropriate sanction, except in situations where the promotion had obtained through fraud or dishonesty.”); *Id.* at 86 n.332 (Euben & Lee, similar to Senate Chair Mellichamp’s 1997 statement quoted earlier

faculty member" (UC Regents 2001 item 303), such as when publications credited in a faculty member's merit or promotion are later found to be the result of plagiarism or data fabrication/falsification or when the faculty member's CV makes material claims about academic publications and accomplishments that are fraudulent. Occasionally UCP&T discusses proposals for further clarify/restrict the APM-016 demotion rule (UCP&T 2011b), but since the rule is already fairly straightforward **I suggest that a more effective approach is for UCP&T to simply engage in more communication and outward reporting to Senate divisions and campus P&T committees about demotion instances it disapproves of, including not only after-the-fact communications but also in annual P&T trainings. Between the upward reporting obligations to UCP&T under Bylaw 334.B and especially 336.F.10 after each disciplinary hearing, without violating the confidentiality provisions of policy and the individual parties, UCP&T can make clear in writing (e.g., not name the campus) to Academic Assembly, Senate Divisions and campus P&T committees where an individual P&T hearing committee has strayed into making an inappropriate recommendation of demotion when it should have instead recommended suspension or termination upon findings such as teaching misconduct, bullying, sexual harassment, racial harassment.** If a Chancellor and the faculty member are agreeing to a questionable demotion via a post-hearing mediation/resolution process, then after Bylaw 334.C and Bylaw 336.D procedures the Senate Division and UCP&T can express disapproval through similar routes of communication.

In addition, given the constraints of only six sanctions authorized under APM-015/016, **another suggestion would be to add a new sanction for middle-of-the-spectrum misconduct that could be called "ineligibility for merit and promotion actions for a specified number of years."** Unlike demotion, this sanction would not have to be limited to cases in which the misconduct was connected to fraud or other misrepresentations in the previous academic personnel decision, and it would afford flexibility in combination with either a reduction in salary or suspension or both. Moreover, I do not believe this suggested sanction would create the merit file headaches that Mellichamp (Senate Source, 1997a-b) and Euben & Lee (2006) identify with problematic demotions. Rather, if a faculty member is held back from putting their merit file forward for two or three additional years, then their personnel situation would "catch up" to their earned cumulative level of accomplishment when the person becomes eligible to submit their next merit or promotion file. Two points that would need to be clarified with such a sanction are that 1) this sanction cannot extend the tenure clock (i.e., the sanction can only be applied to tenured faculty); and 2) mandatory reviews at least every five years per APM-200-0 (which also serve a different minimum competence/performance function, including as a precursor of APM-075 actions) must go forward and are unaffected by this sanction.

## Appendix B: UC Academic Senate [Bylaw 140 \(late-1950s to 1964\)](#)

140. *Privilege and Tenure.*--(A) This committee shall consist of fourteen members, seven from the Northern Section of the Senate and seven from the Southern Section. The seven members from the Southern Section shall be, *ex officio*, the five members of the Committee on Privilege and Tenure of the Los Angeles Division and the Chairmen of the Committees on Privilege and Tenure of the Riverside and Santa Barbara Divisions. The Committee on Committees of each Section of the Senate shall designate the chairman of the appropriate local subcommittee, and these chairmen shall serve in alternate years as chairman of the committee as a whole. The committee shall take cognizance of all matters affecting the privilege or the tenure of all officers of instruction of the University. The Northern sub-committee shall conduct hearings in individual cases. In the Southern Section hearings in individual cases shall be conducted by the appropriate divisional Committees on Privilege and Tenure.

(B) Proceedings for the dismissal, suspension, or demotion of officers of instruction shall be conducted in accordance with the following principles and rules of procedure:

in Section V of this paper, note: "The mechanics of a demotion would seem to raise a number of issues, including what are the conditions to be met to restore the previously held rank--simply the absence of further misconduct or additional academic achievement? If absence of misconduct, for how long?"; Franke 2002:10 ("In 1992 AAUP's Committee A on Academic Freedom and Tenure considered whether reduction of a faculty member's rank was an appropriate sanction and concluded that, except in situations in which the rank may have been obtained through academic fraud, this penalty is not appropriate in the academic community. In the committee's view, a rank earned through scholarly achievement should not be reduced as a disciplinary measure."); Barsness 2019 at Exh. 2:3 (University of Washington faculty task force report noting: "AAUP generally views reductions/demotions in faculty rank (e.g., from associate to assistant professor), as an inappropriate sanction, except in situations where the promotion is obtained by fraud or dishonesty.").

**(1) PRINCIPLES**

The defendant shall have an opportunity to be heard in his own defense by all members of the committee who pass judgment on his case. In the hearing of charges of incompetence, the testimony of faculty members in the same field, either from his own or some other institution, shall always be taken.

**(2) PROCEDURE**

(a) *Complaint.* Charges against an officer of instruction may be filed with the committee only by the President or his designated representative. The charges shall be in writing, shall be entitled the "complaint," and shall contain a plain and concise statement of the facts constituting the basis of the charges.

(b) *Service of Complaint.* Upon receipt of the complaint the chairman of the committee shall promptly deliver a copy to the defendant or send it by registered mail to his last known place of residence.

(c) *Answer to Charges.* The defendant shall have fourteen days from the date of receipt in which to file an answer in writing with the committee. The chairman of the committee, on written application filed with him, may grant a reasonable extension of time for the filing of an answer.

(d) *Notice of Hearing.* Upon receipt of the answer, or upon failure of the defendant to file an answer, the committee shall set a date for the hearing. The defendant shall be given, either personally or by mail, at least ten days' notice of the time and place of the hearing.

(e) *Hearing.* At the time and place fixed, the committee shall hold a hearing on the charges. No member of the committee shall sit on a matter that involves a member of his department or division. A majority of the committee shall constitute a quorum for the conduct of the hearing. Except as hereinafter provided, the hearing shall be conducted according to such rules as the committee may from time to time establish. The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any oral or documentary evidence may be received if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, but the committee shall as a matter of policy provide for the exclusion of irrelevant or unduly repetitious evidence. All findings, conclusions, and recommendations of the committee shall be supported by and in accordance with substantial evidence. Mere uncorroborated hearsay, however, shall not constitute substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. The defendant shall be entitled to be present at all sessions of the committee when evidence is being received and to have with him an adviser of his own choice who may act as counsel. Likewise, the person preferring the charges shall be entitled to be present when evidence is being received, and to be represented during the hearing by any person of his choice. A full stenographic record of the hearing shall be made and shall be available only to the parties concerned.

(f) *Findings, Conclusions, and Recommendation.* At the conclusion of the hearings, the committee shall promptly make its findings of fact, conclusions, and recommendation, the original of which together with the stenographic record shall be forwarded to the Chancellor, Provost, or Director to whom the defendant is responsible. Copies of the findings, conclusions and recommendation shall be transmitted to the defendant and to the person preferring the charges. The findings, conclusions, recommendation, and stenographic record of the hearing, original and copies, shall be confidential.

(C) Any officer of instruction who believes his privileges or tenure have been infringed or violated may take his case to the Committee on Privilege and Tenure. If such person makes out a prima facie showing of such infringement or violation, the committee shall immediately communicate that fact to the appropriate administrative officer and shall make such further investigation of the facts as it deems appropriate. The committee may, in its discretion, after due notice to the parties, hold a hearing as prescribed in (B) (2) (e) of this By-Law and make findings, conclusions, and recommendations as prescribed in (B) (2) (f).

**Appendix C: UC Academic Senate [Bylaw 112 \(1971 to 1975\)](#)**

112. *Privilege and Tenure.* (A) *Membership.* This committee consists of one member from each Division normally serving three-year staggered terms and so selected that at least one-half of the members currently serve on, or have had previous service on, a Divisional Committee on Privilege and Tenure. (Am 6 Mar 74)

(B) *Duties.* This committee advises the President of the University, the Academic Senate and its Divisions, and the Divisional Privilege and Tenure Committees on general policies involving academic privilege and tenure.

(C) *Procedure.* Proceedings for the dismissal, suspension, or demotion of members of the Academic Senate or officers of instruction shall be conducted before a Divisional Committee on Privilege and Tenure in accordance with the following principles and rules of procedure:

**1. PRINCIPLES**

The defendant shall have an opportunity to be heard in his own defense by all members of the committee who pass judgment on his case. In the hearing of charges of incompetence, the testimony of persons of recognized competence in the same field, either from his own or some other institution, shall be taken.

## 2. PROCEDURES

1. *Complaint.* Charges against a member of the Academic Senate or an officer of instruction may be filed with the committee only by the President or his designated representative. The charges shall be in writing, and shall contain a plain and concise statement of the facts underlying the charges.
2. *Service of Complaint.* Upon receipt of the complaint the chairman of the committee shall promptly deliver a copy to the defendant or send it by registered mail to his last known place of residence.
3. *Answer to Charges.* The defendant shall have fourteen days from the date of receipt in which to file an answer in writing with the committee. The chairman of the committee, on written application filed with him, may grant a reasonable extension of time for the filing of an answer.
4. *Notice of Hearing.* Upon receipt of the answer, or upon failure of the defendant to file an answer, the committee shall set a date for the hearing. The defendant shall be given, either personally or by registered mail, at least ten days' notice of the time and place of the hearing.
5. *Hearing.* At the time and place fixed, the committee shall hold a hearing on the charges. The committee shall consider only such charges as are set forth in the complaint. No member of the committee shall sit on a matter that involves a member of his department or equivalent unit. A majority of the committee shall constitute a quorum for the conduct of the hearing. Except as hereinafter provided, the hearing shall be conducted according to such rules as the committee may from time to time establish but it need not be conducted according to technical rules relating to evidence and witnesses. Any oral or documentary evidence may be received if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, but the committee shall as a matter of policy provide for the exclusion of irrelevant or unduly repetitious evidence. All findings, conclusions, and recommendations of the committee shall be supported and in accordance with substantial evidence. Mere uncorroborated hearsay, however, shall not constitute substantial evidence. No evidence other than that presented in the Complaint and Hearing shall be considered by the committee or have weight in the proceedings, except that notice may be taken of any judicially noticeable fact. Parties present at the hearing shall be informed of matters thus noticed; and every party shall be given reasonable opportunity on request to refute such matters. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. The defendant shall be entitled to be present at all sessions of the committee when evidence is being received and to have with him a representative of his own choice who may act as counsel. Likewise, the person preferring the charges shall be entitled to be present when evidence is being received and to be represented during the hearing by any person of his choice. A full record of the hearing, by recording tape or otherwise, shall be made and upon request a transcript thereof shall be furnished to the parties concerned.
6. *Findings, Conclusions and Recommendation.* At the conclusion of the hearing, the committee shall promptly make its findings of fact, conclusions, and recommendation, and forward them to the Chancellor who filed the charges, to the President of the University, and to the chairman of the University-wide Committee on Privilege and Tenure. Copies of the findings, conclusions and recommendation shall be transmitted to the defendant and to the person preferring the charges. The findings, conclusions, recommendations, and stenographic record of the hearing, original and copies shall be confidential except when the defendant has authorized their release.

(D) Any member of the Academic Senate or officer of instruction who believes his privileges or tenure have been violated may complain to the Committee on Privilege and Tenure of his Division. If such person makes a reasonable showing of such violation, the Divisional committee shall make such further investigation of the facts as it deems proper and notify the appropriate administrative officer that the complaint has been filed. The *Divisional* committee may, in its discretion, after due notice to the parties, hold a hearing as prescribed in (C) (2) (e) of this By-Law and make findings, conclusions, and recommendations as prescribed in (C) (2) (f). It may, in its discretion, request appointment of a qualified person or persons, designated by the chairman of the University Committee to assist in the organization and conduct of the hearing. (Am 15 June 71)\*