

# Five years post Nirbhaya: Critical insights into the status of response to sexual assault

SUNITA VS BANDEWAR, AMITA PITRE, LAKSHMI LINGAM

## Abstract

*It is five years since the fatal gang rape of Jyothi Singh (Nirbhaya), a physiotherapy student, on December 16, 2012, in New Delhi, the capital of India. The legal and policy reforms triggered by the Nirbhaya case will remain a watershed moment in the history of efforts towards seeking justice for survivors of gender-based violence in India. The Criminal Law (Amendment) Act, 2013 and the "Guidelines and protocols: Medico-legal care for survivors/victims of sexual violence" issued by the Ministry of Health and Family Welfare in March 2014 are two landmark reforms. March 2018 marks four years since the issuance of these Guidelines and five years since the Criminal Law (Amendment) Act, 2013. Any reasonable tribute to Nirbhaya would constitute fair implementation of legal reforms, efforts to strengthen multi-sectoral response and sincere attempts to reduce crimes against women, gender and sexual minorities, and children.*

*This paper reviews the issue, through a close study of recent cases of rape, police responses, court judgements, studies, news reporting and field-based observations. It brings forth the gaps in implementation that persist, and constitute a major obstacle in making these progressive policies and reforms effective. Given the fact that the reforms are intersectoral in nature, implementation has been particularly challenging. Lack of efficient implementation of such policies and reforms amounts to denying survivors their right to justice.*

## Background

The recently released National Crime Records Bureau (NCRB) Report 2016 (1) records an increase of 12.4% in rape cases from 34,651 in 2015 to 38,947 in 2016. The number of cases of sexual assault is on the rise, due to improved reporting and possibly due to an actual increase in these crimes. In this paper we look at how women are faring in *securing justice* by reviewing some recent judgments, and analysing the implementation of legal reforms initiated by the Government of India in the wake of the Nirbhaya<sup>1</sup> incident (2).

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In September 2017, two regressive judgments in rape cases caused an uproar in the country. These are the Jindal Global Law School (henceforth JGLS) gang rape case and the Mahmood Farooqui case. Both cases date back to 2015. In the JGLS gang rape case, the Punjab and Haryana High Court (3) suspended the sentence awarded by the Additional District and Sessions Court in March 2017 (4) and granted bail to all three accused. The High Court argued, "The testimony of the victim does offer an alternate story of casual relationship with her friends, acquaintances, adventurism and experimentation in sexual encounters and these factors would, therefore, offer compelling reasons to consider the prayer for suspension of sentence favourably particularly when the accused themselves are young and the narrative does not throw up gut-wrenching violence, that normally precede or accompany such incidents." (3: pp. 9-10)

The judgment in the JGLS case raises several old questions once again: should a woman's "adventurism and experimentation in sexual encounters"; "casual relationships with friends" strip her of her right to autonomy and dignity? Should every encounter of rape be accompanied by "gut-wrenching violence" for it to be considered a crime against women arousing public and government response? Should every rape case be like that of Nirbhaya and Jisha<sup>2</sup> (5)? Feminist movements and feminist organisations have argued that, "... In so doing, the Punjab and Haryana HC has strengthened the dangerously patriarchal notion that rape is not rape when the woman is "promiscuous", and that "promiscuous" women invite rape since their "promiscuity" can be read as consent. And what has been the relevance of post Nirbhaya reforms if it is not able to crack the mindsets of those who are critical to delivering justice? It also stands in clear violation of the Indian Evidence Act that specifically prohibits referencing the victim's sexual history or character in an adjudication of cases of sexual assault. ..." (6).

In the Farooqui case, the Delhi High Court dismissed the well-argued judgment of the trial court (7) awarding Farooqui a seven-year jail term and fine of Rs 50,000, for sexually abusing a research scholar from Columbia University. The Delhi High Court judgement dated September 25, 2017 (8) is founded on skepticism about the "lack of consent" by the prosecutrix, that is, the survivor/victim. Contravening the current legal framework under Section 375 of the Indian Penal Code (IPC), 1860 amended under the Criminal Law (Amendment) Act, (henceforth CLA, 2013) (9) the judgment says, "Instances of woman behaviour are not unknown that a feeble 'no' may mean a 'yes'. If the parties are strangers, the same theory may not be applied... But same would not be the situation when

parties are known to each other, are persons of letters and are intellectually/academically proficient, and if, in the past, there have been physical contacts. In such cases, it would be really difficult to decipher whether little or no resistance and a feeble 'no', was actually a denial of consent." (8: p. 59). In this case the submission to the Delhi High Court by Vrinda Grover (10) acting for the prosecutrix draws attention to the "... manner in which the character and past sexual history of the prosecutrix was repeatedly referred to by the defense during oral arguments, despite a clear injunction of law in this regard" (10: p. 47). This clearly discounts and disrespects Section 53A of the Indian Evidence Act (IEA), 1872 amended under CLA 2013 (9), which makes the past sexual history of the prosecutrix irrelevant, in cases relating to rape and other sexual offences.

Another case that caught the attention of the media and the civil society is the gang rape of a young girl in Bhopal in a busy area (11). Responses of the police (resistance to filing a first information report) (11), the examining doctor (12), and the concerned minister only demonstrate that the post Nirbhaya reforms have no relevance for them. The minister's response was to make a public announcement banning coaching classes after 8 pm. (11, 13). These responses demonstrate that representatives of the healthcare system and government are entirely oblivious to what causes gender-based violence (GBV) and continue to advocate that stopping women and girls from being out on the streets is a solution to contain such violence.

The aforementioned judgments and the institutional response to the Bhopal gang rape are not exceptions. The Human Rights Watch (HRW) report "*Everybody Blames Me*" (14) refers to a number of judgments that entertained two-finger-test (TFT) results and doctors who explicitly mentioned "habituated to sexual intercourse" in their medical opinions. The TFT places on record the sexual history of the prosecutrix, thereby adversely impacting the outcome of legal proceedings. The Supreme Court in 2013 condemned the use of TFT as it violates survivors' right to privacy, physical and mental integrity and dignity (15). The HRW report (14) suggests that both the medico-legal practitioners and judiciary continue with their ill-informed practices despite the CLA 2013 (9) and a Supreme Court condemnation (15).

The report also documents a wide range of issues on the ground in terms of persistent gaps in enforcing the laws, policies and guidelines meant to secure justice for survivors of sexual violence. It draws on insights from in-depth research into 21 rape cases, review of research by organisations from within India, and conversations with more than 65 individuals including survivors, their family members, lawyers, civil society activists, advocates, doctors, forensic experts, and government and police officials. This empirical reality warrants reflection on the reforms post Nirbhaya and raises questions as to what efforts are being made by the government and various concerned authorities from across sectors to plug the gaps between the reforms and their implementation. This paper provides a broad overview of the ground reality post-Nirbhaya reforms.

## Legislative reforms post Nirbhaya

The CLA 2013 (9) and the "Guidelines and protocols: Medico-legal care for survivors/victims of sexual violence" (henceforth MoHFW Guidelines) (16) are two landmark responses of the Government of India to the public protests across the country that the Nirbhaya case evoked in December 2012. March 2018 will mark four years since the issuance of these guidelines. A third response has been to institute "One Stop Centres" to provide immediate to long-term care for survivors of GBV.

The MoHFW Guidelines (16) are operational tools facilitating implementation of various sections of the law (including but not restricted to CLA 2013 (9)) binding on healthcare providers. They provide guidance on: creating a safe environment for the survivor to speak about the assault, providing physical and psychological care to the survivor including reproductive healthcare, collecting forensic evidence while maintaining the dignity and autonomy of the survivor, safeguarding the rights and meeting the requirements of survivors who may be children, persons with disability, belonging to gender and sexual minorities, and/or facing difficulties with language. Although referred to as "Guidelines", they ought to be legally binding on healthcare service providers because of the legislative frameworks that inform them.

Section 357C of CLA 2013 (9), among other progressive aspects, recognises the right to no-cost first-aid or medical treatment in public and private healthcare facilities for all survivors of sexual violence. Furthermore, failure to treat and provide medico-legal care is now an offence under Section 166B of the IPC as per the CLA 2013 (9).

Respecting survivors' agency and autonomy as healthcare providers, responding to survivors when they approach the healthcare system, asserting the irrelevance of sexual history of survivors/victims of sexual assault and TFT, and including sexual assault forensic evidence (SAFE) kits<sup>3</sup> in the Guidelines are some of the key aspects of these reforms. Complementing the reforms, the government has also made announcements (17, 18), regarding prevention of such crimes and safeguarding the interests of survivors. Implemented together, in letter and spirit, these were all expected to deeply impact the responses of the police, judiciary and healthcare systems to survivors of sexual assault. They would have contributed to ensuring delivery of justice to survivors of GBV.

The most recent National Health Policy 2017 (19) explicitly articulates the government's commitment to strengthening women's access to healthcare "...by making public hospitals more women-friendly and ensuring that the staff have orientation to gender-sensitivity issues. This policy notes with concern the serious and wide-ranging consequences of GBV and recommends that the health care to the survivors/victims need to be provided free and with dignity in the public and private sector." (19: p 14). However, it would certainly not be meaningful without a system in place that would facilitate successful implementation and realisation of the ultimate goals.

We have identified key domains of concern regarding the implementation of the reforms that require the immediate attention of the concerned government offices.

### **MoHFW Guidelines: Major gaps in implementation**

In the absence of any policy guidance regarding the implementation of the MoHFW Guidelines (16), a number of matters remain ambiguous. These include lack of guidance from the state and central governments regarding (a) the time frame within which and the mechanism by which the healthcare system must equip itself to address sexual violence (b) resource allocation for infrastructure, human resources, capacity building and an internal monitoring system and (d) pathways for inter-departmental collaboration for extending comprehensive support to survivors.

Adoption of the MoHFW Guidelines by the states is an important first step towards implementation. According to the HRW report (14), so far only nine states have adopted these Guidelines. The Kerala government issued its own version of the guidelines for the state healthcare system (20), undermining the very spirit of the MoHFW Guidelines (16). The Kerala version ignores a number of progressive provisions and has guidelines to the contrary (21). Although amending guidelines may fall within the jurisdiction of state governments, such subversion is alarming and makes a case for all states to adopt the MoHFW Guidelines (16) in toto.

### **Slippery slope: Age of consent and mandatory reporting**

A research study in India (22) reports that 19% of men (between the ages of 15 to 29) and 9% of women (between the ages of 15 to 24) had a romantic relationship before they were married. Of those in a partnership, 44% of young men and 26% of young women had progressed to having sex with their partner. Overall 15% of men and 4% of women reported having pre-marital sex. Of these, one in seven women who were in a romantic relationship with an opposite-sex partner, reported that her first sexual contact was forced. The probability of girls and boys being in a romantic relationship increased with increase in age, from early adolescence to late adolescence to early adulthood.

Other studies show that in nearly a quarter to a third of rape cases registered, the girl states in the court that she had consensual sex with the man (23, 24, 25).

Even when there are cases of sexual abuse of women, young girls and boys that call for attention, legal reforms have brought in a set of new contradictions such as the refusal to recognise pre-marital consensual sex and a blanket denial of the right to consent for girls below 18 years.

The legal reforms under discussion here pose certain challenges due to the contradictions inherent in protecting the privacy of the woman/girl on the one hand, and ensuring that all cases receive attention through mandatory reporting. Section 357C of the Criminal Procedure Code, 1973, as

amended under CLA 2013 (9) mandates that hospitals report all cases of sexual offences to the police. Failure to report is treated as a punishable offence under Section 166B of the IPC amended under CLA 2013 (9). The CLA, 2013 (9), by raising the age of consent to 18 years, has clubbed both consensual and non-consensual sexual relations among young people as a criminal act. Combined with the Protection of Children Against Sexual Offences (POCSO) Act, 2012 (26), sexual activity below the age of 18 years, both marital and pre-marital, comes under the scanner. For example, as per this provision in POSCO if any girl younger than 18 years approaches a doctor for treatment of sexually transmitted infections or for a Medical Termination of Pregnancy (with due consent of a parent or guardian), the healthcare centre is expected to report it as a case of sexual abuse to the authorities, irrespective of her wishes and consent. Similarly, if any young girl or woman approaching a health facility for treatment is suspected to be a victim of sexual assault, it has to be reported without heeding her version or recognising her reproductive rights. These contradictory provisions impinge on women and children's rights to comprehensive health care, their right to refuse medical examination or file an FIR with the police, and their access to early and safe abortion services (27).

A recent Supreme Court judgment (28), for the first time in India, has read down the marital rape exception, although only limited to an underage wife. On the other hand, read with the increase in age of consent and POCSO, it again conflates the distinction between consensual and non-consensual sex and makes the will and consent of the woman immaterial. As per the National Family Health Survey 4 (2015-16) (29), 27% of women aged between 20 and 24 years were married below the age of 18 years. While early age at marriage and pregnancy are key concerns for the country, criminalising all consensual sexual relations undermines the sexual and reproductive rights of adolescents and young adults.

These provisions are resulting in women and girls preferring not to access treatment from formal services. These contradictions are leading to ethical dilemmas for doctors while offering services to survivors. These contradictions need to be reviewed and appropriately addressed.

### **Under-utilisation of the Nirbhaya Fund**

The central government announced the creation of a Nirbhaya Fund in its 2013 union budget. An allocation was made of Rs 1,000 crore per year for three years starting from the financial year of 2013-14. This sum of Rs 3,000 crore is a non-lapsable corpus fund to support initiatives by the government and NGOs working towards protecting the dignity of women in India and ensuring their safety. Some of the initiatives envisaged to be undertaken with the Nirbhaya Fund were technological fixes to deal with issues of women's safety. These include: introduction of an SOS button in phones which was to be launched in 157 cities in two phases; a pilot scheme of setting up an SOS alert system in trains in central and western zones through a railway helpline, and installation of closed

circuit television (CCTV) cameras and GPS in public transport in 32 towns each with a population of over one million; setting up of One Stop Crises Centres (OSCs) in every district as single point access for victims of sexual assault and domestic violence; a victim compensation fund for rehabilitation of victims of acid attacks; and a programme named “*Shubh*” for mapping vulnerabilities and identifying areas and categories of women who need special protection measures such as women in sex-work or widowed women (30). Have these schemes taken off over the past four years? Are they making a difference to affected individuals and their families? How much of the allocated funds has actually been spent to date?

Under-utilisation of the Nirbhaya Fund was criticised extensively in the popular press to the extent that the Supreme Court of India issued a notice in May 2016 (31) to the Centre and all the state governments questioning the non-utilisation of the Nirbhaya Fund. In response, the government issued a clarification in January 2017 (17) that the Ministry of Finance had issued guidelines from time to time for administration and utilisation of the fund. According to this clarification, the amount allocated to different projects or schemes under the Nirbhaya Fund until Jan 2017 was approximately Rs 1,530 crores and the expenditure incurred until then was approximately Rs 400 crore. While the Ministry records show the allocation of the fund to different ministries and NGOs, there is not much information available on where the funds have been utilised. It appears that the schemes and projects under the Nirbhaya Fund have been drafted but not implemented at ground level (32).

### Mobile applications and their status

The Ministry of Communications and Information Technology issued a notification mandating the facility of a panic button and inbuilt global positioning system (GPS) from January 1, 2017, and January 1, 2018, respectively (18). The press release by the government dated August 4, 2017 (33) indicated that the aforementioned timelines were missed. This press release mentions that these buttons were to be made operational by the end of September 2017, without any explanations for the inordinate delay.

On the other hand, the pre-occupation with technological fixes such as mobile panic buttons assumes that a majority of sexual assaults are like Nirbhaya’s, by strangers, in alien places and after dark. According to information obtained from the NCRB report (1) and a study by Partners for Law and Development, New Delhi (34), a majority of sexual assaults takes place at home or in familiar places, and by relatives, employers or acquaintances. This should be borne in mind and more emphasis laid on tailoring services to the reality of sexual assaults seen in India.

### The current status of One Stop Centres

Post Nirbhaya, the Justice (Retd.) Usha Mehra Commission (35) mandated the establishment of OSCs at notified hospitals to help victims of sexual assault and ensure speedy justice. The

recommendation by the government to set up OSCs on a pilot basis has also featured prior to the Nirbhaya case in the report by the Working Group on Women’s Agency and Empowerment, 12th Plan (36). This formal commitment to OSCs by the government has been an important step forward and a solid building block in strengthening the overall system, which would be responsive to survivors of sexual assault.

The purpose of these OSCs is to give women easy access to the police, medical facilities, emotional support and other required services. Each Centre is expected to be equipped with a psychologist, a doctor, a nurse, a lawyer, police and facility for 8 beds, which can be expanded (37). Police and NGO run OSCs have been set up across several states in the country along with Special Cells for Women and Children to address domestic violence. The clarification by the MWCD in Jan 2017 via a press release (17) mentions that 79 OSCs have become operational and all of the total 186 OSCs would become operational by July 2017. The most recent update could only be found in a press release dated Aug 4, 2017 (33). It mentions, “The Ministry of Women and Child Development (MWCD) has set up 151 Centres till date under the new scheme of One Stop Centres (OSCs) for women affected by violence. 30,000 such women affected by violence have been assisted at these centres till date. ... The WCD Ministry is trying to get 600 OSCs for setting up across the country ....” (33: p. 1). This shows that the target of setting 186 OSCs by July 2017 has already been missed and there is no timeline stated for completing the new target of establishing 600 OSCs. Other than this brief press release, there is no further detailed update available on the website of MWCD. The last update available on the WCD website is dated 2015<sup>4</sup>.

In the absence of any detailed information that is easily accessible even to researchers and civil society, to have mere announcements regarding OSCs to be established in large numbers is disconcerting. Would these be equipped with appropriately trained human resources? Are there standard operating procedures to be followed at each of these? What systems are put in place to ensure inter-sectoral engagement in general, and for each case the OSC receives, in particular? Are there robust systems in place for awareness generation among the communities and key stakeholders about the existence of these centres and mechanisms to access information? Above all, are they being reviewed and evaluated?

Inadequate resources at the OSCs, lack of awareness about OSCs among women, and inability to serve as “One Stop” centres due to poor coordination across various stakeholders, co-existence of multiple protocols seem to be critically impinging on the functioning of the OSCs. At present there seem to be two models of OSCs: functioning either on hospital or police premises or are non-government organisations are entrusted to set them up and run. They are expected to handle cases under the Protection of Women from Domestic Violence Act, 2005 (38), POCSO, 2012 (26) and CLA, 2013 (9). The idea of hospital-based crisis centres is important because

public hospitals can provide affirmative confidential, one-stop access to physical and emotional healthcare, legal services and linkages to shelter homes, skill training for rape survivors/victims of GBV. These services are expected to be integrated within the functioning of the hospital. But the current design of OSCs - merely being present in the premises of public hospitals - is not geared towards integrated services.

## Discussion

The problem of implementation gaps, ie, the shortfall between the government's legislative commitment to addressing a particular issue and the translation of that commitment into concrete measures, is a global concern across the sectors (39). The policies and laws related to GBV are no exception to this trend. A six-country report (40) on implementation gaps relating to GBV laws notes that there is mounting evidence that implementation often has serious deficiencies. Similarly, Garcia-Moreno and colleagues (41) note that implementation of progressive legislation is lagging far behind. In their "call to action" they include a recommendation relating to enforcement of laws, implementation of policies, and strengthening of institutional capacities.

Our insights into the status of implementation of reforms post Nirbhaya speak to the problem of implementation gaps. A close review of a few cases, poor utilisation of funds, misguided focus on technologies in place of strengthening of institutions, and contradictions in the legal provisions seem to be posing fresh challenges. There is much to be undertaken in the realm of capacity building of all the stakeholders to harmonise the existing responses, protocols and practices, an area not touched upon by this paper. An integrated response by the Ministries of Women and Child Development, Health and Family Welfare and Home Affairs is needed. The government needs to solicit greater collaboration and support from women's groups, civil society organisations, academic institutions, medical colleges, law schools and the IT industry to ensure that care and justice are not denied through sheer negligence and callousness.

In closing, we cannot underscore enough that systematic research into this area is warranted towards better understanding of pathways and specific bottlenecks causing gaps in implementation, developing robust strategies for closing the gaps and creating an enabling and just environment for survivors of sexual assault. In the absence of this, progressive reforms on paper mean little to survivors/victims.

**Post Script:** We would like to note that during the period between our submission of this paper to *IJME* for consideration until its being queued up for online publication, the two cases - JGLS and Farooqui - were further heard in the Supreme Court of India. The Supreme Court bench criticised the order dated September 13, 2017 of the Punjab and Haryana High Court suspending the judgment by the Additional District and Sessions Court in May 2017. (42, 43). However, in the Farooqui case, the appeal by the victim to the SC against the acquittal of

the main accused by the Delhi High Court (7) has been rejected (44). The trend of under-utilisation of Nirbhaya funds continues as reflected in the reply in February 2018 by the MWCD to an RTI application (45). According to this, so far only less than 30 per cent of the current total Rs 3,100 crores of the Nirbhaya funds has been utilised.

And finally, preliminary insights into our current empirical research - supported by the Department of Health Research, Indian Council of Medical Research - to understand the response of the public health care system in Maharashtra and Telangana to GBV indicate that much concrete work needs to be done towards making a difference to survivors of sexual assault.

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## Notes

- 1 On the night of December 16, 2012, a young girl boarded a private bus in Delhi along with her male friend. Inside the bus they were brutally assaulted by four men. The girl, now known as 'Nirbhaya' in commemoration of her courage, was brutally gang raped. So brutal was the assault that she died of her injuries on December 29, 2012.
- 2 Jisha, a student of Ernakulam's Government Law College, was found raped and murdered on April 28, 2016, at her home. Her body bore multiple stab wounds and marks of torture. The case caused a public outcry in Kerala.
- 3 The kit contains the protocol, a checklist and a manual to guide examination of survivors along with all the necessary materials required for forensic examination of survivors.
- 4 The MWCD portal has posted the minutes of the first six meetings of the PAB held between April 28, 2015 and June 18, 2015 during which OSC proposals from fourteen states had been discussed and approved. They have also posted sanction orders for these fourteen states. Thereafter there are no updates available on this portal. <http://www.wcd.nic.in/schemes/one-stop-centre-scheme-1>

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## Evaluation of research in India: Are we doing it right?

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### Abstract

*The evaluation of performance in scientific research at any level – whether at the individual, institutional, research council or country level – is not easy. Traditionally, research evaluation at the individual and institutional levels has depended largely on peer opinion, but with the rapid growth of science over the last century and the availability of databases and scientometric techniques, quantitative indicators have gained importance. Both peer review and metrics are subject to flaws, more so in India because of the way they are used. Government agencies, funding bodies and academic and research institutions in India suffer from the impact factor and h-index syndrome. The uninformed use of indicators such as average and cumulative impact factors and the arbitrary criteria stipulated by agencies such as the University Grants Commission, Indian Council of Medical Research and the Medical Council of India for selection and promotion of faculty have made it difficult to distinguish good science from the bad and the indifferent. The exaggerated importance given by these agencies to the number of publications, irrespective of what they report, has led to an ethical crisis in scholarly communication and the reward system in science. These agencies seem to be unconcerned about the proliferation of predatory journals and conferences. After giving examples of the bizarre use of indicators and arbitrary*

*recruitment and evaluation practices in India, we summarise the merits of peer review and quantitative indicators and the evaluation practices followed elsewhere.*

This paper looks critically at two issues that characterise Indian science, viz (i) the misuse of metrics, particularly impact factor (IF) and h-index, in assessing individual researchers and institutions, and (ii) poor research evaluation practices. As the past performance of individual researchers and the funds they seek and obtain for subsequent projects are inextricably intertwined, such misuse of metrics is prevalent in project selection and funding as well.

This study is based on facts gathered from publicly available sources such as the websites of organisations and the literature. After explaining the meaning of impact factor and h-index and how not to use them, we give many examples of misuse in reports by Indian funding and regulatory agencies. In the next two sections we give examples of the arbitrariness of the criteria and indicators used by the agencies for the selection and promotion of faculty, selection of research fellows, and funding. We follow this up with the evaluation practices in use elsewhere. If we have cited only a few examples relating to medicine, it is for two reasons: one, medicine forms only a small part of the Indian academic and research enterprise; and two, what applies to research and higher education in other areas applies to medicine as well.

### Misuse of metrics

The regulatory and funding agencies give too much importance to the number of papers published and use indicators such as average IF, cumulative IF and IF aggregate in the selection of researchers for awards, the selection and promotion of faculty, awarding fellowships to students and grants to departments and institutions, and thus contribute to the lowering of standards of academic evaluation, scholarly communication, and the country's research enterprise.

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