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To Whom It May Concern:

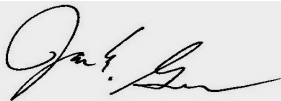
Below are two articles that outline legal and policy concerns with respect to the Department of Education's Dear Colleague Letter of 2011 regarding Title IX.

My precise comments are straightforward:

- (1) If Department statements are treated as binding obligations, they should be promulgated using either notice and comment or formal rulemaking. This practice is required by the Administrative Procedure Act. It is also sensible policy. Department policies on Title IX affect thousands of schools and millions of students, staff, and faculty. Ensuring public participation and the airing of views is critical. If department statements are not binding, but merely tentative announcements of Department positions, then they ought not be treated as legal obligations by the agency during investigation or enforcement proceedings. The law clearly requires this as well.
- (2) During compliance investigations, Department staff should not coerce schools into adopting policies and procedures that exceed any existing federal legal obligations. The threat of losing federal funds ought not be used to change primary behavior if it is not required by existing statutes, regulations, or judicial interpretation.
- (3) School policies and process should seek to protect the rights of complainants and accused, irrespective of sex or gender.

If I can provide any additional information, I would be delighted to do so.

Sincerely,



Jacob E. Gersen

Administering Sex

By Jacob Gersen & Jeannie Suk Gersen*

Sex and administrative law are not words that are traditionally uttered in the same breath. Yet, recently, administrative law scholars and courts have increasingly focused on precisely this relationship. The past decade has seen a transformation of the way sex discrimination, sexual violence, sexual harassment, and just plain sex is legally regulated in the United States. Increasingly, administrative agencies are defining what sex is permissible, requiring educational institutions to adopt particular policies on sex, and specifying how sex that deviates from those norms is investigated and adjudicated. Today, sex is a domain of the federal bureaucracy. The question is what role traditional administrative law principles will play in the administration of sex.

From Here (Sex Discrimination) to There (Sex)

The story of how administrative agencies came to be the chief arbiters of acceptable sexual conduct is part law and part politics. Title IX of the Education Amendments of 1972 states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (2012) (listing exceptions as well). The Supreme Court has described Title IX as “conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.” *Gebser*

v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998) (also discussing Title VI of the Civil Rights Act). Title IX authorizes federal agencies to implement the anti-discrimination mandate by regulating funding recipients, and by terminating funding for the failure to comply with the agencies’ regulations.

Over the course of several decades the legal and social understanding of what it means to “discriminate on the basis of sex” evolved rather dramatically through a process of judicial and agency interpretation. In the 1980s, courts and agencies administering anti-discrimination policies recognized “sexual harassment” as a form of sex discrimination. The Department of Education’s Office of Civil Rights (OCR) is the lead agency for Title IX regulations. In 1997, OCR promulgated its “Sexual Harassment Guidance” explaining that sexual harassment of students is a form of sex discrimination, and that “[s]chools are required by Title IX regulations to have grievance procedures through which students can complain of alleged sex discrimination, including sexual harassment.” Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,038 (Mar. 13, 1997) [hereinafter *Sexual Harassment Guidance 1997*]. The 1997 Guidance explained:

[A] school’s failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. Conversely, if, upon notice of hostile environment harassment, a school takes immediate and appropriate steps to remedy the hostile environment,

the school has avoided violating Title IX. Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice.

Id. at 12,040. OCR issued a Revised Sexual Harassment Guidance in 2001, which affirmed that schools must “end the harassment, prevent its recurrence, and, as appropriate, remedy its effects.” See Office for Civil Rights, U.S. Dep’t of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties iii (2001) [hereinafter *Revised Sexual Harassment Guidance*], <https://perma.cc/CEL8-6Y5D>. But “[a]s long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations.” *Id.* at 12.

The concept of a “hostile environment” that the school had a responsibility to correct, then, enabled Title IX—a command to schools not to discriminate—to reach not only the conduct of the school and its agents, but student conduct as well. The school would be discriminating on the basis of sex if a student’s acts were severe enough to create a hostile environment and the school did not have effective policies and grievance procedures in place to discover and correct the problem.

Then in 2011, OCR issued a Dear Colleague Letter (DCL) that introduced the term “sexual violence” and stated that “the requirements of Title IX pertaining to sexual harassment also cover sexual violence.” Letter from Russlynn Ali, Assistant Sec’y, Office for Civil Rights, U.S. Dep’t

* Professors of Law, Harvard Law School. This article is adapted from Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 Cal. L. Rev. 881 (2016).

of Educ., to Colleague 1–2 (Apr. 4, 2011), [hereinafter Ali, Dear Colleague Letter], <https://perma.cc/7LMK-6U8H>. This DCL focused on student conduct and explained that it was “schools’ responsibility to take immediate and effective steps to end sexual harassment and sexual violence.” *Id.* at 2.

For example: “the Title IX regulation requires schools to provide equitable grievance procedures. As part of these procedures, schools generally conduct investigations and hearings to determine whether sexual harassment or violence occurred.” *Id.* at 10. The DCL stated that any disciplinary or other procedures to resolve complaints “must meet the Title IX requirement of affording a complainant a prompt and equitable resolution.” The DCL made explicit, for the first time, that a school’s discipline process for sexual assault is regulated by OCR’s interpretations of Title IX. Sexual violence is a form of sexual harassment, which is a form of sex discrimination, which is prohibited by Title IX. The federal prohibition on sex discrimination means that schools must prevent and adequately respond to any allegation of sexual assault.

To this point, of course, we have said nothing about administering sex. The bureaucratic regulation of sexual violence, sexual harassment, and sex discrimination sounds like a rather different proposition from the bureaucratic regulation of sex itself. But as with most things in administrative law, the devil is in the details of regulatory interpretation.

The 2011 DCL defines sexual harassment as “unwelcome conduct of a sexual nature” (verbal or nonverbal) and states that “[s]exual violence is a form of sexual harassment prohibited by Title IX.” *Id.* at 3. The 2001 Guidance explained, “[c]onduct is unwelcome if the student did not request or invite it and ‘regarded the conduct as undesirable or offensive.’” Revised Sexual Harassment Guidance, *supra*, at 7-8 (quoting *Does v. Covington Cnty. Sch.*

Bd. of Educ., 930 F. Supp. 554, 569 (M.D. Ala. 1996)). The unwelcome conduct “creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program.” Ali, Dear Colleague Letter, *supra*, at 3. The 2011 DCL explained that “a single or isolated incident of sexual harassment [e.g., sexual assault] may create a hostile environment if the incident is sufficiently severe.” *Id.*

Would a verbal or nonverbal act that is seeking explicit agreement to have sex not be “unwelcome conduct of a sexual nature,” if a person to whom that act is directed “did not

“The past decade has seen a transformation of the way sex discrimination, sexual violence, and just plain sex is legally regulated in the United States.”

request or invite it” and “regarded the conduct as undesirable”? See *Harvard Univ., Sexual and Gender-based Harassment Policy: Policy Statement 2* (July 1, 2014), <http://media.thecrimson.com/extras/2014/sexual-harassment-policy.pdf>; accord Revised Sexual Harassment Guidance, *supra*, at 8. This may seem far-fetched because it is hard to imagine that one such act could create a hostile environment and therefore constitute sexual harassment and therefore discrimination. But in a letter to the University of Montana regarding a Resolution Agreement to resolve an OCR Title IX investigation, OCR wrote that rather than limit sexual harassment

claims to unwelcome conduct of a sexual nature that creates a hostile environment, the university should define sexual harassment “more broadly” as:

[A]ny unwelcome conduct of a sexual nature. Defining “sexual harassment” as “a hostile environment” leaves unclear when students should report unwelcome conduct of a sexual nature and risks having students wait to report to the University until such conduct becomes severe or pervasive or both.

Letter from Anurima Bhargava, Chief, Civil Rights Div., Educ. Opportunities Section, U.S. Dep’t of Just., & Gary Jackson, Reg’l Dir., Office of Civil Rights, Seattle Office, U.S. Dep’t of Educ., to Royce Engstrom, President, Univ. of Mont., & Lucy France, Univ. Counsel, Univ. of Mont. (May 9, 2013), <http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf>. Absent a requirement of either severity or pervasiveness, the conduct that schools must prohibit, prevent, and discipline is simply conduct of a sexual nature that is unrequested and regarded as undesirable.

Similarly, although OCR made clear that a school’s obligation to prevent and respond to sexual harassment includes an obligation to prevent or respond to sexual violence, which itself includes by virtue of OCR definition “sexual assault,” that term is not defined in Title IX regulations or guidance. As criminal law evolved over the past decades, the crime of rape was increasingly called sexual assault, but sexual assault also became an umbrella term that would cover nonpenetrative, nonforcible, and nonconsensual acts, in addition to the paradigmatic sexual violation of forcible rape. Last year, the Department of Justice defined the term as “any type of sexual contact or behavior that occurs without the explicit consent of the recipient.” Sexual Assault, U.S. Dep’t Just., <http://www.justice.gov/ovw/sexual-assault> (last updated Apr. 2, 2015). That is, sexual conduct

without explicit consent is sexual assault; sexual conduct with consent is just sex.

Given that schools must adequately prevent and discipline sexual assault or risk being defunded by the federal government, the meaning of consent is obviously key. To this point, however, the federal bureaucracy has required schools to publish the applicable definition of consent, but has elected not to provide a definition. That means schools have been left to their own devices, often producing definitions of consent that would seem to render the vast majority of actual sexual conduct illegal. For example, “[a]nything less than voluntary, sober, enthusiastic, verbal, noncoerced, continual, active, and honest consent is Sexual Assault.” Univ. of Wyo., *Where is Your Line: Consent is Sexy* 3, http://www.uwyo.edu/stop/resources/10_stop_consentSexy_booklet.pdf (last visited Apr. 3, 2016). These definitions are not hypothetical. Crossing the consent line is supposed to trigger investigation and adjudication, as required by the federal bureaucracy. Someone who has unenthusiastic sex or sex while tipsy is being sexually assaulted, according to the operative definitions of consent being published in many schools’ Annual Security Reports mandated by other federal laws like the Clery Act. 20 U.S.C. § 1092(f).

Because defining consent to include enthusiasm and other markers of desire diverges rather starkly from anything familiar to criminal law or even tort law, these transformations have required active educational campaigns on campus. Some schools supply some suggested phrases that students could use in the midst of a sexual encounter in order to “Make Consent Sexy” or “Make Consent Fun.” Or, as one school put it: “Consent is not only necessary, but also foreplay.” Univ. of Cal., San Diego, 2014 *Annual Security Report* 15 (2014) (emphasis added), <http://police.ucsd.edu/docs/>

AnnualClery.pdf. The administration of sex has predictably produced a growing code of how-to’s for sexual arousal, proposition, and seduction.

Baby, you want to make a bunk bed: me on top, you on bottom?

Would you like to try an Australian kiss? It’s like a French kiss, but “Down Under.”

I’ve got the ship. You’ve got the harbor. Can I dock for the night?

Id. at 5. Putting aside the question whether these kinds of utterances improve or aggravate ambiguity in consent, it should be clear that these handbooks are not about rape, but rather about a set of normative aspirations for healthy sexual relationships. As one school’s materials on consent put it, “[c]ommunication, respect, and honesty are fundamental to great sex and relationships;...Consent is not just about getting a yes or no answer, but about understanding what a partner is feeling.” Consent, Brown Univ., <https://www.brown.edu/campuslife/health/services/promotion/sexual-assault-dating-violence-consent/consent> (last visited Apr. 3, 2016).

The idea seems to be that if everyone has great sex, sexual violence will somehow be stopped. We are skeptical that this program of good sex education does much to stop genuine sexual violence. But regardless, to say that schools failing to teach their students about how to have great sex have “discriminated on the basis of sex” is quite a regulatory distance traveled.

Sexual norms change and colleges have always been at the forefront of that change. What is different this time around is that the shift in norms is being engineered by the federal bureaucracy, pursuant to a statute that prohibits discrimination “on the basis of sex.” Cf. 20 U.S.C. § 1681(a). No longer is the federal bureaucracy simply monitoring whether schools are engaging in discriminatory acts. Rather, the federal bureaucracy’s apparent task is now overseeing what sexual conduct is permitted, and

how schools may or must lawfully prevent, respond, and discipline sexual misconduct. Indeed, OCR says that compliance with Title IX requires schools to put in place measures that “may bring potentially problematic conduct to the school’s attention before it becomes serious enough to create a hostile environment.” Ali, *Dear Colleague Letter*, *supra*, at 6; *see also* Sexual Harassment Guidance 1997, *supra*, at 12,044 (noting that policies prohibiting sexual harassment could even “bring conduct of a sexual nature to the school’s attention so that the school can address it before it becomes sufficiently serious as severe, persistent, or pervasive to create a hostile environment”); *Revised Sexual Harassment Guidance*, *supra*, at 19 (noting also that schools should address any problem before it becomes “sufficiently serious”). Compliance today is not merely about putting an end to a hostile environment. Rather, compliance is also about anticipating and ferreting out “potentially problematic conduct,” which extends far beyond sexual harassment or discrimination.

Administrative Law of Sex

OCR’s 1997 and 2001 Guidance memos on Title IX and sexual harassment were published after notice and comment, but the 2011 DCL was not. Instead, OCR stated its views in the 2011 DCL about what Title IX required, and then launched dozens of investigations of schools for failure to comply with the 2011 DCL’s requirements. OCR publicly threatened to terminate federal funding to schools unless they adopted policies and procedures that complied, and then entered into negotiated settlement agreements with individual schools. Most schools reached resolution agreements in which they agreed to rewrite sexual conduct policies and disciplinary procedures consistent with OCR requirements, thereby avoiding a formal finding of noncompliance. A handful did not. OCR, for example,

entered a formal finding of noncompliance for Harvard Law School.

By its own terms, the DCL is a nonbinding document that cannot impose any new legal obligation. And as such, it might be exempt from the APA's notice-and-comment requirements as either an interpretative rule or a statement of agency policy. Yet, the DCL contains interpretations that do not appear elsewhere in federal law, and, in enforcement investigations and proceedings, OCR has expressly relied on the DCL. Under the legislative rule doctrine, an agency's declaration that a policy is nonbinding is not definitive. Courts will deem the policy a legislative rule if the agency treats the policy as binding, either internally or as applied to regulated parties. It may not be lawfully enforced absent notice and comment. Given that OCR has reached resolution agreements with dozens of schools it investigated for deviating from interpretations of Title IX newly announced in the DCL, we are hard-pressed to imagine a good argument that the DCL does not contain binding requirements.

Nevertheless, the parade of schools challenging OCR's actions and interpretations has yet to commence. Before 2016, not a single institution of higher education—of which there are more than 3000—had filed a procedural or substantive challenge to the 2011 DCL. This should not be surprising. First, imagine the public relations nightmare that would be almost certain to arise if a school sued OCR to slow the implementation of policies against sexual violence. Second, and more to the point, schools—the directly regulated parties—do not really suffer harm as a result of procedurally defective, poorly reasoned, biased, or even unconstitutional policies. School bureaucracies, under the oversight of the federal bureaucracy, simply administer sexual conduct policies and discipline. No matter what conduct is prohibited, no

matter what procedures are required, and no matter how many students are or are not disciplined, it is not schools that are injured. Rather, it is students, whose conduct is subject to investigation and discipline using these procedures, who suffer injury as a result.

Lawsuits against schools brought by students disciplined using the allegedly unfair procedures articulated in the DCL are working their way through the courts. But until this year, no suit was against the Department of Education or challenged the DCL using administrative law. Three lawsuits in federal court have now done so. In one brought by

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a student, the government's position was that the student lacked standing because the harm was caused by an independent third party—the directly regulated school—and the DCL contains no new or binding requirements. If the government prevails, it will have essentially insulated itself from either public participation or judicial review. A school would have standing but no incentive to sue. Students would have incentive to sue, but no standing. As long as the government keeps using “nonbinding” guidance documents to generate

changes in conduct, it will be free to do as it chooses.

At least some of us administrative lawyers believe that process matters. One element of the DCL that even the Department of Education agrees is non-discretionary is the use of the “preponderance of the evidence” standard for the adjudication of sexual misconduct cases. After the Department of Education took comments on the very same issue when implementing provisions of the Violence Against Women Act, the Department abandoned the proposed requirement and decided not to require any particular evidentiary standard. In a procedural challenge to agency action, it is virtually unheard of to have actual evidence rather than speculation, about what would have happened had the agency used different procedures. But that appears to be precisely the case here, making it clear that the procedural defect was hardly inconsequential.

Conclusion

Between 1972 and today, a statutory ban on discrimination was transformed into a bureaucratic structure consisting of policies, procedures, and organizational forms that regulate sexual conduct. The public debate about Title IX and sexual assault on college campuses gives the impression that the target of this bureaucracy is sexual violence: that is, rape and sexual assault. Within the bureaucracy, however, the concepts of sexual violence and harassment have expanded to encompass, for example, unrequested conduct of a sexual nature that is regarded by someone as undesirable. The broader the class of conduct that is regulated in the name of regulating sexual violence as a form of sex discrimination, the larger the footprint of the growing sex bureaucracy. That may be good or bad, but if sex is going to be administered, it should be governed by standard principles of administrative law, rather than regulated in the shadows. ○

The Sex Bureaucracy

Jacob Gersen & Jeannie Suk*

We are living in a new sex bureaucracy. Saliently decriminalized in the past decades, sex has at the same time become accountable to bureaucracy. In this Article, we focus on higher education to tell the story of the sex bureaucracy. The story is about the steady expansion of regulatory concepts of sex discrimination and sexual violence to the point that the regulated domain comes to encompass ordinary sex. The mark of bureaucracy is procedure and organizational form. Over time, federal prohibitions against sex discrimination and sexual violence have been interpreted to require educational institutions to adopt particular procedures to respond, prevent, research, survey, inform, investigate, adjudicate, and train. The federal bureaucracy required nongovernmental institutions to create mini-bureaucracies, and to develop policies and procedures that are subject to federal oversight. That oversight is not merely, as currently assumed, of sexual harassment and sexual violence, but also of sex itself. We call this bureaucratic sex creep—the

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enlargement of bureaucratic regulation of sexual conduct that is voluntary, non-harassing, nonviolent, and does not harm others. At a moment when it is politically difficult to criticize any undertaking against sexual assault, we are writing about the bureaucratic leveraging of sexual violence and harassment policy to regulate ordinary sex. An object of our critique is the bureaucratic tendency to merge sexual violence and sexual harassment with ordinary sex, and thus to trivialize a very serious problem. We worry that the sex bureaucracy is counterproductive to the goal of actually addressing the harms of rape, sexual assault, and sexual harassment. Our purpose is to guide the reader through the landscape of the sex bureaucracy so that its development and workings can be known and debated.

| | |
|--|-----|
| Introduction | 882 |
| I. Sexual Deregulation? | 887 |
| II. Administering Sex | 891 |
| A. Regulation of Quasi-Crime | 892 |
| B. Discipline and Procedure | 897 |
| 1. Sex Discrimination | 897 |
| 2. Reporting Policy and Procedure | 905 |
| 3. Shadow Administration | 908 |
| C. Prevention and Risk Reduction | 912 |
| 1. Beware Poor Minorities and Sexual Fantasies | 913 |
| 2. My Brother's Keeper | 916 |
| D. Making by Measuring | 918 |
| III. Bureaucrats of Desire | 924 |
| A. The Foreplay Bureaucracy | 924 |
| B. DOE Process | 931 |
| Conclusion: Desire for Bureaucracy | 946 |

The behavior of a human being in sexual matters is often a prototype for the whole of his other modes of reaction to life.

—Sigmund Freud¹

When fully developed, bureaucracy[']s . . . specific nature . . . develops the more perfectly the more bureaucracy is “dehumanized,” the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational and emotional

1. SIGMUND FREUD, SEXUALITY AND THE PSYCHOLOGY OF LOVE 25 (1963).

elements which escape calculation. This is the specific nature of bureaucracy and it is appraised as its special virtue.

–Max Weber²

INTRODUCTION

Is bureaucracy the antonym of desire?

We are living in a new sex bureaucracy. The past several decades have witnessed a sea change in the way sex is legally regulated in the United States. We have seen a bureaucratic turn in sex regulation. Saliently decriminalized in the past decades,³ sex has at the same time become accountable to bureaucracy. Today, we have an elaborate and growing federal bureaucratic structure that, in effect, regulates sex.

By “bureaucratic turn” we mean:

First, within the federal government, evolving bureaucratic institutions formulate and enforce sex policy, applying the overlapping rubrics of sex discrimination and sexual violence. Over time, as administrative agencies have developed more law on these topics, and regulatory definitions of discrimination and violence have expanded and become more uncertain, sex itself has increasingly become a subject of bureaucratic regulation. Our claim is that through the interpretation and implementation of legal obligations relating to sexual violence and sex discrimination, the federal bureaucracy is now regulating sex itself.

Second, there has been a shift toward the use of bureaucratic tools. The mark of bureaucracy is procedure and organizational form. Early federal statutes prohibited employers and educational institutions from engaging in sex discrimination⁴ and required schools to report crimes on campus.⁵ Over time, these federal prohibitions and mandates have been interpreted to require private and public educational institutions to adopt policies and procedures to respond, prevent, research, survey, inform, investigate, adjudicate, and train. Today, the failure of a school to have certain procedures, policies, and forms is itself thought to violate federal law.

The leveraging of substantive prohibitions (for example, schools must not discriminate) to regulate procedures (for example, schools must use the preponderance of the evidence standard to adjudicate) has produced the *third* manifestation of the bureaucratic turn: the burgeoning of specified mini-

2. Max Weber, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 215–16 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

3. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

4. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (2012).

5. See Clery Act, 20 U.S.C. § 1092(f) (2012).

bureaucracies within nongovernmental institutions to administer these procedural obligations, including investigation, discipline, and prevention.⁶

In this Article, we focus on higher education to tell the story of the sex bureaucracy, although the sex bureaucracy reaches far beyond this realm.⁷ Colleges and universities are particularly important loci of the sex bureaucracy. Especially because of students' residency away from home and engagement in sexual encounters for the first time, higher education is the site of intense public attention to sexual assault. The education of captive and impressionable youth is an effective context for training in bureaucratically sanctioned sexual norms.

The story is about the steady expansion of regulatory concepts of sex discrimination and sexual violence to the point that the regulated area comes also to encompass ordinary sex. The expansion of bureaucratic reach from core to contiguous or related areas over time is a form of bureaucratic creep. Basic statistics collection and reporting requirements evolved into legal mandates for extensive bureaucracies, procedures, and policies. The federal bureaucracy required nongovernmental institutions to adopt certain organizational forms, essentially replicating itself, demanding that the mini-bureaucracies develop programs, policies, and procedures that are subject to federal oversight.⁸ Once in place, the bureaucracy becomes like many we know, creeping into domains one would not have thought to be the subject of bureaucratic regulation.⁹ We see a growth of policies within bureaucracies mandated by the government, but increasingly remote from federal laws that supposedly required their creation to begin with. The institutional foundation solidifies and the question becomes

6. Cf. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 21 (2006) ("Just think of the tremendous effort that U.S. employers and schools must devote to the regulation of sexual conduct at work, through sexual harassment policies that have produced a sexual harassment bureaucracy with its own cadre of professionals and its own legal character.").

7. The sex bureaucracy also applies to primary and secondary schools through Title IX. OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., *DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE BACKGROUND, SUMMARY, AND FAST FACTS* (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.pdf> [<https://perma.cc/J9ER-6HBV>]. There are also extensive rules about sex in the contexts of the military and prison. See *Sexual Assault Prevention and Response: Law & DOD Policy*, U.S. DEP'T DEFENSE, <http://www.sapr.mil/index.php/dod-policy> [<https://perma.cc/P9JP-DEPL>] (last visited Mar. 22, 2016); *Justice Department Releases Final Rule to Prevent, Detect, and Respond to Prison Rape*, NAT'L PREA RESOURCE CTR., <http://www.prearesourcecenter.org/news-events/news/838/justice-department-releases-final-rule-to-prevent-detect-and-respond-to-prison> [<https://perma.cc/MBN2-78EX>] (last visited Mar. 22, 2016).

8. For a general critique questioning whether universities are well suited to implement such bureaucratic procedures for investigating and adjudicating sexual violence matters, see Janet Napolitano, "Only Yes Means Yes": *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL'Y REV. 387 (2015).

9. See 2 MAX WEBER, *Bureaucracy*, in *ECONOMY AND SOCIETY* 956 (Guenther Roth & Claus Wittich eds., 1978).

what else the bureaucracy will do.¹⁰ One might call this “bureaucratic sex creep”—the enlargement of bureaucratic regulation of ordinary sex.

By “ordinary sex,” we mean voluntary adult sexual conduct that does not harm others. We do *not* mean ordinary in the sense of normal, as opposed to abnormal. To state our assumptions directly: There is a distinction between sexual violence or harassment, a wrong that law is justified in prohibiting and regulating, and sex, a liberty that consenting adults may choose to exercise. To legally regulate the former is not necessarily to regulate the latter.¹¹ Catharine MacKinnon’s critique that respecting a private space of sexual liberty “translates into a right to sexually abuse with impunity, to impose sex on the less powerful and get away with it”¹² is appealing. But valuing liberty in sex does not necessarily entail the underwriting of violent, coerced, or abusive sex. There is today a real contest about where the line between sex and sexual violence or harassment is, and as with all lines, there will be uncertainty over where some marginal cases fall. Nevertheless, most will agree that there is some line to be observed and enforced.

If the reader shares these assumptions, then our hope is to demonstrate that the federal bureaucracy is regulating sex, not merely sexual violence or harassment. Our claim is not just that the set of sexual conduct classified as illegal has grown or changed, but that nonviolent, non-harassing, voluntary sexual conduct—whether considered normal, idiosyncratic, or perverse—is today regulated by the bureaucracy. Thus we use the very imperfect term “ordinary sex,” which understandably raises hackles sounding in feminist critiques of privacy, to distinguish sex from sexual violence or harassment, and to denote nonviolent, voluntary, consensual sex among adults.

The meeting of bureaucracy’s aspiration of technocratic and procedural rationality with the realm of sex is our topic. For many theorists of bureaucracy since Weber, the characteristics of bureaucracy—the ultimate legal-rational form—are supposed to drive emotion and subjective desire out of

10. The terms “bureaucracy” and “administration” are often used interchangeably in administrative law scholarship. Although we also follow that not-quite-correct linguistic practice, it is worth a definitional discussion at the outset. Technically, administration is the task of day-to-day operations of an organization, and bureaucracy is a particular organizational form. In the United States government, the task of administration belongs mainly to the President and administrative agencies—authorities that might be one person or many, organized in a range of different ways. The administrative apparatus is organized as a bureaucracy, a large pyramid with the President on top, the cabinet departments beneath, and smaller agencies and bureaus lower still on the organizational chart.

11. *But see* CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 146 (1989) (“[T]he major distinction between intercourse (normal) and rape (abnormal) is that the normal happens so often that one cannot get anyone to see anything wrong with it.”). A pointed objection to a notion of “ordinary sex” along these lines is that within it “unequal sex can flourish and masquerade as equal sex, *as sex as such*, with the result that sex that is forced, coerced, and pervasively unequal can be construed as consensual, wanted, and free.” Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1088 (2004) (emphasis added).

12. MacKinnon, *The Road Not Taken*, *supra* note 11, at 1090, 1094.

administrative decisions.¹³ As Katherine Franke has written about sex, however:

Desire is not subject to cleaning up, to being purged of its nasty, messy, perilous dimensions, full of contradictions and the complexities of simultaneous longing and denial. It is precisely the proximity to danger, the lure of prohibition, the seamy side of shame that creates the heat that draws us toward our desires, and that makes desire and pleasure so resistant to rational explanation.¹⁴

How is the federal bureaucracy regulating sex and to what end? What does it mean to regulate sex bureaucratically? Is it different from regulating air pollution bureaucratically? Is it different from regulating sex non-bureaucratically? How does the enmeshing of bureaucracy in sex affect or change either?

At a moment when it is politically difficult to criticize any undertaking against sexual assault,¹⁵ we are writing about the bureaucratic leveraging of sexual violence and harassment policy to regulate ordinary sex. The purpose of this work is primarily to guide the reader through the landscape of the sex bureaucracy, and secondarily to inspire questions about the desirability of its particular aspects. But our own ambivalence about this bureaucratic leveraging should not be misunderstood to deny that sexual assault is a serious problem or that intolerably high levels of it exist on campuses and elsewhere. Nor should we be misunderstood to suggest that federal government regulation of sexual violence and sexual harassment is not necessary—because it is necessary. Indeed, an object of our critique is the bureaucratic tendency to merge sexual violence and sexual harassment with ordinary sex, and thus to trivialize a very serious problem: our concern is that moving in that direction delegitimizes the imperative to take sexual assault and sexual harassment seriously. Moreover, our worry is that, in regulating ordinary sex under the rubric of sexual violence, the sex bureaucracy is unfortunately counterproductive to the goal of actually addressing the harms of rape, sexual assault, and sexual harassment. That is an

13. See also, e.g., PETER M. BLAU & MARSHALL W. MEYER, BUREAUCRACY IN MODERN SOCIETY (3d ed. 1988); POLITICS, POLICY, AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY (George A. Krause & Kenneth J. Meier eds., 2005); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989); Gary J. Miller & Terry M. Moe, *Bureaucrats, Legislators, and the Size of Government*, 77 AM. POL. SCI. REV. 297 (1983); William A. Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617 (1975). See generally JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938) (arguing for a technocratic vision of federal bureaucracy); HANDBOOK OF BUREAUCRACY (Ali Farazmand ed., 1994).

14. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 207 (2001).

15. One professor at Northwestern University reports facing a Title IX investigation over an essay she had written about “sexual politics and campus” and subsequent public statements on the topic. See generally Laura Kipnis, *My Title IX Inquisition*, CHRON. HIGHER EDUC. (May 29, 2015), <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf> [https://perma.cc/XD47-R246].

important reason to pay attention to the development and workings of the sex bureaucracy.

I.
SEXUAL DEREGULATION?

Though evolving case law suggests a growing recognition of liberty in one's sex life, sexual regulation may in fact have transmuted itself into a bureaucratic regime. In *Lawrence v. Texas* in 2003, Justice Kennedy noted "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."¹⁶ *Lawrence* stated clearly that government did not have a legitimate interest in regulating private consensual sexual conduct.¹⁷ Justice Scalia in dissent lamented that *Lawrence* "effectively decree[d] the end of all morals legislation."¹⁸ Because disapproval of sexual immorality was the very same interest furthered by laws against "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity,"¹⁹ it was a reasonable inference from *Lawrence* that criminal law could no longer prohibit private consensual sexual acts, at least on the rationale of sexual morality.²⁰

The notion that people had a legally protected liberty to do as they wished in their sex lives was indeed a departure from the traditional criminal law regulation of sex. At common law, all sex was criminal except sex in a marriage: the only legal sex one could have was marital sex.²¹ Through prohibitions on adultery, fornication, sodomy, and rape, criminal law regulated virtually all nonmarital sex, but did not regulate marital rape. Thus sex fell into two categories: legal sex, corresponding to marital sex; and illegal sex, corresponding to nonmarital sex. These criminal sex prohibitions reflected marital morality: the crime of adultery was a violation of marital monogamy. Fornication was sex outside of the marital relationship. Sodomy breached the traditional marital framework because it was not reproductive in purpose.

16. 539 U.S. 558, 572 (2003).

17. *Id.* at 578 (holding that a Texas statute prohibiting sodomy "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual").

18. *Id.* at 599 (Scalia, J., dissenting).

19. *Id.* at 590.

20. *See* *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 (5th Cir. 2008) (invalidating a statute criminalizing the sale of sex toys). *But see* *Williams v. Morgan*, 478 F.3d 1316, 1318 (11th Cir. 2007) (stating that "public morality remains a legitimate rational basis . . . even after *Lawrence*").

21. *See* Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 784–86 (1988); Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 20–32 (1998) (describing the influence of crimes of extramarital sex on the development of rape law); Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 776 (2006) (discussing the parity of marriage and sexual licitness).

Two trends of the past half century are relevant here. First, sex has undergone a general legal liberalization since the sexual revolution.²² By late twentieth century, criminal laws against adultery, sodomy, and fornication were rarely enforced or altogether repealed.²³ *Lawrence* swept away any lingering bans on voluntary sex among adults in private. Second, as large swaths of nonmarital sex were decriminalized, the idea that marriage marked the border between legal and illegal sex eroded, though of course marital sexual morality remained an important feature of social life. The fact that sex is occurring before or outside of marriage is no longer the decisive feature that would make sex illegal. Indeed, as marital rape and domestic violence emerged as categories of violence prohibited and sanctioned by criminal law, it became clear that not all sexual conduct within marriage was legal.²⁴

In the same time frame, however, an alternative marker of sexual illegality came to the fore. If traditionally rape, along with adultery, sodomy, and fornication, was understood as sexual immorality, the past half century has seen a rewriting of the rationale for criminalizing rape.²⁵ In feminist law reform, rape was the harmful subordination of women.²⁶ The concept of violence qua subordination became the distinguishing feature of criminal sexual conduct.²⁷ It explained not just what was wrong with rape, but also sex with minors, sex for money, and sex in relationships of unequal power. As forms of subordination, they were impliedly violent, even if not explicitly or literally so. Statutory rape and prostitution, for example, once paradigmatic crimes of immorality,²⁸ are increasingly understood to be criminal because they subordinate a relatively powerless person.²⁹

22. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing right to access an abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (recognizing right of unmarried people to possess contraception); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing right of married people to possess contraception).

23. See, e.g., *Commonwealth v. Stowell*, 449 N.E.2d 357, 360–61 (Mass. 1983) (noting that the state's adultery statute had "fallen into a very comprehensive desuetude") (citation omitted).

24. See, e.g., *People v. Liberta*, 64 N.Y.2d 152, 171–72 (1984) (holding that a rape statute's marital exemption did not apply when wife had restraining order against husband, and ultimately finding the marital exemption unconstitutional); cf. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1464–74 (2000) (stating that rape could entitle wife to divorce based on intolerable cruelty).

25. See Jeannie C. Suk, "The Look in His Eyes": *The Story of Rusk and Rape Reform*, in CRIMINAL LAW STORIES 171 (Donna Coker & Robert Weisberg eds., 2013).

26. See MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 11, at 247–48.

27. See, e.g., KEITH BURGESS-JACKSON, RAPE: A PHILOSOPHICAL INVESTIGATION 289 (1996) ("Rape—the act and practice—subjugates an entire class of individuals (women) to another (men) . . . every woman, qua woman, is wronged by it.").

28. See, e.g., *Brockway v. People*, 2 Hill 558 (N.Y. Sup. Ct. 1842) ("It will be admitted by all, that the act of renting a dwelling house to be kept for purposes of public prostitution, is, in itself, highly indecent and immoral, evincing a mind deeply depraved and profligate."); *Regina v. Prince*, 2 L.R.-C.C.R. 154 (1875); see also *United States v. Bitty*, 208 U.S. 393, 398–402 (1908) (interpreting a statute forbidding the "importation into the United States of any alien woman or girl for the purpose of

The criminalization of rape not only survived the deregulation of sexual immorality, but also thrived as it moved into a new grouping with other legal categories addressing gender subordination, such as domestic violence and sexual harassment. Immorality mostly left by the wayside, criminal sex offenses now fly under the banner of efforts at antiviolenence and its cognate concept antisubordination. Violence and subordination are now the key concepts for illegal sex.

As the justifications evolved, the appetite for regulating sexual matters did not fade. In fact, criminalization of sexual violence intensified as private sexual conduct was increasingly decriminalized. The conduct classified as sexual violence expanded from the core of forcible rape to other sexual conduct that was not violent in the traditional meaning of the term. We have seen criminal concepts of “force” in some definitions of rape evolve to include nonphysical “intellectual, moral, emotional, or psychological force,”³⁰ and even to mean merely the force “inherent” in accomplishing sexual penetration and nothing more.³¹ Indeed, many states have shed the traditional force requirement so that rape is now sometimes defined as penetration without consent.³² With force becoming less important in ideas of sexual violence, more legal focus came to be placed on whether the sexual encounter lacked consent.

As nonconsent increasingly became the line separating legal and illegal sexual conduct, the concept expanded: lack of consent grew to mean more than physical or verbal resistance or objection to sexual conduct, and today there is a live debate over whether consent should mean “affirmative consent” as opposed to lack of objection.³³ The crime of rape was increasingly called

prostitution, or for any other immoral purpose”); *Jones v. Commonwealth*, 80 Va. 18, 21 (1885) (characterizing prostitution as “wicked and despicable”).

29. See, e.g., *Collins v. State*, 691 So. 2d 918, 924 (Miss. 1997) (“At the heart of [statutory rape] statutes is the core concern that children should not be exploited for sexual purposes regardless of their ‘consent.’ They simply cannot appreciate the significance or the consequences of their actions.”); *Garnett v. State*, 632 A.2d 797, 800, 805 (Md. 1993); *Allen v. Stratton*, 428 F. Supp. 2d 1064, 1073 (C.D. Cal. 2006) (“California has determined that the crime of pimping requires a more serious penalty than the related crime of prostitution, . . . since ‘prostitutes are criminally exploited by [pimps].’”) (citations omitted) (quoting *People v. Pangelina*, 172 Cal. Rptr. 661 (Ct. App. 1981)).

30. See, e.g., 18 PA. CONS. STAT. § 3101 (2014) (defining “[f]orcible compulsion” as the “use of physical, intellectual, moral, emotional or psychological force”).

31. See, e.g., *State in the Interest of M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992) (“[P]hysical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful.”).

32. See, e.g., N.H. REV. STAT. ANN. § 632-A:2 (2007) (defining as aggravated felonious sexual assault those assaults that occur “[w]hen at the time of the sexual assault, the victim indicates by speech or conduct that there is not freely given consent to performance of the sexual act”); N.Y. PENAL LAW § 130.25 (2001); WIS. STAT. § 940.225 (2011).

33. See, e.g., Janet Halley, *The Move to Affirmative Consent*, SIGNS (Nov. 10, 2015), <http://signsjournal.org/currents-affirmative-consent/halley> [<https://perma.cc/A4FZ-S6F3>] (last updated Nov. 16, 2015); Hannah Kozlowska, *Yes Means Yes: The Big Consent Debate*, N.Y. TIMES: OP-TALK (Oct. 15, 2014, 6:21 AM), <http://op-talk.blogs.nytimes.com/2014/10/15/yes-means-yes-the-big-consent-debate> [<http://perma.cc/47Q2-SX5N>]; Judith Shulevitz, *Regulating Sex*, N.Y. TIMES (June 27, 2015), <http://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html>

sexual assault, but “sexual assault” also became an umbrella term that would cover nonpenetrative, nonforcible, and nonconsensual acts, in addition to the paradigmatic sexual violation of forcible rape.³⁴ Rape expanded to cover more sexual conduct, and sexual assault expanded to cover much more than rape. As expanding concepts of violence and nonconsent reshaped the notion of “sexual violence,” the border between decriminalized sex and criminalized sex shifted.

In the past forty years, concern about inadequate law enforcement response to sexual violence led not only to pressure for increased and tougher criminal justice response.³⁵ It also led to pressure on noncriminal parts of the federal regulatory apparatus to increase their response to sexual violence. The federal bureaucracy took up the expanding concepts of violence and nonconsent in its efforts to bring the regulatory apparatus to bear on the problem of sexual violence. Some federal legislation and enforcement priorities focused on criminal prohibitions, but most federal activity took place outside of criminal law.³⁶

Criminal prohibitions travel as a bundle with extensive procedural protections for defendants and limitations on what conduct can be punished constitutionally. A person accused of a criminal sex offense has a right to due process, a right to counsel, a right of confrontation, and so on. The rule of lenity generally means that ambiguous criminal prohibitions will be interpreted in favor of the defendant. But in the administrative context, where the regulation is not criminal, the state can act without the processes owed to people accused of crimes. The state need not wait until prohibited conduct occurs to punish it. Bureaucratic tools can be more proactive, extensive, pervasive, preventive, and anticipatory. They can cover more conduct and more territory—and are doing so.

Conceptual moves that have accompanied the rise of serious criminalization of sexual violence have also contributed to the bureaucratic regulation of sex. The bureaucracy, not bound by the procedural rules that constrain criminal enforcement, began to regulate in the area of sexual violence, and the prominence of sexual violence grew in the federal government. With the increasing use of bureaucratic tools to expand the concept of sexual violence, the balance of regulated to unregulated sex has

[<http://perma.cc/9Z7N-FZDG>] (describing the debate over whether the American Law Institute’s Model Penal Code revision for sexual assault should adopt an affirmative-consent standard).

34. See, e.g., *Sexual Assault*, U.S. DEP’T JUST., <http://www.justice.gov/ovw/sexual-assault> [<http://perma.cc/YCV2-ZARL>] (last updated Apr. 2, 2015) (“Sexual assault is any type of sexual contact or behavior that occurs without the explicit consent of the recipient.”).

35. See generally, e.g., Cassia Spohn & Katharine Tellis, *The Criminal Justice System’s Response to Sexual Violence*, 18 VIOLENCE AGAINST WOMEN 169 (2012).

36. See WHITE HOUSE COUNCIL ON WOMEN & GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 19–32 (2014), https://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf [<https://perma.cc/QU27-P35V>] (noting that “[e]ven at its best, the criminal justice system is a limited remedy for the harm many victims have suffered,” *id.* at 21, and discussing numerous examples of noncriminal federal regulation of sexual violence).

shifted. The regulation of sexual violence is not merely an exceptional regulated island within a largely unregulated sea of sexual liberty. Contrary to *Lawrence*'s implication, the space of sex—not just sexual violence—in the United States is thoroughly regulated, and the bureaucracy dedicated to that regulation of sex is growing. It operates largely apart from criminal enforcement, but its actions are inseparable from criminal overtones and implications.

II.

ADMINISTERING SEX

The sex bureaucracy has emerged from the convergence of two legal-conceptual endeavors: the attempts to address sexual violence³⁷ and to remedy sex discrimination.³⁸ Over the decades, legal definitions of some forms of sex discrimination came to incorporate sexual violence,³⁹ and the idea of sexual violence expanded to cover nonviolent, but nonetheless discriminatory, conduct.⁴⁰ Indeed, bureaucratic overlap and cross-fertilization have led sex discrimination and sexual violence to become in many ways indistinguishable:⁴¹ violence is discrimination is violence.

What does the sex bureaucracy look like? In what follows, we describe four components working together. First, the leveraging of the concept of crime to regulate conduct that is not criminal, through federal reporting requirements that in effect extend to ordinary sex. Second, the federal oversight of institutional policies and procedures used for disciplining sexual conduct. Third, public health and risk reduction models for sexual-violence prevention that regulate conduct traditionally in the domain of morals regulation, like pornography and sexual fantasy. Finally, federal mandates to perform research on sexual climate that in effect constructs the sexual climate and promotes certain understandings of sex.

37. See, e.g., Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of the U.S. Code).

38. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012); and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (2012).

39. See, e.g., *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (holding that a high school student who was allegedly subject to sexual harassment could seek damages under Title IX); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986) (holding that a claim of hostile environment sexual harassment is a form of sex discrimination actionable under Title VII).

40. Cf. *United States v. Castleman*, 134 S. Ct. 1405, 1411 (2014) (“‘Domestic violence’ is not merely a type of ‘violence’; it is a term of art encompassing acts that one might not characterize as ‘violent’ in a nondomestic context.”).

41. See, e.g., OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., KNOW YOUR RIGHTS: TITLE IX PROHIBITS SEXUAL HARASSMENT AND SEXUAL VIOLENCE WHERE YOU GO TO SCHOOL 1 (2011), <http://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf> [https://perma.cc/QV7K-NAC8] (“Under Title IX, discrimination on the basis of sex can include sexual harassment or sexual violence, such as rape, sexual assault, sexual battery, and sexual coercion.”).

A. Regulation of Quasi-Crime

To illustrate how criminal concepts and bureaucratic models have interacted to expand federal regulation of sex, consider the trajectory of campus crime reporting, which in time came to encompass noncriminal incidents. Enacted in 1990, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act)⁴² required any institution of higher education participating in the federal financial aid program to disclose campus statistics and security information regarding certain crimes.⁴³ The Clery Act required colleges to report crime data to the Department of Education (DOE) and to publicly disclose these data in Annual Security Reports (ASRs).⁴⁴ The basic idea was that students and employees armed with information about crime on or near campuses would be able to take precautions or avoid attending or working at certain high-crime schools. Schools, in turn, would be induced to address crime more aggressively than they otherwise might.

The Violence Against Women Act (VAWA 2013), as reauthorized in 2013, amended the Clery Act to add campus reporting requirements for incidents of “dating violence, domestic violence, and stalking.”⁴⁵ It required that schools publicly disclose their programs and policies to prevent and address those incidents.⁴⁶ In requiring schools to report crime statistics, the Clery Act has always used its own definitions of the crimes. The Department of Education’s (DOE) 2014 Final Rule implementing VAWA’s changes to the Clery Act (2014 VAWA Regulations), addressed the definitional gap between what schools are required to report as criminal incidents and what may be prosecutable crimes in jurisdictions where the schools are located:

Although we recognize that these incidents may not be considered crimes in all jurisdictions, we have designated them as “crimes” for the purposes of the Clery Act. We believe that this makes it clear that all incidents that meet the definitions in [VAWA] must be recorded in an institution’s statistics, whether or not they are crimes in the institution’s jurisdiction.⁴⁷

42. The Clery Act was originally enacted as part of the Student Right-to-Know and Campus Security Act of 1990, Pub. L. No. 101-542, 104 Stat. 2381 (codified as amended in scattered sections of 20 U.S.C.), which amended the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in scattered sections of 20 U.S.C.).

43. In 1992, the Clery Act was amended to require the development and implementation of specific policies and procedures to protect the rights of sexual assault survivors. *See* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 486(c), 106 Stat. 448, 621–22 (codified as amended at 20 U.S.C. § 1092 (2012)).

44. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 486(e), 112 Stat. 1581, 1742–45 (codified as amended at 20 U.S.C. § 1092(f)).

45. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304(a)(1)(B)(iii), 127 Stat. 54, 89 (codified as amended at 20 U.S.C. § 1092(f)(1)(F)(iii)).

46. *See id.* § 304(a)(5), 127 Stat. at 89–90 (codified as amended at 20 U.S.C. § 1092(f)(8)(A)).

47. Violence Against Women Act, 79 Fed. Reg. 62,752, 62,764 (Oct. 20, 2014) (codified at 34 C.F.R. § 668 (2015)).

Thus the bureaucratic reporting regime includes not only crimes but also quasi-criminal or noncriminal incidents that federal regulations define as reportable crimes for Clery Act purposes.

Leveraging crime statistics reporting to require that schools report incidents as criminal, even when they are not crimes in that jurisdiction, allows the federal bureaucracy to expand its regulatory reach. For instance, one of the reportable crimes, as interpreted by 2014 VAWA Regulations, is “sexual assault.”⁴⁸ Sexual assault is defined in various ways in different state criminal statutes. For reporting purposes, the 2014 VAWA Regulations’ definition of “sexual assault” is “[a]n offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI’s UCR (Uniform Crime Reporting) program and included in Appendix A of this subpart.”⁴⁹ The FBI’s UCR Program actually contains two different programs with different definitions for offenses: the National Incident-Based Reporting System (NIBRS) and the Summary Reporting System (SRS). Appendix A of the 2014 VAWA Regulations defines “rape” with reference to the FBI’s UCR SRS program: “The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”⁵⁰

But the same VAWA Regulations define the three other named subcategories of “sexual assault”—fondling, incest, and statutory rape—with reference to the FBI’s other UCR program, the NIBRS, and the definitions are laid out thus:

Sex Offenses. Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.

- A. *Fondling*—The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

48. The Clery Act does not mandate statistical reporting of “sexual assault” per se, but rather “sex offenses” and “domestic violence, dating violence, and stalking.” See 20 U.S.C. §§ 1092(f)(1)(F)–(F)(iii) (2012). However, the Department of Education interprets the statute to require such reports: the Executive Summary of the 2014 VAWA Regulations states that “VAWA amended the Clery Act to require institutions to compile statistics for incidents of dating violence, domestic violence, sexual assault, and stalking . . .” 79 Fed. Reg. at 62,752. “The final regulations will—Require institutions to maintain statistics about the number of incidents of dating violence, domestic violence, sexual assault, and stalking that meet the definitions of those terms.” *Id.* “The regulations would reflect the statutory requirement that institutions compile and report statistics for incidents of dating violence, domestic violence, sexual assault, and stalking that are reported to the campus security authorities or local police agencies.” *Id.* at 62,779.

49. *Id.* at 62,784.

50. *Id.* at 62,789.

- B. *Incest*—Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- C. *Statutory Rape*—Sexual intercourse with a person who is under the statutory age of consent.⁵¹

There is quite a lot of ambiguity in this definition of sexual assault. Does the term “sexual assault” also cover conduct that is *not* rape, fondling, incest, or statutory rape, and if so, what? The regulation may be reasonably read to mean that “sexual assault” contains (in addition to fondling, incest, and statutory rape) a catchall, “sex offenses,” which is “[a]ny sexual act directed against another person, *without the consent* of the victim.”⁵²

The language “any sexual act” presumably differs from sexual contact or sexual touching, and could be construed to be verbal, nonverbal, in person, or via phone, text, or other electronic medium. It could include, for example, touching a person’s hand during a date in a romantic way, making a comment expressing sexual arousal, making a sexual gesture, or sending a text message expressing sexual desire. What marks sexual acts as criminal for federal bureaucratic reporting purposes, as opposed to ordinary acts in ordinary sex lives is lack of consent by the person to whom the act is directed. Generally, sexual acts with consent are just sex. Therefore, the definition of sexual assault turns entirely on the meaning of consent. Consent is the key to whether otherwise legal conduct falls within the federal bureaucracy’s regulatory jurisdiction.

The ambiguity and potential breadth of the regulatory definition of sexual assault just explored tempts us to go back to VAWA’s statutory text for signs that the statute anchors “sexual assault” more firmly in violence. However, VAWA’s text itself contains two different statutory definitions of sexual assault.⁵³

First, for Clery Act reporting purposes, sexual assault means “an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.”⁵⁴ But the statute is ambiguous as to *which* FBI UCR definition of “sex offense” should be used. The definition of “sex offenses” in FBI’s UCR SRS at the time included

51. *Id.* at 62,790 (emphasis added).

52. *Id.* (emphasis added).

53. The general definitions part of the statute defines “sexual assault” as “any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent.” Pub. L. No. 113-4, § 3(a)(16), 127 Stat. 54, 58 (2013). Section 304 of VAWA 2013 (“[c]ampus sexual violence, domestic violence, dating violence, and stalking education and prevention”) defines “sexual assault” as “an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.” *Id.* § 304(a)(3)(C), 127 Stat. at 89.

54. *Id.* § 304(a)(3)(C), 127 Stat. at 89.

“offenses against chastity, common decency, morals, and the like.”⁵⁵ Could the Clery Act have contemplated federal regulation of “offenses against chastity, common decency, morals, and the like” and made them reportable “crimes”? Putting VAWA’s statutory definition of “sexual assault” together with the FBI UCR SRS’s “sex offenses” definition at the time of enactment, a reasonable reading of VAWA would require schools to report “offenses against chastity, common decency, morals, and the like,” under the rubric of disclosing “sexual assault” incidents. On this plausible, but not inevitable, reading, reporting *consensual* and *nonforcible* “offenses against chastity, common decency, morals, and the like” would be legally required. If this is correct, the bureaucratic requirement of reporting “sexual assault” mandates the regulation of sex lives, not just sexual violence.

VAWA’s second definition of sexual assault underlines the point as well. This second definition is in the universal definitions section of VAWA and is not Clery Act-specific: “any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent.”⁵⁶ The definition of sexual assault here does not speak of criminal prohibition, but rather of “any nonconsensual sexual acts *proscribed* by Federal, tribal, or State law.” Defining sexual assault in this way brings the most ambitious prohibitions into the federal definition. For example, California and New York have made affirmative consent a requirement for universities and colleges receiving state funding.⁵⁷ Sex without affirmative consent then would be proscribed by these state laws and thus constitute sexual assault for the purposes of VAWA programs. Further, the statute does not say nonconsensual sexual *contact*, but rather nonconsensual sexual *act*, meaning that verbal or physical acts that do not entail touching may well be “sexual assault” for VAWA purposes.

Clearly, it is impossible to know which sexual acts to treat as crimes under VAWA 2013 without a way to determine consent, but VAWA itself does not define the term. Initially, DOE proposed a definition of consent: “the affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during a sexual encounter.”⁵⁸ But in the 2014 Final Rule, DOE abandoned the task of defining consent altogether, surprisingly concluding that “no determination as to whether that element has been met is required” for administration and enforcement of the Clery Act.⁵⁹ While DOE acknowledged that the regulation’s definition of “sex offenses” for reporting purposes has lack of consent as an element, the agency stated that “all sex offenses that are

55. FBI, SUMMARY REPORTING SYSTEM (SRS) USER MANUAL 163 (2013). This definition excluded “rape and prostitution and commercialized vice.” *Id.*

56. § 304(a)(16), 127 Stat. at 58.

57. CAL. EDUC. CODE § 67386 (2015); N.Y. EDUC. LAW § 6441 (2015).

58. Violence Against Women Act, 79 Fed. Reg. 62,752, 62,755 (Oct. 20, 2014) (codified at 34 C.F.R. § 668.46 (2015)).

59. *Id.* at 62,756.

reported to a campus security authority must be included in an institution's Clery Act statistics . . . *regardless of the issue of consent.*"⁶⁰

By the regulation's own terms, the key definitional line that marks sexual conduct that must be reported as crime—as opposed to conduct that need not be reported—is the lack of consent. Yet the agency also concludes that no definition of consent is necessary, because no determination of nonconsent is needed to know which sexual conduct to report. If sex offenses—defined in the regulations as nonconsensual—must be reported regardless of consent, one can only conclude that the federal bureaucracy contemplates schools reporting sexual conduct that is consensual, as long as someone has reported the incident to a campus security authority as a sex offense.

The federal bureaucracy requires schools to report sex offenses, which cannot be identified without some working definition of nonconsent, but which the regulations decline to specify. This leaves schools to devise definitions so that they may disclose in the required Annual Security Report those incidents that fit these definitions. As we discuss below in Part III, the federal bureaucracy's agnosticism on what is nonconsent—the very concept on which the definition of sex offense relies—combined with the need to have some definition, has led schools to overshoot, and to define consent to render most sexual interactions nonconsensual.⁶¹

The Clery Act also requires "timely warning for any Clery Act crime that represents an ongoing threat to the safety of students or employees."⁶² This obligation is intended to require notice to the community of a serious and continuing threat, for example, if someone opened fire or raped someone on or near campus, and the police had not apprehended the suspect.⁶³ Some schools interpret the obligation to require an email blast to the entire university community when there are incidents such as "unwanted touching and grinding." For example, here is one email to one college community:

On Friday, April 5, 2013 at approximately 11:05 p.m. the Office of Safety and Security received a report of unwanted touching and grinding against at least one other person present in Wilder Sco by a patron. A person identified as responsible for the alleged behavior was removed.

Unwelcome or inappropriate touching and/or sexual conduct, even in a social setting including music, is considered a violation of both the College Sexual Offense Policy, and potentially a violation of State law. Any such behavior should be immediately reported to staff that

60. *Id.* (emphasis added).

61. *See infra* Part III.

62. DIANE WARD & JANICE LEE MANN, U.S. DEP'T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 5 (2011), <https://www2.ed.gov/admins/lead/safety/handbook.pdf> [<https://perma.cc/ZG8C-TF3J>].

63. *See id.* at 97–98 (listing "[a]rmed intruder" and "[t]errorist incident" as examples of significant threats for issuing a "timely warning").

may assist, and to Safety and Security and/or the Oberlin Police Department for response, as was done in relation to this incident.⁶⁴

Clery Act crimes would of course be reported in a school's Annual Security Report, but this sort of live incident-by-incident email blast is not just reporting. It is constructing the environment in which students and employees live and work. Such messages communicate that the university is a sexually dangerous place. They remind us that the educational environment contains a constant exposure to underlying sexual risk, and that the bureaucracy is monitoring.

B. Discipline and Procedure

1. Sex Discrimination

We have seen that the concept of crime is a significant building block of the sex bureaucracy. The regulation of sex through the requirement of reporting quasi-criminal sexual incidents is part of the foundation of the sex bureaucracy. The other important building block is the concept of discrimination. Sexual incidents classified under regulatory terms such as "sexual assault" are the same conduct that the federal bureaucracy increasingly treats as sex discrimination. The interactive expansion and crossing of crime and discrimination have characterized the shift toward the bureaucratic regulation of sex.

The federal antidiscrimination law that has most spawned the growth of the sex bureaucracy in education is Title IX of the Education Amendments of 1972,⁶⁵ which states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."⁶⁶ The Supreme Court has described Title IX as

64. Marjorie Burton, *Clery Notice: Reported Sexual Imposition*, OBERLIN ONCAMPUS (Apr. 6, 2013), <https://oncampus.oberlin.edu/bulletins/2013/04/06/clery-notice-reported-sexual-imposition> [<https://perma.cc/8GQ4-DT7R>] (emphasis added). Another example:

You are receiving this Crime Warning as part of UW-Madison's commitment to providing campus-area crime information, in compliance with the federal Clery Act (Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act).

On Sunday, September 21, a UW student reported to a campus official that she was touched inappropriately, without consent, in an on-campus residence hall. The victim reported that this has happened before, and possibly to others as well.

At this time, law enforcement is not involved, at the request of the victim. However, the university is investigating the incident. The perpetrator has been identified and the university's disciplinary procedures have been initiated.

Marc Lovicott, *Sexual Assault—10/17/14*, UW-MADISON POLICE DEP'T (Oct. 17, 2014, 12:00 AM), https://uwpd.wisc.edu/incident_reports/sexual-assault-101714 [<https://perma.cc/2VWA-MH5W>] (emphasis added).

65. Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)).

66. 20 U.S.C. § 1681(a) (listing exceptions as well).

“conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.”⁶⁷ Title IX authorizes federal agencies that give funding to implement the antidiscrimination mandate by regulating funding recipients, and by terminating funding for the failure to comply with the agencies’ regulations.⁶⁸

Today the term “Title IX complaint” commonly refers to an allegation of sexual misconduct by one student against another, but this view was alien at the time of enactment. The early Title IX regulations required schools to establish internal “grievance procedures” to hear complaints about *the school’s* conduct—claims that the schools themselves were discriminating on the basis of sex.⁶⁹ This regulatory requirement morphed into an understanding that an internal school bureaucracy must adjudicate complaints that arise out of sexual conduct among students. Grievance procedures initially required by Title IX regulations to ensure that individuals would have a place to complain about a school’s discrimination have today become a lever by which the federal bureaucracy monitors schools’ policies and procedures regulating sexual behavior. How did this come to pass?

Twenty-five years after the passage of Title IX, and long after courts had recognized sexual harassment as a form of Title VII sex discrimination,⁷⁰ DOE’s Office of Civil Rights (OCR) promulgated a guidance document, “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties”⁷¹ (1997 Guidance). It stated that sexual harassment of students is a form of sex discrimination, and that “[s]chools are

67. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (also discussing Title VI of the Civil Rights Act).

68. *See* 20 U.S.C. § 1682 (“Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title . . . by issuing rules, regulations, or orders of general applicability . . . Compliance with any requirement adopted pursuant to this section may be effected . . . by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient.”).

69. *See* MARTHA MATTHEWS & SHIRLEY MCCUNE, *TITLE IX GRIEVANCE PROCEDURES: AN INTRODUCTORY MANUAL* 38 (1976) (“The fundamental purpose of a Title IX grievance procedure is to provide a fair, orderly, and systematic process for identifying, *modifying*, and *remedying* any policy, procedure, or practice of an education agency or institution which is not in compliance with Title IX requirements.”).

70. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66–67 (1986) (finding, for the first time, that sexual harassment constituted sex discrimination, which could violate Title VII if it created a hostile work environment); *see also* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1685 & n.4 (1998); Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 692 (1997); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333, 343 (1990). For a nuanced discussion of some unforeseen ways that workplace sexual harassment regulation may undermine gender equality on the job, *see* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2074–82 (2003).

71. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (Mar. 13, 1997) [Sexual Harassment Guidance 1997].

required by the Title IX regulations to have grievance procedures through which students can complain of alleged sex discrimination, including sexual harassment.”⁷² The 1997 Guidance explained:

[A] school’s failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. Conversely, if, upon notice of hostile environment harassment, a school takes immediate and appropriate steps to remedy the hostile environment, the school has avoided violating Title IX. Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice.⁷³

The concept of a “hostile environment” that the school had a responsibility to correct, then, enabled Title IX—a command to schools not to discriminate—to reach not only the conduct of the school and its agents, but also student conduct.⁷⁴ If a student’s acts were severe enough to create a hostile environment and the school did not have effective policies and grievance procedures in place to discover and correct the hostile environment, the school would be in violation of Title IX.⁷⁵

The Office of Civil Rights (OCR) in the Department of Education promulgated a Revised Sexual Harassment Guidance in 2001 (2001 Guidance) reaffirming the compliance standards of the 1997 Guidance.⁷⁶ The 2001 Guidance states that schools must “end the harassment, prevent its recurrence, and, as appropriate, remedy its effects.”⁷⁷ The 2001 Guidance made clear that “[a]s long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations.”⁷⁸

72. *Id.* at 12,038.

73. *Id.* at 12,040.

74. The Supreme Court confirmed in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), that schools could be liable for violating Title IX based on students’ sexually harassing conduct.

75. DOE reasoned in the Guidance that strong sexual harassment policies and grievance procedures provided an institution of higher education a means of “telling its students that it does not tolerate sexual harassment and that students can report it without fear of adverse consequences.” Sexual Harassment Guidance 1997, *supra* note 71, at 12,040. DOE also noted that a school could be in violation of Title IX, even if the school was unaware of harassment that served to create a hostile environment, if it lacked “effective policies and grievance procedure . . . because, without a policy and procedure, a student does not know either of the school’s interest in preventing this form of discrimination or how to report harassment so that it can be remedied.” *Id.*

76. See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES i (2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/CEL8-6Y5D>] [REVISED HARASSMENT GUIDANCE].

77. *Id.* at iii.

78. *Id.* at 12.

The 2001 Guidance described schools without effective procedures as hampering “early notification and intervention,” and “permit[ing] sexual harassment to deny or limit a student’s ability to participate in or benefit from the school’s program on the basis of sex.”⁷⁹

Then in 2011, OCR issued a Dear Colleague Letter (DCL) to supplement the 2001 Guidance.⁸⁰ Introducing the term “sexual violence” in this context, OCR stated that “the requirements of Title IX pertaining to sexual harassment also cover sexual violence.”⁸¹ The 2011 DCL focused on student conduct and explained that it was “schools’ responsibility to take immediate and effective steps to end sexual harassment and sexual violence.”⁸² For example: “the Title IX regulation requires schools to provide equitable grievance procedures. As part of these procedures, schools generally conduct investigations and hearings to determine whether sexual harassment or violence occurred.”⁸³ Following a myriad of questions and confusions in the wake of the 2011 DCL, OCR issued another guidance document in 2014, entitled “Questions and Answers on Title IX and Sexual Violence.”⁸⁴

The administrative interpretation of Title IX’s 1972 discrimination ban initially gave rise to the requirement that schools set up grievance procedures to hear complaints that the school violated Title IX.⁸⁵ But once, in the 1990s, sexual harassment was understood to be a form of Title IX sex discrimination,⁸⁶ the idea that schools had a responsibility to correct a hostile environment recast the grievance procedures as a forum for schools to hear complaints about harassing conduct by students.⁸⁷ Then, once OCR in 2011 focused on “sexual violence” as a form of sexual harassment, the connection

79. *Id.* at 14.

80. Letter from Russlynn Ali, Assistant Sec’y, Office for Civil Rights, U.S. Dep’t of Educ., to Colleague 1–2 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/7LMK-6U8H>] [“Ali, Dear Colleague Letter”].

81. *Id.* The agency defined sexual violence as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol,” and stated that sexual violence included “rape, sexual assault, sexual battery, and sexual coercion.” *Id.* at 1–3.

82. *Id.* at 2.

83. *Id.* at 10.

84. See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/X9UZ-XUPT>] [QUESTIONS AND ANSWERS ON TITLE IX].

85. See MATTHEWS & MCCUNE, *supra* note 69, at 2 (“One of the unique aspects of the Title IX regulation is its delineation of procedures which education agencies and institutions receiving Federal funds are required to implement in order to ensure and monitor compliance with Title IX requirements for nondiscrimination.”).

86. See *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (“Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex We believe the same rule should apply when a teacher sexually harasses and abuses a student.”); see also Sexual Harassment Guidance 1997, *supra* note 71, at 12,046 n.3 (noting that the Department of Education had (in 1997) been interpreting Title IX as “prohibiting sexual harassment for over a decade”).

87. See generally Sexual Harassment Guidance 1997, *supra* note 71.

between the grievance procedure required by Title IX regulations and student discipline for sexual misconduct was made explicit. The DCL states that any disciplinary or other procedures to resolve complaints “must meet the Title IX requirement of affording a complainant a prompt and equitable resolution.”⁸⁸ The DCL made explicit for the first time that a school’s discipline process for sexual assault is regulated by OCR’s interpretations of Title IX. Schools must investigate and adjudicate student sexual assault cases to fulfill their Title IX obligations.⁸⁹ This is a very significant, even fundamental, shift in OCR’s position. As recently as 2005, OCR stated to a school that it “was under no obligation to conduct an independent investigation” of an allegation of sexual assault if it “involved a possible violation of the penal law, the determination of which is the exclusive province of the police and the office of the district attorney.”⁹⁰

When schools conduct investigations and adjudications of sexual misconduct, the processes are now subject to government oversight. By reviewing a school’s procedures, the federal bureaucracy oversees the school’s regulation of sexual conduct. This is a not a modest form of oversight.⁹¹ OCR’s monitoring extends to what standard of evidence schools use to evaluate complaints: “OCR reviews a school’s procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints.”⁹² The “preponderance of the evidence” standard had not appeared in Title IX, any Title IX regulation, or the 1997 or 2001 Guidance documents.⁹³ It was an invention of the purportedly nonbinding 2011 DCL.⁹⁴ Nevertheless, dozens of OCR investigations into whether the procedures at various schools

88. Ali, Dear Colleague Letter, *supra* note 80, at 8.

89. *Id.* at 9 (stating that “OCR will review all aspects of a school’s grievance procedures” to ensure that the procedures comply with OCR’s interpretation of Title IX requirements).

90. Letter from John F. Carroll, Compliance Team Leader, Office for Civil Rights, Region II, U.S. Dep’t of Educ., to Muriel A. Howard, President, Buffalo State Coll., State Univ. of N.Y., Re: Case No. 02-05-2008 (Aug. 30, 2005) (on file with authors).

91. OCR provides guidance regarding “notice . . . of the grievance procedures,” “adequate, reliable, and impartial investigation of complaints,” “designated and reasonably prompt time frames [for grievance resolution],” and “written notice . . . of the outcome.” See QUESTIONS AND ANSWERS ON TITLE IX, *supra* note 84, at 12.

92. Ali, Dear Colleague Letter, *supra* note 80, at 10.

93. *But cf.* Letter from Neena Chaudhry, Senior Counsel, Nat’l Women’s Law Ctr., & Lara S. Kaufmann, Senior Counsel, Nat’l Women’s Law Ctr., to Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ. 5–6 (Feb. 8, 2012), http://www.nwlc.org/sites/default/files/pdfs/nwlc_ltr_to_ocr_re_prep_of_evidence_std_2_8_12_2.pdf [<https://perma.cc/8XQS-QBF8>] (arguing that OCR had claimed that universities should rely upon the preponderance of the evidence standard in “earlier case-specific instructions for remedying noncompliance with Title IX,” *id.* at 5, and that many schools had adopted the preponderance of the evidence standard well before the publication of the DCL, *id.* at 6).

94. See, e.g., Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 62 (2013) (noting that the DCL “mandate[d] a new burden of proof of ‘preponderance of the evidence’—the lowest possible threshold”).

were complying with requirements introduced in the DCL soon followed.⁹⁵ In a scramble to be considered compliant and stave off or resolve OCR investigations, schools rushed to rewrite their policies and procedures to satisfy the DCL's commands,⁹⁶ including, most prominently, the "preponderance of the evidence" standard. Many schools entered settlement agreements with OCR promising to take specified measures.⁹⁷

The transformation of the Title IX grievance procedure over several decades wrought a corresponding transformation in the OCR's job of oversight. No longer was it simply monitoring whether schools were engaging in discriminatory acts. Rather, OCR's task became specifying what sexual conduct is permitted, along with schools' policies, procedures, and organizational forms. OCR now says that compliance with Title IX requires schools to put in place measures that "may bring potentially problematic conduct to the school's attention before it becomes serious enough to create a hostile environment."⁹⁸ Compliance is now not merely about putting an end to a hostile environment, but also about anticipating and ferreting out "problematic conduct" that does not rise to the level of hostile environment.

95. See *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEP'T EDUC. (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> [https://perma.cc/T55G-3H4Q]; *About The Chronicle's Title IX Investigation Tracker*, CHRON. HIGHER EDUC., <http://projects.chronicle.com/titleix/about> [https://perma.cc/6W5Q-4W5D] (last visited Mar. 31, 2016).

96. This move was met with considerable protest by a number of professors at these institutions, who objected to many of the changes schools made in response to OCR's threats to cut off federal funding. See, e.g., Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [http://perma.cc/B3VX-EUUS]; Eugene Volokh, *Open Letter From 16 Penn Law School Professors About Title IX and Sexual Assault Complaints*, WASH. POST (Feb. 19, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/19/open-letter-from-16-penn-law-school-professors-about-title-ix-and-sexual-assault-complaints> [https://perma.cc/Z2Y8-JBSH].

97. See, e.g., *U.S. Department of Education Reaches Agreement with the State University of New York to Address and Prevent Sexual Assault and Harassment of Students*, U.S. DEP'T EDUC. (Oct. 31, 2013), <http://www.ed.gov/news/press-releases/us-department-education-reaches-agreement-state-university-new-york-address-and-prevent-sexual-assault-and-harassment-students> [https://perma.cc/V9LQ-CYN5] (agreeing to, among other things, designate a Title IX Coordinator at each of SUNY's campuses, "[c]onduct Title IX complaint investigations promptly instead of waiting for the conclusion of criminal investigations," and "[p]rovide interim relief for the complainant"). Those familiar with administrative law will recognize that this practice is not unheard of, but it is subject to a series of standard objections—legal and political. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312–15 (1992); Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841, 1843–45 (2011).

98. Ali, *Dear Colleague Letter*, *supra* note 80, at 6; see also Sexual Harassment Guidance 1997, *supra* note 71, at 12,044 (noting that policies prohibiting sexual harassment could even "bring conduct of a sexual nature to the school's attention so that the school can address it before it becomes sufficiently serious as severe, persistent, or pervasive to create a hostile environment"); REVISED HARASSMENT GUIDANCE, *supra* note 76, at 19 (noting also that schools should address any problem before it becomes "sufficiently serious").

Schools must have policies and procedures for regulating student conduct that is not creating a hostile environment and therefore is not sexual harassment and therefore not sex discrimination. OCR's purported oversight role is to regulate how schools do so, but by definition, this conduct is outside the agency's jurisdiction.

The bureaucratic regulation of sexual violence and discrimination may seem to be a rather different proposition from the bureaucratic regulation of sex itself, and it should be. But consider the conduct that the bureaucracy deems within its purview. The DCL defines sexual harassment as "unwelcome conduct of a sexual nature. . . . Sexual violence is a form of sexual harassment prohibited by Title IX."⁹⁹ The 2001 Guidance explained, "Conduct is unwelcome if the student did not request or invite it and 'regarded the conduct as undesirable or offensive.'"¹⁰⁰ The unwelcome conduct "creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program."¹⁰¹ The DCL also explains that "a single or isolated incident of sexual harassment [e.g., sexual assault] may create a hostile environment if the incident is sufficiently severe."¹⁰²

Thus, if conduct of a sexual nature is unrequested and regarded as undesirable, it is unwelcome conduct. That conduct may be physical or verbal.¹⁰³ This definition of sexual harassment has been adopted and extended by schools including Harvard University.¹⁰⁴

The boundary of federally regulated sex in this bureaucratic regime is whether the unrequested verbal or nonverbal sexual conduct was *regarded as undesirable*.¹⁰⁵ Query whether a verbal or nonverbal act that is seeking explicit agreement to have sex would not be "unwelcome conduct of a sexual nature" if a person to whom that act is directed "did not request or invite it" and "regarded the conduct as undesirable."¹⁰⁶ This may seem far-fetched because it

99. Ali, Dear Colleague Letter, *supra* note 80, at 3.

100. REVISED HARASSMENT GUIDANCE, *supra* note 76, at 7–8 (quoting *Does v. Covington Cnty. Sch. Bd. of Educ.*, 930 F. Supp. 554, 569 (M.D. Ala. 1996)).

101. Ali, Dear Colleague Letter, *supra* note 80, at 3.

102. *Id.*

103. See REVISED HARASSMENT GUIDANCE, *supra* note 76, at 2 ("Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.").

104. See, e.g., HARVARD UNIV., SEXUAL AND GENDER-BASED HARASSMENT POLICY: POLICY STATEMENT (July 1, 2014), <http://media.thecrimson.com/extras/2014/sexual-harassment-policy.pdf> [<http://perma.cc/RPC2-W28R>] ("Sexual harassment is unwelcome conduct of a sexual nature, including unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, graphic, or physical conduct of a sexual nature.").

105. Cf. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 82 (1987) ("Politically, I call it rape whenever a woman has sex and feels violated.").

106. See HARVARD UNIV., SEXUAL AND GENDER-BASED HARASSMENT POLICY: POLICY STATEMENT, *supra* note 104, at 2; accord REVISED HARASSMENT GUIDANCE, *supra* note 76, at 8

is hard to imagine that one such act could create a hostile environment. But in a letter to the University of Montana, OCR wrote that rather than limit sexual harassment claims to unwelcome conduct of a sexual nature that creates a hostile environment, the university should define sexual harassment “more broadly” as “‘any unwelcome conduct of a sexual nature.’ Defining ‘sexual harassment’ as ‘a hostile environment’ leaves unclear when students should report unwelcome conduct of a sexual nature and risks having students wait to report to the University until such conduct becomes severe or pervasive or both.”¹⁰⁷

Between 1972 and 2011, a statutory ban on discrimination was transformed into a bureaucratic structure consisting of policies, procedures, and organizational forms that regulate sexual conduct. The public debate about Title IX and sexual assault on college campuses gives the impression that the target of this bureaucracy is sexual violence: that is, rape and sexual assault. Within the bureaucracy, however, the concepts of sexual violence and harassment have expanded to encompass, for example, unrequested conduct of a sexual nature that is regarded by someone as undesirable. These are significant shifts in legal and social understandings. The broader the class of conduct that is regulated in the name of regulating sexual violence as a form of sex discrimination, the larger the footprint of the growing sex bureaucracy.

The federal bureaucracy interprets federal law to require colleges and universities to have internal bureaucracies that regulate sexual conduct. An effect of this development is the replication of bureaucracy by bureaucracy. Schools must employ Title IX coordinators to oversee their compliance and their processes of responding to individual complaints. At some schools this is a single person, but at many schools this entails an entire office, staff, and structure dedicated to implementing federal directives regarding regulation of sexual conduct. Former OCR governmental bureaucrats often lead or staff the extra-governmental bureaucracies, which makes sense from the perspective of schools seeking expert knowledge of what OCR wants schools to do.¹⁰⁸ The

(quoting *Does v. Covington Cnty. Sch. Bd. of Educ.*, 930 F. Supp. 554, 569 (M.D. Ala. 1996)) (internal quotation omitted).

107. Letter from Anurima Bhargava, Chief, Civil Rights Div., Educ. Opportunities Section, U.S. Dep’t of Justice, & Gary Jackson, Reg’l Dir., Office of Civil Rights, Seattle Office, U.S. Dep’t of Educ., to Royce Engstrom, President, Univ. of Mont., & Lucy France, Univ. Counsel, Univ. of Mont. (May 9, 2013), <http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf> [<https://perma.cc/QS56-26QL>]. The American Association of University Professors has expressed concern that such broad notions of Title IX hostile environment sexual harassment threaten free speech and academic freedom. See AM. ASS’N OF UNIV. PROFESSORS, THE HISTORY, USES, AND ABUSES OF TITLE IX (Mar. 24, 2016), <http://www.aaup.org/file/TitleIX-Report.pdf> [<https://perma.cc/88SM-EVB3>].

108. For example, the Title IX officer at Harvard University is Mia Karvonides, a former OCR employee. *Q&A with Harvard’s Title IX Officer*, HARV. GAZETTE (July 2, 2014), <http://news.harvard.edu/gazette/story/2014/07/qa-with-harvards-title-ix-officer> [<https://perma.cc/YR>].

Title IX coordinators are supposed to ensure both that sexual misconduct investigations are fair, and that their schools are complying with OCR's interpretation of Title IX, interests that may sometimes conflict. Potential concerns about neutrality and independence aside, the sex bureaucracy has managed to plant seeds of its own replication within the parties it regulates, and the plants are blossoming.

2. Reporting Policy and Procedure

The past several years have also seen an expansion from requiring only the disclosure of incidents to requiring the disclosure of policies and procedures for preventing, investigating, and disciplining conduct. All schools receiving federal funds must include in their Annual Security Report a statement of prevention programs and disciplinary procedures pertaining to dating violence, domestic violence, sexual assault, and stalking.¹⁰⁹ The focus of schools' reporting and disclosure has shifted from criminal (or quasi-criminal) incidents to prevention programs and disciplinary procedures.¹¹⁰ As the Congressional Research Service summarizes:

VAWA requires ASRs to include a statement of the [Institution of Higher Education's] policy or programs to prevent sexual assaults, domestic violence, dating violence, and stalking; policies to address these incidents if they occur, including a statement on the standard of evidence that will be used during an institutional conduct proceeding regarding these crimes; and primary prevention programs that are provided to promote awareness of these crimes for incoming students and new employees, as well as providing ongoing awareness training for students and faculty.¹¹¹

28-7KGW]; Jared T. Lucky, *Mia Karvonides, Federal Civil Rights Attorney, Named Harvard's New Title IX Coordinator*, HARV. CRIMSON, <http://www.thecrimson.com/article/2013/3/13/Karvonides-Title-IX-Coordinator> [<http://perma.cc/582X-GZLA>] (last updated Mar. 14, 2013).

109. See 34 C.F.R. §§ 668.46(j)–(k) (2015). VAWA's text requires each school participating in the federal financial aid program to “develop and distribute as part of the” ASR:

a statement of policy regarding—

- i. such institution's programs to prevent domestic violence, dating violence, sexual assault, and stalking; and
- ii. the procedures that such institution will follow once an incident of domestic violence, dating violence, sexual assault, or stalking has been reported, including a statement of the standard of evidence that will be used during any institutional conduct proceeding arising from such a report.

Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54, 90 (2013) (codified at 20 U.S.C. § 1092(f)(8)).

110. See, e.g., LISA N. SACCO, CONG. RESEARCH SERV., THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING 16 (2014) (stating that VAWA 2013 “established new mandatory grant guidelines for institutions of higher education in their incident response procedures and development of programs to prevent domestic violence, sexual assault, stalking, and dating violence”).

111. GAIL MCCALLION, CONG. RESEARCH SERV., HISTORY OF THE CLERY ACT: FACT SHEET 2 (2014).

Because the Clery Act creates an information-reporting regime, these regulatory requirements are fashioned as disclosure requirements. But the line between a disclosure requirement and a new substantive legal mandate is thin. If a school does not have prevention programs or disciplinary procedures to disclose, the school must develop them.

The basic structure in DOE's 2014 VAWA Final Rule implementing VAWA 2013¹¹² is first to require disclosure of X, promulgate a regulatory definition of X that includes a new term Y, and then generate a regulatory definition of Y that requires Z. What appears to be a disclosure requirement, however, is actually a substantive mandate to regulated parties to do something specific in order to be able to disclose it.

To illustrate, section 668.46 requires the disclosure of any procedures for institutional disciplinary action in cases of dating violence, domestic violence, sexual assault, or stalking (X).¹¹³ The regulation then establishes that all such procedures must follow a "prompt, fair, and impartial process" (Y)—the requirements for which, in turn, are defined in detail (Z). Here is a small slice of the elaborate definitions of Z that are laid out in the regulations:

A prompt, fair, and impartial proceeding includes a proceeding that is—

(A) Completed within reasonably prompt timeframes . . .

(B) Conducted in a manner that—

- (1) Is consistent with the institution's policies and transparent to the accuser and accused;
- (2) Includes timely notice of meetings at which the accuser or accused, or both, may be present; and
- (3) Provides timely and equal access to the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings; and

(C) Conducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused.¹¹⁴

These components of a disciplinary proceeding may be wholly desirable, but they are not simply disclosure requirements. The Rule defines what must be disclosed in such a way as to impose substantive obligations. In order to report policies and procedures to satisfy the Rule, schools must adopt certain policies and procedures as the Rule defines them.

The 2014 VAWA Final Rule also requires schools to establish and disclose the form of tribunals that will adjudicate allegations of dating violence, domestic violence, sexual assault, or stalking.¹¹⁵ These institutional forms have

112. Violence Against Women Act, 79 Fed. Reg. 62,751 (codified at 34 C.F.R. § 668 (2015)).

113. See 34 C.F.R. § 668.46(b)(11)(vi).

114. *Id.* § 668.46(k)(i)(A)–(C).

115. *Id.* § 668.46(k).

the flavor of criminal tribunals because they discipline conduct that is called criminal in the federal statute and regulations at issue,¹¹⁶ and because some of the conduct may actually be criminal in the relevant jurisdiction. But they are, of course, not criminal tribunals; rather, they are noncriminal tribunals that determine a person's responsibility for conduct that may or may not be criminal. These tribunals differ from criminal trials in several respects.

First, more conduct is covered by the regulatory definitions than is covered by criminal law so that the adjudicatory body exercises jurisdiction over a much broader domain of conduct (sexual misconduct) than would a criminal court.¹¹⁷ Second, the institutional disciplinary procedures do not contain (and may be prohibited from containing) procedural protections for the accused that exist in a criminal context. For example, OCR prohibits sexual assault investigations from employing a standard of proof higher than "preponderance of the evidence."¹¹⁸ Again, these requirements apply to any school that participates in the federal student assistance program, which is virtually every institution of higher education in the United States.¹¹⁹

Most schools have long had disciplinary procedures to handle allegations of student misconduct, including sexual misconduct. What is different today is that the content of those procedures, for sexual matters, is specified and controlled by the federal bureaucracy. The result is the establishment of mini-bureaucracies in educational institutions required to address sexual conduct (unclearly) indicated as illegal by federal regulation, the structure and functioning of which is directly specified by a federal agency. In essence, these are privately administered bureaucracies mandated by the federal bureaucracy, deciding liability for sexual conduct that is called criminal but may not be even

116. *Id.* § 668.46(c) (noting that an institution must report on the incidence of a number of "[p]rimary crimes," including "[s]ex offenses," including rape, fondling, incest, and statutory rape and "[d]ating violence, domestic violence, and stalking").

117. *See* Ali, Dear Colleague Letter, *supra* note 80, at 9–10 ("In some cases, the conduct [at issue] may constitute both sexual harassment under Title IX and criminal activity. Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation.").

118. *See id.* at 11 (noting that "in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred)," and rejecting higher standards of proof, such as the "clear and convincing" standard as "inconsistent with the standard of proof established for violations of the civil rights laws, and . . . thus not equitable under Title IX").

119. "Title IX prohibits discrimination based on sex in any educational program or activity that receives federal funds" and applies to "schools that benefit from federal funding indirectly by virtue of their students' receipt of federal financial aid," thus "almost every college and university in the United States, public or private, must comply" with Title IX. Lavinia M. Weizel, Note, *The Process That Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1615 & n.11 (2012).

a civil wrong.¹²⁰ Thousands of these mini-bureaucracies now exist, occupying an uneasy space between the criminal and the administrative.

3. *Shadow Administration*

OCR's 1997 and 2001 Guidances on Title IX sexual harassment were published after notice and comment.¹²¹ The 2011 Dear Colleague Letter was not issued after notice and comment.¹²² Instead, OCR stated its views in the DCL about what Title IX required, and then launched dozens of investigations of schools for failure to comply with the DCL's requirements.¹²³ OCR threatened to terminate federal funding to schools unless they adopted policies and procedures that complied, and then entered into negotiated settlement agreements with individual schools.¹²⁴ A straightforward political objection is that an administrative agency leveraged the threat of denying federal funds to push institutions to adopt policies and procedures that the agency prefers, but that are not required by statute or binding regulation.

By its own terms, the Dear Colleague Letter is a nonbinding document that cannot impose any new legal obligation.¹²⁵ Yet, the DCL contains interpretations that exist nowhere else in federal law, and OCR relies on those interpretations when investigating schools for noncompliance with federal law. Sometimes agencies prefer to avoid the costs and time associated with using notice-and-comment procedures, or to avoid making judgments that would be subject to public comment and judicial review. The legislative rule doctrine, however, requires that even if an agency announces a policy that it declares to be nonbinding, if the agency treats it as, or it has the effect of, binding the regulated parties, then the policy is deemed a legislative rule, and therefore unlawfully promulgated without notice and comment.¹²⁶ Given that OCR has

120. See *supra* text accompanying notes 47–61.

121. See Sexual Harassment Guidance: Peer Sexual Harassment, 61 Fed. Reg. 42,728 (Aug. 16, 1996) (requesting public comment); Sexual Harassment Guidance: Harassment of Students by School Employees, 61 Fed. Reg. 52,172 (Oct. 4, 1996) (same); Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66,092 (Nov. 2, 2000) (same).

122. Ali, Dear Colleague Letter, *supra* note 80, at 1 n.1 (noting that DOE issued the letter as a “significant guidance document”).

123. See *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEP'T EDUC. (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> [<https://perma.cc/5935-W6AQ>].

124. See, e.g., *U.S. Department of Education Finds Tufts University in Massachusetts in Violation of Title IX for Its Handling of Sexual Assault and Harassment Complaints*, U.S. DEP'T EDUC. (Apr. 28, 2014), <http://www.ed.gov/news/press-releases/us-department-education-finds-tufts-university-massachusetts-violation-title-ix-its-handling-sexual-assault-and-harassment-complaints> [<https://perma.cc/YMZ9-H8G8>] (“Under federal civil rights regulations, OCR may move to initiate proceedings to terminate federal funding of Tufts or to enforce the agreement.”).

125. See Ali, Dear Colleague Letter, *supra* note 80, at 1 n.1.

126. See Jacob E. Gersen, *How the Feds Use Title IX to Bully Universities*, WALL ST. J. (Jan. 26, 2016), <http://www.wsj.com/articles/how-the-feds-use-title-ix-to-bully-universities->

reached resolution agreements with dozens of schools it investigated for deviating from interpretations of Title IX newly announced in the DCL, we are hard-pressed to imagine a good argument that the DCL does not contain binding requirements.¹²⁷

To take away a school's federal funding, OCR would be statutorily required to hold a hearing and explain the precise way in which the school had failed to comply with a Title IX obligation.¹²⁸ That explanation and legal analysis could be challenged in court and a judge would evaluate whether the interpretation and policy judgment articulated in OCR's reasoning was consistent with Title IX and the Administrative Procedure Act (APA).¹²⁹ The fact that the school deviated from the DCL itself could not be treated as a per se Title IX violation.

But the process used by OCR instead has run as follows: First, announce an investigation into a school. Second, either (a) enter into negotiations while the investigation is ongoing and reach a resolution agreement in which the school agrees to change its policies and procedures to comply with, or exceed, the directives of the DCL, or (b) enter a finding of noncompliance, and then enter into negotiations to reach a resolution agreement as above. Because the threat of lost federal funds is a big stick to wield, and because the political climate makes being seen as not opposing sexual violence a public relations nightmare, *all* universities have complied rather than challenge OCR's actions even administratively, much less in litigation.¹³⁰ As a result, the agency achieved complete compliance with its nonbinding guidance document without ever having to defend its reasoning through public comments or judicial review.

1453669725 [https://perma.cc/Z24E-QXA7]; Cass R. Sunstein, "Practically Binding": *General Policy Statements and Notice-and-Comment Rulemaking*, U. CHI. L. REV. (forthcoming 2016); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 287–88 (2010); Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1712–13 (2007); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 917–19 (2004).

127. Janet Napolitano has written that both the 2011 DCL and the 2014 Questions and Answers Guidance "clearly imposed new mandates on schools." Napolitano, *supra* note 8, at 394.

128. See 20 U.S.C. § 1682 (2012).

129. See 20 U.S.C. § 1683 (2012).

130. See, e.g., *Joint Statement Between Tufts University and Representatives and Organizers of Today's Undergraduate Student Action*, TUFTS UNIV. (May 1, 2014), <http://oeo.tufts.edu/sexualmisconduct/joint-statement-between-tufts-university-and-representatives-and-organizers-of-today%E2%80%99s-undergraduate-student-action> [https://perma.cc/WJK3-EZJX]; *U.S. Department of Education Reaches Agreement with the Ohio State University to Address and Prevent Sexual Assault and Harassment of Students*, U.S. DEP'T EDUC. (Sept. 11, 2014), <http://www.ed.gov/news/press-releases/us-department-education-reaches-agreement-ohio-state-university-address-and-prevent-sexual-assault-and-harassment-students> [https://perma.cc/PX5T-PUN6]; *Departments of Justice and Education Reach Settlement to Address and Prevent Sexual Assault and Harassment of Students at the University of Montana in Missoula*, U.S. DEP'T EDUC. (May 9, 2013), <http://www.ed.gov/news/press-releases/departments-justice-and-education-reach-settlement-address-and-prevent-sexual-assault-and-harassment-students-university-montana-missoula> [https://perma.cc/R6KN-GJW9].

Indeed, during notice-and-comment rulemaking on the implementation of VAWA 2013, DOE expressly considered the “preponderance of the evidence” standard.¹³¹ Some commenters favored defining “prompt, fair, and impartial” disciplinary proceedings to include only those using the preponderance standard. Others favored the higher “clear and convincing” standard. Still others favored not requiring any particular standard of evidence because the statute requires schools only to disclose the standard used. DOE even considered interpreting “prompt, fair, and impartial” to mean, at a minimum, compliance with the DCL (and other OCR Title IX guidance). Nevertheless, after receiving public comments, DOE decided in the Final Rule to require neither any particular evidentiary standard nor compliance with OCR Title IX guidance. The lack of notice-and-comment on the 2011 DCL allowed OCR to avoid public input on the controversial issue of the “preponderance of the evidence” standard. The avoidance also seems to have made a substantive difference in what the DCL claimed Title IX required more generally.

This seemingly arcane issue of administrative law became the subject of controversy in 2015 and 2016 during an exchange between DOE and the Senate Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management. In January 2016, Senator James Lankford wrote a letter to John King, Acting Secretary of DOE, asking about the lack of statutory authority for the 2011 DCL, the failure to utilize notice-and-comment procedures to issue the document, and OCR “overreach.”¹³² On behalf of Acting Secretary King, Catherine Lhamon, Assistant Secretary for Civil Rights, responded, citing Title IX regulations’ “requirement that schools adopt ‘grievance procedures providing for prompt and equitable resolution’ of complaints,”¹³³ as legal authority for the 2011 DCL. Lhamon insisted that it is Title IX and its regulations that have the force and effect of law, not the DCL.¹³⁴ In effect, she argued that the requirements of the DCL are not new because they are inherent in the phrase “grievance procedures providing for prompt and equitable resolution of complaints” and the general Title IX prohibition of discrimination “on the basis of sex.”¹³⁵ The aforementioned

131. See 79 Fed. Reg. 35,418, 35,443 (June 20, 2014) (proposed rule); 79 Fed. Reg. 62,752 62,775 (Oct. 20, 2014) (final rule).

132. Letter from Sen. James Lankford, Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt., to Hon. John B. King, Jr., Acting Sec’y, U.S. Dep’t of Educ. (Jan. 7, 2016), <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/01/07092429/Lankford-letter-to-ED-1-7-2016.pdf> [<https://perma.cc/2V95-G3BH>].

133. Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, to Sen. James Lankford, Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt. (Feb. 17, 2016), <http://chronicle.com/items/biz/pdf/DEPT.%20of%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf> [<https://perma.cc/Z47Y-CNPL>].

134. See *id.*

135. The response failed to satisfy Senator Lankford. See Letter from Sen. James Lankford, Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt., to Hon. John B. King, Jr., Acting Sec’y, U.S. Dep’t of Educ. (Mar. 4, 2016),

exchange follows testy questioning by Senator Lamar Alexander at Senate hearings, of Lhamon,¹³⁶ and of DOE's Deputy Assistant Secretary, Amy McIntosh.¹³⁷ The core administrative law issue is whether OCR has treated the DCL as having the force and effect of law. OCR says no; the conduct of institutions of higher education seems to suggest otherwise.

The avoidance of administrative law norms partially insulates the sex bureaucracy from judicial scrutiny. If the agency issued an actual rule requiring disciplinary procedures, unfair aspects could be challenged as a violation of due process requirements of the federal Constitution or as arbitrary and capricious under the APA. But when a private institution adopts the very same procedures, there is no federal due process claim because it is not the government acting, nor is there an APA claim to be made against the school.¹³⁸ There is a plausible argument that the government's defunding threat coerces adoption of its preferred procedures and therefore constitutes state action to which due process requirements attach. But as of this date, this claim has not succeeded in court. Thus, the offloading of government responsibility to new mini-bureaucracies inside schools has made it more difficult to subject the federal sex bureaucracy to judicial scrutiny.

Policymaking by agency threat is not unheard of,¹³⁹ but it is not ideal, particularly when one result is to disallow conduct that includes constitutionally protected sex. The lack of openness to public comment also enables the slide—from regulating sexual violence and sex discrimination to regulating ordinary sex—to go unnoticed. To the extent that the bureaucracy is regulating the bedroom, it ought not do so behind closed doors.¹⁴⁰ The policy of the sex bureaucracy should be seen for what it is so that it can be publicly known, examined, and debated.

<http://www.lankford.senate.gov/imo/media/doc/3.4.16%20Lankford%20letter%20to%20Dept.%20of%20Education.pdf> [<https://perma.cc/XPR2-P9WR>].

136. See generally *Sexual Assault on Campus: Working to Ensure Student Safety: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 114th Cong. (2014), <http://www.help.senate.gov/hearings/sexual-assault-on-campus-working-to-ensure-student-safety> [<https://perma.cc/58Z4-SFXG>].

137. See generally *Examining the Use of Agency Regulatory Guidance: Hearing Before the S. Subcomm. on Regulatory Affairs & Fed. Mgmt.*, 114th Cong. (2015), <http://www.hsgac.senate.gov/hearings/examining-the-use-of-agency-regulatory-guidance> [<https://perma.cc/QWU7-YY7P>].

138. See Matthew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 502–05 (2012).

139. See Wu, *supra* note 97 (discussing other examples).

140. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 564–65 (2003) (“The [*Griswold*] Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom.”) (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)); Petition for Rehearing of Respondent at 10, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140) (positing that the question was not what Hardwick “was doing in the privacy of his bedroom, but what the State of Georgia was doing there”); *Griswold*, 381 U.S. at 485 (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?”).

C. Prevention and Risk Reduction

An important component of the sex bureaucracy is prevention. VAWA 2013 requires schools to produce a statement of policy regarding the institution's prevention programs.¹⁴¹ These prevention policies are education, training, and risk-identification programs that blend public health and criminal frameworks. OCR has made clear that Title IX requires schools not just to respond to allegations of sexual violence, but also to "proactively consider" remedies for the broader student population beyond the complainant affected.¹⁴² These proactive measures include counseling and training of students and staff, as well as the development of educational materials.¹⁴³

Pursuant to the 2014 VAWA Regulations, each institution must include in its ASR a description of "primary prevention and awareness programs for all incoming students and new employees."¹⁴⁴ "Primary prevention programs" are:

programming, initiatives, and strategies informed by research or assessed for value, effectiveness, or outcome that are intended to stop dating violence, domestic violence, sexual assault, and stalking before they occur through the promotion of positive and healthy behaviors that *foster healthy, mutually respectful relationships and sexuality*, encourage safe bystander intervention, and seek to change behavior and social norms in healthy and safe directions.¹⁴⁵

Prevention programs are motivated by the imperative to prevent sexual violence, but changing social norms around sex and relationships may also be an end in itself. Prevention programs seek to construct good and bad sexual conduct and entail regulation of sexual behavior that is not sexual violence or harassment.

This is bureaucratic regulation of sex in several senses. First, it is mandated by the federal bureaucracy. Second, it is administered by government-mandated university bureaucracies. Third, the federal bureaucracy's mechanism of control consists mainly of monitoring policies and procedures that schools must adopt. Finally, the resulting policies consist of educational materials that explain ways for individuals to engage in sexual conduct—effectively a set of standard operating procedures, a regulatory sex manual produced by institutions and overseen by the government. We address the schools' resulting materials below in Part III. The bureaucratic requirements of these prevention policies necessitate that university bureaucracies actively regulate not merely sexual violence or sex discrimination, but sex itself.

141. Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4, 127 Stat. 54, 90 (2013) (codified at 20 U.S.C. § 1092(f)(8)).

142. Ali, Dear Colleague Letter, *supra* note 80, at 15–19.

143. *See id.* at 16–19.

144. 34 C.F.R. § 668.46(j)(1)(i) (2015).

145. *Id.* § 668.46(j)(2)(iv) (emphasis added).

1. *Beware Poor Minorities and Sexual Fantasies*

The regulatory requirement that prevention programs include information on “risk reduction”¹⁴⁶ gives rise to the precriminalization of certain groups on campus. The Department of Education states that prevention programs must “consider environmental risk and protective factors as they occur on the individual, relationship, institutional, community, and societal levels.”¹⁴⁷ What exactly are these risk factors? This framework is an explicit attempt to use a public health or epidemiological approach to sexual violence prevention. The Centers for Disease Control and Prevention (CDC) is the main agency providing information, resources, and the organizing conceptual framework for sexual violence prevention programs. Every federal policy statement describing prevention programs, of which we are aware, contains a citation to the CDC, its reports, analysis, and approach to risk reduction.

The CDC relies upon a four-step approach to addressing public health problems in general and sexual violence in particular: “(1) Define the problem; (2) Identify risk and protective factors; (3) Develop and test prevention strategies; (4) Assure widespread adoption.”¹⁴⁸ Risk, in this setting, is the risk that an individual will perpetrate sexual violence.¹⁴⁹ The below discussion is drawn from the CDC’s website and its primary report on risk factors for sexual violence perpetration,¹⁵⁰ which comprehensively summarizes findings from various academic literatures.¹⁵¹

Individual risk factors include alcohol use, early sexual initiation, coercive sexual fantasies, preferences for impersonal sex and sexual risk-taking, exposure to sexually explicit media, adherence to traditional gender role norms, and hyper-masculinity.¹⁵²

146. *Id.* § 668.46(j)(1)(i)(E). Risk reduction means “options designed to decrease perpetration and bystander inaction, and to increase empowerment for victims in order to promote safety and to help individuals and communities address conditions that facilitate violence.” *Id.* § 668.46(j)(2)(v).

147. Violence Against Women Act, 79 Fed. Reg. 35,418, 35,427 (proposed Jun. 20, 2014) (codified at 34 C.F.R. § 668 (2015)) (emphasis added). Similarly, the negotiators participating in the rulemaking “stressed the need to move away from programs that inappropriately place the burden on individuals to protect themselves, instead of focusing on ways to reduce the risk of perpetration.” *Id.*

148. *Sexual Violence*, CTRS. FOR DISEASE CONTROL & PREVENTION (2004), <http://www.cdc.gov/violenceprevention/sexualviolence/index.html> [<https://perma.cc/3BLJ-26KT>].

149. *Sexual Violence: Risk and Protective Factors*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/violenceprevention/sexualviolence/riskprotectivefactors.html> [<https://perma.cc/Z7E3-3SQW>] (last updated Feb. 10, 2015). VAWA Regulations require schools’ prevention programs to “[c]onsider environmental risk and protective factors as they occur on the individual, relationship, institutional, community, and societal levels.” 34 C.F.R. § 668.46(a).

150. *Sexual Violence: Risk and Protective Factors*, *supra* note 149.

151. *See id.* The CDC also draws on the World Health Organization’s Report, which it relies on for its discussion of community and societal risk factors. *Id.* (citing Rachel Jewkes, Purna Sen & Claudia Garcia-Moreno, *Sexual Violence*, in *WORLD REPORT ON VIOLENCE AND HEALTH* 159 (Etienne G. Krug et al. eds., 2002)).

152. *Sexual Violence: Risk and Protective Factors*, *supra* note 149.

Relationship risk factors include a “[s]trong patriarchal relationship or familial environment” and “[e]motionally unsupportive familial environment.”¹⁵³

Community risk factors include “[l]ack of employment opportunities,” “[p]overty,” and a “[l]ack of institutional support from police and judicial system.”¹⁵⁴

Societal risk factors include “[s]ocietal norms that support male superiority and sexual entitlement,” “[s]ocietal norms that maintain women’s inferiority and sexual submissiveness,” and “[w]eak laws and policies related to sexual violence and gender equity.”¹⁵⁵

Schools are required to develop and implement prevention programs that address these risk factors, which can be used to identify high-risk individuals and target them with education and monitoring programs.¹⁵⁶ Although the presence of these perpetration risk factors may not lead to the perpetration of sexual violence, the government believes it increases the probability of sexual violence perpetration. Using the CDC risk factors leads to a mandated consideration of community risk factors like “[l]ack of employment opportunities,” “[p]overty,” and a “[l]ack of institutional support from police and judicial system[s].”¹⁵⁷ It is easy to see that this would result in a kind of precriminalization that would disproportionately affect poor men of color on campus.¹⁵⁸

What exactly would it mean for prevention and awareness programs to address these risk factors? Is the student population to be educated about these risk factors and told that individuals from communities with poverty, unemployment, or a lack of institutional support from police—poor black and Latino men—are more likely to be perpetrators of sexual violence? Or are

153. The CDC has altered its sexual violence website. For a comparison and prior version, see *Sexual Violence: Risk and Protective Factors*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://web.archive.org/web/20140331050420/http://www.cdc.gov/violenceprevention/sexualviolence/riskprotectivefactors.html>. For similar language, see also Jewkes, Sen & Garcia-Moreno, *supra* note 151, at 159.

154. *Sexual Violence: Risk and Protective Factors*, *supra* note 149.

155. *Id.* As the CDC notes, “[f]ew programs, to date, have been shown to prevent sexual violence perpetration. A systematic review conducted by CDC’s Injury Center identified only three programs that have been shown, using a rigorous evaluation methodology, to prevent sexual violence perpetration.” *Sexual Violence: Prevention Strategies*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/violenceprevention/sexualviolence/prevention.html> [https://perma.cc/AW79-S6MF] (last updated Feb. 5, 2016).

156. The CDC highlighted that one type of intervention strategy is programming “aimed at those who are thought to have a *heightened risk* for sexual violence perpetration or victimization.” CTRS. FOR DISEASE CONTROL & PREVENTION, *SEXUAL VIOLENCE PREVENTION: BEGINNING THE DIALOGUE* 7 (2004), <http://www.cdc.gov/violenceprevention/pdf/svprevention-a.pdf> [https://perma.cc/2LUL-9CWT].

157. *Sexual Violence: Risk and Protective Factors*, *supra* note 149.

158. See *infra* text accompanying notes 290–304 (discussing racial impact of student discipline).

prevention programs to be targeted to the groups the CDC's risk factors suggest are more likely to be perpetrators? That would presumably require the identification of these students and either enhanced monitoring or targeted education measures that seek to "increase audience knowledge and share information and resources to prevent violence, promote safety, and reduce perpetration."¹⁵⁹ Given the considerable discretion and elasticity in constructions of key concepts like nonconsent, unwelcome, unwanted, or undesirable, as well as the common feelings of ambivalence in human sexual experience, this sort of precriminalization may create (if not mandate) a serious risk of race discrimination in the effort to prevent sexual violence.

Consider two additional risk factors: hyper-masculinity and coercive sexual fantasies.¹⁶⁰ According to the source the CDC cites as support, hyper-masculinity consists of two factors: membership in a fraternity, and sports participation.¹⁶¹ A plausible reading of the federal requirement that schools address the CDC's risk factors is that schools must make clear through ongoing education programs that fraternity members and student athletes are more likely to be perpetrators of sexual violence. While the majority of student athletes in the country are white, on a predominantly white college campus, a minority presence of poor black men on scholarships may be concentrated in the school's sports teams.¹⁶² Combining the CDC risk factors of hyper-masculinity, poverty, and lack of institutional support from police and judicial systems creates a significant risk of precriminalizing minority men.

As for coercive sexual fantasies, when one reads the systematic review conducted by the CDC regarding risk factors for sexual violence, the actual source cited claims that sexual fantasies per se are associated with sexual violence—not just coercive sexual fantasies.¹⁶³ Some of the studies cited involve asking convicted sex offenders, convicted non-sex offenders, and college males about their sexual fantasies. The evidence from the CDC's source indicates that college males have higher rates of virtually all variants of sexual fantasy, coercive or noncoercive, than convicted sex offenders and non-sex offenders.¹⁶⁴ But setting aside the gap between the CDC's conclusions and

159. 34 C.F.R. § 668.46(j)(2)(i) (2015).

160. *Sexual Violence: Risk and Protective Factors*, *supra* note 149.

161. See Andra Teten Tharp et al., *A Systematic Qualitative Review of Risk and Protective Factors for Sexual Violence Perpetration*, 14 *TRAUMA, VIOLENCE, & ABUSE* 133, 137–39 (2013).

162. See SHAUN R. HARPER ET AL., U. PENN. CTR. FOR THE STUDY OF RACE & EQUITY IN EDUC., *BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUITIES IN NCAA DIVISION I COLLEGE SPORTS* 4 (2013), https://www.gse.upenn.edu/equity/sites/gse.upenn.edu/equity/files/publications/Harper_Williams_and_Blackman_%282013%29.pdf [<http://perma.cc/R4QJ-T49S>] ("Black men were 2.8 percent of undergraduates, but 54.6 percent of football players and 60.8 percent of basketball team members at institutions [of higher education] in the report.").

163. See Tharp et al., *supra* note 161, at 154.

164. See, e.g., Eric L. Daleiden et al., *The Sexual Histories and Fantasies of Youthful Males: A Comparison of Sexual Offending, Nonsexual Offending, and Nonoffending Groups*, 10 *SEXUAL ABUSE: J. RES. & TREATMENT* 195, 205–06 (1998).

the studies on which it relies, what does it mean to mandate that university prevention policies address risk factors like exposure to sexually explicit media, sexual fantasies, and preferences for impersonal sex? The federal government now requires schools to be involved in constructing sexual norms and putting a stamp of disapproval on sexual practices like impersonal sex, pornography, and sexual fantasies.

The CDC risk factors also figure in prevention policies outside of higher education. For example, the Department of Defense (DOD) Sexual Assault Prevention and Response Office (SAPRO) adopted the CDC's "Sexual Violence Risk Factors" almost verbatim after a CDC briefing to SAPRO in November 2013.¹⁶⁵ The DOD implemented both the CDC's public health model in general and the CDC risk factors in particular. Colleges and universities have followed suit and developed prevention policies that take into account CDC risk factors.¹⁶⁶

2. *My Brother's Keeper*

Both statutory¹⁶⁷ and regulatory¹⁶⁸ language require primary prevention and awareness programs to include "bystander intervention" elements as part of the campaign to make sexual violence a community responsibility. The White House Task Force to Protect Students from Sexual Assault explains that "[r]esearch on the causes of sexual violence and evaluation of prevention efforts indicates that bystanders (also referred to as witnesses, defenders, or upstanders) are a key piece of prevention work."¹⁶⁹ These programs tend to

165. U.S. DEP'T OF DEFENSE, 2014–2016 SEXUAL ASSAULT PREVENTION STRATEGY 19 (2014), http://sapr.mil/public/docs/prevention/DoD_SAPR_Prevention_Strategy_2014-2016.pdf [<https://perma.cc/NJ9A-BTVW>].

166. See CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTING SEXUAL VIOLENCE ON COLLEGE CAMPUSES: LESSONS FROM RESEARCH AND PRACTICE 13–30 (2014), <https://www.notalone.gov/assets/evidence-based-strategies-for-the-prevention-of-sv-perpetration.pdf> [<https://perma.cc/JWX3-E5TL>]; Keith Hautala, "Green Dot" Effective at Reducing Sexual Violence, UKNOW (Sept. 10, 2014), <http://uknow.uky.edu/content/green-dot-effective-reducing-sexual-violence> [<http://perma.cc/2E4R-TM4B>]; Kimber Williams, *Sexual Violence Prevention Task Force Offers Recommendations*, EMORY REP. (Nov. 6, 2014), http://news.emory.edu/stories/2014/11/er_sexual_violence_task_force/campus.html [<https://perma.cc/6WWT-C26C>]; *Empirical and Theoretical Background*, HABIF HEALTH & WELLNESS CTR., WASH. U. ST. LOUIS, <https://shs.wustl.edu/SexualViolence/Green-Dot/Pages/Empirical-and-Theoretical-Background.aspx> [<http://perma.cc/7528-SCWP>] (last visited Apr. 2, 2016).

167. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54, 90 (2013) (codified at 20 U.S.C. § 1092(f)(8)) (requiring that schools develop a statement of policy that would address "safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene when there is a risk of domestic violence, dating violence, sexual assault, or stalking against a person other than such individual").

168. See Violence Against Women Act, 79 Fed. Reg. 62,752 (Oct. 20, 2014) (codified at 34 C.F.R. § 668.46 (2015)).

169. *Bystander-Focused Prevention of Sexual Violence*, NOT ALONE, <https://www.notalone.gov/assets/bystander-summary.pdf> [<https://perma.cc/Z5X2-LPP8>] (last visited Apr. 2, 2016).

focus on generating a sense of responsibility and building skills so that bystanders can get involved in preventing sexual assault.¹⁷⁰

Each of the thousands of mini sex bureaucracies must adopt a bystander intervention program. Consider the “Step Up!” program outlined in American University’s 2014 Annual Security Report:

Five Decision-Making Steps

- Notice the event.
- Interpret the event as a problem—investigate!
- Assume personal responsibility.
- Know how to help.
- Implement the help: Step Up!¹⁷¹

It is not just the duty of the educational institution to investigate—bystanders must also investigate. As the National Sexual Violence Resource Center says, “The reality is that everyone is a bystander, every day, in one way or another to a wide range of events that contribute to sexual violence.”¹⁷² Embedded in the idea of bystander intervention is the idea that each person must interpret his or her environment and act before others’ interactions become sexual violence or even sexual conduct. It is not just a matter of intervening in sexually violent acts:

If we limit our interventions to a culminating “event,” we miss multiple opportunities to do something or say something before someone is harmed. Instead, think of the “event” as being on a continuum of behaviors that demand specific interventions at each step. At one end of the continuum are healthy, age-appropriate, respectful, and safe behaviors. At the other end are sexual abuse, rape, and violent behaviors. Between the ends are other behaviors, ranging from those that begin to feel inappropriate, coercive, and harassing. Each situation is an opportunity to intervene by reinforcing positive behaviors BEFORE a behavior moves further towards sexual violence.¹⁷³

Thus, bystanders are to look for opportunities to intervene long before sexual violence, when they see behaviors move along the continuum away from “healthy, age-appropriate, respectful, and safe” behaviors.¹⁷⁴

170. See, e.g., *id.*

171. AM. UNIV., ANNUAL SECURITY REPORT 20 (2014), <http://www.american.edu/finance/publicsafety/upload/2014-DPS-Annual-Security-Report.pdf> [<https://perma.cc/6GWT-RJVV>].

172. Joan Tabachnick, *Engaging Bystanders in Sexual Violence Prevention*, NAT’L SEXUAL VIOLENCE RESOURCE CTR. 7 (2008), http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Booklets_Engaging-Bystanders-in-Sexual-Violence-Prevention.pdf [<http://perma.cc/X5HZ-5ASU>].

173. *Id.* at 10.

174. A recently-filed federal complaint shows the role of the bystander, not only in prevention, but also in discipline. In *Neal v. Colorado State University-Pueblo*, a student suspended for sexual misconduct is suing the university for Title IX sex discrimination and breach of contract. He alleges that the complaint against him was filed, not by the alleged victim, but by a

Bystander intervention programs seek to produce the sense that we are all implicated in the sexual environment and in protosexual interactions taking place around us. Responsibility for the potential sexual interactions surrounding us belongs to us all. There are no innocent bystanders, and perhaps no fully innocent interactions, because nonproblematic sexual behaviors can become problematic. We all must monitor the sexual environment to see if we can investigate and intervene. We are all part of the sex bureaucracy.

D. Making by Measuring

One of the laudable components of the sex bureaucracy's regulatory approach has been a renewed emphasis on research. Accurate statistics regarding the incidence of sexual assault on campus and in society have long been difficult to obtain. Between problems of underreporting and varying definitions of sexual assault, ascertaining the scope and scale of sexual assault is a challenge.¹⁷⁵ Accurate data about what is occurring and why is critical. To that end, the White House Task Force issued a call for all universities to conduct a campus climate survey and provided a toolkit to help universities design their surveys.¹⁷⁶ Following that call, universities across the country have performed or are now performing sexual climate surveys. Although these surveys vary, the American Association of Universities (AAU) survey, developed and implemented by twenty-six colleges and universities, is the most common.¹⁷⁷ The AAU survey uses much, but not all, of the White House Task Force model survey. The results from these surveys are being analyzed and a good deal of useful information has already entered the public debate.

Our goal in this Section is not to critique any particular survey instrument, but rather to explore the ways in which the design of campus climate surveys

peer who believed the accused student raped the alleged victim, after seeing a hickey on her neck and watching them interact, even though the peer did not witness the sexual encounter and the alleged victim stated the sex was consensual. Complaint, *Neal v. Colo. State Univ.-Pueblo et al.*, No. 1:16-cv-00873 (D. Colo. April 19, 2016). One wonders whether bystanders who fail to intervene may be charged with sexual misconduct.

175. See ESTIMATING THE INCIDENCE OF RAPE AND SEXUAL ASSAULT 26, 36 (Candace Kruttschnitt et al. eds., 2014).

176. See WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 8 (2014), https://www.whitehouse.gov/sites/default/files/docs/report_0.pdf [<https://perma.cc/C8VU-JPWF>] (calling on colleges and universities to voluntarily complete campus climate surveys). The task force also provided a "toolkit" for those colleges that elected to conduct climate surveys. See *Climate Surveys: Useful Tools to Help Colleges and Universities in Their Efforts to Reduce and Prevent Sexual Assault*, NOT ALONE, <https://www.notalone.gov/assets/ovw-climate-survey.pdf> [<https://perma.cc/W8EA-D382>] [*Campus Climate Survey Toolkit*].

177. See AAU Campus Survey on Sexual Assault and Sexual Misconduct, ASS'N AM. UNIVS., <http://www.aau.edu/Climate-Survey.aspx?id=16525> [<https://perma.cc/96TM-7KDQ>] (last visited Apr. 3, 2016); see also DAVID CANTOR ET AL., ASS'N OF AM. UNIVS., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT (Sept. 21, 2015), http://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf [<https://perma.cc/748T-9DUE>].

helps construct the sexual norms and perceptions that the survey purports to measure. To be sure, the call for research is partially motivated by a desire to gather information, but it also communicates a message about sexual conduct and sexual norms. “Conducting a climate survey can demonstrate the university’s commitment to addressing sexual assault and build trust with students, faculty, parents, and others.”¹⁷⁸ Asking students about their sexual conduct is part of the formation of the campus sexual climate. As a stark example, if a survey instrument were titled, “Sexual Violence and Institutional Betrayal,” as it was at the University of Oregon,¹⁷⁹ it would seem clear that something more than mere research were occurring. We are constructing a sexual environment in the course of attempting to measure it. This is not to say that we should not do sexual violence surveys—only that we should be cognizant of how the call for research relates to other components of the sex bureaucracy. The new sexual climate surveys attempt to estimate the background level of risk, but in so doing they also construct the perception and understanding of this risk. The survey instrument suggested by the government is part of the regulatory regime that articulates and attempts to alter norms and understandings about sex and desire. Risk estimation and data gathering merge with the active construction of contested concepts that shape the experience and meaning of sexual conduct.

Consider some illustrations. An inevitable choice for any survey is whether to define the terms the survey is asking about. This is particularly true in an area where terms carry varied and changing legal and social meanings. The Massachusetts Institute of Technology (MIT) survey, for example, uses the terms “sexual assault” and “sexual violence” at various points in its climate survey, but does not define the terms.¹⁸⁰ Both the White House Task Force model survey and the AAU survey do define the terms. The model White House survey defines sexual violence as follows:

Sexual violence refers to a range of behaviors that are *unwanted* by the recipient and *include remarks about physical appearance*; persistent sexual advances that are *undesired* by the recipient; *unwanted* touching; and *unwanted* oral, anal, or vaginal penetration or attempted penetration. These behaviors could be initiated by someone known or unknown to the recipient, including someone they are in a relationship with.¹⁸¹

178. *Campus Climate Survey Toolkit*, *supra* note 176, at 3.

179. See Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Surveys: 2014 and 2015*, <http://dynamic.uoregon.edu/jjf/campus> [<https://perma.cc/RS3L-N6XW>] (last updated Oct. 30, 2015). The University of Oregon participated in the AAU Survey and separately administered a sexual climate survey developed at the University of Oregon focused on “institutional betrayal.” *Id.*

180. MASS. INST. TECH., COMMUNITY ATTITUDES ON SEXUAL ASSAULT (2014), http://web.mit.edu/surveys/casatips/CASA_2014_Student_Final.pdf [<https://perma.cc/49QM-59M8>].

181. *Campus Climate Survey Toolkit*, *supra* note 176, at 28 (emphasis added).

Here, nonconsent is replaced by unwanted or undesired as the marker of sexual violence. Sexual violence includes remarks about physical appearance, sexual advances, and unwanted touching (Of which body part? Through clothes?). It seems likely that the average person would not have classified all of the listed behaviors as sexual violence absent the survey defining them as such. Therefore, the model survey departs from an ordinary understanding of sexual violence in broadly constructing conduct, such as unwanted remarks about physical appearance, as sexual violence.¹⁸²

The AAU survey takes a slightly different tack, substituting for sexual violence the phrase “sexual assault and sexual misconduct.” The survey section on perceptions of risk starts with the following preamble:

“Sexual assault” and “sexual misconduct” refer to a range of behaviors that are *nonconsensual or unwanted*. These behaviors could include remarks about physical appearance or persistent sexual advances. They also could include threats of force to get someone to engage in sexual behavior such as nonconsensual or unwanted touching, sexual penetration, oral sex, anal sex or attempts to engage in these behaviors. These behaviors could be initiated by someone known or unknown, including someone you are in or have been in a relationship with.¹⁸³

This preamble is similar to the White House version, but the removal of the term “sexual violence” and the introduction of the term “sexual misconduct” are important. Sexual assault and sexual misconduct are presumably different from each other; yet it is not clear exactly how. Are they of similar severity because the survey asks about them together? Or are they of differing severity? The survey is saying that unwanted remarks about physical appearance are either sexual assault or sexual misconduct. Which, though? Both? In the White House model survey, unwanted remarks about physical appearance are classified as sexual violence.

The surveys are contributing to, if not establishing, perceptions of what sexual assault, sexual misconduct, and sexual violence are understood to be.

182. The Rutgers Sample survey is another commonly cited resource. See #iSPEAK: *Rutgers Campus Climate Survey*, RUTGERS SCH. SOC. WORK (Nov. 2014), http://socialwork.rutgers.edu/Libraries/VAWC/new_doc_to_upload_for_ispeak.sflb.ashx [<https://perma.cc/FGW5-6GPE>]. The Rutgers survey uses the preamble:

“Sexual assault” and “sexual violence” refer to a range of behaviors that are unwanted by the recipient and include remarks about physical appearance, persistent sexual advances that are undesired by the recipient, threats of force to get someone to engage in sexual behavior, as well as unwanted touching and unwanted oral, anal or vaginal penetration or attempted penetration. These behaviors could be initiated by someone known or unknown to the recipient, including someone they are in a relationship with.

Id. at 6.

183. ASS’N OF AM. UNIVS., SURVEY QUESTIONNAIRE: REPORT ON THE AAU CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 7 (2015), http://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Survey%20Instrument.pdf [<https://perma.cc/K3VJ-CKVS>] (emphasis added).

The MIT non-defining approach produces data that are likely less reliable because what is meant by sexual assault will vary across individuals. But the process of defining is a process of creating meaning and social understandings. That is inevitable. To the extent that sexual climate surveys educate students about what (the surveyor or government believes) sexual misconduct is, these instruments are another part of the sexual education and reform program, altering (not merely measuring) understandings about what sex is ordinary and what sex is misconduct. The surveys push these understandings in a particular direction—toward more expansive definitions of sexual violence.

Consider the interaction between the ideas of nonconsensual sexual contact and of unwanted sexual contact. The model survey sometimes starts with a phrase like “nonconsensual or unwanted sexual contact,” but then quickly drops the language of nonconsent, using unwanted as a stand-in:

This section asks about *nonconsensual or unwanted* sexual contact you may have experienced. When you are asked about whether something happened since [TIMEFRAME], please think about what has happened since [TIMEFRAME]. The person with whom you had the *unwanted* sexual contact could have been a stranger or someone you know, such as a family member or someone you were dating or going out with. These questions ask about five types of *unwanted* sexual contact¹⁸⁴

In the model survey, unwanted simply becomes the marker of sexual violence. Consent, as a word and as a concept, fades. In terms of data reliability, treating these terms in the same breath has the effect of measuring the incidence as an aggregation of nonconsensual and unwanted sexual contact. More importantly, it contributes to individual and ultimately social understandings that unwanted is the same thing as nonconsensual—that we should feel similarly about unwanted sexual contact and nonconsensual sexual contact.

So too in the AAU survey, whose Risk Perception questions ask about “sexual assault or sexual misconduct” after defining the terms as noted above. The AAU survey also asks much more focused and directed questions about the use or threat of physical force to achieve or attempt to achieve “[s]exual penetration” or “[o]ral sex,” each of which is carefully defined.¹⁸⁵ This would seem to be an attempt to focus on nonconsensual sexual contact with the use or threat of physical force. Yet the introduction to these questions reads as follows:

This next section asks about *nonconsensual or unwanted* sexual contact you may have experienced while attending [University]. The person with whom you had the *nonconsensual or unwanted* contact

184. *Campus Climate Survey Toolkit*, *supra* note 176, at 23 (emphasis added).

185. ASS’N OF AM. UNIVS., SURVEY QUESTIONNAIRE, *supra* note 183, at 26 (“Sexual penetration. When one person puts a penis, fingers, or object inside someone else’s vagina or anus . . . Oral sex. When someone’s mouth or tongue makes contact with someone else’s genitals.”).

could have been someone you know, such as someone you are currently or were in a relationship with, a coworker, a professor, or a family member. Or it could be someone you do not know.

The following questions separately ask about contact that occurred because of physical force, incapacitation due to alcohol or drugs, and other types of pressure.¹⁸⁶

Thus, even when asking about physical force or incapacitation, the survey merges the ideas of nonconsent and unwantedness. The MIT survey, with a few exceptions, dispenses with the idea of nonconsent entirely and asks directly about “unwanted sexual behavior.”¹⁸⁷

This conflation of nonconsent and unwantedness matters because many people, regardless of gender and sexual orientation, have consensual sex that is unwanted. Sometimes it is partially unwanted, not fully wanted, or both wanted and unwanted at the same time, in contexts ranging from single hookups to longstanding relationships and marriages. Ambivalence—simultaneously wanting and not wanting, desire and revulsion—is endemic to human sexuality. It is far from clear today that having unwanted sexual contact is morally, psychologically, or practically equivalent to having nonconsensual sex.¹⁸⁸ Furthermore, the psychological line between “I did not want that to happen” and “I want that not to have happened” can be thin. The AAU and the model survey’s questions are making a claim that nonconsensual and unwanted are or ought to be treated the same, for purposes of policy, individual and social experience, and memory.

Asking students about their sexual encounters in this way constructs how students understand their sexual experiences and transforms the meaning of some sexual conduct into misconduct, by way of measuring how much sexual violence exists. Whether this is desirable or undesirable, it is important to recognize the regulatory effects of the sexual conduct surveys apart from the project of gathering knowledge.

The public debates about schools’ handling of campus rape complaints and about the prevalence of sexual violence on campus operate with the impression that the subject matter being addressed is, at its core, rape or violent assault. The phrase “one in five” that accompanies the common language of

186. *Id.*

187. MASS. INST. TECH., *supra* note 180.

188. It is of course not legally equivalent either. *See, e.g.,* Stephen J. Schulhofer, *Rape in the Twilight Zone: When Sex Is Unwanted but Not Illegal*, 38 SUFFOLK U. L. REV. 415 (2005) (noting various instances where unwanted sex was not illegal, and arguing for more aggressive criminal laws to address unwanted sex); *see also* Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 183 (2011) (“[U]nder consent models, viewing consent to sex merely as permission or authorization fails to criminalize an array of sexual abuses in which consent is merely apparent. Sexual abuses of power in the workplace, academia, and other professional and institutional settings are the most prominent examples in which obtaining passive submission to unwanted sexual demands is not recognized as warranting criminal sanctions.”).

“epidemic” is part statistic and part rallying cry.¹⁸⁹ Whether that number is inflated or deflated has been the subject of extensive public debate and it is not our subject here.¹⁹⁰ We do, however, wish to point to a shift in the vocabulary used to describe that statistic—a shift related to the instability of what surveys are measuring and the federal government is regulating. A feature on the *Washington Post*’s website contains the heading: “College Sexual Assault: 1 in 5 College Women Say They Were Violated.”¹⁹¹ The first sentence of the article reads: “Twenty percent of young women who attended college during the past four years say they were sexually assaulted, according to a *Washington Post*-Kaiser Family Foundation poll.”¹⁹² Participants in the public debate sometimes use the terms “sexual assaulted” and “violated” interchangeably.¹⁹³ To what extent has the federal bureaucracy moved to implement understandings similar to those Catharine MacKinnon expressed in 1987, “Politically, I call it rape whenever a woman has sex and feels violated”?¹⁹⁴

* * *

Sex regulation has become a domain of the federal bureaucracy. A crime-reporting regime has resulted in a bundle of policies and procedural

189. See, e.g., Kyle Lierman, *It's On Us, a Growing Movement to End Campus Sexual Assault*, WHITE HOUSE BLOG (Sept. 24, 2014, 3:00 PM), <https://www.whitehouse.gov/blog/2014/09/24/its-us-growing-movement-end-campus-sexual-assault> [<https://perma.cc/HH3N-57VF>] (invoking the figure as statistic and rallying cry); see also Libby Nelson, ‘1 in 5’: How a Study of 2 Colleges Became the Most Cited Campus Sexual Assault Statistic, VOX (Dec. 11, 2014, 2:00 PM), <http://www.vox.com/2014/12/11/7377055/campus-sexual-assault-statistics> [<http://perma.cc/Q2Q2-CCM2>].

190. See also Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 5, 2014), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm> [<https://perma.cc/Y5HR-LAND>] (“In the United States, an estimated 19.3 percent of women and 1.7 percent of men have been raped during their lifetimes; an estimated 1.6 percent of women reported they were raped in the twelve months preceding the survey.”). As alluded to in the text, the methodology and implications of such studies have been the subject of debate. See Christina Hoff Sommers, *CDC Study on Sexual Violence in the U.S. Overstates the Problem*, WASH. POST (Jan. 27, 2012), <https://www.washingtonpost.com/opinions/cdc-study-on-sexual-violence-in-the-us-overstates-the-problem/2012/01/25/gIQAHRKPWQstory.html> [<https://perma.cc/E6A6-WPJR>] (criticizing an earlier CDC survey on intimate partner and sexual violence as overstating the problem based on questionable methodology); Cathy Young, *The CDC's Rape Numbers Are Misleading*, TIME (Sept. 17, 2014), <http://time.com/3393442/cdc-rape-numbers> [<http://perma.cc/N9HP-T8QW>] (“[W]hen asked about experiences in the past twelve months, men reported being ‘made to penetrate’—either by physical force or due to intoxication—at virtually the same rates as women reported rape (both 1.1 percent in 2010, and 1.7 and 1.6 respectively in 2011).”).

191. Nick Anderson & Scott Clement, *1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015), <http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated> [<https://perma.cc/VR3N-XR6P>].

192. *Id.*

193. See, e.g., Laura Beck, *1 in 5 College Women Say They Were Sexually Violated*, COSMOPOLITAN (June 14, 2015), <http://www.cosmopolitan.com/college/news/a41953/washington-post-kaiser-family-foundation-poll> [<https://perma.cc/35UP-C5ZW>].

194. MACKINNON, *supra* note 105, at 82.

requirements—regulated parties must formulate, adopt, and implement additional policies to disclose—whose effect is the regulation not just of sexual violence, but of sex. Implementing these requirements has meant the creation of bureaucratic forms in nongovernmental institutions.¹⁹⁵ The framing of sexual violence as a public health matter to be addressed in the mode of risk regulation and prevention has contributed significantly to the expansion of the bureaucracy's area of regulation. Prevention programs to manage risk are in effect defining and regulating the desirable ways to have sex—not just preventing sexual violence. The sex bureaucracy focuses not only on isolated incidents, but also on structuring the environment. Regulation of the sexual environment shifts focus onto the involvement of institutions, cultures, and members of the community, such as bystanders. Because all community members are implicated in a sexual encounter, and because in every sexual encounter there is a risk of it going wrong, the school, the government, and peers are all implicitly involved in each sexual act. That is an active, ongoing, and pervasive endeavor. It requires constant attention, staff, organization, policy, and procedure—not only a federal bureaucracy, but also thousands of sex bureaucracies.

III.

BUREAUCRATS OF DESIRE

The sex bureaucracy has conscripted colleges and universities as bureaucrats of desire. Within each of their mini-bureaucracies, college sex bureaucrats understand their regulation endeavors as federal legal compliance. These sex bureaucracies are not simply training students on the rules of rape, sexual assault, and sexual harassment. They are instructing students on matters such as what is “sexy,” what constitutes “great sex,” what are “positive relationships,” and the like. They are instructing on, advising on, counseling on, defining, monitoring, investigating, and adjudicating questions of sexual desire.

A. *The Foreplay Bureaucracy*

Consent is a central concept in school programs to train students on sexual violence. In the course of sexual violence prevention, many schools have

195. This parallels a development in the Title VII context. To escape vicarious liability for sexual or racial harassment by employees, private firms implemented policies and procedures to demonstrate that they had done all that they could to prevent and respond to any harassment. See Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1435 (1990) (“[The] expansion of due process in organizational governance is an institutionalized response to threats posed by the legal environment.”); see also Lauren B. Edelman et al., *Diversity, Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1609–12, 1610 fig.1 (2001); Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 893–95 (2011).

folded into the consent rubric a set of normative views on good sex and good relationships. Sexual violence education and prevention programming is rapidly morphing into sex instructions reminiscent of guidance provided by sex therapists like Dr. Ruth. This jibes well with the public health framework that has so strongly influenced the federal regulatory orientation to sexual violence. Since the sex bureaucracy's role is regulating health and safety, explanations of consent easily lead to instructions about what is "healthy" or "positive" in sex and relationships. Within the broad health rubric, schools promote normative relationship values, such as respect, honesty, care for feelings, and nontraditional sex roles. All of this serves the sex bureaucracy's construction of an acceptable framework for the expression and gratification of sexual desire.

The distinction between "consensual sex" and "good sexual relationships" is eroding. For example, here is a smattering of instructions to students from Brown University's Health Services: "Communication, respect, and honesty are fundamental to *great sex and relationships*."; "*Positive* views on sex and sexuality are *empowering*."; "Consent is not just about getting a yes or no answer, but about understanding what a partner is *feeling*."¹⁹⁶ The school advises students before having sex to consider whether "[e]ach person is *positive and sincere* about their *desires*."¹⁹⁷

Yale University disclosed in its required 2013 ASR that its prevention program tells students that consent is not enough: "Hold out for enthusiasm. In general, it's easy to tell if someone is enthusiastic about an encounter or not."¹⁹⁸ In complying with the prevention program disclosure requirement, and purporting to prevent nonconsensual sexual contact, Yale instructs students on enthusiastic sex. Students are told to "[c]ommunicate with [their] sexual and romantic partners," as "[o]pen discussion of desires and limits is a critical part of building a positive sexual culture."¹⁹⁹ A positive sexual culture, open discussion of sexual desires, communication with romantic partners, and enthusiastic sex all seem like good sexual aspirations, though perhaps achieved by quite few. But these are not trainings about how to prevent sexual violence. They are instructions on how to have ordinary (or extraordinary) sex, and they are produced and monitored by the sex bureaucracy.

Georgia Southern University explains in its 2015 Annual Security Report definition of consent, which goes significantly further than even affirmative consent: "Consent is a voluntary, *sober, imaginative, enthusiastic, creative,*

196. *Consent*, BROWN UNIV., <https://www.brown.edu/campuslife/health/services/promotion/sexual-assault-dating-violence-consent/consent> [<https://perma.cc/W4ZK-KMF3>] (last visited Apr. 3, 2016) (emphasis added).

197. *Id.* (emphasis added).

198. YALE UNIV., 2013 ANNUAL REPORT ON CAMPUS SECURITY AND FIRE SAFETY 2013, at 21 (2014), <http://publicsafety.yale.edu/sites/default/files/files/Yale%20Clery%20Report%202013.pdf> [<https://perma.cc/K5ET-QFUA>].

199. *Id.*

wanted, informed, mutual, *honest*, and verbal agreement.”²⁰⁰ Many schools have recognized the same definition.²⁰¹ According to these schools, consent is not just an affirmative agreement. It is an agreement that is, *inter alia*, “imaginative,” “enthusiastic,” and “creative.” Because consent is “verbal,” a nod or smile cannot be consent. The inclusion of the term *sober* in the consent definition also seems to indicate that consent is invalid when a person is tipsy or drunk—not just when they are incapacitated. This school’s federally reported definition of consent is in effect not consent, but rather something far more. The school is instructing students to be imaginative and creative in their sexual encounters, to be explicit, and to do more than nod or smile during sex to indicate the required enthusiasm.

A number of schools have taken to presenting consent not simply as a line that marks off sexual assault, but rather as an element of what is sexy. “It is not sexy to have sex without consent!” a number of schools exclaim.²⁰² “Why is consent sexy?” Among other things, because it “*makes sex and relationships better*,” and “provides the opportunity to acknowledge that you and your partner(s) have *sexual needs and desires*.”²⁰³ Asking “[h]ow . . . UGA students make consent sexy,” the University of Georgia quotes a student: “Mutual respect, honor, appreciation, intimacy, foreplay, understanding,

200. GA. S. UNIV., 2015 ANNUAL SECURITY REPORT 39 (2015), <https://91879154016fc3ab09f626fef9f701c15c03c180-www.googleusercontent.com/host/0ByTqyAdCZkgOOHVhNkFyZVVWVEU> [https://perma.cc/8NQF-SEQY] (last visited Apr. 3, 2016) (emphasis added). Note that this definition incorporates the enthusiasm standard. If there was no enthusiasm, there was no consent.

201. *E.g.*, OGEECHEE TECH. COLL., 2015 ANNUAL SECURITY REPORT 27 (2015), http://www.ogeecheetech.edu/docs/d_CampusSafety/OTC2015AnnualSecurityReport.pdf [https://perma.cc/H6BN-YEX3]; VENTURA UNIFIED SCH. DIST., ANNUAL SECURITY REPORT 10–11 (2015), <http://www.vace.com/common/pdfs/crimestat.pdf> [https://perma.cc/5GG2-6UX8]; *Consent Is Sexy*, U. GA., <https://www.uhs.uga.edu/consent> [https://perma.cc/5ZGM-U5LL] (last updated Jan. 11, 2016); *The Importance of Consent*, U. MINN. DULUTH, <http://www.d.umn.edu/hlthserv/phe/Consent.pdf> [https://perma.cc/EJH8-488W] (last visited Apr. 3, 2016); *Violence Against Women Act*, AIMS COMMUNITY C., <http://www.aims.edu/about/departments/safety/vawa> [https://perma.cc/J5NV-GPWG] (last visited Apr. 3, 2016); *What Is Consent?*, OKLA. ST. U., <https://1is2many.okstate.edu/consent> [https://perma.cc/9BNU-7ZUW] (last visited Apr. 3, 2016); *What Is Consent?*, U. MARY WASH., <http://diversity.umw.edu/yesisthekey/what-is-consent> [https://perma.cc/CA25-W65C] (last visited Apr. 3, 2016); *What Is Consent?*, U.R.I., <http://web.uri.edu/womenscenter/consent> [https://perma.cc/9M6R-PZ44] (last visited Apr. 3, 2016); see also Brown Univ. Health Educ., *Brown Students Ask for Consent*, YOUTUBE (July 18, 2012), <https://www.youtube.com/watch?v=8IRIWWItLx4&feature=youtu.be&t=42s> [https://perma.cc/EUL7-B2T4].

202. See, e.g., *Consent Is Sexy*, *supra* note 201; TERESA HELENA MORENO, ILL. INSTITUTE OF TECH., SEXUAL ASSAULT PREVENTION AT THE ILLINOIS INSTITUTE OF TECHNOLOGY 3, <http://sexualassaultandorientation.wikispaces.com/file/detail/Illinois+Institute+of+Technology+Presentation.ppt> [http://perma.cc/XM3K-L827] (last visited Apr. 3, 2016); UNIV. AT BUFF., THE IMPORTANCE OF CONSENT, <http://wellnessed.buffalo.edu/13consentp.pdf> [http://perma.cc/WW25-4DJ4] (last visited Apr. 3, 2016).

203. *Consent Is Sexy*, *supra* note 201 (emphasis added).

communication, dialogue.”²⁰⁴ Sexy is equated with having normatively good relationship values.

The link between respect and sex in many colleges’ training programs is notable. Many schools, including Columbia University and Grinnell College, feature the phrase “Sexual Respect” on their websites presenting information and resources related to Title IX.²⁰⁵ All new Columbia students are required to take part in programming that explores the relationship between sexual respect and community membership.²⁰⁶ The University of Georgia’s instructions articulate the link between respect and sexual desire:

Show your partner that you *respect* her/him enough to ask about her/his *sexual needs* and desires. If you are not accustomed to communicating with your partner about sex and sexual activity the first few times may feel awkward. But, practice makes perfect. Be creative and spontaneous. Don’t give up. The more times you have these conversations with your partner, the more comfortable you will become communicating about sex and sexual activity. Your partner may also find the situation awkward at first, but over time you will both be more secure in yourselves and your relationship.²⁰⁷

Regarding a directive like “[d]on’t give up” even in the face of awkwardness, one wonders how that advice in the service of sexual violence prevention would work at schools that designate persistent sexual advances, or even unrequested and undesirable verbal sexual conduct, as forms of sexual harassment.²⁰⁸ The instruction to be “creative and spontaneous” is also puzzling insofar as it is at least somewhat in tension with instructions to be more communicative, since discussion presumably slows down sexual encounters to make them more deliberate and to avoid surprises that could come with spontaneity and creativity.

Clark University’s consent materials, subtitled “Doing It with the Lights On” tells students, “We want you to have great sex if you choose to have sex—safer, mutually enjoyable, consensual sex,” “Seeking = Sexy!” and “Receiving = Sexy!”²⁰⁹ American University’s 2014 ASR includes a listing of “the difference between healthy and unhealthy relationships.”²¹⁰ Healthy relationships feature, *inter alia*, partners who “are open and communicate needs and desires,” “encourage each other,” “are free to be themselves,” “respect . . .

204. *Id.*

205. See *Sexual Respect*, COLUM. U., <http://sexualrespect.columbia.edu> [<http://perma.cc/5CJJ-PETJ>] (last visited Apr. 3, 2016); *Sexual Respect*, GRINNELL C., <https://www.grinnell.edu/sexualrespect> [<https://perma.cc/63JQ-M3KY>] (last visited Apr. 3, 2016).

206. See *Sexual Respect*, COLUM. U., *supra* note 205.

207. *Consent Is Sexy*, *supra* note 201 (emphasis added).

208. See *supra* text accompanying notes 99–102.

209. Denise A. Hines & Kathleen Palm Reed, *Consent 101 or: Doing It with the Lights On*, CLARK U., <http://www.clarku.edu/offices/cave/consent> [<https://perma.cc/YFT9-EQJL>] (last updated Mar. 2010).

210. AM. UNIV., *supra* note 171, at 31.

each partner's privacy," and enjoy "independence within the relationship."²¹¹ How many people in long marriages can say that their relationships satisfy these criteria, let alone teenage college students in fumbling sexual experiences?²¹² Under the rubric of preventing sexual violence, school mini-bureaucracies within federal bureaucratic oversight are engaged in a normative program of good-sex education, couched in views about good relationships in which that good sex should be had.

Presumably in an attempt to fight a possible association of seeking verbal consent with an awkward damper on sexual excitement or romance, the University of Wyoming has a section in its consent materials, called "Don't Kill the Mood," that explains: "Asking for consent not only shows that you respect and care for your partner, but it also shows your creativity and can even make the sexual interaction more intimate."²¹³ The materials state that "[a]nything less than voluntary, sober, enthusiastic, verbal, noncoerced, continual, active, and honest consent is *Sexual Assault*."²¹⁴ According to this statement, someone who has unenthusiastic sex or sex while tipsy is being sexually assaulted. The materials explain that "[b]oth partners need to be excited about the sexual activity."²¹⁵ Rather than using body language, which is too often misinterpreted, consent should be a verbal "'Yes.' Or even, 'Yes, Yes, Oh! Yes!'"²¹⁶ The school preaches, "If you know your partner is excited and as into the moment as you are, you will have a better sexual experience," and "if you don't like oral sex, tell your partner and find another way to experience or give pleasure to your partner."²¹⁷ The school supplies some suggested phrases students could use in the midst of a sexual encounter, to "Make Consent Sexy":

Do you like when I do this?

What would you like me to do for you?

It makes me so hot when you (kiss/touch/suck/. . .) me there. What makes you hot?

211. *Id.*

212. Note also that the sex bureaucracy applies directly to K-12 education through Title IX, and thus the behavior of children and teenagers is increasingly subject to a sexual violence lens. From 2014 to 2015, the number of OCR complaints filed against K-12 schools for mishandling reports of sexual violence tripled. See Emma Brown, *Sexual Violence Isn't Just a College Problem. It Happens in K-12 Schools, Too.*, WASH. POST. (Jan. 17, 2016), https://www.washingtonpost.com/local/education/sexual-violence-isnt-just-a-college-problem-it-happens-in-k-12-schools-too/2016/01/17/a4a91074-ba2c-11e5-99f3-184bc379b12d_story.html [<https://perma.cc/4RJX-D7RK>].

213. UNIV. OF WYO., WHERE IS YOUR LINE: CONSENT IS SEXY, http://www.uwyo.edu/stop/resources/10_stop_consentSexy_booklet.pdf [<https://perma.cc/45FK-BQRQ>] (last visited Apr. 3, 2016).

214. *Id.* at 3 (emphasis added).

215. *Id.* at 2.

216. *Id.*

217. *Id.* at 3.

Do you want me to (kiss/touch/suck/. . .)?²¹⁸

And for students who want to take things to the next level, in a section on how to “Make Consent Fun,” the school provides some more colorful suggestions for a script:

Baby, you want to make a bunk bed: me on top, you on bottom?

May I pleasure you with my tongue?

Would you like to try an Australian kiss? It’s like a French kiss, but “Down Under.”

I’ve got the ship. You’ve got the harbor. Can I dock for the night?²¹⁹

Putting aside the question whether these kinds of utterances improve or aggravate ambiguity in consent, the point is that these are how-to’s for sexual arousal, proposition, and seduction—not just consent or agreement to have sex. In a similar vein, the University of California, San Diego’s 2014 ASR lists a sexual violence prevention program called “Dirty Talk: Making Consent Fun!” that declares, “Consent is not only necessary, but also *foreplay*.”²²⁰ Under federal bureaucratic oversight, schools are in the business of formulating and providing sex and relationship instruction and advice, and regulating it bureaucratically.²²¹ They are bureaucrats of desire.

Prevention programs for “sexual violence” train students on the kind of sex and sexual relationships they ought to engage in, quite beyond the rules of consent. They are about values in the realm of sex, spurred by the bureaucratic imperative to steer students way clear of boundaries that could implicate federal prohibitions. They are, in effect, endeavors to construct a value-laden sexual relationship environment. In a statement such as, “Consent is about real, honest, confident and open communication,”²²² consent stands in for a whole normative world of assumptions about what makes sex and relationships good, satisfying, worthwhile, meaningful, and fulfilling. The University of Wyoming is especially explicit: “By communicating what you want and need from your sexual relationship (and your relationship outside the bedroom), you will develop a *more caring, responsive, respectful love life*.”²²³ Enthusiasm, respect, excitement, honesty, creativity, imaginativeness, responsiveness, and caring are all terms that we increasingly see schools recite in the mode of didactic training on how to have sex. In short, violence prevention programs, regulated by the

218. *Id.* at 5.

219. *Id.*

220. UNIV. OF CAL., SAN DIEGO, 2014 ANNUAL SECURITY REPORT 15 (2014) (emphasis added), <https://web.archive.org/web/20150607150349/http://police.ucsd.edu/docs/AnnualClery.pdf> [<https://perma.cc/8PL4-ATFE>].

221. Surely many schools produced some educational materials on healthy sex and relationships prior to or independent of the federal requirements that now frame such materials. Those materials now exist under the auspices of the sex bureaucracy’s reporting, prevention, and discipline regimes.

222. UNIV. OF WYO., *supra* note 213, at 6.

223. *Id.* (emphasis added).

sex bureaucracy, direct students to have sex that reflects a familiar set of normative marriage-like ideals.

The ideals are often built into the definitions of consent disclosed in many federally required Annual Security Reports, whose purpose is to report campus crime. Breaches of these standards are supposed to lead to discipline, in accordance with the Department of Education's requirements. Crossing the consent line is supposed to trigger investigation and adjudication, as required by the federal bureaucracy. A number of schools have defined consent for disciplinary purposes to include enthusiasm and other markers of desire.²²⁴ For example, Elon University's 2013 ASR reports: "Only a comprehensible, unambiguous, positive and enthusiastic communication of consent for each sexual act qualifies as consent."²²⁵ Anything else is sexual assault. These definitions of consent to mean enthusiastic agreement or sober agreement and the like raise the question whether the sex bureaucracy will indeed investigate and discipline students for having sex when the agreement was unenthusiastic or tipsy.

We have seen notions of nonconsent transform rapidly, from traditional criminal notions of overcoming resistance and acting against someone's will, to regulatory notions of a lack of affirmative agreement, to unwantedness and undesirability. The consent line moves further with each crop of students across the country taught that they should seek not just agreement to engage in sex but also enthusiasm and excitement. When sexual violence prevention programs teach that sexual assault is anything other than enthusiastic, excited, creative, and imaginative sexual agreement, a disciplinary remedy for sex that is none of those things will be expected as well. In the interlocking system of required reporting, prevention, and discipline, the question of desire is now squarely in the purview of the sex bureaucracy. How much further will it go in regulating sexual desire?

The conduct classified as illegal by the sex bureaucracy has grown substantially, and indeed, it plausibly covers almost all sex students are having today. But is this a problem? Stephen Schulhofer, Reporter for the American Law Institute's Model Penal Code revisions on sexual assault, has compared affirmative consent rules that would render most people's sex lives illegal to a speed limit that one expects to be routinely violated and yet enhances overall

224. See, e.g., GORDON COLL., SAFETY & SECURITY AT GORDON COLLEGE 2014–2015, at 12 ("Consent is a voluntary, sober, *enthusiastic*, informed, mutual, honest and verbal agreement.") (emphasis added) (on file with authors); see also COASTAL CAROLINA COLL., SEXUAL VIOLENCE AND TITLE IX 8 (2015) (specifying that consent is "enthusiastic"), <https://www.coastal.edu/media/studentaffairs/counselingservices/pdfs/SA%20Sexual%20Violence%20booklet%20WEB%20Jul14.pdf> [<http://perma.cc/Y6CX-FYE2>]; *Types of Sexual Assault*, MARSHALL U., <https://www.marshall.edu/wcenter/sexual-assault/types-of-sexual-assault> [<https://perma.cc/GBV5-JG25>] (last visited Apr. 3, 2016).

225. ELON UNIV., ANNUAL SECURITY REPORT 2013, at 8 (2014), <http://www.elon.edu/docs/e-web/bft/safety/Elon%20University%20ASR%202013.pdf> [<https://perma.cc/FE76-WUME>].

safety.²²⁶ If “people know what the rules of the road are . . . the overwhelming majority will comply with them.”²²⁷ The rise of this type of reasoning complements the ratcheting process we have seen in the sex bureaucracy, in which commonsense advice about how to be safe evolves into the legal prohibition itself.

As nonconsent became the distinguishing feature of illegal sex, schools, parents, advocacy organizations, and the government gave commonsense advice: if there is any ambiguity about consent, stop. Don’t take the absence of a no to mean consent. Out of an abundance of caution, avoid ambiguity, get a yes, and avoid the cliff of nonconsent and sexual assault. In short order, however, the extra-cautious strategy of steering clear of the cliff became the new legal definition of consent. Once the line moved, commonsense advice was again to stay well clear of the edge: do not settle for a nod, a smile, or even a yes. Make sure the yes is enthusiastic. This was more than consent, supposedly creating a buffer from the risk of sexual assault. Very rapidly, however, the consent line shifted again to make enthusiasm a requirement of consent itself—anything less than enthusiasm is sexual assault. At each point, an attempt to remain a healthy distance from the cliff’s edge results in a change in where the cliff is. This is a process of legal erosion such that what was considered ordinary sex is regulated in ways that are unstable and uncertain. And as the context of highway stops for exceeding speed limits that nobody follows has shown, vagueness and over-inclusiveness means a likely disproportionate impact on minorities for conduct in which most people routinely engage.²²⁸

B. DOE Process

Accompanying the elevation of consent to enthusiasm, excitement, creativity, and desire is a corresponding set of institutional procedures to discipline sexual misconduct. The 2011 Dear Colleague Letter announced that to satisfy Title IX, schools’ policies and procedures had to meet specific criteria of which schools had not theretofore been aware.²²⁹ Although the DCL was fashioned as a guidance document that itself did not impose any new binding legal obligations, OCR initiated investigations into dozens of schools for noncompliance with Title IX,²³⁰ utilizing interpretations and requirements specified only in the DCL. The explicit threat was (and remains) to terminate

226. See Shulevitz, *supra* note 33 (characterizing and quoting Schulhofer).

227. *Id.*

228. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 27–30 (1998).

229. See generally Ali, Dear Colleague Letter, *supra* note 80.

230. *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEP’T. EDUC. (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> [<http://perma.cc/5935-W6AQ>].

all federal funding—upon which virtually all institutions of higher education significantly rely—if schools did not change their policies and disciplinary procedures to comply.²³¹

In the ensuing years, schools scrambled to adopt new policies and procedures that might satisfy OCR and keep the defunding threat at bay, while also avoiding any negative media attention.²³² Most typically, schools replaced their existing procedures and sexual misconduct policies (which might previously have been common procedures for all student misconduct) with new sexual misconduct-specific policies and procedures designed to comport with the DCL.²³³ But the new policies and procedures that schools adopted under this pressure have also come under intense criticism.

As an example, consider Harvard. While Harvard College and Harvard Law School were under federal investigation for noncompliance with Title IX, Harvard University in July 2014 announced its new “Sexual and Gender-Based Harassment Policy”²³⁴ and its new “Procedures for Handling Complaints Against Students Pursuant to the Sexual and Gender-Based Harassment Policy.”²³⁵ These replaced all of the individual Harvard schools’ previous substantive policies as well as their disciplinary procedures for sexual misconduct complaints.²³⁶ Strong public criticism of the new procedures from Harvard Law School faculty members (including one of us), pointed out the unfairness of key aspects of the procedures, including:

- The absence of any adequate opportunity to discover the facts charged and to confront witnesses and present a defense at an adversarial hearing.
- The lodging of the functions of investigation, prosecution, fact-finding, and appellate review in one office, an office that

231. See Ali, Dear Colleague Letter, *supra* note 80, at 16.

232. In 2015, the American Law Institute began its own project to examine “college and university procedures surrounding allegations of sexual misconduct on campus.” Vicki Jackson to Serve on ALI’s Project on Campus Sexual Assault, HARV. L. TODAY (Feb. 25, 2015), <http://today.law.harvard.edu/vicki-jackson-serve-alis-project-campus-sexual-assault> [<https://perma.cc/Z6HE-8M8W>]. On the state level, Virginia has proposed a \$100,000 study to determine how to “design a pilot program to create a regional center for the investigation of incidents of sexual and gender-based violence,” in part because smaller institutions who could not have a full-time staff of professional investigators. Jake New, *Investigating Sexual Assault, Regionally*, INSIDE HIGHER ED (Jan. 25, 2016), <https://www.insidehighered.com/news/2016/01/25/virginia-may-create-regional-center-investigating-sexual-assaults> [<https://perma.cc/SDH6-PFUP>].

233. See Allie Grasgreen, *Tide Shifts on Title IX*, INSIDE HIGHER ED. (Apr. 24, 2012), <https://www.insidehighered.com/news/2012/04/24/ocr-dear-colleague-letter-prompts-big-change-sexual-assault-hearings-unc> [<https://perma.cc/F588-9F2S>].

234. HARVARD UNIV., SEXUAL AND GENDER-BASED HARASSMENT POLICY: POLICY STATEMENT, *supra* note 104.

235. HARVARD UNIV., PROCEDURES FOR HANDLING COMPLAINTS INVOLVING STUDENTS PURSUANT TO THE SEXUAL AND GENDER-BASED HARASSMENT POLICY (July 1, 2014), https://hls.harvard.edu/content/uploads/2014/09/harvard_sexual_harassment_procedures_student1.pdf [<https://perma.cc/W86K-YPVZ>].

236. See *id.*

is itself a Title IX compliance office rather than an entity that could be considered structurally impartial.

- The failure to ensure adequate representation for the accused, particularly for students unable to afford representation.²³⁷

In December 2014, OCR found Harvard Law School violated Title IX in the previous two years by, *inter alia*, having used a “clear and convincing” standard instead of a “preponderance of the evidence” standard of proof, and not having made clear that mediation would not be used to resolve sexual misconduct cases.²³⁸ As a result, Harvard Law School entered into a resolution agreement with OCR to resolve the investigation.²³⁹ In a press release, OCR announced:

“Under the terms of the agreement, the Law School must:

- Revise all applicable sexual harassment policies and procedures to comply with Title IX and provide clear notice of which policy and procedure applies to Law School complaints;
- Through its Title IX Coordinator, coordinate provision of appropriate interim steps to provide for the safety of the complainant and campus community during an investigation; . . .
- Conduct annual climate assessments to assess whether the steps and measures being taken by the Law School are effective and to inform future proactive steps to be taken by Law School; . . .
- Track and submit for OCR’s review information on all sexual harassment/violence complaints and reports of sexual harassment/violence filed during the course of the monitoring and responsive action taken by the Law School.”²⁴⁰

237. *Rethink Harvard’s Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [<https://perma.cc/HW92-X4GC>]; *see also* Nancy Gertner, *Sex, Lies, and Justice*, AM. PROSPECT (Jan. 12, 2015), <http://prospect.org/article/sex-lies-and-justice> [<http://perma.cc/QR2U-BB7X>] (arguing that Harvard University’s Title IX disciplinary process is one-sided and offering Oberlin’s Title IX disciplinary process, a “symmetrical due process” proceeding, as an illustrative counterexample). *But see* Alexandra Brodsky, *Fair Process, Not Criminal Process, Is the Right Way to Address Campus Sexual Assault*, AM. PROSPECT (Jan. 21, 2015), <http://prospect.org/article/fair-process-not-criminal-process-right-way-address-campus-sexual-assault> [<http://perma.cc/AJ2M-4SEF>] (arguing that DOE Title IX protections provide *more* protection for the accused than may otherwise be in place; asserting that “any continued failures [in protecting the accused] . . . are the fault not of the law but of schools’ refusal to follow it”).

238. *See* Letter from Joel J. Berner, Reg’l Dir., Office for Civil Rights, U.S. Dept. of Educ., to Dean Martha C. Minow, Harvard Law Sch. 1, 3, 7 (Dec. 30, 2014), <http://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf> [<http://perma.cc/LC8H-NL2F>].

239. *See id.*

240. *Harvard Law School Found in Violation of Title IX, Agrees to Remedy Sexual Harassment, Including Sexual Assault of Students*, U.S. DEP’T. EDUC. (Dec. 30, 2014), <http://www.ed.gov/news/press-releases/harvard-law-school-found-violation-title-ix-agrees-remedy-sexual-harassment-including-sexual-assault-students> [<http://perma.cc/P4SF-T9FK>].

Meanwhile, Harvard University had intended that its new 2014 procedures would apply uniformly across the entire university, but Harvard Law School broke with the University's procedures because of the Law School faculty's serious concerns about procedural fairness, and wrote its own new procedures.²⁴¹ In contrast to the University's procedures, the Law School procedures permit a live hearing on the evidence, participation of counsel for whom the school will pay if parties cannot afford it, opportunity for parties to question witnesses and each other through the chair of the proceedings, and separation of roles of investigation, adjudication, and appeal.²⁴² These new Harvard Law School procedures, which OCR approved, do not actually contravene anything in the DCL, but they differ significantly from procedures that many schools such as Harvard University adopted post-DCL in efforts to ward off OCR's threats. While Harvard Law School may now provide a fair process, it is unlikely that schools without extensive resources would be able to adopt the essential but very costly elements of such a process.²⁴³ One can easily speculate why not a single school investigated by OCR or threatened with investigation has challenged OCR's interpretations of Title IX's requirements in court.²⁴⁴ Instead, dozens of schools under investigation nationwide have entered into resolution agreements with OCR.²⁴⁵

The gap between what is legally required of schools and what schools have adopted demonstrates the dynamic of overcompliance that characterizes many schools' actions. This dynamic is fueled by fear of attracting negative attention from both OCR and from nongovernmental organizations that both lobby the government and provide material support to school bureaucracies. Many schools engage the services of a growing cottage industry of lawyers, consultants, and other service providers that specifically cater to schools that must fulfill the extensive bureaucratic functions needed to comply with federal law.²⁴⁶ The NCHERM Group, a law practice that supports both schools and parties in campus sexual misconduct cases, founded the Association of Title IX Administrators (ATIXA), an association of more than 1,400 Title IX coordinators and investigators.²⁴⁷ A 2014 Whitepaper copublished by ATIXA states that "[i]f your campus is not equitable it may be because . . . [y]ou've

241. See HARVARD LAW SCH., HLS SEXUAL HARASSMENT RESOURCES AND PROCEDURES FOR STUDENTS (2014), <http://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf> [<https://perma.cc/F72Z-KK8W>].

242. *Id.* at 5–7.

243. Cf. Napolitano, *supra* note 8, at 400 (“Colleges and universities are devoting significant resources to setting up new systems to respond to incidents of sexual violence.”).

244. See *supra*, Part II.B.3.

245. A map of Title IX resolutions features prominently on notalone.gov.

246. See Napolitano, *supra* note 8, at 400.

247. See NCHERM GRP., LLC, AN OPEN LETTER TO HIGHER EDUCATION ABOUT SEXUAL VIOLENCE FROM BRETT A. SOKOLOW, ESQ. AND THE NCHERM GROUP PARTNERS (May 27, 2014), <https://www.ncher.org/wordpress/wp-content/uploads/2012/01/An-Open-Letter-from-The-NCHERM-Group.pdf> [<https://perma.cc/W8BA-P4PF>].

built your investigation and resolution mechanisms into castles of due process.”²⁴⁸ For \$1,500 to \$3,500, ATIXA sells “Investigation in a Box,” which promises to provide school administrators everything they need to conduct sexual misconduct investigations²⁴⁹—presumably procedures fashioned from this kit would not be “castles of due process.”

OCR has stated that “[p]ublic and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.”²⁵⁰ The implication is that private schools need not provide due process, and that to do so may risk violating Title IX. If OCR were to use two simultaneously enforced interpretations of Title IX’s requirements—different ones for private and public schools—that would run afoul of standard interpretive principles for administrative agencies. But, by negotiating with each school instead of adopting a general rule, OCR has made it possible that each school would agree to resolve an OCR investigation against it by voluntarily adopting a standard different from other schools.

The resolution agreements show some heterogeneity regarding what each school must do to remedy its noncompliance. The agreements address not only procedures but also substantive definitions of misconduct. For example, OCR’s Resolution Agreement with the University of Montana was accompanied by a letter in which OCR pressed the University to expand the definition of sexual harassment significantly beyond what is familiar in sexual harassment law and beyond what is in the DCL or previous guidance.²⁵¹ In this expanded definition, “unwelcome conduct of a sexual nature” in itself would constitute a sexual harassment offense, rather than an offense only if it creates hostile environment.²⁵²

Though schools have not legally challenged OCR, students subject to discipline at the hands of the Title IX bureaucracies are now beginning to sue OCR,²⁵³ and many such students have sued schools directly. These lawsuits

248. W. SCOTT LEWIS ET AL., NCHERM GROUP, LLC AND ATIXA, EQUITY IS SUCH A LONELY WORD: THE 2014 WHITEPAPER 3, <https://uminfoipoint.umsystem.edu/media/hr/titleix/2014-Whitepaper-FINAL.pdf> [<https://perma.cc/Y2DX-7VTA>].

249. See *The ATIXA Investigation in a Box Kit*, ATIXA, <https://atixa.org/resources/investigation-in-a-box> [<http://perma.cc/8GHX-RVMN>] (last visited Apr. 3, 2016).

250. Ali, Dear Colleague Letter, *supra* note 80, at 12.

251. See Letter from Bhargava, *supra* note 107, at 4.

252. See text accompanying notes 99–102.

253. See, e.g., Complaint, Doe v. Lhamon et al., No. (D.D.C. June 16, 2016) (describing lawsuit by student disciplined by University of Virginia, alleging that OCR unlawfully promulgated its 2011 Dear Colleague Letter, was arbitrary and capricious in requiring the “preponderance of the evidence” standard in violation of the APA, and exceeded statutory authority under Title IX); Complaint, Neal v. Colo. State Univ.-Pueblo et al, No. 1:16-cv-00873 (D. Colo. April 19, 2016) (describing lawsuit by suspended student against OCR alleging improper promulgation and enforcement of OCR’s DCL in violation of the APA, and against the university alleging violation of Title IX and breach of contract).

reflect a growing perception that the post-DCL pressure that OCR exerted has caused schools to adopt procedures and practices that deny fairness to accused students. These cases reveal a pattern of accusations in which consent is the key question and procedurally defective disciplinary processes support the expansion of the bureaucracy's domain over ordinary sex.

In one federal case, a male student sued Washington and Lee University after expulsion for "nonconsensual sexual intercourse" with a female student.²⁵⁴ He argued that the school's procedures—which afforded no right to counsel and employed a preponderance of the evidence standard—violated due process and discriminated on the basis of sex in violation of Title IX.²⁵⁵ The plaintiff alleged that the Title IX officer did not show him a copy of the accuser's complaint in a timely fashion, refused his request to have a lawyer participate in the proceedings, failed to interview several of his suggested witnesses, selectively omitted facts from the investigative report, denied his request to record the hearing, and hindered him from putting questions to the accuser, who attended the hearing behind a partition and was asked—through the hearing board—only a subset of his questions.²⁵⁶ Moreover, the plaintiff alleged, the Title IX officer had given a presentation arguing "regret equals rape," a position she framed as "a new idea everyone, herself included, is starting to agree with."²⁵⁷ Citing an article titled, *Is it Possible That There is Something In Between Consensual Sex and Rape . . . And That It Happens To Almost Every Girl Out There?* from a website called *Total Sorority Move*, the presentation allegedly suggested "that sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express"—a situation allegedly parallel to the incident for which the plaintiff was expelled.²⁵⁸

The court dismissed the plaintiff's due process claim because the school could not be considered a governmental actor subject to the Fifth Amendment, even if it "was under pressure to convict students accused of sexual assault in order to demonstrate that the school was in compliance with the OCR's guidance."²⁵⁹ The court noted that "[r]esponding to the OCR's guidance, W&L made changes that one could infer were designed to secure more convictions."²⁶⁰ The court did permit the plaintiff's Title IX claim to go forward, however.²⁶¹ Noting that the allegations, taken as true, amounted to "a

254. Doe v. Washington & Lee Univ., No. 6:14-cv-00052, 2015 WL 4647996, at *1 (W.D. Va. Aug. 5, 2015) (mem.).

255. *Id.*

256. *Id.* at *4–6.

257. *Id.* at *3.

258. *Id.* at *10.

259. *Id.* at *9.

260. *Id.*

261. *Id.* at *10.

practice of railroading accused students,”²⁶² the court found that the plaintiff had “plausibly established a causal link between his expulsion and gender bias.”²⁶³

In another federal case, the plaintiff, a male Columbia University student, was suspended for engaging in “nonconsensual sexual intercourse” with a female student.²⁶⁴ (Interestingly, the accuser also appealed the school’s six-month suspension as too severe.)²⁶⁵ The court described the sexual encounter this way:

Plaintiff and Jane Doe strolled around the Columbia University neighborhood for approximately one hour, at which point they returned to the lounge where Plaintiff had been studying. As Plaintiff gathered his books, Jane Doe and Plaintiff began to flirt with each other, and they discussed “hooking up” instead of going to bed. Because each of their roommates was asleep at the time—and Plaintiff’s roommate was Jane Doe’s ex-boyfriend—Jane Doe suggested that they go to the bathroom located within her suite rather than to either of their bedrooms.

Plaintiff dropped his bag off in his room, and then the two walked together to Jane Doe’s suite. When they reached the bathroom located within Jane Doe’s suite, Jane Doe instructed Plaintiff to wait there while she went into her bedroom to find a condom. When Jane Doe came back into the bathroom, she undressed herself in front of Plaintiff, and the two proceeded to have sex. Afterwards, Jane Doe took a shower, and Plaintiff returned to his room to go to sleep.

In the following weeks, Jane Doe contacted Plaintiff a few times to express concern about how their sexual encounter might appear to others in their social circle, particularly because Jane Doe had dated Plaintiff’s roommate. At or about the same time, Jane Doe also spoke about the encounter to Claire Kao, a resident adviser to both her and Plaintiff, who then approached Plaintiff to discuss the evening. Kao told Plaintiff that she had been advised that he had engaged in “consensual sexual intercourse” with Jane Doe on the night of May 12th and that Jane Doe had sought to discuss the encounter with her in confidence, but that she was required by state law to report the incident to Columbia.²⁶⁶

In this case, the suspended student alleged the gender bias of the Title IX investigator who, *inter alia*, failed to interview witnesses present on the night in question. The court found that this alleged process failure was “arguably irrelevant to the outcome of the hearing, as the panel’s ruling that Plaintiff had

262. *Id.* (quoting *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996)).

263. *Id.*

264. *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356 (S.D.N.Y. 2015).

265. *Id.* at 356.

266. *Id.* at 362–63.

engaged in nonconsensual sex with Jane Doe did not turn on the events of that night. Instead, the panel's conclusion rested on its finding that 'it [was] more likely than not that [Plaintiff] directed unreasonable pressure for sexual activity toward the Complainant over a period of weeks,' and that 'this pressure constituted coercion.'"²⁶⁷ While the accuser initially described the incident as "consensual," it was in the weeks preceding the sex that alleged "[p]ressure for a date or a romantic or intimate relationship" could have vitiated consent under Columbia's Gender-Based Misconduct policy.²⁶⁸ Other than the fact that the individuals had sex, the facts of that night, then, were irrelevant, so procedural failures in investigating into those facts did not cause an inaccurate outcome. Even if the consent were clear, affirmative, or enthusiastic on the night in question, it would have apparently been negated by the several weeks of unreasonable pressure.²⁶⁹

In *Doe v. Brandeis University*, a federal court refused to dismiss a lawsuit of a male student who was disciplined for unwanted sexual conduct arising in the course of a twenty-one-month-long same-sex dating relationship.²⁷⁰ The conduct for which Brandeis had disciplined the plaintiff included: touching the clothed groin of the complainant (who would soon be his boyfriend) while the two watched a movie; occasionally waking his boyfriend with a kiss; looking at his boyfriend's groin while showering together; and, while at his boyfriend's father's house, attempting to perform oral sex when his boyfriend did not want it.²⁷¹ Brandeis had given the plaintiff a "disciplinary warning" which carried a permanent notation of "serious sexual transgressions" on his educational record.²⁷² The court noted that, "substantially spurred by" OCR's 2011 DCL, "universities across the United States have adopted procedural and substantive policies intended to make it easier for victims of sexual assault to make and prove their claims and for the schools to adopt punitive measures in response."²⁷³ Stating that with its new policies, "Brandeis appears to have substantially impaired, if not eliminated, an accused student's right to a fair and impartial process," the court denied the university's motion to dismiss the plaintiff's claims of breach of contract, breach of implied covenant of good faith and fair dealing, negligence, and negligent infliction of emotional distress.²⁷⁴

267. *Id.* at 370.

268. *Id.* at 361.

269. An appeal in this case is pending in the Second Circuit. See Mark Hamblett, *Columbia Male Student Urges Circuit to Revive His Bias Suit*, N.Y.L.J. (Apr. 13, 2016), <http://www.newyorklawjournal.com/id=1202754775138/Columbia-Male-Student-Urges-Circuit-to-Revive-His-Bias-Suit> [<https://perma.cc/M3VS-XDQB>].

270. *Doe v. Brandeis Univ.*, Civ. No. 15-11557-FDS, 2016 WL 1274533, at *46 (D. Mass. Mar. 31, 2016).

271. *Id.* at *4.

272. *Id.*

273. *Id.* at *11.

274. *Id.* at *6, *46.

When a school finds an accused student not responsible for sexual misconduct, it may fear opening itself to a claim that it has violated Title IX. Increasingly, in light of court rulings,²⁷⁵ schools also have reason to anticipate lawsuits under state and federal law on behalf of students disciplined by

275. See *Ritter v. Oklahoma et al.*, No. 5:16-cv-00438-HE (W.D. Okla. May 6, 2016) (finding a substantial likelihood of success on the merits of student's breach of contract claim against university, and granting a preliminary injunction staying his expulsion for sexual misconduct); *Doe v. Alger*, No. 5:15-cv-00035, 2015 WL 1274025, at *10, 12-13 (W.D. Va. Mar. 31, 2016) (denying public university officials' motion to dismiss suspended student's claim of deprivation of property interest in continued enrollment without due process); *Marshall v. Ind. Univ.*, No. 115CV00726TWPDKL, 2016 WL 1028362, at *6-7 (S.D. Ind. Mar. 15, 2016) (denying university's motion to dismiss Title IX claim of student expelled for sexual assault); *Doe v. Rector & Visitors of George Mason Univ.*, No. 1:15-CV-209, 2015 WL 5553855, at *18 (E.D. Va. Feb. 25, 2016) (granting summary judgment on federal due process claim in favor of student expelled for sexual misconduct); *Prasad v. Cornell Univ.*, Civ. No. 15-cv-00322, slip op. at 50 (N.D.N.Y. Feb. 24, 2016) (denying university's motion to dismiss Title IX and New York Human Rights Law claims of student expelled for sexual misconduct); *Doe v. Brown Univ.*, No. CV 15-144 S, 2016 WL 715794, at *4, *16 (D.R.I. Feb. 22, 2016) (denying university's motion to dismiss Title IX breach of contract, breach of covenant of good faith and fair dealing, and declaratory judgment claims, of student suspended for sexual misconduct); *Doe v. Middlebury Coll.*, No. 1:15-CV-192-JGM, 2015 WL 5488109, at *1, *4 (D. Vt. Sept. 16, 2015) (granting preliminary injunction enjoining college from expelling student while student's breach of contract action against the college, related to sexual misconduct expulsion, proceeded); *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 760, 768 (D. Md. 2015) (finding student disciplined for sexual misconduct "alleged a facially plausible claim of erroneous outcome sex discrimination in violation of Title IX" as a result of the university's proceedings); *Doe v. Washington & Lee Univ.*, No. 6:14-cv-0052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015) (mem.) (denying university's motion to dismiss Title IX claim of student expelled for nonconsensual sexual intercourse); *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170RLV, 2015 WL 4478853, at *1, *10 (W.D.N.C. July 22, 2015) (denying university's motion to dismiss procedural and substantive due process claims of student suspended for sexual misconduct); *Sterrett v. Cowan*, 85 F. Supp. 3d 916, 929 (E.D. Mich. 2015) (denying university's motion to dismiss student's due process claim of student suspended for sexual misconduct); *King v. DePauw Univ.*, No. 2:14-CV-70-WTL-DKL, 2014 WL 4197507, at *15 (S.D. Ind. Aug. 22, 2014) (enjoining university's suspension of student for sexual misconduct pending student's Title IX and breach of contract suit); *Harris v. Saint Joseph's Univ.*, No. CIV.A. 13-3937, 2014 WL 1910242, at *1, *7 (E.D. Pa. May 13, 2014) (denying university's motion to dismiss state unfair trade practices and consumer protection law claim of student disciplined for sexual assault); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 751-52 (S.D. Ohio 2014) (denying university's motion to dismiss breach of contract, intentional infliction of emotional distress, libel per se, negligence, and Title IX claims of student expelled for sexual misconduct); *Doe v. Univ. of S. Cal.*, No. B262917 (Cal. Ct. App. Apr. 5, 2016) (holding that university denied accused student a fair hearing); *Dixon v. Allee*, No. BS157112 (Cal. Super. Ct. Aug. 12, 2015) (order granting stay) (staying university's expulsion of student for sexual misconduct); *Doe v. Regents of Univ. of Cal., San Diego*, No. 37-2015-00010549-CU-WM-CTL, at *5 (Cal. Super. Ct. July 10, 2015) (minute order) (finding accused student's sexual misconduct hearing was unfair and that the "evidence did not support the findings," thus ordering university to set aside its findings and sanctions against the accused); *Mock v. Univ. of Tenn.*, No. 14-1687-II, at *1, *8, *23 (Tenn. Ch. Ct. Aug. 10, 2015) (finding university's expulsion of student for sexual misconduct was arbitrary and capricious under the Tennessee Uniform Procedures Act); *McLeod v. Duke Univ.*, No. 14 CVS 3075, 2014 WL 8843115, at *1, *2 (N.C. Super. Ct. May 29, 2014) (enjoining university's expulsion of student pending student's suit for breach of "material rights" related to sexual misconduct allegation and discipline process). But see *Doe v. Univ. of Cincinnati*, No. 1:15-CV-681, 2016 WL 1161935 (S.D. Ohio Mar. 23, 2016) (granting university's motion to dismiss due process and Title IX claims of two students disciplined for sexual assault); *Doe v. Columbia Univ.*, No. 1:14-cv-03573-JMF (S.D.N.Y. Apr. 21, 2015) (granting university's motion to dismiss Title IX claims of student suspended for sexual misconduct).

schools.²⁷⁶ The legal claims now being litigated by plaintiffs under Title IX, due process, or state law focus on flawed disciplinary procedures—encouraged, if not mandated, by OCR—that schools have adopted for resolving sexual misconduct allegations in concerted post-DCL efforts to take sexual violence more seriously.²⁷⁷

Courts have reviewed not only claims about schools' procedures, but also substantive outcomes produced by those procedures. In a lawsuit against a state school, *Doe v. Regents of the University of California, San Diego*,²⁷⁸ a California court determined that the procedures used to hear allegations of sexual misconduct violated federal due process, and that under state administrative law, "substantial evidence does not support the finding of non-consensual sexual activity."²⁷⁹ At the school's sexual misconduct hearing, the accuser "stated that petitioner kept 'trying to finger [her] and touch [her] down there.' Also, Ms. Roe did not object to sexual contact per se, and only explained that it was not pleasurable for her at that time."²⁸⁰ The court found:

What the evidence *does* show is Ms. Roe's personal regret for engaging in sexual activity beyond her boundaries. The panel's finding . . . illustrates the lack of evidence: "Jane stated that she physically wanted to have sex with Ryan but mentally wouldn't." The record reflects this ambivalence on the part of Ms. Roe. But Ms. Roe's own mental reservations alone cannot be imputed to petitioner, particularly if she is indicating physically she wants to have sex.²⁸¹

In this case, the procedural flaws included the limitation on the accused's right to cross-examine the accuser—more than two-thirds of his questions (many of

276. Some may posit that equal pressure on schools from OCR on one hand and from courts on the other hand means the "system is working." *E.g., Courts, Not Campuses, Should Decide Sexual Assault Cases*, INTELLIGENCE SQUARED U.S. 17 (Sept. 16, 2015), <http://intelligencesquaredus.org/images/debates/past/transcripts/091615%20Sexual%20Assault.pdf> [<https://perma.cc/JF8K-S2L3>] (quoting Professor Stephen Schulhofer). But there is little reason to think that being thus caught between a proverbial "rock and a hard place" will itself lead schools to fair processes and just outcomes.

277. For a collection of lawsuits arising out of campus sexual misconduct cases, see *Lawsuits, BOYS & MEN EDUC.*, <http://titleixforall.knackhq.com/due-process-lawsuits> [<https://perma.cc/NHD5-3GQC>] (last visited Apr. 20, 2016). For example, the plaintiff in *Hemington v. Arizona Board of Regents* alleged, inter alia, that he was given insufficient opportunity for discovery, use of an improper legal standard, and a lack of notice, since the school provided him with no specifics of his charge. See First Amended Complaint at 6, 14, No. 4:11-cv-00058-FRZ (D. Ariz. July 1, 2015). In some cases, accused students have sued their accusers in civil court. See, e.g., *Cuba v. Pylant*, No. 15-10212, 2016 WL 723311, at *1–2, *13 (5th Cir. Feb. 23, 2016) (denying a motion to dismiss accused student's tort claim against accuser and accuser's parents); Carmen Forman, *Roanoke College Student Acquitted of Rape Re-enrolls, Sues Accuser*, ROANOKE TIMES (Jan. 19, 2016, 10:16 PM), http://www.roanoke.com/news/local/salem/roanoke-college-student-acquitted-of-rape-re-enrolls-sues-accuser/article_fed17181-c2ef-5206-a5f8-38f270e34984.html [<http://perma.cc/5Y93-CMC7>].

278. *Doe v. Regents of the Univ. of Cal., San Diego*, No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597 (Cal. Super. Ct. July 10, 2015) (minute order).

279. *Id.* at *4; see also *id.* at *3.

280. *Id.* at *4 (alteration in original) (emphasis added and omitted).

281. *Id.* (citation omitted).

which the court deemed germane) were not put by the panel to the accuser, who was also placed behind a barrier so she could not be seen.²⁸² In addition, when the accused appealed the panel's decision to suspend him for one quarter, the Dean increased his suspension time to one year without providing any reason for the increase.²⁸³

According to *Doe v. University of Southern California*, a male student who engaged in sexual conduct that the female complainant agreed was consensual was nevertheless disciplined for sexual misconduct because the school found that he "encouraged or permitted" other students to slap the buttocks of the complainant without consent during group sexual activity, and that he "endangered" her "by leaving her alone in the bedroom when the involved parties dispersed."²⁸⁴ A California appellate court held not only that the accused student was denied a fair hearing because the school did not provide him notice of the factual basis of the charges, but also that there was insufficient evidence to support the school's finding that he encouraged or permitted others to slap the complainant or that he endangered her by leaving the bedroom.²⁸⁵

The cases yield some insight into the kinds of substantive fact patterns that schools are classifying and disciplining as sexual misconduct. But an unfortunate byproduct of the student privacy norms that schools, constrained by the Family Educational Rights and Privacy Act (FERPA),²⁸⁶ understandably must observe regarding campus disciplinary cases, is that research into the fact patterns of campus cases is difficult to undertake. There is no comprehensive database one can search, and no collected records a researcher can access. While anecdotal evidence is informative, it is hard to know how representative are the published legal cases, media reporting, and accounts by individual accusers and accused students.

One partial collection of descriptions of campus cases has been published by the NCHERM Group. The descriptions include the following:

A female student interviewed recently during an investigation had spread rumors by social media that she had been raped by a male student. When the rumors got back to the male student, he approached her about it, and she offered him a lengthy apology, and then put it in writing. We had to investigate nevertheless, and she told us that they'd had a drunken hook-up that she consented to. She was fine with what happened. We asked her why she called it a rape then, and she said, "you know, because we were drunk. It wasn't rape, it was just rapey rape." We asked her if she was aware of what spreading such an accusation might do to the young man's

282. *Id.* at *2.

283. *Id.* at *5.

284. *Doe v. Univ. of S. Cal.*, No. B262917, slip. op. at 2–3 (Cal. Ct. App. Apr. 5, 2016).

285. *Id.* at 37.

286. 20 U.S.C. § 1232g (2012).

reputation, and her response was “everyone knows it wasn’t really a rape, we just call it that when we’re drunk or high.”

A male student performed demeaning, degrading and abusive sexual acts on a female nonstudent. They engaged in BDSM, and he ignored her protests throughout the entire sexual episode, despite her screaming in obvious pain and trying to get away from him. She filed a grievance with the campus, and we soon discovered instant messages in which she consented, just before the incident to exactly these acts, and agreed to forgo the use of a “safe word” common in BDSM relationships.

A female student accused a male student of sexual assault. When her complaint of sexual assault was heard by a campus panel, there was literally no evidence to support her complaint. He was found not responsible and decided not to press a complaint against her for a false allegation out of sensitivity to her serious mental health issues. Then, she went around campus telling anyone and everyone that he had raped her. The male student then filed a complaint against the female student for harassment. The female student then filed a complaint with the college for processing his complaint as an act of retaliation against her.²⁸⁷

There is a significant disconnect between the current discussions in our country about the epidemic of campus rape, and the fact patterns involved in the allegations now routinely investigated as sexual misconduct. The consequences of this disconnect need to be further understood and analyzed. Ignoring them leads to policymaking based on an unstable foundation that cannot serve to support activists’ legitimate and laudable policy goals of addressing rape and sexual violence.

The problem we are drawing attention to is not a “false accusations” problem. We are also in many ways beyond the so-called “he said, she said” problem in which two people’s accounts of the facts differ, and the question is which account to believe. Many of the current fact patterns appear to be situations in which he and she (or he and he, or she and she) say much the same thing about the facts of the incident, but give different meanings to the experience. The different meanings need not be radically dissimilar to result in different determinations about sexual misconduct. This is because the difference between consent and nonconsent today turns on agreement to engage in sexual activity and, increasingly, on whether that agreement was excited, enthusiastic, or desirable.²⁸⁸ Ambivalence and mixed feelings, which are common and deep in human sexuality, create a highly uncertain situation for people engaging in sex under the sex bureaucracy. In this bureaucracy, ambivalent feelings may reveal a lack of consent, which may mean sexual

287. NCHERM GRP., LLC, *supra* note 247, at 4–5.

288. *See supra* Part III.A.

assault for which one who is disciplined. This opens the door wide to judgments about sexual morality that can shade the lived experience of consent.

On an individual level:

Did I consensually sleep with my roommate's boyfriend? I would be a bad person if I did, so I would not have done that.

Did I have consensual sex with a black/Latino/Asian man? That would be inconsistent with what I have known and accepted about my own desires, so I would not have done that.

On an institutional level, moral judgments about what kind of sex is good or bad can inform determinations of consent:

Was this guy out to score that night?

Did he behave like a jerk and not seem to care about her feelings?

Was this sex pleasurable?

When prohibitions are vague, broad, and sweep in swathes of innocent conduct in which many people engage, they raise questions about whether enforcement may have a greater impact on certain groups over others.²⁸⁹ The same OCR that is administering the sex bureaucracy has also acknowledged the serious risk of race discrimination in student discipline in elementary and secondary schools and found the need to issue guidance on “how to identify, avoid, and remedy discriminatory discipline.”²⁹⁰ OCR's Civil Rights Data Collection showed that “African-American students . . . are more than three times as likely as their white peers . . . to be expelled or suspended,”²⁹¹ and that “the substantial racial disparities . . . are not explained by more frequent or more serious misbehavior by students of color.”²⁹² OCR has recognized that “African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students. In short, racial discrimination in school discipline is a real problem.”²⁹³

Whose sexual conduct is more likely to be perceived by individuals and schools as threatening, frightening, or menacing?²⁹⁴ And which accusers are

289. See, e.g., *Chicago v. Morales*, 527 U.S. 41 (1999).

290. Letter from Catherine E. Lhamon, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., & Jocelyn Samuels, Acting Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Colleague, Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline I (Jan. 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> [<https://perma.cc/NZK4-AJPD>].

291. *Id.* at 3.

292. *Id.* at 4.

293. *Id.*

294. Cf. MICHELLE ALEXANDER, *THE NEW JIM CROW* 182–85 (2012) (discussing how in the interest of fighting crime society may create a “set of structural arrangements that locks a racially distinct group into a subordinate political, social, and economic position”); Byron Hurt, *Rape: A Loaded Issue for Black Men*, NEWBLACKMAN EXILE (Dec. 5, 2013), <http://www.newblackmaninexile.net/2013/12/rape-loaded-issue-for-black-men-on.html> [<https://perma.cc/Z5SZ-2VKH>] (“Countless Black men, like Alabama's the Scottsboro boys, Chicago's Emmett Till, the Central Park Five in New York City, and more recently Brian Banks in

more likely to be perceived as victims?²⁹⁵ Is there good reason to think that the unconscious racial stereotyping that may affect police and citizens in decisions to suspect, accuse, arrest, or shoot black men would have no analogue in the pattern of campus accusations and discipline for sexual misconduct?²⁹⁶ The disproportionate impact of sexual misconduct accusations on minority students is currently underappreciated.²⁹⁷ As Janet Halley puts it, “morning-after remorse can make sex that seemed like a good idea at the time look really alarming in retrospect; and the general social disadvantage that black men continue to carry in our culture can make it easier for everyone in the adjudicative process to put the blame on them.”²⁹⁸ Similarly, is it easier for everyone in the process (including the accuser) to perceive a white (rather than minority) accuser as not having consented to sexual conduct with a person of another race?

The lack of transparency in campus investigations and adjudication should cause serious concern that the public does not have a reliable way to see a pattern of accusations, investigations, and discipline that may disproportionately impact minorities. The race of the parties in misconduct cases is not included in existing federal reporting requirements. Indeed, schools may even perceive their obligations under FERPA²⁹⁹ to forbid the release of data on the race of parties—if schools are even compiling and saving such information, which they have not been required to do.³⁰⁰ The Title IX

Atlanta, GA, have shamefully suffered the injustice of a racist criminal justice system that rushed to judgment, with little or no evidence.”).

295. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1266, 1269 (1991) (noting the familiar “casting of all Black men as potential threats to the sanctity of white womanhood,” and observing that the “primary beneficiaries of policies supported by feminists and others concerned about rape tend to be white women”).

296. See Jeannie Suk, *Shutting Down Conversations About Rape at Harvard Law*, NEW YORKER (Dec. 11, 2015), <http://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school> [<https://perma.cc/D5BN-486B>] (“[I]f we have learned from the public reckoning with the racial impact of over-criminalization, mass incarceration, and law enforcement bias, we should heed our legacy of bias against black men in rape accusations. The dynamics of racially disproportionate impact affect minority men in the pattern of campus sexual-misconduct accusations, which schools, conveniently, do not track, despite all the campus-climate surveys. . . . The ‘always believe’ credo will aggravate and hide this context, aided by campus confidentiality norms that make any racial pattern difficult to study and expose.”).

297. See *id.*

298. See Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. FORUM 103, 107 (2015) [*Megaphone*].

299. 20 U.S.C. § 1232g (2012).

300. Cf. Halley, *Megaphone*, *supra* note 298, at 107–08 (“Case after Harvard case that has come to my attention, including several in which I have played some advocacy or adjudication role, has involved black male respondents, but the institution cannot ‘know’ this because it has not been thought important enough to monitor for racial bias.”). FERPA “prohibits universities from capriciously releasing ‘education records,’” and has been invoked to justify not releasing records regarding sexual-assault complaints, making full consideration impossible. Jon Krakauer, *How Much Should a University Have to Reveal About a Sexual-Assault Case?*, N.Y. TIMES (Jan. 21, 2016),

bureaucracy's racial impact is a crucial subject for further study. But even as observations of disproportionate racial impact circulate among the network of administrators, lawyers, and faculty involved in sexual misconduct cases, and appear in piecemeal reporting of cases, a systematic examination is challenging to undertake because of schools' norms of student privacy and confidentiality. It is therefore urgently incumbent on OCR and its regulated institutions to study and address the potential for racial discrimination in discipline at colleges and universities, as OCR has done for general discipline in secondary and elementary schools.

By way of example, in one race and sex discrimination case filed in federal court, two black male student athletes who had sex with a white female student sued Findlay University, alleging the school has "a pattern of . . . discriminat[ing] against African-American males" in white females' allegations of sexual assault.³⁰¹ The plaintiffs alleged that they were expelled within twenty-four hours of the lodging of a sexual assault complaint, that the University failed to question key witnesses including the complainant, and threatened witnesses with expulsion or loss of work-study because their stories corroborated the plaintiffs'.³⁰² The expelled students alleged that the sexual activity was consensual and that the complainant had bragged to others the following morning about the consensual sexual encounter with the plaintiffs.³⁰³ The alleged facts in this particular lawsuit may appear extreme. But as related stories emerge, the worry is that unfair procedures combined with overly broad definitions of nonconsent may have a disproportionate impact on black men in a way that is consistent with both our country's specific history of false accusations and unfair convictions of black men for rape and the more general racially disproportionate impact of criminal law enforcement. Unfortunately, those most likely to be affected by unfair policies and procedures and broad prohibitions that leave all at the mercy of ambivalence may also be the least likely to be able to afford attorneys in campus discipline processes or to file subsequent lawsuits that could hold their schools accountable. Racially disproportionate impact is, in a sense, a "miner's canary" that calls for examination of the workings of the sex bureaucracy.³⁰⁴

Note the important relationship between watered-down procedural protections (the combination of the lack of ordinary practices of fair process, inability to discover facts alleged and probe witness testimony, lack of counsel's participation, selective investigative practices, and the preponderance

<http://www.nytimes.com/2016/01/20/magazine/how-much-should-a-university-have-to-reveal-about-a-sexual-assault-case.html> [<http://perma.cc/V8X8-HQHN>].

301. Complaint at 33, *Browning v. Univ. of Findlay*, No. 3:15-cv-02687 (N.D. Ohio Dec. 23, 2015).

302. *Id.*

303. *Id.* at 2.

304. LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2003).

of the evidence standard employed) and watered-down notions of nonconsent (in ways that may allow ambivalent, undesirable, unpleasant, unsober, or regretted sexual encounters to meet the standard). Eroding procedural protections and expanding the idea of nonconsent in tandem means that the bureaucracy will investigate and discipline sexual conduct that women and men experience as consensual (if nonideal) sex. What results is not a sexual violence or sexual harassment bureaucracy. It is a sex bureaucracy, focused on conduct that differs substantially from the actual wrongs and harms that motivated its growth.

The bureaucrats of desire have their work cut out for them. Their tasks include sorting good sex from bad sex, and preventing, investigating, and disciplining the latter. The sex bureaucracy regulates ordinary sex, to the detriment of actually addressing sexual violence, and unfortunately erodes the legitimacy of efforts to fight sexual violence.

CONCLUSION: DESIRE FOR BUREAUCRACY

The sex bureaucracy is a web of institutions and organizations, programs, policies, and discipline. It is part governmental and part extragovernmental. It is part form and part substance. It is part legislative, part regulatory, part guidance, part research, and part practice. It is a comprehensive regulation of sexual matters under the guise of sexual violence, crime, and discrimination prevention. As we have seen, the bureaucratic regulation of sex reveals anything but a rational and organized technocracy. Indeed it is chaotic, ideologically and morally saturated, and emotionally oriented. There are multiple definitions of prohibited sexual conduct within a single statute. The same statutory terms are defined differently by different agencies, or even within the same agency. Regulations direct that schools must report sex offenses regardless of consent, while the same regulations indicate that the element distinguishing a sex offense from ordinary sex is the absence of consent. Lack of clarity about what exactly is proscribed leads to the further expansion of the bureaucracy as regulated entities try to steer clear of an unclear, unstable, and shifting line of illegality.

The tools of health and safety regulation are now pervasive modes of government oversight in the sexual domain. That means an emphasis on healthy versus unhealthy sex, as the content of sexual violence prevention programs reveal. Regulating health risk in this context makes the association of unhealthy sex and sexual violence plausible. Approaching sexual violence as a public health problem has encouraged regulation of the sexual environment in ways that would otherwise probably be both politically and legally unpalatable. The CDC, DOE, DOD, and universities consistently repeat the mantra that

prevention programs must be “comprehensive.”³⁰⁵ In practice, this means that regulated institutions are training people not merely on how to conform conduct to criminal sex offense laws or campus sexual misconduct codes, but rather on how to have sex, with respect, equality, enthusiasm, even imagination and creativity. If you like to have sex with partners you do not know, with multiple partners, or with one person being dominant, the sex bureaucracy tells you that such behaviors are risk factors for sexual violence.³⁰⁶ The frame of violence and disease obscures the interest in sexual freedom because legal sexual behaviors are risk factors for sexual violence and therefore legitimate domains for bureaucratic oversight.

We began with two quotes, one from Freud and one from Weber. What does it mean when an institution designed to eliminate “from official business love, hatred, and all purely personal, irrational and emotional elements”³⁰⁷ regulates “[t]he behavior of a human being in sexual matters, [which] is often a prototype for the whole of his other modes of reaction to life”?³⁰⁸ In part, this is a question about institutional match. Is the federal bureaucracy the right political institution to be regulating ordinary sex? Would there have been political will to pass the “Good Sex Act of 2013” or the “Healthy Sexual Desire Act of 2014”? If not, there is a democratic deficit underneath the sex bureaucracy. More than merely a lack of legitimacy, however, the bureaucratic mode of formulating and implementing policy may exacerbate this deficit. Accountability in government requires what some have called institutional clarity—the ability to link a public policy to the actor or institution with primary responsibility for it.³⁰⁹ The web of different statutory, regulatory, FBI, CDC, DOE, and school definitions of terms—many of which incorporate each

305. See, e.g., *Sexual Violence: Prevention Strategies*, *supra* note 155 (“[C]omprehensive prevention strategies should address factors at each of the levels that influence sexual violence”); Eve Birge, *Addressing and Preventing Sexual Assault on Campus*, HOMEROOM (Nov. 25, 2013), <http://blog.ed.gov/2013/11/addressing-and-preventing-sexual-assault-on-campus> [<http://perma.cc/F2ZM-N3C9>] (noting “the need for a comprehensive, coordinated approach to violence prevention”); *DOD & Services’ Policies*, U.S. DEP’T DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, <http://www.sapr.mil/index.php/dod-policy/dod-and-service-policy> [<http://perma.cc/XHB7-8UG7>] (last visited Apr. 4, 2016) (describing DOD’s “Sexual Assault Prevention and Response Program Procedures” as “[c]omprehensive procedures for responding to the crime of sexual assault within DoD”); *Governor Cuomo Announces SUNY Adopts a Comprehensive System-Wide Uniform Sexual Assault Policy for All 64 Campuses*, N.Y. GOVERNOR’S PRESS OFF. (Dec. 2, 2014), <https://www.governor.ny.gov/news/governor-cuomo-announces-suny-adopts-comprehensive-system-wide-uniform-sexual-assault-policy> [<http://perma.cc/RX5V-DWQ4>] (“The State University of New York now has the most comprehensive, victim-centered set of sexual assault policies at any college campus or system of higher education in the country.”) (quoting SUNY Board Chairman H. Carl McCall).

306. Cf. Tharp et al., *supra* note 161, at 137–38 tbl.3.

307. Weber, *supra* note 2, at 216.

308. FREUD, *supra* note 1, at 25.

309. See Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 213 (2014); see also Ethan Bueno de Mesquita & Dimitri Landa, *Political Accountability and Sequential Policymaking*, 132 J. PUB. ECON. 95 (2015).

other by cross-reference—generates opacity, not clarity, about who has done what and why.

Lawrence v. Texas seemed to suggest that legislating sexual morality runs afoul of the Constitution.³¹⁰ The growth of the sex bureaucracy reveals that such a restriction is quite limited and easily evaded. Shifting the definition of consent to desirable, sober, or enthusiastic agreement renders more conduct sexual violence, and anything that can be categorized as sexual violence is fair game for federal regulation. By focusing on risk factors for sexual violence, the bureaucracy made it acceptable, indeed even mandatory, to refocus regulatory attention on sexual matters traditionally the domain of morality and even marital morality: promiscuity, sexual fantasy, masculinity, pornography, honesty, feeling, and caring relationships. In addition to the question whether DOE and CDC are the right political institutions to be regulating sex, there is a question as to whether any part of the federal government is. *Lawrence* put the government on notice that it must respect the domain of sexual liberty. The sex bureaucracy is the government's reply. Define sexual violence such that almost all sex people are having is technically illegal, and the feds are squarely in the bedroom. Every potential sexual interaction and negotiation among individuals takes place in that expansive regulatory shadow.³¹¹

All of this reveals much about the bureaucracy, and it also reveals something about sex. If sexual violence is defined as sex that is bad, and if sex that is bad is illegal, stopping sexual violence is no longer about stopping sexual violence. It is about teaching people how to have good sex in healthy relationships. John Stuart Mill wrote that a "bureaucracy always tends to become a pedantocracy."³¹² No less with regard to sex. Let us suggest that a Code of Federal Sex Regulations—complete with rules, definitions, and disciplinary procedures for breach—may not be a desirable development. One might, of course, object not to the bureaucracy regulating sex, but to the bureaucracy regulating sex in this way. Yet there is a relationship between who does the regulating and the way that they do it. To the quotes from the Father of Psychoanalysis and the Father of Sociology, we might add one from the Father of the Nuclear Navy: "If you're going to sin, sin against God, not the bureaucracy: God will forgive you but the bureaucracy won't."³¹³

310. See 539 U.S. 558, 571 (2003).

311. Cf. Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1327–28 (1992) (citing Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979)) (dissecting counterintuitive effects of sexual abuse rules on the "understratum of bargaining" by parties in relationships).

312. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 115 (Cambridge Univ. Press 2010) (1861).

313. ROBERT ANDREWS, *THE COLUMBIA DICTIONARY OF QUOTATIONS* 111–12 (1993) (quoting Admiral Hyman G. Rickover).