

THE SEX BUREAUCRACY

By Jacob Gersen & Jeannie Suk*

104 Cal. L. Rev. (forthcoming August 2016)

The behavior of a human being in sexual matters is often a prototype for the whole of his other modes of reaction in 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 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, within the overlapping rubrics of sex discrimination and sexual violence. Over time as more law on these topics has been developed by administrative agencies, and regulatory definitions of discrimination and violence expanded and became more uncertain, sex itself, or what we could call (for lack of a better term) “ordinary sex” has increasingly become a subject of bureaucratic regulation. Our claim is that through the interpretation and

* Professors of Law, Harvard Law School. We thank the following students for excellent research assistance: Peter Bruland, Shane Hunt, Timothy Goh, Harold Lee, Justin Patrick, Sheri Pan, Lauren Ross, Anna Vinogradav, Virginia Williamson. We are grateful for very useful comments from Anne Joseph O’Connell and Matthew Stephenson.

¹ SIGMUND FREUD, *SEXUALITY AND THE PSYCHOLOGY OF LOVE* # (Touchstone 1963).

² Max Weber, *Bureaucracy*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 196, 233–34 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

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

implementation of legal obligations relating to sexual violence and sex discrimination, the federal bureaucracy is now regulating ordinary sex.

Second, there has been a shift toward the use of bureaucratic policy tools. The mark of bureaucracy is procedures, policies, and organizational forms. Early federal statutes prohibited employers and educational institutions from engaging in discrimination,⁴ and required schools to report crimes on campus.⁵ Over time, these federal prohibitions and mandates have been taken to require private educational institutions to adopt policies and procedures to respond, prevent, research, survey, inform, investigate, adjudicate, and train — in areas whose connections to discrimination and crime are not clear. Today, the failure of an organization to have certain policies, procedures, and forms is itself thought to violate federal law.

The leveraging of substantive prohibition (for example, schools must not discriminate) to regulate policies and procedures (for example, universities must use the preponderance of the evidence standard to adjudicate, and must not use mediation to resolve, sexual violence matters) has produced the *third* manifestation of the bureaucratic turn: the burgeoning of specified mini (or sometimes not so mini) bureaucracies within non-governmental institutions to administer these procedural obligations, including investigation, discipline, and prevention.⁶

In this Article, we focus mainly on the case of higher education to tell the story of the sex bureaucracy, which traces to the conceptual and legal nuclei of discrimination and violence. The story implicates two interrelated arcs. One is the steady expansion of the domain covered by regulatory concepts of sex discrimination and sexual violence, such that the expanded regulatory area today encompasses ordinary sex. The second arc is about how the bureaucracy expanded its domain of authority, as bureaucracies often but do not always do.⁷ Basic statistics collection and reporting requirements evolved into legal mandates for extensive bureaucracies, procedures, and policies that today regulate almost all potential sexual conduct among college students. The federal bureaucracy required non-government institutions to adopt certain organizational forms, and essentially required its own replication within non-governmental institutions. It also demanded that the mini-bureaucracy behave in specific ways, developing programs, policies, and procedures that would be subject to federal oversight. The two arcs together make a bureaucracy that in effect, if not intent, works as a platform for the bureaucratic regulation of ordinary sex.

By "ordinary sex," we mean adult sexual conduct that does not harm others. To state our assumptions directly: There is a distinction between sexual violence, a wrong that law is justified in prohibiting and regulating, and sex, a liberty that consenting adults may choose to exercise --

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

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

⁶ Cf. Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* 21 ("Just think of the tremendous effort that 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 See 2 MAX WEBER, *Bureaucracy*, in *ECONOMY AND SOCIETY* 956 (Guenther Roth & Claus Wittich eds., 1978).

and to legally regulate the former is not *necessarily* to regulate the latter.⁸ 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," is appealing,⁹ but we do not subscribe to the idea that having liberty in sex as a value must 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 is, and as with all lines, there will be uncertainty over where some marginal cases fall. Nevertheless, most will agree that there is some sensible line to be observed and enforced. Our observations about the bureaucratic regulation of sex inevitably implicate the debate about this boundary. If the reader shares these assumptions, then our hope is to demonstrate that the federal bureaucracy is regulating sex, not merely, as one might think, sexual violence. Our claim is not just that the set of sexual conduct classified as illegal has grown or changed—though it has—but that non-violent, voluntary sex—whether considered ordinary, idiosyncratic, normal, or perverse—are today regulated by the bureaucracy. Thus the very imperfect term "ordinary sex," which understandably raises hackles sounding in feminist critiques of privacy, is nonetheless used here to distinguish sex from sexual violence, and to designate nonviolent, voluntary, consensual sex among adults.

Once in place, the sex bureaucracy becomes like many bureaucracies we know, expanding authority into domains one would not have thought to be the subject of bureaucratic regulation. We see a growth of policies, within bureaucracies mandated by the government, that are increasingly remote from the federal laws that supposedly required the creation of these bureaucratic forms to begin with. One might call this *bureaucratic sex creep*—the steady expansion of bureaucratic regulation of ordinary sex, through the implementation of Congressional laws about other matters, namely discrimination and violence. The institutional foundation underlying the agencies solidifies and the question becomes *what else* the bureaucracy will do.¹⁰

The meeting of bureaucracy's aspiration of technocratic and procedural rationality with the subjective, messy, and irrational desire of sex is our topic. For most theorists of bureaucracy since Weber, the characteristics of the bureaucratic form are supposed to drive emotion and

⁸ But see Catharine A. MacKinnon, *Sexuality, Pornography, and Method: Pleasure Under Patriarchy*, 99 *Ethics* 314, 336-37 (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 State L.J.* 1081, 1988 (2004) (emphasis added).

⁹ Mackinnon, *The Road Not Taken*, *supra* note xx, at 1094.

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 operation 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 of the federal government 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.

subjective desire out of administrative decisions.¹¹ As Katherine Franke has written about sex: "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."¹² Why 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 encounter of bureaucracy with sex affect or change either?

At a moment when it is politically difficult to criticize any undertaking against sexual violence, we are writing about the bureaucratic leveraging of sexual violence policy to regulate ordinary sex. We should not be misunderstood to deny that sexual violence is a serious problem, and that intolerably high levels of sexual violence exist on campuses and elsewhere. Nor should we be understood to disagree with the goal of legally addressing sexual violence. Indeed we are motivated by what we see as an unfortunate bureaucratic tendency to merge sexual violence with ordinary sex, and thus to trivialize the very problem of sexual assault.

I. SEXUAL DEREGULATION?

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."¹³ *Lawrence* stated clearly that government did not have a legitimate interest in regulating private consensual sexual conduct. Justice Scalia in dissent lamented that *Lawrence* effectively "decree[d] the end of all morals legislation."¹⁴ 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,"¹⁵ it was a reasonable inference from *Lawrence* that criminal law could no longer prohibit private sexual acts, at least on the rationale of sexual morality.¹⁶

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

¹¹ See e.g., PETER M. BLAU & MARSHALL W. MEYER, *BUREAUCRACY IN MODERN SOCIETY* (3d ed. 1987); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1991); POLITICS, POLICY, AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY (George A. Krause & Kenneth J. Meier, eds., 2005); Gary J. Miller & Terry M. Moe, *Bureaucrats, Legislators, and the Size of Government*, 77 AM. POL. SCI. REV. 297, 310 (1983); William A. Niskanen, *Bureaucrats and Politicians*, 18 J. L. & ECON. 617, 637 (1975); See HANDBOOK OF BUREAUCRACY (Ali Farazmand eds., 1994).

¹² Katherine Franke, *Theorizing Yes*, 101 Colum. L. Rev. 181, 207 (2001).

¹³ *Lawrence v. Texas*, 539 U.S. 558, 559 (2003).

¹⁴ *Id.* at 599 (Scalia, J., dissenting).

¹⁵ *Id.* at 590.

¹⁶ See *Reliable Consultants, Inc. v. Earle* 517 F.3d 738, 746–47 (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*").

sex.¹⁷ Through prohibitions on adultery, fornication, sodomy, and rape, criminal law regulated virtually all nonmarital sex, and did not regulate marital rape. Thus sex fell within two broad categories: legal sex, which corresponded to marital sex; and illegal sex, which corresponded to nonmarital sex. 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 by not being reproductive in purpose.

Two trends of the past half-century are relevant here. The first is the general liberalization of sex since the sexual revolution.¹⁸ By late twentieth century, criminal laws against adultery, sodomy, and fornication were rarely enforced or were repealed.¹⁹ *Lawrence* swept away any lingering bans on voluntary sex among adults in private. Second, as large swaths of nonmarital sex were decriminalized, the idea of marriage marking the border between legal and illegal sex was eroded, though of course marital sexual morality is still an important feature of social life. The fact that sex is taking place before or outside of marriage is no longer the decisive feature that would make sex illegal. And as marital rape and domestic violence emerged as categories of violence prohibited and enforced by criminal law,²⁰ it became clear that not all sexual conduct within marriage was legal.

In the same time frame, alternative markers of sexual illegality came to the fore. If traditionally rape was understood as a crime of sexual immorality, along with sodomy and fornication, the past half-century has seen a rewriting of the rationale for criminalizing rape.²¹ The criminalization of rape developed in feminist law reform, not as sexual immorality, but as the harm of subordinating women.²² The concept of violence qua subordination replaced sexual immorality as the distinguishing feature of criminal sexual conduct.²³ And in turn, this concept of violence explained not just what was wrong about rape and sexually violent acts, but also about sex with minors, sex for money, and sex in a relationships of unequal power — forms of subordination, and therefore impliedly violent, even if not explicitly or literally so. Statutory rape and prostitution, for example, once paradigmatic crimes of immorality,²⁴ are increasingly

¹⁷ See Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 784–86 (1988); Anne Coughlin, *Sex and Guilt*, 84 Va. L. Rev. 1 (1998); Ariela Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 Yale L.J. 756 (2006) (discussing the equation of marriage and sexual licitness).

¹⁸ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁹ See e.g., *Commonwealth v. Stowell*, 449 N.E.2d 357, 360 (Mass. 1983) (noting that the state’s adultery statute had “fallen into a very comprehensive desuetude”).

²⁰ See, e.g., *People v. Liberta*, 64 N.Y.2d 152 (1984); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1503 (2000).

²¹ 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).

²² CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 247–48 (1989).

²³ See Chamallas, *supra* note 17, at 794 (“As the liberal view of sex began to permeate the law, consent of the parties simultaneously emerged as the crucial determinant of the lawfulness of sexual conduct.”); *id.* at 814 (“Under the refurbished version of consent, consent is not considered freely given if secured through physical force, economic pressure, or deception.”).

²⁴ See, e.g., *Regina v. Prince*, L.R. 2 Cr Cas Res 154 (1875).

understood to be criminal because they are ways of subordinating a relatively powerless person.²⁵

The criminalization of rape not only survived the deregulation of sexual immorality, but 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 anti-violence and its cognate concept anti-subordination. Violence and subordination are now the key concepts for distinguishing legal from illegal sex.

As the legitimate justifications evolved, however, we have not seen the appetite for regulating sexual matters fade. Criminalization of sexual violence intensified as private sexual conduct was increasingly conceived as a decriminalized sphere. The kinds of conduct classified as sexual violence increased, expanding 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 definitions of rape evolve to mean merely the force “inherent” in accomplishing sexual intercourse and nothing more,²⁶ or to include non-physical “moral,” “emotional,” or “intellectual” force.²⁷ And many states have now shed the traditional force requirement so that rape is often now defined as intercourse without consent.²⁸ With actual force becoming less important in ideas of sexual violence, more legal focus was then placed on whether the sexual encounter lacked consent.

As nonconsent increasingly became the line separating legal and illegal sexual conduct, we also saw the concept of nonconsent expand. What it meant to lack consent grew to mean more than encountering a partner who verbally or physically resisted the sexual contact. The core sexual violation of rape was also increasingly called sexual assault, but sexual assault also included more than penetration. “Sexual assault” became an umbrella term that might cover other nonforcible, nonconsensual acts, in addition to the paradigmatic sexual violation of forcible rape.²⁹ 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.

²⁵ 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 (Ct. App. 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)).

²⁶ 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.”).

²⁷ See, e.g., 18 PA. CONS. STAT. § 3101 (2014) (defining “[f]orcible compulsion” as the “use of physical, intellectual, moral, emotional or psychological force”).

²⁸ See e.g., WIS. STAT. § 940.225 (2011); N.Y. PENAL LAW § 130.25 (2001).

²⁹ *Sexual Assault*, U.S. DEP’T OF JUSTICE (Apr. 2, 2015), <http://www.justice.gov/ovw/sexual-assault> (“Sexual assault is any type of sexual contact or behavior that occurs without the explicit consent of the recipient.”).

Concern about inadequate law enforcement response in sexual violence matters led not only to pressure for increased and tougher criminal justice response.³⁰ It also led to pressure on non-criminal parts of the federal regulatory apparatus to increase its response to sexual violence. The expanding concepts of violence and nonconsent then also were taken up by the federal bureaucracy 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.³¹

Criminal prohibitions travel as a bundle with extensive procedural protections for defendants and limitations on what conduct can constitutionally be punished. 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 particular processes owed to people accused of crimes. The state need not wait until prohibited conduct occurs and then 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 ordinary 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 and expanded in the federal government. Through the increasing use of bureaucratic tools and expansion of the concept of sexual violence by the bureaucracy, the balance of regulated to unregulated sex has 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 not through criminal enforcement but its actions are inseparable from criminal overtones and implications.

II. ADMINISTERING SEX

The sex bureaucracy has emerged as two legal-conceptual endeavors developed and largely converged: the attempts to address sexual violence,³² and to remedy sex discrimination in education and employment.³³ Over the decades, legal definitions of discrimination came to incorporate sexual violence,³⁴ and the idea of sexual violence expanded to cover conduct that

³⁰ See generally, e.g., Cassia Spohn & Katharine Tellis, *The Criminal Justice System's Response to Sexual Violence*, 18 VIOLENCE AGAINST WOMEN 169 (2012).

³¹ WHITE HOUSE COUNCIL ON WOMEN AND 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.

³² 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).

³³ Title VII (1964) and Title IX (1972), *supra* note 4.

³⁴ See, e.g., *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

might perhaps have been seen as discriminatory but not considered violent.³⁵ Through bureaucratic overlap and cross-fertilization, the concepts of sex discrimination and sexual violence have now come to occupy each other's spaces so thoroughly that they are now in many ways indistinguishable.³⁶ Violence is discrimination is violence.

What does the sex bureaucracy look like? In what follows we describe four components. First, the leveraging of the concept of "crime" to regulate conduct that is not criminal through federal reporting requirements that in effect apply 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 purposes of sexual violence prevention result in the regulation of ordinary sex and conduct traditionally in the domain of morals regulation like pornography and sexual fantasy. And finally, federal mandates to perform research on sexual climate that in effect construct the sexual climate and promote certain understandings of sex.

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. Enacted in 1990, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act)³⁷ required any institution of higher education participating in the federal financial aid program to disclose campus statistics and security information about certain crimes.³⁸ The Clery Act required colleges to report crime data to the DOE, and to publicly disclose these data in Annual Security Reports (ASRs).³⁹ 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, as reauthorized in 2013, amended the Clery Act to add campus reporting requirements for incidents of "domestic violence, dating violence, sexual assault, and stalking."⁴⁰ It required that schools publicly disclose their programs and policies to prevent and address those incidents.⁴¹ In requiring schools to report crime statistics, the Clery

³⁵ See, e.g., *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.").

³⁶ See, e.g., 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> ("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.").

³⁷ The Clery Act was originally enacted as part of the Student Right-to-Know and Campus Security Act of 1990, Pub. L. 101-542, which amended the Higher Education Act of 1965.

³⁸ 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. 102-325, § 486(c).

³⁹ Higher Education Amendments of 1998, Pub. L. 105-244.

⁴⁰ See 34 C.F.R. 668.46(a) (implementing statutory requirements).

⁴¹ See 34 C.F.R. 668.46(k) (implementing statutory requirements).

Act has always used its own definitions of the crimes, opening up possible gaps between what schools are required to report as criminal incidents and what may be prosecutable crimes in jurisdictions where the schools are located. The DOE's 2014 Final Rule implementing VAWA's changes to the Clery Act ("2014 VAWA Regulations") (which require reporting of incidents of domestic violence, dating violence, sexual assault, and stalking) directly addressed this definitional gap:

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.⁴²

The bureaucratic reporting regime thus includes not only crimes but also quasi-criminal incidents that federal regulations define as reportable "crimes" for Clery Act purposes. As we shall see, leveraging crime statistics reporting to require that schools report "criminal" incidents even when they are not crimes allows the federal bureaucracy to expand its regulatory reach.

One of the reportable crimes is "sexual assault." The crime of sexual assault is defined in various ways in different state criminal statutes. For reporting purposes, the 2014 VAWA Regulations' definition of "sexual assault" is "an offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's UCR program and included in Appendix A of this subpart."⁴³ The FBI's universal crime reporting (UCR) system 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 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."⁴⁴

But the same regulation defines the three other named subcategories of "sexual assault" – fondling, incest, 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.

B. Incest—Sexual intercourse between persons who are related to each other

⁴² Violence Against Women Act, 79 Fed Reg. 62,752, 62,764 (Oct. 20, 2014).

⁴³ *Id.* at 62,752, 62,784.

⁴⁴ *Id.* at 62,789 (emphasis added).

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.⁴⁵

There is actually quite a lot of ambiguity in this definition of sexual assault. Does “sexual assault” also cover conduct that is *not* rape, fondling, incest, or statutory rape, and if so, what? Because “sex offenses” is an additional term that is defined here, the regulation may be read reasonably to mean that “sexual assault” contains (in addition to fondling, incest, and statutory rape) a catchall, “sex offenses,” which is “*any sexual act* directed against another person, *without the consent* of the victim. . . .”⁴⁶ The language of “any sexual act” presumably differs from sexual contact or sexual touching, and could be verbal, nonverbal, in person, 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 ones the federal bureaucracy requires reporting as the “crime” of “sexual assault,” as opposed to ordinary acts in ordinary sex lives, is lack of consent of the person to whom the act is directed. Generally sexual acts with consent are just sex. The definition of sexual assault turns completely on the meaning of consent. Consent then is the key to whether otherwise ordinary conduct falls in the federal bureaucracy’s regulatory jurisdiction.

Given the ambiguity and potential breadth in the regulatory definition of sexual assault, it is tempting to go back to VAWA’s statutory text itself for signs that the statute anchors “sexual assault” more firmly in violence. VAWA’s text contains two different statutory definitions of sexual assault.⁴⁷ 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.”⁴⁸ The FBI’s UCR SRS at the time defined “sex offenses” as “offenses against chastity, common decency, morals, and the like.”⁴⁹

Could the Clery Act really contemplate federal regulation of “chastity, common decency, morals and the like” and make them reportable “crimes”? The statute itself references the UCR program and is ambiguous as to which UCR definition of “sex offenses” should be used. But putting together the VAWA 2013’s statutory definition of “sexual assault” 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”

⁴⁵ *Id.* at 62,790 (emphasis added).

⁴⁶ *Id.* (emphasis added).

⁴⁷ 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, 127 Stat. 54, § 29. Section 304, (Campus 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,” Pub. L. No. 113-4, 127 Stat. 54, § 304(a)(3)(iv).

⁴⁸ *Id.* at ...§ 304(a)(3)(CCC4).

⁴⁹ FBI, SUMMARY REPORTING SYSTEM (SRS) USER MANUAL 163 (2013). This definition excluded “rape, prostitution, and commercialized vice.” *Id.*

under the rubric of disclosing “sexual assault.” On this reading, reporting *consensual* and *nonforcible* “offenses against chastity, common decency, morals, and the like” would be legally required. If this is correct, it is the regulation of sex lives, not just sexual violence, that is authorized in the bureaucratic requirement of reporting “sexual assault.”

A reading of the second definition of sexual assault provided in VAWA 2013 underlines the point as well. This definition is in the universal definitions section of the statute 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.”⁵⁰ 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.” This seems to sweep in the universe of severe to mild nonconsensual sexual acts proscribed by any state jurisdiction, any Tribal law, and any Federal law, presumably including civil and regulatory law, not merely the criminal law of sex offenses.

Moreover, defining sexual assault as *any nonconsensual* sexual act *proscribed* by State law would seem to bring the most far-reaching ways of resolving the all-important question of consent, including noncriminal definitions of consent, into this federal definition. For example, California and New York have made affirmative consent a requirement for universities and colleges receiving state funding.⁵¹ Sex without affirmative consent would be proscribed by these state laws and therefore arguably be “proscribed by Federal, tribal, or State law.” If so, any sexual act without *affirmative consent* would 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 purposes of VAWA. Notwithstanding the criminal law overhang created by terms like “crime” and “sexual assault,” the federal bureaucracy is regulating what many jurisdictions and many people consider ordinary consensual sex.

Clearly, it is impossible to know which sexual acts to treat as “crimes” under VAWA 2013 without a way to determine *consent*. The term is not defined in VAWA itself. The DOE initially proposed a definition of consent during the negotiations prior to the proposed VAWA rule: “the affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during a sexual encounter.”⁵² But in the 2014 Final Rule, the DOE decided to abandon the task of defining consent, surprisingly concluding that “no determination as to whether that element has been met is required” for administration and enforcement of the Clery Act.⁵³ While the DOE acknowledged that the regulation’s definition of “sex offenses” for reporting purposes have lack of consent as an element, the agency stated that “*all sex offenses* that are reported to a campus security authority must be recorded in an institution’s Clery Act statistics . . . *regardless of the issue of consent.*”⁵⁴

⁵⁰ Pub. L. No. 113-4 § 3(a)(16).

⁵¹ Cal Ed Code § 67386 (2015); NY CLS Educ § 6441 (2015).

⁵² Violence Against Women Act, Proposed Rule, 79 Fed. Reg. 35418 (June 20, 2014).

⁵³ *Id.* at 62,756.

⁵⁴ Violence Against Women Act, 79 Fed. Reg. 62,752, 62,779 (Oct. 20, 2014) (emphasis added).

By the regulation's own terms, the key definitional line that marks sexual conduct that must be reported as "crime"—as opposed to just sex that need not be reported—is the lack of consent. Yet the DOE also concludes that no definition of consent is necessary, because no determination of nonconsent is needed to know which sexual offenses 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 sex that is not nonconsensual 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 report 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 consent – the very concept on which the definition of sex offense relies – combined with the necessity of having some definition, has led schools to overshoot, and to define nonconsent as entailing much more than nonconsent.⁵⁵

In addition to the reporting of crimes in the ASR, the Clery Act requires "timely warning for any Clery Act crimes that represents an ongoing threat to the safety of students or employees."⁵⁶ Some schools are interpreting this 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 blast to one entire 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 may assist, and to Safety and Security and/or the Oberlin Police Department for response, as was done in relation to this incident. Any Oberlin College community member who finds specific behavior hostile, offensive, or intimidating; is subject to unwanted physical contact of any kind; or is subject to sexual contact, for which consent has not been given, can and should report that behavior immediately to Safety and Security for assistance.⁵⁷

⁵⁵ See *infra*, Part III.

⁵⁶ U.S. DEP'T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, U.S. DEPARTMENT OF EDUCATION 5 (2011), available at <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.

⁵⁷ Marjorie Burton, *Clery Notice: Reported Sexual Imposition* (Apr. 6, 2013), <https://oncampus.oberlin.edu/bulletins/2013/04/06/clery-notice-reported-sexual-imposition> (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).

The original “timely warning” obligation was intended to require notice to the community when there is a serious and continuing threat, for example, if someone has opened fire or raped someone on or near campus, and the police have not apprehended the person.⁵⁸ Clery Act crimes would of course be aggregated into a school's Annual Security Report, but this sort of incident-by-incident email blast is not just reporting. It is constructing the environment in which students and employees live and work. The meaning of such messages is clear: they are both verifying that the university is a dangerous place, reminding that all members of the educational environment are constantly exposed to this underlying sexual risk, and that a mix of bystanders and the sex bureaucracy is and ought to be monitoring.

B. Discipline & Procedure

1. *The Discrimination Track*

We have seen that the concept of “crime” is a significant building block of the sex bureaucracy. The bureaucratic 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, to which we now turn, 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 concepts of sex crime and sex discrimination have characterized the shift toward the bureaucratic regulation of sex full stop.

The main federal anti-discrimination law that has most spawned the growth of the sex bureaucracy is Title IX of the Education Amendments of 1972,⁵⁹ 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.”⁶⁰ 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 essentially amounts to a contract between the Government and the recipient of funds.”⁶¹ Title IX authorizes

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 university’s disciplinary procedures have been initiated.

UW-Madison Police Dep’t, *Sexual Assault – 10/17/14*, https://uwpd.wisc.edu/incident_reports/sexual-assault-101714/

⁵⁸ HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note xx, at 98 (listing “[a]rmed intruder” and “terrorist incident” as examples of significant threats for issuing a “timely warning”)

⁵⁹ Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified as amended at 20 U.S.C. §§1681-1688).

⁶⁰ 20 U.S.C. § 1681 (a) (2012).

⁶¹ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

federal agencies that give such funding to implement the anti-discrimination mandate by regulating funding recipients, and to terminate funding to recipients who do not comply with the agencies' regulations.⁶²

Today it is common to hear people refer to an allegation of campus sexual misconduct by one student against another as “a Title IX complaint,” but this view of the federal legislation would have been 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.⁶³ But this regulatory requirement has more recently morphed into an understanding that an internal school bureaucracy must adjudicate misconduct complaints that may 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 through 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,⁶⁴ the DOE's Office of Civil Rights (OCR) in 1997 promulgated a guidance document, “Sexual Harassment Guidance: Harassment of Students by Employees, Other Students, or Third Parties.”⁶⁵ It stated that sexual harassment is a form of sex discrimination, and that “[s]chools are required by the Title IX regulations to have grievance procedures through which students can complain of alleged sex discrimination, including sexual harassment.”⁶⁶ The 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,

⁶² 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 with respect to such program or activity 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.”).

⁶³ Martha Matthews & Shirley McCune, *Title IX Grievance Procedures: An Introductory Manual*, U.S. Department of Education, Office for Civil Rights 41 (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.”).

⁶⁴ See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (finding, for the first time, that sexual harassment constituted sex discrimination, which could, if it created a hostile work environment, violate Title VII); see also 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).

⁶⁵ Office for Civil Rights, *Sexual Harassment Guidance 1997*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> (last visited August 20, 2015) [hereinafter *Sexual Harassment Guidance 1997*].

⁶⁶ *Id.*

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.⁶⁷

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. If a student’s acts created a hostile environment and the school did not have effective policies and grievances procedures in place to discover and correct it, the school would be in violation of Title IX for essentially tolerating a hostile environment and thereby engaging in discrimination.⁶⁸

The DOE promulgated its Revised Sexual Harassment Guidance in 2001 reaffirming the compliance standards of the 1997 Guidance.⁶⁹ The mantra of the 2001 Guidance was that schools have a responsibility to “end the harassment, prevent its recurrence, and, as appropriate, remedy its effects.”⁷⁰ The Guidance makes 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.”⁷¹ The school’s responsibility for not having effective procedures was depicted 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.”⁷²

Then in 2011, the DOE OCR issued its Dear Colleague Letter (DCL) to supplement the 2001 Guidance.⁷³ Introducing the term “sexual violence” for the first time in this context, the DOE OCR stated that “the requirements of Title IX pertaining to sexual harassment also cover sexual violence.”⁷⁴ 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.”⁷⁵ The DCL stated, for example: “The Title IX regulation requires schools to

⁶⁷ *Id.*

⁶⁸ DOE reasoned in the Guidance that strong sexual harassment policies and grievance procedures provided an institution of higher education a means of “telling students that it does not tolerate sexual harassment and that students can report it without fear of adverse consequences.” *Id.* See also *id.* (noting 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 procedures...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.”).

⁶⁹ 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 (2001) [hereinafter REVISED HARASSMENT GUIDANCE], <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

⁷⁰ REVISED HARASSMENT GUIDANCE, *supra* note 48, at 11.

⁷¹ *Id.* at 12.

⁷² *Id.* at 14.

⁷³ Russlynn Ali, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Sexual Violence 1 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (hereinafter “Ali, Dear Colleague Letter”).

⁷⁴ *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 the victim’s use of drugs or alcohol” and stated that sexual violence included “rape, sexual assault, sexual battery, and sexual coercion.” *Id.* at 2–3.

⁷⁵ *Id.* at 2.

provide equitable grievance procedures. As part of these procedures, schools generally conduct investigations and hearings to determine whether sexual harassment or violence occurred.”⁷⁶

The administrative interpretation of Title IX’s 1972 discrimination ban initially gave rise to the requirement that schools set up internal procedures to hear complaints that a school violated Title IX.⁷⁷ But once sexual harassment was understood in the 1990’s to be a form of Title IX sex discrimination,⁷⁸ the idea that schools had responsibility to correct a hostile environment led to the recasting of the grievance procedures as means of hearing complaints about student conduct.⁷⁹ Then, once the DOE OCR in 2011 focused on “sexual violence” as a form of sexual harassment, the tie 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 sexual harassment and sexual violence complaints “must meet the Title IX requirements of affording a complainant a prompt and equitable resolution.”⁸⁰ The DCL makes explicit for the first time that any school’s discipline process for sexual misconduct is regulated by OCR’s interpretations of Title IX and of regulatory terms such as “prompt and equitable.” Schools must thus hear grievances about student sexual conduct to fulfill its obligations under Title IX, and when they do, the process must be under the auspices of OCR.⁸¹ That is, by reviewing a school’s procedures, the federal bureaucracy will oversee the school’s regulation of sexual conduct.

This is not a modest form of oversight.⁸² The OCR’s monitoring of schools extends to what standard of evidence schools are using to evaluate complaints of student conduct: “OCR reviews a school’s procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints.”⁸³ The “preponderance of the evidence” standard had not appeared in Title IX, any Title IX regulation, or the properly promulgated 1997 or 2001 Guidance Documents.⁸⁴ It was an invention of the *nonbinding* 2011 DCL.⁸⁵ Nevertheless it was

⁷⁶ *Id.* at 10.

⁷⁷ Martha Matthews & Shirley McCune, *Title IX Grievance Procedures: An Introductory Manual*, U.S. Department of Education, Office for Civil Rights (1976).

⁷⁸ *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992); *see also Sexual Harassment Guidance 1997*, *supra* note 44 (noting that the Department of Education had (in 1997) been interpreting Title IX as prohibiting sexual harassment “for over a decade”).

⁷⁹ *Sexual Harassment Guidance 1997*, *supra* note 44.

⁸⁰ Ali, Dear Colleague Letter, *supra* note 73, at 8.

⁸¹ “OCR will review all aspects of a school’s grievance procedures” to ensure that the procedures comply with OCR’s interpretation of what Title IX requires. *Id.* at 9

⁸² OCR has promulgated guidance regarding “Notice of the grievance procedures,” *see id.*, “Adequate, Reliable, and Impartial Investigation of Complaints,” *see id.* at 9–12, “Designated and Reasonably Prompt Time Frames [for grievance resolution],” *see id.* at 12_13, and “Notice of Outcome,” *see id.* at 13–14.

⁸³ Ali, Dear Colleague Letter, *supra* note 73, at 10.

⁸⁴ *But cf.* Letter from the Nat’l Women’s Law Ctr. to Assistant Sec’y Ali, (Feb. 8, 2012) at 5-6, http://www.nwlc.org/sites/default/files/pdfs/nwlc_ltr_to_ocr_re_prep_of_evidence_std_2_8_12_2.pdf (arguing that OCR had claimed that universities should rely upon the preponderance of the evidence standard in “earlier case-specific instructions for remedying non-compliance with Title IX” and that many schools had adopted the preponderance of the evidence standard well before the publication of the DCL).

⁸⁵ *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 mandated “a new burden of proof of “preponderance of the evidence –the lowest possible threshold”).

followed by dozens of OCR investigations into whether the procedures at various schools were complying with the requirements introduced by OCR in the DCL.⁸⁶ The DOE threatened to terminate federal funding to schools unless they adopted policies and procedures that complied with newly announced requirements. In a scramble to be considered compliant and stave off or resolve OCR investigations, schools rushed to rewrite their policies and procedures to fit with the 2011 DCL's commands, including, most prominently, the "preponderance of the evidence" standard.⁸⁷ Many schools entered settlement agreements with OCR promising to take specified measures.⁸⁸

In the transformation of the meaning of the Title IX grievance procedure over several decades, the DOE's job of oversight was transformed. No longer was it simply monitoring whether the school was engaging in discriminatory acts. Rather, the DOE's task became specifying the schools' policies, procedures, and organizational forms. Compliance with Title IX is described as requiring 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."⁸⁹ It is not merely about putting an end to a hostile environment but rather anticipating and ferreting out "problematic conduct" that has not yet developed to the level of hostile environment sexual harassment. Schools must now have elaborate policies and procedures for regulating student sexual conduct. The DOE's role is to regulate how schools do so, overseeing the form and content of internal school policies, procedures, and personnel.

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."⁹⁰ The 2001 Guidance had previously explained: "Conduct is unwelcome if the student did not request or invite it and regarded the conduct as undesirable or offensive."⁹¹

⁸⁶ See, e.g., Tyler Kingkade, *85 Colleges Are Now Under Federal Investigation For Sexual Assault Cases*, HUFFINGTON POST (Oct. 15, 2014, 3:21 PM), http://www.huffingtonpost.com/2014/10/15/colleges-federal-investigation-sexual-assault_n_5990286.html ("Of the current investigations [by the DOE into how higher education institutions handle sexual violence on campus], 55 began in 2014 and nine were added in the past two months.").

⁸⁷ This move was met with considerable protest by a number of professors at these institutions, who objected to many of the changes wrought by the DCL. See, e.g., *Rethink Harvard's Sexual Harassment Policy*, BOSTON GLOBE (October 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>; Eugene Volokh, *Open Letter From 16 Penn Law School Professors About Title IX and Sexual Assault Complaints*, VOLOKH CONSPIRACY (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/>.

⁸⁸ 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 Tim Wu, Essay, *Agency Threats*, 60 *Duke L.J.* 1841, 1843–45 (2011); 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).

⁸⁹ Ali, Dear Colleague Letter, *supra* note 73, at 6; see also *Sexual Harassment Guidance 1997*, *supra* note 43 (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 to create a hostile environment"); REVISED HARASSMENT GUIDANCE, *supra* note 48, at 19 (same).

⁹⁰ Ali, Dear Colleague Letter, *supra* note 73, at 3.

⁹¹ REVISED HARASSMENT GUIDANCE, *supra* note 48, at 7 – 8.

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.”⁹²

Thus if conduct of a sexual nature is unrequested and regarded as undesirable, it is unwelcome conduct. That conduct may be physical or verbal.⁹³ This definition of sexual harassment, which has been adopted and extended by schools including Harvard University,⁹⁴ puts all such sexual conduct in the purview of the federal bureaucracy. The boundary of federally regulated sex in this bureaucratic regime is whether the verbal or nonverbal sexual conduct was *regarded as undesirable*.⁹⁵ 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.” This query may seem farfetched, but the DOE has stated in a letter to the University of Montana 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.”⁹⁶

Between 1972 and 2011, DOE transformed a statutory ban on discrimination into a bureaucratic structure consisting of required procedures and organizational structures 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 idea of sexual violence has expanded to encompass 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 sexual 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.

2. Reporting Procedure & Policy

In the past several years, there has been an expansion from requiring disclosure of crimes (or quasi-crimes) towards disclosure of policies and procedures. In the Clery Act context post

⁹² Ali, Dear Colleague Letter, *supra* note 73, at 3.

⁹³ See REVISED HARASSMENT GUIDANCE, *supra* note 48, 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.”).

⁹⁴ See, e.g., Harvard University, *Sexual and Gender-Based Harassment Policy: Policy Statement*, http://diversity.harvard.edu/files/diversity/files/harvard_sexual_harassment_policy.pdf (“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.”) (last visited August 20, 2015).

⁹⁵ Cf. Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 82 (1987) (“Politically, I call it rape whenever a woman has sex and feels violated.”)

⁹⁶ Letter from Anurim Bhargava, Chief, Civil Rights Div., Educ. Opportunities Section, Dep’t of Justice, and Gary Jackson, Reg’l Dir., Office of Civil Rights, Dep’t of Educ., to Royce Engstrom, President, Univ. of Mont., & Lucy France, Univ. Counsel, Univ. of Mont. 8 (May 9, 2013) (italics added), available at: <http://www.ed.gov/news/press-releases/departments-justice-and-education-reach-settlement-address-and-prevent-sexual-as>. See also *id.* at 22.

2014 VAWA Regulations, all covered schools 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.⁹⁷ VAWA shifted the focus of reporting and disclosure to the schools' prevention programs and disciplinary procedures.⁹⁸ As the Congressional Research Service summarizes,

VAWA requires ASRs to include a statement of the [Institution of Higher Education's] policy on 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 those crimes for incoming students and new employees, as well as providing ongoing awareness training for students and faculty.⁹⁹

Because the Clery Act created an information-reporting regime, these regulatory requirements are all fashioned as mere 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 institutional procedures to disclose, the institution must develop them.

The basic structure in the DOE's 2014 VAWA Final Rule implementing VAWA 2013¹⁰⁰ 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. So long as the agency has the legal authority to require Z, a substantive requirement, this is perfectly lawful. What appears to be a disclosure requirement 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

⁹⁷ 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. 113-4, 127 Stat 54, 90 (2013) (codified at 20 U.S.C.A. §1092(f)(8)).

⁹⁸ Lisa N. Sacco, THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING (Mar. 6, 2014) (CRS-R42499).

⁹⁹ Gail McCallion, CONG. RESEARCH SERVICE, R43759, HISTORY OF THE CLERY ACT: FACT SHEET 2 (2014) (emphasis added).

¹⁰⁰ Violence Against Women Act, 79 Fed. Reg. 62,752-01 (codified at 34 C.F.R. 34 C.F.R. § 668.46 (2015)).

(X).¹⁰¹ 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 elaborate detail (Z):

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 transparency 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, 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.¹⁰²

This is a small slice of the elaborate definitions of Z that are laid out in the regulations. These components of a disciplinary proceeding may be wholly desirable, but they are not simply disclosure. Though presented in the 2014 VAWA Final Rule as disclosure requirements, the Rule defines what must be disclosed in such a way as to impose substantive and procedural 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 requires schools to establish and disclose the form of tribunals that will adjudicate allegations of dating violence, domestic violence, sexual assault, or stalking.¹⁰³ These institutional structures have the flavor of criminal tribunals because they discipline conduct that is called “criminal” in the federal statute at issue,¹⁰⁴ and because some of the conduct may actually be criminal in the relevant jurisdiction. But they are of course not criminal trials but rather quasi-criminal tribunals.

First, more conduct is covered by the regulatory definitions than is covered by criminal law so that the adjudicatory body is exercising jurisdiction over a broader domain of conduct than would a criminal court.¹⁰⁵ Second, the institutional disciplinary procedures do not contain (and may be prohibited by the DOE from containing) the procedural protections for the accused that one would find in a criminal context. For example, institutional proceedings regarding

¹⁰¹ See 34 C.F.R. § 668.46(b)(11)(vi) (2015).

¹⁰² 34 C.F.R. § 668.46(k)(3)(i)

¹⁰³ See 34 C.F.R. § 668.46(k)

¹⁰⁴ See 34 C.F.R. § 668.46(c) (noting that an institution was obligated to report on the incidence of a number of “[p]rimary crimes,” including “[s]ex offenses,” which were defined as including rape, fondling, incest, and statutory rape and “[d]ating violence, domestic violence, and stalking”).

¹⁰⁵ See Ali, Dear Colleague Letter, *supra* note 73, 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.”).

allegations of sexual assault are prohibited by DOE OCR from using a standard of proof approaching “beyond a reasonable doubt.”¹⁰⁶ These administratively mandated disciplinary procedures regulate more sexual conduct than criminal courts, with fewer procedural protections.

Importantly, 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.¹⁰⁷ Each of these schools must have a policy that prohibits a much broader class of conduct than terms like “sexual violence” and “sexual assault” would suggest—and establish tribunals for adjudicating those allegations. Most schools have long had disciplinary procedures that would handle allegations of student misconduct including sexual misconduct. What is different today is that the structure of those procedures 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) defined as illegal by federal regulatory definition, and their structure and functioning 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. Thousands of these mini-bureaucracies now or will soon exist, and they occupy a space between criminal and administrative.

3. *Shadowy Administration?*

The DOE’s 1997 and 2001 Guidance on Title IX sexual harassment were published after Notice and Comment.¹⁰⁸ The 2011 Dear Colleague Letter (DCL) was not issued after notice and comment.¹⁰⁹ Instead, the DOE stated its views in the DCL about what Title IX required regarding sexual violence, and then launched dozens of investigations of schools for failure to comply with requirements announced in the DCL.¹¹⁰ The Department threatened to terminate

¹⁰⁶ 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.”).

¹⁰⁷ “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, 1615 n.11 (2012).

¹⁰⁸ See Sexual Harassment Guidance: Peer Sexual Harassment, 61 Fed. Reg. 42728 (Aug. 16, 1996) (requesting public comment); Sexual Harassment Guidance: Harassment of Students by School Employees, 61 Fed. Reg. 52172 (Oct. 4, 1996) (same); Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66092 (Nov. 2, 2000) (same).

¹⁰⁹ Dear Colleague Letter, *supra* note 73, at 1, n.1 (Apr. 4, 2011) (noting that the DOE promulgated the letter as a “significant guidance document”).

¹¹⁰ See *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEP’T OF 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>.

federal funding to schools unless they adopted policies and procedures that complied, and then entered into negotiated settlement agreements with individual schools.¹¹¹

A straightforward political objection is that an administrative agency is leveraging 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, a “Dear Colleague Letter” is a non-binding document that cannot impose any new legal obligation.¹¹² Yet, it contains interpretations that exist nowhere else in federal law, and the DOE is relying on those interpretations in investigations of schools for noncompliance. Sometimes agencies prefer to avoid the costs and time associated with using notice-and-comment procedures or to avoid making judgments subject to judicial review. Yet, the “legislative rule doctrine” requires that even if an agency announces a policy that it purports to be non-binding, 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.¹¹³ Given that the DOE has reached resolution agreements with nearly 100 schools for deviating from the DCL's interpretations of Title IX, we are hard pressed to imagine that it does not contain binding requirements.

To take away a school's federal funding, the DOE would be required by statute to have a hearing and to explain the precise way in which the school had failed to comply with a Title IX obligation.¹¹⁴ That explanation and legal analysis could be challenged in court and evaluated by a judge who would evaluate whether the legal interpretation and policy judgment articulated in the agency's reasoning is consistent with Title IX and the Administrative Procedure Act.¹¹⁵ The fact that the school deviated from the DCL would not be treated as a Title IX violation.

But the process used by the DOE instead runs as follows: (a) Announce an investigation into a school; either (b1) enter into negotiations while the investigation is ongoing and reach a resolution agreement in which the school agrees to changes its policies and procedures to comply with the requirements of the non-binding DCL, or (b2) enter a finding of noncompliance, and then enter into negotiations to reach a resolution agreement as above. Because the threat of the loss of federal funds is a big stick to wield and because the political climate is such that being seen not to oppose sexual assault is a public relations nightmare, *all* universities have simply complied rather than challenge the agency's actions even administratively, much less in litigation.¹¹⁶ As a result, the agency has achieved complete compliance with its nonbinding legal

¹¹¹ 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 OF 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> (“Under federal civil rights regulations, OCR may move to initiate proceedings to terminate federal funding of Tufts or to enforce the agreement.”).

¹¹² See Dear Colleague Letter, *supra* note 73, at 1 n.1.

¹¹³ See David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 288 (2010); Jacob E. Gersen, Essay, *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).

¹¹⁴ See 20 U.S.C. § 1682 (2012).

¹¹⁵ See *id.* § 1683.

¹¹⁶ 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->

document without ever having to defend its reasoning against public comments or judicial review. This kind of policymaking by agency threat is far from unheard of, but it is not ideal, particularly when the result is to make illegal common conduct.

In the sex bureaucracy context, this avoidance of administrative law norms has two important consequences. The first is the partial insulation of the sex bureaucracy from public or judicial scrutiny. If the agency issued an actual rule requiring certain disciplinary procedures, any unfair aspects could be challenged as a violation of due process requirements of the federal constitution. But when a private institution adopts the very same procedures, there is no federal due process claim because it is not the government acting. There is a plausible argument that the government's role in threatening and coercing adoption of the procedures through these settlement agreements constitutes state action and therefore make due process requirements attach, but it is not at all clear that argument would carry the day in court. At a minimum, the DOE's recent way of doing policy and compliance with its DCL rather than notice-and-comment rulemaking creates a layer of insulation from legal challenge. The off-loading of responsibility to new mini-bureaucracies inside of schools has made it harder to subject the federal bureaucracy to public or judicial scrutiny.

The second consequence of the sex bureaucracy's policymaking by agency threat has to do with the subject matter of sex. The DOE is requiring or encouraging the adoption of specific policies to shape the sexual environment and regulate sexual norms, while maintaining a stance that none of this is legally binding but that federal funds might be withdrawn if schools don't comply. The lack of openness to public comment and judicial review enables the slide—from regulating sexual violence and discrimination to regulating ordinary sex—to go unnoticed. Perhaps the bedroom is supposed to be behind closed doors, but instead, the bureaucracy is regulating the bedroom behind closed doors. To the extent that the bureaucracy is regulating sex, it should be seen for what it so that it can be publicly known and challenged.

C. Prevention & Risk Reduction

An important component of the sex bureaucracy is the imperative to prevent sexual violence. VAWA requires schools to produce a statement of policy regarding the institution's prevention programs.¹¹⁷ These prevention policies are ex ante education, training, and risk identification programs that blend public health and criminal frameworks. Further, DOE OCR's view is that Title IX requires not just that schools respond to allegations of sexual violence, but that they also “proactively consider” remedies for the broader student population beyond the

between-tufts-university-and-representatives-and-organizers-of-today%E2%80%99s-undergraduate-student-action; *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 OF EDUC. (Sep. 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>; *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 OF 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>.

¹¹⁷ Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat 54, 90 (2013) (codified at 20 U.S.C.A. §1092(f)(8)).

complainant affected.¹¹⁸ These proactive measures include counseling and training of students and staff, and the development of educational materials.¹¹⁹

Pursuant to the DOE's 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."¹²⁰ "Primary prevention programs" are

programming, initiatives, and strategies informed by research or assessed for value, effectiveness, or outcome that are intended to stop dating 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.*¹²¹

Prevention programs are motivated by the imperative to prevent sexual violence, but changing social norms around sex itself is either the means or a concomitant end in itself. Prevention programs thus seek to construct good and bad sexual conduct, and entail active regulation of sexual behavior that is not sexual violence. This is bureaucratic regulation of sex in several senses. First, it is mandated by the federal administrative bureaucracy. Second, it is administered by government mandated university bureaucracies. Third, the federal bureaucracy's mechanism of control consists mainly of regulating policies and procedures that must be adopted. Finally, the resulting policies consist of educational materials that explain the way for individuals to engage in sexual conduct – effectively a set of standard operating procedures, a regulatory sex manual produced by institutions overseen by government. The bureaucratic requirements of these prevention policies necessitate that the university bureaucracy actively regulate not merely sexual violence or sex discrimination but sex itself.

1. Beware Poor Minorities and Sexual Fantasies

A worrisome implication of the prevention programs arises from the regulatory requirement that the programs include information on "risk reduction."¹²² In the rulemaking process, the DOE made clear that these prevention programs must "consider environmental risk and protective factors as they occur on the individual, relationship, institutional, community, and societal levels."¹²³ This is an explicit attempt to use a public health or epidemiological approach to sexual violence. The Centers for Disease Control (CDC) is the main agency providing information, resources, and the basic organizing conceptual framework for these prevention

¹¹⁸ Ali, Dear Colleague Letter, *supra* note 73, at 15–19.

¹¹⁹ *See id.*

¹²⁰ *See* 34 C.F.R. § 668.46(j) (2015).

¹²¹ 34 C.F.R. § 668.46(j)(2)(iv) (emphasis added).

¹²² 34 C.F.R. § 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." 34 C.F.R. § 668.46(j)(2)(v).

¹²³ Violence Against Women Act, 79 Fed. Reg. 35427 (proposed Jun. 20, 2014) (to be codified at 34 C.F.R. § 668) (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.*

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 4-step approach to address public health problems like sexual violence: “(1) Define the problem; (2) Identify risk and protective factors; (3) Develop and test prevention strategies; (4) Assure widespread adoption.”¹²⁴ What the CDC means by “risk” is the risk that an individual will perpetrate sexual violence.¹²⁵ The below discussion is drawn from the CDC’s website and its primary report on risk factors for sexual violence perpetration, which comprehensively summarizes findings from various academic literatures.¹²⁶

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 hypermasculinity.¹²⁷

Relational risk factors include “strong patriarchal relationship or familial environment” and “emotionally unsupportive familial environment.”¹²⁸

Community risk factors include “[l]ack of employment opportunities,” “[p]overty,” and a “[l]ack of institutional support from police and judicial system.”¹²⁹

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.”¹³⁰

Schools must develop and implement prevention programs that address these risk factors. The risk factors might be used to identify high-risk individuals, to target education and

¹²⁴ *Sexual Violence*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/violenceprevention/sexualviolence/index.html> (last updated Mar. 9, 2015).

¹²⁵ *Sexual Violence: Risk and Protective Factors*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/violenceprevention/sexualviolence/riskprotectivefactors.html> (last updated Feb. 10, 2015). VAWA Regulations require schools’ prevention programs to Consider environmental risk and protective factors as they occur on the individual, relationship, institutional, community, and societal levels.” 34 C.F.R. § 688.46(a).

¹²⁶ The CDC also draws on the World Health Organization’s Report, which it relies on for its discussion of community and societal risk factors. See Rachel Jewkes, et al., *Sexual Violence*, in WORLD REPORT ON VIOLENCE AND HEALTH 159 (Etienne G. Krug, et al. eds., World Health Organization 2002).

¹²⁷ *Id.*

¹²⁸ The CDC has altered its sexual violence website. For a comparison and prior version see <https://web.archive.org/web/20140331050420/http://www.cdc.gov/violenceprevention/sexualviolence/riskprotectivefactors.html>). For similar language, see also Rachel Jewkes, et al., *Sexual Violence*, in WORLD REPORT ON VIOLENCE AND HEALTH 159 (Etienne G. Krug, et al. eds., World Health Organization 2002).

¹²⁹ *Sexual Violence: Risk and Protective Factors*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/violenceprevention/sexualviolence/riskprotectivefactors.html> (last updated Feb. 10, 2015).

¹³⁰ *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 two programs that have been shown, using a rigorous evaluation methodology, to prevent sexual violence perpetration.” *Sexual Violence: Prevention Strategies*, CTRS. FOR DISEASE CONTROL AND PREVENTION,

<http://www.cdc.gov/violenceprevention/sexualviolence/prevention.html> (last updated Feb. 10, 2015). Both were developed and implemented with middle and high school students. See *id.*

monitoring programs at them.¹³¹ Even though the presence of an above-mentioned risk factor does not necessarily result in perpetration of sexual violence, according to the government, it makes the probability of sexual violence perpetration higher. Using the CDC risk factors leads to the consideration of community risk factors like “[l]ack of employment opportunities,” “[p]overty,” and a “[l]ack of institutional support from police and judicial systems.”¹³² It is hard not to notice that this would result in a kind of pre-criminalization that would fall disproportionately on poor men of color on campus.

What exactly would it mean for prevention and awareness programs to consider these perpetration risk factors? Should the student population be educated about these risks factors, and told explicitly or implicitly 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? Alternatively, perhaps prevention programs must be targeted to these students who the CDC says are more likely to be perpetrators. That would presumably require the identification of these students and either enhanced monitoring or targeted education materials that seek to “increase audience knowledge and share information and resources to prevent violence, promote safety and reduce perpetration.”¹³³

Given the considerable discretion hidden in constructions of key concepts like “nonconsent,” “unwelcome,” or “undesirable,” as well as the prevalence of ambivalence in human sexual experience, this sort of pre-precriminalization corrosively may creates (if not mandate) serious risk of discrimination in the effort to prevent sexual violence. As Janet Halley, points out, “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.”¹³⁴

Consider two additional risk factors: hypermasculinity and coercive sexual fantasies.¹³⁵ According to the source the CDC cites as support, hypermasculinity consists of two risk factors: (1) membership in a fraternity, and (2) sports participation.¹³⁶ It is a plausible reading of the federal requirement that schools must make clear through ongoing education programs that fraternity members and student athletes are more likely to be perpetrators of sexual violence.

¹³¹ The CDC highlighted the fact that one of three types or categories of intervention strategies for sexual violence are programs “aimed at those who are thought to have a heightened risk for sexual violence perpetration or victimization.” *Sexual Violence Prevention: Beginning the Dialogue*, CTR’S FOR DISEASE CONTROL AND PREVENTION 7 (2004), <http://www.cdc.gov/violenceprevention/pdf/svprevention-a.pdf>.

¹³² *Sexual Violence: Risk and Protective Factors*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/violenceprevention/sexualviolence/riskprotectivefactors.html> (last updated Feb. 10, 2015).

¹³³ 34 C.F.R. § 688.46(j)(2)(i.) (2015).

¹³⁴ Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 Harv. L. Rev. F. 103 (2015). Furthermore, she writes, “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.” *Id.*

¹³⁵ *Sexual Violence: Risk and Protective Factors*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/violenceprevention/sexualviolence/riskprotectivefactors.html> (last updated Feb. 10, 2015).

¹³⁶ See Andra Teten Tharp, et al. *A Systematic Qualitative Review of Risk and Protective Factors for Sexual Violence Perpetration*, 14(2) TRAUMA, VIOLENCE & ABUSE. 133, 137 – 39 (2013).

While the majority of student athletes in the country are white, on a majority white and preppy elite college campus, the minority presence of poor black men on scholarships will often be concentrated in the school's sports teams. Combining the CDC risk factors of "hypermasculinity," "poverty," and "lack of institutional support from police and judicial systems" amounts to a significant a risk of pre-criminalizing 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 full stop are associated with sexual violence – not just coercive sexual fantasies.¹³⁷ Some of these studies involve asking convicted sex offenders, convicted non-sex offenders, and college males about their sexual fantasies. The evidence from the source the CDC cites is that college males have a higher rate of virtually all variants of sexual fantasy, coercive or noncoercive, than the convicted sex and non-sex offenders.¹³⁸ But setting aside the strange gap between the CDC’s conclusions and 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? It means, in part, that federal policies require schools to be involved in constructing sexual norms and putting a stamp of disapproval on sexual practices like impersonal sex, consumption of pornography, sexual fantasies.

While it might appear unlikely that risk factors like these would find their way into actual prevention policies, it is already happening. These risk factors are very much a component of existing prevention policies. For example, the Department of Defense Sexual Assault Prevent and Response Office (SAPRO) adopted the CDC’s “Sexual Violence Risk Factors” almost verbatim after a briefing by the CDC to SAPRO in November 2013.¹³⁹ Both the CDC’s public health model in general and the actual risk factors identified by the CDC have been adopted and implemented by the Department of Defense.

2. *My Brother's Keeper*

Both statutory¹⁴⁰ and regulatory¹⁴¹ language require primary prevention and awareness programs to include “bystander intervention” elements. This is 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

¹³⁷ See *id.* at 154.

¹³⁸ 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: A Journal of Research and Treatment* 195, 205-206 (1998).

¹³⁹ Department of Defense 2014-2016 Sexual Assault Prevention Strategy *19 (Apr. 30 2014).

¹⁴⁰ VAWA 2013. See Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat 54, 90 (2013) (codified at 20 U.S.C.A. §1092(f)(8)) (requiring that schools develop a statement of policy that would, in addition to a variety of other areas, 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”).

¹⁴¹ See Violence Against Women Act, 79 Fed. Reg. 62,752-01 (codified at 34 C.F.R. 34 C.F.R. § 668.46 (2015)).

upstanders) are a key piece of prevention work.”¹⁴² These programs tend to focus on generating a sense of responsibility and building skills so that bystanders start being involved.¹⁴³

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:

**Primary Components of Step Up!
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!¹⁴⁴

It is not just the duty of the educational institution to investigate – bystanders must 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.”¹⁴⁵ Embedded in the idea of bystander intervention is the idea that each person must interpret their environment and act before others' interactions may become sexual violence or even sexual conduct, and that there are many such opportunities for bystanders to do so. It is not a matter of intervening in individual 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.¹⁴⁶

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

¹⁴² *Bystander-Focused Prevention of Sexual Violence*, NOT ALONE 1, <https://www.notalone.gov/assets/bystander-summary.pdf> (last visited August 20, 2015).

¹⁴³ *See, e.g., id.*

¹⁴⁴ American University, *Annual Security Report 20* (2014), <http://www.american.edu/finance/publicsafety/upload/2014-DPS-Annual-Security-Report.pdf>.

¹⁴⁵ Joan Tabachnick, *Engaging Bystanders in Sexual Violence Prevention*, NT’L SEXUAL VIOLENCE RES. CTR 7 (2008), http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Booklets_Engaging-Bystanders-in-Sexual-Violence-Prevention.pdf.

¹⁴⁶ *Id.* at 10.

Bystander intervention programs seek to produce the sense that we are all implicated in the sexual environment and in sexual interactions taking place around us. The potential sexual interactions all around us are each of our responsibility. There are no innocent bystanders, and perhaps no fully innocent interactions, because sexual behaviors that are not violent could lead there. We all must monitor the sexual environment to see if we can investigate and intervene. We are all part of the sex bureaucracy.

D. Research: 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.¹⁴⁷ Accurate data about what is occurring and why is critical. Toward 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.¹⁴⁸ 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 26 colleges and universities is the most common.¹⁴⁹ 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 as a result.

Our goal in this section is not to critique the survey instrument, but rather to explore the ways in which the design of the survey helps construct the 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 is also communicating a message about sexual conduct and sexual norms. "Conducting a climate survey can demonstrate a university's commitment to addressing sexual assault and build trust with students, faculty, parents, and others."¹⁵⁰ Asking students about their sexual conduct is part of the formation of the campus sexual environment. We are constructing a sexual environment in the course of attempting to measure it. This does not mean that we should not engage in the endeavor of research, but it does mean we should be cognizant of how these dynamics relate to other components of the sex bureaucracy.

¹⁴⁷

¹⁴⁸ 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 (April 2014), https://www.whitehouse.gov/sites/default/files/docs/report_0.pdf (calling on colleges and universities to voluntarily complete campus climate surveys). The task force also provided a 'tool kit' for those colleges who 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>.

¹⁴⁹ See <http://www.aau.edu/Climate-Survey.aspx?id=16525>

¹⁵⁰ *Climate Surveys: Useful Tools to Help Colleges and Universities in Their Efforts to Reduce and Prevent Sexual Assault*, NOT ALONE 3, <https://www.notalone.gov/assets/ovw-climate-survey.pdf>.

The new sexual climate surveys purport to estimate the background level of risk, but in so doing, they also construct the perception and understanding of 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 merges with the active construction of contested concepts that shape the experience and meaning of sexual conduct. Consider some illustrations.

An inevitable choice for any climate survey is whether to define terms the survey is asking about. This is particularly true in an area where terms carry varied and changing meanings, both legally and socially. The 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. Both the White House Task Force model survey and the AAU survey do define the terms. First the White House:

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.¹⁵¹

Note both the transformation of “nonconsent” into “unwanted” or “undesired” as the marker of sexual violence, and the inclusion of “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* those incidents as “sexual violence,” but for the explanation by the survey itself that they are sexual violence. This part of the sample survey essentially constructs the category of sexual violence: it establishes a “sexual violence” meaning about conduct being asked about.¹⁵²

The AAU survey takes a slightly different tack, substituting “sexual violence” with the phrase “sexual assault” and “sexual misconduct.” The 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

¹⁵¹ *Id.* at 28 (emphasis added).

¹⁵² The Rutgers Sample survey is another commonly cited resource. 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.

in or have been in a relationship with.¹⁵³

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” is 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? The survey is clearly saying that remarks about physical appearance or persistent sexual advances are either sexual assault or sexual misconduct. The point is not that this is a bad definition. The point is that the survey question is contributing to perceptions of what sexual assault is. 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 surveyors believe) sexual misconduct is, these instruments are another part of the sexual education and reform program, altering understandings about what sex is ordinary and what sex is misconduct.

This dynamic gets played out repeatedly in the surveys.¹⁵⁴ Consider the interaction between the ideas of *nonconsensual* sexual contact and the idea 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 contact:¹⁵⁵

In the model survey, “unwanted” simply becomes the marker of sexual violence. 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 battery of “Risk Perception” questions all 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 “Sexual penetration” or “Oral sex”, each of which is carefully

¹⁵³ AAU Survey, Part B, p. 7 (emphasis added).

¹⁵⁴ See Bonnie S. Fisher, Ph.D, et al., The Campus Sexual Assault (CSA) Study (December 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

¹⁵⁵ *Climate Surveys: Useful Tools to Help Colleges and Universities in Their Efforts to Reduce and Prevent Sexual Assault*, NOT ALONE 23, <https://www.notalone.gov/assets/ovw-climate-survey.pdf>.

defined.¹⁵⁶ This would seem to be an attempt to focus in 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 could have been someone you know, such as someone you are currently or were in a relationship with, a co-worker, 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.¹⁵⁷

Thus, even when asking about physical force or incapacitation, there is a merger of the idea of nonconsent and the idea of unwantedness. The MIT survey, with a few exceptions, simply dispenses with the idea of nonconsent and asks directly about “unwanted sexual contact.”

To be clear about why this matters, many people, both men and women, have consensual sex that is unwanted. Sometimes it is partially unwanted, not fully wanted, or both wanted and unwanted in equal measure at the same time, in contexts ranging from ambivalent single hookups to longstanding relationships and marriages. It is far from clear today that having sexual contact when one does not really want to is morally, psychologically, practically, or legally equivalent to having nonconsensual sex.¹⁵⁸ Furthermore, the psychological line between “I did not want that to happen” and “I want that not to have happened” can be thin. The model survey’s question is making a claim that nonconsensual and unwanted are or ought to be treated the same, not only for purposes of law and policy, but also individual and social experience and memory.

Asking students about their sexual experience in this way constructs the key concepts of how students think about and understand their sexual experiences and, if internalized by both schools and students, helps transform some sexual conduct into misconduct, under the guise of simply measuring how much sexual violence exists.

* * *

¹⁵⁶ “Sexual penetration. When one person puts a penis, fingers, or object inside someone else’s vagina or anus, or

Oral sex. When someone’s mouth or tongue makes contact with someone else’s genitals.” AAU Survey, Part G, p.26.

¹⁵⁷ Id.

¹⁵⁸ 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 nonetheless 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.”).

Sex regulation has become the domain of the federal bureaucracy. A crime reporting regime has resulted in a bundle of policies and procedural requirements—regulated parties must formulate, adopt, and implement additional policies in order to disclose—whose effect is the regulation not just of sexual violence but of sex itself. Implementing these requirements has meant the creation of bureaucratic forms in non-governmental institutions.¹⁵⁹ 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.¹⁶⁰ 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 primarily on isolated incidents, but rather the endeavor to structure the *environment*. Regulation of the sexual environment shifts focus onto the involvement of institutions, cultures, and members of the community such as bystanders. Because we are all 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 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, 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. Make no mistake. They are instructing students on matters such as what is “sexy,” what constitutes “great sex,” what are “positive relationships,” and the like. They are defining, instructing, advising, counseling, monitoring, investigating, and adjudicating on questions of sexual desire.

A. What is Sexy: The Foreplay Bureaucracy

¹⁵⁹ This parallels a development in the Title VII context. In order to escape vicarious liability for racial harassment or sexual harassment by certain 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).

¹⁶⁰ See, e.g., U.S. Dep’t of Educ., Dear Colleague Letter, *supra* note 73, at 1 n.1; (Apr. 4, 2011) (noting that the DOE promulgated the letter as a “significant guidance document”) [hereinafter Dear Colleague Letter or DCL]; U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter 2001 Guidance]; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (Mar. 13, 1997).

Consent is of course a central concept in schools' programs to train students on sexual violence. In the course of sexual violence prevention, though, many schools have 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 something else altogether: 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 sees its role as regulating health and safety, explanations of consent easily lead to instructions about what is "healthy" or "positive" in sex and relationships. Within the increasingly broad health rubric, schools promote normative relationship values such as respect, honesty, care for feelings, and nontraditional sex roles, in the training they give on the kind of sex students should have. 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 relationship" 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*."¹⁶¹ Before having sex, the school advises students to consider whether "[e]ach person is *positive and sincere* about their *desires*."¹⁶²

Yale University disclosed in its federally 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."¹⁶³ In complying with the prevention program disclosure requirement, and purporting to prevent nonconsensual sexual encounters, 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."¹⁶⁴ A positive sexual culture, open discussion of sexual desires, communication with romantic partners, enthusiastic sex – all seem like great sexual aspirations, though perhaps achieved by quite few. But these are not training about sexual violence. They are instructions on how to have ordinary (or extraordinary) sex, and they are produced and monitored by the sex bureaucracy.

Glendale Community College disclosed in its 2014 ASR its definition of consent, which in effect goes significantly further than even affirmative consent: "Consent in reference to sexual activity – Defined as a voluntary, *sober, imaginative, enthusiastic, creative*, wanted, informed, mutual, honest, and verbal agreement. It is an active agreement, not a passive nod of the head or

¹⁶¹ *Consent*, BROWN UNIV., http://www.brown.edu/Student_Services/Health_Services/Health_Education/sexual_assault_&_dating_violence/consent.php (last visited Aug. 19, 2015) (emphases added).

¹⁶² *Id.*

¹⁶³ Yale University, *2013 Annual Security Report* 21 (2014), <http://publicsafety.yale.edu/sites/default/files/files/Yale%20Clery%20Report%202013.pdf>.

¹⁶⁴ *Id.*

smile. . . ."¹⁶⁵ The same definition has been adopted at many schools.¹⁶⁶ Consent is not just an affirmative agreement, according to these schools. It is an agreement that is, *inter alia*, "imaginative," "enthusiastic," and "creative." 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 tipsy or drunk -- not just when incapacitated. This school's federally reported definition of "consent" is in effect not consent, but rather something 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 active enthusiasm.

A number of schools have taken to presenting consent not simply as a line that marks sexual assault, but rather as an element of what is "sexy." "It is not sexy to have sex without consent!" exclaims a number of schools.¹⁶⁷ "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*."¹⁶⁸ Asking "[h]ow . . . UGA students make consent sexy," the University of Georgia quotes a student: "Mutual respect, honor, appreciation, intimacy, foreplay, understanding, communication, dialogue."¹⁶⁹ "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.¹⁷⁰ All Columbia students are "required to take part in new, required programming that explores the relationship between sexual respect and community membership." 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

¹⁶⁵ GLENDALE CMTY. COLL., 2014 JEANNE CLEARY DISCLOSURE OF CAMPUS SECURITY POLICY AND CAMPUS CRIME STATISTICS ACT REPORT 16 (2014) (emphasis added). Note that this definition incorporates the *enthusiasm* standard. If there was no enthusiasm, there was no consent.

¹⁶⁶ For example, University of Georgia, Brown University, Vassar College, Aims Community College, University of Mary Washington, Central Ohio Technical College, University of Rhode Island, University of Minnesota, Oklahoma State University Institute of Technology.

¹⁶⁷ See, e.g., UNIV. OF GA.; UNIV. OF BUFFALO, THE IMPORTANCE OF CONSENT (2013), <http://wellnessed.buffalo.edu/13consentp.pdf>; Teresa Helena Moreno, *Sexual Assault Prevention at the Illinois Institute of Technology*, ILL. INST. OF TECH. (2011), <http://sexualassaultandorientation.wikispaces.com/file/detail/Illinois+Institute+of+Technology+Presentation.ppt>.

¹⁶⁸ See UNIV. OF GA., *supra* note 167 (emphases added).

¹⁶⁹ *Id.*

¹⁷⁰ See *Sexual Respect*, COLUMBIA UNIV., <http://sexualrespect.columbia.edu> (last visited Aug. 19, 2015); *Sexual Respect*, GRINNELL COLL., <https://www.grinnell.edu/sexualrespect> (last visited Aug. 19, 2015).

yourselves and your relationship.¹⁷¹

Clark University tells students, “We want you to have great sex if you choose to have sex—safer, mutually enjoyable, consensual sex.”¹⁷² “Seeking = Sexy!” and “Receiving = Sexy!”¹⁷³ Respecting a partner means conversing openly about sexual desire. Persistence, creativity, and spontaneity are encouraged in these conversations about sex. Talking about sex is good. Having sex in silence is no good.

American University’s 2014 ASR includes a listing of “[t]he difference between healthy and unhealthy relationships.”¹⁷⁴ Healthy relationships feature, *inter alia*, partners who “are open and communicate needs and desires,” “encourage each other,” “are free to be themselves,” “respect . . . each partner’s privacy,” and enjoy “independence within the relationship.”¹⁷⁵ How many people in longstanding marriages can say that their relationships satisfy these criteria, let alone students in fumbling sexual experiences? Under the rubric of eliminating sexual violence, school mini-bureaucracies within federal bureaucratic oversight are engaged in a normative program of good sex education, and increasingly, education on 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 materials on consent 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.”¹⁷⁶ The materials state that “[a]nything less than voluntary, *sober, enthusiastic*, verbal, non-coerced, continual, active, and honest consent is *sexual assault*.”¹⁷⁷ If someone has sex while tipsy or intoxicated, that is, not sober, they are being sexually assaulted. The materials explain that “[b]oth partners need to be excited about the sexual activity.”¹⁷⁸ Rather than using body language, which is too often misinterpreted, consent should be a verbal “‘Yes.’ Or even, ‘Yes, Yes, Oh! Yes!’”¹⁷⁹ 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 “[i]f you don’t like oral sex, tell your partner and find another way to experience or give pleasure to your partner.”¹⁸⁰ 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?

¹⁷¹ See UNIV. OF GA. (emphases added).

¹⁷² *Consent 101 or: Doing It With the Lights On*, CLARK UNIV., <http://www.clarku.edu/offices/cave/consent> (last visited Aug. 19, 2015).

¹⁷³ *Id.*

¹⁷⁴ AMERICAN UNIV., ANNUAL SECURITY REPORT 31 (2014), available at <http://www.american.edu/finance/publicsafety/upload/2014-DPS-Annual-Security-Report.pdf>.

¹⁷⁵ *Id.*

¹⁷⁶ UNIV. OF WYO., WHERE IS YOUR LINE: CONSENT IS SEXY 5 (2011), available at http://www.uwyo.edu/stop/resources/10_stop_consentSexy_booklet.pdf.

¹⁷⁷ *Id.* at 3 (emphasis added).

¹⁷⁸ *Id.* at 2.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 3.

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?
Do you want me to (kiss/touch/suck/...)?¹⁸¹

And for students who want to take things to the next level, in a section on “Making Consent Fun,” the school provides some more colorful or even ribald 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?¹⁸²

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, University of California, San Diego's ASR has a section called “Dirty Talk: Making Consent Fun!” in which declares, “Consent is not only necessary, but also *foreplay*.”¹⁸³ Under federal bureaucratic oversight, schools are in the business of formulating and providing sex and relationship instruction and advice, and regulating it bureaucratically—they are bureaucrats of desire.

Prevention programs for “sexual violence” are also training of 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 get students to steer way clear of legal boundaries that could implicate federal prohibitions, but in effect an endeavor to construct a values-laden sexual relationship environment. In a statement such as “Consent is about real, honest, confident and open communication,”¹⁸⁴ “consent” is standing 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 most 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*.”¹⁸⁵ 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, this is a collection of normative values increasingly associated with the sex that the school programs in the sex bureaucracy's purview are directing students to have.

This is not just a matter of schools educating or advising students about healthy sexual relationships. The ideals are often built into the definition of consent in federally-required Annual Security Reports whose purpose is to report campus crime. Breaches of these standards is supposed to lead to discipline, in accordance with the DOE's requirements. Crossing the

¹⁸¹ *Id.* at 5.

¹⁸² *Id.*

¹⁸³ UNIV. OF CAL., SAN DIEGO, 2014 ANNUAL SECURITY REPORT 15, available at <http://www.police.ucsd.edu/docs/annualclery.pdf>.

¹⁸⁴ UNIV. OF WYO., *supra* note 176, at 6.

¹⁸⁵ *Id.* (emphasis added).

consent line triggers investigation and adjudication of sexual misconduct -- now seen as required by the federal bureaucracy. A number of schools' recent ASR's which are required report sexual assaults, *define consent* to include *enthusiasm* and other markers of desire.¹⁸⁶ For example, Elon University's ASR reports that "[o]nly a comprehensible, unambiguous, positive and *enthusiastic* communication of consent for each sexual act qualifies as consent."¹⁸⁷ Anything else is sexual assault. These new 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 sex with an agreement that was unenthusiastic or tipsy.

We have seen notions of nonconsent transform rapidly, all the way 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 along further with each crop of students across the country taught they should seek not just agreement to engage in sex, but enthusiasm and excitement. Today the sex bureaucracy is disciplining people for unwanted sex, or sexual conduct that is regarded as undesirable. It cannot be much of a stretch to think that people who have been trained by schools in a sexual violence prevention program that they are supposed to seek enthusiastic, excited, creative, imaginative sexual agreement, and that anything else is sexual assault, would also expect a disciplinary response for sex that was none of those things. 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 the regulation of sexual desire?

The set of sexual conduct classified as illegal by the sex bureaucracy has grown substantially. This has occurred through a ratcheting process in which common sense advice interacts with legal regulation. As nonconsent became the distinguishing feature of illegal sex, schools, parents, advocacy organizations, and the government gave common-sense 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 steer well clear of the cliff of nonconsent and sexual assault. In short order, however, the extra-cautious way to steer clear of the cliff became the new legal definition of consent in some quarters. Once the line moved, common sense advice is again to stay well clear of it. Do not settle for a nod or a "yes." Make sure the yes is "enthusiastic." This is more than mere consent, supposedly creating a buffer from the risk of sexual assault. Very rapidly, however, the consent line shifted again in many places to make enthusiasm a requirement of consent itself: anything less than enthusiasm is not valid consent. At each point, an attempt to steer well clear of the cliff's edge results in a change in where the cliff is. This is a process of erosion of the ground that used to be considered permissible sex, to the point that the regulated area is now ordinary sex.

¹⁸⁶ 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)), available at http://www.gordon.edu/download/galleries/Safety_Report_2014_15.pdf; YALE UNIV., 2013 ANNUAL SECURITY AND FIRE SAFETY REPORT 21 ("Hold out for enthusiasm."), available at <http://publicsafety.yale.edu/sites/default/files/files/Yale%20Clery%20Report%202013.pdf>.

¹⁸⁷ Elon Univ., Annual Security Report 2013, at 8, available at <http://www.elon.edu/docs/e-web/bft/safety/Elon%20University%20ASR%202013.pdf>.

B. “DOE Process”

Accompanying the elevation of consent to enthusiasm and desire is a corresponding set of institutional procedures for disciplining sexual misconduct. The DOE's 2011 Dear Colleague Letter announced that to satisfy Title IX, schools' policies and procedures for handling sexual harassment including sexual violence had to meet specific criteria of which schools had not theretofore been aware.¹⁸⁸ Although fashioned as a “guidance” document that itself does not impose any new binding legal obligations, after setting out the DCL interpretations, the DOE launched investigations into over a hundred schools for noncompliance with Title IX—that is, violations of requirements specified only in the DCL. Lurking was the explicit threat to terminate all federal funding—upon which virtually all institutions of higher education significantly rely—if schools did not change their policies and disciplinary procedures to come into compliance.

In the ensuing months and years, schools scrambled to adopt new policies and procedures that might satisfy the DOE and keep the defunding threat at bay. Most typically post-DCL, schools replaced their existing sexual misconduct policies, and their procedures (which might previously have been common procedures for all student misconduct) with new sexual-misconduct-specific policies and procedures redesigned to comport with the DCL. But the new policies and procedures that schools have 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” and its new “Procedures for Handling Complaints Against Students Pursuant to the Sexual and Gender-Based Harassment Policy.” These replaced all of the Harvard schools’ previous substantive policies as well as their disciplinary procedures for sexual misconduct complaints. Strong public criticism of the new procedures, namely from Harvard Law School faculty members (including one of us), pointed out the unfairness of key aspects of the procedures. For example:

- The absence of any adequate opportunity to discover the facts charged and to confront witnesses and present a defense at an adversary hearing.
- The lodging of the functions of investigation, prosecution, fact-finding, and appellate review in one office, and the fact that that office 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.¹⁸⁹

In December 2014, the DOE actually found Harvard Law School to have violated Title IX in the previous two years by, *inter alia*, having used a clear and convincing standard instead of a

¹⁸⁸ See Dear Colleague Letter, *supra* note 73.

¹⁸⁹ Rethink Harvard’s sexual harassment policy, BOSTON GLOBE (Oct 15, 2014), available at <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.htm>; see also Nancy Gertner, *Sex, Lies, and Justice*, American Prospect, Winter 2015, <http://prospect.org/article/sex-lies-and-justice>.

preponderance of the evidence standard of proof, and not having made clear that mediation would not be used to resolve sexual misconduct cases.¹⁹⁰ As a result, Harvard entered into a resolution agreement with the DOE that would resolve the investigation.¹⁹¹ In a press release, the DOE announced that under the terms of the agreement, the Law School must, *inter alia*,

- 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.¹⁹²

While Harvard University had intended for its new procedures to apply uniformly across the entire university, 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. 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. These new Harvard Law School procedures, which have been approved by the DOE, do 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 comply with the DOE.

The gap demonstrates the potential dynamic of “over-compliance” that characterizes many school’s recent actions, as they have run scared from the prospect of attracting negative attention from the DOE. This dynamic is also encouraged by non-governmental organizations that both lobby the government and provide material support to the school bureaucracies. One can easily speculate about why, but not a single school investigated by OCR or threatened with investigation has challenged the DOE’s interpretations of Title IX’s requirements in court. Instead dozens of schools across the country under DOE investigation have entered into

¹⁹⁰ Letter from Joel Berner, Regional Director, US DOE OCR Region 1, to Dean Minow, 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>.

¹⁹¹ Resolution Agreement, Harvard Law School, Complain No. 01-11-2002, available at <http://www2.ed.gov/documents/press-releases/harvard-law-agreement.pdf>. January 2015. *See also* Harvard Law School Foundation in Violation of Title IX, Agrees to Remedy Sexual Harassment, including Sexual Assault of Students (Dec. 30, 2014), available at <http://www.ed.gov/news/press-releases/harvard-law-school-found-violation-title-ix-agrees-remedy-sexual-harassment-including-sexual-assault-students>.

¹⁹²<http://www.ed.gov/news/press-releases/harvard-law-school-found-violation-title-ix-agrees-remedy-sexual-harassment-including-sexual-assault-students>

“resolution agreements” with the DOE OCR.¹⁹³ Uniformly present in all resolution agreements of which we are aware is the agreement to use the preponderance-of-evidence standard for sexual misconduct allegations, a requirement that exists nowhere other than in the “nonbinding” guidance document.

A 2014 Whitepaper co-published by the Association of Title IX Administrators (ATIXA) states: “If your campus is not equitable it may be because . . . [y]ou’ve built your investigation and resolution mechanisms into castles of due process.”¹⁹⁴ For \$1500, ATIXA sells “Investigation in a Box,” for purchase by schools, that promises to provide school administrators everything they need to conduct sexual misconduct investigations – presumably procedures fashioned from this kit would not be “castles of due process.” The idea of constitutionally required due process in sexual violence matters is a target of attack.¹⁹⁵ The DOE has stated that “Public 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.” The implication is that private schools need not provide due process, and that to do so risks violating Title IX. If the DOE 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 individually with each school instead of adopting a general rule, the DOE has made it possible that each school would voluntarily adopt different standards in resolving a DOE investigation.

The resolution agreements show some heterogeneity as to precisely what each school must do to remedy its non-compliance with the nonbinding DCL. The agreements address procedures but also substantive definitions of misconduct. For example, the DOE’s Resolution Agreement with the University of Montana, discussed above, was accompanied by a letter in which the DOE 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.¹⁹⁶ In this expanded definition, “unwelcome conduct” would be the offense in itself, rather than rather than a component of a hostile environment that makes a sexual harassment offense.

Schools have not legally challenged the DOE, but many students subject to discipline at the hands of the Title IX bureaucracies have sued schools directly. The growing perception that the post-DCL pressure exerted by the DOE has caused schools to adopt procedures and practices that deny fairness to accused students has resulted in many lawsuits by students against universities in state and federal courts. Reading these cases reveals a pattern of accusations in which consent is the key question and procedurally defective disciplinary processes work to support the expansion of the bureaucracy’s domain over ordinary sex.

¹⁹³ A map of with Title IX resolutions features prominently at notalone.gov.

¹⁹⁴ W. Scott Lewis et al., *Equity is Such a Lonely Word*, NCHERM and ATIXA Whitepaper, 2014.

¹⁹⁵ *Id.* at 12.

¹⁹⁶ *See* Letter from Anurim Bhargava, *supra* note xx.

In one recent federal case,¹⁹⁷ a male student sued Washington and Lee University, challenging the school's sexual misconduct disciplinary procedures. The plaintiff, who had been expelled for “nonconsensual sexual intercourse” with a female student, argued that the school's procedures – which afforded the accused no right to counsel and employed a preponderance of the evidence standard¹⁹⁸ – violated due process and discriminated on the basis of sex in violation of Title IX. Specifically, the plaintiff alleged that the Title IX officer did not show him a copy of the accuser's complaint, refused his request to have a lawyer participate during the investigation, 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.¹⁹⁹ Moreover, the plaintiff alleged, the Title IX officer had earlier given a presentation arguing that “regret equals rape,” a position she framed as a new idea everyone, herself included, is starting to agree with.²⁰⁰ 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, this presentation 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.²⁰¹

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.”²⁰² The court did, however, permit his Title IX claim to go forward. Noting that the allegations, taken as true, suggested that the procedures “were designed to secure more convictions” and amounted to “a practice of railroading accused students,” the court found that the plaintiff had “established a causal link between his expulsion and gender bias.”²⁰³

In another federal case, plaintiff was a male Columbia University student who had been suspended for engaging in “non-consensual sexual intercourse” with a female student. The school hearing panel's specific finding of nonconsent was “that it is more likely than not that [Plaintiff] directed unreasonable pressure for sexual activity toward [Jane Doe] over a period of weeks” preceding a hook-up.²⁰⁴ (Interestingly, the accuser herself also appealed the schools six-month suspension of the accused to reduce the severity of the sanction.²⁰⁵) The court described the sexual encounter this way:

¹⁹⁷ Doe v. Washington & Lee Univ., No. 6:14-cv-00052 (W.D. Va. Aug. 5, 2015).

¹⁹⁸ Id. at *14.

¹⁹⁹ Id. at *4-*7.

²⁰⁰ Id. at *5.

²⁰¹ Id.

²⁰² Id. at *20.

²⁰³ Id. (citing *Haley v. Virginia Com. Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996)).

²⁰⁴ *Doe v. Columbia University*, No. 1:14-cv-03573-JMF (S.D.N.Y. Apr. 21, 2015) (Mem. Op. & Order *10).

²⁰⁵ Id. at *10.

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 advisor 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.²⁰⁶

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 questions. 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 engaged in non-consensual 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.’”²⁰⁷ While the incident in itself may have appeared consensual (and was even described as consensual to the resident advisor by the accuser), it was in the weeks preceding the sex that alleged “[p]ressure for a date or romantic relationship” could have vitiated “consent” under Columbia’s Gender-Based Misconduct policy.²⁰⁸ Other than the fact that the parties had sex, the facts of the night in question, then, were irrelevant, so any procedural failures regarding investigation into those facts did not cause an inaccurate outcome. No matter how clear, affirmative, or enthusiastic the consent was on the night in question, it was apparently negated by the several weeks of unreasonable pressure.

²⁰⁶ Id. at *6.

²⁰⁷ Id. at *19.

²⁰⁸ Id. at *3.

In a recent lawsuit against a state school, *Doe v. Regents of the University of California San Diego*,²⁰⁹ a California court determined that the disciplinary 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.”²¹⁰ 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.”²¹¹ 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.²¹²

In this case, the procedural flaws included the unfair limitation on the accused's right to cross-examine the accuser: two thirds of his questions (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. 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 reasoning for the increase.²¹³

The legal claims now being litigated by plaintiffs under Title IX, due process, or state law focus on flawed and unfair disciplinary procedures -- specifically encouraged if not mandated by the Department of Education -- that schools have recently adopted for hearing sexual misconduct allegations. These are concerted post-DCL efforts to take sexual violence more seriously. Yet, the recent cases also reveal a change in the kinds of fact patterns being classified as sexual misconduct and therefore disciplined. At least some of these cases involve nonforcible sexual conduct that plausibly could be seen as consensual but that have been given a non-consensual meaning through the school's disciplinary bureaucracy, particularly since every time a school acquits an accused student they open themselves to a claim that they have violated Title IX.

Indeed, note the complementarity of watered down procedures encouraged or required by the federal government (lack of ordinary practices of due process, inability to discover facts alleged and probe witness testimony, lack of counsel, selective investigative practices, and preponderance of the evidence), and watered-down notions of nonconsent (to include ambivalent, undesirable, unpleasurable, or regretted sex). Watering down both procedural protections and the idea of nonconsent together means that the bureaucracy disciplines more

²⁰⁹ *Doe v. Regents of the University of California San Diego*, No. 37-2015-00010549-CU-WM-CT (Sup. Ct. Cal., San Diego, Central Jul. 10, 2015) (Minute Order).

²¹⁰ *Id.* at *5.

²¹¹ *Id.* at *5 (emphasis added).

²¹² *Id.* at *5 (emphasis in original).

²¹³ *Id.* at *5-*6.

sexual conduct that many people experience as ordinary (if non-ideal) sex. Procedure and substance together enable the bureaucracy to increasingly regulate ordinary sex.

We are far beyond the so-called “he said, she said” problem. Many of the current fact patterns are situations in which he and she say much same thing about the facts of the incident that occurred, but give different meanings to the experience. The different meanings need not be radically different to result in different determinations about sexual misconduct. That is because the difference between consent and non-consent today turns not only on *agreement* to engage in sexual activity, but increasingly on whether that agreement was excited, enthusiastic, desirable. Ambivalence and mixed feelings, which is, far as we can tell, endemic to human sexuality and sexual behavior, create an uncertain situation for students engaging in sex under the sex bureaucracy. Because in this bureaucracy, ambivalent feelings may reveal a lack of consent, which may mean sexual assault for which one may be disciplined. This opens the door wide to moral judgments shading the sexual 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 wouldn't have done that.

Did I have consensual sex with a black/Latino/Asian man? That wouldn't fit with what I have previously known about my own desires.

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?

The bureaucrats of desire have their work cut out for them. It is the task of sorting good sex from bad sex, and preventing and disciplining the latter. The erosion of substantive and procedural concepts of sexual misconduct and fair process in this legal regime together create a field in which the sex bureaucracy regulates ordinary sex.

IV. CONCLUSION: DESIRE FOR BUREAUCRACY

The sex bureaucracy is a web of institutions and organizations, programs, policies, and discipline. It is part governmental and part private. 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. 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 even emotional. There are multiple definitions of prohibited sexual conduct within a single statute. The same statutory terms are defined differently by different agencies. Regulations direct that schools must report

sex offenses regardless of consent, when 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 and regulated leads to further expansion of the bureaucracy as regulated entities try to steer clear of an unclear line and veer into ordinary sex.

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 that would otherwise probably be unpalatable both politically and legally. The CDC, DOE, DOD, and universities consistently repeat the mantra that prevention programs must be “comprehensive.”²¹⁴ In practice this means regulated institutions are training people on how to have sex—not how to conform conduct to criminal sex offense law or even campus codes, but rather how to have sex, with “respect,” “equality,” “enthusiasm,” even “imagination” and “creativity.” If you like sex with partners you don't know, or with multiple partners, or with one person being dominant, the sex bureaucracy tells you that is a problem, because it implicates risk factors for sexual violence.²¹⁵ The frame of violence and disease obscures the interest in sexual freedom because legal sexual behaviors are risk factors for sexual violence.

We began with two quotes, one from Freud and one from Weber. What does it mean when an institution designed to eliminate “from its official business love, hatred, and all purely personal, irrational and emotional elements” 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 in life?” 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 2013”? If not, there is a democratic deficit underneath the sex bureaucracy. More than merely a lack of legitimacy, however, there is something about the bureaucratic mode of formulating and implementing policy that seems to 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. The web of different statutory, regulatory, FBI, CDC, DOE, and school

²¹⁴ See, e.g., *Sexual Violence: Prevention Strategies*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 19, 2015), <http://www.cdc.gov/violenceprevention/sexualviolence/prevention.html> (“[C]omprehensive prevention strategies should address factors at each of the levels that influence sexual violence”); *Addressing and Preventing Sexual Assault on Campus*, HOMEROOM: THE OFFICIAL BLOG OF THE U.S. DEP’T OF EDUC. (Nov. 25, 2013), (noting “the need for a comprehensive, coordinated approach to violence prevention”); *Carter: DoD & Services’ Policies*, U.S. DEP’T OF DEFENSE, <http://archive.defense.gov/news/newsarticle.aspx?id=128720> (last visited Aug. 20, 2015) (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. STATE (Dec. 2, 2014), <https://www.governor.ny.gov/news/governor-cuomo-announces-suny-adopts-comprehensive-system-wide-uniform-sexual-assault-policy> (“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.” (internal quotation mark omitted)).

²¹⁵ See Tharp et al., *supra* note 136, at 137–38 tbl.3.

definitions of terms—many of which incorporate each 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. The sex bureaucracy would suggest that such a restriction is quite limited and can be avoided. Shifting the definition of consent to desired, sober (i.e. not drunk), or enthusiastic renders more sexual 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 mandatory, to refocus regulatory attention on sexual matters traditionally the domain of morality, and even marital morality: promiscuity, sexual fantasy, masculinity, pornography, honesty, and caring relationships. In addition to the question whether the DOE and the CDC are the right political institutions to be regulating sex, there is a question whether any part of the federal government is. *Lawrence* put the government on notice 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 have are technically in violation, and the feds are squarely in the bedroom.

All of this reveals much about the bureaucracy, but it also reveals something about sex. If sexual violence is defined as all sex that is bad and if all sex that is bad is illegal, then stopping sexual violence is no longer just about stopping sexual violence. It involves constructing and reconstructing a line between what is good or bad sex, what is wanted and unwanted, what is desired and what is not, what meaning is attached to sexual acts. 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.”²¹⁶ 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—is not a desirable development. One might object not to the bureaucracy regulating sex at all, but to the bureaucracy regulating sex in this way. Yet, there is a relationship between who is doing the regulating and the way that they are doing 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 are going to sin, sin against God, not the bureaucracy. God will forgive you but the bureaucracy won’t.”²¹⁷

²¹⁶ JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 115 (2d ed., Ch. VI: Of the Infirmities and Dangers to Which Representative Government Is Liable 234 (1861).

²¹⁷ ROBERT ANDREWS, *THE COLUMBIA DICTIONARY OF QUOTATIONS* 111 (1993) (quoting Hyman Rickover).