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Back to Basics: Excavating the Sex Discrimination Roots of Campus Sexual Assault

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**BACK TO BASICS:
EXCAVATING THE SEX DISCRIMINATION ROOTS OF CAMPUS
SEXUAL ASSAULT**

Deborah L. Brake*

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INTRODUCTION

It takes some explaining to use the occasion of a symposium honoring the legacy of Pat Summitt,¹ one of the most successful college basketball coaches of all time, to publish an article addressing Title IX’s application to campus sexual assault. Neither the coach’s record nor the top-shelf program she ran for so many decades calls this topic immediately to mind.² And yet, as I reflect on the challenges ahead for Title IX and the continuing struggle for sex equality in higher education, including in university athletic programs,³ I am struck by how

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¹ See *Pat Summitt, Legendary Tennessee Basketball Coach, Dies At 64*, NAT’L PUB. RADIO (June 28, 2016, 6:08 AM), <http://www.npr.org/sections/thetwo-way/2016/06/28/483612431/pat-summitt-legendary-tennessee-basketball-coach-dies-at-64>.

² See *id.*

³ See *Title IX—Gender Equity in Education*, AM. C.L. UNION, <https://www.aclu.org/title-ix-gender-equity-education> (last visited Mar. 20, 2017) [hereinafter *Gender Equity in Education*]; see also Deborah L. Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J. L. REFORM 13 (2001).

interconnected women's leadership is to a broader set of issues of gender and power, including the sexual objectification and harassment of women. As if we needed a culturally explosive reminder to shock feminism out of a state of apathy, the linkages between gender, power, and leadership were on full display in the bitterly divisive presidential election between Donald Trump and Hillary Clinton. Social practices that objectify and subordinate women, and their consequences for women's access to leadership, figured prominently throughout the campaign.⁴

This article explores the connections between sexual assault, harassment, objectification, and the challenges facing women in leadership against the backdrop of Title IX. It argues that Title IX's application to sexual harassment, including sexual assault, is an essential part of the law's broader agenda of opening the paths to leadership on an equal basis. More particularly, it seeks to ground the Title IX administrative framework that has emerged for addressing campus sexual assault in the statutory prohibition of sex-based discrimination. Without such a reckoning, the Title IX obligations on universities enforced during the Obama Administration are vulnerable to unilateral rollback by the new Trump Administration. This article begins the project of strengthening the sex discrimination roots of the Title IX framework for campus sexual assault and calls for further work linking the particular obligations the U.S. Department of Education's Office for Civil Rights (OCR) has imposed on educational institutions to the statutory mandate against sex discrimination.

Part I sketches some linkages between liberal feminism's goal of expanding women's access to leadership and the dominance feminist agenda of resisting the sexual subordination of women. It argues that these two strands of feminist legal theory are not alternatives to each other, but are complementary and mutually reinforcing in their shared goal of dislodging the social practices that keep women from power.

Ironically, perhaps, the gender inequality that sits at the root of sexual assault as a social practice has been lost in the weeds of the controversies surrounding the specific procedures institutions are required to use in responding to sexual assault complaints. Part II details the gender-blind narratives that are ascendant in the discourse surrounding campus sexual assault and argues that they function to obscure the gendered reality, and the gender inequality, of campus sexual assault.

Part III explains the Title IX framework that courts and the OCR have developed for handling sexual assault. It traces the evolution of this legal framework from the statute's broad, general ban on sex-based discrimination in education programs receiving federal funds to the more particular obligations now placed on educational institutions to follow specific practices in addressing campus sexual assault allegations. Although OCR has acted consistently with the role of an enforcing agency by filling in the gaps of Title IX's broad antidiscrimination mandate, I argue that neither the courts nor the agency has

⁴ See Amy Chozick & Ashley Parker, *Donald Trump's Gender-Based Attacks on Hillary Clinton Have Calculated Risk*, N.Y. TIMES (Apr. 28, 2016), https://www.nytimes.com/2016/04/29/us/politics/hillary-clinton-donald-trump-women.html?_r=0.

fully explained, in a persuasive way, how the emerging Title IX framework is connected to the statute's ban on sex-based discrimination.

Part IV begins the work of grounding the specific obligations placed on educational institutions in the statute's discrimination ban. Sexual assault is a social practice rooted in, and reinforcing of, gender inequality. It is not merely the gender of the typical perpetrator and victim (although sexual assault is overwhelmingly a practice engaged in by men and experienced by women and gender minorities, including LGBTQ persons), but the gender inequality in sexual relations on campus that situates sexual assault as a sexually subordinating practice. Most importantly for the legitimacy of the Title IX framework, institutional cultures and institutions' own practices in responding to sexual assault contribute to the campus cultures that reinforce and facilitate sexual assault as a sexually subordinating practice. Institutional responses to sexual assault, and not just sexual assault itself, are deeply gendered and embedded in gender inequality. The very rape myths and peer norms that underlie sexual assault as a social practice also find purchase in the common responses that excuse and minimize sexual assault when it occurs. Without the kinds of specific obligations the Title IX framework places on institutions for handling sexual assault charges, gender scripts and rape myths would have full rein to undermine complainants' credibility and mitigate empathy for their experiences of harm.

This article seeks to begin a conversation about whether and how the specific obligations on universities for responding to sexual assault are grounded in the statute's mandate for ending sex-based discrimination on campus. That work remains vital if Title IX is to fulfill its promise of dislodging the gender practices that block women's pathways to power and leadership.

I. LIBERAL FEMINISM AND WOMEN'S LEADERSHIP MEET DOMINANCE FEMINISM AND SEXUAL SUBORDINATION

Despite (or perhaps, in part, because of) the gains women have made in infiltrating the ranks of leadership since Title IX was enacted in 1972, sexual objectification and sexual harassment continue to function as powerful tools to take women down and block the ladders upward.⁵ The recent sexual harassment charges by Gretchen Carlson and other newswomen at Fox News against Roger Ailes were a case study in how sexual harassment functions to reduce smart professional women to their fragmented body parts, diminishes their organizational power, and undermines their competence—followed by marginalization if they refuse to stay silent.⁶ Although Carlson ultimately prevailed in extracting an apology from Fox, and Ailes was forced to resign, it

⁵ Yvette M. Alex-Assensoh, *40 Years of Title IX: Leadership Matters for Women in Academe*, CHRON. HIGHER EDUC. (June 18, 2012), <http://www.chronicle.com/article/40-Years-of-Title-IX-/132311/>.

⁶ Michael M. Grynbaum & John Koblin, *Gretchen Carlson of Fox News Files Harassment Suit Against Roger Ailes*, N.Y. TIMES (July 6, 2016), <https://nyti.ms/2ksPfJc>.

was not a career-ending event for Ailes, who went on to assume a high-profile position in the Trump campaign.⁷

Indeed, the Trump campaign itself served as a veritable tutorial in how objectifying women is a tried-and-true tactic for undermining women as leaders. Of the many painful reminders of this during the presidential campaign, one of the most insidious occurred when then-candidate Trump reflected, before a crowd of supporters, on his reaction to Secretary Clinton walking in front of him during a presidential debate, and stated, “believe me, I wasn’t impressed.”⁸ In this crude remark, which could not help but conjure the candidate’s experience evaluating the appearance of women contestants in beauty pageants and “reality” television shows,⁹ he reduced a former Secretary of State to the ranks of a female object worth no more than the sum of her body parts. Then there was the *coup de grace* of the campaign’s reprise of sexual objectification, the Access Hollywood tape.¹⁰ In the controversy that ensued when the tape was released, then-candidate Trump excused his caught-on-tape bragging about grabbing women by their body parts and forcibly kissing them (in other words, sexual assault), and his exalted privilege in getting away with it, as mere “locker room banter.”¹¹ Unfortunately, such talk is hardly unfamiliar in men’s locker rooms—although some male athletes were quick to point out that locker room norms are in flux and that not all men condone misogyny and sexism as part of the banter that takes place in the locker room.¹²

As if on cue, sexually objectifying and misogynistic rants poured out of the proverbial “locker room” in a stream of disclosures illustrating the

⁷ See Michael M. Grynbaum & John Koblin, *Fox Settles With Gretchen Carlson Over Roger Ailes Sex Harassment Claims*, N.Y. TIMES (Sept. 6, 2016), <https://nyti.ms/2kTLyw2>; Maggie Haberman & Ashley Parker, *Roger Ailes Is Advising Donald Trump Ahead of Presidential Debates*, N.Y. TIMES (Aug. 16, 2016), <https://nyti.ms/2maBUpa>. As this article was nearing publication, sexual harassment scandals continued to dog Fox News, resulting in the departure of Fox icon Bill O’Reilly. See Emily Steel & Michael S. Schmidt, *Fox News Ousts O’Reilly, A Host Central to its Rise*, N.Y. TIMES (April 20, 2017) at A1. Roger Ailes died one month later. See Clyde Haberman, *Ailes Turned Rage into a News Empire*, N.Y. TIMES (May 19, 2017) at A1.

⁸ Nolan D. McCaskill, *Trump: Clinton Walked in Front of Me and ‘I wasn’t impressed.’* POLITICO (Oct. 14, 2016), <http://www.politico.com/story/2016/10/trump-clinton-debate-walk-not-impressed-229810>.

⁹ See Amy Zimmerman, *Donald Trump Thinks He’s a Reality-TV ‘Ratings Machine.’ History Tells a Different Story*, DAILY BEAST (Jan. 9, 2017, 1:10 AM), <http://www.thedailybeast.com/articles/2017/01/09/donald-trump-thinks-he-s-a-reality-tv-ratings-machine-history-tells-a-different-story.html>.

¹⁰ See David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.27ac5b912e23.

¹¹ *Id.*

¹² Cindy Boren, *‘Not In Any Locker Room’: Athletes Continue to Fiercely Debunk Trump’s Video Defense*, WASH. POST (Oct. 11, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/10/10/no-one-talks-like-donald-trump-in-locker-rooms/?postshare=2671488414684103&tid=ss_mail&utm_term=.551e956a469e.

problematic norms of sexual inequality in the culture of men's sports.¹³ At Harvard, the men's soccer team developed a "list" that later leaked to the public in which the male athletes rated their colleagues on the women's soccer team in vulgar and sexually explicit terms.¹⁴ At Columbia University, the men's wrestling team was caught sending team text messages replete with racist, lewd, misogynistic and homophobic content.¹⁵ At Princeton University, the men's swimming and diving team was found to have circulated an electronic email list with misogynistic, lewd, and racist disparaging comments about women.¹⁶ And at Amherst, the men's cross-country team was discovered to have sent and received social media messages and emails to incoming team members with—déjà vu—racist, misogynistic, and homophobic comments.¹⁷ All of these incidents occurred post-presidential election, and yet, are hardly unprecedented in male locker room culture.¹⁸ If anything about these incidents was novel, it was the strong rebukes they elicited from their universities, which responded by cancelling the offending teams' games and seasons.¹⁹ The refusal by these teams' universities to write off the incidents as "boys-will-be-boys" inevitabilities reflects a measure of success by campus activists in challenging rape culture and

¹³ See generally Nikita Vladimirov, *Eric Trump: 'Locker Room Banter' Common Among 'Alpha Personalities'*, THE HILL (Oct. 11, 2016, 2:36 PM), <http://thehill.com/blogs/blog-briefing-room/news/300430-eric-trump-locker-room-banter-common-among-alpha-personalities>.

¹⁴ Andrew M. Duehren, C. Ramsey Fahs & Daphne C. Thompson, *Harvard Cancels Men's Soccer Season After Finding Sexually Explicit Reports Continued Through 2016*, HARV. CRIMSON (Nov. 4, 2016), <http://www.thecrimson.com/article/2016/11/4/soccer-suspended-scouting-report-harvard/>; C. Ramsey Fahs, *2012 Harvard Men's Soccer Team Produced Sexually Explicit 'Scouting Report' on Female Recruits*, HARV. CRIMSON (Oct. 25, 2016), <http://www.thecrimson.com/article/2016/10/25/harvard-mens-soccer-2012-report/>.

¹⁵ Seth Berkman, *Columbia Disciplines Wrestlers and Clears Team to Return to Competition*, N.Y. TIMES (Nov. 18, 2016), https://www.nytimes.com/2016/11/19/sports/columbia-wrestlers-apologize-for-texts-in-open-letter.html?smid=pl-share&_r=0.

¹⁶ Christopher Mele, *Princeton is Latest Ivy League School to Suspend Team Over Vulgar Materials*, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/sports/princeton-mens-swimming-suspended.html?smid=pl-share>.

¹⁷ Des Bieler, *'The Messages Are Appalling': Amherst Suspends Cross-Country Team Over Misogynistic and Racist Emails*, WASH. POST (Dec. 12, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/12/12/the-messages-are-appalling-amherst-suspends-cross-country-team-over-misogynistic-and-racist-emails/?postshare=9191488415717030&tid=ss_mail&utm_term=.69ec98aaf828.

¹⁸ Seth Berkman, *Columbia Suspends Wrestling Season Over Lewd and Racist Text Messages*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/sports/columbia-suspends-wrestling-season-lewd-text-messages.html>; Kay Lazar & Andy Rosen, *Amherst College Suspends Men's Cross Country Over Offensive Posts*, BOS. GLOBE (Dec. 12, 2016), <https://www.bostonglobe.com/metro/2016/12/12/amherst-college-suspends-men-cross-country-due-racist-misogynist-and-homophobic-messages/xOhcJ4K0AJ1013UCaTapaM/story.html>; *Princeton University Suspends Men's Swim Team Over Offensive Materials*, CBS NEWS (Dec. 16, 2016, 9:15 AM), <http://www.cbsnews.com/news/princeton-university-suspends-men-swim-team-offensive-materials/> [hereinafter *Princeton Men's Swim Team*]; Katharine Q. Seelye & Jess Bidgood, *Harvard Men's Soccer Team is Sidelined for Vulgar 'Scouting Report'*, N.Y. TIMES (Nov. 4, 2016), <https://www.nytimes.com/2016/11/05/us/harvard-mens-soccer-team-scouting-report.html>.

¹⁹ See Berkman, *Columbia Disciplines Wrestlers*, *supra* note 15; Lazar & Rosen, *supra* note 18; *Princeton Men's Swim Team*, *supra* note 18; Seelye & Bidgood, *supra* note 18.

the subordinating gender norms that support it.²⁰ Notably, all of the incidents mentioned above involved men's non-revenue sports, upending the expectation that the problem of sexual misconduct is limited to revenue sports like football and basketball.²¹ These events provide punctuation for recent social science research findings that sexual coercion is rampant among male athletes across all levels of sport, including at less elite levels of sport.²²

Despite the significant progress educational institutions have made toward gender equality in the post-Title IX era, the path to leadership for women remains rocky at best, and the acceleration of women into leadership positions has proceeded at a glacial pace.²³ This is especially true in job sectors where women have been historically excluded and continue to be disproportionately underrepresented.²⁴ Surely, there is no more male-dominated employment setting—aside from the presidency of the United States—than sports. Despite the gains wrought by Title IX in the field of women's sports, the percentages of women working in intercollegiate athletics as head coaches is at near-historic lows.²⁵ Women's share of the head coaching jobs in women's college sports has gone from more than 90% in the pre-Title IX era to about 40% today, while women's share of the jobs coaching men's college sports remains below the 3% mark.²⁶

Among the many complex reasons for the resilience of the gender gap in leadership positions in intercollegiate athletics is that leadership itself, even apart from the setting in which it is exercised, is masculinizing.²⁷ Historically,

²⁰ See Berkman, *Columbia Disciplines Wrestlers*, *supra* note 15; Lazar & Rosen, *supra* note 18; *Princeton Men's Swim Team*, *supra* note 18; Seelye & Bidgood, *supra* note 18.

²¹ See Berkman, *Columbia Disciplines Wrestlers*, *supra* note 15; Lazar & Rosen, *supra* note 18; *Princeton Men's Swim Team*, *supra* note 18; Seelye & Bidgood, *supra* note 18.

²² Belinda-Rose Young et al., *Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes*, VIOLENCE AGAINST WOMEN 1, 9–10 (2016) (stating that 54% of the male athletes who completed the survey reported having perpetrated some form of sexual coercion, compared to just under 38% of the non-athletes taking the survey).

²³ See generally VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* (MIT Press 1999); Alex-Assenhoh, *supra* note 5.

²⁴ GRANT THORNTON, *WOMEN IN BUSINESS: TURNING PROMISE INTO PRACTICE 2* (2016), https://www.granthornton.global/globalassets/wib_turning_promise_into_practice.pdf (reporting that 24% of senior roles in businesses are held by women).

²⁵ VIVIAN ACOSTA & LINDA CARPENTER, *WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL, NATIONAL STUDY THIRTY-SEVEN YEAR UPDATE*, available at <http://www.acostacarpenter.org/>, (reporting that 43.4% of women's teams are coached by females, 2-3.5% of men's teams are coached by females, and 22.3% of athletic directors are females as of 2014); Deborah L. Rhode & Christopher J. Walker, *Gender Equity In College Athletics: Women Coaches As A Case Study*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 1 (2008) (discussing the barriers confronting women in college athletics seeking positions in coaching and administration); Nicole M. LaVoi, *Female Coaches in High School Sports: Data Released*, ONE SPORT VOICE (May 28, 2013), <http://www.nicolemlavoi.com/2013/05/28/female-coaches-in-high-school-sports-data-released/> (reporting that women held 27% of all high school head coaching positions).

²⁶ Jere Longman, *Final Four Contenders Reflect Thinning Ranks of Female Coaches*, N.Y. TIMES (Mar. 30, 2017), at A1.

²⁷ See Samantha C. Paustian-Underdahl, Lisa Slattery Walker & David J. Woehr, *Gender and Perceptions of Leadership Effectiveness: A Meta-Analysis of Contextual Moderators*, 99 JOUR.

leadership has been strongly gendered as a male domain, with leadership skills being defined as attributes strongly associated with men.²⁸ Women entering leadership ranks must navigate countervailing pressures to be competent leaders (and hence, project masculine attributes) without departing too far from the norms of conventional femininity.²⁹ This double bind is well known to the women who navigate this path and is poignantly illustrated by the women basketball coaches who run up and down the court coaching their teams in high heels.³⁰ To ascend as leaders, women must display enough femininity and sexuality to remain recognizable as women, but not so much as to be sexualized themselves, and thereby rendered incompetent.³¹ While the norms of femininity are constantly in flux and have expanded to accommodate less conventional norms of femininity as more women are accepted as leaders (witness the celebration of “the pantsuit” and the emergence of Pantsuit Nation), the strictures of the double bind remain.³²

The barriers confronting women in leadership cannot be separated from broader issues of gender and power. Sexual harassment and objectification—along with rape and sexual assault—have historically functioned as effective tools to separate women from power, and sexual objectification reduces women to their instrumental value to others and deprives women of power from non-sexual sources.³³ Sexual objectification and harassment of a girl or woman who experiences it can make her feel small, derail her from her path forward, and stymie her drive to leadership.³⁴ One of the most emotionally poignant moments of the presidential campaign for me was listening to the tweet-backs from women after the Hollywood Access tape’s celebration of Donald Trump’s grabbing

APPLIED PSYCHOL. 1129, 1130 (2014) (citing Eagly, A. H., & Karau, S. J., *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573 (2002)).

²⁸ Anne M. Koenig, Alice H. Eagly, Abigail A. Mitchell & Tiina Ristikari, *Are Leader Stereotypes Masculine? A Meta-Analysis Of Three Research Paradigms*, 137 PSYCHOL. BULL. 616–42 (2011) (reporting a meta-analysis of sixty-nine studies on stereotypes and leadership, researchers found that stereotypes about leadership are decidedly masculine).

²⁹ Andrea Kupfer Schneider, Catherine H. Tinsley, Sandra Cheldelin & Emily T. Amanatullah, *Likeability v. Competence: The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers*, 17 DUKE J. GENDER L. & POL’Y 363 (2010).

³⁰ ELLEN J. SAUROWSKY, WOMEN AND SPORT: FROM LIBERATION TO CELEBRATION 213 (questioning whether subscribing to ultra-feminine social norms such as wearing heels at games garners respect or undermines authority); Joanne Klimovich Harrop, *Heels are Part of Hoops Coaches’ Game Plan*, TRIB TOTAL MEDIA (Feb. 15, 2014, 6:16 PM), <http://triblive.com/lifestyles/fashion/5356223-74/heels-game-coach>.

³¹ Alice H. Eagly & Steven J. Karau, *Role Congruity Theory Of Prejudice Toward Female Leaders*, PSYCHOLOGICAL REVIEW 109(3), (2002) (proposing a theory of prejudice against female leaders that is based on the descriptive aspects of gender roles including feminine and masculine leadership characteristics).

³² See Lori Poloni-Staudinger, “What Do ‘Pantsuit Nation’ Women Want? Here’s What You Need to Know About Women’s Movements,” WASH. POST (Jan. 19, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/19/what-do-pantsuit-nation-women-want-heres-what-research-tells-us-about-womens-movements/?utm_term=.7b6baf501cf5.

³³ Jennifer L. Martin & Martha L. Sharp-Grier, *Lest We Forget, the Personal Continues to Be Political: Yik Yak and Other Unsafe Spaces, Necessary Dialogue in a Time of Silence*, in CAMPUS ACTION AGAINST SEXUAL ASSAULT: NEEDS, POLICIES, PROCEDURES, AND TRAINING PROGRAMS 55 (Michele A. Paludi ed., 2016) [hereinafter CAMPUS ACTION].

³⁴ *Id.*

women “by the pussy.”³⁵ The “tweet me your first [sexual] assault” twitter campaign gave voice to the lasting pain and scars of the macro and micro sexual aggressions and assaults so many women and girls have experienced, some from a very young age.³⁶

On the other side of this gender power dynamic, sexual objectification, and harassment solidifies a certain kind of power among men. It constructs masculinity among the men who participate in sexually assaulting and objectifying women.³⁷ A type of masculinity that gender theorists have called “hostile masculinity”—“an umbrella term encompassing ideologies such as dominance, hostility toward women and to feminism, rape myths, adversarial relationship beliefs, traditional/sexist views of gender roles, and sexually aggressive behavior”—now appears to be ascendant.³⁸ Hostile masculinity polices the boundaries of leadership as a men’s club.³⁹ In settings where hostile masculinity is hegemonic, exerting sexual dominance over women is status-enhancing.⁴⁰ To give just one example of the appeal of hostile masculinity, not only was then candidate-Trump’s publicized boasting about sexual assault not disqualifying for the office of the Presidency of the United States, it seemed to increase the candidate’s appeal to some men whose status as men rose by aligning themselves with this version of hegemonic masculinity.⁴¹ Because hostile masculinity treats women as sexual objects and as untrustworthy sexual actors who are prone to deceit, it was easy for the candidate to successfully impugn the credibility and character of the women who came forward to accuse him of behavior similar to what he described and bragged about on the tape.⁴²

If all of this sounds like 1980s dominance feminism all over again, I plead guilty and beg forbearance.⁴³ Much of the past year has felt like déjà vu from a

³⁵ See Paige Lavender, *These Might Be Donald Trump’s Most Disgusting Comments Yet About Women*, HUFFINGTON POST (Oct. 7, 2016, 4:45 PM), http://www.huffingtonpost.com/entry/donald-trump-women-comments_us_57f8016de4b0e655eab4148d.

³⁶ Jonathan Mahler, *For Many Women, Trump’s ‘Locker Room Talk’ Brings Memories of Abuse*, N.Y. TIMES (Oct. 10, 2016), <https://www.nytimes.com/2016/10/11/us/politics/sexual-assault-survivor-reaction.html>.

³⁷ Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 409 (2004).

³⁸ MARTIN & SHARP-GRIER, *supra* note 33, at 53. See also Jill Filipovic, *The All-Male Photo Opp Isn’t a Gaffe. It’s a Strategy*, N.Y. TIMES (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/opinion/the-all-male-photo-op-isnt-a-gaffe-its-a-strategy.html> (exploring the politics of appealing to “aggrieved masculinity” underlying the President’s strategy of surrounding himself with men in photographs marking key moments in his Presidency).

³⁹ See McGinley, *supra* note 37, at 365–67.

⁴⁰ *Id.*

⁴¹ Olag Khazan, *The Precarious Masculinity of 2016 Voters*, ATLANTIC (Oct. 12, 2016), http://www.theatlantic.com/politics/archive/2016/10/male-trump-voters-masculinity/503741/?utm_source=eb (“Many seem to find comfort in Trump’s talk of male dominance and success.”).

⁴² MARTIN & SHARP-GRIER, *supra* note 33, at 53 (stating that the belief that women are sexually deceptive is a precursor to hostile masculinity); Louis Nelson, *Trump Reels as More Accusers Emerge*, POLITICO (Oct. 13, 2016), <http://www.politico.com/story/2016/10/trump-new-sexual-harassment-allegations-229724>.

⁴³ See generally MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 39–76 (2d ed. 2003).

bygone era. Yet, feminist scholarship has traveled far from that decade, especially in its intersectional critique of monolithic gender theorizing and postmodern questioning of the stability of sex and gender itself.⁴⁴ This body of work remains more vital than ever. Differences among women shape women's social positions, and race, gender, and heteronormativity intertwine to stratify and subordinate women.⁴⁵ But this is not the place for building out theory. My point here is more modest: dominance feminism, with its focus on sexuality as a tool of oppression, should not be viewed as an alternative to liberal feminism, with its focus on equal opportunity for women and opening up women's pathways to power. Rather, they are complementary and mutually necessary strategies for empowering women. The conditions of sexual inequality that dominance feminism challenges must be upended for liberal feminism to have any chance of placing women on an equal playing field as men. If there is anything new to be gained from reflecting on the past year's events, perhaps it is that pigeonholing feminist legal theory into discrete silos obscures the ways in which subordinating practices are interconnected and overlapping. Widening the path for women in leadership, a liberal feminist goal, requires addressing the sexual subordination and objectification of women and the culture of silencing and normalization that supports it.

The silo effect of separating feminist theory into alternative theoretical constructs too often characterizes advocacy and scholarship around Title IX. The case law, the OCR regulations, and public discourse about the law all divide Title IX into separate and discrete areas, such as equal athletic opportunity, the treatment of pregnant students, and sexual harassment and assault.⁴⁶ However, at its core, the law has a singular, unifying theme. Legislators passed Title IX to broaden women's pathways to leadership by expanding opportunities in education, thereby opening the gates to power.⁴⁷ Seen through this lens, the distance separating the areas covered by the law closes, and the law's overarching goal circles back to empowering women and creating opportunities for women in leadership. Securing Title IX's continued enforcement in the area of campus sexual assault is important not just because sexual assault involves harms to the persons subjected to unwanted sexual contact, but because it has consequences for women's access to power and leadership. Treating women as sexual objects and sexual outlets undermines women's agency and competence and obstructs their paths to leadership by relegating women to a position in which their interpersonal power depends on their looks and sex appeal—a source of power that is transient at best and easily undermined.

⁴⁴ *Id.* at 77-128.

⁴⁵ Katie Rogers, *White Women Helped Elect Donald Trump*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/12/01/us/politics/white-women-helped-elect-donald-trump.html?smid=pl-share> (stating that while women strongly supported Hillary Clinton, a majority of white women voted for Trump).

⁴⁶ Lexie Kuznick & Megan Ryan, *Changing Social Norms?*, 31 HARV. J. L. & GENDER 367 (2008) (discussing the history and legacy of Title IX in expanding women's educational opportunities and pathways to leadership).

⁴⁷ *Id.*

Ever since it was enacted, Title IX has been a flashpoint for the gender culture wars, and a frequent trigger for backlash, even as Title IX advocates have successfully used the law to challenge traditional gender norms that limit women's opportunities; the passage of time has not lessened the passions and vehemence on all sides of this struggle.⁴⁸ One of the most pressing minefields now is the controversy over Title IX enforcement as applied to campus sexual assault, and in particular, the ramped-up OCR enforcement that occurred during the Obama administration. Because the OCR documents that laid the groundwork for this work consist of guidance from the Department of Education, they may be unilaterally rescinded by the Secretary of Education in the Trump Administration—a fate that recently befell the joint guidance from the Education and Justice Departments on educational rights, including bathroom access, for transgender students.⁴⁹ Yet, rolling back the legal meaning of what Title IX requires educational institutions to do in responding to campus sexual assault is not so easily accomplished. Ultimately, the ability of the Trump Administration, acting without the support of Congress, to change the obligations on institutions in responding to campus sexual assault turns on the meaning of the statute. Resisting retrenchment in this area requires going back to basics and grounding the OCR framework that emerged during the Obama Administration as part of the statutory ban on sex discrimination. The remainder of this article takes up that challenge, in a preliminary fashion, by sketching the sex discrimination roots of inadequate institutional responses to campus sexual assault.

II. THE GENDER-BLIND DISCOURSES OF CAMPUS SEXUAL ASSAULT

Oddly enough, it has not always been easy to discern the sex discrimination violation, as a legal construct, in the problem of campus sexual assault through the haze of gender-obscuring discourse that surrounds it. Commentators who oppose OCR's enforcement initiatives have accused federal regulators of forcing universities to meddle in private, interpersonal relationships

⁴⁸ For a recent example of the continuing push and pull over the meaning of Title IX, see U.S. DEP'T OF JUST., CIVIL RIGHTS DIVISION & U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (2016) (providing some protections to transgender students) [hereinafter 2016 DEAR COLLEAGUE LETTER]; U.S. DEP'T OF JUST., CIVIL RIGHTS DIVISION & U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER (2017) (rescinding protection to transgender students) [hereinafter 2017 DEAR COLLEAGUE LETTER].

⁴⁹ Jeremy W. Peters, Jo Becker & Julie Hirschfeld Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html>. Compare 2017 DEAR COLLEAGUE LETTER (rescinding protection to transgender students), with DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, OFFICE OF THE ASSISTANT SECRETARY, DEAR COLLEAGUE LETTER (2011) [hereinafter 2011 DEAR COLLEAGUE LETTER], DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, OFFICE OF THE ASSISTANT SECRETARY, QUESTIONS & ANSWERS ON TITLE IX & SEXUAL VIOLENCE (2014) [hereinafter Q&A ON TITLE IX & SEXUAL VIOLENCE], and 2016 DEAR COLLEAGUE LETTER (providing some protections to transgender students).

in an intrusive manner at odds with universities' institutional capacities.⁵⁰ Much of the criticism focuses on the specificity of the procedures OCR requires institutions to use in their grievance procedures for handling reports of sexual assault, including the preponderance of the evidence standard and the constraints on cross-examination questions posed directly by accused students.⁵¹ This focus on individualized adjudications and the zero-sum framing of vindication for the victim versus the due process rights of the accused student obscures the gender inequality underpinning sexual assault and university responses to it.⁵² Foregrounding the procedures universities use for adjudicating allegations of sexual misconduct in conversations about the legitimacy of the OCR Title IX framework leads critics to skeptically question federal regulators' authority to impose such detailed constraints on colleges and universities.⁵³

Gender-neutral discourses about sexual assault further submerge the connections between OCR's framework and the statute's directive against sex discrimination. In the discourses surrounding campus sexual assault, the sexual encounters that are the subject of institutional proceedings are often characterized as instances of mistaken communication—a sexual encounter gone wrong.⁵⁴ The mistake narrative is ascendant in the critical commentary of the OCR enforcement regime.⁵⁵ Highlighting the role of alcohol in college sexual experiences bolsters the contention that complaints of sexual assault stem from regrets about bad sex

⁵⁰ Jacob E. Gerson & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881 (2016) (arguing that the OCR guidance is part of an “enlargement of bureaucratic regulation of sexual conduct that is voluntary, non-harassing, nonviolent, and does not harm others.”); Janet Halley, *Trading the Megaphone for a Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103 (2015) (speaking generally of the difficulties for universities and the government to judge relationships).

⁵¹ See, e.g., Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://perma.cc/R67A-UGUY> (criticizing an inadequate opportunity to discover facts, the housing of all agents of review in one office, and the failure to ensure adequate representation for the accused); David Rudovsky et al., *Open Letter From Members of the Penn Law School Faculty* (Feb. 18, 2015), <https://perma.cc/7HSD-YQ2J> (criticizing the cross examination prohibition, limitations on admitting evidence, lack of protection against self-incrimination, as well as the preponderance standard).

⁵² See Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 B.Y.U. EDUC. & L.J. 143, 160 (2013) (discussing this criticism of Title IX enforcement).

⁵³ See John Villasenor, *Is a Higher Standard Needed for Campus Sexual Assault Cases?*, N.Y. TIMES (Jan. 4, 2017, 1:07 PM), <http://www.nytimes.com/roomfordebate/2017/01/04/is-a-higher-standard-needed-for-campus-sexual-assault-cases>.

⁵⁴ See, e.g., Zoe Heller, *Rape on the Campus*, N.Y. REV. BOOKS (Feb. 5, 2015), <https://perma.cc/36BH-SFBX>; Heather MacDonald, *The Campus Rape Myth*, CITY J. (Winter 2008), <https://perma.cc/L23G-8V26>; Judith Shulevitz, *The Best Way to Address Campus Rape*, N.Y. TIMES (Feb. 7, 2015), <https://perma.cc/4WYN-DNF7>; Christina Hoff Sommers, *Rape Culture is a 'Panic Where Paranoia, Censorship, and False Accusations Flourish'*, TIME (May 15, 2014), <https://perma.cc/EU6Y-V75W>; Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014), <https://perma.cc/67SA-7QR5>; Cathy Young, *Feminists Want Us to Define These Ugly Sexual Encounters as Rape. Don't Let Them*, WASH. POST (May 20, 2015), <https://perma.cc/6RX8-6NEL>.

⁵⁵ Gerson & Suk, *supra* note 50; Aya Gruber, *Anti-Rape Culture*, 64 U. KAN. L. REV. 1027 (2016); Halley, *supra* note 50.

and poor decisionmaking.⁵⁶ With drinking so prevalent on college campuses, sexual encounters that result in allegations of sexual assault are often attributed to the over-consumption of alcohol, which leads to poor choices and unclear communication.⁵⁷ If too much alcohol is the problem, the link to sex discrimination appears ever more tenuous. Undoubtedly, alcohol plays some role in contributing to sexual assault, but the way it is translated into the discourse functions to submerge gender inequality in the analysis.⁵⁸

A perusal of OCR's "Reading Room," the website where OCR posts its guidance documents and letters of finding, does little to map the connections between campus sexual assault and the statute's prohibition of sex discrimination.⁵⁹ The OCR guidance documents are largely devoted to the procedural requirements that OCR expects institutions to use in responding to reports of sexual assault, with little to no analysis connecting the dots between the required procedures and the theory of sex discrimination that supports them.⁶⁰ Reading the OCR documents, including the controversial 2011 Dear Colleague Letter and the agency's Letters of Finding in response to complaints filed with the agency, one can easily lose sight of the sex discrimination forest for the trees of procedural technicalities.⁶¹ By avoiding a substantive discussion of how institutional practices toward campus sexual assault have long been—and continue to be—gender-subordinating, the documents miss an opportunity to build a persuasive case for why correcting sex discrimination requires restructuring universities' institutional processes that handle sexual assault.

The gender-sanitized tone of the OCR documents is echoed in the now-ubiquitous college and university policies that address student sexual misconduct, and that are written in the de-gendered, rationalizing language of complainants, respondents, and bystanders.⁶² The authors of these policies take pains to maintain a tone of gender neutrality.⁶³ They avoid gender pronouns and often

⁵⁶ Gerson & Suk, *supra* note 50, at 941–42; Halley, *supra* note 50.

⁵⁷ Halley, *supra* note 50.

⁵⁸ Vanessa Tirone, Jennifer Katz & Melanie Schukrafft, *Verbal Sexual Coercion in Young Adults' Heterosexual Dating Relationship*, in *CAMPUS ACTION 221* (critiquing the discourse of miscommunication as "incomplete and problematic" for missing the gendered inequality upon which assumptions about consent proceed, and stating that "miscommunication connotes a gender-neutral interaction, although sexual negotiations are not.").

⁵⁹ See READING ROOM, DEP'T OF JUST., CIVIL RIGHTS DIVISION & DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/publications.html> (last visited Apr. 4, 2017)..

⁶⁰ Cf. Katharine K. Baker, *Campus Sexual Misconduct as Sexual Harassment: A Defense of the DOE*, 64 U. KAN. L. REV. 861, 862, (2016) ("[D]espite all the publicity, DOE has done an inexplicably poor job of explaining the theory under which it is compelling universities to act.").

⁶¹ See, e.g., LETTER OF FINDINGS TO ROYCE ENGSTROM AND LUCY FRANCE, U.S. DEP'T OF JUST., CIVIL RIGHTS DIVISION & U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS (May 9, 2013), <https://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf> (discussing Title IX compliance issues related to the University of Montana) [hereinafter LETTER OF FINDINGS].

⁶² See Susan V. Iverson, *A Policy Discourse Analysis of Sexual Assault Policies in Higher Education*, in *THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE* 15 (Sara C. Wooten & Roland W. Mitchell eds. 2016).

⁶³ *Id.*

omit discussion of the gender impact of sexual violence, with the bulk of the policies focusing on the process for handling complaints.⁶⁴ As Susan Marine—a former Harvard administrator with responsibility for handling sexual misconduct—wrote of her experience in that role: “Quite simply, the decades of feminist theorizing, activist strategies, and promotion of a gendered awareness of interpersonal violence that had emerged since the 1970s was routinely silenced or ignored.”⁶⁵ Instead, Marine explains, the administrative policies treated rape “primarily as an issue of alcohol abuse” and “female collusion in unsupervised, male-controlled spaces,” with no “consistent narrative from survivors.”⁶⁶

In fairness, part of the reason for the gender neutrality in the policy discourse is a sensitivity that has emerged from critiques of the radical feminist account of sexual violence.⁶⁷ In the classic dominance feminist account, heterosexual sex is the problem because male sexual privilege leads men to feel entitled to having sex with women.⁶⁸ While it is true that, overwhelmingly, women are the victims of sexual violence and men are the perpetrators, this account of heterosexual male privilege had the unfortunate effect of neglecting sexual violence that does not fit the heterosexual male-female pattern. Sensitive to these critiques, university policies now use gender-neutral pronouns so as not to assume that complainants are women and accused students are men. For the most part, this is a useful correction to an over-emphasis on heterosexual actors in the treatment of sexual assault. And yet, it has the unfortunate and likely unintended consequence of scrubbing references to gender out of these policies, with the effect of obscuring the ways gender power and gender inequality intersect with and contribute to sexual violence.

The absence of articulated connections between institutional processes for handling campus sexual assault allegations and the statutory directive against sex discrimination has left the OCR framework vulnerable to critics’ charges of illegitimacy. Critics accuse the agency of overreaching beyond interpreting the statute and regulations, and instead imposing *sui generis* procedural requirements that are unmoored from the statute. The bureaucratic tone in the OCR interpretive and enforcement documents, and their outsized emphasis on hyper-technical requirements, such as how a policy notifies affected persons of its content, have not helped matters.⁶⁹

The substantive void in OCR’s articulation and explanation of required procedures has left the framework vulnerable to the well-worn dichotomy that often threatens to derail feminist law reform projects: an asserted split between what is private, and hence properly outside the law, and what is public, and

⁶⁴ *Id.*

⁶⁵ *Id.* at 67.

⁶⁶ *Id.*

⁶⁷ Susan Marine, *Combatting Sexual Violence in the Ivy League: Reflections on Politics, Pain, and Progress*, in *THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE* 55, 67, 69 (Sara C. Wooten & Roland W. Mitchell eds. 2016).

⁶⁸ Iverson, *supra* note 62, at 39 (“Radical articulations of sexual violence during the second wave are steeped in a heterosexist understanding of this violence.”).

⁶⁹ LETTER OF FINDINGS, *supra* note 61.

properly subject to law's power.⁷⁰ The opposition to Title IX's regulation of campus disciplinary procedures has succeeded, to an extent, in depicting the subject matter of Title IX's regulatory framework as a private interpersonal conflict. As one participant at an American Law Institute meeting that I attended on this topic put it, OCR is asking universities to resolve the equivalent of an intra-family dispute, akin to a fight between a brother and sister.⁷¹ If such matters are shaded as private interpersonal conflicts, OCR's intrusion into campus procedures for handling them looks like a bureaucratic overreach, a meddling in universities' internal affairs without justification. As with most such dichotomies, however, the public-versus-private framing here obscures the porosity of the line separating what is regarded as private from the very public harm of gender inequality in education.⁷² The critique of OCR for interfering in private conduct fails to engage what must be taken as the core theory underlying Title IX's framework for sexual assault: that gender violence, followed by a pallid institutional response, amounts to sex discrimination in violation of Title IX's anti-discrimination mandate.⁷³ Rebutting the criticisms of the legitimacy of OCR's regime requires delving into the theory undergirding the procedural framework adopted by OCR and connecting it to the statutory ban on sex discrimination. Before attending to that work, the next section reviews the history of how Title IX's ban on sex discrimination came to be understood to encompass sexual assault and to place obligations on how educational institutions must respond to it.

III. TRACING THE EVOLUTION OF INSTITUTIONAL RESPONSES TO SEXUAL ASSAULT AS A TITLE IX VIOLATION

To understand and defend where OCR has taken Title IX, we need to take a step back and trace the trajectory launched by feminist scholars in situating sexual violence as a central feature of gender inequality. This early feminist work pushed back against a traditional view of rape as an anomalous act by an individual bad actor, and replaced it with an understanding of rape as an instrument of systemic subordination of women.⁷⁴ The strand of feminism now known as dominance feminism emphasized how conditions of gender inequality facilitate rape and delegitimize the women who resist it.⁷⁵ In this account, rape is a product of a patriarchal power structure that supports men's sexual access and

⁷⁰ See generally CHAMALLAS, *supra* note 43; Jennifer McErlean, *Sexual Assault in Principle and in Practice*, in *CAMPUS ACTION* 84 (discussing the Western philosophical commitment to a rigid distinction between public and private realms as the subject of government intervention).

⁷¹ Notes on file with author.

⁷² CHAMALLAS, *supra* note 43, at Introduction (discussing the public-private dichotomy).

⁷³ See Marine, *supra* note 67, at 67.

⁷⁴ See Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453 (2014).

⁷⁵ See CHAMALLAS, *supra* note 43.

entitlement to women.⁷⁶ The sexual objectification of women simultaneously supports male dominance and sexualizes female subordination.⁷⁷

The feminist reconceptualization of rape achieved some traction in shaping the development of the law. Although far from a complete overhaul, feminist law reform efforts made some headway in revising the most draconian definitions of rape in the criminal law, for example, by moving the law away from force and resistance as the linchpins of criminal conduct.⁷⁸ These reforms have had little impact on the real-world crime of rape, however, which remains under-reported, is rarely prosecuted, and even more rarely results in convictions.⁷⁹

Feminist work reconceptualizing sexual violence and sexual misconduct against women has had its greatest impact in the civil law, and particularly the law of civil rights, where it sparked judicial recognition of a new sex discrimination claim for sexual harassment.⁸⁰ This feminist-inspired cause of action first found its way into workplace law, taking root in Title VII, but soon migrated to Title IX. A few years after the Supreme Court recognized hostile environment sexual harassment as a form of sex discrimination under Title VII in its 1986 decision, *Meritor Savings Bank v. Vinson*,⁸¹ the Court relied on that case to embrace a parallel principle recognizing a sex discrimination claim for a teacher's sexual harassment, including sexual assault, of a student in a Title IX case, *Franklin v. Gwinnett County*.⁸² It took several more years for the Court to develop a framework for institutional liability for sexual harassment under Title IX. By 1999, the Court had established three core principles that set the stage for OCR's 2011 Dear Colleague Letter (DCL) addressing institutional obligations for handling sexual violence: first, sexual assault is a form of sexual harassment (*Franklin*); second, educational institutions violate Title IX's ban on sex discrimination when they knowingly respond to sexual assault with deliberate indifference (*Gebser v. Lago Vista School District*),⁸³ and third, both of these principles extend to sexual harassment and sexual assault between students (*Davis v. Monroe County Board of Education*).⁸⁴ Through this case law, the Supreme Court laid the groundwork for Title IX's framework for sexual assault more than a decade before OCR issued its 2011 DCL, and the lower courts had embarked on

⁷⁶ See Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 40 (2015).

⁷⁷ Brief for Catharine A. MacKinnon as Amicus Curiae in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

⁷⁸ See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940 (2016); Tuerkheimer, *Rape On and Off Campus*, *supra* note 76.

⁷⁹ See Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 221–22 (2015) (discussing the inadequacies of the criminal legal system as applied to rape).

⁸⁰ See Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029 (2015).

⁸¹ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

⁸² *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 78 (1992); *see also Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (explaining that rape “obviously qualified as being severe, pervasive, and objectively offensive sexual harassment that could deprive [plaintiff] of access to the educational opportunities provided by her school.”).

⁸³ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

⁸⁴ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 632–33 (1999).

this course even earlier.⁸⁵ From this vantage point, the 2011 DCL did not pave new ground as much as reinforce the legal foundation laid by the courts.

Although the Title IX case law now clearly recognizes rape and sexual assault as a form of sex discrimination, it does so based on a thin understanding of sex-based discrimination, and one that requires little of educational institutions by way of response to sexual harassment and sexual assault. For the most part, taking their lead from the Title VII case law, courts in Title IX cases assumed that sexual assault is a form of sexual harassment based on a formalistic understanding of what sex discrimination means: that the assailant would not have engaged in the challenged conduct toward the plaintiff but for her sex.⁸⁶ In other words, if the sexually assaulted woman had been a man, the sexual assault would not have taken place. This explanation of sexual assault and sexual harassment as forms of sex discrimination locates the “because of sex” element of the discrimination claim in the presumed sexual orientation of the assailant, who “discriminates” on the basis of sex in his (or her) selection of targets for sexual advances—conduct that is implicitly understood to be motivated by the assailant’s sexual desire for the target.⁸⁷ The desire model rests on an understanding of sexual assault that lends itself to undermining a complainant’s credibility in a particularly pernicious way. If the woman who claims she was sexually assaulted is not desirable to the person accused of sexual assault, the implication is that she must not be telling the truth. This strategy for undermining complainants’ credibility is a tried and true tactic of persons accused of sexual harassment and assault.⁸⁸

Under this overly simplistic and formalistic account of sex discrimination, the institution is liable for damages resulting from the assailant’s sex discrimination only when it had actual notice of the conduct and responded with deliberate indifference, in which case the institution is at fault for compounding

⁸⁵ See, e.g., *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 899 (1st Cir. 1988) (“Although the plaintiff in *Meritor* sued under Title VII, we apply the same analysis to sexual harassment claims under Title IX.”); *Mabry v. State Bd. of Community Colleges & Occupational Education*, 813 F.2d 311, 316 (10th Cir. 1987) (“Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX’s substantive standards . . .”).

⁸⁶ *Franklin*, 503 U.S. at 75 (“Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex,” and “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”) (quoting *Meritor*, 477 U.S. at 64).

⁸⁷ See, e.g., *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 141 (4th Cir. 1996); *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766, at *26 (6th Cir. Jan. 15, 1992); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

⁸⁸ See, e.g., Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, forthcoming UTAH L. REV. at 61, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2971447 (describing a university chancellor’s denial of allegations of sexual harassment in which he stated, “By the way, have you ever noticed that almost all the women who claim to have been sexually harassed are physically ugly?”); Ben Jacobs, *Donald Trump’s Defence is to Demean Accusers: “Look at Her, I Don’t Think So,”* THE GUARDIAN, Oct. 14, 2016 (discussing Donald Trump’s rebuttal of accusations by women accusing him of sexual assault).

the harm of, and acquiescing in, the harasser's sex-based discrimination.⁸⁹ This theoretical grounding of sexual assault as sex discrimination is minimalist both in terms of its substantive understanding of sex discrimination and in what it requires of institutions.⁹⁰ Under the most narrow interpretation of this model, anything short of a cover-up or gross incompetence arguably falls short of deliberate indifference.⁹¹ It also rests on a baseline norm of gender blindness: the institution must respond to sexual assault in a gender-neutral way, that is, no worse when the harassment targets victims of one sex than another, in order to correct the sex discrimination perpetrated by the harassing students.⁹² This understanding is compatible with the prevailing, although hardly exclusive, understanding of sex discrimination law that the courts generally embrace, with gender blindness as the law's foundational principle.⁹³

This gender-blind account is also ascendant in the Title IX reverse discrimination cases in which male students have sued their institutions under Title IX for disciplining them for sexual assault. Male students have lost these cases when courts see their treatment as reflective of the institution's disfavoring of students accused of sexual assault, as long as the institution reacts to such students in a gender-blind fashion.⁹⁴ However, any sign that the institution has reacted to sexual assault as a gendered problem, even by recognizing the gender impact and harm of sexual assault, may leave the defendant vulnerable to Title IX liability for violating the principle of gender blindness.⁹⁵ For example, in one case a male plaintiff succeeded in defeating the university's motion to dismiss based partly on allegations that the university's Title IX officer made a

⁸⁹ *Davis v. Monroe Cty. Bd. Of Educ.*, 526 U.S. 629 (1999) ("If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subjects' its students to harassment."); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290–91 (1998) ("The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation.")

⁹⁰ See *Davis*, 526 U.S. at 633; *Gebser*, 524 U.S. at 277.

⁹¹ *Doe v. Blackburn College*, No. 06-3205, 2012 U.S. Dist. LEXIS 24797 (C.D. Ill. Feb. 27, 2012) (granting summary judgment to the school because college's response did not amount to deliberate indifference); *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1356 (M.D. Ga. 2007) (finding no evidence of deliberate indifference where plaintiff showed that a school official had actual knowledge of the six prior incidents and had not responded to any of them).

⁹² See *Davis*, 526 U.S. at 633; *Gebser*, 524 U.S. at 277.

⁹³ See Tracy E. Higgins, *Job Segregation, Gender Blindness, and Employee Agency Symposium: Law, Labor, and Gender—New Perspectives on Labor and Gender*, 55 ME. L. REV. 241, 244 (2002).

⁹⁴ *Ludlow v. Northwestern Univ.*, 125 F. Supp. 3d 783, 792–93 (N.D. Ill. 2015) (granting Northwestern's motion to dismiss) ("Ludlow's allegation that Northwestern 'needed to believe the victim' similarly points to a victim-focused procedure by Northwestern, not a procedure that took the gender of the victim and the accused into account."); *Blank v. Knox College*, No. 14-CV-1386, 2015 U.S. Dist. LEXIS 8205, at *10 (C.D. Ill. Jan. 23, 2015) (granting Knox College's motion to dismiss) ("[Nothing] in the Amended Complaint shines any light on how 'the several decisions of the board' were motivated by gender bias, as opposed to being gender-neutral acts of simple procedural discretion afforded to the board by the governing rules.")

⁹⁵ Cf. Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 87–93 (2017) (discussing Title IX discrimination cases brought by disciplined students).

presentation in which she emphasized the pervasiveness of sexual assault experienced by women even when sexual contact may appear consensual at the time.⁹⁶ In the court's view, such statements evidenced possible gender bias against men.⁹⁷ The standard account of sexual assault as sex discrimination due to the "but-for her sex" selection of the target feeds into this account, equating gender consciousness with sex discrimination.

In contrast to this formalistic understanding of discrimination, OCR's approach, while lacking a full explanation of its theoretical grounding, requires a more sophisticated and nuanced explanation for why campus sexual assault implicates Title IX's ban on sex discrimination and why it imposes specific obligations on institutions to address it.⁹⁸ The de-gendered discourse of OCR documents and university sexual assault policies does little to flesh out a justification that goes beyond the simplistic account of sexual assault as sex discrimination. However, the Title IX framework that OCR enforces necessitates a more robust and institutionally grounded view of why campus sexual assault is a form of sex discrimination. Such an account would ground sexual assault in a theory of institutional discrimination, and would have more in common with the sociological approach that emerged from social science research on sexual violence than the standard legal account.⁹⁹ OCR's focus on the procedural framework campuses must use to address sexual assault is consistent with research showing that sexual violence is not merely the product of individual actors, but is supported and facilitated by the institutions in which sexual violence occurs.¹⁰⁰ The agency's approach necessitates an understanding of sex discrimination that goes beyond the motives of an individual perpetrator and the formalistic presumption that the perpetrator would not have done the same thing to someone of the other sex, and reaches into the structures and cultures of campus life that facilitate sexual assault and institutional denial. The prevailing "thin" understanding of why sexual assault is discriminatory—grounded in implicit assumptions about the sexual orientation of the harasser and the desire directed toward a person of the target's sex—cannot bear the weight of the agency's institution-restructuring approach to the problem, thereby leaving OCR vulnerable to attack by critics.¹⁰¹ A more robust justification requires digging

⁹⁶ See *Doe v. Washington & Lee Univ.*, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015), at * 10–11.

⁹⁷ *Id.*; see also *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 767 (D. Md. 2015) (in finding insufficient evidence for disciplined student's sex discrimination claim under Title IX, emphasizing that university statements and policies on sexual assault "are presented in a gender-neutral tone, addressed to all students, and published to improve campus safety for both men and women.").

⁹⁸ See Baker, *Campus Sexual Misconduct*, *supra* note 60, at 862.

⁹⁹ Sarah K. Murnen & Marla H. Kohlman, *Athletic Participation, Fraternity Membership, and Sexual Aggression Among College Men: A Meta-Analytic Review*, 57 *SEX ROLES* 145, 147 (2007).

¹⁰⁰ See Todd W. Crosset, *Athletes, Sexual Assault, and Universities' Failure to Address Rape-Prone Subcultures on Campus*, in *THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE* 76 (Sarah C. Wooten & Roland W. Mitchell eds., 2016).

¹⁰¹ See Associated Press, *Football Players Settle Hazing Case Over 'No Gay Thursday'*, FOXSPORTS (Jan. 3, 2017, 3:19 PM), <http://www.foxsports.com/other/story/football-players-settle-hazing-case-over-no-gay-thursday-010317> (discussing a case in which a prosecutor declined to

deeper into how sexual assault is a product of gendered institutions and manifests as a form of gender subordination.¹⁰²

Although it has not explained this well in its official documents, OCR has taken an approach to Title IX more in line with substantive equality and an institutional account of gender discrimination. Under the OCR framework, universities must do more than merely maintain a gender-neutral process for campus sexual assault and refrain from deliberate indifference after learning of sexual assault allegations.¹⁰³ The OCR framework requires a more proactive, specific response that can register as being required by Title IX only if the law is understood to require more than formal gender neutrality in institutional responses to sexual assault.¹⁰⁴ As enforced by OCR, Title IX requires institutions to abandon the gendered scripts that normalize male sexual privilege and create a procedural system that takes allegations of sexual assault seriously. By requiring universities to adopt such policies without a prior finding of actual notice and deliberate indifference—and without a prior, known allegation of sexual assault—the OCR regime provides an antidote to the difficulty sexually assaulted students face, individually and collectively, in seeking recourse and a just institutional response.¹⁰⁵ At its core, if not in its articulation, the OCR framework digs deep into institutional structures and cultures to change the scripts that normalize sexual assault. In changing the process for handling complaints and allegations, the goal is to unsettle the norms of college life that contribute to rape-prone campus cultures. The following section sketches some preliminary ideas for connecting the required institutional procedures for handling sexual assault charges to Title IX's statutory prohibition of sex discrimination.

IV. FROM THE INTERPERSONAL TO THE INSTITUTIONAL: RECONSTRUCTING THE SEX DISCRIMINATION FOUNDATION OF TITLE IX'S FRAMEWORK FOR CAMPUS SEXUAL ASSAULT

A. *The Sex and Gender of Campus Sexual Assault*

The case for why inadequate institutional responses to campus sexual assault violate Title IX begins—but does not end—with the sex and gender of the students being assaulted and the students carrying out the assaults. Notwithstanding the sex-neutral language of OCR guidance documents and university sexual misconduct policies, it is well documented that sexual assault, like sexual harassment, is a practice most often performed by men to women.¹⁰⁶ The recent studies on the prevalence of sexual assault and sexual misconduct on campus have found much higher rates of women than men being subjected to

charge misconduct as sexual assault because of the lack of sexual gratification resulting from the act of the defendant).

¹⁰² Tuerkheimer, *Rape On and Off Campus*, *supra* note 76, at 40 n. 248.

¹⁰³ 2011 DEAR COLLEAGUE LETTER, *supra* note 49.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ MARTIN & SHARP-GRIER, *supra* note 33, at 54 (“The literature on sexual harassment suggests that over 90% of the time, males are the perpetrators of sexual harassment against females.”).

such conduct.¹⁰⁷ The overwhelming majority of victims of sexual violence are women—although it is often overlooked that this category includes women who identify as lesbian as well as women who identify as straight.¹⁰⁸ Women are not the only gender-subordinated group to experience high levels of sexual assault.¹⁰⁹ Both men and women who are sexual minorities and gender non-conforming experience disproportionately high rates of sexual assault and misconduct. In a recent study by the American Association of Universities on the prevalence of campus sexual assault, over 39% of students who identify as trans, gay, queer, or gender non-conforming reported having experienced sexual misconduct during their college years—the highest rate of any demographic group studied.¹¹⁰ Included among this group are many students who identify as men. Men who are gay, trans, or otherwise gender non-conforming are particularly vulnerable to campus sexual assault.¹¹¹ Of course, gender-conforming, straight men can also be sexually assaulted, but the overwhelmingly predominant pattern is that the persons subjected to campus sexual assault are women (both cisgender and transgender) and gender non-conforming men (*e.g.*, gay men and trans men).¹¹² The perpetrators of sexual assault are also a group sharply demarcated by gender; the vast majority of the perpetrators of sexual assault are men who self-identify as heterosexual.¹¹³

Acknowledging these gender dynamics is a necessary first step to understanding why, historically, sexual assault has been handled so differently from other serious offenses, with so little recourse for its victims and why that pattern continues to this day. Recognizing the gendered reality of who perpetrates

¹⁰⁷ See generally *Executive Summary: Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASSOC. AM. UNIV. (Dec. 14, 2015), https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Executive%20Summary%2012-14-15.pdf [hereinafter *Executive Summary*]; Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study: Final Report*, NAT'L CRIM. JUST. RES. SERV. (Dec. 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

¹⁰⁸ As Sara Carrigan Wooten has pointed out, the common assumption that women/survivors are heterosexual is often incorrect, even in situations involving male-to-female sexual assault and rape. See Sara Carrigan Wooten, *Heterosexist Discourses: How Feminist Theory Shaped Campus Sexual Violence Policy*, in *THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE* 33, 46–47 (Sarah C. Wooten & Roland W. Mitchell eds., 2016).

¹⁰⁹ See David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASSOC. AM. UNIV. (Dec. 14, 2015), https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf.

¹¹⁰ *Id.* at xiv.

¹¹¹ Iverson, *supra* note 62, at 27.

¹¹² *The National Intimate Partner and Sexual Violence Survey*, NAT'L CTR. INJ. PREVENTION & CONTROL, https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_victimization_final-a.pdf (last visited Mar. 3, 2017) (reporting that sexual minority respondents reported higher rates of sexual violence than heterosexual women and men); *Victims of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence> (last visited Mar. 3, 2017) (reporting that one out of every six women has been a victim of attempted or completed rape and that transgender students are at a higher risk for sexual violence).

¹¹³ Doug P. Vanderlaan & Paul L. Vasey, *Patterns of Sexual Coercion in Heterosexual and Non-Heterosexual Men and Women*, 38 *ARCHIVES OF SEXUAL BEHAVIOR* 987, 993–94 (2009).

and who is subjected to campus sexual assault does not erase the reality that not all instances of this offense follow these predominant patterns.¹¹⁴ As one author plaintively asked, “[C]an one highlight this point,” that patriarchy fuels the gender violence that functions to control women, “without being heterosexist?”¹¹⁵ One path toward answering that question in the affirmative is to shift the understanding of why sexual misconduct occurs from the traditional legalistic account, which rests on the binary sex and sexual orientation desire model, to the gendered-institutions account, which pinpoints how the distribution of power and gendered scripts facilitate sexual assault and contribute to the problem of insufficient institutional responses to it.¹¹⁶ In the institutional account of gender violence, the gender subordination is not rooted in the sex of the victim in conjunction with the presumed sexual orientation of the perpetrator; rather, the gender privilege and gender scripts that arise in gender violence are socially constructed and nourished by the institutional settings in which they take root. In this account, the gender and gender nonconformity of the target contributes to the sexual privilege acted upon by the assailant, and these gender power dynamics and gendered scripts, in turn, shape the institution’s response.

Recognizing that men are among the group of (predominantly female) persons subjected to sexual assault does not erase the gender inequality enforced by campus sexual assault. While it took some time (early courts had fun with the “bisexual harasser” “loophole” to their theory of sex discrimination), sexual harassment law has long left such extreme versions of formalism in the dustbin of discarded legal theories.¹¹⁷ The Supreme Court, in an opinion by Justice Scalia, recognized that men too can be targeted for sexual harassment because of their sex and left the door open to (if not embracing outright) an anti-stereotyping theory that locates the “because of sex” element in stereotypes about men and masculinity—stereotypes that are complementary to the very stereotypes about women and female sexuality that create the rape-prone cultures that make women—and some men—vulnerable to sexual assault.¹¹⁸ Sexual assaults of gender non-conforming men are traceable to the same cultures of masculinity, privilege and silence that facilitate and protect men in sexually assaulting women.¹¹⁹ The simplistic judicial account of sex discrimination, resting on the

¹¹⁴ Iverson, *supra* note 62, at 46-47.

¹¹⁵ *Id.*

¹¹⁶ Cf. Brief of National Organization on Male Sexual Victimization, Inc., Men Stopping Rape, Inc., Oakland Men’s Project, Inc., Men Against Pornography, Sexual Exploitation Education Project, Inc., Men Overcoming Sexual Assault, Stop Prisoner Rape, Inc., Men Overcoming Violence, Inc., Community United Against Violence, Inc., Emerge: A Men’s Counseling Service on Domestic Violence, Inc., Men Stopping Violence, Inc., Men’s Rape Prevention Project, Inc., New York City Gay & Lesbian Anti-Violence Project, Inc., and National Coalition Against Sexual Assault, Inc., as Amici Curiae, *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (No. 96-568), 1997 WL 471814, at *4-5 [hereinafter Amicus Brief].

¹¹⁷ *Doe by Doe v. City of Belleville*, 119 F.3d 563, 572 (7th Cir. 1997) (“[We] cannot agree that Title VII excludes from its purview men who are sexually harassed by other men.”); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138 (4th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996).

¹¹⁸ See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78, 82 (1998).

¹¹⁹ Amicus Brief, *supra* note 116.

harasser's sexual orientation and desire, coupled with the target's sex, obscures the interconnections between gender stereotyping and the sex and gender scripts that support sexual assault.¹²⁰

An example of these gender subordinating scripts recently played out in a Philadelphia area high school football team's celebration of "No gay Thursdays," an approximately three-year-old tradition in which the team decided Thursdays gave team members a free pass to do things that would otherwise count as "gay."¹²¹ Using "No gay Thursday" as cover for their actions, several teammates allegedly assaulted a freshman with a broomstick.¹²² The prosecutor decided to charge the offense as simple harassment, a misdemeanor, instead of sexual assault, explaining the reason for doing so on the grounds that there was no "sexual gratification" motive by the offenders.¹²³ The prosecutor's explanation makes the same mistake as the early sexual harassment court decisions by assuming sexual harassment and related offenses to be predicated on a model of desire and implied sexual attraction toward the target.¹²⁴ This excuse for the prosecutor's charging decision mistakes sexual assault for sexual desire. The desire-based model of sexual assault is particularly obtuse as applied to sexual harassment and assault of men. It overlooks how gender stereotypes and gendered expectations about masculinity drive assailants' behavior. Sexually assaulting a male teammate with a broom is an assertion of hegemonic and hostile masculinity that feminizes the target as a relatively powerless and less masculine man.

The fact that men—as well as women—can be sexually assaulted does not take gender out of the equation. Like women, men—whether gay or straight, cisgender or transgender—experience the harm of sexual assault in deeply gendered ways. A man who is sexually assaulted is forced to come to terms with social constructions of masculinity that deny the possibility that a "real man"—a culturally recognizable masculine man—could be sexually assaulted.¹²⁵ Masculinity—always precarious—is deeply compromised when a man names what he has experienced as sexual assault.¹²⁶ This conflict with masculinity likely explains why men report rape and sexual assault at even lower rates than women.¹²⁷ By not reporting and instead minimizing and denying what happened

¹²⁰ *Id.*

¹²¹ Michelle Bond, 'No-Gay Thursday: Horrid Abuse Alleged at Conestoga', PHILA. INQUIRER (Mar. 5, 2016), http://www.philly.com/philly/news/20160305_DA__3_charged_in_Conestoga_hazing_incident.html.

¹²² *Id.*

¹²³ See Associated Press, *supra* note 101.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Cf. Tirone et al., *supra* note 58, at 219.

¹²⁷ D. D. Lab, J. D. Feigenbaum & P. De Silva, *Mental Health Professionals' Attitudes and Practices Towards Male Childhood Sexual Abuse*, 24 CHILD ABUSE & NEGLECT 391 (2000) (providing evidence that men underreport their abuse experiences).

to them, men seek to maintain society's (and their own) understanding of their masculinity.¹²⁸

As this brief discussion attempts to explain, there is an interpersonal dimension to the sex discrimination grounding of sexual assault, although it is nowhere near as simplistic as the standard desire plus sexual orientation model presumes. Further mapping of the gender discrimination connections to the Title IX OCR framework requires moving beyond the interactions between the assailant and the target to unearth the broader cultural and institutional forces that make weak university responses to sexual assault a form of sex discrimination.

B. *Conditions of Gender Inequality in Negotiating Sexuality on Campus*

Not only does gender impact exist in terms of who is sexually assaulted and who sexually assaults, but the settings in which sexual practices occur on campus are also gendered in ways that disadvantage women. The hookup culture that prevails in many campus settings is not a level sexual playing field. The balance of power is tilted toward men in their sexual hookups with women, partly as a result of men's exercise of control over the physical spaces in which students' parties—and their anticipated hookups—occur. Most sororities are forbidden by their charters to have alcohol on-site, so fraternities, which have no such restrictions, control access to alcohol and the geography of party space.¹²⁹ In addition, social pressures surrounding sex and hooking up leave women with less power. While many women choose to participate in hookup culture, and some claim that it enables them to have sexual relationships without compromising their independence with encumbering relationships, a gender double bind leaves women less room to navigate sexual encounters without the loss of social status.¹³⁰ The norms of status seeking in party culture remain differently gendered for men and women, and with disparate consequences. A qualitative study of campus hookup culture found that “men derived status from securing sex (from high status women), while women derived status from getting attention (from high status men).”¹³¹ According to several researchers who interviewed participants in campus hookup culture, women report obtaining less physical and sexual pleasure from hookups than men, even while feeling greater pressure to engage in hookups to please men and be popular.¹³² All of this contributes to a

¹²⁸ Karen G. Weiss, *Too Ashamed to Report: Deconstructing the Shame of Sexual Victimization*, 5 FEMINIST CRIMINOLOGY 286, 289–90 (2010).

¹²⁹ Michael Kimmel, *Is It the End of Men, or Are Men Still in Power? Yes!*, 93 B.U. L. REV. 689, 694 (2013).

¹³⁰ Laura Hamilton & Elizabeth A. Armstrong, *Gendered Sexuality in Young Adulthood Double Binds and Flawed Opinions*, 2009 GENDER & SOC'Y 589, 598 (2009); see also Elizabeth A. Armstrong, Laura Hamilton, & Brian Sweeney, *Sexual Assault on Campus: A Multi-Level, Integrative Approach to Party Rape*, 53 SOC. PROBS. 483, 488 (2006) (citations omitted) (explaining that women felt the need to look “hot” but not “slutty” at campus parties and struggled to successfully navigate that line).

¹³¹ Armstrong et al., *Sexual Assault on Campus*, *supra* note 130, at 488.

¹³² Elizabeth A. Armstrong et al., *Accounting for Women's Orgasm and Sexual Enjoyment in College Hookups and Relationships*, 77 AM. SOC. REV. 435, 458 (2012); see also Lynn Jones, Brooke de Heer & Sarah Prior, *Campus Sexual Assault: Conceptualizing Vulnerable Groups in an*

sexual environment on campus that is primed for setting inequitable expectations of women's sexual availability and male sexual entitlement.¹³³ Despite an aura of sexual liberation surrounding hookups, the gender scripts in the hookup culture are marked by entrenched norms of masculine entitlement and female passivity.

Of course, that does not mean that when women and men hook up in a casual sexual encounter that it is tantamount to sexual assault. The point, rather, is that the social backdrop for sexual activity on campus is one that is marked by gender inequality in the social pressures for women to have sex with men and intensifies men's expectations of entitlement and sexual access to women. The result is an environment in which the conditions for consenting to sex leave women at a disadvantage in negotiating consent to sex with men and leave men more inclined to assume—or not care about—a female partner's consent.¹³⁴ As Professor Katherine Baker has argued, when women are used for sex without sufficient regard to whether they consent, women are treated as sexual outlets instead of as sexual agents, with the result of denying women equal dignity and respect and creating a hostile and discriminatory educational environment.¹³⁵

At the core of the gender inequality enforced by campus sexual assault is not merely an assumption that a woman's sex is part of what made her a desirable target for sexual conduct in the first place. More importantly, sexual assault is a form of gender discrimination because of the unequal conditions in which men and women consent to sex on campus and the denial of equal dignity when consent is taken for granted or disregarded.

C. *Rape-Prone Cultures, Rape Myths and Peer Support for Sexual Assault*

It is not just sex as an identity characteristic of the targets and perpetrators of sexual assault, nor gender inequality in negotiating consent to particular sexual encounters, that make inadequate university responses to sexual assault a matter of sex discrimination. Most importantly, it is the gender dynamics of institutions that make inadequate university responses to sexual assault a matter of sex discrimination. The social sciences have done a better job than the courts in articulating how gender disparities in institutions contribute to sexual assault. Social science research situates sexual assault as a product of the cultures and structures of the institutions in which it occurs.¹³⁶

Unfolding Legal Context, in CAMPUS ACTION 29 (“Students report that female pleasure is secondary to male pleasure and that the use of aggression and deceptive techniques by men to obtain consent is not uncommon.”).

¹³³ See PEGGY ORENSTEIN, *GIRLS & SEX: NAVIGATING THE COMPLICATED NEW LANDSCAPE* (2016).

¹³⁴ See Baker, *Campus Sexual Misconduct*, *supra* note 60, at 862.

¹³⁵ *Id.* As Baker describes her theory of sex discrimination in relation to OCR's DCL:

The common expropriation of sex from people who do not want their bodies used sexually creates a disorienting and discouraging atmosphere for those who feel used. It is an atmosphere that inhibits an equal sense of belonging and respect in an educational community. It is sexual harassment. *Id.*

¹³⁶ See, e.g., Peggy Reeves Sanday, *The Socio-Cultural Context of Rape: A Cross-Cultural Study*, 37 J. SOC. ISSUES 5 (1981).

This account of sexual assault as a product of gender inequality in institutions is not new to the social sciences. Peggy Reeves Sanday's anthropological account of rape and rape-prone cultures, in which she criticized the traditional, individualistic understanding of rape and replaced it with a culturally contingent perspective, is now over three and a half decades old.¹³⁷ Sanday used the term "rape-prone society" to refer to an environment in which "the incidence of rape is reported by observers to be high, or rape is excused as a ceremonial expression of masculinity, or rape is an act by which men are allowed to punish or threaten women."¹³⁸ She found three cultural and sociological factors that affect the prevalence of rape: (1) The level of interpersonal violence; (2) the extent of support for male domination; and (3) the degree of sex segregation.¹³⁹ These factors continue to resonate in research on gender violence and help explain why some university settings have higher levels of sexual assault than others.¹⁴⁰

In particular, Sanday's findings about the significance of sex segregation in contributing to rape continue to be borne out in research that finds a higher incidence of sexual assault by members of all-male groups—such as fraternities and athletic teams—than the population of men in the general student body.¹⁴¹ Similar findings apply to sexual harassment in the workplace. In highly sex-stratified workplaces, where men predominate in higher level jobs, Barbara Gutek coined the term "sex-role spillover" to describe the process of sex stereotypes spilling over into workplace relations—for example, by male employees sexually objectifying and acting sexually aggressively towards women.¹⁴² Similarly, in university settings characterized by high levels of sex segregation—such as men's sports and fraternities—Sanday's theory retains its explanatory force.¹⁴³ Greek life is often hierarchical in ways that encourage or facilitate interpersonal hazing, promote sexual hookups and reinforce traditional gender roles.¹⁴⁴ Likewise, men's college sports takes place in all-male settings, with male athletes led by male coaches, and often require and reward interpersonal violence—and male athletes in these settings express higher than average levels of agreement with traditional gender ideologies.¹⁴⁵

Sanday's work laid the foundation for a more recent body of research focused on how beliefs about gender, sexuality and rape contribute to a rape-

¹³⁷ *Id.*

¹³⁸ Peggy Reeves Sanday, *Rape-Prone Versus Rape-Free Campus Cultures*, 2 VIOLENCE AGAINST WOMEN 191, 193 (1996).

¹³⁹ Sanday, *The Socio-Cultural Context of Rape*, *supra* note 136, at 25.

¹⁴⁰ *Id.*

¹⁴¹ Sarah K. Murnen & Marla H. Kohlman, *Athletic Participation, Fraternity Membership, and Sexual Aggression Among College Men: A Meta-Analytic Review*, 57 SEX ROLES 145, 147 (2007).

¹⁴² BARBARA GUTEK, SEX AND THE WORKPLACE 121 (1985).

¹⁴³ *See, e.g.*, Kristy L. McCray, *Intercollegiate Athletes and Sexual Violence: A Review of Literature and Recommendations for Future Study*, 16 TRAUMA, VIOLENCE, & ABUSE 438 (2015).

¹⁴⁴ *See generally* ELIZABETH A. ARMSTRONG & LAURA T. HAMILTON, PAYING FOR THE PARTY: HOW COLLEGE MAINTAINS INEQUALITY 83–93 (2013).

¹⁴⁵ Belinda-Rose Young et al., *supra* note 22; Kristy L. McCray, *Intercollegiate Athletes and Sexual Violence: A Review of Literature and Recommendations for Future Study*, 16 TRAUMA, VIOLENCE & ABUSE 438 (2015)..

prone culture by creating a campus environment in which sexual violence is prevalent and normalized.¹⁴⁶ Sociologists studying gender and sexual assault have illuminated the role of gender ideology and gender scripts in the prevalence of, and responses to, campus sexual assault.¹⁴⁷ A consistent finding within this research is that men who hold beliefs about sex that justify male sexual aggression and conform to gender stereotypes about sex roles are more likely to sexually assault others.¹⁴⁸ The literature on the subject refers to such beliefs as “rape myths”—“widely held distorted beliefs about the nature of rape, which minimize its prevalence and the harm it entails, while stressing victim precipitation as its primary cause.”¹⁴⁹ Such beliefs include that women mean “yes” when they say “no,” that women lie about rape, that women secretly desire coercive sex, that men cannot control their natural sexual urges, and that rape by an acquaintance or without a weapon is not “real rape.”¹⁵⁰

Within the broader campus culture, there are certain campus settings in which rape culture is intensified and the risk of sexual violence is heightened.¹⁵¹ These settings are characterized by a high prevalence of rape myths and traditional views about the roles of men and women.¹⁵² Both fraternities and men’s sports teams have, on average, members who are more likely to share rape-supportive beliefs and opinions hostile to women, and to use coercion, incapacitation and force to have sex with women without their consent.¹⁵³ Both of these settings have been particular trouble spots for sexual assault. The link between sexual assault prevalence and male sports participation has already been noted. And the stories of fraternities celebrating male sexual aggression are legion, although rarely included as part of the narrative of individual allegations of sexual assault.¹⁵⁴ Reports like the one from Old Dominion University in 2015—in which one of its fraternities hung signs “reading ‘rowdy and fun! hope your baby girl is ready for a good time,’ ‘freshman daughter drop-off,’ and ‘go ahead and drop mom off too,’”—continue to surface with some regularity.¹⁵⁵

Such posturing among men in male-only environments signals a culture and perception of peer support for sexual assault, which itself contributes to the prevalence problem. The perception of peer support for sexual assault is a driving force in contributing to its occurrence. In fraternities and sports teams in which men believe that their peers support their sexually aggressive acts, male members

¹⁴⁶ Armstrong et al., *Sexual Assault on Campus*, *supra* note 130, at 485.

¹⁴⁷ *Id.*

¹⁴⁸ See Antonia Abbey, Angela J. Jacques-Tiura & James M. LeBreton, *Risk Factors for Sexual Aggression in Young Men: An Expansion of the Confluence Model*, 37 *AGGRESSIVE BEHAVIOR* 450, 451-52 (2011); Joetta L. Carr & Karen M. VanDeusen, *Risk Factors for Male Sexual Aggression on College Campuses*, 19 *J. FAM. VIOLENCE* 279, 280-81 (2004).

¹⁴⁹ Susan Fineran, *Teaching an Online Course on Sexual Harassment: A Course for Graduate and Undergraduate Students*, in *CAMPUS ACTION* 151.

¹⁵⁰ *Id.*

¹⁵¹ Patricia Yancey Martin, *The Rape Prone Culture of Academic Contexts: Fraternities and Athletics*, 30 *GENDER & SOC’Y* 30, 32 (2016).

¹⁵² *Id.*

¹⁵³ Martin, *supra* note 151; Murnen & Kohlman, *supra* note 141.

¹⁵⁴ McCray, *supra* note 143, at 438.

¹⁵⁵ See Jones et al., *supra* note 132, at 28.

of these groups are significantly more likely to have high levels of self-reported sexual aggression.¹⁵⁶ The perception of male peer support for sexual assault in these settings makes men more likely to engage in such actions.¹⁵⁷

Much of the discussion surrounding campus sexual assault emphasizes the role of alcohol in increasing the risk of sexual violence, and yet, even here, gender power dynamics are at the root of the problem. Researchers have found that it is not drinking *per se* that increases the likelihood of sexual violence, but rather the gender dynamics of the setting in which drinking occurs.¹⁵⁸ It is those party environments where drinking takes place that are characterized by high levels of perceived peer support for sexual assault and widely shared beliefs in rape myths that the risk of sexual assault is heightened.¹⁵⁹ In keeping with these findings, regularly attending fraternity and athletics parties that involve a lot of drinking—settings that are characterized by such belief systems—increases both the incidence of sexual assault and the subsequent denial and neutralization of sexual assault when it happens.¹⁶⁰ In contrast, drinking alcohol in itself, outside of these settings, has no effect on the prevalence of, or responses to, sexual assault.¹⁶¹

Of course, fraternities and athletics are far from singularly responsible for campus sexual assault—most sexual assaults do not involve athletes or fraternity members.¹⁶² The disproportionate incidence of sexual assault in these settings and the higher levels of adherence to rape myths and beliefs in gender inequality drive home the point that sexual assault is rooted in institutional cultures, and is not merely a product of individual desire.¹⁶³ It is, instead, a product of gendered institutions and subcultures in which women are devalued and in which men compete for high-status masculinity by publicizing their sexual exploits and treating women as “sexual outlets.”¹⁶⁴

D. Gendered Responses to Sexual Assault

Not only is sexual violence itself influenced by rape-prone cultures and adherence to rape myths, but the reaction to it is as well. Responses that “neutralize” sexual assault—that is, deny, minimize or justify it—trade on gender scripts to excuse male sexual aggression as normal and blame women for failing to prevent it.¹⁶⁵ A commonly shared superficially gender-neutral ideology of “personal responsibility” functions to blame victims for not preventing sexual

¹⁵⁶ Stephen E. Humphrey & Arnold S. Kahn, *Fraternities, Athletic Teams, and Rape*, 15 J. INTERPERSONAL VIOLENCE 1313, 1316 (2000).

¹⁵⁷ *See Id.*

¹⁵⁸ Kaitlin M. Boyle & Lisa Slattery Walker, *The Neutralization and Denial of Sexual Violence in College Party Subcultures*, 37 DEVIANT BEHAVIOR 1392, 1403 (2016).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1404–05.

¹⁶¹ *Id.* at 1401.

¹⁶² *See id.*

¹⁶³ *See id.*

¹⁶⁴ Young et al., *supra* note 145, at 2–3 (summarizing literature).

¹⁶⁵ Karen G. Weiss, “Boys Will be Boys” and Other Gendered Accounts: An Exploration of Victims’ Excuses and Justifications for Unwanted Sexual Contact and Coercion, 15 VIOLENCE AGAINST WOMEN 810, 827 (2009).

assault.¹⁶⁶ Women who are sexually assaulted are often devalued for seemingly not exercising “agency” in their sexual autonomy or for succumbing to coercion.¹⁶⁷ The use of such gender scripts is influenced by the culture on campus. For example, one study found that students who regularly attend parties hosted by athletes or fraternities were more likely to subscribe to strict definitions of rape (such as, it is not “really rape” if she did not fight back or if he did not have a weapon) and relatedly, to deny a perpetrator’s responsibility for sexual assault when it occurred.¹⁶⁸ Within this group of partygoers, men were more likely than women to hold strict views of rape and to deny perpetrator responsibility.¹⁶⁹ By comparison, students who did not regularly drink *and* students who did regularly drink but not in the party settings marked by these belief systems, were both less likely to subscribe to rape myths and less likely to excuse or neutralize incidents of sexual assault.¹⁷⁰

It is bad enough when peers react with neutralizing responses, but when educational institutions respond in such fashion, it creates a sexually hostile campus environment.¹⁷¹ A weak institutional response to sexual assault can cause sex discrimination in two respects. First, it promotes a campus culture in which sexual assault and harassment are more likely to occur.¹⁷² Institutional acquiescence in sexual misconduct normalizes sexually coercive behaviors, making it less likely that the social norms that support of such conduct will be disrupted. Not surprisingly, researchers have found that institutional factors, such as support for male privilege and the failure to hold athletes accountable, influence the likelihood of sexual assault by athletes.¹⁷³ Second, an educational institution’s lackluster response once a sexual assault has occurred compounds the harm of the initial assault, especially when persons within the institution respond in ways that neutralize sexual misconduct.¹⁷⁴

Such gendered institutional responses to campus sexual assault, in turn, contribute to the low levels of reporting of sexual assault to officials.¹⁷⁵ By one estimate, only about 12% of persons who experience sexual assault report it to

¹⁶⁶ Jones et al., *supra* note 132.

¹⁶⁷ Tirone et al., *supra* note 58, at 216.

¹⁶⁸ Young et al, *supra* note 145, at 8–14.

¹⁶⁹ *Id.*

¹⁷⁰ Boyle & Walker, *supra* note 158.

¹⁷¹ Cf. ANN C. MCGINLEY, MASCULINITY AT WORK: EMPLOYMENT DISCRIMINATION THROUGH A DIFFERENT LENS 57 (2016) (explaining why employers’ inadequate reactions to sexual harassment should be understood to contribute to the hostile environment itself and not just as relevant to the standard for employer liability for a hostile environment created by employees).

¹⁷² Boyle & Walker, *supra* note 158, at 1393–94.

¹⁷³ See Todd W. Crosset, *Athletes, Sexual Assault, and Universities’ Failure to Address Rape-Prone Subcultures on Campus*, in THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE 74, 76 (Sarah C. Wooten & Roland W. Mitchell eds., 2016).

¹⁷⁴ C.P. Smith & J.J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 123 (2013).

¹⁷⁵ MICHELE A. PALUDI, SEXUAL HARASSMENT ON COLLEGE CAMPUSES: ABUSING THE IVORY POWER 179 (1990).

police or campus officials.¹⁷⁶ Most survivors confide in a friend rather than tell a campus official.¹⁷⁷ And they have good reason for doing so—as commentators have noted, the incentives placed on institutions in adjudicating sexual assault tend to align against a university finding that an accused student is responsible.¹⁷⁸

One of the tragedies of campus sexual assault is that the gendered scripts and institutional cultures that contribute to the neutralization of sexual assault by peers and campus officials can also cause persons who have experienced sexual assault to neutralize or “explain away” what happened to them.¹⁷⁹ Research on rape acknowledgement demonstrates that anywhere from 42% to 73% of women who experience conduct that meets the legal definition of rape do not identify their experience as rape—a result that is particularly likely when the perpetrator was someone the victim knew, rather than a stranger.¹⁸⁰ Weak institutional responses when allegations of sexual assault surface only exacerbate this phenomenon.¹⁸¹

The upshot is that the gendered underpinnings of campus sexual violence do not end with the influence of institutional culture on the prevalence of sexual assault.¹⁸² The aftermath of a sexual assault and the institutional responses to it, also result from gender dynamics on campus. Weak institutional responses that serve to neutralize sexual assault are both rooted in—and reinforcing of—gender inequality.

V. CONCLUSION: TWO CHEERS FOR LEGAL PLURALISM AND EXTRA-JUDICIAL SOURCES OF MEANING

Admittedly, the preceding analysis stops short of connecting the dots between the statute’s ban on sex discrimination and the specific procedural protections OCR articulated in the 2011 DCL. That work is important in its own right and would be worth doing even without the axe of the Trump Administration’s Department of Education hanging over the OCR Title IX framework for sexual violence. But the very real possibility of rolling back the OCR Title IX framework adds a new level of urgency to the project of grounding the Title IX administrative framework on a firmer foundation than the thin sex discrimination theory on which the courts have built judicially constructed standards for institutional liability. This article is a preliminary foray in sketching some possibilities for how that foundation might be laid.

Part of the critique of the Obama Administration’s OCR is that it, like the agency’s actions in the preceding two administrations (those of Presidents Bush

¹⁷⁶ Dean G. Kilpatrick et al., *Drug-facilitated, Incapacitated, and Forcible Rape: A National Study*, 3 MED. U. OF S.C., NAT’L CRIME VICTIMS RES. & TREATMENT CTR. (2007) (“Among college women, about 12% of rapes were reported to law enforcement.”).

¹⁷⁷ MICHELE A. PALUDI, *CAMPUS ACTION AGAINST SEXUAL ASSAULT* xxxi (Michele A. Paludi ed., 2016).

¹⁷⁸ McErlean, *supra* note 70, at 86.

¹⁷⁹ Young et al, *supra* note 145, at 4.

¹⁸⁰ *Id.* (summarizing the literature).

¹⁸¹ Boyle & Walker, *supra* note 158, at 1395.

¹⁸² See PALUDI, *supra* note 175.

and Clinton), went well beyond what courts have required of universities under Title IX for responding to sexual assault.¹⁸³ Some of these critics lambasted the agency for interpreting Title IX to do more than the courts required and for imposing greater obligations on universities than courts have required.¹⁸⁴ This critique is based on a misunderstanding of both the scope of Title IX doctrine, as elaborated by the courts, and of the space that judicial interpretation of an antidiscrimination statute leaves for an enforcing agency in the executive branch to fill in the gaps through its own interpretation of the statute.

To the first point, the doctrinal limitations on institutional liability developed by the courts are expressly grounded in the limited context of civil lawsuits for damages.¹⁸⁵ The institutional liability standard devised by the Supreme Court in the *Gebser* and *Davis* cases stems from the spending clause origins of Title IX and the resulting limitations placed on private lawsuits seeking damages.¹⁸⁶ In contrast, OCR's administrative enforcement process, which gives recipients notice and an opportunity to correct a violation before any financial penalty of loss of federal funds may be imposed, avoids the notice problem that concerned the Court in private damages actions.¹⁸⁷ The Court explicitly left open the ability of OCR to impose a different standard in its own enforcement actions.¹⁸⁸ Doctrinally, OCR is on solid footing in requiring institutions to do more than merely refrain from deliberate indifference upon receiving actual notice of sexual harassment.

Second, faulting the agency for going beyond what the courts require ignores the important role historically served by executive agencies in enforcing and interpreting a civil rights statute with a broad-based ban on discrimination.¹⁸⁹ This critique of the Obama OCR rests on a court-centric view of legal meaning, treating judicial interpretation of Title IX as sacrosanct and exclusive, and leaves no role for the enforcing agency to adopt a more robust reading of what the statute

¹⁸³ Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>.

¹⁸⁴ *Id.*

¹⁸⁵ See *Davis v. Monroe Cty. Bd. Educ.* 526 U.S. 629, 647 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288–89 (1998).

¹⁸⁶ *Gebser*, 524 U.S. at 288–89 (stating that actual notice and the deliberate indifference standard need not restrict administrative enforcement of the statute); U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 3–4 (2001) [hereinafter OCR REVISED GUIDANCE] (explaining that the agency may find recipients in violation of Title IX for failing to respond in a manner calculated to remedy sexual harassment of which the recipient knew or should have known). As the Court noted in *Gebser*, administrative enforcement already requires notice to the recipient before financial penalty—the termination of federal funds. 524 U.S. at 285.

¹⁸⁷ OCR REVISED GUIDANCE, *supra* note 186, at 10.

¹⁸⁸ *Davis*, 526 U.S. at 647; *Gebser*, 524 U.S. at 274, 288–89.

¹⁸⁹ Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining Discrimination*, 70 GEO. L.J. 1, 3 (1981) (“This means that . . . Congress adopted neither an effects nor an intent test for discrimination, but instead authorized agencies to make the choice through regulations.”); Ming Hsu Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 HARV. C. R.-C. L. L. REV. 291, 300–06 (discussing generally executive agencies interpreting legislation and specifically OCR interpreting Title VI).

requires.¹⁹⁰ This conception of the agency's role does not comport with our national history of civil rights enforcement. Like other statutory bans on discrimination, Title IX is susceptible to a broad range of possible meanings. Executive agencies that answer to the President bring a different capacity to the process of identifying and articulating the content of anti-discrimination law.¹⁹¹ When the Executive branch ascribes a more robust meaning to a discrimination statute than the courts, it brings democratic engagement with anti-discrimination law from the national constituency represented by the President.¹⁹²

In the case of OCR's strengthened enforcement of Title IX as applied to campus sexual assault, the agency's recent interpretation and administrative actions have been shaped by the interactions between social movement activists, led by survivors of sexual assault, and the Obama Administration. The 2014 White House Task Force Report and accompanying campaign, "It's On Us," and the OCR enforcement initiative that accelerated with the 2011 DCL, were the Obama Administration's responses to the stepped-up student activism from survivors in recent years.¹⁹³ While student activism surrounding campus sexual assault is hardly a new phenomenon, there was a resurgence of passion and energy around the issue during the Obama years.¹⁹⁴ A new generation of student survivors eschewed the anonymity of "Jane Doe" pseudonyms and went public with their stories.¹⁹⁵ This move by survivors to self-identify and publicize their personal experiences gives a more powerful resonance to their voices.¹⁹⁶ Advocacy groups founded by survivors such as "Know Your IX" and "End Rape on Campus" have sprung into action to mobilize survivors around the country and

¹⁹⁰ Gerson & Suk, *supra* note 50.

¹⁹¹ See MICHAEL McCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 218–19 (1994) (making a similar argument about the Department of Labor's role in interpreting and enforcing the Equal Pay Act).

¹⁹² Cf. Stephen Rich, *One Law of Race?*, 100 IOWA L. REV. 201, 210–11 (2014) (criticizing courts' push toward "convergence"—applying "one law of race" consistently in statutory and constitutional contexts—because it sacrifices the ability of political institutions to pursue different approaches to racial equality in different settings and cuts short the diversity of democratic choices available among possible alternative conceptions of race discrimination).

¹⁹³ MEMORANDUM ESTABLISHING A WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, 79 Fed. Reg. 4385 (Jan. 22, 2014); 2011 DEAR COLLEAGUE LETTER, *supra* note 49.

¹⁹⁴ See Anderson, *supra* note 78, at 1971–76 (detailing history of student activism and OCR enforcement efforts surrounding campus sexual assault); Tuerkheimer, *Rape On and Off Campus*, *supra* note 76, at 6–7 (discussing the role of campus activism in fueling national attention to the problem of campus sexual assault).

¹⁹⁵ JON KRAKAUER, MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN (2015); Walt Bogdanich, *Reporting Rape, and Wishing She Hadn't*, N.Y. TIMES, (July 13, 2014), <https://perma.cc/QD4T-ZVTS>; Katie Sanders, "I'm at the Beginning of a Movement" *Sexual Assault Survivors are Coming Forward so Other Women Can Find a Voice*, MARIE CLAIRE (Dec. 16, 2015), <http://www.marieclaire.com/culture/a16068/women-sexual-assault-activists/> (listing a number of sexual assault survivors who have become activists); The Hunting Ground (CNN Films 2015), <https://perma.cc/4PM4-AJZB>.

¹⁹⁶ Emily Suran, Note, *Title IX And Social Media: Going Beyond the Law*, 21 MICH. J. GENDER & L. 273 (2014) (discussing survivor activism and how Title IX has become a rallying cry for college activists).

assist them in filing complaints against their schools with OCR.¹⁹⁷ Responding to the increased number of sexual assault complaints and the heightened advocacy from survivors' groups, OCR decided to maintain and publicly disclose a list of colleges and universities under investigation for their handling of sexual assault—a list that has grown to include, at the time of this writing, more than 200 colleges and universities.¹⁹⁸

Social movement activism has long influenced the scope of antidiscrimination law, including at the level of executive enforcement.¹⁹⁹ Social movements can catalyze new legal meanings and commitments at the level of presidential politics as well as through the legislative process. As this process has unfolded, other voices, representing conflicting interests, are now pushing back against the Obama Administration's enforcement approach and its reading of Title IX's promise. Groups representing men who have been disciplined for campus sexual assault—allegedly unfairly so—have found audiences with some legislators and judges, contesting the OCR enforcement regime.²⁰⁰ It remains to be seen how these competing claims on Title IX's meaning will be resolved. But the meaning of the law that has emerged so far from this process of democratic engagement, messy though it is, is no less legitimate for having spawned from the interaction of presidential politics and campus activism. The emergence of legal norms out of conflict between different government and social actors is not anti-democratic; it is part of the democratic process of creating legal meaning.²⁰¹

Of course, what the executive branch giveth, the executive branch can taketh away, without the need for any affirmative act or amendment from the Congress. To the extent that the 2011 DCL goes beyond what the statute requires, the new administration may lawfully roll it back. But that assumes that the statute's ban on sex discrimination does not itself require the directives in that document, and that is very much an open issue. The reading of Title IX's requirements articulated in the 2011 DCL has not been foreclosed by the narrower approach to institutional liability taken by courts in private lawsuits for damages.²⁰² The past few years' experience with OCR's renewed commitment to

¹⁹⁷ Alison Kiss & Kiersten N. Feeney White, *Looking Beyond the Numbers: Understanding the Jeanne Clery Act and Sexual Violence*, in *THE CRISIS OF CAMPUS SEXUAL VIOLENCE* 95 (2016); Martin, *supra* note 151, at 36–37.

¹⁹⁸ See Tyler Kingkade, *There Are Far More Title IX Investigations of Colleges Than Most People Know*, HUFFINGTON POST (June 16, 2016), http://www.huffingtonpost.com/entry/title-ix-investigations-sexual-harassment_us_575f4b0ee4b053d433061b3d.

¹⁹⁹ See generally William N. Jr. Eskridge, *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 *UCLA L. REV.* 1333 (2010); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 *CALIF. L. REV.* 1323 (2006).

²⁰⁰ Tyler Waldron, *How Obama Took An Existing Feminist Law And Made It Even Stronger*, HUFFINGTON POST (January 7, 2017, 8:00 AM), http://www.huffingtonpost.com/entry/obama-title-ix_us_585afcd5e4b0eb5864851a93.

²⁰¹ Michael Waterstone, *Backlash, Courts, and Disability Rights*, 95 *B.U. L. REV.* 833, 835 (2015) (offering observations on how the disability rights movement, and the controversy it has generated between supporters and critics, has enriched understandings of disability rights and the evolution of constitutional values more generally).

²⁰² See *Davis v. Monroe Cty. Bd. Educ.* 526 U.S. 629, 647 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288–89 (1998).

enforcement actions, including the embrace by many (if not all) universities of the primary components of that framework, will inevitably influence interpretations of the statute's ban on sex discrimination and the scope of obligations it places on educational institutions moving forward.²⁰³ Whatever the Trump Administration decides to do with the agency guidance issued during the Obama Administration, the struggle over the meaning of Title IX is far from over.

²⁰³ Cf. FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009) (developing a theory of exogenous rights in which employers articulate, interpret and implement employee rights in more robust ways than required by judicial authority, and the resulting workplace norms then shape the scope of rights recognized by courts); Jason Thompson et al., *In-Services and Empty Threats: The Roles of Organizational Practices and Workplace Experiences in Shaping U.S. Educators' Understanding of Students' Rights*, 53 *SOC. SCI. RES.* 391–402 (Sept. 2015) (finding that students' due process rights as defined by courts have been translated into a much more robust set of legal rights by educators with institutional responsibility for complying with the law than is required by legal authorities themselves).