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The Trouble with 'Bureaucracy'

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The Trouble with “Bureaucracy”

Deborah L. Brake*

Despite heightened public concern about the prevalence of sexual assault in higher education and the stepped-up efforts of the federal government to address it, new stories from survivors of sexual coercion and rape, followed by institutional betrayal, continue to emerge with alarming frequency. More recently, stories of men found responsible and harshly punished for such conduct in sketchy campus procedures have trickled into the public dialogue, forming a counter-narrative in the increasingly polarized debate over what to do about sexual assault on college campuses. Into this frayed dialogue, Jeannie Suk and Jacob Gersen have contributed a provocative new article criticizing the federal government’s efforts to regulate sexuality on campus as a bureaucratic overreach. This essay offers several counterpoints for thinking about Gersen and Suk’s critique. First, how much personal liberty would be enhanced by the dismantling of the bureaucracy depends on the conditions of sexual equality in which that liberty will be exercised. Second, Gersen and Suk’s lens of bureaucracy obscures the pre-existing role that government and institutional actors have played in regulating and influencing the conditions of sexuality. Finally, Gersen and Suk’s account of the democratic illegitimacy of the federal sex bureaucracy neglects the grassroots activism that pressed for a tougher regulatory regime and the legitimate role executive agencies can play, consistent with robust

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democratic engagement, in strengthening sex equality law. In the final analysis, any decision to disengage or recalibrate the federal sex bureaucracy must take into account and bring into dialogue the stories of both survivors and accused students.

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INTRODUCTION

In Jacob Gersen and Jeannie Suk’s provocative new article, bureaucracy is the lens through which they scrutinize Title IX, the Clery Act, and the Violence Against Women Act (including recent amendments) as applied to all things sexual in higher education. Through the guise of enforcing these statutes, they argue, the federal government and the institutions it regulates have come to occupy students’ lives by overregulating “ordinary sex.” This regulation takes three forms: mandatory reporting, prevention and education programs, and campus disciplinary processes. While Gersen and Suk bracket what they perceive as the narrower category of “violent, coerced, or abusive sex” from their critique,¹ they arrive at a place of deep distrust for federal intrusion into campus sexual misconduct and of the ability of the federal government to distinguish between abusive and ordinary sex. The upshot of their critique is that the federal sex bureaucracy is interfering with sexual liberty on campus and should be dismantled—or at least severely reined in.

Their article joins the productive conversation our nation has been having about campus sexual assault, its pervasiveness, and the balance struck by the public policies addressing it. This is an important conversation and their paper deepened my appreciation for some of the costs of the stepped-up enforcement of these laws. And yet, I have serious qualms about their framing of the sex bureaucracy. This Essay proceeds in three parts. Part I takes a critical look at the assumptions about liberty at the heart of the Gersen and Suk bureaucracy critique. Part II argues that *The Sex Bureaucracy* goes awry in deemphasizing the regulatory constraints on educational institutions in the federal regulation of campus sex, and as a result, misses the theory of sex discrimination at the heart of that regime. Finally, Part III situates the federal regulatory apparatus in the

1. Jacob E. Gersen & Jeannie Suk Gersen, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 885 (2016).

broader social context that gave rise to it. Set against this backdrop, the regulatory regime Gersen and Suk call a “sex bureaucracy” looks more like the product of social movement activism than a bureaucratic appetite for power.

I.

A CRITICAL EXAMINATION OF SEXUAL “LIBERTY” IN THE ABSENCE OF SEXUAL EQUALITY

An implicit assumption behind the discourse of bureaucracy—made explicit in Gersen and Suk’s critique—is that the opposite of bureaucracy is liberty. But this begs the question of whether there is necessarily more sexual liberty in a deregulated space, or whether the sexual liberty of some individuals interferes with the sexual liberty of others. Gersen and Suk train their critical gaze on the federal government as the threat to liberty, but private power, especially when unevenly distributed, can also threaten liberty.

With sexual liberty as their guidepost, Gersen and Suk invoke the Supreme Court’s decision in *Lawrence v. Texas*² to dispute the legitimacy of government intrusion into ordinary sex. Their invocation of *Lawrence* leaves out another constitutional value, however. Importantly, *Lawrence* proclaimed that “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”³ The state’s criminalization of same-sex contact stigmatized persons in same-sex relationships, effectively extending “an invitation” to discriminate, the Court explained.⁴ Other recent Supreme Court cases have echoed this refrain, pointing out the interdependence of liberty and equality as constitutional values.⁵

The need to attend to equality in giving voice to liberty is more than an abstract point. Real sexual liberty necessitates equality in sexual relations, lest one person’s liberty intrude into another’s. *The Sex Bureaucracy* implies that deregulating the sexual sphere would promote sexual liberty. But whose liberty does the sex bureaucracy undercut, and whose liberty would be enhanced if it were dismantled? The legal developments Gersen and Suk critique are a response to social and institutional practices that deny many students—disproportionately women and LGBTQ persons—their own sexual liberty.⁶ The push for greater

2. 539 U.S. 558 (2003).

3. *Id.* at 575.

4. *Id.*; see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015) (“The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.”).

5. See *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (elaborating on the relationship between liberty and equality and explaining that inequality in respect for peoples’ intimate choices undercuts the dignity that liberty confers).

6. See, e.g., CHRISTOPHER P. KREBS ET AL., *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT* x (2007) (reporting that 19.8 percent of women on university campuses, or one in five,

enforcement of Title IX by the Office for Civil Rights (OCR) of the Department of Education (DOE) was fueled by the many accounts of women denied sexual liberty by a campus culture in which going out, drinking, or having “ordinary” social relationships made them fair game for the sexual taking, so that they could not later be heard to challenge nonconsensual sex that results.⁷ Jon Krakauer’s book, *Missoula*, and the documentary film, *The Hunting Ground*, are two examples of journalistic accounts of such narratives that have received a wide audience.⁸ As these and other stories show, a deregulated sexual space does not necessarily promote sexual liberty for everyone—not as long as power and privilege are unequally distributed.⁹

In portraying bureaucracy as the antithesis of desire, Gersen and Suk equate sexual liberty with acting on desire. Their account treats desire as a given. However, desire does not exist in a state of nature. Cultural and institutional forces influence the social conditions that shape desire.¹⁰ To be sure, the educational programs that colleges are now experimenting with to try to make consent “sexy” may or may not change the social norms that shape desire.¹¹ But where is the illegitimacy in government promotion of a model of desire that is

experience some form of sexual misconduct or sexual assault); AMERICAN ASSOCIATION OF UNIVERSITIES, EXECUTIVE SUMMARY: REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT xiv (2015) (reporting a 33 percent incidence of sexual misconduct among university women and an even higher incidence of sexual misconduct, at 39 percent, experienced by students who identify as trans, gay, queer, or gender nonconforming).

7. See Katharine K. Baker, *Campus Sexual Misconduct as Sexual Harassment: A Defense of the DOE*, 64 U. KAN. L. REV. 101 (2016). Professor Baker has articulated the theory underlying DOE’s interpretation of Title IX as follows:

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. at 102.

8. See JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* (2015); *The Hunting Ground* (CNN Films 2015), <http://thehuntinggroundfilm.com/>.

9. See, e.g., Dana Bolger, *Gender Violence Costs: Schools’ Financial Obligations Under Title IX*, 125 YALE L.J. 2106, 2108–09 (2016) (recounting the story of a survivor whose experience of sexual violence led to her expulsion).

10. See Cindy M. Meston, *Why Humans Have Sex*, 36 ARCH. SEX. BEHAV. 477, 478 (2007) (discussing the role of social and cultural context in the motivation to have sex). For an argument that much campus sexual activity is not an authentic expression of desire nor worth preserving, see Baker, *supra* note 7, at 121 (“Studies suggest that a great deal of what college students participate in is rushed, anonymous, not particularly pleasant, and alienating sex. As such, it usually fails to afford its participants the benefits that sex positivists celebrate in sex.”).

11. See Katharine Silbaugh, *Reactive to Proactive: Title IX’s Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1068–72 (2015) (advocating evidence-based approaches to sexual assault prevention on campus modeled after a “public health approach” to education and prevention). My own alma mater, Stanford University, was engaged in just such a norm-shifting effort long before the construction of the bureaucratic scaffold that Gersen and Suk now criticize. When I was an undergraduate in the mid-1980s, I attended a similar residential life education program for which our resident advisor encouraged attendance. I recall being mildly embarrassed by the explicitness of the program, but I did not feel that it compromised my liberty.

compatible with sexual equality? Government-incentivized sex education could do much worse than promoting normative sexuality based on equality and consent.¹²

Nor are such “consent is sexy” programs the first time colleges have injected their messages into sexual norms. College and universities have done plenty already to influence normative expectations about sex, from rules enabling fraternity parties with free-flowing alcohol to the recruitment of female students as escorts enlisted to show football recruits a good time.¹³ The new programs reflect a concerted effort to change the messages universities send about sexuality.

Although Gersen and Suk describe the sexy consent programs as anomalous interventions into personal liberty, such initiatives are certainly not the only proactive efforts universities make in an effort to shape the social norms of the university. Those efforts coexist with comparable intrusions into virtually all aspects of campus life, such as promoting respect for diversity, responsible drinking, denormalizing bullying and hazing, and defining what it means to be a good citizen of the university through honor codes and extracurricular programs.¹⁴ That such messages are conveyed by universities relentlessly, in both subtle and overt iterations, does not necessarily make them antithetical to liberty; nor do efforts to engage bystanders in the norm-changing project undercut liberty. These programs, which are aspirational, are a far cry from imposing liberty-denying consequences on resistant bystanders.¹⁵

Much of the authors’ critique depicts as a governing principle the broadening of nonconsent, including its decoupling from force and its definition as the absence of enthusiastic, sober, affirmative consent. If such expanded notions of consent are indeed gaining traction, it is not from Title IX’s regulation of the campus disciplinary regime, which is predicated on unwelcome sexual

12. The gender messages in the content of sex education programs in the public schools make such prevention programs all the more urgent at the college level. See Jennifer S. Hendricks & Dawn Marie Howerton, *Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools*, 13 U. PA. J. CONST. L. 587 (2011) (exposing and critiquing the sex stereotyped messages in sex education or abstinence-only programming).

13. See Patricia Yancey Martin, *The Rape Prone Culture of Academic Contexts: Fraternities and Athletics*, 30 GENDER & SOC’Y 30 (2016); Kaitlin M. Boyle & Lisa Slattery Walker, *The Neutralization and Denial of Sexual Violence in College Party Subcultures*, DEVIANT BEHAV. (May 31, 2016), <http://www.tandfonline.com/doi/full/10.1080/01639625.2016.1185862>.

14. See Baker, *supra* note 7, at 121 (discussing universities’ regulation of racist speech as in violation of “the communal norms of respect, civility, and equality on college campuses”); Silbaugh, *supra* note 11, at 1073 (discussing the totalizing education by universities of their students’ learning, growth, behaviors, and attitudes).

15. See Caitlin B. Henriksen, Kelsey L. Mattick & Bonnie S. Fisher, *Mandatory Bystander Intervention Training*, in THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE 169, 175–76 (2016) (discussing the evidence to date on the potential for bystander intervention programs to disrupt the attitudes and behaviors that contribute to sexual assault).

conduct, a concept borrowed from well-established Title VII law.¹⁶ Gersen and Suk base their claims about the sex bureaucracy's expansion on a handful of university education and prevention programs that broadly define sexual misconduct, and in the federal reporting requirements under the Clery Act. While Gersen and Suk point out instances where university definitions of nonconsent go beyond federal requirements, it is unclear whether such definitions are actually being used for disciplinary purposes and the reporting requirements enforced by the federal government, or are merely aspirational.¹⁷ As a result, much of their attack on the liberty-denying implications of sweeping definitions of nonconsent has the whiff of the strawman. I know of no university that has been fined under the Clery Act for not reporting a misguided, romantically-motivated touch of the hand or an "offense against chastity."¹⁸ Gersen and Suk succeed in pointing out places where the federal regulatory definitions leave room for improvement; but fine-tuning the definition of consent and the offenses subject to mandatory reporting is not their objective here.

Gersen and Suk do attend to liberty's intersection with equality on one dimension, the racial impact of the sex bureaucracy, in what is, for me, their most trenchant critique. Although they acknowledge a lack of data establishing a racial impact on persons accused of or disciplined for campus sexual assault (and the lack of available data *is* troubling), the historic and continuing salience of race in the criminal justice system's responses to rape and other sex offenses should give pause before endorsing any regulatory regime governing sexual misconduct on college campuses. And yet, the race and gender interactions that trouble institutional responses to campus sexual assault are more complex than a race versus gender narrative can capture. Gersen and Suk correctly note, for instance, that athletes are disproportionately among those believed to perpetrate sexual assault on campus, and that athletes often are—with the exception of historically black college and universities—a group with a higher representation of men of color than the rest of the student body.¹⁹ And yet, as Ann Scales has pointed out, the exploitation of athletes of color and the prevalence of male athlete violence are both undeniable facts that coexist simultaneously; dismantling the racial caste system in athletics (and in the university at large) should be part of the strategy for reducing violence, including sexual violence, and not set up in opposition to this goal.²⁰ Universities protect elite athletes from charges of sexual assault because of their value to the athletic program, not as part of a holistic

16. See Baker, *supra* note 7, at 112 (discussing the unwelcomeness requirement in sexual harassment law).

17. Gersen & Suk, *supra* note 1, at 928 (quoting the University of Wyoming's "consent materials").

18. *Id.* at 895.

19. *Id.* at 915.

20. Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205, 254 (2009).

concern for athletes' welfare.²¹ Male athletic privilege comes at a high cost to the athletes it endows, including the tyranny of low expectations for athletes' academic prospects and their behavior as members of the university.²² Protecting athletes accused of sexual assault protects the white elites and monied interests that the athletic program serves as much as the athletes themselves.²³

More fundamentally, as always, the race versus gender trope obscures women of color and their experiences. While the authors perceptively point out that expansive definitions of sexual misconduct invite racial bias against accused men of color,²⁴ restrictive definitions of consent summon racial bias in a different direction, opening the door to sexual stereotypes about women of color that undermine their credibility and deny their experience of harm.²⁵ In a deregulated space left to university discretion, the credibility of a complainant can be undermined not just by gender-specific myths about "real rape victims" but also by racial narratives questioning the credibility—and the very rapability—of women of color.²⁶ The stories of women of color surviving and resisting sexual harassment and sexual assault are often neglected in the gender frame of men versus women, in which race is considered, if at all, only in relation to men.²⁷ In the football gang rape case against the University of Colorado, for example, public attention to race focused on the fact that the alleged assailants were African American; it went virtually unnoticed that one of the women allegedly raped was also African American.²⁸ In the foundational case establishing Title IX's applicability to sexual harassment between students, *Davis v. Monroe County Board of Education*,²⁹ the plaintiff, whose complaints of sexual harassment went unheeded for five months, was an African American girl. The

21. Todd Crossett, *Capturing Racism: An Analysis of Racial Projects within the Lisa Simpson v. University of Colorado Football Rape Case*, 24 INT'L J. HIST. OF SPORT 172 (2007).

22. See Deborah L. Brake, *Sport and Masculinity: The Promise and Limits of Title IX, in MASCULINITIES AND THE LAW: A MULTI-DIMENSIONAL APPROACH* 223–24 (Frank Rudy Cooper & Ann C. McGinley, eds., 2012).

23. *Id.* at 177–85.

24. Gersen & Suk, *supra* note 1, at 944.

25. See, e.g., Jennifer C. Nash, *Black Women and Rape: A Review of the Literature*, BRANDEIS UNIV. FEMINIST SEXUAL ETHICS PROJECT (June 12, 2009), <http://www.brandeis.edu/projects/fse/slavery/united-states/slav-us-articles/nash2009.pdf> (last visited Aug. 16, 2016) (surveying literature on black women and rape, including findings that stereotyping and credibility judgments disadvantage black women and that intraracial rape is treated less seriously than interracial rape).

26. See, e.g., Elizabeth Kennedy, *Victim Race and Rape*, BRANDEIS UNIV. FEMINIST SEXUAL ETHICS PROJECT, <http://www.brandeis.edu/projects/fse/slavery/united-states/kennedy.html> (last visited Aug. 16, 2016) (discussing the continuing effects of the legacy of slavery on African American women who are subjected to rape).

27. See Tanya Kateri Hernandez, "What Not to Wear"—*Race and Unwelcomeness in Sexual Harassment Law: The Story of Meritor Savings Bank v. Vinson*, in *WOMEN AND THE LAW STORIES* 277, 278 (2011) (discussing the prominence of women of color in sexual harassment litigation and the paucity of analysis of the intersection of race and gender in these cases).

28. Scales, *supra* note 20, at 251 n.175.

29. 526 U.S. 629 (1999).

principal's response to her reflected his disbelief of, and lack of concern for, her complaints about the sexual overtures that were directed her way ("Why are you the only one complaining?" he asked her).³⁰ Race has poisoned and infected the legal system's response to sexual violence since our Nation's founding, and the intervention of Title IX's legal regime must attend to that reality. It is far from clear, however, that the best answer to racial bias in handling sexual assault charges is for the bureaucracy to back off and leave campus cases to the criminal justice system.³¹

II.

EXAMINING THE SUBJECTS OF THE REGULATORY REGIME AND RESISTING THE PUBLIC-PRIVATE DICHOTOMY

Gersen and Suk contend that the federal sex bureaucracy is now regulating primary sexual conduct and not just institutional actors. That perspective magnifies the threat to liberty depicted in their article by setting up the federal government in opposition to the sexual freedom of students, and not just the freedom and discretion of institutional actors. However, the laws themselves (as Gersen and Suk readily acknowledge) run against educational institutions, not students; primary sexual conduct is regulated, if at all, through institutional responses to federal regulation. To be sure, Gersen and Suk do not dispute the identity of the regulated parties. But their depiction of the bureaucracy's application to primary sexual conduct subtly invokes the private-public distinction to play up the threat to personal liberty.

By depicting higher education institutions as the pass-through for federal regulation to reach into the lives of citizens, the article implies that the federal government is primarily regulating private conduct and only nominally targeting public actors. It is as if, until the federal bureaucracy came along, higher education left well enough alone, leaving a state of nature populated by students and their private sex. The federal regulatory regime is cast as illegitimately forcing institutions of higher education into spaces where they do not belong and were not heretofore present.

There are two problems with this picture. First, to take a page from feminist critiques of the public-private dichotomy, the public shaping of sexual norms was here all along. It just took a different form. Historically, institutions of higher

30. *Id.* at 635. The principal responded more seriously when the same boy struck a white girl, disciplining the boy in that instance. *Aurelia D. v. Monroe Cty. Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994).

31. See, e.g., Nancy Chi Cantalupo, *Title IX's Civil Rights Approach and the Criminal Justice System*, in *THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE* 125 (2016) (detailing the limitations of the criminal justice system in responding to campus sexual assault); Sara Carrigan Wooten & Roland W. Mitchell, *Afterword: Questioning the Scripts of Sexual Misconduct*, in *THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE* 185, 187 (2016) ("[T]he criminal justice system's racist, classist, and homophobic history make this path of recourse inaccessible to many victim-survivors.").

education have, time and again, empowered private actors to perform abusive and coercive sex.³² They also have chosen to set limits on the sexual liberty of their students, most often, historically speaking, in the service of a particular sexual morality rather than a concern for promoting sexual equality.³³ The new federal regulatory regime now seeks to impose a different set of rules on students' sexual conduct, but it does not insert higher education into an area where it was not already governing.

Second, the focus on regulating primary sexual conduct obscures a key insight at the heart of the legal regime's shift away from a formalistic interpretation of sex discrimination law that would require only genderblind sex-neutrality to the more substantive, outcome-oriented vision of equality that has taken root in OCR's Title IX enforcement. It is not the coercive sex per se that puts the university in violation of sex discrimination law, but the university's complicity in it. This is indeed an expansion of sex discrimination law from a narrower, "formal equality" mandate, that would require only the gender-neutral treatment of students alleging sexual assault, but it is one that goes to the substance of the meaning of sex equality law. The bureaucracy frame obscures more than illuminates this substantive move by foregrounding the primary sexual conduct as the target of regulation, instead of the institutional actions that enable and acquiesce in such conduct. The specificity of the federal regulatory regime is a response to the complicity of institutional actors in the widespread sexual coercion on campus that disproportionately injures women and sexual minorities, and not an attempt to regulate private sexual conduct for its own sake.

III.

THE QUESTION OF DEMOCRATIC LEGITIMACY

The bureaucracy trope conjures a top-down structure driven by the urge to power of the bureaucrats running the system. However, this framing eclipses the precipitating events that set this "bureaucracy" in motion: the activism of survivors and their allies who brought the issue of campus sexual assault, and university acquiescence in it, to the national forefront. Far from an aggressive bureaucracy fashioning an excuse to expand power, the recent developments in Title IX, the Clery Act, and the Violence Against Women Act enforcement are the federal government's response to an increasingly engaged, vocal, and angry grassroots constituency.³⁴ By raising the specter of a federal sex bureaucracy as

32. See Joanne Belknap & Edna Erez, *Violence Against Women on College Campuses: Rape, Intimate Partner Abuse, and Sexual Harassment*, in *CAMPUS CRIME: LEGAL, SOCIAL, AND POLICY PERSPECTIVES* 211, 221–23 (Bonnie S. Fisher & John J. Sloan, III, eds., 3d ed. 2013).

33. See, e.g., DAVID ALLYN, *MAKE LOVE, NOT WAR: THE SEXUAL REVOLUTION: AN UNFETTERED HISTORY* 19 (2001) (noting Vassar College's warning to female undergraduates in 1962 that engaging in premarital sex would be grounds for expulsion).

34. See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 *YALE L.J.* 1940 (2016).

a totalizing mammoth force, the authors neglect and obscure the social movement behind it all.

The Sex Bureaucracy describes a federal apparatus lurching forward, unmoored from statutory law. At least with respect to OCR's interpretation and enforcement of Title IX, however, the development of the legal framework has been an evolutionary process, with more continuity than change, albeit with increasingly specificity as OCR gained experience with institutional failures in handling sexual assault.³⁵ For example, although the preponderance of the evidence standard was, at least arguably, always implicit in the statute's requirement of a fair and equitable grievance process, it was first expressly articulated in the agency's 2011 guidance because of OCR's experiences with the unequal and unfair treatment of complainants under a higher proof standard.³⁶ In this respect, it is not unlike what OCR and other executive branch agencies have done with respect to other civil rights laws, filling in the details of a nondiscrimination mandate based on the agency's experience with intransigent and noncompliant institutions.³⁷ In keeping with this role, OCR also has embraced stronger interpretations of Title VI, the federal statute prohibiting race discrimination in federally funded programs, than the Court has read into the statute.³⁸

35. For example, the 2011 Dear Colleague Letter (DCL) is hardly the "first time" that Title IX's legal framework has been interpreted to explicitly cover a school's discipline process for handling sexual assault. Gersen & Suk, *supra* note 1, at 901. Such coverage was explicit in *Davis* itself, where the theory of the case rested on the school's inadequate handling of the sexual harassment allegations—allegations that were also the predicate for a criminal sexual battery charge against the accused student. Coverage was also explicit in OCR's 1997 guidance on sexual harassment (which was later replaced by its 2001 revised guidance). See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (U.S. Department of Education, Office for Civil Rights Mar. 13, 1997) ("[T]he Guidance is intended to inform educational institutions about the standards that should be followed when investigating and resolving claims of sexual harassment of students."). It is true that more specific requirements followed, but the general principle of requiring schools to respond to with a "prompt, thorough, and impartial" process is longstanding. *Id.* at 12042.

36. See, e.g., Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613 (2009) (discussing many of the OCR investigations and court cases that preceded the 2011 DCL); Katharine K. Baker, Deborah L. Brake & Nancy Chi Cantalupo, et al., *Title IX and the Preponderance of the Evidence: A White Paper*, FEMINISTLAWPROFESSORS.COM, <http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-8.7.16.pdf> (explaining and defending the preponderance standard, as consistent with existing law and prior agency action). If the specifics in the 2011 DCL constitute clarifications of requirements previously developed through case law and agency actions, then the notice and comment process was not required. That said, I do agree with Gersen and Suk that going through notice and comment before issuing the 2011 document would have been advisable. Even if not technically required, that process would have provided a structured mechanism for dialogue and debate, and might have resulted in increased acceptance of the final document.

37. See Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 146 (2008).

38. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 281–82, 291–92 (holding that OCR's disparate impact regulation could not support a private right of action challenging disparate impact

Gersen and Suk indict the legitimacy of OCR's role in constructing the sex bureaucracy, a role they find in tension with the democratic process.³⁹ I disagree. Neither the courts nor Congress has a monopoly on elaborating the content of antidiscrimination law. Our constitutional structure leaves room for executive branch contributions to this interbranch dialogue. Consider OCR's recent application of Title IX requiring schools to permit transgender students to use facilities in accordance with their gender identity, or the Equal Employment Opportunity Commission's recent interpretation of Title VII to encompass discrimination based on sexual orientation.⁴⁰ In both instances, the agencies proffered articulations of antidiscrimination principles that Congress and the courts have been slower to endorse. Of course, executive agencies may only fill in the gaps of statutes; they cannot override them. But broad bans on sex discrimination leave many gaps to fill.

On this issue in particular, Gersen and Suk overstate the degree to which agency action is unaccountable to popular and political pressure. OCR's heightened attention to sexual violence in recent years is itself the product of democratic pressure.⁴¹ The student activism challenging institutional responses to campus sexual assault—on full display in *The Hunting Ground*—was the driving force behind the White House Task Force and OCR's ramped-up enforcement in this area.⁴² Because the President, to whom OCR answers, is singularly accountable to a national political constituency, there is actually a more immediate democratic connection here than to the more geographically diffuse and time-staggered Congress.⁴³ By design, the structure of Congress is more resistant to the pull of majoritarian politics.

because Title VI prohibits only intentional discrimination, but assuming that the agency had the power to proscribe disparate impact for purposes of its administrative enforcement process).

39. Gersen & Suk, *supra* note 1, at 947 (claiming a “democratic deficit” if Congress would have lacked the political will to pass a “Good Sex Act of 2013” or a “Healthy Sexual Desire Act of 2013” coextensive with the requirements of the federal regulatory regime).

40. See U.S. DOJ and DOE, *Dear Colleague Letter on Transgender Students* (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>; Baldwin v. Foxx, EEOC Decision (2015), available at <https://www.eeoc.gov/decisions/0120133080.pdf>.

41. See Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2101 (2016); *The College Sexual Assault Crisis Turns a Corner*, THINKPROGRESS (Apr. 29, 2014), <https://thinkprogress.org/the-college-sexual-assault-crisis-turns-a-corner-b1352e4d44ce#.xu83jbtwt> (last visited Aug. 16, 2016).

42. See Deborah Tuerkheimer, *Rape on and off Campus*, 65 EMORY L.J. 1, 6–7 (2015) (discussing the role of campus activism in fueling national attention to the problem of campus sexual assault).

43. See Juliet Eilperin, *Biden and Obama Rewrite the Rulebook on Campus Sexual Assaults*, WASH. POST (July 3, 2016), https://www.washingtonpost.com/politics/biden-and-obama-rewrite-the-rulebook-on-college-sexual-assaults/2016/07/03/0773302e-3654-11e6-a254-2b336e293a3c_story.html (discussing the influence of survivor-activists on the Obama Administration's approach to campus sexual assault).

CONCLUSION: BRINGING SURVIVORS’ STORIES INTO THE DIALOGUE

None of this means, however, that OCR and the institutions it regulates are getting the particulars right in every instance. In a search for bureaucratic abuses, Gersen and Suk certainly find some. Among them, Gersen and Suk relay stories from a handful of cases where men have sued their universities for unfair processes, disciplining them for conduct that—in their telling—they had reason to believe was consensual. As Gersen and Suk acknowledge, if these abuses are borne out, they are instances of overcompliance, and not what the federal bureaucracy requires. But there are other stories that are not found in *The Sex Bureaucracy*—the stories of survivors of sexual assault whose complaints are unheeded by the institutions they attend and whose education suffers as a consequence.⁴⁴ Telling these stories would contextualize why schools have “scrambled to adopt new policies and procedures” for addressing sexual violence, and provide a different frame of reference for evaluating the fairness of disciplinary procedures.⁴⁵ One’s sympathies with the project of federal regulation of campus sex have much to do with which sets of stories are foremost in mind. The challenge of reckoning with the sex bureaucracy—both its existence and its particulars—is to find a way to engage the stories from these different perspectives and bring them into dialogue instead of talking past each other.⁴⁶

While Gersen and Suk disclaim any objective to completely deregulate campus sex, their central theme is skepticism of the bureaucracy’s ability to distinguish harmful, abusive sex from the ordinary sex which government may not legitimately regulate. Their conclusion strikes a chord of distrust for any sex bureaucracy.⁴⁷ They convincingly show some instances where federal regulators and regulated institutions could do better. But without hearing and coming to terms with the stories of sexual assault survivors who have been let down by their institutions, they cannot show that college campuses are more dystopian places with a sex bureaucracy than they would be without one.

44. The tally of colleges and universities under investigation by OCR for the alleged mishandling of complaints about sexual harassment continues to grow. See Tyler Kingkade, *There Are Far More Title IX Investigations of Colleges Than Most People Know*, THE HUFFINGTON POST (June 16, 2016), http://www.huffingtonpost.com/entry/title-ix-investigations-sexual-harassment_us_575f4b0ee4b053d433061b3d (last visited Aug. 16, 2016).

45. Gersen & Suk, *supra* note 1, at 932.

46. A full consideration of Title IX’s requirements for university disciplinary processes would far exceed the space limits of this forum, but suffice it to say that one’s views about whether such requirements tilt too far in favor of complainants or accused students also turn on whose stories are foregrounded, those of innocent accused or the unheard and revictimized survivor.

47. Gersen & Suk, *supra* note 1, at 946–48.