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The Sex Bureaucracy

To fight assault, the feds have made colleges clumsy monitors of students' sex lives.

By Jacob Gersen and Jeannie Suk Gersen | JANUARY 06, 2017 ✔ PREMIUM

André Chung for The Chronicle Review

Often with the best of intentions, the federal government in the past six years has presided over the creation of a sex bureaucracy that says its aim is to reduce sexual violence but that is actually enforcing a contested vision of sexual morality and disciplining those who deviate from it.

Many observers assume that today's important campus sexual-assault debate is concerned with forcible or coerced sex, or with taking advantage of someone who is too drunk to be able to consent. But the definition of sexual assault has stretched enormously, in ways that would have been unimaginable just a few years ago. Indeed, the concept of sexual misconduct has grown to include most voluntary and willing sexual conduct.

Behind this elastic idea of sexual misconduct is a web of well-meaning federal statutes, especially Title IX, which prohibits sex discrimination in education, and the Violence Against Women Act, which, in its 2013 reauthorization, requires colleges to publicly disclose how they define, prevent, investigate, and discipline sexual misconduct. Under President Obama, the Department of Education's interpretations of those laws have greatly expanded the control exercised by the federal government over sexual conduct.

In essence, the federal government has created a sex bureaucracy that has in turn conscripted officials at colleges as bureaucrats of desire, responsible for defining healthy, permissible sex and disciplining deviations from those supposed norms. The results are not only cringeworthy but also unfair, potentially racially discriminatory, and detrimental to the crucial fight against sexual violence.

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With a new administration set to take office, a host of open questions arises about what President-elect Donald J. Trump and his appointees will do with the sex bureaucracy's reins. Will they stay the course? Will they abandon the current trajectory, lessening the role of the federal government in establishing norms of sexual conduct? Or, as seems more likely, will they use the extensive administrative apparatus at their command to advance a different, retrograde vision of sexual morality?

Title IX became law in 1972. Since then, what it means to discriminate "on the basis of sex" has evolved through a process of judicial and agency interpretation. Today the phrase "Title IX complaint" commonly refers to an allegation of sexual misconduct by one college student against another, but this view was alien at the time of the law's enactment. The Department of Education's Office for Civil Rights, known as OCR, is the lead agency for Title IX. Early regulations implementing Title IX required colleges to establish their own internal grievance procedures, so that individuals would have a forum to complain about their institution's sex discrimination.

Since the 1990s, OCR and the courts have established that sex discrimination under Title IX includes sexual harassment. As a result, the mandate not to discriminate on the basis of sex includes a college's obligation to ensure that harassing conduct by employees or students doesn't create a hostile environment. According to this legal logic, if a college did not have effective policies and procedures in place to address

harassing conduct that is pervasive or severe enough to create a hostile environment, the college would be discriminating on the basis of sex and in violation of Title IX.

In 2011, OCR announced a spate of new interpretations of Title IX in its "Dear Colleague" letter explaining how colleges that receive federal funds must address allegations of sexual violence. The letter argued that because sexual violence is a form of sexual harassment, colleges' responses to sexual violence are also governed by Title IX's ban on sex discrimination. Most colleges have long had procedures to handle student discipline, including for sexual assault and other sexual misconduct. But the 2011 "Dear Colleague" letter made clear that a college's sexual-conduct policies, including the investigatory and disciplinary processes, are mandatory and dictated by OCR's interpretations of Title IX, whatever they might be. Before 2011, OCR had taken inconsistent positions on what was required of colleges, sometimes stating even that they were "under no obligation to conduct an independent investigation" of an allegation of sexual assault if it "involved a possible violation of the penal law, the determination of which is the exclusive province of the police and the office of the district attorney."

The past five years have seen hundreds of investigations into colleges whose sexual-misconduct policies and procedures differ from OCR's wishes. Although many investigations remain unresolved, the modus operandi has been to announce an investigation and then negotiate college-by-college "resolution agreements" — lengthy documents that specify the defects in the college's sexual-conduct policies and procedures and include an agreement that the institution will take specific steps to ensure compliance with OCR's views. The office has no legal authority to force colleges to do anything that the law — whether a statute or regulation — does not mandate. But it has pressured colleges to take measures that are clearly beyond what the law requires, and colleges have entered these resolution agreements "voluntarily" to resolve OCR investigations and avoid public-relations nightmares. For example, OCR told colleges to put in place measures that, as the "Dear Colleague" letter put it, "may bring potentially problematic conduct to the school's attention before it becomes serious enough to create a hostile environment." In other words, Title IX compliance meant disciplining "potentially problematic conduct" *before* it became unlawful.

As part of a federal investigation, OCR sent a letter to the University of Montana in 2013 stating that, rather than limit sexual-harassment claims to unwelcome conduct that creates a hostile environment, the university should define sexual harassment "more broadly" as "any unwelcome conduct of a sexual nature." By that definition, touching a person's hand during a date in a romantic way, sending a text message expressing romantic attraction — or, for that matter, asking for consent to have sex, could qualify as sexual harassment, and has, on some campuses. The college's failure to prohibit, investigate, and discipline this conduct would then be unlawful, according to OCR's broad definition, even if the conduct itself had not created a hostile environment.

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OCR explicitly made the Montana letter a "blueprint" for the reform of other colleges' sexual-misconduct policies, and the push to expand the definition of sexual harassment has steadily continued. On September 9, 2016, OCR informed Frostburg State University that it was violating Title IX because its sexual-harassment policy stated that "in assessing whether a particular act constitutes sexual harassment forbidden under this policy, the rules of common sense and reason shall prevail." The university's policy continued: "The standard shall be the perspective of a reasonable person within the campus community." Could it really be that a university engages in sex discrimination by using the perspective of a reasonable person to evaluate conduct, a standard that has long been a key feature of sexual-harassment law, civil tort law, and criminal law?

The sex bureaucracy's insistence that using reasonableness and common sense is illegal would be amusing if the stakes for individuals and institutions were not so high. The lives of both individual complainants and students accused in the complaints are often seriously altered by findings or nonfindings of responsibility for sexual misconduct. In addition to the

reputational costs of being seen as soft on sexual violence, colleges have been threatened with defunding by the federal government if they maintain policies and procedures that do not satisfy OCR. And colleges are now regularly defending lawsuits brought by students disciplined under the very procedures that colleges adopted to appease OCR.

Because sex without consent is sexual assault, and sex with consent is just sex, the meaning of consent carries the weight of nearly the entire legal regime. How to define and evaluate consent is a subject of legal, political, and cultural dispute. While regulations that implement the Violence Against Women Act of 2013 require colleges to publish a definition of consent for purposes of disciplining sexual misconduct, the government has not provided a universal definition. Each college has been left to come up with its own, and some have produced definitions that seem to prohibit the vast majority of actual sexual conduct.

As consent became the distinguishing feature of permissible sexual conduct, many colleges, parents, and advocacy groups offered common-sense advice: If there is any ambiguity about consent, stop. Don't take the absence of "no" to mean "yes." Make sure your partner is not just willing but enthusiastic. Soon, asking for and receiving a clear "yes" for each discrete act during a sexual encounter became a common requirement. At some colleges, enthusiasm became not just precautionary advice but also a definitional requirement of consent itself. Here, for instance, is the University of Wyoming's version: "Anything less than voluntary, sober, enthusiastic, verbal, noncoerced, continual, active, and honest consent is Sexual Assault." By that standard, moving forward even after a clear assent that is less than enthusiastic is, by definition, sexual assault.

So, too, could be sexual conduct with someone who is not completely sober or who agrees to have sex after repeated requests (potential pressure constituting coercion). Because some colleges' expansive definitions render much if not most sex that occurs on campus a technical violation of the rules, there is wide discretion and leeway for a participant in a sexual encounter to interpret or label the incident as sexual misconduct. This definitional overinclusiveness makes it difficult for both colleges and students to distinguish serious cases of sexual assault and harassment from cases in which the absence of affirmative or enthusiastic agreement

nonetheless accompanied a genuinely voluntary decision to engage in sexual conduct. Students who wereat the time willing to have sex can still bring complaints against their partners, and under the college's rules, such complaints should be considered valid.

If the difference between consent and nonconsent turns on whether agreement to each discrete act (e.g., kiss, touching of each body part, penetration) in a sexual encounter was affirmative or enthusiastic, we will increasingly see students who believe they were victimized after they willingly engaged in sexual activity. One might ask, if a person was actually willing, why would he or she afterward bring a complaint? It is not because the complaint is fraudulent, but because a common feature of human sexuality is ambivalence — both wanting and not wanting at the same time, or wanting at one time and later wishing one hadn't. This is an acute and pervasive challenge for college administrators, because legal ambiguity and sexual ambivalence are a dangerous combination. When everybody is technically violating an overly broad policy but only a small and unpredictable subset is investigated and disciplined for it, largely at the discretion of the partner who decides whether to complain, the results will not be fair. Worse, it distracts from the important fight against sexual violence and erodes the legitimacy of serious efforts to combat it.

You may think that an enlarged definition of sexual assault, even one that leads to incidents of overpunishment, is acceptable if it also reduces sexual violence against women. But sexual-conduct policies are gender neutral. Women who do not receive affirmative consent for each step of a sexual encounter with a man, or if the man was not entirely sober, have also violated those policies. Men are beginning to file Title IX complaints against women, because, according to the absurdly broad policy definition, they can claim to have been sexually assaulted.

A set of adjudicatory procedures that are fair, neutral, and rigorous could serve as a check, albeit imperfect, on vague and overinclusive policy definitions. Even if most sexual encounters could formally qualify as sexual misconduct, robust and rigorous adjudication might accurately sort cases that are worthy of discipline from those that are not. Unfortunately, since 2011, colleges have adopted inadequate and unfair procedures, perhaps in overzealous efforts to avoid negative attention by OCR.


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Many students disciplined under these new policies have sued their colleges, arguing that the procedures used to investigate and adjudicate the complaints were unfair and unlawful. Such cases provide a glimpse both at the sexual conduct that is being disciplined by the sex bureaucracy and at how the campus adjudicatory process holds up in court.

In one federal case in 2015, a male student sued Washington and Lee University after being expelled for "nonconsensual sexual intercourse" with a female student. His court complaint claimed that the university's Title IX officer in charge of the proceeding had earlier given a presentation arguing "regret equals rape," a position she framed as "a new idea everyone, herself included, is starting to agree with." The complaint said the officer, citing an article titled, "Is It Possible That There is Something In Between Consensual Sex and Rape … And That It Happens to Almost Every Girl Out There?," from a website called Total Sorority Move, had suggested "that sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express."

The accused student claimed that the Title IX officer had not shown him a copy of the accuser's complaint in a timely fashion, refused his request to have a lawyer participate in the proceedings, failed to interview several of his suggested witnesses, selectively omitted facts from the investigative report, denied his request to record the hearing, and hindered him from putting questions to the accuser, who attended the hearing behind a partition. After the court denied the university's motion to dismiss the case, the parties settled.

Another federal case last year involved two male undergraduates at Brandeis University who had a sexual relationship that lasted almost two years. After they broke up, one of them attended a campus session on sexual assault, and his thinking about his former boyfriend began to change. He filed a complaint with the university, alleging "numerous

inappropriate, nonconsensual interactions" during the relationship. While sleeping together, he said, his boyfriend occasionally woke him up with kisses, and sometimes continued kissing him when he wanted to go back to sleep. When they showered together, his boyfriend looked at his genitals. At the start of their romance, his boyfriend once put a hand on his clothed groin while they watched a movie together. A year and a half into their relationship, his boyfriend once tried to perform oral sex when the accuser didn't want it, and they quarreled and then made up.

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The university found the accused ex-boyfriend "responsible" in each of these incidents and placed a record in his student file that he had been disciplined for "sexual misconduct, lack of consent, taking advantage of incapacitation, sexual harassment, physical harm, and invading personal privacy." On social media and elsewhere, the accuser referred to himself as a victim of sexual assault and called his ex-boyfriend his "attacker," "rapist," and "a threat to the safety of the well-being of the entire campus." The accused student filed a federal lawsuit against the university. In refusing to grant the university's motion to dismiss the suit, the judge found plausible the accused student's claim of unfair procedures, including Brandeis's failure to give him notice of specific charges, allow him to have counsel, or permit him to cross-examine the complainant or witnesses. The student then dropped the lawsuit, because, given the cost of continuing it, he felt vindicated by the court's ruling.

In September, a federal judge concluded that Brown University had breached a student's reasonable expectations about the university's disciplinary process by applying a new affirmative-consent definition to an earlier incident. Brown's new definition specified that consent obtained through "manipulation" was invalid; in a text exchange before the sexual encounter, the female complainant told the male student that he was trying to manipulate her, and he responded, "I'm trying to manipulate you a lot." Finding that the accused student's responsibility for sexual misconduct very likely turned on Brown's use of the new consent definition, the court held

that he was entitled to a new hearing. In November, another federal court held that the University of Cincinnati's failure to allow an accused student to put at least written cross-examination questions to the complainant violated constitutional due process.

On both procedural and substantive grounds, courts applying federal and state law have increasingly recognized unfairness in sexual-misconduct policies and practices adopted by colleges. And in October, in the wake of multiple court decisions in favor of accused students during the past year, OCR itself found that Wesley College, in Delaware, had violated Title IX with the unfair procedures it used to expel a male student accused of live-streaming without consent an otherwise consensual sexual encounter. The college's investigation had omitted an interview of the accused, and he had not been given the incident report before the hearing or a chance to provide or challenge evidence.

Because many new definitions of consent on campus diverge rather starkly from anything familiar in criminal law or civil tort law, colleges have developed educational campaigns, categorized as sexual-violence-prevention programs mandated by the Violence Against Women Act. Clark University's consent materials, subtitled "Doing It With the Lights On," tell students, "We want you to have great sex if you choose to have sex — safer, mutually enjoyable, consensual sex." The University of Wyoming has a "Don't Kill the Mood" section in its consent materials, that explains: "Asking for consent not only shows that you respect and care for your partner, but it also shows your creativity and can even make the sexual interaction more intimate." Students are instructed that consent should be verbal — "'Yes.' Or even, 'Yes, Yes, Oh! Yes!' " — and are offered phrases to use in a sexual encounter:

Baby, you want to make a bunk bed: me on top, you on bottom?Would you like to try an Australian kiss? It's like a French kiss, but "Down Under."I've got the ship. You've got the harbor. Can I dock for the night?

Putting aside whether such utterances reduce the ambiguity of sexual encounters, these instructions are not about rape, sexual assault, sexual harassment, or sexual violence. They are how-to's for sexual arousal, proposition, and seduction. Moreover, in a statement such as, "Consent is about real, honest, confident and open communication," consent stands in

for a whole normative world of assumptions about what makes sex and relationships good, satisfying, worthwhile, meaningful, and fulfilling. About this, Wyoming is especially explicit: "By communicating what you want and need from your sexual relationship (and your relationship outside the bedroom), you will develop a more caring, responsive, respectful love life."

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The shift toward anticipating potentially problematic behavior before it occurs is a feature of what might be called the public-health model of sexual violence. This model of prevention centers on identifying factors that increase the risk of sexual violence. For example, the Department of Education requires colleges to publish their sexual-violence-prevention programs, which must "consider risk factors for sexual violence." The government's compendium of risk factors for sexual violence, assembled by the federal Centers for Disease Control and Prevention, includes "lack of employment opportunities," "poverty," a "lack of institutional support from police and judicial system," and "hyper-masculinity." Colleges are supposed to use these risk factors to formulate and target their sexual-violence-prevention programs. Ohio University's "Black Men's Think Tank" and "Healthy Masculinity Working Group," for example, are categorized by the university in its annual security report as focusing on "Relationship Level" risk factors; the "Better Bystanders" program focuses on individual risk factors, and the "Sober Sex" posters are classified as community-level interventions. This individual, relationship, and community (or environmental) risk-factor framework is taken almost verbatim from the CDC.

> When the campus community is told by the federal government that students with the above risk factors are more likely to commit sexual violence, it is not hard to imagine that when it comes to accusation, investigation, and adjudication, those individuals

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will also be perceived as more likely to be perpetrators.

Last September, a black male student who had been accused of sexual assault by a white female student sued the University of Pennsylvania, claiming that an unfair investigation process discriminated on the basis of race, in violation of federal civil-rights laws. Elsewhere, OCR itself has acknowledged the serious risk of race discrimination in student discipline in elementary and secondary schools, and has gone so far as to issue guidance on "how to identify, avoid, and remedy discriminatory discipline." According to OCR, African-American students "are more than three times as likely as their white peers" to be expelled or suspended, and those substantial racial disparities "are not explained by more frequent or more serious misbehavior by students of color."

When it comes to sexual misconduct in higher education, however, OCR has so far been silent about the risk of racial bias. The race of the parties in sexual-misconduct cases is not included in existing federal reporting requirements, so the issue is difficult to study and expose. Indeed, colleges may interpret their obligations under the Family Educational Rights and Privacy Act (Ferpa) as preventing the release of such data — if they even compile and save such information, which they are not legally required to do.

Among administrators, lawyers, and faculty members involved in sexual-misconduct cases, however, stories of disproportionate racial impact are common. "Case after Harvard case that has come to my attention, including

several in which I have played some advocacy or adjudication role, has involved black male respondents," writes Janet Halley, our colleague at Harvard Law School. "But the institution cannot 'know' this because it has not been thought important enough to monitor for racial bias." It is incumbent on OCR, as well as colleges and universities, to study and address the potential for race discrimination in sexual-assault allegations.

Sexual norms change, and colleges have often been at the forefront of that change. What is different this time around is that the shift has been supervised by the federal government. Under the guise of sexual-violence prevention and discipline, the sex bureaucracy has grown to oversee sexual matters in a way that defies common sense and renders most sexual interactions impermissible.

What will President-elect Trump do with the sex bureaucracy he's inheriting? Ignoring it isn't a real option. Federal legal requirements are now intertwined with college bureaucracies. Once institutions are created, offices staffed, policies promulgated, and disciplinary boards have begun meting out punishments, existing practices are likely to continue even if the federal agency loses interest or cedes the field. An expansive bureaucratic apparatus operating on every campus in the country would remain to carry on a life and motivation of its own.

It is possible that the Trump administration will retract the 2011 "Dear Colleague" Letter. But unless OCR adopts new interpretations of federal law that forbid the very practices it has required for the past five years, it is hard to imagine colleges making costly wholesale changes to the sex bureaucracy they have expended great resources to build. The many institutions that are

bound by resolution agreements they entered into with Obama's OCR will continue to be bound by them, unless OCR goes so far as to invalidate the existing agreements, which is highly unlikely. Inertia is now on the sex bureaucracy's side.

There is little in the historical record to suggest that any president — much less this one — would give up power and control on this order of magnitude. The sex bureaucracy is probably here to stay. During the campaign, a videotape emerged of Trump bragging about assaulting women, which was followed by a dozen women's accusations that he had assaulted or harassed them. His administration, in turn, may want to appear tough on sexual violence. Meanwhile, it will be filled with people who have gone on the record against premarital sex and homosexuality. The new administration will use the sex bureaucracy to advance its own version of sexual morality.

The norms of sexual conduct embraced by activists in recent years are, of course, not the same as the sexual morality potentially imposed from the right. But common ground between them may not be so elusive in the sex bureaucracy. Almost the entire domain of sexual interaction is now regulated under the guise of sexual-violence prevention, on which right and left can agree. The sex bureaucracy will therefore not only survive the change in administration, but it may flourish. What is more, future iterations may more explicitly reveal how an expansive regulation of problematic sex and a conservative project of sexual morality can converge.

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