The History, Uses, and Abuses of Title IX

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The report that follows, prepared by a joint subcommittee of the Association's Committee A on Academic Freedom and Tenure and of the Committee on Women in the Academic Profession, was approved by both committees in May 2016 and adopted by the Association's Council in June of that year.

As a result of committed student and faculty activism, the topic of sexual harassment and sexual assault within colleges and universities has entered the national spotlight. Renewed attention to these problems has been met by a federal push to pressure institutions of higher education to comply with Title IX of the Education Amendments of 1972. Yet Title IX's track record has proven to be uneven. Success stories about compelling colleges and universities to address problems of sexual assault are matched by reports of cases in which university administrators have failed to punish gross and repeated sexual harassment or in which Title IX administrators from the Department of Education and within the university have sought to punish protected academic speech. These cases have compromised the realization of meaningful educational goals that enable the creation of sexually safe campuses; they also have undermined due-process rights and shared governance in unprecedented ways.

In response to these cases (discussed below in section II.C), Committee A on Academic Freedom and Tenure and the Committee on Women in the Academic Profession created a joint subcommittee to prepare a report. Although the AAUP has issued a number of reports on sexual harassment (as early as 1984 and most recently in 2014), the undersigned subcommittee determined that it would be useful to delve into Title IX itself in a more sustained way, examining its history, the case law connected to it, and the various and changing ways sexual harassment has been dealt with as a matter of federal policy.[1] In light of the increasing prominence of Title IX, the uses and abuses of the legislation warrant an examination of their own.

Title IX defines sex discrimination as encompassing more than sexual harassment and sexual assault. Sex discrimination involves a broad range of issues related to women's access to educational opportunities, including issues of employment and access to higher education. It is in this context that we analyze the expanding definitions of sexual harassment under Title IX: at a moment when popular conceptions of the law focus narrowly on sexual harassment and sexual assault at the expense of other forms of sex discrimination on campus. We address the impact of this diminished interpretation of Title IX on faculty members and students, and we take up the different issues of faculty-student and student-student conduct. Our concerns are threefold: academic freedom, faculty governance, and due process for students and faculty members alike. Attention to these concerns will promote students' access to a quality education and the faculty's ability to provide it.

As currently interpreted, sexual harassment consists not only of sexual misconduct but also of speech that creates a "hostile environment." When speech and conduct are conflated, however, the

1. Previous AAUP statements include *Due Process in Sexual-Harassment Complaints* (1994), *Campus Sexual Assault: Suggested Policies and Procedures* (2012), and *Sexual Harassment: Suggested Policy and Procedures for Handling Complaints* (initially adopted in 1984 and revised in 1990 and 2014).

constitutional and academic freedom protections normally afforded speech are endangered. We do not argue that speech can never create a hostile environment nor that all speech is protected, only that matters of speech are difficult to negotiate and always require attention to First Amendment guarantees and to considerations of academic freedom. We do argue that questions of free speech and academic freedom have been ignored in recent positions taken by the Office for Civil Rights (OCR) of the Department of Education, which is charged with implementing the law, and by college and university administrators who are expected to oversee compliance measures. We offer a critique of the failure to attend to free speech and academic freedom as well as an analysis of the resulting negative effects on teaching, research, shared governance, and extramural speech. Further, because actions by the OCR and responding institutions have compromised established practices of due process and faculty governance, we also present some reflections on how such abuses of Title IX have developed in the context of the corporate university, and we review relevant AAUP policies. Although our primary focus is on Title IX's impact on faculty members, we also ask how its enforcement (or lack thereof) has affected students on the graduate and undergraduate levels. In our research we have found instances of overzealousness on the part of administrators and instances of differential treatment of allegations of sexual misconduct. Sometimes student voices are heard, sometimes they are not. Sometimes faculty members are denied due process, and sometimes powerful senior faculty members are protected at the students' expense. It is clear that there is no consistent application of Title IX, no coherent policy that respects due process and academic freedom at all levels.

Finally, we offer recommendations—based on AAUP policies—for the OCR, college and university administrators, and faculty members. We call for all Title IX policies to be developed through shared governance, for full protection of free speech and academic freedom, and for adequate levels of due process for both complainants and the accused. We stress the importance of supporting courses that address issues of discrimination and inequality and that provide the intellectual underpinnings for healthy campus cultures, where equality and nondiscrimination coexist with freedom of speech and academic freedom.

I. History

In this section we consider the passage of Title IX, the courts' interpretation of the legislation, and the legal definition of sexual harassment.

A. Enactment of the Statute

Passage of Title IX was the result of intense campaigning by feminists who wanted to call attention to discrimination in educational employment—an arena that had been deliberately excluded from earlier antidiscrimination legislation on the grounds that educational institutions were autonomous entities that ought not to be subjected to government interference.[2] But as the number of colleges and universities expanded dramatically in the 1960s, policy makers identified a need to recruit more women to the faculty ranks, and that recruitment elicited a feminist response. Bernice Sandler, a lecturer at the University of Maryland College Park (and later the executive director of the Project on the Status and Education of Women for the Association of American Colleges), argued that sex discrimination in higher education employment demanded congressional attention. Studies by the Ford and Carnegie Foundations, as well as the US Department of Labor, the US Civil Rights Commission, and the commissioner of education documented the extent of the problem.

Two congresswomen took up the challenge. In 1970, Representative Martha Griffiths (D-MI) gave a speech on the floor of the House that pointed to discrimination against women in higher education, and, later that year, Representative Edith Green (D-OH), chair of the subcommittee on higher education, held hearings to investigate the situation. Based on the voluminous documentation produced in the hearings, Green called for legislation that would amend Title VII of the Civil Rights Act of 1964 to cover employees of educational institutions, amend Title VI to prohibit discrimination based on sex, and amend the Equal Pay Act to cover college and university administrators, professionals, and executives. Representative Green's proposal was taken

2. Prior to the passage of the Education Amendments of 1972, which included Title IX, the Higher Education Act of 1965, Pub. L. No. 89-329, provided in Section 804(a): "Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, or over the selection of library resources by any educational institution."

up in the Senate by Birch Bayh (D-IN), who argued that "discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community."[3] In the meetings to reconcile the House and Senate versions, it was agreed that there would be a new document: Title IX of the Education Acts. Title IX addressed sex discrimination not only in faculty employment but also in student admissions, scholarships, and the like. Senator Bayh noted the connection between education and students' future opportunities: "The field of education is just one of many areas where differential treatment has been documented; but because education provides access to jobs and financial security, discrimination here is doubly destructive for women."[4]

Most of the congressional debate about Title IX centered on student admissions and on access to gender-differentiated vocational programs; the final version of the law exempted from coverage religious institutions, military academies, and single-sex private colleges. In the years following the passage of Title IX, athletic programs became a focus of attention as some senators sought unsuccessfully to exclude revenue-producing sports (typically all male) from regulation. Indeed, a good deal of the attention to the law in the 1980s and 1990s concerned athletics—and the vast increase in opportunities for women to participate in sports is a measure of the law's success.[5]

President Richard Nixon signed Title IX into law in 1972. It declared that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance." Under Title IX and Title VI, federal funding is conditioned on the promise that the recipient of funding will not discriminate on the basis of sex (Title IX) or race, color, or national origin (Title VI). In this way, the two statutes form a contract between the federal government and the recipient of federal funds. Congressional spending power provides the pressure for enforcing Title IX and Title VI.

Title VII is broader, prohibiting employment discrimination in both public and private institutions on the basis of race, color, religion, sex, or national origin. Title IX generally follows Title VII's approach to sex-based discrimination in employment, leading to cases with significant substantive overlap. The US Court of Appeals for the Eighth Circuit, for example, explains that "when a plaintiff complains of discrimination with regard to conditions of employment in an institution of higher learning, the method of evaluating Title IX gender discrimination claims is the same as those in a Title VII case."[6]

Because of the close connections among Title IX, Title VI, and Title VII, cases decided under these statutes provide important interpretive guidance for Title IX's application. However, Title IX has a unique place within federal antidiscrimination law. It encompasses ten key areas with regard to women's educational opportunities: access to higher education, athletics, career training and education, education for pregnant and parenting students, employment, the learning environment, math and science education, sexual harassment, standardized testing, and technology.

Today, Title IX applies to "any education program or activity receiving federal financial assistance," which includes pre-K through adult education, single-sex and coeducational environments, and public and private institutions. Traditional educational institutions such as colleges, universities, and elementary and secondary schools have been subject to the Department of Education's Title IX regulations since 1972. And, since 2000, additional activities operated by recipients of federal financial assistance have come under the Title IX umbrella, including police academies, job-training programs, vocational training for prison inmates, and other educational programs operated by recipients of federal assistance. In addition, Title IX covers all participants in an educational program, including students, parents, and employees.

B. Judicial Interpretation of Title IX

Early interpretation and implementation of Title IX bears little resemblance to the version of Title IX

3. 118 Cong. Rec. 5803 (Feb 28, 1972).

4. Ibid., 5804.

5. There have been recent efforts made to water down its impact, most notably a clarification in 2005 by Title IX administrators that allowed colleges and universities to e-mail female students to establish their interest in sports programs and on that basis to decide whether to offer those programs.

6. Johnson v. Baptist Med. Ctr., 97 F.3d 1070, 1072 (8th Cir. 1996). See also Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996); Brine v. University of Iowa, 90 F.3d 271, 276 (8th Cir. 1996), *cert. denied,* 519 U.S. 1149; and Doe v. Oyster River Co-Op Sch. Dist., 992 F. Supp. 467, 474 (D.N.H. 1997) (reference to Title VII provides helpful guidance). But see Chance v. Rice Univ., 984 F.2d 151 (5th Cir. 1993) (claim of discrimination properly reviewed under the intentional discrimination standard of Title VI rather than the standards under Title VII).

currently advanced by the OCR. Sexual *harassment* was not mentioned in the original statute; only recently has it become an area of central concern. Instead, the focus of early interpretations of the law was a broader view of sex *discrimination*. Even so, the implementation of Title IX did not follow a linear path. In the late 1970s, there remained the question of whether administrative remedies alone (such as the termination of federal funding) or other remedies (such as reinstatement or individual monetary awards for damages suffered) could be awarded following the determination of an intentional violation of Title IX. At issue as well was the applicable scope of Title IX: Was its enforcement limited to the programs and offices that received federal financial assistance, or did Title IX apply to all programs throughout the entire institution? Taken together, shifts in judicial interpretation, detailed below, set the stage for the current tension between academic freedom and Title IX enforcement—tensions that have resulted from the current focus of Title IX on sexual violations and the conflation of conduct and speech.

In 1979, the Supreme Court recognized an "implied private right of action"—a judicially inferred right to relief from injuries caused by another's violation of a federal statute—under Title IX, thereby paving the way for students to sue in a wide array of cases involving gender equity. Although Title IX did not expressly authorize a private right of action for alleged victims of sex discrimination, the Court, in *Cannon v. University of Chicago*, held that a woman could sue the university that denied her admission to medical school.[7] The case was the first to recognize a private remedy available to individuals under Title IX for intentional discriminatory violations. Recognition of an implied private right of action is significant because it suggests that administrative remedies alone may be insufficient to correct for the discrimination found to have been suffered by the affected party. Instead, individuals may avail themselves of additional remedies against discriminatory practices.[8] In this way, *Cannon* is also noteworthy for opening the door to monetary damages for those who believe they have been discriminated against in violation of Title IX. Unfortunately, in the context of the contemporary corporate university, individual monetary damages can come at the expense of the kind of broad, systemic transformation originally envisioned by Title IX. The idea that there can be civil redress for victims of sexual misconduct focuses on the individual perpetrator's misbehavior but does not necessarily address the structures of discrimination that make such conduct possible.

Five years later, the Supreme Court's decision in *Grove City v. Bell* further shifted the legal landscape, narrowing Title IX's parameters by limiting its enforcement only to those programs or offices that receive federal financial assistance.[9] In other words, *Grove City v. Bell* did not require colleges and universities that received some federal financial assistance to enforce Title IX throughout the entire institution. The *New York Times* described the case as involving "a clash of values: the American tradition of valuing diversity and autonomy, especially in colleges, where academic freedom could be stifled by pervasive regulation, versus Washington's commitment to bar the use of Federal funds to subsidize discrimination."[10] Grove City College, a small, private, coeducational college in western Pennsylvania, had refused all federal funding in order to preserve its independence from "the expensive and burdensome regulation which invariably follows Government funding." However, a large number of its students received direct federal aid through a program of the Department of Education. Title IX regulations required all educational institutions to sign an "Assurance of Compliance" with Title IX. Arguing that it was not covered by Title IX because it did not accept any federal funds, officials at Grove City College refused to sign the assurance. As a result of their refusal, the federal government cut off federal financial aid to the college's students.

In the appeal that followed, the US Supreme Court held that, notwithstanding its refusal to take federal funds, Grove City College was covered by Title IX as an indirect recipient of federal financial assistance through student financial aid. Though the Court's decision brought Grove City College within the reach of Title IX, that decision was limited to the financial aid and admissions office, the only department that received federal financial assistance, and did not apply

7. 441 U.S. 677 (1979).

8. Donna L. Goldstein, "Implied Private Rights of Action under Federal Statutes: Congressional Intent, Judicial Deference, or Mutual Abdication," *Fordham Law Review* 50 (1981): 611.

9. 465 U.S. 555 (1984).

10. Stuart Taylor Jr., "Court Case Yanks on the Whole Ball of Federal-Aid Strings," *New York Times*, September 23, 1983, http://www.nytimes.com/1983/09/25/weekinreview/court-case-yanks-on-the-whole-ball-of-federal-aid-strings.html.

to the entire institution. The decision, as subsequently interpreted, left women's sports programs across the country with few substantive legal protections under Title IX, since these programs often received no federal financial funding. In fact, in the immediate aftermath of the decision, the Department of Education curbed or suspended forty Title IX investigations and twenty more investigations under the other affected statutes, including Title VI. Citing economic pressures, several institutions dropped athletic programs that did not generate revenue, which disproportionately affected women's sports teams.

The *Grove City* decision was limited to educational institutions that received federal funding and did not affect noneducational institutions that were covered by other civil rights laws prohibiting discrimination by programs receiving federal funding. Nor did *Grove City* affect enforcement of Title VII, which was not enacted under Congress's spending power. Since all the civil rights statutes relating to federal funds use the same language to describe their coverage, however, *Grove City* had the effect of narrowing the scope of laws prohibiting discrimination based on race, disability, and age. Concerned with the Court's interpretation of Title IX in *Grove City* and recognizing the broad impact the decision had on other important federal antidiscrimination statutes, Congress enacted the Civil Rights Restoration Act in 1988, overcoming a veto by President Ronald Reagan.[11] Sponsored by Senator Edward Kennedy (D-MA), the act makes clear that discrimination is prohibited throughout entire agencies or institutions if any part receives federal financial assistance. A Senate report stated that the act was intended "to overturn the Supreme Court's 1984 decision in *Grove City College v. Bell* . . . and to restore the effectiveness and vitality of the four major civil rights statutes that prohibit discrimination in federally assisted programs." Section 2 of the act states that "[c]ertain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX of the Education Amendments of 1972" and that "[l]egislative action is necessary to restore the prior consistent and long-standing executive branch interpretation of broad, institution-wide application of those laws as previously administered."

Beginning in the 1980s, in response to student and faculty feminist pressure, application of Title IX was expanded to cover not only discrimination in employment and educational facilities but also a wide range of unacceptable forms of sexual conduct. (The early development of these expanded interpretations by the courts and the OCR is discussed in section I.C, below.) While increased attention to eliminating sexual misconduct is certainly warranted, the OCR's recent interpretations of Title IX and the sometimes overzealous implementation of the law by administrators anxious to preempt government disciplinary action have defined sexual harassment so broadly as to undermine academic freedom and due process. As discussed in section II, below, the OCR's recent interpretations conflate speech and conduct—particularly with regard to defining hostile environment—and give little, if any, attention to rights of free speech, academic freedom, and due process.

C. Defining Sexual Harassment

Sexual harassment is not mentioned in the Title IX legislation itself, nor in Title VII. The first judicial recognition that sexual harassment constituted a form of sex discrimination came in 1977, when the DC Circuit Court of Appeals held that Title VII applied to a claim alleging that a supervisor sought sexual favors from an employee who was seeking promotion.[12] That same year, in *Alexander v. Yale University*, the federal Second Circuit Court of Appeals allowed a case to be heard in which sexual harassment was claimed as a violation of Title IX. The court ultimately found that the plaintiffs failed to prove their case, but the recognition of sexual harassment as a form of sex discrimination remained in place. In 1980, the Equal Employment Opportunity Commission—the administrative agency charged with enforcing Title VII—provided guidelines that included the two aspects of what was to become the standard definition of sexual harassment: the demand for sex in exchange

11. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). In addition to Title IX, the act covers Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d, *et seq.* (Title VI) (prohibiting discrimination on the basis of race, color, and national origin in all programs or activities that receive federal financial assistance); section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 (Section 504) (prohibiting discrimination on the basis of disability in all programs or activities that receive federal financial assistance); and the Age Discrimination Act of 1975, 42 U.S.C. 6101, *et seq.* (prohibiting discrimination on the basis of age in all programs or activities that receive federal financial assistance).

12. Monica L. Sherer, "No Longer Just Child's Play: School Liability under Title IX for Peer Sexual Harassment," *University of Pennsylvania Law Review* 141, no. 5 (May 1993): 2119–68.

for favorable treatment (the quid pro quo demand) and the creation of an environment "so infused with hostility" that it unreasonably interfered with an individual's ability to work. Sexual harassment was defined as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[13]

In 1980, the National Advisory Council on Women's Educational Programs reviewed Title IX and concluded that the explicit addition of sexual harassment to Title IX prohibitions was needed. The council was particularly concerned about students, since Title VII already protected academic employees, and it provided extensive documentation of student experience. The council defined academic sexual harassment as "the use of authority to emphasize the sexuality or sexual identity of a student in a manner which prevents or impairs that student's full enjoyment of educational benefits." The presumption here was that the unequal power relationship between faculty members and students was the source of the problem. Kimberly Mango, in an extensive and informative review of the issue, explains that "the argument for protecting students was strongest because these students purchased an education, by virtue of their payment of tuition, and as such were entitled to an environment free from sexual harassment."[14] In 1981, the OCR followed through on the council's recommendation, declaring in a policy memorandum that "sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX." Here the presumption is that the law applies to individual actions (by an employee or agent) of a recipient of federal funds in relation to individual students; the existence of a hostile environment is not yet an explicit consideration.

A series of lawsuits followed in which the courts either rejected or recognized the validity of a claim of hostile-environment sexual harassment under Title IX but found that no basis existed for the claim. In *Alexander v. Yale*, for example, a federal district court ruled that "no judicial enforcement of Title IX could properly extend to such imponderables as atmosphere or vicariously experienced wrong," so "the claims [by plaintiffs without 'direct, personal experience of sexual harassment'] are untenable on their face."[15] In *Lipsett v. Rive-Mora* (1987), where female interns complained of gender-based mistreatment by supervising male doctors, a federal district court found the incidents "so trivial and isolated that they cannot lend any support . . . for an actionable constitutional wrong." And the court concluded that one doctor's "flattering remarks . . . were neither indecent nor obscene. They portray a treatment based on romantic attraction rather than on a desire to discriminate because of gender."[16] In 1989, in *Bougher v. University of Pittsburgh*, a student claimed that the failure of the university to respond to her complaints about sexual abuse by a professor had created a hostile environment. The federal district court, however, explicitly rejected the idea that Title IX covered "environmental harassment," saying that the concept pertained only to workplace situations and not to university campuses.[17] We cite these instances to indicate how difficult it was to establish the validity of claims of sexual harassment in the wake of the passage of Title IX. What was the difference between romance and sex, and how did power figure in the difference? How many incidents did it take to create a hostile environment? Beyond concrete demonstration of individual injury, how should one measure the individual and collective effects of "vicariously experienced wrong"?

Things changed after 1991, when the Clarence Thomas hearings and then the Tailhook scandal provoked a widespread national debate on sexual

13. Ibid., 2125.

14. Kimberly Mango, "Students versus Professors: Combatting Sexual Harassment under Title IX of the Education Amendments of 1972," *Connecticut Law Review* 23 (1990–91): 381.

15. 459 F. Supp. 1, 5 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

16. Mango, "Students versus Professors," 405; Lipsett v. Rive-Mora, 669 F. Supp. 1188 (D. P.R. 1987), *rev'd and remanded*, 864 F.2d 881 (1st Cir. 1988).

17. Mango, "Students versus Professors," 410; Bougher v. University of Pittsburgh, 713 F. Supp. 139 (W.D. Pa. 1989), *aff'd on other grounds*, 882 F.2d 74 (3d Cir. 1989).

harassment. The Supreme Court ruled in 1992 (in *Franklin v. Gwinnett County Public Schools*) that monetary damages could be awarded to individual victims of sexual harassment under Title IX. In that case, the school district could be held financially liable for a coach's predatory behavior toward a student athlete. Citing its 1986 precedent finding that sexual harassment is a form of sex discrimination under Title VII, the Court held that Title IX's prohibition of sexual harassment in educational institutions by supervisors toward employees also applies to teachers' conduct toward students, with a remedy of monetary damages available in both situations. In the wake of *Franklin*, a series of cases applied the standards of Title VII to students who brought claims of sexual harassment under Title IX.[18] In *Doe v. Petaluma City School District* (1996), for example, the Court concluded that "in Title IX [there is] no intent to provide a lesser degree of protection to students than to employees."[19] These cases also included student-on-student misconduct under Title IX jurisdiction.

In *Davis v. Monroe County Board of Education* (1999), the Supreme Court held that schools may be found liable in private damage suits for student-to-student sexual harassment where the behavior is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[20] In 2001, the OCR stated that despite some differences in wording, the Court's definition of a hostile environment is consistent with the definition used by the OCR in administrative enforcement of Title IX; it asserted that hostile-environment sexual harassment is "conduct of a sexual nature [that] is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment."[21]

By the end of the century, the right to file a claim of hostile environment was firmly established under Title IX, although college and university administrators and the courts continued to find it hard to assess exactly what constituted a hostile environment. It seems clear that the claim of a hostile environment was less about course syllabi and the behavior of fraternities than it was about how administrators handled one-on-one situations of sexual harassment—usually unwelcome sexual advances or requests for sexual favors made by male faculty members and directed at female students. In these rulings, the sexual abuse was the misconduct that became a hostile environment when the institution refused to punish an offending faculty member or (less often) a student. Although under Title VII environmental harassment is generally concerned with *multiple* instances of offensive conduct (not always by the same person), under Title IX, these rulings suggested that a hostile environment existed when the institution failed to act to protect an individual who was subjected to one or more instances of sexual abuse.

II. Problems with Interpretation and Enforcement of Title IX

Overly broad interpretations of what constitutes a "hostile environment" are increasingly undermining academic freedom, and the enforcement of Title IX does not adequately protect due-process rights and academic governance.

A. Overly Broad Definitions of "Hostile Environment"

The issue of what constitutes a hostile environment has been contentious under both Title VII and Title IX, but the higher education context raises distinctive issues, particularly when speech rather than conduct is in question. To what extent can speech be subject to the same regulations as assault, as has been increasingly the case in recent years? What are the consequences of such an equation in a college or university setting, where a careful balance must be struck between an interest in preventing or punishing hostile-environment sexual harassment and an interest in protecting academic freedom, free speech, shared

18. Murray v. NYU College of Dentistry, 57 F.3d 243 (2d Cir. 1995) (educational institution may be held liable for gender discrimination based on sexual harassment); Doe v. Petaluma City School District, 54 F.3d 1447 (9th Cir. 1995) (school officials who tolerated student peer sexual harassment may be liable); and Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996) (male football player harassment by his teammates in a hostile-environment argument for which university may be responsible). In none of these cases did the plaintiffs prevail, but the fact that their claims were recognized as potentially legitimate made the hostile-environment standard part of the Title IX standard.

19. Verna L. Williams and Deborah L. Brake, "When a Kiss Isn't Just a Kiss: Title IX and Student-to-Student Harassment," *Creighton Law Review* 30 (1996–97): 445.

20. 526 U.S. 629, 650 (1999).

21. US Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Washington, DC: 2001), v–vi.

governance, and due process? How can students' and employees' equal rights and safety be protected without violating their rights of academic freedom or free speech? These questions were considered central to Title IX enforcement in the last decades of the twentieth century but have been pushed to the side at least since 2011.

Under Title IX (as under Title VII), hostile-environment claims are to be analyzed based on objective factors (whether a "reasonable person" in the complainant's position would find the conduct offensive) and subjective factors (whether the complainant found the conduct offensive). But under Title IX, determination of the weight of these factors and of the balance between them has become skewed in recent years to overemphasize subjective responses to sexual conduct or speech.

In the 1980s and 1990s, courts invoked the principles of free speech and academic freedom to protect the constitutional free-speech rights of public university professors and students against encroachments by overly broad antiharassment policies. For example, a federal court found the University of Michigan's sexual-harassment policy to be unconstitutionally vague and overly broad in a case brought by a biopsychology graduate student who was concerned that theories he wished to explore could be labeled as "racist" or "sexist" under the policy.[22] A federal court also found the University of Wisconsin's harassment code unconstitutionally broad, notably its prohibitions against "discriminatory comments, epithets or other expressive behavior directed at an individual . . . [that] intentionally . . . [d]emean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual . . . and . . . [c]reate an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity."[23] And three years later, a federal district court held that a professor who had been suspended under the university's sexual-harassment policy was constitutionally protected in drawing an analogy during class between sex and writing, because the comments were part of his academic freedom to teach about writing.[24]

The OCR's 2001 *Revised Sexual Harassment Guidance* took such rulings into account. In its guidance documents and in "Dear Colleague" letters sent to university administrators to explain its policy, the OCR stated that Title IX should not be interpreted in ways that would interfere with academic freedom or free speech. The 2001 document states:

> Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX. In order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program.
>
> Moreover, in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently serious as to create a hostile environment), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights.

In this 2001 guidance, the OCR stated that "all actions taken by OCR must comport with First Amendment principles, even in cases involving private schools that are not directly subject to the First Amendment."

The OCR's July 28, 2003, "Dear Colleague" letter repeated these points and further explained the OCR's position that free speech principles apply to public *and* private educational institutions:

> There has been some confusion arising from the fact that OCR's regulations are enforced against private institutions that receive federal funds. Because the First Amendment normally does not bind private institutions, some have erroneously assumed that OCR's regulations apply to private federal-funds recipients without the constitutional limitations imposed on public institutions. OCR's regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses. Any private post-secondary institution that chooses to limit free

22. Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989). See also Benjamin Dower, "The Scylla of Sexual Harassment and the Charybdis of Free Speech: How Public Universities Can Craft Policies to Avoid Liability," *Review of Litigation* 31 (2012): 718–24.

23. UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991); discussed in Dower, "The Scylla of Sexual Harassment," 723–24.

24. Silva v. Univ. of N.H., 888 F. Supp. 293, 330 (D.N.H. 1994); discussed in Dower, "The Scylla of Sexual Harassment," 718–19.

> speech in ways that are more restrictive than at public educational institutions does so on its own accord and not based on requirements imposed by OCR.[25]

Since 2011, however, the emphasis has changed. The OCR now conflates conduct and speech cases. The 2011 "Dear Colleague" letter broadly defines sexual harassment under Title IX as ranging from the most serious conduct of "sexual violence" (including rape, sexual assault, sexual battery, and sexual coercion) to a hostile environment based on speech. Further, while the 2011 letter focuses on student-on-student sexual violence, it adds that the same principles of enforcement will apply to all types of sexual-harassment cases, which include speech or conduct of a sexual or nonsexual (but gender-based) nature.[26] Yet the letter does not include any statements or warnings about the need to protect academic freedom and free speech in sexual-harassment cases, including those involving hostile-environment allegations. With this conflation of sexual violence (which is also criminal conduct) and sexual harassment (including a hostile environment based on speech), concerns about the need to protect academic freedom and free speech seem to have been relegated to the background or ignored completely.[27] In its 2014 "Questions and Answers on Title IX and Sexual Violence," the OCR states that the 2011 letter did not address free-speech issues because it focused on "unlawful physical sexual violence" and that provisions on free speech set forth in the OCR's 2001 guidance and 2003 "Dear Colleague" letter remain fully in effect.[28] The 2011 letter was not, however, limited to sexual-assault cases, explicitly stating that its principles of enforcement extend to all sexual-harassment cases. Given this broad reach, we believe that the 2011 "Dear Colleague" letter should have made clear that rights of free speech and academic freedom continue to apply in cases that do not involve assault, including those complaints alleging a hostile environment.

Even as the 2011 letter stated that the principles being described apply broadly to sexual harassment, it also recognized that sexual violence and sexual harassment are distinctive concepts, referring throughout to "sexual harassment and violence," "sexual harassment and sexual violence," or "sexual harassment or violence." These distinctions are important, as the letter recognizes, given the seriousness of criminal conduct involving sexual violence and the need for colleges and universities to interact with off-campus police departments and the criminal justice system about such cases. These differences reinforce as well the importance of emphasizing that free speech and academic freedom apply in sexual-harassment cases that do not involve sexual violence.

Further, in carrying out compliance reviews, the OCR has broadened its description of sexual harassment in ways that limit the scope of permissible speech. In its 2013 findings that the University of Montana violated Title IX, the OCR defined sexual harassment as unwelcome conduct or speech of a sexual nature, without regard to whether it creates a hostile environment: "Sexual harassment is unwelcome conduct of a sexual nature and can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence."[29] The OCR charged the University of Montana with failing to separate the definitions of "sexual harassment" and "hostile environment." The OCR explained: "Sexual harassment is unwelcome conduct of a sexual nature. When sexual harassment is sufficiently severe or pervasive to deny or limit a student's ability to participate in or benefit from the school's program based on sex, it creates a hostile environment." The Department of Justice has similarly weighed in with an expanded definition of sexual harassment. Its April 22, 2016, letter reporting on an investigation into allegations of sex discrimination at

25. US Department of Education Office for Civil Rights, "First Amendment: Dear Colleague," July 28, 2003, http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

26. For an extensive discussion of the expanding scope of the definition of sexual assault and sexual violence used by the OCR, see Jacob Gersen and Jeannie Suk, "The Sex Bureaucracy," *California Law* Review 104 (forthcoming).

27. Jon Krakaeur, in *Missoula: Rape and the Justice System in a College Town* (New York: Doubleday, 2015), 384, notes that Diane Barz, the Missoula Supreme Court justice who investigated the University of Montana rapes, said in her report to UM president Royce Engstrom, "the [2011 "Dear Colleague" letter] Guidelines are not clear on what constitutes 'prompt and effective steps'" for investigating a sexual assault. Such due-process uncertainties have contributed to the creation of climates dismissive of a need to protect academic freedom and free speech.

28. US Department of Education Office for Civil Rights, "Questions and Answers on Title IX and Sexual Violence," April 29, 2014, http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

29. US Department of Justice Civil Rights Division and US Department of Education Office for Civil Rights to President Royce Engstrom of the University of Montana, May 9, 2013, http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf.

the University of New Mexico declared that compliance with Title IX required defining sexual harassment as "unwelcome conduct of a sexual nature," including "verbal conduct" and "regardless of whether it causes a hostile environment."[30]

The OCR's separation of sexual harassment from hostile environment creates a seemingly limitless definition of harassment that encompasses any "unwelcome conduct" (including speech). Although the OCR continues to consider objective factors in defining a hostile environment, its broadened definition of harassment is based solely on a complainant's subjective responses to conduct or speech of a sexual nature.[31] Further, the OCR's current definition of "harassment" contradicts its 2003 "Dear Colleague" letter, which states: "Harassment . . . , to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program."

Additionally, the OCR's compliance letter to the University of Montana explicitly stated that it defined hostile environment as being "severe or pervasive" rather than using the "severe *and* pervasive" definition the Supreme Court applied in interpreting Title IX in *Davis v. Monroe County Board of Education*.[32] As discussed in section II.C, the OCR's expanded definitions of sexual harassment and hostile environment have had a negative impact on academic freedom. AAUP policies have long emphasized that there is no necessary contradiction between an institution's obligation to address problems of sexual harassment effectively and its duty to protect academic freedom. The OCR's interpretation of Title IX should reemphasize the requirement that colleges and universities adopt policies and procedures designed to respond to and prevent sexual harassment while also fully respecting academic freedom.

B. Inadequate Protection of Due Process and Academic Governance

In its policy documents and compliance investigation reports, the OCR has given only limited attention to the due-process rights of those accused of misconduct. The OCR's 2001 *Revised Sexual Harassment Guidance* states that "[p]rocedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions," followed immediately by the caveat that "[o]f course, schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant." In this way the OCR described due-process rights of the accused as being potentially in conflict with protecting complainants under Title IX, which then opened the door to restrictions on due process. If there is a conflict, the implication is that protection of complainants takes priority.

The OCR's 2011 "Dear Colleague" letter went further, mandating an evidentiary standard that conflicts with due-process protections of faculty members and students. In a shift of enormous significance, the 2011 letter prohibited colleges and universities from using the standard calling for "clear and convincing" (highly probable or reasonably certain) evidence and mandated the use of a lower standard: that there need be no more than a "preponderance of evidence" to assess sexual violence claims and all sexual-harassment claims. The letter concluded that procedures using a "clear and convincing" evidence standard did not comport with a Title IX regulation requiring educational institutions to adopt grievance procedures that provide for "equitable resolution of student and employee sex discrimination complaints."[33] Although its letter marked a substantial change in procedures, the OCR, prior to issuing this letter in 2011, did not engage in the public notice and comment process that is part of federal administration rulemaking.

30. US Department of Justice Civil Rights Division to President Robert G. Frank of the University of New Mexico, April 22, 2016, https://www.justice.gov/opa/file/843901/download.

31. See public comments of Joan Bertin to US House of Representatives Committee on the Judiciary Subcommittee on the Constitution and Civil Justice, June 11, 2015, http://docs.house.gov/meetings/JU/JU10/20150602/103548/HHRG-114-JU10-20150602-SD003.pdf; written testimony of Greg Lukianoff before the US House of Representatives Committee on the Judiciary Subcommittee on the Constitution and Civil Justice, June 2, 2015, https://www.thefire.org/written-testimony-of-greg-lukianoff-before-the-house-judiciary-committee/; and Conor Friedersdorf, "How Sexual-Harassment Policies Are Diminishing Academic Freedom," *The Atlantic*, October 20, 2015, http://www.theatlantic.com/politics/archive/2015/10/sexual-harassment-academic-freedom/411427/.

32. 526 U.S. 629 (1999). Unlike its use of a "severe and pervasive" standard in interpreting Title IX, the Supreme Court has applied a "severe or pervasive" standard in defining hostile-environment harassment under Title VII; see Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

33. 34 C.F.R. § 106.8(b).

The "preponderance of evidence" standard is a new mandate, even though the OCR describes the letter as only a clarification of its regulations and its guidance from 1997 and 2001, which had followed federal rulemaking requirements.

This clarification, which was in fact a substantive change, has produced significant and worrisome effects on the enforcement of Title IX. The AAUP quickly responded to the 2011 "Dear Colleague" letter by writing to the OCR to convey its concern that the "preponderance of evidence" standard threatens to erode due-process protections for the accused and thereby undermine academic freedom. Harvard University's adoption of these OCR standards led a group of law school professors there to protest the arbitrary nature of the new rules. The professors objected to the university's apparent capitulation to new interpretations by government officials. Instead of having faculty members collaborate in crafting standards that would make sense in the academic context, they wrote in an opinion piece for the *Boston Globe*, "Harvard apparently decided to simply defer to the demands of certain federal administrative officials."[34]

Jeannie Suk, one of the Harvard professors, wrote of the racial implications of granting immediate credibility to accusers without affording the protections of due process for the accused:

> Sexual assault is a serious and insidious problem that occurs with intolerable frequency on college campuses and elsewhere. Fighting it entails, among other things, dismantling the historical bias against victims, particularly black victims—and not simply replacing it with the tenet that an accuser must always and unthinkingly be fully believed. It is as important and logically necessary to acknowledge the possibility of wrongful accusations of sexual assault as it is to recognize that most rape claims are true. And if we have learned from the public reckoning with the racial impact of over-criminalization, mass incarceration, and law enforcement bias, we should heed our legacy of bias against black men in rape accusations. The dynamics of racially disproportionate impact affect minority men in the pattern of campus sexual-misconduct accusations, which schools, conveniently, do not track, despite all the campus-climate surveys. . . . The "always believe" credo will aggravate and hide this context, aided by campus confidentiality norms that make any racial pattern difficult to study and expose. Let's challenge it. Particularly in this time of student activism around structural and implicit racial bias pervading campuses, examination of the racial impact of Title IX bureaucracy is overdue. We are all fallible—professors, students, and administrators—and disagreement and competing narratives will abound. But equating critique with a hostile environment is neither safe nor helpful for victims. We should be attentive to our history and context, and be open to believing, disbelieving, agreeing, or disagreeing, in individual instances, based on evidence.[35]

Recent student activism protesting institutionalized racial biases in colleges and universities reveals the need to ensure that Title IX enforcement initiatives do not, even unwittingly, perpetuate race-based biases in the criminal justice system, which disproportionately affect men who are identified as racial minorities.

The OCR, in its 2011 "Dear Colleague" letter, described the "clear and convincing evidence" standard in grievance procedures as "inconsistent with the standard of proof established for violations of the civil rights laws and . . . thus not equitable under Title IX." However, there is only a partial analogy between campus hearings and civil trials. Enforcement of civil rights laws in the courts provides the parties with many due-process protections that seek to ensure fair and reliable proceedings, including public pleadings, motions, hearings, trials, and appeals; the right to an attorney acting in a full representative capacity; the right to confront and cross-examine witnesses; extensive discovery processes; rules of evidence; and the right to a jury trial. In campus hearings, many of these due-process protections do not exist or are provided only in very limited forms. Using a heightened standard of proof of clear and convincing evidence, therefore, can help overcome the lack of the full scope of due-process protections that guard against erroneous findings of sexual harassment and sexual assault.

34. "Rethink Harvard's Sexual Harassment Policy," *Boston Globe*, October 15, 2014, https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html. An open letter from sixteen University of Pennsylvania law professors distributed on February 18, 2015, raised similar concerns: see "Title IX and Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities," http://media.philly.com/documents/OpenLetter.pdf.

35. Jeannie Suk, "Shutting Down Conversations about Rape at Harvard Law," *New Yorker*, December 11, 2015, http://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school.

Colleges and universities could extend the use of a clear and convincing evidence standard to all campus misconduct hearings, including sexual and racial harassment cases. The OCR's mandate, though, removes this choice. In an opinion in a lawsuit filed by a student accused of sexual misconduct at Brandeis University, the federal district court judge noted that Brandeis uses the "preponderance of evidence" standard only for sexual misconduct cases but uses the "clear and convincing evidence" standard for "virtually all other forms of alleged misconduct."[36] The judge observed, "The lower standard may thus be seen, in context, as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused."

Several courts have recently found in favor of male students who have sued colleges and universities for violating due process in campus sexual-assault hearings. These cases include findings that institutions failed to provide adequate notice to students of the charges against them, imposed overly severe restrictions on the scope of cross-examination, and used procedures unfairly biased against the accused.[37] These cases confirm the importance of upholding sound due-process standards in campus investigations and hearings. As Erin Buzuvis, director of the Center for Gender and Sexuality Studies at Western New England University, has observed, universities' "obligation to provide fair and meaningful hearings" in sexual-assault cases is important "not only for the sake of students who are accused" but also for "victims and their advocates," who "have a stake in the integrity of the process as well."[38] This analysis applies, more broadly, to all kinds of sexual-harassment hearings.

Procedures for sexual-harassment investigations and for hearings concerning allegations against faculty members may differ from the procedures used for allegations against students. Since no campus-based hearing will include the full array of procedural rights required in judicial proceedings, however, the "clear and convincing evidence" standard provides important due-process protections to ensure that hearings are fair and reliable. As discussed in section IV of this report, AAUP policies provide additional bases for faculty due-process protections, including the requirement that administrators carry the burden of demonstrating adequacy of cause prior to taking disciplinary action against a faculty member.

In May 2014, the OCR announced investigations of fifty-five colleges and universities for possible violations of Title IX in their handling of sexual violence and harassment complaints. By September 2015, the OCR was carrying out such investigations at 130 institutions, and by March 2016, that number had grown to 169.[39] The OCR's investigations have resulted in findings set forth in long, detailed letters to institutions, including the University of Montana, Michigan State University, Tufts University, the University of Virginia, Harvard University, and Yale University. These letters show a pattern of university conduct that the OCR has identified as violating Title IX: failure to provide adequate information to the university community about Title IX; failure to respond to allegations of sexual assaults until a formal complaint has been filed; failure to act promptly in response to sexual-assault complaints; failure to take adequate interim measures to protect complainants; and failure to consider whether there "was the need for a broad response . . . to address the issue

36. Doe v. Brandeis University, 2016 U.S. Dist. LEXIS 43499 (D. Mass. 2016).

37. See Jake New, "Out of Balance," *Inside Higher Ed*, April 14, 2016, https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault; Jake New, "The Right to Confront," *Inside Higher Ed*, July 23, 2015, https://www.insidehighered.com/news/2015/07/23/suit-against-u-california-san-diego-could-provide-framework-other-students-accused; Doe v. The Rector and Visitors of George Mason University, 2016 U.S. Dist. LEXIS 24847 (E.D. Va. 2016) (granting plaintiff's motion for summary judgment); John Doe v. University of Southern California, 246 Cal. App. 4th 221 (2016) (plaintiff was denied fair hearing); and Doe v. Brandeis University, 2016 U.S. Dist. LEXIS 43499 (D. Mass. 2016) (denying Brandeis University's motion to dismiss the complaint).

38. New, "The Right to Confront"; Erin Buzuvis, "Court Rules UC San Diego Unfairly Sanctioned Student for Sexual Assault," *Title IX Blog*, July 15, 2015, http://title-ix.blogspot.com/2015/07/court-rules-uc-san-diego-unfairly.html.

39. See Nick DeSantis, "Education Dept. Names 55 Institutions Facing Sex-Assault Investigations," *Chronicle of Higher Education*, May 1, 2014, http://chronicle.com/blogs/ticker/education-dept-names-55-institutions-facing-sex-assault-investigations/76849; Andy Thomason, "U.S. Finds Michigan State's Sexual-Assault Policies Created 'Hostile Environment,'" *Chronicle of Higher Education*, September 1, 2015, http://chronicle.com/blogs/ticker/u-s-finds-michigan-states-sex-assault-policies-created-hostile-environment/103967; Sara Lipka, "An Arc of Outrage," *Chronicle of Higher Education*, April 13, 2015; http://chronicle.com/interactives/assault_main; and Robin Wilson, "What It Took to Resolve a Federal Sexual-Assault Investigation at UVa," *Chronicle of Higher Education*, March 4, 2016, http://chronicle.com/article/What-It-Took-to-Resolve-a/235586.

of sexual harassment and violence in the campus community," even after complainants requested confidentiality or chose not to proceed with a formal or informal resolution process.[40]

The OCR investigations do consider, as well, whether an institution's flawed procedures, including insufficiently prompt responses to any individual complaints, have contributed to the continuation of a hostile environment. The OCR will make this determination about a hostile environment even where insufficient evidence exists to support the underlying complaint. For example, although the OCR concurred in Michigan State University's conclusion that there was insufficient evidence that "Student A" had been sexually assaulted, the OCR went on to consider whether the university's failure to respond promptly to the complaint subjected the student to a sexually hostile environment. Ultimately the OCR found that it had not.

The OCR letters often conclude with a description of an agreement entered into by the institution to reform its policies and procedures to conform to the OCR's requirements under Title IX. The similarity among these agreements may be partially attributable to the fact that the Department of Justice and the OCR's 2013 agreements with University of Montana have been used as "a blueprint [for] colleges and universities across the country to take effective steps to prevent and address sexual assault and harassment on their campuses."[41] Among the provisions commonly included in these agreements are requirements that a university effectively disseminate information about Title IX; revise its policies and practices to ensure prompt and equitable resolution of sexual harassment and sexual-assault allegations; report such proposed revisions to the OCR; expand training and education for staff members and students; conduct annual "climate assessments"; improve tracking and review of its handling of sexual-harassment allegations; and assess the handling of prior sexual-harassment complaints and remedy any concerns identified.

Enacted under Congress's spending power, the Department of Education's authority to enforce Title IX comes from its right to initiate proceedings to terminate federal funding, although it has not used this power since *Grove City*. Further, the Department of Education must notify the educational institution "of its failure to comply" with Title IX and must invite voluntary compliance by the educational institution before taking any action to terminate federal funding. Thus, the compliance process opens the possibility for the OCR to work with colleges and universities to develop policies and procedures for receiving and addressing complaints in ways that remedy problems while also providing due process for all parties. The OCR could also help institutions to develop educational programs that address underlying problems of gender inequality, including sexual assault and sexual harassment, on campus. But these possibilities have not typically been realized.

Instead, the OCR's approach to compliance has become increasingly punitive. These punitive measures belie the insistence of OCR administrators that their recommendations do not have the force of law.[42] The OCR's recent or current investigations of more than 130 colleges and universities have taken on an adversarial character, leading to increasing fear that the OCR may wield its power to initiate proceedings to withdraw federal funding. The threatening nature of the OCR's actions is fueled by the ever-broadening scope of its investigations, both in terms of the number of institutions under scrutiny and the breadth of the OCR's investigation at each institution. The OCR's recommendation that colleges and universities use as a "blueprint" the compliance agreement resulting from its investigation at University of Montana further undermines the potential for the OCR to facilitate measures to address gender inequality in ways that best fit particular institutions (see section III).

The sharp increase in the number and scope of OCR investigations and in OCR findings that institutions have violated Title IX has brought greater public attention to the OCR's heightened scrutiny, not only of sexual assault on campuses but also of speech that includes sexual references of any kind. The heightened scrutiny of speech has led to a series of cases in which administrators' apparent fears of being targeted by the OCR have overridden faculty academic freedom and

40. For details on resolved cases and ongoing tracking of investigations, see Sara Lipka, "How 46 Title IX Cases Were Resolved," *Chronicle of Higher Education*, January 15, 2016, http://chronicle.com/article/How-46-Title-IX-Cases-Were/234912.

41. US Department of Justice, "Departments of Justice and Education Reach Settlement to Address and Prevent Sexual Assault and Harassment of Students at the University of Montana at Missoula," press release, May 9, 2013, http://www.justice.gov/opa/pr/departments-justice-and-education-reach-settlement-address-and-prevent-sexual-assault-and.

42. Jake New, "Colleges Frustrated with Lack of Title IX Guidance," *Inside Higher Ed*, February 25, 2016, https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance.

student free-speech rights. Further, by focusing attention on speech, administrators undermine efforts to address serious issues of actual sexual misconduct.

C. Cases

In this section, we list some of the academic freedom and free-speech cases reported since 2013. They involve teaching, research, extramural speech, and governance.

1. Teaching

In November 2013, Title IX enforcement administrators at the University of Colorado at Boulder sat in without previous warning on sociology professor Patty Adler's class, Deviance in US Society, which had for more than twenty years enrolled around five hundred students each semester. They were there in response to concerns expressed by a graduate teaching assistant that undergraduate teaching assistants might feel uncomfortable about participating in role-playing exercises in Professor Adler's class featuring subjects relevant to course material involving the global sex trade. These performances animated character types, such as an "Eastern European 'slave whore,' a pimp, a 'bar whore,' and a high-end escort."[43] In December, Professor Adler's dean offered Professor Adler a buyout for early retirement and indicated that if she did not accept the offer, she could incur penalties up to and including forfeiture of her retirement benefits, because her pedagogical approach entailed too much risk in a "post-Sandusky" climate; alternatively, she could return to the classroom, understanding that she was no longer allowed to teach the course. After faculty members, students, and numerous academic freedom advocacy groups objected to this unilateral action as a violation of necessary governance procedures, the university, without apology, rescinded its ultimatum and invited Professor Adler back to teach, without any qualifying conditions, as if the incident had never happened.[44] Professor Adler returned for a semester before deciding to retire, deeply affected by the chilling academic freedom climate that lingered in the wake of the reversed decision.[45]

Similarly, Louisiana State University faculty members continue to grapple with blatant violations of due-process and shared governance rights in the aftermath of the dismissal of Teresa Buchanan, an associate professor of early childhood education. In December 2013, Professor Buchanan, after having been approved at every stage of the process of promotion to full professor, received an e-mail message with the subject heading "Unacceptable Performance" from the same dean who had already endorsed the favorable reviews by noting, "very good scholar, strong funding."[46] Professor Buchanan found herself suspended immediately so that the Office of Human Resource Management could commence an investigation into allegations by some students and administrators regarding her use of "salty language." Meanwhile, she learned that the provost would not be recommending her for promotion because of the unfolding investigation, even though the university-level faculty committee had done so. In May 2014, LSU's Office of Human Resource Management found Professor Buchanan guilty of sexual harassment and of violating the Americans with Disabilities Act. The administration shortly thereafter moved to convene a faculty hearing committee to consider her dismissal for cause. Though this committee unanimously concluded in spring 2015 that Professor Buchanan should not be dismissed, the president recommended her dismissal to the board of supervisors, which concurred in his recommendation. Faculty protests, including a vote of no confidence, and a damning AAUP report have not reversed the administration's actions. Professor Buchanan has sued the university, specifically objecting to OCR language as used by the university administration.

43. Michelle Goldberg, "This Professor Was Fired for Saying 'Fuck No' in Class," *The Nation*, July 2, 2015, http://www.thenation.com/article/this-professor-was-fired-for-saying-fuck-no-in-class/; see also Scott Jaschik, "Too Risky for Boulder," *Inside Higher Ed*, December 16, 2013, https://www.insidehighered.com/news/2013/12/16/tenured-professor-boulder-says-she-being-forced-out-over-lecture-prostitution. The Colorado AAUP conference condemned the administration in a statement released on December 18, 2013, and on December 20, 2013, the national AAUP issued the "AAUP Statement on the University of Colorado's Treatment of Professor Patricia Adler" (http://www.aaup.org/file/ColoradoStatement.pdf).

44. For a comprehensive examination, see Boulder Faculty Assembly Ad Hoc Committee, *Report of the Boulder Faculty Assembly (BFA) Ad Hoc Committee to Investigate the Patricia Adler Case*, May 1, 2014, http://www.colorado.edu/bfa/sites/default/files/attached-files/ReportBFAAdlerFinalReport05.2014.pdf.

45. Matt Ferner, "Patricia Adler, C-U Boulder Professor, Allegedly Forced Out over Prostitution Lecture [Update]," *Huffington Post*, December 16, 2014, updated on January 25, 2015, http://www.huffingtonpost.com/2013/12/16/patricia-adler-deviance_n_4454652.html.

46. Professor Buchanan's case was the subject of a supplementary AAUP report on a censured institution, *Academic Freedom and Tenure: Louisiana State University, Baton Rouge*, September 2015, http://www.aaup.org/file/aaupBulletin_LSU_final.pdf.

Recent calls for trigger warnings to flag curricular content that might unsettle students have sometimes fed into Title IX concerns about sexual harassment or a hostile environment; indeed, in some cases, such disclaimers literally turn into controversies about how to teach the Constitution and the law.[47] For example, a memorandum from the Title IX administrator at Eastern Kentucky University in July 2014 reminded the faculty that "some courses may require students to deal with content that is especially sensitive or disturbing and may cause distress to students who have experienced past trauma." The memorandum then lists the Title IX office recommendations "regarding classroom materials containing instances of violence related to power, control or intimidation that may be comparable to students' traumatic experiences." It goes on to note that there are no federal regulations requiring trigger warnings but cautions nonetheless that the issue may require attention. The link between Title IX and trigger warnings is here made explicit. But it is implicit in the objections by students who are offended or discomfited by sexually specific texts included in the syllabus. Alison Bechdel's lesbian coming-of-age story, *Fun Home*, was not only the target of objections because of its "pornographic" content (by students at Crafton Hills College and Duke University in 2015 and the University of Utah in 2008); it also inspired the South Carolina state legislature in 2014 to target the College of Charleston and the University of South Carolina–Upstate for a budget cut equaling the annual cost of the College Reads program, which had included *Fun Home* as a recommended selection on voluntary reading lists for incoming students. Ironically, the compromise eventually reached involved reallocating the funds to support books teaching about the Constitution and other documents relating to "American ideals."[48]

In its 2014 report *On Trigger Warnings*, the AAUP noted:

> The presumption that students need to be protected rather than challenged in a classroom is at once infantilizing and anti-intellectual. It makes comfort a higher priority than intellectual engagement . . . it singles out politically controversial topics like sex, race, class, capitalism, and colonialism for attention. Indeed, if such topics are associated with triggers, correctly or not, they are likely to be marginalized if not avoided altogether by faculty who fear complaints for offending or discomforting some of their students. Although all faculty are affected by potential charges of this kind, non-tenured and contingent faculty are particularly at risk. In this way the demand for trigger warnings creates a repressive, "chilly climate" for critical thinking in the classroom.

The report went on to consider the relationship of trigger warnings to the current anxiety about sexual violence on campus:

> It is probably not coincidental that the call for trigger warnings comes at a time of increased attention to campus violence, especially to sexual assault that is often associated with the widespread abuse of alcohol. Trigger warnings are a way of displacing the problem, however, locating its solution in the classroom rather than in administrative attention to social behaviors that permit sexual violence to take place. Trigger warnings will not solve this problem, but only misdirect attention from it and, in the process, threaten the academic freedom of teachers and students whose classrooms should be open to difficult discussions, whatever form they take.

At USC–Upstate, the controversy about *Fun Home* coincided with the closure of the Center for Women's and Gender Studies. The transfer of funds underscores the fact that the serious study of sex and sexuality is becoming increasingly vulnerable, leading to self-censorship by faculty members. This state of affairs extends to areas such as creative writing, where some instructors are wary of assignments that may raise the specter of sex, and criminal law, where some faculty members have chosen to omit from their courses units on rape and sexual-assault law out of fear that students may claim that the content is too emotionally distressing. Harvard Law School professor Jeannie Suk contends that, ironically, after long feminist campaigns to include rape law in the law school curriculum, the topic has once again become difficult to teach. Not only is discussion of rape sometimes thought to be "triggering," but discussions of how consent or nonconsent may be communicated in a sexual encounter

47. For a discussion of pedagogical issues posed by this trend, see the AAUP report *On Trigger Warnings*, August 2014, http://www.aaup.org/report/trigger-warnings.

48. Trudy Ring, "S.C. Colleges in LGBT Controversy May Get Funding Back, With Strings Attached," *Advocate*, May 2014, http://www.advocate.com/education/2014/05/14/sc-colleges-lgbt-controversy-may-get-funding-back-strings-attached.

or how social inequalities (tied to class, race, or sexual preferences) might bias the assessment of whether an incident is labeled as a crime risk being perceived as disrespectful of victims. As a result, some students view such necessary debates about the law and sexual violence as fostering a hostile environment.[49]

Efforts to clarify Title IX's application and juridical reach continue to develop in ways that highlight a need for more nuanced understandings of gender-identity dynamics and sexual expression across a diverse spectrum of higher education institutions. In December 2014, for example, the Department of Education offered additional guidance on transgender issues in a learning environment: "All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." This guidance has resulted in more explicit policies on how a student's gender identity factors into admissions and student life at same-sex institutions such as Mills, Mount Holyoke, Simmons, Wellesley, and, most recently, Smith College.[50] Such clarifications, however, coincided in 2014 with the OCR's decision to grant the requests by George Fox University, Spring Arbor University, and Simpson University for Title IX religious exemptions from compliance with such protections for transgender individuals.[51] Some educational institutions have also been granted Title IX exemptions from compliance with protections on the basis of sexual orientation.[52]

While Title IX enforcement should be sensitive to differences in university contexts, this contradictory treatment of LGBTQ rights has resulted in the exclusion of a class of individuals from Title IX protection. Such results may be more likely when no faculty consultation has occurred in the process of implementing Title IX requirements.

The disjuncture between OCR mandates and institutional realities has pushed overzealous administrators to implement policies that are not required under Title IX and have harmful effects on the educational mission. This is evident in the issue of mandatory faculty reporting. College and university administrations often designate all faculty members as mandated reporters, although Title IX does not require such a broad sweep. Such action by colleges and universities may be a result of OCR guidelines that provide latitude to institutions in designating "responsible employees" while nonetheless being specific about exemptions for members of the clergy and health professionals; administrators generally disregard how faculty members differ from most other staff members in their degree of responsibility for the academic and personal well-being of students.[53] For example, the OCR's compliance agreement with the University of Montana obligates "*all employees* who are aware of sex-based harassment, except health-care professionals and any other individuals who are statutorily prohibited from reporting," to report cases to the "Title IX coordinator regardless of whether a formal complaint was filed." As noted above, the OCR has stated that the Montana agreement will serve as a "blueprint" for other institutions of higher education. However, such an overly broad definition of faculty members as mandatory reporters, adopted by colleges and universities without consultation with the faculty, disregards compelling educational reasons to respect the confidentiality of students who have sought faculty advice or counsel.[54] Indeed, many colleges and universities require "all employees" (including faculty members) to complete online sexual misconduct "training" that involves answering multiple-choice and true-or-false questions about, among other things, their status as mandatory reporters; this sidesteps any attempts to determine what mechanisms and policies

49. Jeannie Suk, "The Trouble with Teaching Rape Law," *New Yorker*, December 15, 2014, http://www.newyorker.com/news/news-desk/trouble-teaching-rape-law.

50. Paul G. Lannon, "Transgender Student Admissions: The Challenge of Defining Gender in a Gender Fluid World," *Boston Bar Journal*, April 22, 2015, http://bostonbarjournal.com/2015/04/22/transgender-student-admissions-the-challenge-of-defining-gender-in-a-gender-fluid-world/; see also Scott Jaschik, "Tipping Point for Trans-Admissions?" *Inside Higher Ed*, May 4, 2015, https://www.insidehighered.com/news/2015/05/04/smith-college-will-accept-transgender-applicants-who-identify-women.

51. Amanda Bryk, "Title IX Giveth and the Religious Exemption Taketh Away: How the Religious Exemption Eviscerates the Protection Afforded Transgender Students under Title IX," *Cardozo Law Review* 37 (December 2015): 751–91.

52. Human Rights Campaign, *Hidden Discrimination: Title IX Religious Exemptions Putting LGBT Students at Risk*, (Washington, DC: 2015), 12.

53. See OCR, "Questions and Answers," 21–25.

54. Colleen Flaherty, "Endangering a Trust," *Inside Higher Ed*, February 4, 2015. https://www.insidehighered.com/news/2015/02/04/faculty-members-object-new-policies-making-all-professors-mandatory-reporters-sexual.

exist for allowing appropriate exemptions, particularly when faculty members teach in areas involving the study of gender and sexuality.

Some institutions have in addition adopted policies requiring that course syllabi include statements informing students of faculty reporting obligations relating to sexual harassment and discrimination. The chilling effect such requirements pose constitutes a serious threat to academic freedom in the classroom. How can instructors share their knowledge and research with students if they are unable to ensure privacy when a disclosure by a student to a teacher might happen as part of the student's learning process? If many students view faculty members as "first responders" in their advising and pedagogical capacities, they should be explicitly classified by institutional policies as "confidential" rather than "mandatory" reporters. In addition, reporting mandates perpetuate sex-based double standards that disproportionately burden women and LGBTQ faculty members; students may experience these professors as more responsive to some issues without realizing how bureaucratic and legalistic dynamics may hamstring those faculty members most affected by, and most invested in, advancing Title IX's educational objectives.

2. Research

Even before reaching the publication stage, scholars may find their research activities stymied as institutional review board protocols that previously protected the confidentiality of study participants as an ethical obligation are overruled by administrators who interpret such rights as conflicting with Title IX reporting guidelines.[55] The Oregon State University Office of Research Integrity website indicates that in the case of a study that deals with sexual harassment and sexual violence, the principal investigator and any collaborators or research assistants should recognize a need to file a form reporting an "anticipated adverse event" within thirty days of the disclosure. In scenarios in which the study does not pertain to such topics but a disclosure occurs that requires consultation with the Office of Equity and Inclusion, the principal investigator must submit an "unanticipated problem" form within three days of learning of the information. For researchers who study topics connected to sexual harassment and violence, or for that matter sex and sexuality on campus, this requirement can have a chilling effect. Without the ability to guarantee confidentiality for study participants, researchers may not be able to obtain the necessary data. Furthermore, the three-day reporting period limits the researcher's ability to assess the situation. The research subject has little control over whatever pending procedural matters lie ahead as a result of the disclosure. Fittingly, the need for institutional review board approval of survey questions disseminated by Title IX coordinators to a campus community—for assessing campus climate on the issues and for training student peer counselors—has in turn become an ethical consideration for survey and training participants.[56]

The increased attention of Title IX administrators to the potential risks of any discussions of sex and the climate of fear this new attention has engendered may also have led to censorship in an online academic journal, *Atrium*, published by Northwestern University's Feinberg School of Medicine. In that case, an article by William Peace, who at the time was the Jeannette K. Watson Distinguished Visiting Professor in the Humanities at Syracuse University, about his experiences with one of his caregivers who consensually performed oral sex on him as he was adjusting to life as a paraplegic, was blocked on the grounds that it conflicted with the university's branding agreement with the hospital and medical school. As a result, the guest editor of the journal, Alice Dreger, a nontenured, decadelong member of the faculty, resigned to protest her and Peace's loss of academic freedom. She held that even though the university eventually reversed its course in this instance, it would continue to prevent the publication of articles such as Peace's.[57]

3. Extramural Speech

At Northwestern University, Professor Laura Kipnis found herself the target of a Title IX investigation after student activists claimed that a piece she published in the *Chronicle of Higher Education*, "Sexual Paranoia Strikes Academe," was retaliatory for having

55. Jake New, "Who Must Report?" *Inside Higher Ed*, December 4, 2015, https://www.insidehighered.com/news/2015/12/04/researchers-fraternity-volunteers-argue-exemption-sexual-assault-reporting.

56. See Oregon State University Office of Research Integrity, "What Do I Do If a Research Participant Tells Me about an Experience with Sexual Harassment or Sexual Violence?," accessed May 20, 2016, http://research.oregonstate.edu/irb/frequently-asked-questions/what-do-i-do-if-research-participant-tells-me-about-experience-sexual.

57. Tom Bartlett, "Star Scholar Resigns from Northwestern, Saying It Doesn't Respect Academic Freedom," *Chronicle of Higher Education*, August 25, 2015, http://chronicle.com/article/Star-Scholar-Resigns-From/232601/.

made passing allusions to sexual-assault and sexual-harassment cases on the campus. Professor Kipnis's controversial essay outlined some key generational and perspectival shifts on agency in gender dynamics and sexual relationships, relating how "[s]tudents' sense of vulnerability is skyrocketing" and how the "new codes sweeping America's campuses" had turned some students into "trauma cases waiting to happen."[58] Subsequent Title IX complaints targeted the faculty senate president, who accompanied Professor Kipnis to sessions with investigators and spoke of the proceedings in general terms at a senate meeting, and the university president, who authored a *Wall Street Journal* op-ed piece expressing his support for academic freedom and free speech. Shortly before being exonerated, Professor Kipnis published another piece in the *Chronicle*, "My Title IX Inquisition," which detailed at length the harrowing bureaucratic ordeal, concluding with a defense of her ongoing forays into extramural forums: "[F]or the record, . . . this isn't retaliation. It is intellectual disagreement. . . . [W]hat's the good of having a freedom you're afraid to use?"[59] It is clear from this case that university administrators understood OCR rules to mean that once a complaint (however questionable) had been filed, an investigation had to be pursued. In its 2001 *Revised Sexual Harassment Guidance*, however, the OCR explained that "a reasonable response" to allegations of sexual harassment "will differ depending upon the circumstances."[60] In this case, it was unreasonable for the Northwestern University administrators to conduct an investigation, particularly given the chilling effect that was certain to result from such action.

The institutional monitoring of extramural utterances extends to students as well, particularly with respect to their use of social media (Facebook, Twitter, Yik Yak) and web technologies (blogs, texting, webcams). For example, the Kansas Court of Appeals in September 2015 overruled the University of Kansas administration's decision to expel a student, Navid Yeasin, who had posted tweets on a private account in which he referred to his ex-girlfriend as a "psycho bitch" and "#psycho." The university claimed that, in light of a "no contact" order he had been given after an earlier incident, he infringed on her Title IX rights by creating a hostile environment for her on the campus. The court's decision narrowly focused on the language of the university's code of student conduct, ruling that it did not cover the tweets because there was no evidence the postings happened on campus.[61] Although the ruling limited the university's authority in this case, the court's narrow holding avoided discussion of the more important substantive issue of university administrators' failure to distinguish between punishable conduct and protected speech.

In October 2015, the OCR initiated an investigation of the University of Mary Washington following a civil rights complaint by a campus feminist group that the administration had violated Title IX by deeming harassment on the anonymous app Yik Yak, to be protected by the First Amendment. When the president issued a letter asserting that the university did not have legal authority to track threats made on social media using off-campus networks, the complainants amended the charges to include illegal retaliation for the "disparaging" response. Ultimately, seventy-two women's and civil rights groups urged the Department of Education to pressure colleges and universities to protect faculty members and students from sexually harassing anonymous posts made on social media. A lawyer representing the groups asserted that anonymous apps like Yik Yak were "the new frontier of unlawful conduct under Title IX." This assertion reveals the expanding reach of the OCR's policy that inadequately distinguishes conduct from speech.[62]

In November 2015, a student publication at Michigan Technological University was placed on probation for two years and denied part of its funding after it published a satirical article about a fictional sexually harassed man. The university stated that even though it was clear that the article was a satire, it might be construed as "advocating

58. Laura Kipnis, "Sexual Paranoia Strikes Academe," *Chronicle of Higher Education*, February 27, 2015, http://chronicle.com/article/Sexual-Paranoia-Strikes/190351.

59. Laura Kipnis, "My Title IX Inquisition," *Chronicle of Higher Education*, May 29, 2015, http://chronicle.com/article/My-Title-IX-Inquisition/230489.

60. OCR, *Revised Sexual Harassment Guidance*, 14.

61. Scott Jaschik, "Appeals Court Reverses Twitter-Based Expulsion," *Inside Higher Ed*, September 28, 2015, https://www.insidehighered.com/news/2015/09/28/court-rules-u-kansas-cant-expel-students-over-remarks-twitter-made-campus.

62. See Josh Logue, "Who Should Prevent Social Media Harassment?," *Inside Higher Ed*, October 22, 2015, https://www.insidehighered.com/news/2015/10/22/colleges-face-new-pressure-monitor-social-media-site-yik-yak, and Peter Schmidt, "Women's Groups Urge Colleges and Government to Rein In Yik Yak," *Chronicle of Higher Education*, October 21, 2015, http://chronicle.com/article/Women-s-Groups-Urge-Colleges/233864.

sexual violence." If such an interpretation were possible, administrators maintained, then Title IX required the action it had taken. The vice president for student affairs insisted that the Constitution did not "supersede" it: "Title IX is a federal compliance policy. Those policies supersede anything else."[63] This comment exemplifies the power OCR regulation can exercise over university officials, who tend to interpret Title IX in the most restrictive ways possible—even if it means contradicting common sense as well as constitutional law.

Such ad hoc disciplinary actions taken against students over extramural speech controversies demonstrate how overly broad definitions of hostile-environment harassment work at cross-purposes with the academic freedom and free-speech rights necessary to promote learning in an educational setting. Learning is best advanced by encouraging discussion of controversial issues, not by using punitive administrative and legal fiat to prevent such discussions from happening.

4. Governance

In 2013, a lab technician at Bard College filed a Title IX complaint with the administration against a chemistry professor, apparently alleging that he had used aggressive and vulgar language. (The details of the charge, and of the subsequent investigatory report, were kept secret.) Bard hired a law firm to investigate and then, without disclosing the investigator's report to the professor, imposed sanctions by stripping him of his position as director of the chemistry program, barring him from certain meetings, and requiring him to hire a professional to coach him on job performance. The college's AAUP chapter, acting on behalf of the professor, filed a grievance pursuant to a collective bargaining contract. The college president denied that the contract's grievance procedure applied, maintaining that it was superseded by Title IX. No due process was afforded to the professor, nor did the allegations, even if true, appear to meet any legal definition of sexual harassment. The AAUP chapter sued in federal court, seeking an order enforcing the collective bargaining agreement, but the college ultimately reached a settlement with the professor, and the lawsuit was dropped.[64] The accuser and some of the administrators who pursued his complaint have now left Bard College, but the question of whether institutions can circumvent existing grievance procedures, conduct secret Title IX investigations, and impose sanctions based on a star-chamber-like process remains unanswered at Bard and elsewhere.

The cases involving teaching, research, and extramural speech attest to a severe crisis in academic governance. Rather than use mechanisms of faculty governance to carefully construct institutional measures to address problems of sexual harassment and sexual misconduct, college and university administrations have implemented hastily created procedures in an effort to conform to the OCR's interpretation of Title IX requirements. College and university Title IX administrators, who often lack faculty standing, usually operate out of a human resources department or an office of equity and inclusion, insulated from faculty members, students, and existing shared governance mechanisms. For the most part, faculty members do not participate in the formulation of sexual-assault and sexual-harassment policies, instead encountering them as information items on a senate agenda or a university website. As a result, the process of adopting and implementing Title IX procedures has been carried out in parallel with—but independent of—the policies and practices of academic freedom, due process, and shared governance, all of which are crucial to the work of faculty members and students at all stages of their academic careers as well as to sustaining the university's educational mission.

The 1994 AAUP statement *On the Relationship of Faculty Governance to Academic Freedom* recognizes that "sound governance practice and the exercise of academic freedom are closely connected, arguably inextricably linked." Faculty participation in institutional governance is essential to creating policies and procedures that protect academic freedom in teaching, research, and extramural speech and that require due process in investigating and adjudicating allegations of misconduct. As discussed in section IV, AAUP statements and reports on sexual misconduct and sexual harassment provide sources for developing policies and procedures that are responsive to the laudable goals of Title

63. Madeline Will, "Student Satire Publication Lost Funding, Put on Probation after Article on Sexual Harassment," Student Press Law Center, December 15, 2015, http://www.splc.org/article/2015/12/student-satire-publication-lost-funding-put-on-probation-after-article-on-sexual-harassment.

64. Conor Skelding, "Union Sues Bard College over Title IX Investigation," *Politico New York*, April 10, 2015, http://www.capitalnewyork.com/article/albany/2015/04/8565830/union-sues-bard-college-over-title-ix-investigation.

IX yet are respectful of the principles of academic freedom and sensitive to the free-speech and due-process rights of faculty members and students alike. Through shared governance, faculty members can and should play a key role in creating sexual-harassment policies that define proscribed conduct and speech while protecting academic freedom and free expression. Faculty participation in the creation and implementation of policies can ensure that due process and peer review are central to investigating and adjudicating allegations of sexual misconduct or harassment. Participation of faculty members in disciplines related to gender and sexuality can be particularly important, since they are vulnerable to the chilling effect of potential hostile-environment charges and are disproportionately affected in their teaching and research as a result of the adoption of overly broad designation of all faculty members as mandatory reporters.

Infringements on academic freedom such as those that occurred in the cases described above are often the consequence of procedures that violate due process and override faculty peer review. Administrators have taken unilateral action against faculty members under adjudicatory protocols that impose tight procedural timelines in the name of complying with Title IX. For example, Professor Adler's dizzying reversal of fortune with respect to sexual-harassment allegations happened during a winter break intersession. Professor Buchanan's positive promotion status became "unacceptable performance" in roughly a fortnight, triggering a human resources investigation that found her guilty of the charges she had yet to hear. The LSU administration gave priority to this precipitate action to preempt consideration of a faculty hearing committee's contrary findings that were reached after many months of sifting evidence. Professor Kipnis's Title IX "inquisition" similarly turned into a referendum on shared governance when the complainants deemed the senate chair who accompanied her to some meetings a conspiratorial harasser merely for having alluded to the case in general terms before the faculty senate. Bard College failed to afford due-process protections to the chemistry professor, maintaining secrecy in its Title IX investigation, refusing to follow the grievance procedure in the collective bargaining agreement, and pursuing a Title IX investigation based on charges that, apparently, involved only vulgar language.

The role of faculty governance in defining and applying protections of academic due process is essential to safeguarding the interests in fair adjudication of all parties, including victims. For example, an investigation of astronomer Geoffrey Marcy at the University of California, Berkeley, who was alleged to have repeatedly harassed female students without significant consequences, became public not as a result of a faculty hearing, but because *BuzzFeed* broke the story, much to the surprise of colleagues and students on the campus, whose expression of collective outrage at the allegations ultimately forced his resignation.[65] As their explanation for refusing disciplinary action in the situation, administrators cited "lengthy and uncertain" hearing guidelines with differing evidentiary standards and a three-year limitations period they could not reconcile with Title IX investigation requirements. The administration thus managed to avoid addressing a case of alleged sexual misconduct by a "celebrity" faculty member. In the process, established governance procedures were bypassed in the name of Title IX requirements.[66] Additional sexual-harassment charges at UC Berkeley have surfaced that raise similar concerns about the processes used in investigations and in arriving at decisions about sanctions to be applied.[67]

In the Marcy case, University of California system president Janet Napolitano called for a reassessment of procedures for investigating misconduct complaints against tenured faculty members. Her suggestions might instead be redirected to protecting due-process rights for tenured, tenure-track, and non-tenure-track faculty members, while also improving the fairness of reporting and investigative procedures for faculty members and students who have filed complaints of sexual harassment or other sexual misconduct. Unfortunately, Title IX enforcement processes do not now do this work.

UC Berkeley chancellor Nicholas Dirks named Carla Hesse, dean of social sciences and executive dean of the College of Letters and Science, to serve as

65. Azeen Ghorayshi, "Famous Berkeley Astronomer Violated Sexual Harassment Policies over Many Years," *BuzzFeed News*, October 9, 2015, http://www.buzzfeed.com/azeenghorayshi/famous-astronomer-allegedly-sexually-harassed-students.

66. Berkeley had been placed on a list of institutions being investigated for Title IX violations the previous year; see Sahil Chinoy, "UC Berkeley on New List of Schools under Investigation for Handling of Sexual Violence," *Daily Californian*, May 5, 2014, http://www.dailycal.org/2014/05/01/uc-berkeley-new-list-schools-investigation-handling-sexual-violence/.

67. Nanette Asimov, "UC Berkeley Announces Improvements to Harassment Response," *SF Gate*, March 27, 2016, http://www.sfgate.com/education/article/UC-Berkeley-announces-improvements-to-harassment-7029697.php.

"interim campus lead" on problems of sexual harassment. Unfortunately, in one of her first public acts in that role, Hesse published an op-ed in the *Daily Californian* that exemplifies the problem of conflating conduct and speech. Hesse stated: "[I]f we are going to succeed in producing a campus environment in which every one of our members can enjoy the personal safety and social dignity that are preconditions for freedom, we are going to have to learn how to embrace the virtue of respect for those who are different and of those with whom we disagree. Without respect, the Free Speech Movement becomes the Filthy Speech Movement. Free love becomes harassment and even assault."[68] Hesse's focus on getting rid of "filthy speech" and learning to respect different viewpoints opens the door to restrictions on free speech and academic freedom. Further, her description presents only an individual rather than a structural analysis of why sexual harassment persists and how to eliminate it. In a subsequent op-ed responding to these critiques, Hesse acknowledged the importance of addressing underlying structural problems.[69]

In interpreting Title IX, Harvard University law professor Janet Halley has suggested that a feminist model of governance could create fair and transparent adjudicative procedures, particularly in light of sensitivities surrounding topics like sex. Halley calls on "governance feminist decision-makers" to acknowledge the dangers posed by overzealous applications of Title IX, pointing out "the rights they invade: rights to privacy, to autonomy, to due process."[70] She urges vigilance in opposing procedural frameworks that may disadvantage an accuser or an accused on the basis of class, sexual identity, or racial difference, depending on the nature of the hostile-environment or sexual-harassment allegations.

Halley's critique contrasts faculty governance interests in due process with university administrative interests in risk-avoidance and institutional control. As Halley contends, "[i]ncreasingly, schools are being required to institutionalize *prevention*, to control the *risk* of harm, and to make *regulatory* action to protect the *environment*. Academic administrators are welcoming these incentives, which harmonize with their risk-averse, compliance-driven, and rights-indifferent worldviews and justify large expansions of the powers and size of the administration generally."[71] Such administrative excess frustrates meaningful recognition of the goals of Title IX by prioritizing liability risks over the realities of sexual and other inequalities on campus. This administrative overreliance also erodes faculty governance and academic freedom—the very preconditions necessary to address such inequality on campus and beyond.

III. Title IX in the Context of the "Corporate" University

Proponents of Title IX's broad interpretation and robust enforcement often suggest equivalence between bringing a sex discrimination claim, successfully resolving it, and delivering gender justice. Recent developments in the interpretation and enforcement of Title IX, however, risk fostering conditions that facilitate or encourage constraints on faculty members' and students' academic freedom and access to due process. Further, when Title IX's legal mandate to end sex discrimination is not accompanied by corresponding institutional commitments to ending racial or other forms of inequity on campus, its enforcement, however well-intentioned, may exacerbate gender, racial, and other injustices.

A serious assessment of Title IX's current implementation must account for how its enforcement affects and is affected by the social contexts in which it is applied and in which it operates. To start, the merits of Title IX as a principal instrument in the fight to end sex discrimination on campus must be evaluated in light of the increasing "corporatization of the university." That phrase refers to a new organizational model of university management and governance that is entrepreneurial at its core. In part a result of reductions in state and federal support for higher education, the model also reflects a vast cultural change in thinking about the value and function of higher education, one that is oriented more toward vocational training than toward humanistic learning. The entrepreneurial model privileges administrative managerial methods and interests; evaluates and reduces or eliminates departments and disciplines

68. Carla Hesse, "Mutual Respect Must Inform Any Solution," *Daily Californian*, April 12, 2016, http://www.dailycal.org/2016/04/12/352614/. For letters to the editor critiquing Hesse's op-ed and Hesse's response, see http://www.dailycal.org/2016/04/22/community-criticizes-op-ed-from-interim-lead-on-campus-sexual-misconduct-response/.

69. Carla Hesse, "Concept of Freedom Mischaracterized in Responses to Op-Ed," *Daily Californian*, April 26, 2016, http://www.dailycal.org/2016/04/26/concepts-of-freedom-mischaracterized-in-responses-to-op-ed/.

70. Janet Halley, "Trading the Megaphone for the Gavel in Title IX Enforcement," *Harvard Law Review Forum* 103 (February 2015): 117.

71. Ibid.

according to borrowed business metrics of economic efficiency; and promotes a commercial model of higher education, in which student satisfaction as "education consumers" is paramount.

Critics have noted that Title IX–based efforts to end sex discrimination on campus effectively view the university as a universe unto itself. Sex discrimination on campus is figured as a discrete issue, one that can be considered in isolation from the large cultural problem of sexual violence and harassment.[72] This perspective carries particular assumptions about how and by whom sexual assault and harassment on campus might be best addressed. In this view, the institution is the author of its own solutions: careful policy drafting and the judicious application of Title IX will eradicate the problem. Not coincidentally, this approach positions administrators as the definitive source of such policies, enlisting them as the first-line enforcers of Title IX.

As a result, college and university efforts to comply with Title IX have followed the trail blazed by departments of human resources, where the establishment of reporting protocols and internal processes can take precedence over holistic challenges to prevailing gender and sexual norms. Harvard University, for example, has created a single-purpose Title IX office, specializing exclusively in the adjudication of sexual and gender-based harassment claims, and many colleges and universities have implemented mandatory training to instruct students, faculty members, and staff members on what behaviors run afoul of Title IX. In attempts at educational outreach, many institutions recruit their own students to attend and lead orientation and training on the issue of sexual assault on campus and the importance of obtaining sexual consent. The University of Richmond, Rutgers University, Johns Hopkins University, American University, and the University of Michigan all offer some form of "for student, by student" anti-sexual-violence initiatives as evidence of Title IX compliance.[73]

The efficacy of these student-based efforts, however, remains an open question; they pose challenges and limitations that need to be addressed.[74] Critics charge that isolating sex discrimination as a problem of institutional culture frustrates meaningful change. As law professor Francine Banner notes, this approach pits individuals against public institutions, resulting in a scenario in which the law "overvalues the maintenance of organizational loyalty and undervalues the rights of victims."[75] Institutional protocols and procedures can also be at odds with those of the criminal justice system—not that either approach is particularly noted for the quality of its response. Both systems stand accused of serving neither survivors nor alleged perpetrators with any notable degree of fairness. Additionally, even if a student is found to be in violation of Title IX, the internal sanctions meted out by colleges and universities do little to prevent that student's bad behavior from occurring beyond the bounds of the quad.[76] Defining sex discrimination on campus as an institutional or individual peculiarity frustrates a more comprehensive examination of social norms and practices that contribute to sex discrimination while entrenching administrative decision making and organizational power.

Problems of defining what counts as sexual harassment are compounded by the administrative and governance structures of the entrepreneurial university itself. Title IX compliance is in the hands of administrators, while the courses that might address structures of discrimination and inequality are often marginalized and underfunded. Emphasis on external research funding devalues programs such as gender, feminist, and sexuality studies, which are unlikely to have the same kinds of research grant opportunities as social science and science departments. The current focus on measuring the worth of higher education in terms of a path to employment also lowers the perceived value of such programs. Further, seeking to raise more tuition

72. See Francine Banner, "Institutional Sexual Assault and the Rights/Trust Dilemma," *Cardozo Journal of Public Law and Policy Ethics* 13 (August 2015): 97–172.

73. Sarah Brown, "How One University Uses New-Student Orientation to Talk about Sexual Assault," *Chronicle of Higher Education*, August 26, 2015, http://chronicle.com/article/How-One-University-Uses/232603/.

74. See Greg Lukianoff and Jonathan Haidt, "The Coddling of the American Mind," *The Atlantic*, September 2015, http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/, and Samantha Harris and Greg Lukianoff, "Threats to Due Process and Free Speech on Campus," in *Liberty's Nemesis: The Unchecked Expansion of the State*, ed. Dean Reuter and John Yoo (New York: Encounter Books, 2016), 169–80.

75. Banner, "Institutional Sexual Assault," 106.

76. See Zoë Carpenter, "Who Should College Students Really Call When They Are Sexually Assaulted on Campus?," *The Nation*, December 10, 2014, http://www.thenation.com/article/who-should-college-students-really-call-when-they-are-sexually-assaulted-campus-0/.

revenue, universities "are investing in resort-like amenities, even as they cut academic departments and financial aid."[77] Allied disciplines such as Africana studies, Latino/a studies, and other locations for gender and sexuality inquiry as well as critical race and ethnic studies scholarship across the humanities and social sciences have faced similar setbacks. One recent example is the drastic—40 percent—budget cut for ethnic studies at San Francisco State University, part of "the structural undercutting of Ethnic Studies across the California State University system."[78] At Berkeley, in 2015, the administration proposed "repositioning" the Center for Race and Gender, effectively decreasing its institutional support.[79] Similar attacks on such programs have charged them with contributing to divisiveness and stressing collective over individual experience.

The entrepreneurial university offers a single-purpose Title IX infrastructure and authorizes training to address sex discrimination while simultaneously promoting a culture of inequality by employing large numbers of underpaid adjunct faculty members and graduate students. A study of changes in higher education faculty appointments concludes that women are disproportionately represented in these contingent positions: "More than half of all female faculty now hold part-time positions and more than 45 percent of full-time female faculty have non-tenure-track appointments."[80] In higher education, as in other employment sectors, such employment conditions can create a disempowered workforce that lacks the institutional security to take advantage of basic modes of redress, including those afforded by Title IX for sex discrimination.

While the original aims of Title IX and the legal meaning of "sex discrimination" encompass more than sexual violations, today the claims most readily associated with Title IX involve sexual violence or sexual harassment, whether actual conduct or speech. This is largely a result of the efforts of a national student movement against sexual violence on campus, often in the name of enforcing Title IX. While students' wide-ranging commitment to combating sexual violence across a number of fronts is admirable and necessary, institutional engagement with such activism in the context of the corporate university can result in disturbing outcomes. First, administrative efforts to address sexual harassment and violence have adopted bureaucratic and legalistic methods that reward the narrowest forms of activism, student or otherwise, on campus. In this context, invocations of Title IX—and in particular calls by some activists to adhere to OCR and US Department of Justice criteria—have effectively narrowed the popular meaning of sex discrimination to sexual speech and sexual violence, often conflating the two. This singular focus on sexual harassment has overshadowed issues of unequal pay, access, and representation throughout the university system.

Additionally, the treatment of students as "clients" in the corporate university has obscured the question of how to deal with prohibited behavior on campus. The client-service model allows administrations to try to have it both ways. For example, the University of Colorado at Boulder recently settled a lawsuit, for $15,000, from a former student who said the university violated Title IX when it suspended him for nonconsensual sexual intercourse. The university's behavior in this case satisfied the law, and it satisfied the accuser by finding the accused responsible, but it mitigated any fallout by settling the accused individual's resulting lawsuit.[81] This bureaucratic and legal resolution does not address the question of whether sex-based inequality is being remedied.

Finally, investigations of claims of sexual harassment and violence do not necessarily understand those claims as embedded within the broader social dynamics on and off campus. As Janet Halley points out, this segmented approach to sex discrimination promotes partial and legalistic analyses of the nature and scope of the problem, obscuring how biases or

77. Michelle Goldberg, "This Is What Happens When You Slash Funding for Public Universities," *The Nation*, May 19, 2015, http://www.thenation.com/article/gentrification-higher-ed/.

78. San Francisco State pioneered ethnic studies in the 1960s and 1970s in response to student strikes, and the program flourished there until recently. Quotation from Joanne Barker, "The Beginning and End of Ethnic Studies," *Tequila Sovereign* (blog), February 22, 2016, https://tequilasovereign.wordpress.com/2016/02/22; see also "Remembering the Strike," *SF State Magazine*, Fall/Winter 2008, http://www.sfsu.edu/~sfsumag/archive/fall_08/strike.html.

79. Barker, "The Beginning and End of Ethnic Studies."

80. For an analysis of data from 1975 through 2007, see Ernst Benjamin, "The Eroding Foundations of Academic Freedom and Professional Integrity: Implications of the Diminishing Proportion of Tenured Faculty for Organizational Effectiveness in Higher Education," *Journal of Academic Freedom* 1 (2010), http://www.aaup.org/reports-publications/journal-academic-freedom/volume-1.

81. See Robin Wilson, "Should Colleges Be Judging Rape?" *Chronicle of Higher Education*, April 12, 2015, http://chronicle.com/interactives/assault_judging.

discrimination on the basis of race, sexual orientation, or gender identity may be ignored or even perpetuated by a narrow view of gender equality.[82] This approach fails to respond to the overarching question: What vision of justice, educational access, and public accountability should the enforcement of Title IX seek to facilitate?

The answer depends in part on what counts as sex discrimination—particularly what conduct or speech (and in what amounts) can support a charge of sexual harassment. While financial cuts and program eliminations have threatened entire disciplines and methods of producing knowledge, struggles over the importance and scope of academic freedom in the context of sex discrimination have also surged across campuses nationwide. From trigger warnings to tweets, the AAUP has documented an increase in potential threats to the academic freedom that protects teaching, research, and extramural speech and that fosters shared governance by administrations, students, and faculty members. When Title IX concerns play out as sexual-harassment panics within the corporate university, academic freedom is threatened across several fronts.[83] Under such interpretations of Title IX, faculty members who teach, research, and otherwise study sexuality are left especially vulnerable to sexual-harassment charges. Further, those who seek to bring material related to sex or sexuality into courses not specifically devoted to those topics are also reluctant to do so for fear of being accused of violating Title IX. In responding to the OCR's 2011 "Dear Colleague" letter, the AAUP warned of this danger, emphasizing that "[a]ny training for faculty, staff, and students" about how to identify and report sexual harassment "should explain the differences between educational content, harassment, and 'hostile environments,' and a faculty member's professional judgment must be protected. Women's studies and gender studies programs have long worked to improve campus culture by teaching about issues of systemic gender inequity, sex, and sexuality. [The OCR] should encourage discussion of topics like sexual harassment both in and outside of the curriculum, but acknowledge that what might be offensive or uncomfortable to some students may also be necessary for their education."

IV. AAUP Policies on Sexual Harassment and Academic Freedom

There is no necessary contradiction between effectively addressing problems of sexual harassment (assault, inappropriate conduct, and unprotected speech) and fully protecting academic freedom. AAUP policies consistently have condemned sexual harassment while emphasizing the need for institutions of higher education, through shared governance, to adopt clear and fair policies and procedures pertaining to sexual harassment. Such policies and procedures should respect academic freedom and due-process rights and should seek not only to respond appropriately to sexual harassment, but also to prevent it.

The AAUP report *Sexual Harassment: Suggested Policy and Procedures for Handling Complaints*, revised most recently in 2014, states:

> Recently, national attention has focused on complaints of sexual harassment in higher education. These particular complaints invoke the Association's more general commitment to the maintenance of ethical standards and the academic freedom concerns these standards reflect. In its *Statement on Professional Ethics*, the Association reiterates the ethical responsibility of faculty members to avoid "any exploitation of students for . . . private advantage." The applicability of this general norm to a faculty member's use of institutional position to seek unwanted sexual relations with students (or anyone else vulnerable to the faculty member's authority) is clear. Similarly, the Association's *Statement on Freedom and Responsibility* states that "intimidation and harassment" are inconsistent with the maintenance of academic freedom on campus. This statement is no less germane if one is being made unwelcome because of sex, rather than because of race, religion, politics, professional interests or other irrelevant characteristics. The unprofessional treatment of students and colleagues assuredly extends to sexual discrimination and sexual harassment, as well as to other forms of intimidation.[84]

82. Halley, "Trading the Megaphone for the Gavel," 117.

83. Sex panics are essentially moral panics, the imposition of state- or elite-generated moral norms that result in the punishment of women, queer people, and people of color for transgressing normative rules of sexuality. See Roger N. Lancaster, *Sex Panic and the Punitive State* (Berkeley: University of California Press, 2011).

84. *AAUP Policy Documents and Reports* (Baltimore: Johns Hopkins University Press, 2015), 363.

The report proposes a policy for colleges and universities desiring a separate statement of policy on sexual harassment that distinguishes conduct or speech defined as sexual harassment from protected speech:

> It is the policy of this institution that no member of the academic community may sexually harass another. Sexual advances, requests for sexual favors, and other conduct of a sexual nature constitute sexual harassment when:
>
> 1. such advances or requests are made under circumstances implying that one's response might affect educational or personnel decisions that are subject to the influence of the person making the proposal; or
> 2. such speech or conduct is directed against another and is either abusive or severely humiliating, or persists despite the objection of the person targeted by the speech or conduct; or
> 3. such speech or conduct is reasonably regarded as offensive and substantially impairs the academic or work opportunity of students, colleagues, or co-workers. If it takes place in the teaching context, it must also be persistent, pervasive, and not germane to the subject matter. The academic setting is distinct from the workplace in that wide latitude is required for professional judgment in determining the appropriate content and presentation of academic material.[85]

AAUP statements and reports have consistently upheld the need for due-process protections for faculty members facing disciplinary investigations and hearings. The AAUP's *Recommended Institutional Regulations on Academic Freedom and Tenure* provides, "The burden of proof that adequate cause [for dismissal or other severe sanction] exists rests with the institution and will be satisfied only by clear and convincing evidence in the record considered as a whole." The 1994 statement *Due Process in Sexual-Harassment Complaints* emphasizes that institutions of higher education should not bow to pressure to sacrifice due-process standards in handling sexual-harassment complaints:

> These instances of avoiding or shortcutting recognized safeguards of academic due process in treating complaints of sexual harassment may be motivated partly by fear of negative publicity or of litigation if prompt and decisive action does not appear to be taken, or they may be motivated by a well-meaning desire to cure a wrong. Nonetheless, sexual harassment—which Committee A certainly does not condone, be the offender a faculty member or anyone else—is not somehow so different from other kinds of sanctionable misconduct as to permit the institution to render judgment and to penalize without having afforded due process. In dealing with cases in which sexual harassment is alleged, as in dealing with all other cases in which a faculty member's fitness is under question, the protections of academic due process are necessary for the individual, for the institution, and for the principles of academic freedom and tenure.[86]

Endorsing the "clear and convincing" evidence standard as part of due process, the 2012 statement of the AAUP's Committee on Women in the Academic Profession, *Campus Sexual Assault: Suggested Policies and Procedures*, states:

> In an effort to improve the likelihood of bringing perpetrators to justice, the Office for Civil Rights . . . argues in its "Dear Colleague Letter" that replacing the prevailing standard of "clear and convincing evidence" with a "preponderance-of-the-evidence" standard would help level the playing field for victims of sexual violence. The proposal has in general been favorably received by women's advocacy groups and sexual-assault support agencies but has been opposed by many organizations representing both progressive and conservative values. The AAUP advocates the continued use of "clear and convincing evidence" in both student and faculty discipline cases as a necessary safeguard of due process and shared governance. The committee believes that greater attention to policy and procedures, incorporating practices we have suggested here, is the more promising direction.[87]

In July 2014, AAUP associate secretary Anita Levy further explained the importance of the "clear

85. Ibid., 363–64.

86. *Due Process in Sexual-Harassment Complaints* (1994), https://www.aaup.org/report/due-process-sexual-harassment-complaints.

87. *AAUP Policy Documents and Reports*, 371.

and convincing" standard in her written remarks to the US Commission on Civil Rights for its panel on "Academic Freedom and Sexual Harassment Law Enforcement":

> Given the seriousness of accusations of harassment and sexual violence and the potential for accusations, even false ones, to ruin a faculty member's career, we believe that the "clear and convincing" standard of evidence is more appropriate than the "preponderance of evidence" standard. Since charges of sexual harassment against faculty members often lead to disciplinary sanctions, including dismissal, a preponderance of evidence standard could result in a faculty member's being dismissed for cause based on a lower standard of proof than what we consider necessary to protect academic freedom and tenure. We believe that the widespread adoption of the preponderance of evidence standard for dismissal in cases involving charges of sexual harassment would tend to erode the due process protections for academic freedom. While clear policy statements and timely responses are critical for both the complainant and the accused, preserving a higher standard of proof is vital in achieving fair and just treatment for all. We urge both the Departments of Education and Justice to reconsider "the preponderance of evidence" standard.

AAUP statements and reports emphasize that shared governance is essential to creating and implementing programs, policies, and procedures to address sexual assault and sexual harassment. As the AAUP's 2012 statement on campus sexual assault states, "All members of the campus community—faculty members, administrators, staff members, and students—share responsibility for addressing the problem of campus sexual assault and should be represented in the policy-development process." The statement discusses, as well, "the special role and responsibility of faculty members, a group often overlooked in campus sexual-assault prevention and training programs." The 2014 report on sexual harassment proposes procedures for handling sexual-harassment complaints against faculty members, including a faculty review committee to hold hearings, determine the merits of complaints, and make recommendations of any sanctions that may be appropriate.

AAUP statements and reports should be amended, as needed, to further clarify the distinctions between sexual assault and harassment and between speech and conduct and to strengthen academic freedom protections. The 2012 AAUP statement on sexual assault, for example, notes that it employs the term *sexual violence* to mean "sexual harassment, sexual abuse, sexual assault, rape, stalking, domestic violence, and other forms of sexual misconduct." Using the term "sexual violence" so broadly does not adequately distinguish sexual harassment—particularly where it involves only speech—from other types of sexual misconduct.

Sexual Harassment: Suggested Policy and Procedures for Handling Complaints proposes a policy that distinguishes protected speech from conduct or speech that might constitute sexual harassment. Further, the policy includes protection of conduct in the teaching context. This could include expressive conduct such as gestures, dance, or other types of actions. To further clarify the protection of speech and expressive conduct, the proposed policy could be amended to include specific references to academic freedom. The proposed policy could also be amended to clarify that teaching, research, and extramural speech protected by academic freedom are excluded from definitions of sexual harassment.

V. Conclusion

Following are recommendations for the OCR, for administrators, and for faculty members.

A. Recommendations for the Office for Civil Rights of the Department Of Education

1. ***The OCR should reiterate its interpretation of Title IX as protecting academic freedom and freedom of speech.*** The OCR should reiterate and emphasize its 2001 *Revised Sexual Harassment Guidance* and 2003 "Dear Colleague" letter, which interpret Title IX as protecting students from sex discrimination while also protecting academic freedom and free speech in public and private educational institutions. To protect academic freedom adequately, the OCR should distinguish between allegations of sexual harassment based on conduct and allegations based on speech. The OCR should clarify that proof of sexual harassment (particularly hostile-environment sexual harassment) cannot be based only on subjective perceptions that speech is offensive and that, in the words of the 2001 guidance,

"[i]n order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program."

2. ***The OCR should interpret Title IX as fully protecting due-process rights of complainants and accused parties.*** The OCR should increase its attention to ensuring the protection of due process in all stages of Title IX investigations and proceedings. Given the seriousness of accusations of sexual harassment and sexual violence and the consequences for reputations and careers that can result from such accusations, even false ones, the "clear and convincing" standard of evidence is more appropriate than the "preponderance of evidence" standard. Indeed, criminal courts require evidence "beyond a reasonable doubt"—and some sexual-assault cases are criminal cases. At a minimum, the OCR should recognize the freedom of colleges and universities to adopt the "clear and convincing" standard of evidence. Further, the OCR should not mandate the lesser "preponderance of evidence" standard without first engaging in the federal administrative rule-making process.
3. ***The OCR should work with colleges and universities in constructive ways to develop policies and procedures for applying and enforcing Title IX.*** The OCR should refine its compliance process to minimize confrontation and instead develop the potential to work with colleges and universities to create policies and procedures for responding effectively to Title IX complaints while also protecting academic freedom, preserving free speech, and providing due process for all parties. The OCR should also help colleges and universities to develop educational programs that address underlying problems of gender inequality, including sexual assault and sexual harassment. Such measures should not be based on a "blueprint" but should instead seek to facilitate measures that address gender inequality in ways that best fit particular institutions.

B. Recommendations for College and University Administrators

1. ***Colleges and universities should reference and incorporate AAUP language on academic freedom in all Title IX policy.*** Colleges and universities must strengthen policies to protect academic freedom from overly broad harassment definitions and other excessive regulatory protocols. Administrations often view academic freedom as an obstacle to policies that have already been promulgated instead of as a foundational tenet of higher education that should shape institutional policy. Instead, and from their inception, institutional policies should strive to ensure academic freedom by referencing AAUP policies and actively incorporating their strong protections.

   Policies against sexual harassment should distinguish speech that fits the definition of a hostile environment from speech that individuals may find hurtful or offensive but is protected by academic freedom. Title IX policies ought not to be treated as special or separate from other institutional policies that are developed and approved through faculty governance.
2. ***Colleges and universities should include the faculty in all stages of Title IX policy development, implementation, and enforcement.*** Respect for faculty governance ought to be a tenet of administrative practice. Crucially, faculty representatives should be included in all stages of the development, implementation, and enforcement of policies on sexual harassment. Because Title IX prohibits nonsexual sex discrimination as well as conduct that does not rise to the legal definition of assault, broad-based campus community participation in the development, implementation, and enforcement of Title IX is especially crucial to fulfilling its expansive vision of equality. Faculty members have a key role to play.

   Faculty senates can further academic freedom by drafting and enshrining protective language within the faculty handbook policies regarding sex discrimination. Where the faculty is unionized, such protections can be included in the collective bargaining agreement. Additionally, in order to ensure adequate due process, the faculty should be meaningfully involved in the creation of any campus adjudication system and should drive every stage of its operation. Entrusting a trained, appropriately constituted faculty body to review all Title IX complaints involving faculty members would offer a timely

defense against unprincipled and overly broad interpretations of Title IX that potentially subject speech that provokes feelings of discomfort to the same institutional process and censure as sexual assault. Faculty members, enmeshed as they are in the quotidian work of campus life, are uniquely situated to help diagnose threats to academic freedom that may accompany sincere attempts to effect equality on campus. Precisely because the difference between protected and unprotected speech is not easy to define, faculty members are in the best position to help facilitate context-sensitive assessments of the issues at stake. Training on these questions might well be provided by AAUP representatives, who can help to clarify the definition of sexual harassment, to distinguish between conduct and speech, and to keep crucial issues of academic freedom at the forefront of policy making.

3. ***College and university policies should not require all faculty members to serve as mandatory reporters under Title IX.*** Colleges and universities are not required, under Title IX, to define all faculty members as mandatory reporters. Such overly broad policies compel faculty members to violate confidentiality in their relationships with students. Institutions of higher education can better facilitate the achievement of Title IX's commendable goals of remedying sex-based discrimination if they more resolutely focus on creating educational initiatives and recommending procedural models that involve faculty members in more relevant ways. For example, Title IX policy development at the institutional level could support ways for faculty members to engage students who are concerned about how best to achieve gender and sex equity on campus. They would work collaboratively to address those issues without violating academic freedom and due-process rights. This is an issue not only of shared governance but also of the educational mission of colleges and universities.

4. ***Campuses should coordinate Title IX enforcement with the criminal justice system.*** While most sexual-harassment complaints involve institutional regulations or civil law, sexual-assault allegations also implicate criminal law. In cases involving allegations of sexual assault, colleges and universities can improve their handling of Title IX claims by clarifying their relationship to the criminal justice system. Allegations of campus sexual assault can currently trigger two parallel institutional responses: those of the criminal justice system and those of the university.

The criminal justice system is neither the sole nor necessarily the best option for addressing the norms and practices that lead to sexual assault. Under Title IX, colleges and universities should also pursue Title IX sexual-assault claims in ways that mitigate some of the problems of a criminal justice approach. This can include, as the AAUP's 2012 statement *Campus Sexual Assault: Suggested Policies and Procedures* advises, partnering with local police departments early in the process "to determine the rules, definitions, laws, reporting requirements, and penalties that pertain to sexual assault in the local criminal justice system." Of equal importance is that minimum professional standards are agreed upon and observed: as the statement notes, "closer collaboration with local law enforcement, greater knowledge of what constitutes 'a crime,' and better coordination between campus and community service providers would aid many colleges and universities in more effectively addressing the problems of campus sexual assault." Greater knowledge of what constitutes a crime, as distinct from bad behavior that may breach university policies, can help institutional authorities to decide whether and when the criminal justice system should be involved in responding to sexual misconduct allegations. Conversely, understanding criminal sexual assault might also help prevent unproductive appeals to the criminal justice system. Collaborations of this sort are already occurring between universities and local police.

For example, Southern Oregon University, together with the city of Ashland police department, has transformed its approach to sexual-assault reports in ways that signal serious concern for survivors of sexual assault while still safeguarding the rights of alleged perpetrators. SOU empowers survivors of sexual assault by accepting anonymous reporting until the initiation of criminal proceedings. Further, the police department created a program, You Have Options, that allows survivors to halt proceedings at any time; SOU has a companion program, Campus Choice, that accommodates

possibilities for suspending investigations, so that students can manage other aspects of their lives as the process unfolds. Additionally, both the university employees and the Ashland police department personnel who work on sexual-assault cases receive targeted training in interviewing sexual-assault survivors.[88] Coordinated efforts on the part of campuses and local criminal justice systems can help address the differences between due process and definitional concerns in the educational setting and those in the criminal justice system. These efforts should lead to better strategies to address some of the problems that currently plague administrations' preemptive and precipitate attempts to comply with Title IX at the expense of academic freedom, due process, and meaningful equality on campus.

5. ***Colleges and universities should consider adopting restorative justice practices for some forms of prohibited misconduct.*** By adopting restorative justice practices for some forms of misconduct, institutions can comply with the letter of Title IX without falling victim to the totalizing approach proffered by the OCR and the 2011 "Dear Colleague" letter.[89] Unlike the criminal justice approach, which involves investigating allegations of criminal activity and determining the punishment of the individual wrongdoer, a restorative justice approach focuses on repairing the harm done to the survivor and the community. A restorative justice model, which requires both the accuser and the accused to agree to participate in the process, encourages meetings between the two as well as community-wide discussion, often led by a facilitator. Restorative justice aims to make amends to the survivor and dissuade the accused from reoffending. As the *New York Times* reports, "the accused might apologize, undergo education, agree to be monitored or take other actions to help the victim and community recover."[90] While not necessarily applicable in the most severe cases, such as in many forms of sexual assault, a restorative justice model may prove useful in transforming other forms of conduct that violate Title IX, as well as conduct that falls between a Title IX violation and legal, if ill-advised, bad behavior. As the *New York Times* article notes, Dalhousie University in Halifax, Nova Scotia, successfully implemented this approach for university-based sexual-harassment claims earlier this year, when women in the dental school reported that male classmates had made inappropriate comments on Facebook. A commitment to restorative justice could help limit the scope of hostile-environment claims by providing a mechanism for addressing potentially harmful behavior that does not exaggerate the nature of the harm or inappropriately escalate the response to it.[91] The limiting effect of a restorative justice approach might also help safeguard the procedural rights of the accused. Further, restorative justice measures might help mitigate the effects of potential discrimination on the basis of race, gender identity, and sexual orientation that more litigious sex equality efforts (such as those encouraged by the latest actions of the OCR) can obscure.

6. ***Colleges and universities must address all forms of inequality on campus, including inequalities of race, gender identity, class, and sexual orientation.*** To secure the rights of the complainants and the accused, campus initiatives must be conscious of potential bias in sex discrimination claims. Following Janet Halley's suggestion, Title IX offices could take on a compliance-monitoring role and stay out of the business of adjudicating cases. As Halley writes, "[c]ases should go to a body charged with fairness to all members of our community, and with particular charges not only to secure sex equality but also to be on the lookout for racial bias and racially disproportionate impact and for discrimination on the basis of sexual orientation and gender identity—not only against complainants but also against the accused."[92]

88. See Carpenter, "Who Should College Students Really Call?"

89. Restorative justice programs are already being utilized on some campuses. See, for example, Campus PRISM at Skidmore College, http://www.skidmore.edu/campusrj/prism.php.

90. "An Alternative Approach to Campus Justice," *New York Times*, September 9, 2015, http://www.nytimes.com/2015/09/09/opinion/an-alternative-approach-to-campus-justice.html.

91. See, for example, Mary P. Koss, Jay K. Wilgus, and Kaaren M. Williamsen, "Campus Sexual Assault: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance," *Trauma, Violence, and Abuse: A Review Journal* 15 (3): 242–57.

92. Halley, "Trading the Megaphone for the Gavel," 108.

7. ***Colleges and universities have an educational mission to support teaching and research on inequality.*** While colleges and universities seem eager to address the sexual dimensions of sex discrimination, the plain language of Title IX shields those on campus from unequal access to educational resources, wage disparities, and inequitable representation across the university system. To address these conceptual and material inequalities more fully, colleges and universities should return to their educational mission. They should improve the conditions of interdisciplinary learning on campus by adequately funding gender, feminist, and sexuality studies as well as allied disciplines. Colleges and universities could further signal their commitment to equality by asking the faculty governance bodies to consider adopting a requirement that students take one or more of these classes. To this end, they might formally commit to the development of a core curriculum and a required course or coursework dedicated to the analysis of inequality. Promoting such teaching and research will provide students and society at large with the tools for understanding inequality, not as a fact of individual motivation and insult but as a structural issue whose analysis requires a wide range of approaches across the disciplines. Other programs could include campuswide teach-ins and symposia dedicated to exploring these complex issues.

   Campus education is a measure endorsed by the AAUP in its 2012 statement on campus sexual assault. The AAUP recommends prevention programs focused on education as a critical component of any strategy "proactively to end sexual violence." In that narrower, resolutely sexual context, campus education can include workshops and training sessions—some led by trained peer educators—that explore what may constitute healthy relationships, the meaning of consent, and strategies for bystander interventions.

   In the present climate, however, faculty members who teach and present their research in sexuality studies, gender studies, and related disciplines are in essence being asked to self-censor or risk running afoul of Title IX. To safeguard academic freedom when faculty members stand accused, the AAUP's long-standing recommendations on academic due-process standards must be maintained. These include the requirement that complaints against faculty members be reviewed by a committee consisting solely of faculty peers. But to safeguard academic freedom in the long run, the educational mission endorsed by the AAUP's statement on campus sexual assault must extend to the programs and curricula that promote the study of inequality, broadly defined. Such efforts would guard against a shallow commitment to equality that undermines the very source of its mandate.

C. Recommendations for Faculty Members

Above all, faculty members must participate in the furtherance of principles of academic freedom, shared governance, and generally accepted standards of academic due process. Faculty members have a duty to engage in governance and to refuse demands to curtail or eliminate content or speech that is critical to achieving educational objectives. The recognition that some classroom subjects can be intellectually discomfiting should not be confused with the harms engendered by harassment. To these ends, faculty members should disseminate these AAUP recommendations throughout their home institutions—not only to colleagues and students, but also to senior administrative officers and governing board members. Faculty members should also consult with their AAUP chapters on how best to address these issues on their home campuses. At public universities, where the US Constitution provides First Amendment protection, additional efforts to enact state laws that both define academic freedom in principle and require defense of principle in practice may be warranted. The recommendations in this report are consistent with prior AAUP recommendations contained in other reports and policy documents.

At the same time, faculty members must recognize that student action—from calls for trigger warnings on syllabi to participation in the Black Lives Matter movement—is an impassioned response to rampant inequalities on campuses and in society at large. These are issues that deserve a public forum. In fact, decades of feminist research and organizing insist that sexual violence, as well as labor and wage discrimination, are not individual but rather social problems that in turn require public solutions. These solutions depend on robust public engagement and discussion—on more and varied speech, not less.

Within the current landscape of Title IX interpretation and enforcement, problems arise

when public calls for accountability become fused with legal and administrative enforcement efforts that paradoxically either reduce the issue to a problem between individuals best addressed by litigation or frame it as a question of institutional compliance. These responses are inadequate stand-ins for comprehensive efforts to address the social and material bases of inequality. Both are based on a client-service model of higher education, and both risk foreclosing the rigorous contestation of bias, discrimination, and the misuse of institutional power.

In this regard, the guarantee of academic freedom effectively serves as more than an individual right to speech; academic freedom and shared governance can also serve as crucial, collective correctives to entrenched bias, discrimination, and the misuse of institutional power. For this reason, faculty members would do well to bear in mind the role of student governance in developing policies and procedures related to sexual harassment. As the AAUP's *Joint Statement on Rights and Freedoms of Students* provides, "[a]s constituents of the academic community, students should be free, individually and collectively, to express their views on issues of institutional policy and on matters of general interest to the student body. The student body should have clearly defined means to participate in the formulation and application of institutional policy affecting academic and student affairs."

That statement also encourages the faculty's active support of students' right to speech and protest, popular or not, within and outside of the classroom: "Students and student organizations should be free to examine and discuss all questions of interest to them and to express opinions publicly and privately." Once again, dialogue, not dismissal, will prove the best path forward.

As educators and researchers on the frontlines of these debates, faculty members must act in solidarity with students attempting to alleviate campus inequalities. These efforts will succeed only through robust participation in governance and a dedicated and unwavering defense of academic freedom. ■

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