

Sexual Harassment and the Evolving Civil Rights State

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In April, 2014, the Obama Administration released a report on a problem that “tears at the fabric of our communities.” According to the President, “It threatens our families, it threatens our communities; ultimately, it threatens the entire country.”¹ The danger in question was not the usual presidential fare of international terrorism, nuclear proliferation, or gun violence. It was sexual assault on college campuses. The report states unequivocally that “one in five women is sexually assaulted in college.” To those who believe this claim is accurate, the Obama Administration’s sexual assault initiative is a long-overdue response to a problem colleges have swept under the rug. To those who question that figure, it is a prime example of regulatory overreach by the federal government.

The White House report unleashed a media frenzy. The first wave—exemplified by Time magazine’s cover story “RAPE: A Crisis in Higher Education”—described an “epidemic” of campus rape. The Huffington Post dedicated a special section to documenting the prevalence of sexual assault and the inadequacy of colleges’ investigations. The New York Times provided several front-page stories, including one on the Columbia student who carried a mattress to protest the university’s failure to punish an alleged assailant. The second wave—exemplified by Emily Yoffe “The College Rape Overcorrection” in Slate and Newsweek’s cover story, “The Other Side of the College Sexual Assault Crisis”—emphasized the ambiguity of many of the cases that come before college disciplinary bodies and the danger of false accusations.² Rolling Stone’s now discredited story of a gang-rape on at the University of Virginia first raised alarms about the problem of sexual violence, and then underlined the hazard of replacing the traditional presumption of innocents with a presumption of guilt.

White House reports often generate intense media attention but fade into the sunset as reporters and the pundits turn to fresher issues. Not so with this one. In large part this is because it could build on the work of a wide variety of offices already committed to addressing the problem. These include the Center for Disease Control, four offices within the Department of Justice, and, most importantly, the Department of Education's Office for Civil Rights (OCR). On the day the report was issued, OCR released a 46-page document explaining in great detail what educational institutions receiving federal money—meaning every elementary and secondary school and virtually every college in the country—must do to eliminate sexual harassment.³ With great fanfare OCR announced that it was investigating 55 colleges, including some of the most prestigious in the nation. By the end of 2015 159 colleges and 68 elementary and secondary schools were under investigation.⁴ Those who fail to comply with its Title IX requirements, OCR insisted, would face termination of all federal funds. According to Assistant Secretary for Civil Rights Catherine Lhamon, this was not an empty threat: “It’s one I’ve made four times in the 10 months I’ve been in office. So it’s one that’s very much in use.”⁵

Many of the schools investigated by OCR investigations responded with alacrity. Shortly after release of the report, Tufts University signed a 16-page agreement that incorporated all OCR's requirements plus a few more.⁶ Soon thereafter Harvard created a new procedure for sexual harassment complaints, giving its new Office for Sexual and Gender-Based Dispute Resolution authority to investigate all charges of sexual harassment and to make determinations of guilt—functions previously left to administrative boards in the university's various schools. Under pressure from OCR, Princeton agreed to lower the burden of proof on complainants in sexual harassment cases.⁷ Despite criticism from some of its law professors, the University of Pennsylvania also changed its procedures for handling such complaints.⁸ In the fall Governor

Andrew Cuomo announced that all 64 campuses within the SUNY would not only adopt the grievance procedures required by the federal government, but also codify “affirmative consent” rules for sexual relations among students. In September, 2014, Ohio State University signed a resolution letter establishing a student conduct code that required prior to “each and every sexual act” a “knowing and voluntary verbal or non-verbal agreement between both parties” regarding “the who, what, where, when, *why*, and how this sexual activity will take place.”⁹ Federal regulation has had a snowball effect, not only forcing schools to change their practices, but empowering those inside those institutions to go beyond what the federal government has explicitly required.

So far, most of the debate over these federal requirements has focused the procedures colleges must use in disciplinary proceedings, especially OCR’s insistence that they use the lenient “preponderance of the evidence” standard (requiring a finding of guilt if the story told by the accuser is only slightly more credible than the story of the accuse) rather than the “clear and convincing evidence” standard previously employed by many colleges. But OCR’s mandates go well such procedural matters, requiring schools to offer extensive services to students; to provide regular training of students, faculty, and staff; to alter their bureaucratic structure; to conduct regular “climate checks” of their student body; to develop new protocols for dealing with local police; and in some cases to seek prior approval from OCR before changing any of their practices.¹⁰ These are among the most prescriptive regulations ever imposed on educational institutions by the federal government.

Controversies

When the White House first released its report, it seemed that sexual assault was a classic example of what political scientists call a “valence” issue: no politician wants to defend campus

rapists; those who call for more aggressive federal action could combine support for women's issue with a tough-on-crime stance. Yet substantial opposition soon did arise, some of it coming from people who consider themselves liberal Democrats.

Three sets of issues have dominated the debate. The most controversial is due process: civil libertarians argue that OCR has pressured colleges to adopt procedures that failed to provide accused students with the opportunity adequately to defend themselves. In the fall of 2014 a diverse group of Harvard Law School professors charged that their school was “jettisoning balance and fairness in the rush to appease certain federal administrative officials.”¹¹ One third of the University of Pennsylvania Law School faculty complained that the agreement their school had reached with OCR “requires subordinating so many protections long deemed necessary to protect from injustice those accused of serious offenses.” They also charged that “OCR has used threats of investigation and loss of federal funding to intimidate universities into going further than even the guidance requires.”¹² Harvard Law Professor and former federal judge Nancy Gertner argued that the procedures adopted by Harvard and other schools under pressure from OCR unnecessarily “jettison every modicum of a fair process to redress decades-long inattention to these issues.”¹³ Some judges agreed: students found guilty of misconduct under procedures mandated by the federal government have sued their schools for violating due process norms and contractual obligations, and a few have won.¹⁴

A second controversial feature of OCR's sexual harassment rules is the restrictions they place on speech. According to OCR, “sexual harassment” includes “verbal, nonverbal, graphic, or physical conduct of a sexual nature.” Its guidelines prohibit “unwelcome” sexual advances “whether or not they involved physical touching.” They also prohibit “sexual-stereotyping,” which includes “persistent disparagement of a person based on a perceived lack of stereotypical

masculinity or femininity.” Harvard’s code goes even further, covering “sexually suggestive comments, jokes, innuendoes, or gestures” and even “commenting about . . . an individual’s body.” Marshall University defines harassment as any expression that causes “mental harm, injury, fear, stigma, disgrace, degradation, or embarrassment,” Colorado State University at Pueblo as the “infliction of psychological and /or emotional harm upon any member of the University community through any means.”¹⁵ As the Foundation for Individual Rights in Education’s Andrew Kloster has written, “prohibiting all ‘unwelcome verbal conduct of a sexual nature’ means that a professor discussing sexual politics could be guilty of sexual harassment; a student asking another student out on a date could be sexual harassment; a student production of Hamlet (“Frailty, thy name is woman!”) could be prohibited as well.”¹⁶ The potential reach of OCR’s rules became evident in 2015, when Northwestern University professor Laura Kipnis was subject to an extensive Title IX investigation for writing an article in The Chronicle of Higher Education entitled “Sexual Paranoia Strikes Academe.”

Supporters and critics of OCR’s sexual harassment rules also disagree about the frequency of sexual assaults. The claim that 20% of college women are sexually assaulted during their years on campus has become a staple of the argument for the federal government’s aggressive role. Senator Kristen Gillibrand, a leading defender of OCR’s policies, has repeatedly decried “the fact that women are at greater risk of sexual assault as soon as they step onto a college campus.”¹⁷ A 2015 survey conducted by the Association of American Universities (AAU) at 23 schools seemed to confirm these claims, finding that over 20% of undergraduate women reported being sexually assaulted while in college.¹⁸

Critics have pointed out significant flaws in these studies. The 20% figure initially came from an online survey of female college students at two public universities. Given its small

sample size and low response rate, the study's lead author has conceded, "We don't think one in five is a nationally representative statistic."¹⁹ The 2015 AAU survey had an even lower response rate (19%), raising the possibility that those who had been subject to sexual assault were more likely to respond than those who had not. Just as importantly, most surveys adopt a definition of sexual assault that goes well beyond anything recognized by criminal law. In a review of the academic literature, Callie Rennison and Lynn Addington emphasized that researchers' failure to adopt clear and consistent definitions of sexual violence and assault has made it hard to quantify the extent of the problem, map trends over time, or compare college with non-college women.²⁰

A 2014 study by the Department of Justice's Bureau of Justice Statistics had a much higher response rate than the studies discussed above, and provided respondents with clearer definitions of various forms of assault.²¹ It found that since 1997 the rate of rape and sexual assault among female college students has not escalated, but in fact has been cut in half. According to this report, the annual rate of rape and sexual assault among college students is 0.61%--just over half of one percent. If we assume that students spend four years on campus, this means that female undergraduates face an assault rate of 2.44%, about one tenth of the figure cited by the White House report. Females between 18 and 24 who do *not* attend college are 1.2 times *more* likely to be the victim of sexual assault than those who attend college, and 1.5 times more likely to be victims of completed rape.

Sexual Harassment and the Civil Rights State

These disputes about due process, free speech, and the prevalence of sexual assault will not soon be resolved. It will no doubt take years to get a better handle on the extent of the problem or the effectiveness of federal policies. But the events unfolding around us provide a window into the operation and evolution of the American civil rights state, by which I mean

the extensive regulatory regime we have created since 1964 to reduce discrimination based on race, ethnicity, sex, sexual orientation, disability, and age. Although the term “civil rights state” will no doubt sound strange to many ears, it reminds us that over the past half century we have constructed an impressive edifice of nondiscrimination rules that apply to nearly every business, school, non-profit, and government unit in the country, rules enforced by judges and administrators armed with often formidable sanctions. Like its cousin, the American welfare state, it has a distinctive form that reflects both our unusual constitutional system and our long history of struggles over civil rights.

The remainder of this chapter is devoted to tracing the history of regulation of sexual harassment under Title IX of the Education Amendments of 1972 and Title VII of the 1964 Civil Rights Act. (See Table 1 for a brief overview.) In an era of alleged government “gridlock” and a conservative Supreme Court, how has such a controversial set of regulatory demands been established and enforced? This is a long and convoluted story—indeed the labyrinthian quality of the development of sexual harassment rules is one of their most important political characteristics.

OCR’s sexual harassment rules are not an anomaly. Since 2010 the agency has issued controversial “Dear Colleague Letters” on bullying, bilingual education, affirmative action, school discipline, the assignment of students to primary and secondary schools, intercollegiate athletics, and equity in the distribution of school resources.²² All were announced in the same manner OCR’s sexual harassment guidelines: unilaterally, without opportunity for public comment or review by Congress or other government agencies. They constitute a key part of what the Obama Administration has called its “We Can’t Wait” campaign, a far-reaching effort to change policy without enacting legislation.²³

As audacious as these initiatives might seem, they build on decades of slow, incremental policymaking by federal judges and administrators. The foundation for the federal government's current sexual harassment was first laid in the 1970s and 1980s by the Equal Employment Opportunity Commission (EEOC) and the federal courts under Title VII of the 1964 Civil Rights Act, which forbids race and sex discrimination by employers. In the 1990s OCR and federal judges invoked Title IX to apply to schools rules originally designed for the workplace. But enforcement efforts remained weak. The guidelines OCR announced in 2011 and 2014 expanded upon those it had issued in 1997 and 2001. This time, of course, its enforcement effort was far more forceful.

The history of federal regulation of sexual harassment illustrates three characteristics of the civil rights state more generally.

1. *Extensive regulation rests on a slender and ambiguous statutory foundation.*

The central section of Title IX states 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 subjected to discrimination under any education program or activity receiving Federal financial assistance.” Similarly, Title VII makes it illegal for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual because of such individual’s race, color, religion, sex, or national origin.” For decades the most heated civil rights debates have centered on the meaning of the key term “discrimination” and the evidence required to prove it. Some argue that only intentional discrimination violates federal civil rights statutes. Others maintain that any practice that has a “disparate impact” on racial minorities or women constitutes discrimination unless justified by a compelling employment- or education-based argument. This debate continues to rage in the courts, in Congress, and in the law reviews, with no end in sight.

The argument that sexual harassment constitutes a form of sexual discrimination is now widely accepted. But neither judges nor administrators have provided a clear explanation of why that is so. Yale Law Professor Reva Siegel, a staunch supporter of the federal government's efforts to reduce sexual harassment in the workplace and in schools, has decried the federal courts "terribly thin account" of why sexual harassment violates Titles IX and VII.²⁴ Siegel notes that even those who agree that harassment should be covered by these laws "disagree about the reasons why this is so," and that "disagreements about the normative basis of the prohibition on sexual harassment in turn produce disputes about the range and type of practices the prohibition constrains."²⁵ As we will see, the normative basis of OCR's recent guidelines is quite different from that of the regulatory framework previously developed by the EEOC and the federal courts under Title VII. The latter sees sexual harassment as the product of a few individual malfeasors who must be reined in by employers; the former views sexual harassment as the product of broader institutional structures and cultures that must undergo a fundamental reformation. OCR has never acknowledged, explained, or defended this shift, which has informed its entire post-2010 regulatory effort.

2. For many years civil rights regulation expanded through a process of mutual "leap-frogging" by federal judges and administrators.

Most of the federal agencies created to implement civil rights legislation—including the EEOC and the Department of Education's OCR—have little authority to enforce these laws on their own. For years they have had to rely on federal courts give their rules enforcement teeth. At the same time, judges have looked to these agencies for help devising workable rules and monitoring compliance. Agencies have relied on courts to add legitimacy to their policies, and

courts have relied on the expertise of specialized agencies. Regulation has grown slowly and almost imperceptibly, with neither institution providing extensive justification for its actions.

As Sean Farhang has shown, the congressional compromise that created Title VII gave primary enforcement authority to the courts, leaving the EEOC “a poor enfeebled thing” (as contemporaries often described it).²⁶ The EEOC could investigate complaints but not impose sanctions; it could issue guidelines, but not binding rules. Both Title XI and Title VI of the Civil Rights Act—on which Title IX was modeled—seemed to give more authority to administrative agencies: federal offices charged with carrying out these provisions have the authority both to issue rules and to enforce them by cutting off federal funds. Indeed Title VI was initially viewed as a swift administrative alternative to plodding judicial enforcement of nondiscrimination mandates. But it quickly became apparent that the funding cut-off would seldom be used. It proved both administratively cumbersome and politically unacceptable. Agencies were reluctant to punish state and local governments with which they worked closely, especially since termination of funding would often hit hardest those facing discrimination. Even at the height of southern resistance to school desegregation the funding cut-off was rarely used. The number of times it has been used to enforce Title IX is precisely zero.

What prevented Title VI and Title IX from fading into irrelevance was the willingness of federal courts to recognize “implied private rights of action” to enforce their nondiscrimination mandates through judicial injunctions and the threat of monetary damages. For Title IX the crucial Supreme Court came in 1979, when a closely divided court for the agreed that private parties could file court suits to enforce that law, and in 1992, when it authorized federal judges to award monetary damages to children subjected to discriminatory action by school districts.²⁷ Not only have federal courts heard hundreds of Title IX cases, but the threat of injunctions and

monetary damages has allowed OCR to negotiate thousands of agreements with schools at all levels, from elementary to professional.

For years this meant that the effectiveness of the guidelines issued by OCR and the EEOC depended on the extent to which they were endorsed by the courts. At the same time, judges often felt overwhelmed by the complexity of these issues before them, and looked to “expert” agencies to provide assistance. As Steven Halpern has shown, “the synergistic power of the bench and bureaucracy working together” first became apparent in the desegregation battles of the 1960s.²⁸ John Skrentny’s work describes how the same combination of administrative and judicial action drove the evolution of affirmative action in employment.²⁹ One finds a similar pattern in bilingual education policy during the 1970s and Title IX policy on intercollegiate sports during the 1990s.³⁰ As we will see, from 1980 to 2000 administrative and judicial rules on sexual harassment stayed pretty close together. Each institution would take only a small step beyond the other, often claiming that it was following the others’ lead. Over the long run these multiple, barely perceptible incremental changes added up to major regulatory expansion.

3. Over the last twenty years a more conservative Supreme Court has often disrupted this pattern, giving civil rights agencies the opportunity to set off on their own, but leaving them with the difficult task of devising new enforcement strategies.

The policy “leapfrogging” of the 1970s and 1980s became less common during the late Rehnquist Court. Other contributors to this volume have described in detail this judicial “retrenchment.”³¹ Perhaps the best example of this shift came in a 2001 case, *Alexander v. Sandoval*. There Justice Stevens described in glowing terms the “integrated remedial scheme” that courts and agencies had developed under Titles VI and IX during the previous three decades for “attacking the often-intractable problem of racial and ethnic discrimination.” This “inspired

model,” Stevens argued, allowed courts and agencies to go beyond merely forbidding intentional discrimination to attacking “more subtle forms of discrimination (such as schemes that limit benefits or services on ostensibly race-neutral grounds but have the predictable and perhaps intended consequence of materially benefiting some races at the expense of others).” According to Stevens the regulatory scheme created by abundant judicial precedent “empowers the relevant agencies to evaluate social circumstances to determine whether there is a need for stronger measures . . . [and] builds into the law flexibility, an ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress.”³²

What is notable about *Alexander v. Sandoval* is that Stevens wrote these words in dissent. Justice Scalia’s majority opinion described these institutional arrangements as the *ancien regime* that should not be resurrected. The Court held that while it would recognize private rights of action to enforce the explicit mandates of Title VI, it would not allow federal courts to enforce agency rules that went beyond those mandates. In particular, since Title VI itself prohibits only intentional discrimination, private rights of action could not be used to enforce an agency’s “disparate impact” regulations. This threw into question the ability of private parties to enforce many of the guidelines issued by OCR since the late 1960s.

This shift at the Supreme Court level created a particularly acute problem for the sexual harassment rules OCR announced in 1997. In 1998 and 1999 the Court issued two decisions that narrowed school districts’ liability under Title IX for sexual harassment by teachers and students. On the last day of the Clinton Administration, OCR responded by asserting that this interpretation applied only to private suits for damages, not administrative rules. Although the agency’s legal argument was plausible, it left unanswered the central question: if OCR could not rely on the courts to enforce its guidelines, how would it do so by itself? This question remained

unanswered until 2014, when OCR launched its current offensive. As we will see, OCR's response has been two-fold: first, the agency initiates well-publicized investigations designed to embarrass and shame the targeted schools; and second, it pushes schools to establish internal Title IX compliance offices laden with a variety of new duties, insulated from control by other university officials, and required to stay in close touch with OCR regulators. So far, at least, this strategy has proven successful.

Sexual harassment is not the only example of the Obama Administration's OCR staking out positions at variance with those established by the Supreme Court. The same can be said of its DCLs on school discipline and the allocation of school resource. The principal purpose of its DCLs on affirmative action in college admissions and on efforts by primary and secondary schools to promote racial balance is to minimize the effects of Supreme Court decisions on those topics. OCR has not quietly acquiesced to the Court's new doctrines, but has begun to experiment with methods for countering them.

Phase One: Attacking Sexual Harassment in the Workplace

It is fair to say that when the word "sex" was added to Title VII on the floor of the House in 1964, no one gave any thought to sexual harassment. In fact, the term had not yet been invented. According to Carrie Baker it was not until 1975 that feminist activists "coined the term 'sexual harassment' to name something they had all experienced but rarely discussed—unwanted sexual demands, comments, looks, or sexual touching in the workplace."³³ As women entered the workforce in greater numbers and took jobs in traditionally held by men, the newly named "sexually harassment" became a potent political and legal issue. Catherine MacKinnon's influential 1979 book Sexual Harassment of Working Women helped to lay the foundation for

Table 1
TITLE VII AND TITLE IX SEXUAL HARASSMENT CHRONOLOGY

1970s	Women’s groups and feminist lawyers develop arguments describing sexual harassment as a form of sex discrimination actionable under Title VII.
1976	After losing most sexual harassment cases, plaintiffs finally get a win in <i>Williams v. Saxbe</i> (D.D.C, 1976)
1977	The D.C. Circuit becomes the first federal appeals court to recognize sexual harassment as sex discrimination under Title VII
1980	After President Carter loses the November election, the EEOC promulgates rules establishing sexual harassment as a form of sex discrimination
1981	Reagan Administration tries, unsuccessfully, to rescind EEOC rules In <i>Bundy v. Jackson</i> , D.C. Circuit endorses EEOC rules, relying in part on Catherine MacKinnon’s legal arguments in finding for plaintiff in Title VII case
1983	The number of sexual harassment cases in federal court reaches 52 EEOC votes to retain its sexual harassment rules, citing “widespread public and judicial support”
1986	In <i>Meritor v. Vinson</i> the Supreme Court decides its first sexual harassment case, finding that sexual harassment constitutes sex discrimination under Title VII, but declining to endorse the EEOC rules
1991	Hill-Thomas hearings shine media spotlight on sexual harassment, Congress passes Civil Rights Act of 1991, increasing damages in Title VII cases
1992	In <i>Franklin v. Gwinnett County School</i> Supreme Court authorizes monetary damage awards against school districts that turn a blind eye to sexual misconduct by teachers
1993	First federal decision finding a school district liable for peer-on-peer sexual harassment; over the next 5 years there will be 24 federal district court decisions and 6 circuit court decisions on peer harassment
1997	OCR publishes in the <i>Federal Register</i> its first set of Title IX sexual harassment guidelines
1998	Supreme Court’s <i>Burlington Industries</i> and <i>Faragher</i> decisions establish liability rules for employers Supreme Court hands down <i>Gebser</i> , holding school districts liable for harassment of a student by a teacher only if school officials have “actual knowledge” of the misconduct and are “deliberately indifferent” to it
1999	Supreme Court rules school districts are liable for peer harassment “serious enough to have the <i>systemic</i> effect of denying the victim equal access to an educational program or activity.”
2001	On President Clinton last day in office, OCR publishes “Revised Sexual Harassment Guidance,” asserting its authority to enforce Title IX rules more stringent than those laid out in <i>Davis</i> and <i>Gebser</i>
2010	OCR distributes “Dear Colleague Letter” on bullying that includes new rules on racial, sexual, and “gender-based” harassment
2011	OCR “Dear Colleague Letter” on steps to reduce sexual harassment and assault
2014	White House releases “Not Alone” report on sexual violence; OCR simultaneously releases 46-page guidance document and announces investigation of over a hundred universities for Title IX violations

Title VII suits against employers that tolerate sexual harassment of and by their employees. MacKinnon popularized the distinction between “quid pro quo” harassment (where submission “is made either implicitly or explicitly” a condition of employment or is “used as the basis for employment decisions”) and “hostile environment” harassment (conduct that “has the purpose or effect of unreasonably interfering with an individual’s work performance, or creating an intimidating, hostile, or offensive working environment.”)

Early rounds of litigation did not go well. Some judges found such “personal” matters to be outside the control and the responsibility of employers. Others argued that improper behavior might violate state law, but does not constitute sexual discrimination. Authorizing judges to scrutinize these issues, many predicted, would open the proverbial “floodgates of litigation.” The Title IX suit against Yale that MacKinnon helped develop in the late 1970s met with some initial success, but then fizzled out.³⁴

The tide changed in the late 1970s and early 1980s due to the combined efforts of the EEOC and federal judges in the District of Columbia. In 1976 case a federal district court judge concluded that the conduct of a supervisor who allegedly fired a female subordinate because she would not submit to his demands for sexual favors “created an artificial barrier to employment which was placed before one gender and not the other.”³⁵ A year later the D.C. Circuit became the first appellate court to find that Title VII covers “quid pro quo” harassment, holding that the plaintiff “became the target of her superior's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job. . . . [N]o male employee was susceptible to such an approach by appellant's supervisor.”³⁶ The court insisted that this should be viewed not as a “personal escapade” by the plaintiff’s immediate supervisor, but as an action by the supervisor’s employer, who should be held strictly liable for the actions of its agents.

Another panel of the D.C. Circuit took the further step of holding that “hostile environment” harassment in which no tangible employment action has been taken against the plaintiff also violates Title VII. Judge Skelly Wright agreed with the plaintiff that “the sexually stereotyped insults and demeaning propositions to which she was indisputably subjected and which caused her anxiety and debilitation” were sufficient to “illegally poison” her “psychological and emotional work environment.”³⁷ Gender-based stereotypes and insults, Judge Wright insisted, are just as serious as the raced-based insults and stereotypes federal judges had previously determined could create a discriminatory “hostile environment.” Citing MacKinnon’s recently published book, Judge Wright argued that sexual harassment on the job should be understood both as pervasive and as linked to women’s unequal status: “so long as women remain inferiors in the employment hierarchy, they may have little recourse against harassment beyond the legal recourse [the plaintiff] seeks in this case.”³⁸

Judge Wright made passing reference to guidelines issued by the EEOC, asserting that judges “owe considerable deference” to its interpretations of Title VII. EEOC had promulgated these rules in November of 1980, just a few days after Ronald Reagan defeated President Jimmy Carter in the presidential election.³⁹ They were largely the work of EEOC chair Eleanor Holmes Norton, an energetic and outspoken Carter appointee. The rules were short, no more than seven paragraphs that filled only half a page of the Federal Register. Their significance lay in the fact that they were followed by most federal judges in the 1980s and 1990s, and thus provided the framework for subsequent debate over sexual harassment.

The most significant and controversial features of the 1980 EEOC guidelines were the liability standards they established for employers. This was a matter judges had barely addressed in previous cases. According to the EEOC, employers should be held “strictly liable” for all

misbehavior by supervisors--whether of the “quid pro quo” or “hostile environment” variety--regardless of what those further up the chain of command knew, what measures they had taken to stop sexual harassment, or whether the person subject to abuse had filed a complaint. Although the guidelines advised employers to “take all necessary steps to prevent sexual harassment from occurring,” such preventative measures would never insulate employees from liability for supervisors’ misconduct. In contrast, employers would be held liable for harassment by non-supervisory employees only if the employer “knew or should have known” about the offending behavior and failed to take “immediate and appropriate corrective action.”

The fact that these rules were issued so soon after President’ Carter’s unexpected electoral defeat infuriated the incoming Reagan Administration and some members of the Republican Senate. The Task Force on Regulatory Relief chaired by Vice President Bush targeted them for special scrutiny. Yet in the end the guidelines survived. Democrats in the House held hearings to demonstrate popular support for the rules. Women’s groups mobilized their supporters. In 1983 the full Commission voted to retain them, “citing widespread public and judicial support.”⁴⁰

Some judges hearing Title VII cases accepted the EEOC’s liability rules in full. Others held that strict liability was appropriate only for “quid pro quo” harassment by supervisors, not for “hostile environment” harassment, which is harder to define and detect. Still others applied the “knew or should have known” standard to all forms of sexual harassment. That was not the only issue on which federal judges disagreed in the 1980s and 1990s. How serious or pervasive must harassment become to create an actionable “hostile environment”? Should judges apply a “reasonable man” or a “reasonable women” standard? If the latter, what is the difference? When is it reasonable to say that an employer “should have known” about harassment by

supervisors or co-workers? How does one determine whether conduct is “welcome”? What evidence should be admissible in the common he-said-she-said controversy? As these issues accumulated, the Supreme Court largely sat on the sidelines. It decided only two Title VII sexual harassment cases before 1998, and both of them avoided the hardest questions.

The Supreme Court heard the first, *Meritor Savings Bank v. Vinson*, in 1986. It agreed that both “quid pro quo” and “hostile environment” sexual harassment constitute sex discrimination under Title VII, but made little effort either to resolve the liability issue or to explain *why* sexual harassment constitutes a form of sex discrimination. Although Justice Rehnquist’s opinion for the court relied in part on the EEOC’s guidelines, he refused to endorse either the agency’s strict liability standard for supervisors or the more lenient negligence standard recommended by the Solicitor General. The Court’s four dissenters urged it to follow the lead of the EEOC. But the majority “decline[d] the parties’ invitation to issue a definitive rule on employment liability,” offering only the enigmatic guidance that “Congress wanted courts to look to agency principals for guidance in this area.” At the same time it warned that “such common law principals may not be transferable in all particulars to Title VII.” What these limits might be the Court refused to say. By saying so little, David Oppenheimer has observed, “the *Meritor* Court gave us a decade of confusion.”⁴¹ The Court was equally enigmatic seven years later when it tried to explain what constitutes conduct serious enough to create a “hostile environment.”⁴²

The difficulties created by the Supreme Court’s reluctance to provide became more severe as the number of sexual harassment complaints and courts suits surged in the 1990s. In 1990 the EEOC received 5,557 sexual harassment complaints. By 1995 that had nearly tripled to 15,549.⁴³ Damage awards by federal courts in these suits increased by a factor of four. Two

factors contributed to this growth. First was the Clarence Thomas/Anita Hill controversy in the fall of 1991. Never before had sexual harassment received such sustained media and public attention. Second, Congress included in the Civil Rights Act of 1991 provisions allowing judges to award compensatory and punitive damages in Title VII cases. This made Title VII litigation much more attractive for lawyers working on a contingency fee basis.⁴⁴

Until 1998 the EEOC continued to hold employers strictly liable supervisors' conduct that creates a "hostile environment." Some circuit courts, most notably the D.C. Circuit, agreed. Several others did not. The disarray on the question became particularly apparent in 1997, when the Seventh Circuit hearing a case *en banc* could not find majority support for any liability standard. Not only did the court produce eight lengthy opinions, but three of them were written by eminent jurists, Richard Posner, Frank Easterbrook, and Diane Wood. This case finally forced the Supreme Court to recognize that the lower courts still "struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees,"⁴⁵ and to resolve the controversy.

Justice Kennedy's opinion in *Burlington Industries v. Ellerth* and Justice Souter's parallel opinion in *Faragher v. City of Boca Raton*⁴⁶ tried to stake out a middle position between the strict liability and negligence standards. The two dissenters in these cases, Justices Thomas and Scalia, described the Court's liability rules as "a product of willful policymaking pure and simple," and a "whole-cloth creation that draws no support from the legal principles" it cited.⁴⁷ Justices Kennedy and Souter made little effort to hide their innovation, claiming that "Congress has left it to the courts to determine controlling agency law principles in a new and difficult area of federal law."⁴⁸ Not only did they jettison the well-established quid pro quo/hostile environment distinction, but they created a novel burden-shifting procedure.

The liability scheme created by the Supreme Court in 1998 had three parts: First, when sexual harassment takes the form of a “tangible employment action” (such as a raise, promotion, or termination) by a supervisor, the employer will be held strictly liable for the supervisor’s conduct. Second, when the conduct of a fellow employee creates a “hostile environment” without any “tangible actions” by a supervisor, the employer will be held liable only if he “knew or should have known” about the conduct. Third, when a supervisor creates a “hostile environment” without taking any “tangible actions” against the complainant, the employer will be held strictly liable unless the employer can demonstrate (a) that he “exercised reasonable care to prevent and correct promptly any sexually harassing behavior”; and (b) that the complaining employee “unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.” The EEOC quickly incorporated these liability standard into its guidelines, and it has provided the basic framework for Title VII cases ever since.

Labor law experts Michael Harper and Joan Flynn describe these twin cases both as “an extraordinary example of the Supreme Court exercising its authority to engage in lawmaking in the manner of a traditional common law court,” and as a rare instance in which “the Court not only brought much-needed clarity to the law, but also produced a coherent and logically defensible rule with which both plaintiffs and employees could readily live.”⁴⁹ The New York Time’s Linda Greenhouse agreed, noting that “Few Supreme Court decisions in recent memory have been received as enthusiastically across the spectrum of interested parties . . . praised by women’s rights leaders, the Chamber of Commerce, and federal trial judges alike for providing the first clear set of rules in this rapidly evolving area of employment law.”⁵⁰

Charles Epp has convincingly argued that the potent combination of Title VII rules and the zeal of personnel administration professionals for changing organizational practices have proven to be “key mechanisms for reducing harassment.”⁵¹ According to David Oppenheimer, a law professor who wrote an amicus brief on behalf of the plaintiff in *Ellerth*, the Supreme Court’s liability decisions “promise that rare thing in employment discrimination law—a rule that encourages employers to take meaningful steps to prevent discrimination while increasing the possibility that victimized employees will be able to recover damages for their injuries.”⁵² Under the *Ellerth-Faragher* framework plaintiffs have won some very large jury awards, giving employers strong incentives to monitor their employees. At the same time it provided business with greater clarity on how to avoid sexual harassment litigation. This has contributed to a gradual decline in the number of sexual harassment complaints filed with local, state, and federal agencies. That figure peaked at about 16,000 in 1997, the year before the Court’s two decisions. Since then it has fallen by 28%, plateauing at about 11,000 complaints per year. Despite the Supreme Court’s success in constructing a workable tort-based strategy for dealing with sexual harassment in the workplace, this approach was abandoned by OCR after 2000.

Phase Two: Sexual Harassment Regulation Goes to School

In the first half of the 1990s two sets of events converged to move sexual harassment to the top of OCR’s agenda. The first was publicity. On the heels of the 1991 Hill/Thomas hearings, *Seventeen* magazine published an article on sexual harassment in elementary and secondary schools, and it encouraged readers to report on their experiences. Over 4,000 students did so. The magazine reported that 90% of the respondents had been subject to some form of sexual harassment, nearly 40% on a daily basis. In 1993 the American Association of University Women published a study entitled *Hostile Hallways* claiming that the vast majority of high

school girls had been subject to sexual harassment of some form. This finding, too, was widely reported in the press.

The second development was the Supreme Court's unexpected 1992 ruling in *Franklin v. Gwinnett County Public Schools*. A unanimous Court held that a student who had been subjected to serious and repeated sexual misconduct by a teacher could sue the school district for monetary damages under Title IX. In 1979 a narrow majority on the Court had made an exception for Title IX, arguing in effect that federal courts had already entertained too many Title IX private enforcement suits to put the genie back into the bottle.⁵³ Instead of cabining that exception, the Court's *Franklin* decision significantly expanded plaintiffs' incentives to file private rights of action under Title IX. Title VII precedents loomed large in its analysis. In *Meritor*, it noted, the Court had held that "when a supervisor sexually harasses a subordinate because of that subordinate's sex, that supervisor discriminates on the basis of sex." That "same rule should apply when a teacher sexually harasses and abuses a student. Congress did not intend for federal money to be expended to support the intentional action it sought by statute to proscribe."⁵⁴ All the questions that had bedeviled courts for years under Title VII—when employers are responsible for the behavior of supervisors and employees, what constitutes "hostile environment" harassment, what steps employers must take to reduce harassment—were left unanswered. The Supreme Court simply announced that monetary damages were available, and left everything else to the lower courts.

As judges and administrators struggled with this new issue, they looked to Title VII doctrines for help, analogizing students to employees and teachers to supervisors. The usefulness of this analogy became a matter of dispute. In 1999 Justice Kennedy argued that "analogies to Title VII" are "inapposite" because "schools are not workplaces and children are

not adults. “The norms of the adult workplace,” Kennedy insisted, “are not easily translated to peer relationships in schools, where teenage romantic relationships and dating are part of everyday life.”⁵⁵ Although Justice O’Connor did not agree with Kennedy in the outcome of that case, she, too, warned that judges “must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults.”⁵⁶

Title IX also differs from Title VII in its basic structure. Title VII directly and explicitly imposes specific sanctions—back pay and expenses before 1991, plus compensatory and punitive damages thereafter—on employers. Title IX, in contrast, is a condition placed on federal grants to schools, most of which are run by state and local governments. The sole explicit remedy for violating Title IX is termination of federal funding; all other are only “implied.” For many years now the Supreme Court has insisted that conditions on federal grants are “in the nature of a contract” between the federal government and the recipients of its largess. Fairness and “our federalism” both require that the terms of these contracts be spelled out in advanced, not unilaterally imposed upon an unsuspecting party. As a result, the Supreme Court has been reluctant to expand federal mandates in the absence of congressional action.

Most of the cases that arrived in federal court after *Franklin* did not involved misconduct by teachers, but the more difficult issue of peer harassment. The lower courts struggled to explain when public schools should be held responsible for the “hostile environment” created by other students. The first reported decision on school liability for peer harassment appeared in 1993.⁵⁷ By 1998 there were 24 published federal district court decisions on the subject, as well as rulings by six circuit courts.⁵⁸ Federal courts were all over the map on the standard of liability to apply. Some ruled that schools were liable for peer harassment if they “knew or should have known” about behavior that created a “hostile environment.” Others held that

schools would be held responsible only if they had “actual knowledge” of the behavior and failed to take corrective action. The Fifth Circuit argued that a school only violates Title IX “if it treated sexual harassment of boys more seriously than sexual harassment of girls.”⁵⁹

In 1997 one judge noted with distress that “whether and to what extent school districts can be found liable under Title IX for peer sexual harassment” was “an issue undecided” by the Supreme Court. Not only had the Supreme Court “provided little guidance with respect to interpreting the scope of Title IX,” but “the legislative history of Title IX provides no direct guidance.” He “urge[d] Congress to carry out its legislative responsibility and to address these issues squarely so that policy will be made where it should be made—in Congress—and not by default by the courts.”⁶⁰ Congress, of course, remained silent.

The resulting legal uncertainty—especially when combined with the threat of significant punitive damages—alarmed school officials. To make matters worse, articles in professional journals such as Education Week exaggerated the frequency of litigation, the legal liability of school districts, and the size of monetary awards in Title IX “hostile environment” suits. According to Jodi Short, the authors of these articles “largely ignoring or downplaying the controversy in the courts.” They not only “created a climate that begged [for] a response,” but “helped construct what the appropriate response should be.”⁶¹

School officials pressed OCR to explain what Title IX requires of them. In 1997 the agency announce its first set of sexual harassment guidelines, regulations that were far more detailed than any previously issued under Titles VII or IX. Despite the novelty of this undertaking, OCR insisted that “the standards in the Guidance reflect OCR’s longstanding nationwide practice and reflect well established legal principles developed under Title VII of the Civil Rights Act.”⁶² This allowed OCR to avoid review by other units within the Department or

by the Office of Management and Budget. Since this was “guidance” rather than a “rule,” OCR argued that no presidential signature was required—despite Title IX’s clear command that no “rule, regulation, or order” issued under it “shall become effective unless and until approved by the President.”

The most striking feature of the 1997 guidelines was their laser-like focus on legal precedent. They read like a heavily footnoted appellate decision, devoid of any discussion of the frequency of sexual harassment, the consequences of various forms of harassment, or alternative methods for attacking the problem. Since Title IX cases were relatively few in number and inconsistent one with another, OCR relied most heavily on Title VII case law. Where federal courts disagreed, especially on the topic of schools’ liability, agency lawyers did not hesitate to weigh in on the “correct” legal answer.

OCR followed the EEOC in distinguishing between “quid pro quo” and “hostile environment” harassment and setting different liability standards for the actions of teachers and administrators on the one hand and students on the other. A school would be held strictly liable for quid pro quo harassment by employees “whether or not it knew, should have known, or approved of the harassment at issue.” The same standard would apply to “hostile environment” harassment by teachers and administrators as long as it could be shown that they “acted with apparent authority” from the school or were aided “by their position of authority”—which would almost always be the case. A school will be held liable for peer harassment if it “knows or should have known” of the offending behavior and “fails to take immediate and appropriate corrective action.” OCR emphasized that a school “has notice” of peer harassment “as long as any agent or responsible employee”—meaning any teacher, administrator, or professional staff member—has been informed of the problem.

In subtle ways, OCR's 1997 guidelines went well beyond anything the EEOC or the courts had mandated under Title VII. Title VII rules focused almost entirely on the standards for adjudicating individual complaints. EEOC's guidelines remained relatively short, devoted above all to the procedures and evidence used to evaluate cases coming before the agency or the courts. Under Title VII neither the courts nor the EEOC said much the shape of internal grievance procedures (which are often governed by union contracts), the training employers must provide to their employees, or the support they must offer to the victims of harassment. In the employment context remedies were relatively straight-forward: firing or reassigning the miscreant; reinstating or promoting the victim; paying back wages to those wrongfully dismissed; and emphasizing to others that sexual harassment will not be permitted in the workplace. The emphasis was not on what employers *must* do, but rather on what they *can* do to avoid liability. Regulators offered "safe harbors" rather than impose specific mandates.

OCR's guidelines, in contrast, went into considerable detail telling educational institutions what they *must* do to comply with Title IX. These mandates covered not only the development of grievance procedures, but the measures they must take to compensate victims and to prevent all incidents of harassment on school grounds. For example, schools that fail to adopt "grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex" violate Title IX "regardless of whether harassment occurred." These grievance procedures must include six elements listed by OCR. Schools must have one Title IX coordinator to oversee compliance efforts. They must ensure that students and staff have "adequate training as to what constitutes sexual harassment." Schools must provide special assistance to victims of harassment, ranging from grading changes and tutoring to professional counseling and tuition adjustments. In some cases schools will also be expected "to

provide training for the larger school community.” Since public schools cannot expel all harassers, they must be prepared to offer counseling to those who remain in school. Schools must not only end the specific form of harassment that led to the complaint, but “take steps reasonably calculated to end *any* harassment, *eliminate* a hostile environment if it has been created, and *prevent* harassment from occurring again”—a Sisyphean task in most schools. OCR had come late to the game, but it seemed intent upon making up for lost time.

To justify this new set of rules, OCR linked them to the underlying purpose of Title IX, guaranteeing equal educational opportunity. Here its regulatory ambitions—and its subsequent divergence from the Supreme Court—become most apparent. According to OCR “hostile environment sexual harassment” occurs when the “conduct of a sexual nature” by “other students, employees, or third parties” is “sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from the educational program or to create a hostile or abusive educational environment.” In making this determination, “the conduct should be considered from both a subjective and objective perspective”—that is, not simply from the perspective of the “reasonable person,” but from the perspective of the particular individual involved. A “hostile environment” may exist “even if there is no tangible injury to the student” and “even if the harassment is not targeted specifically at the individual complainant.” Although it will usually take a pattern of harassing conduct to create a hostile environment, “a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.” In any large school this combination of breadth and vagueness will ensure that some form of sexual harassment is almost always taking place. That is why schools must create extensive new programs to root it out.

OCR clearly saw itself as establishing rules that would be enforced by federal judges, not through the ineffective funding mechanism. Not once has it initiated termination proceedings to enforce its sexual harassment rules. In the preface to its 1997 guidelines it explained that “one beneficial result” of the new rules would be “to provide courts with ready access to the standards used by the agency that has been given the authority by law to interpret and enforce Title IX. Courts generally benefit from and defer to the expertise of an agency with that authority.”⁶³ No doubt the Supreme Court’s decision in *Franklin v. Gwinnett* increased OCR’s confidence that the Court would follow its lead.

In 1998 and 1999, though, the Supreme Court adopted a more limited interpretation of Title IX. Its first Title IX sexual harassment case, *Gebser v. Lago Vista Independent School District*, involved serious—indeed most likely criminal—misconduct by a public school teacher against a middle school girl. Its second *Davis v. Monroe County School Board*, involved repeated and unquestionably offensive behavior by an elementary school boy. In each instance the Court split along liberal-conservative lines. Justice O’Connor wrote both opinions, siding with the conservative bloc in *Gebser* and with the liberals in *Davis*. Together these cases established the liability standards federal courts would apply to Title IX cases brought by private parties for monetary damages. In both the Court emphatically rejected the definition of “hostile environment harassment” and the liability standards endorsed by OCR in 1997.

Justice O’Connor’s majority opinion in *Gebser* concluded that a school district would not be held liable for teacher-on-student sexual harassment “unless an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has *actual knowledge of, and is deliberately indifferent to*, the teacher’s misconduct.”⁶⁴ The Clinton Administration’s Solicitor General had urged the Court to defer to OCR. But the majority

refused to impute such a standard to a statute that make no explicit provision for individual damage suits. Title IX, Justice O'Connor argued, explicitly gives school districts the opportunity to correct deficiencies before facing administrative enforcement action. "It would be unsound," she concluded, to allow courts to use an *implied* private right of action to penalize schools for deficiencies of which they had no notice." Title IX was not designed primarily "to compensate victims," but to prevent discrimination by those using federal funds. Federal regulation should "avoid diverting educational funding from beneficial uses when a recipient was unaware of discrimination . . . and willing to institute prompt corrective measures." The strict liability standard favored by OCR and the Solicitor General "is at odds with that basic objective."⁶⁵

The four dissenters complained that the Court's "exceedingly high standard" would make it nearly impossible for "victims of intentional discrimination" to recover damages.⁶⁶ "As a matter of policy," Justice Stevens charged, "the Court ranks protection of the school district's purse above the protection of immature high school students."⁶⁷ A year later it would be the conservative justices who dissented from an O'Connor opinion.

In *Davis*, Justice O'Connor again tried to stake out a middle path between the conservatives—who argued that school districts should *never* be held responsible for peer harassment—and the liberals—who favored OCR's "knew or should have known" standard. Her opinion in *Davis* applied to peer harassment the "actual knowledge/deliberate indifference" standard enunciated in *Gebser*. To this O'Connor added a further limitation: "Such action will lie only for harassment that is *so severe, pervasive, and objectively offensive* that it *effectively bars* the victim's access to an educational opportunity or benefit."⁶⁸ Justice O'Connor repeatedly emphasized the limited scope of judicial review of school's practices. The "deliberate indifference" standard "narrowly circumscribe[s] the set of parties whose known acts of sexual

harassment can trigger some duty to respond.”⁶⁹ It also “cabins the range of misconduct that the statute proscribes.” The lower courts “should refrain from second-guessing the disciplinary decisions made by school administrators.” To avoid liability schools “must merely respond to known peer harassment in a manner that is not clearly unreasonable.” Although “students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the student subject to it,” damages are not available unless it is “serious enough to have the *systematic* effect of *denying* the victim equal access to an educational activity or program.”⁷⁰

To emphasize her disagreement with OCR’s broad definition of “hostile environment harassment” (see above, p.xx) O’Connor explained that while “in theory, a single instance of sufficiently severe one-on-one peer harassment” could have the effect of denying a victim equal access to education,

we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.

She then stated,

By limiting private damages actions to cases having a *systemic effect* on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to ignore.⁷¹

O’Connor suggested that colleges should be granted even more leeway than elementary and secondary schools since a college cannot “exercise the same degree of control over its students that a grade school would enjoy,” and must refrain from “disciplining action that would expose it to constitutional or statutory claims.”⁷² In short, Justice O’Connor’s opinions in both cases emphasized that Title IX obliged schools only to address known misconduct that systematically denies some students the opportunity to receive an education.

In his opinion for the four dissenters, Justice Kennedy warned that while “the majority’s opinion purports to be narrow,” its “limiting principles it proposes are illusory.” “The fence the Court has built is made of little sticks, and it cannot contain the avalanche of liability now set in motion.”⁷³ Anticipating colleges’ response to OCR’s 2011 and 2014 directives, Kennedy warned that schools would be so “desperate to avoid Title IX peer harassment suits” that they would “adopt whatever federal code of student conduct and discipline the Department of Education sees fit to impose on them,” thus “transforming Title IX into a Federal Student Civility Code” and “justify[ing] a corps of federal administrators in writing regulations on student harassment.”⁷⁴ Justice Kennedy’s prediction that federal regulation would expand was correct. But he did not foresee how that would happen, namely, through OCR’s refusal to accept the Court’s narrow reading of Title IX.

The two Supreme Court decisions received scathing reviews from women’s groups and in the law reviews. One law review article, for example, suggested that the *Gebser* decision had caused “the metastasization of the sexual harassment epidemic in educational institutions.” Another asked “Why has the Supreme Court allowed schools to put their heads in the sand?” Yet another concluded that the two decisions “signal that the protection against discrimination that Title IX originally seemed to offer is an empty promise.”⁷⁵

In the waning days of the Clinton Administration OCR responded to *Gebser* and *Davis* by reaffirming its commitment to its 1997 guidelines and even expanding federal regulation a bit here and there. Less than a week before the 2000 presidential election, it released its proposed “Revision of Sexual Harassment Guidelines.” On January 19, 2001, the day before the inauguration of George W. Bush, it published a short notice in the Federal Register announcing that a final set of guidelines that would soon be made available to the public. It seems that OCR

was in such a rush to beat the presidential clock that it could not get its 37 pages of guidelines into the Federal Register on time.⁷⁶

The central argument of OCR's 2001 guidelines was that *Gebser* and *Davis* only apply to *private suits for money damages*, not to *administrative enforcement* of Title IX. According to OCR, "the *Gebser* Court recognized and contrasted lawsuits for money damages with the incremental nature of administrative enforcement of Title IX."⁷⁷ OCR's "enforcement action, therefore, do not raise the Court's concern." In fact, OCR contended that the Supreme Court's recent decisions had "confirmed several fundamental principles articulated by the Department in the 1997 guidance." Consequently, "our proposed revised guidance does not change the standards that we use."

OCR's 2001 midnight regulations broke the link between administrative rules and enforcement on the one hand, and the liability rules that had gradually evolved under Titles VII and IX on the other. In bland legalistic language that belied the huge step it was taking, OCR explained,

Because the focus of the guidance is on a school's administrative responsibilities under the nondiscrimination requirements of the Title IX statute and regulations, rather than its liability to private litigants, the proposed revised guidance no longer describes a school's compliance in terms of "liability" or "Title VII agency law." Instead, the proposed revised guidance explains the regulatory basis for a school's Title IX responsibility to take effective action to prevent, eliminate, and remedy sexual harassment occurring in its program.⁷⁸

OCR lawyers justified this switch with many pages of intricate legal argument, abundantly footnoted. They had the temerity to cite several lower court decisions to support this claim, completely ignoring the Supreme Court's clear statement to the contrary. Apparently OCR had decided to stick its finger in the Court's eye—and let the incoming Bush Administration deal with the consequences.

This was deft work, but it ignored one fundamental point: for nearly 30 years OCR had relied on judicial enforcement of Title IX because it knew it could not terminate federal funding for any but the most egregiously discriminatory actions. When OCR demanded more than the courts, how would it enforce its dictates? Why would school districts subject to adverse administrative action not challenge OCR in court, claiming that its interpretation of Title IX not only conflicted with *Gebser* and *Davis*, but had flouted the rulemaking procedures established in Title IX and the Administrative Procedures Act?

Not surprisingly, the Bush Administration made little effort to enforce these midnight guidelines. The incoming head of OCR's enforcement division suggested that since the Clinton OCR had not followed standard rulemaking procedures, these guidelines had no legal force. For this he earned the scorn of several women's groups. The number of sexual harassment complaints received by OCR remained tiny—less than a dozen per year—and OCR's investigations were few in number and limited in scope. Responding to concerns voiced by the Foundation for Individual Rights in Education, the Bush OCR issued a statement emphasizing that the guidelines should not be interpreted to limit First Amendment rights.⁷⁹ Other than that, it made little effort to revise or to enforce the 2001 policy statement. It concluded, probably correctly, that such a move would unnecessarily open a can of political worms.

Interlude: Disputed Foundations

In the decade that followed publication of OCR's 2001 guidelines, there was little reason to explore their rationale or implications. OCR's declaration that it would "no longer describe a school's compliance in terms of 'liability'" appeared to be little more than a legal ploy to distance itself from Supreme Court decisions criticized by many of its allies. But over the long run this seemingly technical switch allowed OCR to adopt a radically different approach to the

issue. To understand the broader significance of this break with the established tort-law approach, it is necessary to take a step back and examine the larger debate over the foundation of sexual harassment law.

In the early years of Title VII litigation, judges struggled to explain why sexual harassment constituted discrimination “on the basis of sex.” The rationale upon which most judges eventually fastened was that when a heterosexual male harasses a woman, it is “because” of her “sex.” A heterosexual male would not similarly harass another male—he is discriminating in his sexual preferences. This means that Title VII or Title IX also applies when a straight woman harasses a man, when a gay male harasses another male, or when a lesbian harasses another woman. But, as several judges reluctantly concluded, a bisexual man does not violate Title VII or Title IX if he harasses both men and women.⁸⁰ Since he does not discriminate on the basis of sex, such an equal opportunity harasser violates no federal law. This led the syndicated humor columnist Art Buchwald to advise lecherous bosses to bring a male employee along on their trysts with employees of the opposite sex.⁸¹

Buchwald was not the only one to find this anomalous. In his dissent in *Meritor*, D.C. Circuit Court Judge Robert Bork (joined by Judges Scalia and Starr) made this observation about “the awkwardness of classifying sexual advances as ‘discrimination’”:

Harassment is reprehensible, but Title VII was passed to outlaw discriminatory behavior and not simply behavior of which we strongly disapprove. The artificiality of the approach we have taken appears from the decisions in this circuit. It is “discrimination” if a man makes unwanted sexual overtures to a woman, a woman to a man, a man to another man, or a woman to another woman. But this court has twice stated that Title VII does *not* prohibit sexual harassment by a “bisexual superior because the insistence upon sexual favors would apply to male and female employees alike.” Thus, this court holds that only the differentiating libido runs afoul of Title VII, and bisexual harassment, however blatant and however offensive and disturbing, is legally permissible.

Bork argued that this “bizarre result suggests that Congress was not thinking about individual harassment at all” when it enacted Title IX. “Had Congress been aiming at sexual harassment, it seems unlikely that a woman would be protected from unwelcome heterosexual or lesbian advances but left unprotected when a bisexual attacks.”⁸²

When Congress passed Title VII and Title IX it was concerned with gross gender discrimination, primarily the exclusion of women from jobs and educational programs, but possibly similar exclusion of men as well. Sexual harassment law focuses on a much different meaning of the key word, “sex.” (To appreciate the contrasting meanings, recall the old joke about the employer who must fill out a government questionnaire. To the query “Number of employees broken down by sex?” he replies, “A few have succumbed to drink, but I can’t recall any who have been broken down by sex.”) As a result, Titles VII and IX now cover not just behavior that discriminates against members of one or the other gender, but *any* form of harassment involving *sexual activity or words*. Indeed, so intense has this focus become that OCR had to remind schools that gender-based harassment unconnected to sexual activity still violates Title XI.

As a number of legal scholars have pointed out, efforts to establish a firmer foundation for sexual harassment law fall into one of two camps. The first, sometimes called the “liberal”⁸³ approach, is the one most commonly endorsed by judges. Margaret Crouch provides this helpful summary:

Proponents of this perspective tend to see sexual harassment as behavior by some individuals that unjustly harms other individuals in their place of work (or perhaps elsewhere.) On this view, sexual harassment is not intrinsically connected to gender. However, because of contingent gender disparities in our society, men will tend to be the harassers and women the harassed. Advocates of this perspective tend to attribute sexual harassment to *misbehaving individuals*, rather than to any group-based cause.⁸⁴

Judith Resnik has emphasized the ways in which the court's invocation of tort law has put the focus on individual malfeasors, individual victims, and individualized damages: "By and large, defendants are identified either as individuals or as small groups of people, alleged to harass deliberately or knowingly tolerate harassing behavior."⁸⁵

This tort-based approach tends to assume that sexual harassment is the work of a few bad apples—usually, but not always males—who need to be identified, punished, and most likely removed from the workplace or school. This can best be done by giving victims opportunities and incentives to complain, and by giving schools and employers strong incentives to create grievance procedures and to take action when faced with credible evidence of harassment. The more liability rests on employers and schools, the stronger their incentives to identify, discipline, and eliminate those bad apples.

A central irony of sexual harassment law is that Catherine MacKinnon, usually considered the intellectual godmother of these legal doctrines, has from the very beginning attacked the tort-based, individualistic understanding of sexual harassment adopted by most judges and administrators. It is a fundamental mistake, MacKinnon argued, to view sexual harassment as wayward behavior by a few individuals. Sexual harassment, she has written, is "not merely a parade of interconnected consequences with the potential for discrete repetition by other individuals." Instead it is

a group-defined injury which occurs to many different individuals regardless of unique qualities or circumstances, in ways that connect with other deprivations of the same individuals, among all of whom a single characteristic—female sex—is shared. *Such an injury is in essence a group injury.* The context which makes the impact of gender cumulative—in fact, the context that makes it injurious—is lost when sexual harassment is approached as an individual injury, however wide the net of damages is cast.⁸⁶

Sexual harassment must be viewed not as the work of a few bad apples, but as part of a much

larger pattern of subordination of women, “just one of many features of society that perpetuates the interlocked structure by which women have been kept sexually in thrall to men and at the bottom of the labor market.” Far from an aberration, sexual harassment is engrained in our social structure: “Women historically have been required to exchange sexual services for material survival in one form or another. Prostitution and marriage as well as sexual harassment in different ways institutionalize this arrangement.” (175) The problem is gender inequality. The victims are women, and the perpetrators men.

MacKinnon insisted that legal doctrines that ignore these crucial facts produce only incoherent, ineffective liability rules and remedies. “Tort theory,” she argued, “fails to capture the broadly social sexuality/employment nexus that comprises the injury of sexual harassment” because it treats “the incidents as if they were outrages particular to an individual woman rather than integral to her social status as a woman worker, the personal approach on the legal level fails to analyze the relevant dimensions of the problem. “(88) Tort law only shaves off the tip of the patrimonial iceberg: “Tort law considers *individual* and *compensable* something which is *fundamentally social* and should be *eliminated*.”⁸⁷ Rather than focus on the crass, immoral, or unethical behavior of a few individual supervisors, fellow employees, teachers, or students, her “inequality” approach “sees women’s situation as a structural problem of enforced inferiority that needs to be radically altered.” (5) In short, sexual harassment on the job and in schools is not a random, occasional event perpetrated by a few malfactors, but rather an omnipresent threat that maintains the economic and physical subordination of women.

Many others feminist writers and activists have adopted this understanding of the problem, which Margaret Crouch calls the “sociocultural” or “dominance perspective.” Although they recognize that courts and agencies have taken a few steps to reduce sexual

harassment, they are critical of judges—and especially Supreme Court justices—who fail to provide “a systematic account of the social order sustained by ‘discrimination.’”⁸⁸ According to Katherine Franke, for example, “completely ignored in the Supreme Court’s sexual harassment jurisprudence are notions of structural inequality and the relationships between gender-based power and sex.”⁸⁹

The feminist critique of the individual malfeasor understanding of sexual harassment is usually couched in highly abstract terms. But three specific claims lie at the heart of this argument. First, sexual harassment in its many forms—including sexual assault—is not an exception, but the rule. It is the inevitable result of a culture that condones and even encourages it. This is reflected in the rhetoric now common on college campuses: the “epidemic” of sexual assault is a direct result of our “rape culture.”

Second, the very institutions tort law calls upon to stop sexual harassment—above all employers and schools—are complicit in the abuse of women. They have turned a blind eye to the problem not only because they want to guard their reputation, but also because they are determined to protect powerful internal interests. For schools this includes money-making athletic programs, fraternities with influential alumni, and old-boy networks that generate financial contributions. Consequently one simply cannot trust established institutions to confront or eliminate the problem. Nor will a small change in incentives of the sort achieved by tort law be enough to change deeply embedded institutional assumptions and practices.

Third, the sexual harassment problem is not a product of the complexities of human nature or intimate relationships. Rather, it is a consequence of contemporary culture and power relationships. The individual malfeasor approach assumes that the problem can be reduced, but—like other forms of criminal and unethical behavior—not eliminated. Despite the fact that the

inequality/subordination approach views the problem as much more severe and deeply rooted in social practices, its adherents repeatedly argue that sexual harassment can indeed be *eliminated* and federal regulators should not relax their supervision of educational institutions until it is.⁹⁰

Those who adopt the inequality/subordination position insist that four decades of sexual harassment law have done little to reduce the frequency of harassment. Despite her praise for the judges who made sexual harassment actionable under Title VII, Catherine MacKinnon maintains that “men sexually harass women as often as they did before sexual harassment became illegal.”⁹¹ “While courts have developed a comprehensive set of legal rules governing workplace harassment,” Joanna Grossman maintains, “the incidence of harassment has not changed.” For her, the regulatory regime established by the Supreme Court constituted “the final triumph of form over substance in sexual harassment law.”⁹²

Although it is unlikely that anyone quite understood it at the time, OCR’s 2001 abandonment of the standard tort/liability regulatory approach made it easier for the agency to move from the individual malfeasor to the inequality/subordination understanding of the underlying problem. The agency’s focus shifted from how schools should handle individual cases to demands for comprehensive efforts to eliminate all forms of sexual harassment. OCR now assumed that schools bear responsibility not just for creating grievance procedures to identify and punish the bad apples, but also for remedying the effects of all harassment aimed at its students, regardless of its source and regardless of schools’ efforts to punish perpetrators. OCR required all schools, not just those where harassment had been demonstrated to be widespread, to provide regular training for all students and for most faculty and administrators. In short, the emphasis shifted from individual cases to systematic efforts to change institutional structure and organizational culture.

Phase Three: The Obama Initiative

For the first year of the Obama Administration, OCR remained quiet. Not only was the Administration preoccupied with its ambitious legislative agenda, but Secretary of Education Arne Duncan focused his efforts on the President's Race to the Top initiative, which had been funded by the 2009 stimulus bill. This changed in March of 2010, when Secretary Duncan delivered a speech in Selma, Alabama, charging that for a decade (i.e. during the Bush Administration) OCR had "not been as vigilant as it should have been in combating gender and racial discrimination and protecting the rights of individuals with disabilities" and promising "to reinvigorate civil rights enforcement."⁹³ OCR simultaneously announced investigations of over 30 school districts that had allegedly failed to provide minority students with equal access to college prep and AP courses. It subsequently published lengthy new rules for determining whether schools have discriminated against racial minorities in their disciplinary practices and allocation of resources, new rules and multiple settlement agreements on education for English Learners, and guidance on what schools must do to promote gender equity in intercollegiate and interscholastic athletics. Its sexual harassment guidelines and investigations were just one part of the "We Can't Wait" campaign waged by the White House and cabinet secretaries

The following pages attempt to summarize the key features of OCR's new sexual harassment regulation. It should be noted from the outset that the agreements colleges have negotiated with OCR frequently go beyond the minimums OCR has established in its policy statements. For example, OCR encourages, but does not require, schools to replace disciplinary hearings with a "single investigator model" that places nearly full authority in a "professional" Title IX investigator. One suspects that colleges eager to end quickly OCR compliance reviews feel considerable pressure to bow to demands not explicitly stated in formal OCR documents.

Defining “Sexual Harassment” and “Hostile Environment”

Perhaps the most notable features of OCR’s recent policy is its broad definition of sexual harassment. “Unwelcome conduct of a sexual nature” now includes

making sexual comments, jokes, or gestures; writing graffiti or displaying or distributing sexually explicit drawings, pictures, or written material; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating e-mails of Web sites of a sexual nature. (p. 6)

To violate Title IX harassment need not (a) require “intent to harm,” (b) “be directed at a specific target,” or (c) involve repeated incidents.” Nor must harassment involve actions by a member of one sex against members of another sex or even sexual activity or comments of any kind. Title IX also covers what OCR has termed “gender-based harassment”:

acts of verbal, nonverbal, or physical aggression, intimidation or hostility based on sex or sex-stereotyping. Thus it can be sex discrimination if students are harassed either for exhibiting what is perceived as stereotypical characteristics for sex, or for failing to conform to stereotypical notions of masculinity or femininity. (2010 DCL, p. 80)

Originally Title IX was aimed at preventing schools from denying educational opportunity to students on the basis of their biology. Now it has been extended to requiring schools to prevent students from criticizing others because of their behavior and gender identity.

As we have seen, in *Davis* the Supreme Court emphasized that educational institutions violate Title IX only when peer harassment becomes “systemic” and the institution willfully refuses to respond. OCR, in contrast, continued to insist that even a “single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe.” “Sufficiently severe” is not limited to cases of physical assault. In a pamphlet distributed to all schools, OCR explained that when one student “repeatedly passed sexually explicit photographs” to a classmate, that student had created a “hostile environment” that violated Title IX.⁹⁴

OCR's recent guidelines have also insisted that school officials are responsible for harassment of students by people not affiliated with the college and for harassment "that initially occurred off school grounds, outside a school's education program or activity." Schools must process complaints "regardless of where the conduct occurred" because "students often experience the *continuing effects* of off-campus sexual harassment in the educational setting." If the perpetrator is not a student or an employee, the school may not be able to take action against him, but "must still take steps to provide appropriate remedies for the complainant, and, where appropriate, the broader school population." (2014, p. 9) Even when a school has no control over those who created the "hostile environment," it still bears responsibility for minimizing its long-term effects.

Procedures for soliciting, investigating, and resolving complaints

No section of OCR's 2011 guidelines has been more controversial than the requirements for schools' adjudicatory procedures. Both in its general policy statements and in its agreements with particular schools, OCR has prescribed in great detail the requisite timelines, investigative practices, evidentiary rules, hearing and appeals procedures, and confidentiality protocols. While the Supreme Court cautioned that "courts should refrain from second guessing the disciplinary decisions made by school administrators," OCR has demanded that all schools use the "preponderance of the evidence" standard in adjudicating sexual harassment complaints, not the "clear and convincing evidence" standard used by some college disciplinary boards. It "strongly discourages schools from allowing the parties personally to question or cross-examine each other." It requires schools to take the position "that use of alcohol or drugs never make the victim at fault for sexual violence" and to "recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or

preclude a finding of sexual violence.” And it prohibits “questioning about the complainant’s sexual history with anyone other than the alleged perpetrator.” Noting that “Title IX does not necessarily require a hearing” to determine whether a student or employee is guilty of sexual harassment, OCR has encouraged (many would say pressured) schools to adopt “single investigator” model in which “trained investigators” not only gather evidence and interview witnesses without the use of a hearing, but “render a finding, present a recommendation, or even work out an acceptance-of-responsibility agreement with the offender.”⁹⁵ If a school choose to hold a hearing, it must be sure that the complainant and the alleged perpetrator are not present in the same room at the same time—in effect depriving the accused of the right to confront their accusers.

OCR has also insisted that schools investigate *all* complaints, regardless of how serious or credible they seem to school officials. Although school investigators can wait for the police to complete their initial gathering of information in an assault case (usually 3-10 days), they cannot delay their own proceedings pending completion of that investigation. All students at a university must be covered by the same procedures, regardless of whether they are freshmen or third-year law students. Schools must remove from its sexual harassment policy statements any language that appears to discourage anonymous complaints.⁹⁶ The legally binding agreements OCR has reached with many schools contain even more detailed procedural requirements.

Remedial measures to minimize the effects of sexual harassment

OCR makes it clear that punishing perpetrators is a necessary but not sufficient response to incidents of sexual harassment. Once a “hostile environment” has been established—even by a single infraction—schools “must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects.” “Effective corrective action” includes not just

“disciplinary action against the harasser” and “remedies for the complainant,” but also “changes to the school’s overall services and policies.” (2011, p15) The “hostile environment” that must be remediated is not just that surrounding the individual victim, but that of “the broader student population.” The assumption seems to be that acts of harassment reflect not just the pathologies of the perpetrator, but the culture of the institution.

Even before the school’s investigation has been completed and a finding announced, the school must “take steps to protect the complainant.” This may include allowing the complainant “to change academic or living situations” in order to “avoid contact with the alleged perpetrator.” In separating the two, “a school must minimize the burden on the complainant.” In other words, if anyone must change classes, dormitories, or activities it *must* be the accused—an obvious deviation from the ordinary assumption of innocent until proven guilty. Moreover, the school must protect the complainant against “retaliatory harassment,” including “name-calling and taunting.” How the school can accomplish this—and how it can distinguish “retaliation” from reasonable criticism of the actions of the claimant—is left unclear. There is no mention of protecting the *accused* student from “name-calling and taunting” (not an uncommon occurrence on college campuses)--another indication that the presumption of innocence has been abandoned

OCR suggests that schools consider the following measures to assist victims of sexual assault: “providing an escort to ensure that the complainant can move safely between classes and activities; “comprehensive, holistic victim services, including medical, counseling, and academic support services, such as tutoring” at no cost to the victim; and “arranging for the complainant to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not adversely affect the complainant’s academic record.” Schools are

encouraged to provide these services immediately “as interim measures before the school’s investigation is complete.”

It takes OCR two single-spaced pages to list remedies “for the broader student population.” These include “but are not limited to” the following: “offering counseling, health, mental health and comprehensive victim services to all students affected by sexual harassment or sexual violence”; “designating an individual from the school’s counseling center to be ‘on call’ to assist victims of sexual harassment or violence whenever needed”; creating a committee of students and school officials to identify strategies for combatting sexual harassment; “conducting periodic assessments of student activities to ensure that the practices and behavior of students do not violate the school’s policy against sexual harassment and violence”; and “investigating whether school employees with knowledge of allegations of sexual harassment or violence failed to carry out their duties.” Since it will be rare for any but the smallest college to be completely free of all non-consensual sexual activity, almost every school will be expected to take at least some of these steps.

One might wonder why a school that has diligently solicited and investigated complaints and punished perpetrators should be expected to take so many additional remedial steps. The answer, it seems, is that the measures listed by OCR are not so much remedies for specific acts as measures all schools should be expected to adopt to address the general problem.

Remaking school culture

A key theme underlying OCR’s guidelines, one repeated in several White House reports, is that reducing sexual assault requires not just punishing offenders, but achieving deeper cultural change. In the words of a 2014 report by the White House Council on Women and Girls,

Sexual assault is pervasive because our culture still allows it to persist. According to the experts, violence prevention can’t just focus on the perpetrators and the survivors. It has

to involve everyone. And in order to put an end to this violence, we as a nation must see it for what it is: a crime. Not a misunderstanding, not a private matter, not anyone's right or any woman's fault.⁹⁷

Consequently, effective prevention programs must be “sustained (not brief, one-shot educational programs), comprehensive, and address the root individual, relational and societal causes of sexual assault.” Getting students to understand that “sexual assault is simply unacceptable” will require a “sea change” in attitudes.⁹⁸

To this end schools must provide “training” to faculty, adjudicators, investigators, law enforcement personnel, general counsels, resident assistants, medical and counseling staff, and, of course, students. Indeed, no word is repeated more frequently in OCR guidance documents. The types of mandatory are too numerous to list here, but they include the following: training for all employees on their responsibility to report sexual harassment that they witness or hear about, how to recognize the “warning signs” of sexual harassment, and how to encourage students to file grievances without breaching confidentiality; training for law enforcement personnel on how to investigate sexual harassment cases; training for those who will sit on disciplinary boards on how to evaluate sexual harassment claims; training for students who serve as advisors in residence halls; and special training for student athletes and their coaches, and for fraternities and sororities. The Title IX Coordinator is responsible for all these forms of training, with the help of the “best practices” documents produced by several federal agencies. Schools must also “have methods for verifying that the training was effective.” How they might do that—demonstrate that this training led to a decrease in sexual violence and other forms of sexual harassment—was left for another day and another DCL.

Given the prominence of “training” in OCR documents, the lack of detail on what this means is striking. The compliance agreements OCR has reached with particular institutions are only slightly more specific. The Tufts agreement, for example, states that staff training must

include not only understanding federal rules, university policies, and resources available to students, but also “victim behavior, dynamics of power, [and] implicit bias.”⁹⁹ Who will provide this tutoring on the “dynamics of power” and “implicit bias”? Given the fact that thousands of educational institutions must now offer training on a yearly, it is likely that an extensive industry will spring up to meet the demand, providing much needed employment opportunities to JDs and sociology PhDs. Schools are already scrambling to hire administrators and trainers who can claim expertise in this area.

Strengthening Internal Compliance Offices

Little noticed so far in the heated debate over OCR’s guidelines has been the agency’s effort to expand both the responsibilities and the independence of schools’ internal Title IX offices. Federal officials have apparently learned an important lesson from decades of experience: in order to change the behavior of a large bureaucracy, it is essential to embed within it new offices sympathetic and responsive to the concerns of regulators. As OCR’s ability to call upon the courts to enforce its mandates waned, it has placed more emphasis on strengthening its allies within regulated entities.

A number of recent studies of affirmative action and sexual harassment have shown that “human resources” professionals within corporations, schools, and local governments have been a major factor behind the institutionalization of these practices.¹⁰⁰ “In the United States,” Harvard sociologist Frank Dobbin writes, “once harassment was defined as employment discrimination, it gained a natural constituency among corporate personnel experts handling Title VII.”¹⁰¹ These personnel administrators offered two solutions, grievance procedures and training—both designed and run, of course, by personnel administrators. In his study of local government compliance with Title VII rules, Charles Epp found that “to win executive backing,

personnel experts often exaggerated federal support for training just as they had exaggerated support for grievance procedures.” Although “the personnel administration profession initially received feminists’ complaints of sexual harassment coolly,” before long “the profession accepted many of the feminists’ policy recommendations and endorsed policies that reached significantly beyond the Supreme Court’s narrow suggestions.” The “growth of employees rights in the 1970s and 1980s,” Epp writes, “offered personnel administrators a virtual lifeline, a new rationale for its existence and role.”¹⁰² Examining articles on sexual harassment in Education Week and other journals read by school officials, Jodi Short found that the vast majority of these stories baldly asserted that schools were liable for peer-on-peer sexual harassment well before either OCR or the federal courts had taken a stand on this contentious legal issue. She notes that some of these authors also offered training programs to protect schools from litigation, and thus “had a professional, material stake in the widening concern over peer sexual harassment that helped drive the issue.”¹⁰³

OCR’s post-2011 guidelines require schools to expand the authority of their Title IX coordinators and to insulate them from control by other school officials. The Title IX coordinator is responsible not just for “overseeing all Title IX compliance,” but also for “identifying and addressing any patterns or systematic problems that arise during the review of such [sexual harassment] complaints.” (2011, p. 7) The coordinator must have access to the entire record of complaints, adjudicatory determinations and punishments, including law enforcement records. Title IX coordinators have responsibility for conducting all the training exercise described above. They are also given the important task of conducting the “climate checks”—surveys of the extent and nature of sexual harassment on campus—that have been all

but mandated by OCR. The guidelines strongly imply that the coordinator should hire and supervise all those who investigate Title IX complaints.

In April, 2015, OCR issued yet another DCL, this one devoted exclusively to the structure of Title IX offices. Title IX coordinators, Assistant Secretary Lhamon told school leaders, “must have the full support of your institution.” She highly recommended that each institution employ a “full-time Title IX coordinator” in order to “minimize the risk of conflict of interest and . . . ensure sufficient time is available to perform all the role’s responsibilities.” The coordinator “should be independent to avoid any potential conflict of interest” and “should report directly” to the school’s “senior leadership.” To underscore the institutional autonomy of the Title IX office, the 2015 DCL contained this novel demand:

Title IX’s broad anti-retaliation provision protects Title IX coordinators from discrimination, intimidation, threats, and coercion for the purpose of interfering with the performance of their job responsibility. A recipient [school], therefore, must not interfere with the Title IX coordinator’s participation in complaint investigations and monitoring of the recipient’s efforts to comply with and carry out its responsibility under Title IX.¹⁰⁴

This seems to suggest that no one within a school can modify, overrule, or even question the decisions and policies of the Title IX coordinator. Nor, apparently, can the Title IX coordinator be fired as the result of a disagreement with the school’s leadership. At the very least this DCL sends the clear message that any school that second-guesses its Title IX coordinator risks being investigated by OCR.

The same 2015 DCL recommends that to provide the requisite “regular training to the Title IX coordinator,” schools take advantage of “technical assistance” provided by OCR’s regional offices and training programs offered by the Department of Education’s “Equity Assistance Centers.” The federal government has deluged Title IX coordinators with suggestions on what constitutes “best practices” for almost all their tasks. The 2014 White

House report promised to provide them with “sample reporting and confidentiality protocols”; “promising policy language” on “definitions of various forms of sexual misconduct” and “the proper immediate, interim, and long-term measures a school should take on behalf of survivors, whether or not they seek a full investigation”; “training programs for campus officials involved in investigating and adjudicating sexual assault cases; a sample “Memoranda of Understanding” for establishing divisions of labor with local police and local rape crisis centers; and “a new toolkit for developing and conducting a climate survey.” To strengthen their ties with like-minded professionals outside their school, OCR encourages Title IX coordinators “to seek mentorship from a more experienced Title IX coordinator and to collaborate with other Title IX coordinators in the region.”

In its agreements with particular schools, OCR has asserted much more direct OCR control over schools’ Title IX offices. For example, the Tufts resolution letter lists 13 items it must report to OCR on every student complaint it investigates.¹⁰⁵ The university promised to “provide access to its files during OCR’s monitoring” to confirm the accuracy of these reports. Tufts must submit all training material to OCR for its approval. It cannot alter the pamphlets it distributes to students without an OK from OCR. The agreement stipulates that “OCR may visit the University, interview staff and students, and request additional reports” to determine whether the university has complied with the agreement and all Title IX rules. Most strikingly, Tufts may not make any changes in its grievance procedures without prior approval by OCR. It must receive prior approval from OCR on the design and evaluation of the annual “climate checks” it has agreed to conduct. OCR also required the university to “formulate a working group of students and staff to help gather and provide feedback on how the climate checks are conducted, and how to respond to its results.”¹⁰⁶ Although the resolution letter is not clear on this point, it

seems that this monitoring will end only when Tufts has demonstrated it is a “campus free from sexual misconduct.” It is easy to see why universities are so eager to avoid OCR investigations.

Who is likely to staff these enlarged Title IX offices? The Chronicle of Higher Education reports that since OCR started its sexual harassment investigations in 2013, schools have been “scrambling to find people with experience responding to sexual-violence complaints and the ability to interpret federal regulations. Among new hires are former lawyers with the Office for Civil Rights and longtime equal-opportunity advocates.”¹⁰⁷ Since 2014 Harvard has hired a new Title IX coordinator and a new chief investigator. Both are former OCR lawyers. One way to attract top candidates, one head-hunter told the Chronicle is to show that the university is thinking about the job “not only in the narrow compliance sense, but in the spirit of Title IX.” According to Kaaren Williamsen the new Title IX coordinator at Swarthmore (and previously director of the Gender and Sexuality Center at Carleton College), “These new jobs are really not just about compliance anymore,” but are about “campus climate.” Since 2013 Swarthmore, a college with only 1500 students, has appointed four new Title IX deputy coordinators plus a “violence prevention educator and advocate” in its health center and a new sexual misconduct investigator in the college police department. It has also added staff positions in a new Office of Student Engagement, and created a Student Title IX Advisory Team, “a group of 10 dedicated Swarthmore students who will advise on policy, procedures, events, and initiatives.”¹⁰⁸ This is a good example how expansion of government regulation increases the number and influence of academic administrators—an institutional shift of great significance in higher education.

The aspirations of some of these newly empowered administrators was expressed by Laura Bennett, the President of the Association for Student Conduct Administrators, a group sure to benefit from OCR’s mandates. Bennett was one of the people asked by The Chronicle of

Higher Education to explain when we would know we have made progress combatting sexual violence on campus. She responded that “the following would demonstrate institutional and systemic progress to me”:

First, there is adequate staffing for prevention and response, ample funding, and ongoing training. . . . Title IX coordinators, student-conduct administrators, and campus law enforcement are empowered by presidents and attorneys to make relevant policy decisions. Second, faculty discuss consent and healthy and unhealthy relationships in every course . . . Students confront misogynistic and homophobic behaviors and statements . . . [and] the student party culture changes as a result of healthier concepts of masculinity and multiple positive identities for all genders and orientations.¹⁰⁹

Bennett’s statement captures the link between bureaucratic expansion and sweeping cultural change that informs OCR’s regulatory initiative.

Conclusion

OCR’s post-2010 sexual harassment initiative not only raises a host of controversial issues, but shows us how the American civil rights state is responding to a more conservative Supreme Court. The implicit alliance between judges and administrators that built the civil rights state in the decades following the civil rights revolution of the 1960s is now badly frayed. Paradoxically, this has left OCR freer to expand its regulatory reach, but has also forced it to develop a new enforcement strategy. If that emerging strategy works for sexual harassment regulations, it will undoubtedly be tried elsewhere—at least during Democratic administrations.

The success of this new enforcement strategy depends in part on staying out of court—a reversal of the previous institutional pattern. It also depends on OCR’s ability to gain allies within the institutions it is regulating and to prevent the mobilization of sustained, organized opposition. That is easier to do on the issue of curbing sexual assault on campus than, say, redistributing resources among public schools. Few people dare being tarred with the charge of condoning sexual assault. College leaders have shown little backbone in resisting demands from

vocal students or from federal administrators threatening (at least in public) to cut funding. They are, in short, soft targets. At the local level, though, school funding issues are clearly redistributive, almost guaranteed to provoke concerted opposition. Similarly, OCR rules on school discipline are likely to generate opposition from teachers and from parents concerned with school safety and order. So far OCR has instituted few investigations of these other DCLs.

As we have seen, a prominent feature of OCR's regulatory initiative on sexual harassment has been the lack of opportunity for public comment or for review by other federal agencies. Instead of proceeding through standard notice-and-comment rulemaking, OCR has unilaterally announced its new guidelines, and only then asked for comments. It has been guided by a variation on the dictum of the Red Queen: "Guidelines first; debate afterwards." In testimony before a Senate committee in 2014, Molly Corbett Broad, president of the American Council on Education, complained that as a result, "no affected party—advocacy groups, colleges and universities, civil liberties organizations, the public, policy makers, students and parents—has the opportunity to raise questions and ask for clarifications. . . . Those who must comply with the law are far less likely to understand what they are expected to do, and key questions go unanswered."¹¹⁰ It is thus not surprising that OCR has run into more opposition than it expected.

One might defend OCR by saying that it can still modify its demands on the basis of what it learns during the investigation and settlement phases of regulation. But OCR's new institutional strategy is likely to lock in current policies rather than promote learning about the nature of the problem, what works, and what doesn't. Both the political science literature on "path dependency" and common sense tell us that the offices created within universities to run the programs mandated by OCR will neither disappear nor conclude that the problem they have

been created to attack is not nearly as serious as originally believed. They will either do all they can to find evidence justifying their existence or they will expand their mandate to address additional problems they manage to identify. Issues come and go. Academic administrators remain in place. The balance between faculty and administrators within the university will again shift in the direction of the latter. This will not worry federal regulators or college presidents, deans, and assorted deanlets. But for the parents and students paying for college education and for the faculty paid to teach them, this remains an ominous development.

ENDNOTES

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⁶ Complaint No. 01-10-2089, <http://www2.ed.gov/documents/press-releases/tufts-university-agreement.pdf>

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¹² “Open Letter from Members of the Penn Law School Faculty,” <http://media.philly.com/documents/OpenLetter.pdf>

¹³ “Sex, Lies, and Justice: Can we reconcile the belated attention to rap on campus with due process?” *The American Prospect*, Winter, 2015

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- ³⁴ The early cases are described in Baker, pp. 15-26, and Catherine MacKinnon, *Sexual Harassment of Working Women* (Yale, 1979), ch. 4. The Yale case is *Alexander v. Yale* 631 F. 2d 178 (1980).
- ³⁵ *Williams v. Saxbe* 413 F. Supp. 654 (1976) at 657-58.
- ³⁶ *Barnes v. Costle* 561 F. 2d 983 (1977) at 989-90
- ³⁷ *Bundy v. Jackson*, 641 F. 2d 934 (1981) at 944.
- ³⁸ At 945.
- ³⁹ 45 *Federal Register* 74676 (November 10, 1980). The proposal was published on April 11, 1980, 45 *Federal Register* 25024
- ⁴⁰ Charles Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (Chicago, 2009), pp. 174-5 and Baker, *Women’s Movement*, pp. 139-40
- ⁴¹ “Employer Liability for Sexual Harassment by Supervisors,” in MacKinnon and Siegel, p. 287
- ⁴² At 25.
- ⁴³ Charles Clark, “Sexual Harassment,” *CQ Researcher*, August 9, 1991, p. 61; Sarah Glazer, “Crackdown on Sexual Harassment,” *CQ Researcher*, July 19, 1996, p. 642.
- ⁴⁴ For the effect of this change on Title VII litigation, see Farhang, *Litigation State*, ch. 6
- ⁴⁵ Justice Souter in *Faragher v. City of Boca Raton*, 524 US 775 (1998), at 785.
- ⁴⁶ *Burlington Industries v. Ellerth* 524 US 742 (1998) and *Faragher v. City of Boca Raton* 524 US 775 (1998)
- ⁴⁷ Justice Thomas dissent in *Burlington Industries*, at 771-2
- ⁴⁸ Justice Kennedy in *Burlington Industries*, at 751
- ⁴⁹ “*Burlington v. Ellerth* and *Faragher v. Boca Raton*: Federal Common Lawmaking for the Modern Age,” in Joel Friedman, ed., *Employment Discrimination Stories* (Foundation Press, 2006), pp. 226-27.
- ⁵⁰ “Supreme Court Weaves Legal Principles from a Tangle of Litigation,” *N.Y. Times*, June 30, 1998, p. A20
- ⁵¹ Epp. *Making Rights Real*, p. 227

⁵² “Employer Liability,” p. 287

⁵³ *Cannon v. University of Chicago* 441 US 677 (1979)

⁵⁴ *Franklin v. Gwinnett*, at 75

⁵⁵ *Davis v. Monroe County Board of Education* 526 US 629 (1999) at 675.

⁵⁶ *Davis* at 651.

⁵⁷ *Doe v. Petaluma School District* 949 F. Supp. 1415 (N.D. Cal., 1994).

⁵⁸ “Creating Peer Sexual Harassment,” p. 40. Many of the decisions are listed in *Doe v. Londonderry School District* 970 F. Supp. 64 (D. N.H., 1997).

⁵⁹ *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006, (1996), at 1016

⁶⁰ *Doe v. Londonderry*, at 72.

⁶¹ Jodi Short, “Creating Peer Sexual Harassment: Mobilizing Schools to Throw the Book at Themselves,” Law & Policy, vol. 28 (2006), p.44.

⁶² 61 Fed. Reg. 42728 and 52172.

⁶³ 12036

⁶⁴ *Gebser v. Lago Vista Independent School District* 524 US 274 (1998) at 277, emphasis added

⁶⁵ *Gebser* at 289 (emphasis in the original)

⁶⁶ *Gebser* at 304

⁶⁷ At 306

⁶⁸ *Davis v. Monroe County School Board* 526 US 629 (1999) at 651 (emphasis added).

⁶⁹ At 644

⁷⁰ At 649 (emphasis added)

⁷¹ At 652-53 (emphasis added)

⁷² At 649

⁷³ At 657-58

⁷⁴ At 684

⁷⁵ Justin Paget, “Did Gebser Cause the Metastasis of the Sexual Harassment Epidemic in Educational Institutions? A Critical Review of Sexual Harassment under Title IX Ten Years Later,” 42 University of Richmond Law Review 1257 (2008); Meghan Cherner-Ranft, “The Empty Promise of Title IX: Why Girls Need Courts to Reconsider Liability Standards and Preemption in School Sexual Harassment Cases,” 97 Northwestern University Law Review 1891 (2003) at 1910; Anne D. Byrne, “School District Liability Under Title IX for Sexual Abuse by a Teacher: Why has the Supreme Court allowed Schools to Put their Heads in the Sand?” 22 Hamline Law Review 587 (1998-99).

⁷⁶ The proposal was published in the Federal Register on November 2, 2000, 65 Federal Register 66092. On January 19, 2001 OCR published in the Federal Register a half-page “Notice of availability,” explaining that “revised guidance” was available from the Department of Education. 66 Federal Register 5512. That document is now available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>

⁷⁷ 65 Federal Register 66093

⁷⁸ *ibid*

⁷⁹ <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>

⁸⁰ *Barnes v. Costle*, 561 F.2d 983 at 990 n.55; *Bundy v. Jackson*, 641 F.2d 943 at 942 n.7

⁸¹ The column is discussed in Baker, p. 22.

⁸² *Meritor v. Taylor*, dissent from denial of hearing *en banc* 760 F.2d 1330 (1985), n. 7

⁸³ Eskridge, “Theories of Harassment ‘Because of Sex,’” in MacKinnon and Siegel, p. 161

⁸⁴ Margaret A. Crouch, Thinking About Sexual Harassment: A Guide for the Perplexed (Oxford, 2001), p. 9

⁸⁵ Resnik, “The Rights of Remedies: Collective Accounting for and Insuring Against the Harm of Sexual Harassment,” in MacKinnon and Siegel, pp. 250-51

⁸⁶ Sexual Harassment of Working Women, p. --(emphasis in original)

⁸⁷ *Ibid*, emphasis added

⁸⁸ Siegel, “Introduction,” p. 18

⁸⁹ “What’s Wrong with Sexual Harassment?” in MacKinnon and Siegel, p. 173

⁹⁰ This understanding of the nature of sexual harassment became particularly apparent at the University of Iowa in 2015. There the university’s president, Sally Mason, responded to student protests by discussing her own distressing experience with sexual assault as an undergraduate. In passing she said that ending sexual assault altogether is “probably not a realistic goal just given human nature and that’s unfortunate.” Student activists immediately attacked her for assuming that sexual violence has some foundation in human nature. The university’s board of

trustees demanded an explanation. It is unlikely that the mayor or police chief of Iowa City would have faced a similar reaction for indicating that the rate of murder, assault, and other felonies in that city cannot be reduced to zero. Outside college campuses most people still believe that unfortunate features of human nature place some limits on what public policy can accomplish. See http://www.huffingtonpost.com/2014/02/27/university-of-iowa-sex-assault_n_4871103.html; and <http://thegazette.com/2014/02/28/regents-express-concern-about-iowa-president-masons-sexual-assault-comments>

⁹¹ “Afterword,” in MacKinnon and Siegel, p. 673

⁹² “The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law,” 26 *Harvard Women’s Law Journal* 1

⁹³ *New York Times*, March 8, 2010

http://www.nytimes.com/2010/03/08/education/08educ.html?ref=collection%2Ftimestopic%2FDuncan%2C%20Arne&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=115&pgtype=collection

⁹⁴ “Sexual Harassment, It’s Not Academic” OCR, 2008, p. 12, available at

<http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html>

⁹⁵ “Not Alone,” p. 14

⁹⁶ Tufts University, Complaint No. 01-10-2089, p. 9, available at <http://www2.ed.gov/documents/press-releases/tufts-university-agreement.pdf> Tufts Resolution Letter

⁹⁷ “Rape and Sexual Assault: A Renewed Call to Action,” p. 6. This section of the report is titled “Changing the Culture.”

⁹⁸ “Not Alone,” p. 9

⁹⁹ Tufts agreement, pp. 10-11

¹⁰⁰ Frank Dobbin, *Inventing Equal Opportunity* (Princeton University Press, 2009); Epp, *Making Rights Real*.

¹⁰¹ Dobbin, p. 193

¹⁰² Epp, *Making Rights Real* p. 177-78

¹⁰³ Short, “Creating Peer Sexual Harassment,” p. 49

¹⁰⁴ <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>

¹⁰⁵ *ibid*, p. 12

¹⁰⁶ Tufts agreement, *op cit.* n. 99, section VIII (F)

¹⁰⁷ *Chronicle of Higher Education*, <http://chronicle.com.proxy.bc.edu/article/Overseeing-Sex-Assault-Cases/149739>

¹⁰⁸ <http://www.swarthmore.edu/sexual-misconduct-prevention-response/swarthmore-college-action-steps-to-date>

¹⁰⁹ http://chronicle.com/interactives/assault_views

¹¹⁰ Letter to Senators Harkin and Alexander, June 25, 2014, <http://www.acenet.edu/news-room/Documents/Letter-Senate-HELP-Sexual-Assault-Hearing.pdf>