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Katharine B. Silbaugh

*Boston University School of Law*

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## REACTIVE TO PROACTIVE: TITLE IX’S UNREALIZED CAPACITY TO PREVENT CAMPUS SEXUAL ASSAULT

KATHARINE SILBAUGH\*

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### INTRODUCTION

This article examines the efforts to use Title IX to address the problem of sexual assaults on college campuses. It seeks to explain an odd phenomenon: universities seem to put more resources into addressing assaults that have already occurred than they do into preventing sexual assaults from occurring. To better understand how universities implicitly frame their options for addressing sexual assault, I’m going to posit that there are two particularly prevalent analytic approaches to sexual assault prevention. I’m going to call one the *law enforcement* approach and the other the *public health* approach. I’m going to link the law enforcement approach to the analytical framework

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\* Professor of Law and Law Alumni Scholar, Boston University School of Law. I would like to thank Lauren Bentlage and Meghan O’Malley for helpful research assistance, and the participants in the Civil Rights Act at 50: Past, Present, and Future Symposium at Boston University School of Law for helpful feedback.

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we use in law when we focus on individual choice and character, in criminal law in particular. I'm going to link the public health approach to the violence prevention framework used by researchers within public health institutions such as the Centers for Disease Control ("CDC").

Which approach to sexual assault is Title IX taking? I argue that while it is doing some of both, the weight of Title IX's influence is in the law enforcement, or moral/individual, approach to violence prevention. I will consider what role the legal development of the Civil Rights Act of 1964—and its articulation of sexual imposition as a mechanism of inequality in the workplace—has played in the development of the law of Title IX, which came less than a decade after the Civil Rights Act and in its shadow. I'm going to conclude that a good statute designed to ensure equality based on sex on college campuses would concern itself as much with providing colleges and universities incentives to prevent sexual assaults using research-based best prevention practices as it does with addressing assaults that have already occurred. The research-based best practices are likely to be identified by the public health community, rather than the law enforcement community.

I am positing that the tendency towards a post-assault focus, rather than a prevention focus, does not reflect an intentional theory about how to remedy sex inequality. Rather, it is an unintended consequence of borrowing Title VII precedents in the Title IX context. Simply stated, certain doctrinal elements of sex discrimination under Title VII have led to an understanding of sex discrimination under Title IX that disproportionately pressures colleges to deliver sex equality primarily by adjudicating assaults that have already occurred. As has been so frequently illustrated in recent portrayals in the media, however, colleges are poorly equipped to function at this particular phase of the sexual assault arc. Those in the disciplinary process are typically not lawyers or trained fact-finders, and they are not familiar with either basic due process norms or with some of the victim-blaming features of sexual assault law that have been addressed to some extent in the criminal context. Indeed, a college's particular strengths might run better to prevention of sexual assault than it does to response to sexual assault. This Article explores how colleges became law enforcement-oriented and considers the particular strengths of colleges that might make them well suited to implementing a public health approach to sexual assault. Finally, the article considers whether Title IX can play a role in shifting the compliance priorities of colleges toward actions for which they are better suited.

*What is the distinction between the public health and the law enforcement approach?*

For purposes of this analysis, I want to draw a distinction between the public health approach and the law enforcement approach to difficult social problems. The law enforcement approach, simplified, has individuals making autonomous moral or strategic decisions according to their wishes. The public health approach, again simplified, would frame discussion at the population

rather than the individual level, and look for ecological as well as individual factors that influence behavior.

As an example of the distinction, consider the different frames that might be placed on youth suicide—the second leading cause of death for those ages 10–24.<sup>1</sup> After a community experiences a youth suicide, the individual victim’s mental health and frame of mind become a significant focus for many. Indeed, a history of mental illness is linked to the majority of youth deaths by suicide.<sup>2</sup> Many frame a death by suicide as an individual decision, tragic, pathological, and primarily internally driven. I suspect many high school principals have stood before bereaved groups of students and parents and said that we will never understand what drove Sally to take her life—we will never grasp the demons inside her head. Yet, there is solid evidence that the rate of youth suicide is dramatically influenced by the availability of guns.<sup>3</sup> Where there are fewer guns, there are far fewer deaths by suicide.<sup>4</sup> Guns, compared with other means of committing suicide, lead to far higher rates of death from a suicide attempt, or, put differently, lower rates of survival of a suicide attempt.<sup>5</sup> Because ninety percent of suicide attempters who survive do *not* go on to die by suicide later, the gun itself becomes an enormous part of the public health perspective on suicide causation and suicide prevention.<sup>6</sup> Guns are not in Sally’s head; they are not a part of the fabric of her desperation or her impulsiveness or her unique and individualized moral decision-making. Rather, they are an aspect of her ecology. A public health frame for suicide prevention would, insofar as gun availability is as strong a predictor of death by suicide as mental health history, focus on gun availability in addition to mental health interventions.

Suicide prevention is not the focus of this discussion. It is offered to frame a distinction between moral choice and culpability (law enforcement) as an

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<sup>1</sup> *Youth Suicide Statistics*, JASON FOUND., <http://jasonfoundation.com/prp/facts/youth-suicide-statistics/>, archived at <http://perma.cc/JF36-S6MD> (last visited Jan. 29, 2015).

<sup>2</sup> Cf. *Teen Suicide Facts*, SUICIDE PREVENTION EDUC. ALLIANCE, <http://www.speaneohio.org/about-teen-suicide-and-depression/youth-suicide-facts>, archived at <http://perma.cc/J45J-S9VV> (last visited Jan. 29, 2015) (“Ninety percent of people who die by suicide suffered from a treatable mental disorder at the time of their death (mood disorder, substance abuse and often both).”).

<sup>3</sup> *Firearm Access Is a Risk Factor for Suicide*, HARVARD T.H. CHAN SCH. PUB. HEALTH, <http://www.hsph.harvard.edu/means-matter/means-matter/risk/>, archived at <http://perma.cc/8A8Q-YGYL> (last visited Jan. 30, 2015) (explaining that studies of adolescent suicides have found that “those dying by suicide were more likely to live in homes with guns”).

<sup>4</sup> See *id.*

<sup>5</sup> *Id.* (“About 85% of [suicide] attempts with a firearm are fatal: that’s a much higher case fatality rate than for nearly every other method.”).

<sup>6</sup> *Attempters’ Longterm Survival*, HARVARD T.H. CHAN SCH. PUB. HEALTH, <http://www.hsph.harvard.edu/means-matter/means-matter/survival/>, archived at <http://perma.cc/2NG7-XF6K> (last visited Jan. 30, 2015).

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analytical frame and public health as an analytical frame for campus sexual assault. For the purposes of this Article, I will put the two frames in starker contrast than they deserve. For example, a good discipline procedure functions to deter future sexual assaults—it is preventative both specifically for that perpetrator and as it gives caution to those contemplating sexual aggression. In addition, the experience of sex equality on a campus may require moral condemnation of perpetrators of sexual assault, as well as the prevention of sexual assault. I draw a line between the approaches only to highlight an undeniable fact of Title IX administration on college campuses: attention to post-assault infrastructure is far greater than attention to assault prevention.

Title IX strongly incentivizes the post-assault focus. Colleges may want to reduce the overall rate of sexual assault, but they risk liability under Title IX primarily for a bad response to an assault that has already occurred, rather than for ineffective efforts to reduce the overall rate of assault.

## I. TITLE VII TO TITLE IX: THE DOCTRINAL DEBT TO THE CIVIL RIGHTS ACT

### A. *Sex in Title VII of the Civil Rights Act of 1964*

The inclusion of the word “sex” in Title VII of the Civil Rights Act (“CRA”)<sup>7</sup> is sometimes described as an accident or unintended.<sup>8</sup> That description highlights one aspect of how the text entered the bill, but it ignores the work of serious advocates of sex equality in achieving passage of that amendment.<sup>9</sup> From either version of its inclusion, the journey that our understanding of sex discrimination traveled to include sexual harassment is substantial. Individuals raised during and after the 1980s cannot imagine a different meaning of sex discrimination, but when Title VII and Title IX were passed, that sexual assault or harassment could be framed as sex discrimination wasn’t yet contemplated. The CRA included the word “sex” only in Title VII, leaving things like public accommodations and education unprotected from sex discrimination. By limiting the prohibition on sex discrimination to the employment context, the CRA made the eventual inclusion of Title IX in the Higher Education Act<sup>10</sup> seem inevitable.

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<sup>7</sup> 42 U.S.C. §§ 2000e to e-17 (2012).

<sup>8</sup> See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63 (1986) (“The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives.”); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 234 (1985) (describing the sex amendment to the CRA as “a deliberate ploy by foes of the bill to scuttle it”).

<sup>9</sup> See Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 *LAW & INEQ.* 163 (1991) (describing the actions of advocates seeking to add the word sex to the CRA amendment).

<sup>10</sup> 20 U.S.C. §§ 1681-1688 (2012).

B. *Sex in Title IX of the Higher Education Act*

The omission of the word “sex” from the titles of the Civil Rights Act of 1964 that addressed education was corrected in 1972, during a reauthorization of the Higher Education Act of 1965. Title IX was added to that reauthorization to govern sex equality in educational programs receiving federal support. At that time, sexual harassment and imposition were still not viewed as sex *discrimination*. The entire wing of anti-discrimination law that addresses sexual violence was not yet anticipated. There was considerable feminist energy around and attention to the deficiencies in rape law.<sup>11</sup> But rape was conceived of as a crime of violence in those early feminist reform discussions, perpetrated by men to maintain cultural control.<sup>12</sup> There was still little to no discussion of rape or sexual assault as a mechanism of institutional inequality in workplaces or educational settings at the time Title IX was enacted. That understanding evolved under Title IX, with each step in the doctrinal development following the same or similar steps as under Title VII. As Title VII shaped the concept that sexual imposition can be sex discrimination, Title IX followed.

C. *Sexual Imposition as Sex Discrimination Under Title VII and Title IX*

The answer to the question “is sexual violence sex discrimination?” evolved over the 1980s and 1990s. Courts reached a “yes” first under Title VII, and then a “yes” in the 1990s under Title IX. A review of that analytical movement, and how it was so transformative, is useful to understanding its implications today in the campus sexual assault discussion and the recent legal actions taken by the Obama administration to address sexual assault on campuses via Title IX.

The first Title VII case in the United States that seemed to address sexual harassment came in 1974, though the terminology was not yet used. The plaintiff lost at trial and was not acknowledged as presenting an actionable theory under Title VII until a 1977 appeals court decision.<sup>13</sup> In 1980, the Equal Employment Opportunity Commission (“EEOC”) issued guidelines positing that sexual harassment constitutes sex discrimination, effectively encouraging

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<sup>11</sup> See, e.g., CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 20 (1992) (discussing the history of feminist attention to the deficiencies and reform of rape law).

<sup>12</sup> SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 388-89 (1975) (“The ideology of rape is fueled by cultural values that are perpetuated at every level of our society . . . . The theory of aggressive male domination over women as a natural right is so deeply embedded in our cultural value system that all recent attempts to expose it . . . have barely managed to scratch the surface.”).

<sup>13</sup> *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977) (“[S]he 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 . . . . [That] advances a prima facie case of sex discrimination within the purview of Title VII.”).

litigants to test the theory in court.<sup>14</sup> At that time, the concept was more often illustrated in cases of quid pro quo harassment, meaning a demand by a supervisor of a subordinate for sex as a condition of keeping a job or of receiving a raise or promotion. But the EEOC in 1980,<sup>15</sup> and the Supreme Court in 1986,<sup>16</sup> recognized hostile work environment harassment, which does not condition a finding of sex discrimination on whether an employer took a tangible job action, such as a firing. In 1986, the Supreme Court affirmed that both quid pro quo harassment and hostile work environment harassment constitute sex discrimination under Title VII, marking a significant paradigm shift in thinking about sex discrimination.<sup>17</sup> Yet when Title IX was passed in 1972, it lived in the same world that Title VII did with respect to the equation of sexual violence with discrimination: that equation had not happened yet. Title IX, at the time it passed, contemplated more direct issues of access to programs and equality of resources for male and female students.

Once sexual imposition as sex discrimination was established under Title VII, the analysis followed under Title IX. In 1996, in *Doe v. Petaluma City School District*,<sup>18</sup> the U.S. District Court for the Northern District of California became the first court to hold that a school can be sued under Title IX if it doesn't address one student's serious harassment of another.<sup>19</sup> The Supreme Court confirmed the peer-to-peer sexual harassment concept in 1999 under *Davis v. Monroe County Board of Education*.<sup>20</sup> It is those cases, establishing a cause of action based on *peer-to-peer* sexual harassment, that provide the foundation for Title IX's intervention in the handling of sexual assaults on college campuses.

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<sup>14</sup> 29 C.F.R. § 1604.11 (2014) ("Harassment on the basis of sex is a violation of section 703 of title VII.").

<sup>15</sup> *Id.* ("Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of . . . creating an intimidating, hostile, or offensive working environment.").

<sup>16</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) ("[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").

<sup>17</sup> *Id.* at 64, 66 (1986) (explaining that "Title VII is not limited to 'economic' or 'tangible' discrimination," and concluding that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment").

<sup>18</sup> 949 F. Supp. 1415 (N.D. Cal. 1996).

<sup>19</sup> *Id.* at 1427 (holding that plaintiff could sue the school district for peer harassment and that the applicable standard is Title VII's hostile environment standard); *see generally* *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1449-52 (9th Cir. 1995) (holding that the court lacked jurisdiction to decide whether a school counselor could be sued under 42 U.S.C. § 1983, and that the counselor was entitled to qualified immunity).

<sup>20</sup> 526 U.S. 629, 633 (1999) ("[A] private damages action may lie against the school board in cases of student-on-student harassment.").

Courts and agencies interpreting both Title VII's and Title IX's legal requirements dithered over whether peer sexual assault or harassment should be characterized as discrimination. Meanwhile, the Department of Education ("DOE") focused much of its Title IX work on equality in athletic opportunities—which is why the world at large thinks about Title IX as the law that stretched our limited conceptions of the female college athlete, bringing women's sports much closer to parity with men's.<sup>21</sup>

Only in the past four years has public discussion of Title IX's equality mandate taken on a different meaning on college campuses. That's because in 2011, the DOE issued a "Dear Colleague" letter, reaffirming that sex equality under Title IX, just as under Title VII, requires institutions to adequately address peer-to-peer sexual violence and harassment, and guiding schools by better defining their obligations under the law.<sup>22</sup> The weight of that important letter is placed on how a college should respond to the perpetrator and the victim, using its disciplinary process and other program and support remedies at its disposal, once the school gains actual knowledge that an assault has occurred.<sup>23</sup> Before turning to that guidance, we need to understand the legal source of that post-assault focus.

## II. THE DOCTRINAL BASIS FOR THE POST-ASSAULT FOCUS

If there's some way to prevent an assault, surely that would be the best way to ensure that students are not limited in their ability to benefit from the school's educational programs, which is the ultimate promise of Title IX equality. Instead, the DOE focuses on how well a university responds to news of an assault once it has already happened—it focuses on the disciplinary process in particular. The horse is out of the barn at that point. A good process is incredibly important, but no rape at all is far superior to a good disciplinary process post-rape. The focus on that disciplinary process may result from borrowing from Title VII the framework for the insight that sexual violence is institutional sex discrimination, because, under some circumstances, the

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<sup>21</sup> See, e.g., U.S. DEP'T OF EDUC., "OPEN TO ALL" TITLE IX AT THIRTY (2003), available at <http://www2.ed.gov/about/bdscomm/list/athletics/title9report.pdf>, archived at <http://perma.cc/582A-5YQK> (quoting the Secretary of Education upon creating the Commission on Opportunities in Athletics as saying, "[w]ithout a doubt, Title IX has opened the doors of opportunity for generations of women and girls to compete, to achieve, and to pursue their American Dreams. This Administration is committed to building on those successes.").

<sup>22</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER 2 (2011) [hereinafter OCR, 2011 DEAR COLLEAGUE LETTER], available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>, archived at <http://perma.cc/2BGT-YRHU> ("This letter begins with a discussion of Title IX's requirements related to student-on-student sexual harassment, including sexual violence, and explains schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence.").

<sup>23</sup> *Id.* at 3-19.



personal conduct that occurs in the workplace can be attributed to the employer.

A. *Implicating the Employer: From Personal to Institutional Misconduct*

Let's return to the early Title VII cases. When first presented with the concept that sexual harassment and imposition are a form of sex discrimination, courts struggled to see the conduct as anything other than private. In a prominent early case rejecting the theory that sexual harassment is cognizable sex discrimination under Title VII, even when the perpetrator was the direct supervisor of the employees he harassed, the court said that the supervisor's conduct "appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, [he] was satisfying a personal urge. Certainly no employer policy is here involved . . . ."<sup>24</sup>

Early reactions to the theory that sexual harassment is sex discrimination stumbled on this point: sexual harassment is individual private conduct, not an instrument used by an employer to perpetrate sex discrimination.<sup>25</sup> In 1980, the EEOC issued guidelines that defined both quid pro quo and hostile work environment harassment as sex discrimination under Title VII,<sup>26</sup> a theory accepted by the Supreme Court in the 1986 *Meritor Savings Bank v. Vinson* case.<sup>27</sup> Those same guidelines addressed the problem of the personal proclivities argument that had stymied many in the legal system who were still trying to understand how an employer was responsible for a supervisor's sexual behavior. Applying traditional agency principals, the EEOC asserted, and the Supreme Court eventually accepted, that a supervisor acts as an agent of the employer and can therefore be held liable as the employer itself.<sup>28</sup> Indeed, as early as 1982, the Eleventh Circuit in *Henson v. City of Dundee*<sup>29</sup> recognized that in a quid pro quo case where the supervisor "relies upon his apparent or actual authority to extort sexual consideration from an employee," the conduct is within the supervisor's scope of employment and can be

<sup>24</sup> *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated without opinion*, 562 F.2d 55 (9th Cir. 1977).

<sup>25</sup> *E.g.*, *Barnes v. Costle*, 561 F.2d 983, 999 (D.C. Cir. 1977) (MacKinnon, J., concurring) (arguing that employers cannot distinguish among "invited, uninvited-but-welcome, offensive-but-tolerated and flatly rejected advances"); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) ("[Title VII] is not intended to provide a federal tort remedy for what amounts to a physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley."), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

<sup>26</sup> 29 C.F.R. § 1604.11(a) (2014) (explaining that sexual harassment in violation of Title VII comprises both quid pro quo harassment and hostile work environment harassment).

<sup>27</sup> 477 U.S. 57, 64, 66 (1986).

<sup>28</sup> 29 C.F.R. § 1604.11(d) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct . . .").

<sup>29</sup> 682 F.2d 897 (11th Cir. 1982).

imputed to the employer.<sup>30</sup> However, that same court found that hostile work environment harassment, even when perpetrated by a supervisor, still rung of personal proclivities, and, therefore, the employer must have actual or constructive knowledge to be responsible for the conduct.<sup>31</sup> While this second ruling would eventually fall, it expressed a common concern over the theory that sexual harassment is a form of sex discrimination: What else must occur to draw the institution into the equation?

While *Meritor* did not entirely resolve the appropriate standard for employer responsibility, it did seem to cite *Henson* approvingly.<sup>32</sup> Moreover, the *Meritor* Court justified using agency principles to limit and define the circumstances under which an employer is responsible for employee behavior by arguing that Title VII used agency terms when it defined “employer”<sup>33</sup> and, therefore, Congress intended to provide traditional limitations on the scope of employer liability for employee behavior.<sup>34</sup> In other words, when the Supreme Court first indicated its approval for looking to agency law to explain institutional responsibility, it did so in reliance on the statutory text of Title VII. But this precise text does not appear in Title IX; the first of several ways that Title IX and Title VII could develop differently on the question of institutional connection.

In 1998, the Supreme Court set out with much more care the appropriate standard for Title VII employer liability for hostile work environment sexual harassment in two prominent cases: *Burlington Industries, Inc. v. Ellerth*<sup>35</sup> and *Faragher v. City of Boca Raton*.<sup>36</sup> In *Faragher*, the Court noted that since *Meritor*, courts had struggled with how to apply agency principals to hostile

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<sup>30</sup> *Id.* at 910.

<sup>31</sup> *Id.* at 910 & n.20 (explaining that because a supervisor generally creates a hostile work environment “for his reasons and by his own means,” employers are only responsible if they knew or should have known about the conduct).

<sup>32</sup> *Meritor*, 477 U.S. at 66-67, 76 (citing *Henson* for the propositions that a hostile work environment constitutes sex discrimination, that not all harassing conduct affects a “term, condition, or privilege of employment” and that harassment that results in a tangible job detriment is “automatically imputed to the employer”).

<sup>33</sup> Congress defined employer to include any “agent” of an employer. 42 U.S.C. § 2000e(b) (2012) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person . . .”).

<sup>34</sup> *Meritor*, 477 U.S. at 72 (“Congress’ decision to define ‘employer’ to include any ‘agent’ of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.” (citation omitted)).

<sup>35</sup> 524 U.S. 742, 765 (1998) (“An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor . . . . When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability . . .”).

<sup>36</sup> 524 U.S. 775, 807 (1998) (using substantially the same language as *Ellerth*, which was decided on the same day).

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work environment harassment under Title VII.<sup>37</sup> Going forward, the Court instructed lower courts to apply something like a strict vicarious liability standard for harassment that led to a tangible job action such as a firing.<sup>38</sup> Tangible job actions are not likely to be implicated in peer-to-peer harassment, however, and therefore they are not likely to serve as a foundation for an analogy to peer assault under Title IX.

*Ellerth* and *Faragher* established a different approach to institutional responsibility where there is no tangible job action, as is the case in a typical hostile work environment case. In those cases, an employer can assert an affirmative defense where it has “exercised reasonable care to prevent and correct promptly any sexually harassing behavior.”<sup>39</sup> The Supreme Court accomplished two feats with this declaration. First, it allowed employers to *avoid* liability for harassing conduct under a modified version of agency principals. Second, it gave employers a substantial incentive to “prevent and correct promptly” harassing behavior. After *Faragher* and *Ellerth*, employers need to have a well-publicized complaint process for handling the reporting of sexual harassment internally; employees need to know about it, it needs to be free of conflicts (e.g., the harasser can’t be the only person to whom you can report harassment), and it needs to effectively resolve the problem that makes the environment discriminatory.<sup>40</sup> Title VII, then, evolved to incentivize an effective internal procedure for finding out about and addressing peer sexual harassment within the workplace.

#### B. *Translation of the Agency Principle to Title IX*

When it came to defining sexual harassment as sex discrimination, it may be unsurprising that Title IX borrowed directly from Title VII. But when it came to the liability standard, to what extent does the borrowing make sense? A long history of employment law, including common law principles of agency, were brought to bear in the Title VII cases establishing that employers could be responsible for some direct actions of supervisors, but that other actions require constructive notice before they may be attributed to an employer. An

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<sup>37</sup> *Faragher*, 524 U.S. at 785 (“Since our decision in *Meritor*, Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees.”).

<sup>38</sup> *Id.* at 808 (“No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.”); *see also Ellerth*, 524 U.S. at 761-63 (discussing tangible employment actions and vicarious liability and finding that whenever a supervisor “takes a tangible employment action against a subordinate” agency principles cannot allow the employer to escape liability).

<sup>39</sup> *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

<sup>40</sup> *See Faragher*, 524 U.S. at 808-09 (“[The employer] could not reasonably have thought that precautions against hostile environments . . . could be effective without communicating some formal policy against harassment, with a sensible complaint procedure.”).

employer may not bury its head in the sand and avoid knowing about particular behaviors and environments, which is why *constructive* notice is enough. But an employer that has taken reasonable steps to learn about sex discrimination and to address it may avoid liability.

It is not obvious that the logic of agency law, developed to include the employment relationship, applies well in the educational context to schools and their students. In fact, the liability standard took a different course under Title IX case law. Title IX was passed pursuant to spending clause authority and does not explicitly contemplate a private cause of action; *by design*, Title IX anticipates administrative enforcement, while Title VII anticipates private causes of action.<sup>41</sup> This significant enforcement design disparity gave courts that found a private right of action under Title IX their reason to require a tougher standard for school notice of conduct than Title VII did in the employment context.<sup>42</sup> If this is a reason for a higher standard under Title IX for a private right of action, however, it does not seem like a reason for a higher standard in the case of administrative enforcement of Title IX by the DOE. Yet that is what has happened.

In 1998, the same year that the Supreme Court clarified the version of agency law to be applied in Title VII harassment claims, the Court decided *Gebser v. Lago Vista Independent School District*,<sup>43</sup> finding that under limited circumstances, Title IX does allow a private action for damages for sexual harassment of a student by a teacher, even though there is no textual mention of a private right. The Court held that for a school to be liable for sexual harassment of a student by a teacher, “an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.”<sup>44</sup> In other words, the standard for a private right of action under Title IX against a school would be higher than it is under Title VII; the school needs *actual knowledge*. While the student in *Gebser* was an eighth-grader in a public school, the same standard, actual knowledge of sexual misconduct by a teacher against a student, applies on college campuses.<sup>45</sup> In 1999, the Supreme Court extended this standard from teacher-against-student to student-against-student sexual harassment under Title IX in *Davis v. Monroe County Board of*

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<sup>41</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287-88 (1998).

<sup>42</sup> *Id.* (explaining that because it was passed under Congress’s spending power and was intended to be enforced by administrative agencies, Title IX “operates on an assumption of actual notice to officials of the funding recipient”).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 277.

<sup>45</sup> *E.g.*, *Wills v. Brown Univ.*, 184 F.3d 20, 26-27 (1st Cir. 1999) (applying the actual knowledge standard at the university level); *Bloomer v. Becker Coll.*, 2010 U.S. Dist. LEXIS 82997, at \*10-15 (D. Mass. Aug. 13, 2010) (discussing the application of the actual knowledge standard at the college level and citing additional cases expounding the standard).

*Education*.<sup>46</sup> *Davis* involved prolonged sexual misconduct by a fifth-grade boy against a fifth-grade girl, repeatedly brought to the attention of school officials and ignored.<sup>47</sup> This actual knowledge standard applies to student-against-student harassment on college campuses as well: Title IX, though textually silent on a private right of action, gives rise to such an action for student-against-student sexual assault, for example, in cases where the college had actual knowledge of the misconduct and responded with deliberate indifference.<sup>48</sup> The courts in *Gebser* and *Davis* draw heavily on the concept of hostile environment sexual harassment as sex discrimination articulated in *Meritor* under Title VII, applying it to the schools' conduct.<sup>49</sup> They depart from *Meritor* on the liability standard because Title VII is designed to afford a private right of action, while Title IX articulates no private right of action and is designed primarily for administrative enforcement.<sup>50</sup>

Both *Gebser* and *Davis* arose out of public education in the K-8 setting. In every state in this country, state constitutions guarantee all students the right to a public education in those grades.<sup>51</sup> To some extent, the school population in the whole K-12 environment is framed by this right. Schools in this context manage a population that they are required by state law to educate. The Supreme Court did not address the obligation to educate in justifying a lighter

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<sup>46</sup> 526 U.S. 629, 633 (1999) (finding that a private right of action may lie against a school board in cases of student-on-student harassment, "but only where the funding recipient acts with deliberate indifference to known acts of harassment").

<sup>47</sup> *Id.* at 633-35.

<sup>48</sup> *See id.* at 643 (finding that a school's "deliberate indifference to known acts of harassment[]" amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher").

<sup>49</sup> *Id.* at 631 (citing *Meritor* for the proposition that a student doesn't need to "show an overt, physical deprivation of access to school resources to make out a damages claim for sexual harassment under Title IX"); *Gebser*, 524 U.S. at 281 (citing *Meritor* for the proposition that sexual harassment in the workplace constitutes discrimination on the basis of sex).

<sup>50</sup> *Davis*, 526 U.S. at 638, 640 (acknowledging that "Congress authorized an administrative enforcement scheme for Title IX" and stating that "[b]ecause we have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause . . . private damages actions are available only where recipients of federal funding had adequate notice"); *Gebser*, 524 U.S. at 284-85 ("Because the private right of action under Title IX is judicially implied . . . it would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on . . . constructive notice, *i.e.*, without actual notice to a school district official.").

<sup>51</sup> *Cf.* Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2241 & n.1 (2003) (explaining that every state constitution except Mississippi's "requires the state to provide its children with an education" (citing Avidan Y. Cover, *Is "Adequacy" a More "Political Question" than "Equality?"*: *The Effect of Standards-Based Education on Judicial Standard for Education Finance*, 11 CORNELL J.L. & PUB. POL'Y 402, 404 & n.6 (2002)).

burden on schools through use of an actual knowledge standard. However, sympathy for the challenges of being a public school administrator is evident in the opinions;<sup>52</sup> perpetrators and targets alike have a right to access public education guaranteed in state constitutions. In the case of college sexual assaults, the vast majority of the institutions covered by Title IX requirements have far greater control over their populations and their environments because they are not balancing a right of access against the equality mandates of Title IX. They can manage who enrolls and qualify the conditions of entry and continued access to a much greater extent than the K-12 system. Yet the restrictive actual knowledge standard that *Gebser* and *Davis* applied to private rights of action against an elementary school in the case of a peer sexual assault under Title IX applies at the college level as well.

An actual knowledge standard for misconduct has an obvious problem: it provides a powerful incentive for schools to avoid information about misconduct, as Nancy Cantalupo has compellingly argued in a series of articles.<sup>53</sup> Private colleges competing for enrollment already have a market incentive to minimize the reporting of accurate statistics about sexual assault rates on campus in their effort to attract students who might be concerned about risk of crime.<sup>54</sup> The Title IX actual knowledge liability standard exacerbates their market incentive toward ignorance. There are ample grounds to critique the standard set out in those Supreme Court cases and evidence to believe that they have had the predictable impact on knowledge.<sup>55</sup>

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<sup>52</sup> See, e.g., *Gebser*, 524 U.S. at 280, 287-90 (observing disapprovingly that a strict vicarious liability standard would “result in school district liability in essentially every case of teacher-student harassment”).

<sup>53</sup> E.g., Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 220 (2011) [hereinafter Cantalupo, *Burying Our Heads*] (“[S]chools have incentives not only to remain unaware of the general problem and specific instances of campus peer sexual violence, but also to actively avoid knowledge about both.”); Nancy Chi Cantalupo, *Institution-Specific Victimization Surveys: Addressing Legal and Practical Disincentives to Gender-Based Violence Reporting on College Campuses*, 15 TRAUMA, VIOLENCE, & ABUSE 227, 238 (2014) [hereinafter Cantalupo, *Victimization Surveys*] (explaining that the federal legal regimes create “serious disincentives for schools to encourage victim reporting and proactively address sexual violence on campus”).

<sup>54</sup> Caroline Kitchener, *When Helping Rape Victims Hurts a College’s Reputation*, ATLANTIC (Dec. 17, 2014), <http://www.theatlantic.com/features/archive/2014/12/when-helping-rape-victims-hurts-a-universitys-reputation/383820/>, archived at <http://perma.cc/U9YX-NV4E>.

<sup>55</sup> Cantalupo, *Burying Our Heads*, *supra* note 53, at 227 (explaining the actual knowledge standard derived from the *Gebser* and *Davis* cases as “[t]he first way in which Title IX exacerbates the information problems and encourages both passive unawareness and active avoidance of knowledge” of campus peer sexual violence); Cantalupo, *Victimization Surveys*, *supra* note 53, at 230 (“[T]he actual knowledge standard, as U.S. Supreme Court Justice, John Paul Stevens, noted in his dissent in *Gebser*, encourages schools to avoid knowledge rather than set up procedures that allow survivors easily to

But this Article focuses on a different compelling question: How did a standard deliberately narrowed for private causes of action—because Title IX isn't designed for private causes of action—go on to shape *administrative enforcement* of Title IX? In other words, why has the DOE, in developing its administrative approach to conceptualizing sex discrimination on college campuses via sexual assault, built on the framework developed in *Gebser* and *Davis* rather than developing a framework based on the goals and language of Title IX not limited by a private right of action? After all, the *Gebser* and *Davis* framework intended to outline the unusual circumstances that could lead to a private right of action under a statute that does not explicitly state one. The statute does, however, state sex equality expectations that can be enforced less dramatically but more systematically by the DOE, and need not be constrained by the narrow conditions for a private cause of action. DOE policymakers appear to have focused on addressing the difficult but textually based gap between Title VII and Title IX, rather than on the expansive possibilities for administrative enforcement that are in Title IX's design.

### III. THE DEPARTMENT OF EDUCATION INTERVENTIONS

In January of 2001, in the wake of *Gebser* and *Davis*, the Office for Civil Rights ("OCR") in the DOE issued a revision to its 1997 Guidance entitled *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* ("2001 Revised Guidance").<sup>56</sup> In that Guidance, the OCR emphasized that its administrative enforcement of Title IX did not need to track the actual notice provisions of *Gebser* and *Davis* because those cases explicitly apply to private enforcement.<sup>57</sup> Therefore, in cases involving harassment by school staff, the Guidance more closely aligns Title IX's administrative enforcement with Title VII's liability standard, and arguably exceeds Title VII's standard because no constructive notice is required.<sup>58</sup> But the Guidance does not extend this lower notice standard to cases involving the peer harassment that is the foundation of sexual assault regulation on college campuses. In particular, the new Guidance reaffirmed the earlier OCR standard for school *employee* treatment of students during the course of carrying out school duties:

A school also engages in sex-based discrimination if its employees, in the context of carrying out their day-to-day job responsibilities for providing

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report what happened to them." (citation omitted)).

<sup>56</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) [hereinafter OCR, 2001 REVISED GUIDANCE], available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>, archived at <http://perma.cc/2NPE-CX8A>.

<sup>57</sup> *Id.* at ii ("[T]he Court was explicit in *Gebser* and *Davis* that the liability standards established in these cases are limited to private actions for monetary damages.").

<sup>58</sup> *Id.* at iv.

aid, benefits, or services to students (such as teaching, counseling, supervising, and advising students) deny or limit a student's ability to participate in or benefit from the schools program on the basis of sex. Under the Title IX regulations, the school is responsible for discrimination in these cases, whether or not it knew or should have known about it, because the discrimination occurred as part of the school's undertaking to provide nondiscriminatory aid, benefits, and services to students. The revised guidance distinguishes these cases from employee harassment that, although taking place in a school's program, occurs outside of the context of the employee's provision of aid, benefits, and services to students. In these latter cases, the school's responsibilities are not triggered until the school knew or should have known about the harassment.<sup>59</sup>

The justification for ignoring notice altogether is that the school *undertakes to provide* something to students as its mission, whereas the employer under Title VII does not exist to serve employees. In this way, DOE identifies an important difference between educational institutions and employers in crafting its standard for school staff—a difference that *could* also justify very different standards for peer harassment in the two contexts. In addition, the broader reach of institutional responsibility for staff conduct under Title IX is mitigated by the fact that the enforcement is administrative: OCR will always tell a school when it is aware that an employee has harassed a student and provide the school an opportunity to take corrective action before finding a violation.<sup>60</sup> Therefore, actual notice is achieved through the administrative process under all circumstances.

In the context of peer-to-peer harassment, however, OCR does not extend the logic of *undertaking to provide* services to students to raise the sex equality standard under Title IX. OCR misses the opportunity to distinguish the mission-driven nature of educational institutions and the opportunity to heighten the equality expectations through less onerous administrative enforcement. OCR does not articulate a Title IX prevention standard unless the school has constructive notice of peer harassment (or assault), and, at the same time, it grants that effective institutional response to peer sex discrimination that has already occurred will satisfy Title IX:

If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, *and if the school knows or reasonably should know about the harassment*, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence. *As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the*

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<sup>59</sup> *Id.* at iv.

<sup>60</sup> *Id.* (“OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation.”).



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*harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations.*<sup>61</sup>

While this Guidance applies a constructive notice standard, it provides examples of constructive notice that indicate that a school may be said to have notice primarily in cases where it would take some effort to avoid the information, including graffiti in public spaces and failure to investigate a known incident where related incidents would be uncovered in the investigation.<sup>62</sup> However, the Guidance did stake out the right to a different administrative standard from the one applied for a private right of action, and applied a different standard to the conduct of school and college employees. Yet the administrative enforcement standard for peer-to-peer sexual conduct amounting to sex discrimination is remarkably similar to the standard for a private right of action under Title IX for peer-to-peer harassment (*Davis*), and even more similar to the standard for hostile work environment harassment under Title VII (*Faragher*). In addition to its borrowing of the notice standard from Title VII, the DOE's approach is remarkably uncreative toward the question: Constructive notice of what? It appears, and colleges seem to understand, that constructive notice is of assaults that have already occurred. The DOE approach is reactive to assaults that have already occurred where it could be interventionist on school climate issues demonstrated to correlate with risk of sexual assault. But evidence-based reduction of sexual assaults on campus as an obligation of Title IX does not fit particularly well into the Title VII or Title IX private cause of action frameworks. Proactive evidence-based prevention programming could be required administratively under Title IX, but it won't spring naturally from a framework grounded in either Title VII or Title IX lawsuits.

The OCR has issued several Dear Colleague letters since the 2001 Revised Guidance. While each carries less formal weight than regulations or Guidance, colleges and universities respond to them wisely as expressions of OCR's intentions in conducting investigations of colleges for compliance with Title IX. In 2006, OCR issued a Dear Colleague Letter that simply re-attached the 2001 Revised Guidance and put colleges on notice that OCR intended to conduct compliance reviews under Title IX.<sup>63</sup> In 2011, the OCR issued a far more substantial, nineteen-page Dear Colleague Letter, described in greater

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<sup>61</sup> *Id.* at 12 (emphasis added) (footnotes omitted).

<sup>62</sup> *Id.* at 13 (stating that "if the school knows of incidents of harassment, the exercise of reasonable care should trigger an investigation that would lead to a discovery of additional incidents," and that "if the harassment is widespread, openly practiced, or well-known to students and staff (such as sexual harassment occurring in the hallways, [or] graffiti in public areas . . .)" that "may be enough to conclude that the school should have known").

<sup>63</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (2006), available at <http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>, archived at <http://perma.cc/B3YT-9ZBT>.

detail below, focusing on sexual violence under the 2001 Revised Guidance.<sup>64</sup> DOE issued another update in 2014 structured as a question-and-answer document, further spelling out the 2001 Revised Guidance that remains in effect.<sup>65</sup> These documents were followed by the release in May of 2014 of a list of colleges and universities under investigation by the OCR for violation of Title IX on the basis of the handling of sexual violence,<sup>66</sup> and more recent updates to this list of schools. The DOE is signaling its active use of administrative enforcement of Title IX to address peer assault since the 2011 Dear Colleague letter, and colleges are scrambling to react. Both fueled by the public discussion of campus sexual assault and also fueling the discussion, the DOE is a significant player in raising the profile of this issue in the past several years. Colleges feel greatly increased pressure to do what the DOE is requiring, raising the question whether the DOE's choice of pressure points in its guidance are unnecessarily narrowed by historical analogy to Title VII.

The 2011 Dear Colleague Letter ("DCL") in particular has shifted the equality conception of Title IX in the public eye from one aimed primarily at women in sports to one aimed at rape and other sexual assault on college campuses. The pace of the discussion of sexual assault on college campuses has accelerated exponentially. Colleges feel new pressure from the DOE, the White House,<sup>67</sup> the media,<sup>68</sup> and student groups.<sup>69</sup>

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<sup>64</sup> OCR, 2011 DEAR COLLEAGUE LETTER, *supra* note 22, at 2.

<sup>65</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>, *archived at* <http://perma.cc/2DCQ-DAQA>.

<sup>66</sup> Press Release, Office for Civil Rights, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>, *archived at* <http://perma.cc/D9Z7-XA26>.

<sup>67</sup> Kyle Lierman, *It's on Us, a Growing Movement to End Campus Sexual Assault*, WHITE HOUSE BLOG (Sept. 24, 2014, 3:00 PM), <http://www.whitehouse.gov/blog/2014/09/24/its-us-growing-movement-end-campus-sexual-assault>, *archived at* <http://perma.cc/G5F5-A6MH> ("President Obama and Vice President Biden joined leaders from universities, media companies, the sports world, and grassroots organizations to launch the 'It's on Us' campaign against sexual assault on college campuses.").

<sup>68</sup> Richard Pérez-Peña & Kate Taylor, *Fight Against Sexual Assaults Holds Colleges to Account*, N.Y. TIMES, May 3, 2014, [http://www.nytimes.com/2014/05/04/us/fight-against-sex-crimes-holds-colleges-to-account.html?smid=pl-share&\\_r=0](http://www.nytimes.com/2014/05/04/us/fight-against-sex-crimes-holds-colleges-to-account.html?smid=pl-share&_r=0), *archived at* <http://perma.cc/F2NY-W7SF> (criticizing higher education's response to sexual assaults on campus).

<sup>69</sup> Joseph Shapiro, *Campus Rape Reports Are Up, and Assaults Aren't the Only Reason*, NPR (Apr. 30, 2014, 5:24 PM), <http://www.npr.org/2014/04/30/308276181/campus-rape-reports-are-up-and-there-might-be-some-good-in-that>, *archived at* <http://perma.cc/XNA7-H7RU> ("School administrations have been prodded by students who are demanding better

Remarkably, the DCL is primarily aimed at post-assault disciplinary procedures, not at assault prevention. The nineteen-page DCL devotes less than one page to a recommendation that schools implement “preventive education programs” as “proactive measures to prevent sexual harassment and violence.”<sup>70</sup> By contrast, the DCL devotes, conservatively counted, fifteen of the nineteen pages to how a college should respond to a sexual assault, including guidance on training employees to recognize and report a sexual assault that has occurred; the duties of a Title IX coordinator to oversee complaints of sexual assault; and the requirements of an adequate grievance procedure for addressing complaints of sexual assault, including disciplinary procedures and victim support services.<sup>71</sup> Most of the document is devoted to explicating the characteristics of an adequate grievance procedure, such as an opportunity for both parties to present witnesses; a prompt process; notification of a right to involve law enforcement; that the right to an attorney be extended to both parties if it is extended to either; that schools do not allow parties to directly cross-examine each other; that a school offer an appeals process; notice to complainant if a disciplinary action relates to the complainant, such as a restriction that the perpetrator must stay away from the complainant; a requirement that interim steps be taken to ensure the complainant suffers no further discrimination pending the outcome of the grievance process, such as a campus escort, medical services, or academic tutoring; and most controversially, the use of a preponderance of the evidence standard in determining whether a sexual assault took place.<sup>72</sup> Any fair reading of the DCL leads to the conclusion that its primary goal is to communicate to colleges and universities how they must conduct their discipline or grievance processes after learning of a possible sexual assault in order to remain in compliance with Title IX.

With as many as one in five undergraduate women being subject to sexual violence on campus,<sup>73</sup> the recent attention to the subject instigated by both women on campuses and the Obama White House and OCR is good. Is the guidance being given by the federal government unnecessarily constrained by the way that Title VII was interpreted to capture peer behavior, the narrowing of that conception for private rights of action under Title IX, and the importation of that Title VII and private right of action thinking into

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treatment.”).

<sup>70</sup> OCR, 2011 DEAR COLLEAGUE LETTER, *supra* note 22, at 14-15.

<sup>71</sup> *See generally id.*

<sup>72</sup> *See id.* at 8-14; Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 59-60 (2013) (stating that the fact that the DCL lowered the burden of proof to a preponderance of the evidence standard “will increase convictions without regard to guilt or innocence”).

<sup>73</sup> President Barack Obama, Remarks by the President at “It’s On Us” Campaign Rollout (Sept. 19, 2014), <http://www.whitehouse.gov/the-press-office/2014/09/19/remarks-president-its-us-campaign-rollout/>, archived at <http://perma.cc/RBT3-MNQQ> (“An estimated one in five women has been sexually assaulted during her college years . . .”).

administrative enforcement of Title IX? I am arguing that Title VII thinking anchors Title IX's purchase on sexual violence in colleges' responses to incidents that have already occurred, rather than on preventing campus sexual assaults to begin with. This seems odd because what Title IX requires is that *federally funded schools must ensure that students are not denied or limited in their ability to participate in or benefit from the school's educational programs or activities on the basis of sex.*<sup>74</sup> Is equal opportunity in education the chance to be in an environment structured to eliminate sexual assault using the best public health and social science research, or is it just the chance to have a decent process after a sexual assault happens?

#### IV. IS THE LEGAL EQUIVALENCE BETWEEN WORKPLACES AND COLLEGES SOUND?

After *Faragher* and *Ellerth*, I think we find that Title VII more effectively gives incentives to the relevant institutional actor—the employer—to proactively manage the risk that sexual violence will occur, even though it is built primarily on a private right of action and should be constrained in what it can achieve as a result. Employers have taken control over *gateway behaviors*, for example, in an effort to reduce the risk that mildly inappropriate conduct will give way to actionable conduct. Colleges, by contrast, typically run rape prevention educational programming at the beginning of the year, but have little incentive to follow up by managing the day-to-day culture on campus, whether by using alcohol control, staff supervision, pinpointed prevention interventions aimed at sports teams and fraternities, or spatial design elements (such as lighting).

Yet a college may be able to manage its culture more effectively than an employer. *Colleges sell students the educational opportunity.* Students are the reason for the college, while employees are not the reason for a business. It may be perfectly fair to impose a higher obligation on colleges to manage the very experience for which they invite students to enroll and for which they receive payment. The DOE identified just this rationale in the 2001 Revised Guidance when it noted that staff can be held to a different standard than employees under Title IX if discrimination “occurred as part of the school’s undertaking to provide nondiscriminatory aid, benefits, and services to students.”<sup>75</sup> Moreover, typically college students are younger than the average workforce, to the point that they are still in development on the road between adolescence and adulthood. Formation of student attitudes and behaviors is a perfectly appropriate educational goal, consistent with the mission of running a

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<sup>74</sup> 20 U.S.C. § 1681 (2012) (“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 . . .”).

<sup>75</sup> OCR, 2001 REVISED GUIDANCE, *supra* note 56, at iv.

residential college in particular. Therefore, colleges may be in a uniquely effective position to undertake educational prevention strategies.

V. PUBLIC HEALTH VERSUS INDIVIDUAL RESPONSIBILITY APPROACHES TO SEXUAL ASSAULT PREVENTION

The law enforcement frame focuses on the adequacy of the prosecution of perpetrators of sexual assault. This seems like an appropriate frame for a legal system managing the perpetration of felony sexual assault, certainly. But is it the appropriate frame for Title IX?

The CDC, a public health-oriented institution, frames the prevention of sexual violence on campus as follows: “The [CDC] . . . emphasizes reducing rates of sexual violence at the population level rather than focusing solely on the health or safety of the individual.”<sup>76</sup> According to the CDC, “[i]t is unlikely that approaches that only focus on the individual, when implemented in isolation, will have a broad public health impact.”<sup>77</sup>

The entire framing of the problem of sexual assault in the public health literature is noteworthy: “Sexual violence perpetration is a product of multiple, interacting levels of influence. . . . Framing violence within the context of this social-ecological model highlights the need for comprehensive prevention strategies that focus on risk and protective factors at each of these levels.”<sup>78</sup>

The CDC’s approach is not without critics. Some question whether a fully medical model of rape prevention is appropriate, in contrast with a more theoretical model aimed at belief systems.<sup>79</sup> But even those questioning the CDC’s position still want to focus on programs that prevent rape before they occur, whether these are education programs aimed at all college freshmen, higher risk perpetrators such as sports teams and fraternities, or bystanders.<sup>80</sup>

A. *What Are the Public Health Interventions Available to Colleges?*

Joining the increased public discussion over campus sexual assault that marked 2014, the CDC published its summation of the public health research

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<sup>76</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTING SEXUAL VIOLENCE ON COLLEGE CAMPUSES: LESSONS FROM RESEARCH AND PRACTICE 3 (2014) [hereinafter CDC, PREVENTING SEXUAL VIOLENCE], <https://www.notalone.gov/assets/preventing-sexual-violence-on-college-campuses-lessons-from-research-and-practice.pdf>, archived at <https://perma.cc/2LVC-VF5K>.

<sup>77</sup> *Id.* at 4.

<sup>78</sup> *Id.* at 3-4.

<sup>79</sup> John D. Foubert, *Answering the Questions of Rape Prevention Research: A Response to Tharp et al.*, 26 J. INTERPERSONAL VIOLENCE 3393, 3394 (2011) (questioning whether the medical model should guide rape prevention programs and suggesting that rape should be “approached with theoretical models” like belief system theory).

<sup>80</sup> *Id.* at 3395 (explaining the effects of rape-prevention programs with bystander components targeted at residence halls, athletic teams, and fraternities).

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on sexual violence prevention in a thirty-nine page document in April of 2014. The summary of its points is worth quoting at length:

- Sexual violence is a serious and complex public health problem.
- CDC focuses on preventing sexual violence perpetration before it happens to achieve the greatest population level impact.
- Effective prevention strategies are comprehensive—addressing the multiple levels of influence for sexual violence victimization and perpetration in the social ecology. These levels include characteristics of individuals, their relationships, and their physical, social and cultural environments.
- Prevention strategies should be based on the best available evidence, with emphasis on rigorous evaluation that measures changes in behavior.
- Prevention strategies that are consistent with best practices—such as being theory-based and including multiple skill-based sessions—have the greatest potential in reducing rates of sexual violence.
- Only two programs have rigorous evidence of effectiveness for preventing sexual violence: *Safe Dates* and the building-level intervention of *Shifting Boundaries*. Both were developed with middle/high school students but may provide useful models for the development of college prevention strategies.
- Other strategies hold some promise for changing related behaviors or modifying risk factors. These include:
  - Building relationship skills;
  - Organizational policies or practices to improve safety or climate;
  - Addressing social norms and behavior with messages from trusted and influential voices; and
  - Training student bystanders to intervene or speak up against violence.
- Brief, one-session educational programs focused on increasing awareness or changing beliefs and attitudes are not effective at changing behavior in the long-term. These approaches may be useful as one component of a comprehensive strategy. However, they are not likely to have any impact on rates of violence if implemented as a stand-alone strategy or as a primary component of a prevention plan.<sup>81</sup>

The CDC's indictment of one-session educational programs focused on increasing awareness and changing belief is particularly jarring to the current

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<sup>81</sup> CDC, PREVENTING SEXUAL VIOLENCE, *supra* note 76, at 2.

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practice on college campuses of addressing sexual assault during freshman orientation and not again.<sup>82</sup> The CDC pushes colleges to move away from individual sessions aimed at countering rape myths toward two programs that meet the CDC's high evidentiary standard, albeit in non-college populations, and several other programs that show promising early results and are premised on theories consistent with successful violence prevention research in other contexts.<sup>83</sup>

In addition, the CDC backs bystander programs for their efficacy at reducing the overall rate of sexual assault on college campuses.<sup>84</sup> Some colleges have begun implementing bystander programming with some evidence of success.<sup>85</sup> Bystander strategies play a significant role in legally mandated, evidence-based *anti-bullying* programs in the K-12 setting as well.<sup>86</sup> Bystander programs teach concrete intervention strategies to the college population at large and sub-groups considered particularly "at-risk" based on crime statistics, such as sports teams and fraternities.<sup>87</sup> Bystander intervention operates at two levels. First, it reduces the incidence of sexual assault by readying more individuals to redirect a potentially violent situation. In addition, by inviting bystanders to view themselves as agents, bystander programming may influence culture and climate, engaging pro-social behavior to shift norms. Its potential to reduce the rates of sexual assault are obvious, and so the evidence that is emerging that it may be effective should not be surprising.

Bystander programs are a perfect example of a public health approach to reducing sexual assault because, by definition, a bystander is not a perpetrator. Like a Good Samaritan in the legal system, a bystander is not someone who criminal law or a law enforcement model is comfortable coercing. A public health model, such as the CDC's, by contrast, asks us to evaluate whether it

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<sup>82</sup> *Id.* at 8 ("Brief, one-session educational programs conducted with college students, typically aimed at increasing knowledge or awareness about rape or reducing belief in rape myths . . . [do not] have demonstrated lasting effects on risk factors or behavior.").

<sup>83</sup> *Id.* at 6-8 (naming two programs used with middle school students that "have demonstrated significant reductions in sexual violence behaviors using a rigorous evaluation design" and several other programs that "have demonstrated increases in sexual violence protective factors and/or decreases in risk factors for sexual violence in a rigorous outcome evaluation").

<sup>84</sup> *Cf. id.* at 8 (explaining that evaluations of bystander programs have "found a mix of positive and null effects on risk factors for sexual violence").

<sup>85</sup> *Id.*

<sup>86</sup> See Katharine B. Silbaugh, *Bullying Prevention and Boyhood*, 93 B.U. L. REV. 1029, 1038 n.45, 1039 (2013) (explaining the skills taught in anti-bullying programs and noting sources on breaking the bystander cycle).

<sup>87</sup> For a description of these programs, see Michael Winerip, *Stepping Up to Stop Sexual Assault*, N.Y. TIMES, Feb. 7, 2014, [http://www.nytimes.com/2014/02/09/education/edlife/stepping-up-to-stop-sexual-assault.html?\\_r=0](http://www.nytimes.com/2014/02/09/education/edlife/stepping-up-to-stop-sexual-assault.html?_r=0), archived at <http://perma.cc/CD7C-JNUQ>.

works. If it does work, and it therefore can create better conditions for sex equality on college campuses, then according to a public health framework, private colleges should consider placing bystander obligations in their student codes of conduct. If a private college can have an honor code that requires students to report the cheating of other students, surely that private college can have an honor code that requires students to prevent or report a possible sexual assault. There seems little doubt that such an obligation is within a private college or university's authority. If it's within a private college's power, why isn't the DOE recommending it? It would be unfortunate if part of the answer is that the cause-of-action frameworks of Title VII and *Gebser* and *Davis* constrain and channel the meaning of sex discrimination via sexual violence such that an institution's responsibility can only or primarily lay in its post-rape response.

The CDC cites a systematic review of the literature on alcohol and sexual assault association, and finds alcohol use is significantly associated with sexual violence perpetration.<sup>88</sup> The CDC further notes that:

Alcohol policy may directly affect excessive alcohol consumption or may indirectly impact alcohol use by decreasing alcohol outlets. Although more research is needed, findings from this review suggest that policies affecting alcohol pricing, alcohol outlet density, bar management, sexist content in alcohol marketing, and bans of alcohol on college campuses and in substance-free dorms may have potential for reducing risk for sexual violence perpetration.<sup>89</sup>

Alcohol policy is another field of controversy between those favoring a public health approach to prevention and those more comfortable with a law enforcement approach. In particular, focus on alcohol policy has been said to relieve perpetrators of responsibility for their actions or to blame victims for violence perpetrated against them.<sup>90</sup> Moreover, the research on efforts to reduce alcohol consumption is mixed, as the CDC report acknowledges.<sup>91</sup> But to the extent alcohol consumption and assault are linked on college campuses, discussion of alcohol policy poses a reasonable test of the commitment to assault reduction in its own right.

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<sup>88</sup> See CDC, PREVENTING SEXUAL VIOLENCE, *supra* note 76, at 10 (“Research has shown that alcohol use and sexual violence are associated.”).

<sup>89</sup> *Id.* at 10-11.

<sup>90</sup> Amanda Hess, *To Prevent Rape on College Campuses, Focus on the Rapists, Not the Victims*, SLATE (Oct. 16, 2013, 3:41 PM), [http://www.slate.com/blogs/xx\\_factor/2013/10/16/it\\_s\\_the\\_rapists\\_not\\_the\\_drinking\\_to\\_prevent\\_sexual\\_assault\\_on\\_college\\_campuses.html](http://www.slate.com/blogs/xx_factor/2013/10/16/it_s_the_rapists_not_the_drinking_to_prevent_sexual_assault_on_college_campuses.html), archived at <http://perma.cc/WSB7-HL6T> (“[W]arning young women that there are rapists who use alcohol, not violence, you reinforce the idea that rape does not constitute a violent crime if alcohol is involved.”).

<sup>91</sup> See CDC, PREVENTING SEXUAL VIOLENCE, *supra* note 76, at 11 (detailing the findings of two studies on college social norms drinking campaigns, which both found that the campaigns were less effective “in areas with greater alcohol outlet density”).



In addition, both fraternities and sports teams have been associated with heightened risk of rape perpetration on college campuses.<sup>92</sup> The CDC endorses one particular prevention program aimed at sports teams for its demonstrated efficacy at reducing dating violence perpetration, which is called *Coaching Boys Into Men*.<sup>93</sup> The program uses sports coaches to engage young men in structured conversations about intimate violence, gender equity, and bystander intervention over the course of the entire sports season.<sup>94</sup> To the extent that appropriate programming by sports coaches has been shown to be effective at reducing the rate of sexual assault by athletes, the DOE should consider requiring such programming in order to proactively reduce the risk of sexual assault on campus and ensure that colleges are taking reasonable measures to create an environment that does not discriminate on the basis of sex. Similarly, if pro-social interventions in Greek life can reduce sexual assault, the DOE should consider requiring those as well, just as the DOE should evaluate the role colleges and universities play in enabling Greek life if their role can be demonstrated to increase significantly the risk of sexual assault on a campus.

B. *What Are the Competencies of a Residential College?*

As everyone in this debate keeps observing, colleges are not particularly well-equipped institutionally to conduct trials.<sup>95</sup> Rape is a serious crime, and every college does need to make that crime a violation of its disciplinary rules. Title IX is requiring colleges, appropriately, to address an array of serious sexual assaults that prosecutors' offices often decline to prosecute—even when they are reasonably convinced this serious crime has occurred.<sup>96</sup> If it is sexism that drives prosecutors' offices to take a pass on sexual assault prosecutions, then there's no problem with Title IX eliminating that discretion. But if it is, for example, blackout drinking by the perpetrator or by the victim that makes their testimony by definition incomplete, then we ask a college to solve a trial-

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<sup>92</sup> Stephen E. Humphrey & Arnold S. Kahn, *Fraternities, Athletic Teams, and Rape: Importance of Identification with a Risky Group*, 15 J. INTERPERSONAL VIOLENCE 1313, 1314 (2000) (“Much literature has focused on fraternity and athletic team members as more likely than their nonmember colleagues to commit sexual assaults.”).

<sup>93</sup> CDC, PREVENTING SEXUAL VIOLENCE, *supra* note 76, at 8 (“At one-year follow-up [*Coaching Boys Into Men*] showed positive effects on a general measure of dating violence perpetration . . .”).

<sup>94</sup> *Id.* at 7-8.

<sup>95</sup> *E.g.*, Perez-Peña & Taylor, *supra* note 68 (“[T]he storm of attention [on sexual assault] has forced university administrators to pay more attention to a largely unfamiliar set of duties, more akin to social work and criminal justice than to education.”).

<sup>96</sup> Tyler Kingkade, *Prosecutors Rarely Bring Charges in College Rape Cases*, HUFFINGTON POST (June 17, 2014, 7:31 AM) [http://www.huffingtonpost.com/2014/06/17/college-rape-prosecutors-press-charges\\_n\\_5500432.html](http://www.huffingtonpost.com/2014/06/17/college-rape-prosecutors-press-charges_n_5500432.html), archived at <http://perma.cc/AZ4U-SXQJ> (explaining that even after accounting for the underreporting of sexual assault, only “roughly 5 percent of rapes are ever prosecuted”).

like complexity that the professionals cannot. I'm *not* arguing that the DOE should back down or that colleges should do less in the face of incidents of assault. I'm suggesting that there may be actions that colleges are better at, and we should at least consider asking them to do those things as well.

What do colleges do well? They think well in a public health frame. Residential colleges create out of whole cloth a unique living and social environment and context, unlike any other institution in American culture. They are the authors of that environment. They are educational and they undertake transformative education—meaning they undertake to change young people and to catalyze all kinds of growth in them. They don't just *manage* the highly artificial occurrence of eighteen- to twenty-two-year-olds living together without many people younger or older in their midst. They *create* that occurrence; they are the authors of it. In other contexts, they embrace that truth: they arrange admissions, dorms, and roommates so as to force interactions among people from different parts of the country or world; they require community service; they invent new forms of housing—language housing, housing around areas of study or interest—designed by the colleges to generate new behaviors, attitudes, and learning. They engineer the residential experience for growth. This may explain why they were so effective in changing the national attitude toward women athletes with the push from DOE via Title IX: they have norm-shaping potential. Maybe it is *not* too much to ask that instead of solely responding to rapes that happen, they are required to do the evidence-based prevention programming and design interventions that change the culture and incidence of sexual assault, precisely because they do rise to this kind of challenge well. The DOE could be more effective if it matched its guidance to the institutional capacity of those it regulates.

#### VI. CAN TITLE IX DO THIS WORK?

In March of 2013, President Obama signed a re-authorization of the Violence Against Women Act.<sup>97</sup> Within the re-authorization were amendments to the Clery Act, which requires educational institutions to disclose statistics about the number of sexual assaults on campus in an annual report that must be distributed to students and prospective students, engaging market pressures to press universities into addressing sexual assault.<sup>98</sup> The amendments to the Clery Act (entitled the Campus Sexual Violence Elimination Act, or SaVE Act)<sup>99</sup> strengthen reporting requirements and go beyond DOE's "recommendation" that colleges educate staff and students to *require* educational institutions to educate staff and students about campus sexual

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<sup>97</sup> *President Signs Violence Against Women Act*, CNN (Mar. 7, 2013, 2:57 PM), <http://www.cnn.com/2013/03/07/politics/obama-violence-against-women-act/>, *archived at* <http://perma.cc/ZCF6-KXNY>.

<sup>98</sup> 20 U.S.C. § 1092 (2012).

<sup>99</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 304, § 1092(f), 127 Stat. 54, 89-92 (codified as amended at 20 U.S.C. § 1092(f)).

assault, including statements that sexual assault is prohibited, definitions of sexual assault and consent, bystander tools, and awareness programs for new students.<sup>100</sup> The Clery Act is enforced by the DOE primarily through fines, but it is not a part of Title IX. While the focus of the Clery Act remains the accurate reporting of crimes, it will serve as a limited and defined mechanism for getting colleges to introduce education and prevention strategies to students. However, the Clery Act, unlike Title IX, does not mandate equality in the provision of education; a school can check off requirements under the new Clery Amendments without evaluating their efficacy or revising them toward the particular goal of equal educational opportunity. Title IX has a far greater capacity to address sexual assault prevention because colleges could be compelled to take whatever reasonable steps can be shown to reduce assaults, or combination of steps as research about efficacy continues to develop. The DOE has the ability to develop a far more comprehensive approach to assault prevention under Title IX than the specific prescriptions the Clery Amendments mandate.

Does the *Gebser* framework constrain Title IX from doing prevention work? Not for the DOE. To the contrary, the DOE has effectively used Title IX to change campus culture more broadly already. Consider Title IX as the rest of the world has: as sports law. Title IX applied pressure on institutions to offer equality in programming and in the educational experience. Differences in interest in participation couldn't be offered as an excuse for noncompliance with Title IX: if there was not a culture of sports for girls and women, schools needed to create that culture to ensure equality.<sup>101</sup> While it was not smooth sailing throughout, schools largely achieved that cultural shift. This may have been possible because relative to other institutions, schools are good creators of culture. When schools first tried to say that they simply found the world as is, with girls not wanting to participate in sports at the rate boys did, the DOE pushed back. In response, schools became creative at expanding and cultivating interest in sports among girls and women. The social change around girls in sports resulted in large part from a charge to schools to cultivate that change, taking concrete steps that would have the effect of changing cultural dynamics. The colleges faced cultural resistance to change and allegations that they were going too far in redesigning athletic programs and opportunities,<sup>102</sup>

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<sup>100</sup> *Id.* (explaining that education programs regarding campus sexual assault shall include prevention and awareness programs for all students and faculty, and that these programs shall include statements that the institution prohibits sexual assault, definitions of sexual assault and consent, and options for bystander intervention).

<sup>101</sup> *History of Title IX*, WOMEN'S SPORTS FOUND., <http://www.womenssportsfoundation.org/en/home/advocate/title-ix-and-issues/history-of-title-ix/history-of-title-ix>, archived at <http://perma.cc/4SEN-S75U> (last visited Feb. 7, 2015) (explaining that in *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996), both the district court and the court of appeals rejected Brown's argument that "it did not violate Title IX because women are less interested in sports than men").

<sup>102</sup> *Id.* (explaining that several organizations representing male athletes and alumni "filed

much as colleges do today as they deliberate over the right sexual assault prevention measures.<sup>103</sup> But they demonstrated a powerful ability to transform the culture and expectations of equality in sports participation.

Title IX operates primarily as a spending clause regulation overseen by the DOE. The DOE should not have felt constrained by the doctrine developed to address the individual cause of action. If poor reaction in response to an actual, individual sexual assault can give rise to an individual cause of action, why can't high rates of sexual assault in a school's population amount to sex discrimination for purposes of DOE enforcement? If higher rates of assault overall result when a school fails to take evidence-based steps to reduce the overall rate of sexual assault, why wouldn't the DOE nudge schools to be proactive? What if schools have concrete tools at their disposal to reduce the overall rate of assault? Isn't that within the DOE's enforcement purview?

Consider, by comparison, the legislative approach to school bullying. In the past decade, nearly every state has passed laws addressing the obligations of a school system to address incidents of bullying and to prevent bullying.<sup>104</sup> While those statutes are aimed at both prevention and post-incident intervention, the most recent and best-regarded statutes focus substantial energy on requiring schools to deliver evidence-based bullying prevention programming in an effort to reduce the amount of bullying within each school.<sup>105</sup> Prevention and culture change are at the core of these legal interventions.<sup>106</sup> Ideally, they would be at the core of the DOE's approach to Title IX's guarantee of equal access to education on college campuses.

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suit alleging that Title IX regulations and policies are unconstitutional”).

<sup>103</sup> Consider California's "Yes Means Yes" law. *E.g.*, *California Governor Signs Bill on Affirmative Consent*, INSIDE HIGHER ED (Sept. 29, 2014), <https://www.insidehighered.com/quicktakes/2014/09/29/california-governor-signs-bill-affirmative-consent>, archived at <https://perma.cc/ZYC8-QV29> (“[S]ome civil liberties advocates have expressed concern that the law shifts too much of the burden of proof in these cases to the accused.”); Jake New, *The “Yes Means Yes” World*, INSIDE HIGHER ED (Oct. 17, 2014), <https://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies>, archived at <https://perma.cc/N4XN-2HFL> (“[C]ritique of affirmative consent has been renewed in recent months as more colleges began to adopt similar [yes means yes] policies.”).

<sup>104</sup> See Dena T. Sacco, Katharine Silbaugh, et al., *An Overview of State Anti-Bullying Legislation and Other Related Laws*, BERKMAN CTR. FOR INTERNET & SOC’Y 3 (Feb. 23, 2012), [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/State\\_Anti\\_bullying\\_Legislation\\_Overview\\_0.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/State_Anti_bullying_Legislation_Overview_0.pdf) (“As of January 2012, 48 states had enacted legislation requiring school districts to adopt policies regarding bullying.”).

<sup>105</sup> Silbaugh, *supra* note 86, at 1038 (“[E]vidence-based curricula — meaning curricula that have been shown to significantly reduce the incidence of bullying.”).

<sup>106</sup> *Id.* at 1037 (explaining that anti-bullying efforts “require more explicit and direct bullying prevention efforts” that may result in cultural changes).

Perhaps we are seeing the beginning of this exact reform: the DOE is investigating schools, and, in turn, schools have stepped up their evaluations of their own processes. If so, I would hope the next step will be a DOE guidance on prevention measures, because to date, they've drawn colleges far into the weeds on responses without adequately directing them toward prevention.