

# Shame Agent

Joan W. Howarth

*“Shame is the shawl of Pink  
In which we wrap the Soul...”*

Emily Dickinson

## Introduction

As a nation, we have recently experienced a significant positive shift in norms against casual campus sexual violence. These changes are perhaps as dramatic as the attitudinal shifts over recent decades regarding drunk driving or cigarette smoking. In a world in which masculinity is too often associated with sexual conquest, and women still suffer under intense and conflicting pressures regarding their sexual behavior, pushing this potential transformation forward is both difficult and necessary. Enforcement of Title IX protections has become a crucial driver of much of this change.

This is an account of some of what I learned as a participant in Title IX sexual misconduct enforcement at my law school and university. As with drunk driving and smoking, the newly strengthened norms against nonconsensual campus sex result from a combination of public activism, new laws and regulations, new enforcement of existing laws and regulations, and purposeful steps taken by strong institutional leaders. Michigan State University (MSU) exemplifies all this. Indeed, my optimism on these issues is grounded in my experience at MSU. MSU is a particularly good source of relevant lessons. MSU features some aspects of campus culture that have been found to be most related to sexual violence, including strong Greek life and heavy presence of athletics.<sup>1</sup>

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1. See, e.g., Todd W. Crosset, *Athletes, Sexual Assault, and Universities' Failure to Address Rape-Prone Subcultures on Campus*, in *THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE* 74 (Sara Carrigan Wooten & Roland W. Mitchell eds., 2016); PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS* (2007); Katharine Silbaugh, *Reactive to Proactive: Title IX's Unrealized Capacity to Prevent*

Colleges and universities are often diverse communities with significant numbers of students, faculty, and staff from around the world. The splendid diversity of a university brings differences in norms and expectations regarding gender roles and sexual conduct as much as it brings difference in food preferences or primary languages. International presence on campus and MSU's footprint around the globe are key parts of MSU identity.

Also, MSU is one of the scores of colleges and universities recently investigated by the Office for Civil Rights ("OCR") of the United States Department of Education ("DOE") for potential Title IX violations related to sexual harassment or sexual violence.<sup>2</sup> The OCR investigation of MSU began with two complaints of misconduct from 2011, and was finally resolved with a resolution letter in September 2015.<sup>3</sup> I served as dean of MSU Law for eight years that preceded, coexisted, and followed the formal OCR investigation of MSU.<sup>4</sup>

MSU faced heavy pressure from the Department of Education, and in some sense that pressure transformed the campus, with new university resources, overhaul of the Title IX regimen, new and visible student activism, and hypersensitivity to Title IX procedural compliance. I found MSU leadership to be sincere, effective, and dedicated to responding appropriately to create a nondiscriminatory and safe campus environment. Campus sexual violence

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*Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1072 & n. 92 (2015) ("In addition, both fraternities and sports teams have been associated with heightened risk of rape perpetration on college campuses," citing to 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."); see also Deborah L. Brake, *Sport and Masculinity*, in MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 207, 208 (Frank Rudy Cooper & Ann C. McGinley eds., 2012) ("[S]port remains a primary site for construction of masculinity.").

2. See 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 14, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>.
3. See U.S. DEP'T OF EDUC., MICHIGAN STATE UNIVERSITY RESOLUTION AGREEMENT, OCR DOCKET NOS. 15-11-2098 & 15-14-2113, <http://www2.ed.gov/documents/press-releases/michigan-state-letter.pdf> (last visited June 6, 2017). The OCR's 2011 Dear Colleague Letter shaped the landscape during this time as well. See Dear Colleague Letter from Russlynn Ali, Assistant Secretary, Office for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter Office for Civil Rights, Dear Colleague Letter].
4. Due to an unusual governance structure that provides MSU College of Law more autonomy than other colleges at MSU and other university-based law schools, my work in Title IX compliance included more oversight and decision-making authority for resolution of complaints involving law students than is typical for a dean. I also had very limited experience with complaints not involving the law school. I am not describing specifics of any actual cases I was involved with, but instead am providing fictional hypotheticals to highlight some issues I saw.

became a highly visible focus of student activism.<sup>5</sup> Some days I had the exhilarating and somewhat unsteady sense of being in the midst of what Cass Sunstein might recognize as a norm cascade.<sup>6</sup>

I am grateful for the creative explosion of student activism laser-focused on the pressing need for widespread culture change to reduce violence against women. My personal resume includes leadership in feminist antiviolence organizations and campaigns, including a particular focus on changing the culture that minimizes, romanticizes, and sexualizes violence against women.<sup>7</sup> I applaud this movement for campus safety, and have learned a great deal from student activists leading these campaigns.<sup>8</sup>

However, respectful criticism of some aspects of Title IX compliance may be more useful than more praise. My purpose here is to reflect on some of my misgivings about the operation of the Title IX compliance regime in which I participated. In spite of strong university and law school support, earnest and admirable complainants, and my serious commitment to addressing violence against women, my role was sometimes troubling.

I imagined that I would be vindicating women students' sexual autonomy and freedom, and protecting vulnerable students. That was often true, but not always. At my worst moments, I felt like an agent of the Anti-Rape Culture so powerfully criticized by Aya Gruber<sup>9</sup> or a reluctant Sex Bureaucrat, as

5. For example, when the university awarded honorary degrees to columnist George Will and filmmaker Michael Moore, Moore joked that he was enjoying being the mainstream, noncontroversial speaker. George Will's presence caused protest and disruption, including teach-ins and an alternative commencement ceremony, because of a particularly offensive column Will had published earlier that year, but after the invitation, decrying what he called a politically correct campus atmosphere in which rape victims had a coveted status. See George F. Will, *Colleges Become the Victims of Progressivism*, WASH. POST, June 6, 2014, [https://www.washingtonpost.com/opinions/george-will-college-become-the-victims-of-progressivism/2014/06/06/e90e73b4-eb50-11e3-9f5c-9075d5508fa\\_story.html?utm\\_term=.a0c21dcbd685](https://www.washingtonpost.com/opinions/george-will-college-become-the-victims-of-progressivism/2014/06/06/e90e73b4-eb50-11e3-9f5c-9075d5508fa_story.html?utm_term=.a0c21dcbd685).
6. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (“[N]orm cascades occur when there are rapid shifts in norms.”). For a similarly optimistic account of recent improvements regarding campus sexual assault, see Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822 (2017). Katharine Baker shares my focus on the need to change norms to address sexual violence on campus. See, e.g., Katharine K. Baker, *Campus Misconduct, Sexual Harm and Appropriate Process: The Essential Sexuality of It All*, 66 J. LEGAL EDUC. 777, 788 (2017) [hereinafter Baker, *Campus Misconduct*] (“Not everyone knows that taking sex without asking is all that wrong.”); see *id.* at 788 (“[S]tudents have not internalized a norm of respect and caution in the sexual context.”).
7. See CAROLYN BRONSTEIN, *BATTLING PORNOGRAPHY: THE AMERICAN ANTI-PORNOGRAPHY MOVEMENT 1976-1986* 119-25 (2011).
8. For similar support, see JOSEPH J. FISCHER, *SEX AND HARM IN THE AGE OF CONSENT* (2016).
9. See Aya Gruber, *Anti-Rape Culture*, 64 U. KANSAS L. REV. 1027 (2015). For important criticisms of Title IX processes, see Janet Halley, *The Move to Affirmative Consent*, 42 SIGNS 257 (2016) and Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. FORUM 103 (2015).

warned against by Jacob Gersen and Jeannie Suk.<sup>10</sup> Unlike these critics, though, I am fundamentally supportive of the Obama administration's Title IX enforcement efforts. My criticisms are intended to improve the systems in place, not replace them.

Some of my frustrations arose from problems that others have critiqued. For example, several aspects of current Title IX compliance processes, such as mandatory reporting by professors, strong preferences for formal findings, and prohibitions on mediation, take control away from victims of sexual violence. Also, I have seen occasional investigation reports that reflect widely held but undeniably sexist assumptions about women's sexuality, such as a report that detailed a woman's behavior with male friends at a sex club but was silent on the men's equally (to me) provocative conduct there. In addition, I am not confident that hearing processes created for typical academic misconduct (such as plagiarism) using panels of faculty and students are appropriate for complaints of sexual violence.<sup>11</sup> These concerns, however, are not new, and are not my focus here.

My attention is directed to three interrelated concerns with Title IX compliance efforts: (a) an overly broad definition of sexual assault; (b) failure to deal appropriately with vast variations in attitudes and experiences of sexuality of campus women; and (c) resolution processes that ignore the complex web of relationships involved in many allegations of Title IX violations. These three issues can work together to the detriment of the fundamental fairness and safety that are core values underlying the Title IX project.

My focus on these particular operational issues requires attention to the emotional context that surrounds and in some senses controls the policies and

10. See Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881 (2016).

11. The formal hearing processes would have involved faculty or students or both in ways that were unlikely to be helpful. See, e.g., Michelle Goldberg, *Why the Campus Rape Crisis Confounds Colleges*, THE NATION (June 23, 2014), <https://www.thenation.com/article/why-campus-rape-crisis-confounds-colleges> ("In the nationwide controversy over the proper response to pervasive sexual assault on college campuses, there is one thing almost everyone agrees on: school disciplinary boards have rarely done a very good job of handling these cases. That's partly because these boards were never intended to try serious crimes. Composed of faculty, administrators and sometimes students, they were originally created to handle honor-code violations like plagiarism and underage drinking. Their members generally don't have training in law, investigation or the use of physical evidence. There are rarely hard and fast rules about what sort of information is and isn't admissible. Yet due to a combination of law enforcement failure and federal regulation, they are on the front lines of the campus rape crisis . . . ."); Ross Douthat, *Stopping Campus Rape*, N.Y. TIMES (June 29, 2014), [https://www.nytimes.com/2014/06/29/opinion/sunday/ross-douthat-stopping-campus-rape.html?\\_r=0](https://www.nytimes.com/2014/06/29/opinion/sunday/ross-douthat-stopping-campus-rape.html?_r=0) (quoting Goldberg article [" . . . [D]ealing with serious crimes in a setting that normally handles minor infractions risks a worst-of-both-worlds scenario: a process whose lack of professionalism leaves victims more 'devastated than vindicated,' even as its limited protections for the accused lead to endless lawsuits claiming kangaroo-court treatment."]).

processes. Specifically, my Title IX work forced me to think seriously about shame.<sup>12</sup>

The rhetorical justification of Title IX is nondiscrimination, now wrapped in a discourse of safety.<sup>13</sup> Title IX attempts to redress two serious shame-related wrongs: women having been blamed for sexual violence perpetrated against them, and some men perpetrating sexual violence with impunity. In some ways, then, the compliance and cultural Title IX project is designed to change norms<sup>14</sup> in profound ways, moving shame from the accusers to the accused, from the victim to the perpetrator of sexual violence.<sup>15</sup>

Title IX compliance imposes requirements on how campuses address both prevention of sexual misconduct and responses to individual complaints. The first, prevention efforts, often reflect an awareness of the need to address cultures of gendered shame. Reduction in campus sexual violence requires some young men to profoundly change their sexual identities and practices. They need to become people who would be ashamed of pressuring or forcing others sexually, not people who are proud of such sexual conquest. In a sense, the core prevention project is to shift shame about sexual activity away from women, who may suffer undeserved sexual shame, to men, who may not feel shame that is appropriate for sexual violence. The recent presidential campaign provides yet another example of how difficult and crucial this consciousness-raising can be.

My focus, however, is the second aspect of Title IX compliance, institutional responses to complaints. Title IX complaint investigation and adjudication operations are also shaped by the shame that may be experienced by participants.

I had considered the absence of shame in too many men, but had not thought seriously about the excess of shame that haunts too many women. I discovered seemingly bottomless pits of shame about sexuality. Young women suffer shame from the terrible and unfair vise grip of being perceived as not sufficiently sexual (not attractive or “hot”) or as too sexual (“slutty” or “easy”) or both. I had understood that women’s pervasive sexual shame

12. Martha Nussbaum is probably the leading commentator on issues of law and shame. See MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* (2004).
13. Office for Civil Rights, Dear Colleague Letter, *supra* note 3, at 2 (“The Department is deeply concerned about this problem and is committed to ensuring that all students feel safe in their school, so that they have the opportunity to benefit fully from the school’s programs and activities.”). The Obama White House also emphasized safety for students. See, e.g., WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, *NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT* (2014), <https://www.justice.gov/ovw/page/file/905942/download>.
14. Cass R. Sunstein, *supra* note 6, at 909 (“[N]orm entrepreneurs [. . .] produce what I will call norm bandwagons and norm cascades.”).
15. See Katharine K. Baker, *Sex, Rape and Shame*, 79 B.U. L. REV. 663, 666 (1999) (advocating to shame college men and others into seeing unconsented-to sex as a sign of weakness, not prowess).

would cause underreporting of violence and discomfort in the investigation and adjudication processes. My experience taught me additional, different repercussions of the ways that women's shame can affect Title IX complaint procedures.

Section I discusses the breadth of the category of "sexual assault" approved by the OCR and currently in use at MSU and other institutions. Title IX procedures to address allegations of sexual violence can and do reach sexual misconduct that is much less serious than rape. My experience, thankfully, was application of the regulatory enforcement regime to alleged sexual misconduct of less violence, less culpability, and less injury than rape. Focus on some of these lesser incidents helped me to understand that current definitions of sexual assault are too broad.

My second concern, presented in Section II, is that the Title IX sexual-complaint processes seem to assume that women students' sexual identities are much more uniform than the range of attitudes, approaches, and understandings that I saw. Many young women operate within very punishing and limiting constructions of their own sexuality. Some young women suffer from deep shame from sexual contact, even minor sexual contact. Some women experience very little control or autonomy over their own sexuality. This can lead to the enforcement regime being activated to vindicate honor, provide safety from a third party, reinforce identities of sexual innocence, protect against jealousy, or protect young women from falling from someone's grace. It can be a safety net to catch someone from falling from "good" to "slut."

Section III presents an argument for a new category of sexual misconduct, "sexual infraction." If current definitions of sexual violence or sexual assault are so broad as to capture some conduct that is not easily understood as assault, the solution is either to narrow the range of prohibited sexual misconduct or explicitly recognize a category of misconduct that is less egregious than assault. I pursue the second choice.

My final concern is the artificial isolation of the complainant and respondent in the Title IX adjudication framework. The binary adjudication undervalues the social and community context, including the duties owed by the institution to both parties. This is the focus of Section IV, which suggests that restorative justice responses could respond more effectively to the range of injuries currently being adjudicated, protect the complainant, change behaviors of respondents, and use the webs of relationships positively to change campus culture more profoundly.

My central frustrations as a Title IX administrator—and as a feminist dedicated to reducing sexual violence on campuses—relate to each of these issues, and especially to their impact when combined.

### *I. Lesser Sexual Assault*

As a Title IX adjudicator, I was lucky. My experience was investigation and informal resolution of multiple allegations of sexual misconduct other

than rape. None of the cases I adjudicated involved allegations of penetration. None of the cases I dealt with involved physical injury. The cases I dealt with were typical in that most involved heavy drinking<sup>16</sup> and allegations of misconduct by friends or acquaintances. All the cases I dealt with entailed heterosexual contact in which women alleged misconduct by men.<sup>17</sup> In my experience, the regulatory compliance regime put in place for the campus to handle sexual violence may be unsuited to lesser incidents.

Consider a hypothetical: A female student leans against a wall. A male student leans in to her and kisses her on the mouth.

What happened? Was this sexual violence in violation of Title IX? Without more, we have no way to answer either question. Were they strangers, friends, or romantic partners? What interaction preceded the kiss, if any? Were they talking to each other? What did they say? Were they already touching? Was it a forceful kiss, or a light one? Was this at a party, or in the law library, or in a workplace? This kiss could be anything from a serious crime to an innocent, even wonderful moment for both students.

We can fill in the contextual blanks to make my bare-bones hypothetical kiss something that sounds easily like sexual assault. Perhaps it came without warning between strangers, in a formal or professional setting, effectuated through force, or some combination of these factors. Or we can make it something that seems nothing like violence or assault. Perhaps the two students were in a romantic relationship, were already touching, were at a party, had just danced together, or some of this together. The injury of the contact could be large, nonexistent, or something in between. It could be apparently small to many observers, but large to the woman kissed. Context is required to determine whether injury and culpability exist and, if so, to what degree. But the broader context may matter surprisingly little in the Title IX investigation as to whether a prohibited sexual assault occurred.

16. See, e.g., Justin R. Garcia et al., *Sexual Hookup Culture: A Review*, 16 REV. GEN. PSYCHOL. 161, 168-69 (2012) (prevalence of alcohol use with “unintentional” sex); *id.* at 169 (“Alcohol may also serve as an excuse, purposely consumed as a strategy to protect the self from having to justify hookup behavior later” (citation omitted)); Heidi A. Lyons, Wendy D. Manning, Monica A. Longmore & Peggy C. Giordano, *Young Adult Casual Sexual Behavior: Life-Course-Specific Motivations and Consequences*, 57 SOC. PERSP. 79, 81 (2014) (casual sex–vaginal intercourse outside of a committed relationship—is prevalent among college students and is highly related to alcohol use); MICH. STATE UNIV., UNIVERSITY POLICY ON RELATIONSHIP VIOLENCE AND SEXUAL MISCONDUCT [hereinafter MSU RVSM POLICY] at 13, <https://www.hr.msu.edu/policies-procedures/university-wide/documents/RVSMPolicy.pdf> (“Being intoxicated or impaired by drugs or alcohol is never an excuse for misconduct and does not diminish one’s responsibility to obtain consent.”).
17. Following my experience, I will refer to complainants as women and respondents as men, understanding that this configuration is typical, but not universal. My ease with this oversimplification probably reflects my second-wave feminist roots. See Sara Carrigan Wooten, *Heterosexist Discourse: How Feminist Theory Shaped Campus Sexual Violence Policy*, in THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE, *supra* note 1, at 33 (explaining prevalent Title IX construction of rape as perpetrated by men against women as grounded in second-wave feminism).

As is typical when sex and law collide, consent is the crucial issue. The Department of Justice has told us that “[s]exual assault is any type of sexual contact or behavior that occurs without the explicit consent of the recipient.”<sup>18</sup> MSU policies define “sexual violence” as “a physical sexual act perpetrated without consent.”<sup>19</sup> MSU’s definition of “sexual assault” includes “having sexual contact with another individual by force or threat of force; without consent; *or* where that person is incapacitated.”<sup>20</sup>

Not surprisingly, the terms of MSU policies follow the common understanding that a kiss on the lips is sexual contact. “Sexual contact” includes “intentional contact with the intimate parts of another” “without permission.”<sup>21</sup> “Intimate parts of another” include the “mouth.”<sup>22</sup> For MSU students, unless consented to, a kiss on the lips is sexual assault. A Title IX sexual assault determination will turn on specific and somewhat constrained evidence of whether consent existed for that particular sexual contact, that particular kiss.

Thoughtful feminists have warned for decades that the concept of consent cannot bear all the weight we give it.<sup>23</sup> Consent suggests autonomous people on a level playing field who know what they want and are able to express it. Sexual consent interactions are shaped by highly gendered preexisting power dynamics and social expectations, both conscious and unconscious. Plus, of course, sexual desire is inherently mysterious. As Judith Butler noted in questioning the groundbreaking Antioch College affirmative-consent rules, “we expect knowingness precisely at those moments when unknowingness

18. U.S. DEP’T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, AREAS OF FOCUS: SEXUAL ASSAULT, <https://www.justice.gov/ovw/sexual-assault> (last visited June 6, 2017). According to the Office for Civil Rights’s Dear Colleague Letter, “sexual violence” includes “physical sexual acts perpetrated against a person’s will,” and “Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX.” Office for Civil Rights, Dear Colleague Letter, *supra* note 3, at 1. “A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.” *Id.*, at 1-2.

19. MSU RVSM POLICY, *supra* note 16, at 10.

20. *Id.* (emphasis added).

21. *Id.*

22. *Id.*

23. See, e.g., Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 780-84, 814-18, 820-26, 835-38, 841-42 (1988) (choosing to use “mutual” instead of “consensual” because consent is so fraught in a world of strongly different power and different roles); WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1239-40, 1260 (2d ed. 2006) (challenging whether “consent” is, can be, or should be “the main arbiter of the legality of sexual activity”); Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN’S L.J. 81, 94 (1987) (“[W]omen define themselves as ‘giving selves’ so as to obviate the threat, the danger, the pain, and the fear of being self-regarding selves from whom their sexuality is taken.”).



is inseparable from sexuality.”<sup>24</sup> In sexualized encounters, our emotions may run amok, complicating our always-limited powers of observation and understanding. And sexual novices are the least promising candidates for clarity and direct communication about sexual desire. Beyond all that, at a practical level, proving what happened in any private dispute between two people—whether agreeing on a price for a car or agreeing to have sex—is not easy. Consent is fraught politically, conceptually, and practically. But however flimsy consent is as the dividing line between violation or no violation, it is the best (and only) demarcation we have. Therefore, our pressing job is to address and reduce the potential unfairness in determining whether consent existed.

Like those of many others, MSU’s policies attempt to limit the potential problems in consent determinations in two ways: first, by requiring evidence of unambiguous agreement; and second, by constraining what evidence adequately establishes consent. For too many years and in too many situations, consent to sex by women has been assumed or not thought necessary. MSU policy addresses these unbalanced assumptions by requiring evidence of “voluntary, willful, and unambiguous agreement” to establish consent.<sup>25</sup> This staunch requirement is justified in a world where too many men are ready to assume consent when faced with silence, reluctance, or even refusal.

Similarly, contrary to long-standing attitudes, being in a sexual relationship does not or at least should not itself create blanket permission for sex. Enduring attitudes that women in sexual relationships give up their ability to withhold consent justifies an explicit policy, such as MSU’s, that “prior consent does not imply current consent or future consent; even in the context of a prior or current relationship, consent must be sought and freely given for each instance of sexual contact.”<sup>26</sup> The political and social context requires these evidentiary limitations to counter biased and misogynistic supposed common sense. But, at the same time, these policy specifics reduce the saliency of the broader context, and make clear expression of consent determinative.

24. Judith Butler, *Sexual Consent: Some Thoughts on Psychoanalysis and Law*, 21 COLUM. J. GENDER & L. 3, 25 (2011-2012). More fully:

If making oneself available to the unknown is part of sexual probing, sexual exploration, then none of us starts as fully self-conscious, deliberate, and autonomous individuals when we consent. How do we understand this not knowing as not only part of any sexual formation, but as a continuing risk of sexual encounter, even as part of its allure?

*Id.* at 21.

25. MSU RVSM POLICY, *supra* note 16, at 11. Policies at many other universities define consent similarly. *See, e.g.*, the UNIV. OF MICHIGAN, POLICY AND PROCEDURES ON STUDENT SEXUAL AND GENDER-BASED MISCONDUCT AND OTHER FORMS OF INTERPERSONAL VIOLENCE (July 1, 2016), <https://studentsexualmisconductpolicy.umich.edu/files/smp/SSMP-FINAL-062916.pdf>.

26. MSU RVSM POLICY, *supra* note 16, at 12. The MSU policy does not require unambiguous verbal consent, and in that way is not the most stringent possible. But the policy cautions that reliance on nonverbal communication causes the risk of mistake about consent. *Id.* at 12. Unless and until this warning is known and well-understood by students, this aspect of the policy is likely to surprise many of them.

Returning to my hypothetical kiss, almost independent of any other aspect of the context, without evidence that the woman unambiguously consented, this kiss is sexual assault in violation of Title IX.

If we stipulate that consent for the kiss was not given, we know it constituted sexual assault under the policy, but we still do not know much else. Even without consent, the injury could vary widely, ranging from serious criminal activity to a minor, forgettable incident. For example, even if the two students were married or otherwise in a committed sexual relationship, she may not have consented to that particular kiss for any one of countless reasons, including distraction, annoyance, modesty, or a headache. Or maybe the two were friends at a party who had been dancing, drinking, and talking together in a flirtatious way, but the kiss was a misstep.

In many situations like this, when evidence of affirmative consent is missing and the kiss is in fact unwelcome, the woman kissed would turn away and stop the kiss. In the scenarios I suggested, she probably would not even consider making a complaint. For most kisses that constitute sexual assault, the Title IX enforcement mechanism is not set in motion. Many women are reluctant to pursue complaints about rape, let alone a relatively minor kiss. The woman would not consider herself seriously injured, and would not want to waste her time.

But if such a complaint is pursued, an unconsented-to kiss will result in a finding of sexual assault. Even if the evidence of consent is contested and ambiguous, two aspects of the Title IX compliance regime make it likely that, if a complaint is pursued, a finding of sexual violence, specifically sexual assault, is likely. As discussed above, stringent evidence of consent is required. Also, using the preponderance-of-the-evidence standard, a finding of sexual assault can be found even in a very close case. Most of the critical commentary about the preponderance-of-the-evidence standard required by the 2011 Dear Colleague Letter questions the fairness of adjudicating serious criminal conduct with this forgiving standard of proof.<sup>27</sup> I am suggesting that the preponderance standard may lead to unjust results following complaints of much less serious sexual misconduct, such as an unconsented-to kiss.

But why would anyone pursue a formal complaint about a nonforceful but unwanted first kiss? Perhaps the possibility seems far-fetched, but it may not be.

## *II. Shame Agent*

My terrible disappointment from the Title IX work was discovering that too many highly accomplished women students suffer from sexual identities that are painfully constrained, fearful, and fraught with potential shame. I learned

27. *E.g.*, Nancy Gertner, *Sex, Lies and Justice*, 26 AM. PROSPECT 32 (2015) (preponderance standard wrong in part because these proceedings do not include discovery and offer less than full civil procedural protections).

from listening to women with Title IX complaints that the sexual freedom I imagined for them is too often illusory.

At least somewhat aware of the “hookup culture” on campuses, I misinterpreted what it meant. I imagined that the fact that many women students engage in casual sex reflects widespread comfort with sexuality and confidence in seeking sexual pleasure.<sup>28</sup> Impressed by the “slutwalk” demonstrations, I envisioned that a slutwalk protestor holding a sign declaring “It’s my hot body/ I do what I want”<sup>29</sup> represents the sexual freedom and even refreshing sexual swagger of women students. I somehow even allowed myself to be misled by the almost ubiquitous fashion choices of many younger women, foolishly associating low-cut tops, high heels, or tight clothes with comfortable sexual freedom. The intimate details of Title IX investigations revealed a very different reality for some students.

We should not be surprised that I was operating from many false ideas about women students’ sexual identities and attitudes. My personal experience as a heterosexual college student was about fifty years ago, and happened to be at a particular time of sexual liberation and freedom. Then I came out as a lesbian forty years ago, at a time when that constituted defiance toward and disregard of well-entrenched attitudes and laws about so-called sexual deviancy. I have taught Gender and the Law and Sexual Orientation and the Law many times, at multiple law schools, starting in the 1990s, but I now understand that the self-selection into those classes probably gave me a false sense of understanding students’ sexual worlds.

Like most of the students in my feminist and sexuality classes, my own experience is that sexual attraction, arousal, and desire are very complicated, not particularly static, and often unpredictable. I do not believe in some immutable separation between friendship and attraction. I do not believe in being ashamed for having strange, unwelcome, inappropriate, messy sexual thoughts.<sup>30</sup> I do not agree that a sexual practice based on explicit, verbal cues prior to all sexual contact is the best sexual realm,<sup>31</sup> and I am distrustful of easy constructions of healthy or unhealthy sex. For me, sexual transgression can be

28. For more accurate and troubling accounts, see KATHLEEN A. BOGLE, *HOOKING UP: SEX, DATING, AND RELATIONSHIPS ON CAMPUS* (2008) and LISA WADE, *AMERICAN HOOKUP: THE NEW CULTURE OF SEX ON CAMPUS* (2017).

29. For a photograph of such a protestor holding this sign in a 2011 Boston SlutWalk, see KAITLYNN MENDES, *SLUTWALK: FEMINISM, ACTIVISM AND MEDIA* 121 (2015).

30. Similarly, see Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 *COLUM. L. REV.* 181, 207 (2001) (“Desire is not subject to cleaning up, to being purged of its nasty, messy, perilous dimensions, full of contradictions and the complexities of simultaneous longing and denial. It is precisely the proximity to danger, the lure of prohibition, the seamy side of shame that creates the heat that draws us toward our desires, and that makes desire and pleasure so resistant to rational explanation.”)

31. *Id.* at 206-07 (“[T]o evacuate women’s sexuality of any risk of a confrontation with shame, loss of control, or objectification strikes me as selling women a sanitized, meager simulacrum of sex not worth getting riled up about in any case.”); Gersen & Suk, *supra* note 10 (discussing the kind of sex that sex bureaucrats are enforcing).

positive.<sup>32</sup> I am hostile to notions of sexual ownership, such as, for example, the attitude that kissing or being kissed violates the kissed woman's boyfriend, fiancé, or husband. I discovered that some of our students hold these attitudes.

I probably was also misled by the apparent ease of students, no matter their background, with the reality of an openly lesbian dean. Surely that translated into some core appreciation of sexual freedom for themselves? I was wrong. I was truly surprised to learn that some current women students hold very traditional ideas about women's sexuality. The ageless pressure on young women not to be perceived as too sexually active is very much alive and much stronger than I had realized.

Young women walk reputational tightropes. They deal with social pressure to appear super-comfortable with sexuality, plus the contrary pressure to not be "too" sexually active. Casual sex on campus happens more than ever before, but university communities also include many women who are attempting to be quite strict about their sexual activity. Young people are highly reactive to perceptions of peer expectations and norms, but their understanding of those norms is often wrong.<sup>33</sup>

Even young women who are sophisticated about feminist ideas often see their own experiences through lenses of shame.<sup>34</sup> Even happily sexually active women may operate within intense prohibitions about their sexual identities and be vulnerable to slut-shaming.<sup>35</sup> More traditional women may face even more pressure.

Judgments of promiscuousness ("slut-shaming") are not evenly distributed or evenly harmful. A recent study of college women at a large Midwest university found that slut discourse was ubiquitous and that "[w]omen's

32. Franke, *supra* note 30, at 207 ("It is precisely the proximity to danger, the lure of prohibition, the seamy side of shame that creates the heat that draws us toward our desires, and that makes desire and pleasure so resistant to rational explanation. It is also what makes pleasure, not a contradiction of or haven from danger, but rather a close relation.")

33. See Annika M. Johnson & Stephanie M. Hoover, *The Potential of Sexual Consent Interventions on College Campuses: A Literature Review on the Barriers to Establishing Affirmative Sexual Consent*, 4 *PURE INSIGHTS* 1 (2015), <http://digitalcommons.wou.edu/pure/vol4/iss1/5>.

34. See LYNN M. PHILLIPS, *FLIRTING WITH DANGER: YOUNG WOMEN'S REFLECTIONS ON SEXUALITY AND DOMINATION* (2000) (noting that college women in this study who were sophisticated about feminist ideas still had difficulty naming what happened to them as sexual assault or something not their fault; they too suffered lots of shame and difficulty navigating the elusive goal of sexual pleasure).

35. For example, a recent study of white, primarily heterosexual university women revealed that the label "slut" was actively deployed to establish status among the women, although often it was divorced from actual sexual conduct. High-status women were able to be sexually active without being at risk of being understood to be sluts. Higher- and lower-status women differentiated the other group in part by calling them sluts. See Elizabeth A. Armstrong, Laura T. Hamilton, Elizabeth M. Armstrong & J. Lotus Seeley, 'Good Girls': Gender, Social Class, and Slut Discourse on Campus, 77 *SOC. PSYCHOL. Q.* 100 (2014). The authors found that "[s]lut discourse was ubiquitous among the women ... studied." *Id.* at 117.

definitions of sluttiness revolve around status on campus, which is largely dictated by class background.”<sup>36</sup> More specifically:

High-status women employ slut discourse to assert class advantage, defining their styles of femininity and approaches to sexuality as classy rather than trashy. Low-status women express class resentment—deriding rich, bitchy sluts for their wealth, exclusivity, and participation in casual sexual activity. For high-status women—whose definitions prevail in the dominant social scene—slut discourse enables, rather than constrains, sexual experimentation. In contrast, low-status women are vulnerable to public shaming.<sup>37</sup>

This is an unforgiving world, in which the serious stigma from a reputation for being “easy” is often not based on actual sexual activity.<sup>38</sup>

Many women students continue to be subjected to intense pressure to maintain a character or identity of sexual innocence and purity. For some, the protection against sexual shame is fragile and very thin. Some navigate safety and comfort by finding protection in a sexual relationship, sometimes even considering themselves the sexual property of a boyfriend, fiancé, or husband. Some may have a very traditional understanding of their sexuality, based on cultural, religious, or other values. This range of attitudes and experiences interacts with Title IX sexual misconduct enforcement processes.

Some women’s capacity for shame in a sexual encounter is very broad, and can be rooted in a sexual morality that provides very little room for sexual ambiguities. Some accomplished, smart, sophisticated women have sexual identities and moralities that are very different from what I imagined. I want Title IX work to affirm women’s sexual agency, desire, and safety, but it may also be activated to defend women’s honor.

My purpose here is not to judge more traditional understandings of one’s sexuality. We celebrate the diversity of our student bodies, and that includes religious, political, and cultural diversity that inevitably includes wide variations in sexual behavior and attitudes. But some of the Title IX definitions and processes seem to be based on mistakes about women’s sexuality very much like mine.

When combined with the expansive definition of sexual assault, the Title IX consent policies seem to assume a complainant who is confident and secure in her sexual identity, clear about her experiences, and unhampered by confusion or shame. In short, the processes seem to share the naiveté that I brought to this work.

36. *Id.* at 101.

37. *Id.*

38. “The slut label may have little or nothing to do with the kind or amount of sex women have.” *Id.* at 103; see also Patricia J. Williams, *On Imperfection and Its Comforts*, SIGNS, <http://signsjournal.org/bad-feminist/#williams> (last visited June 6, 2017) (reviewing Roxanne Gay’s *BAD FEMINIST*) (“Gay speaks to the mean-spirited perfectionism that so many young women must deal with today.”).

Some women are caught between relatively permissive campus sexual culture and strict family, cultural, or religious prohibitions. Most disturbingly, some women, even today, understand their sexuality as something that is owed to men to whom they must be loyal. In those cases, women's own safety could be at risk from any kind of flirtatious behavior, let alone being kissed, or kissing. These women may need to defend their honor and innocence in the context of relationships with fiancés or boyfriends or husbands. At the worst, the entire compliance regime could be defending the property rights of a boyfriend or fiancé.

Women have many reasons to avoid reporting sexual violence and misconduct that they suffer, including lack of confidence in the processes, desire not to cause harm to themselves or someone they know, and privacy concerns. The importance and precariousness of their sexual reputations may play a role. Debilitating sexual shame and associated reputational risks are prime reasons that women choose not to report even serious sexual violence. This massive underreporting of sexual violence is the larger problem. But the importance and precariousness of women's sexual reputations may also cause what may seem to others like overreporting. Some complainants may have complicated pressures to exaggerate the harm that they suffered, substitute certainty for uncertainty about exactly what happened, or pursue serious penalties for conduct that may not be considered serious to others. Unpleasant and unwelcome as this reality may be, we should recognize it.

The expansive formal definition of sexual assault interacts with this diversity of sexual attitudes held by our students. Some women may suffer or perceive themselves to suffer serious harm from what seems to others a trivial incident. Some students may have intense pressure to use the system to establish their sexual innocence, after even a relatively minor incident. What if earnest, honest complainants could use the enforcement and protection apparatus to simplify and clean up messy sexual realities, protecting themselves (perhaps even establishing their safety) by solidifying their identity as sexually innocent, pure, passive, or clean? Sexual shame may lead to formal complaints about relatively minor incidents.

In various scenarios, for women who are conservative sexually, whether for religious or other cultural reasons, or for any reason, an unwanted kiss from a close friend after dancing at a party, for example, could be very upsetting. It could even be dangerous. And she could have very serious reasons to want to establish as convincingly as possible that she did nothing to elicit that kiss.

Most women subjected to an unwanted kiss will reject it without recourse to formal procedures. Most women who are not sure whether they consented to a kiss will not initiate formal procedures. But some will. Perhaps ironically, this may become more common as campus culture improves by making the availability of formal complaint procedures much more widely understood.

"We believe you" advocacy campaigns are powerful and appropriate in a world in which women are routinely ridiculed and not believed when

complaining about sexual violence. In the context of long-standing impunity for sexual violence by young men, Title IX compliance regimes correctly are attempting to level the field for women suffering from this conduct. But “we believe you” does not translate fairly into individual adjudications.

Taking seriously the continuing pressures that young women face related to their sexuality means also taking seriously pressures that some women may face to understand the encounter in ways that maximize their surprise at the unwanted sexual contact. Not only does this sexual diversity of our students mean that relatively minor complaints may be brought, but it also means that the complainant may have deep self-interest to understand or interpret the context to diminish any role in suggesting consent. To not be considered a slut, a disloyal girlfriend or fiancée, or a “tease” can be very important, perhaps crucial, for a young woman’s identity and well-being. These pressures can turn memories of an ambiguous event into something more clear-cut, and more obviously injurious.

Cognitive biases are real. Certainty about exactly what happened may be grounded in the importance of that version to self-esteem, safety, deeply held notions of identity, and worthiness, as much as anything else. The Title IX educational project is intended to teach young men (in particular, but not exclusively) that their self-interested perception about sexual advances being welcome may be wrong. Young women also bring self-interested perceptions into their understanding of sexual encounters. We all do.

And nothing suggests that fighting off powerful feelings of shame adds to the accuracy of one’s memory.<sup>39</sup> Indeed, cultural theorists write convincingly about the way that shame may operate: “[S]hame betrays a proclivity for seeking distance between a shamed subject and an other, onto whom shame becomes projected.”<sup>40</sup> I do not want any women to feel deep shame for sexual contact that they let themselves experience, or even that they sought. But acknowledging that some do feel that shame, and that the enforcement apparatus may help them to even unknowingly transfer it to another, is an important caution.

39. Sally R. Munt, *QUEER ATTACHMENTS: THE CULTURAL POLITICS OF SHAME* (2008) at xiv (Foreword by Donald L. Nathanson, M.D.) (The shame effect, “the basic physiological mechanism underlying the experience we feel as shame, is triggered when we’re interrupted whilst thinking/feeling/doing something pleasant. The associated period of blush, cognitive shock, incoherence, and confusion lasts only moments until we seek freedom from this discomfort through the compass of interpersonal manoeuvres I’ve described as withdrawal, submission, distraction, or attack on whomever we deem responsible for our discomfort.”).
40. Clara Fischer, *Gender, Nation, and the Politics of Shame: Magdalen Laundries and the Institutionalisation of Feminine Transgression in Modern Ireland*, 41 *SIGNS* 821, 835 (2016), referencing MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS AND THE ETHICS OF QUEER LIFE* (1999). “A ranking of shamed others thus creates a chain along which shame travels to establish more or less deviant subjects. This produces competition, envy, and a jostling for position among those willing and able to compete for a higher place in the hierarchy. Of course it also affords the opportunity for manipulation by those in top position, as the reward of upward progression can be used as currency.” *Id.*

A woman's shame and vulnerability can influence not only the decision to pursue a complaint and the memories related to consent, it can also influence remedies sought and obtained. Especially in the negotiations of an informal resolution, the remedial apparatus may be shaped in part by the desire or need of the complainant to establish her innocence or minimize her shame or dishonor. The apparatus of safety—removal from the same classes, removal from the dorm—also carries with it an expressive function, especially when social circles of the complainant and respondent overlap. Those remedial measures may function to the complainant as evidence of the vindication of the correctness of her interpretation of the incident. The vehemence of insistence on a particular sequence of events, or interpretation of events, for all of us, may be based as much on the importance to us of that interpretation as on its accuracy.

The difficulty of proof of sexual consent and the morass of conflicting pressures facing the students involved are not sufficient reasons to give up the effort. But they are reasons to be sure that the categories of offense are accurate and proportionate to the injury or culpability. Students who attempt understandable but mistaken kisses should not be so easily found responsible for sexual assault.

### *III. Sexual Infraction*

The simplest way to correct the overly broad category of sexual assault is to create a new category of sexual misconduct, which could be called "sexual infraction." The unfairness of holding someone responsible for misperceiving consent for lesser sexual contact can be mitigated by creating this category of lesser offense.

An alternative approach would be to narrow consent requirements by requiring a showing of consent for most, but not all, sexual contact. In other words, consent would *not* be required for some category of lesser sexual contacts. But imperfect as it surely is, the current across-the-board requirement of affirmative consent for all sexual contact has the great virtue of simplicity. The bright-line requirement of consent before any sexual contact is a clumsy but highly effective, pragmatic tactic in the massive consciousness-raising project of educating young men and women not to engage in unwanted sexual conduct. The simplicity of this message is a crucial advantage in the educational effort to reduce or eliminate campus sexual violence.

The investigation and adjudication processes could also be harmed by creating a category of sexual contact for which unambiguous consent is not required. Carving out such a category would create a new and massive incentive for accused students to fit their conduct into that category in order to absolve themselves completely. A better approach is adoption of a new category of lesser sexual misconduct, "sexual infraction."



Sexual infraction<sup>41</sup> could consist of nonconsensual sexual contact with someone known to you without coercion, penetration, or touching intimate portions of the body other than the lips.<sup>42</sup> This new “lesser included” offense has the benefit of more fairly and accurately describing a large category of sexual contact that currently would be pursued as sexual assault.

Infraction<sup>43</sup> as a new category of sexual misconduct has the significant advantage of proportionality. Especially with initial contact such as a kiss, mistakes about consent are entirely predictable. Realistically, many welcome first kisses have occurred without explicit, unambiguous consent. The university’s stringent, OCR-approved consent requirement reflects the aspiration for a highly communicative sexual practice that is unlikely to be prevalent. Especially because they are relatively inexperienced in sexual behavior, many students do not communicate well with sexual partners.<sup>44</sup> Like people of any age, many young adults are uncomfortable talking about sex, and use indirect communication rather than direct consent. Sexual scripts differ between various communities represented on our diverse campuses.<sup>45</sup> We should not have policies that too easily permit language, national origin, or cultural differences to result in findings of sexual assault.

These are important and difficult cautions for affirmative-consent requirements, consent evidentiary limitations, and the preponderance-of-the-evidence standard. But each also brings important advantages. The grip of

41. I am indebted to the JOURNAL OF LEGAL EDUCATION editors for the suggestion that “sexual infraction” replace the label “sexual mistake” that I used originally. Some participants at the Boyd School of Law discussion of this paper suggested the even flatter label, “sexual incident,” either to replace “sexual infraction” or as part of a three-tiered approach.
42. The category’s definition requires choices regarding intent, type of relationship, and specific contact covered. I am following current policy in avoiding any intent language, leaving it as a type of strict liability. A “person known to you” covers the most obvious scenarios I have discussed, but could also include troubling categories of employers or professors unless language is added excluding those relationships. Other lesser contact could be added, including contact with clothed breasts, for example. Some campus policies do not include oral contact as “sexual contact” unless it is oral-genital contact. *See, e.g.*, U. OF MICH., POLICY & PROCEDURES ON STUDENT SEXUAL & GENDER-BASED MISCONDUCT & OTHER FORMS OF INTERPERSONAL VIOLENCE: PROHIBITED CONDUCT, <https://studentsexualmisconductpolicy.umich.edu/content/prohibited-conduct> (last visited June 7, 2017). But unwelcome kisses may in fact constitute sexual assault, a strong justification for including them explicitly in campus policies on sexual misconduct.
43. As suggested by Lydia Nussbaum, labeling this an “infraction” rather than a “sexual infraction” would flatten the rhetorical charge of the offense. It could also be called an “intimacy violation” or an “intimacy infraction.”
44. *See* Johnson & Hoover, *supra* note 33, at \*4 (“Young adults tend to avoid direct conversations regarding sexual consent when possible and rely on nonverbal passive approaches to avoid embarrassment.”); *see id.* (“Heterosexual young adults often do not engage in verbal or direct methods when establishing sexual consent.”).
45. *Id.* at \*6 (“Sexual scripts are social phenomenon [sic] that may differ based on the gender, race, ethnicity, sexual orientation, and class of the young adults.”).

sexual conquest as an element of masculinity is so strong<sup>46</sup> that I am willing to support blunt tactics, such as requirements of affirmative consent, as a corrective. I accept their value as highly pragmatic tactics in a crucially important norm-shifting legal, cultural, and regulatory project.

But mistakes about consent are especially possible in the initial stages of sexual contact, such as a kiss (“first base”). Unconsented-to vaginal or anal penetration is usually something qualitatively different from unconsented-to sexual touching of the mouth. The consent evidentiary requirements work well in the context of unconsented-to intercourse, disrobing, or other similarly serious sexual contact. Aside from the greater intimacy of sexual intercourse, it typically takes more time to get there. A surprise kiss is often welcome. Surprise genital contact generally is not.

Enforcement mechanisms can be structured so that adjudicatory outcomes are proportionate to the offense. A finding of “sexual assault” for failing to obtain unambiguous evidence of consent to a kiss is not proportionate.

Every dispute system results in errors, no matter the standard of proof or its evidentiary rules. Errors from the combination of the preponderance-of-the-evidence standard and the affirmative-consent requirements can predictably fall on accused students. Academic communities must be mindful of the potential unfairness to students from these rules, and work diligently to reduce the risk of such errors. For example, the university can reduce the risk of mistakes in complaint adjudications through relentless education of the entire campus community about university policies and the serious risks from engaging in sexual activity without express consent. If the policy says that evidence of prior consent is not determinative, for example, it is important for every student, male and female, to understand that before a dispute arises.

Drawing lines is difficult, but possible. Just as drunk-driving prohibitions based on blood alcohol levels penalize some people who are not impaired,<sup>47</sup> requirements of affirmative evidence of consent ensnare some people who sincerely believed that they had consent. But the reasonableness of that belief is likely to be limited to less intimate sexual contact. And an accused found responsible for a “sexual infraction” is facing a much less serious judgment and less stigma.

Equally important, a finding of sexual infraction based on mistake about consent would be likely to justify a different, lesser remedial response. This matters for both interim and permanent remedies. An allegation of sexual assault supports more aggressive measures, including immediate removal from a dorm or from classes shared with the complainant. The lesser finding of sexual infraction could vindicate the complainant’s understanding of what happened without imposing the greater level of penalty on the accused that

46. For a compelling description of the powerful culture of masculinity of many young men, see MICHAEL KIMMEL, *GUYLAND: THE PERILOUS WORLD WHERE BOYS BECOME MEN* (2008).

47. See Baker, *Campus Misconduct*, *supra* note 6, at 788-92 (discussing norms against drunk driving and impact of offense based on blood alcohol, not impairment).

is understood to be necessary to protect a complainant from a perpetrator or possible perpetrator of sexual assault. Most important, proportionality is required for fairness. Unfair processes breed resentment, and resentment slows or even reverses the norm cascade that can and should create safer campuses.<sup>48</sup>

#### IV. RELATIONAL REMEDIES: TURNING TOWARD RESTORATIVE JUSTICE

The incidents underlying the Title IX matters I worked on were highly social, but the processes and remedies artificially isolated the accuser and the accused. Some of this is inevitable, given that the complained-of acts themselves are highly personal, usually intimate. Certainly the stakes are highest for the accuser and the accused. But adjudication processes should not artificially isolate the two main participants. The fundamental rationale underlying Title IX processes is the institution's obligation to provide a nondiscriminatory and safe learning environment to all students. That principle is inherently social and relational. It also highlights the institution's ongoing relationship with and obligations to both the accuser and the accused. Indeed, although the processes focus very much on the (usually) two central participants, the action is formally taken by the educational institution, as part of its obligation to create and maintain an effective educational environment.

Also, the underlying incidents that precipitate a complaint often occur in a social setting, such as at or on the periphery of a party. Most crucially, the incident and its aftermath usually have ramifications for wide social circles. It may involve friendship networks, often overlapping, of the accuser and the accused. The accuser and accused might both be law students, or live in the same dorm. The accused could be a friend of the accuser, or of her boyfriend, or of her friends. Complex webs of loyalty surround both students. Friends can be pulled in as witnesses, or may attempt to insert themselves on one side or another. A boyfriend can attempt to insert himself. The community suffers an injury.

Current complaint investigation and adjudication compliance regimes do not sufficiently recognize the complexities of the relationships between the two and among their friendship circles. Nor does an adversarial process adequately account for the ongoing duties owed by the university to both central figures and many others. Isolating the two key participants also fails to acknowledge the meaning and impact that the complaint may have on the complainant's relationships to others with whom she is close, and in the respondent's relationships.

These observations bring me back to restorative justice.<sup>49</sup> Restorative justice methods recognize the institution's responsibilities to all students involved.

48. Brodsky, *supra* note 6, at 831 ("Over time, fair procedures should lead to greater community faith in campus discipline, allowing colleges to take the steps necessary to build safe and just campuses."). Proportionate categories of misconduct are an important aspect of fair procedures.

49. See Joan W. Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 HASTINGS CONST. L. Q. 717 (2000).

Restorative justice models hold the accused accountable for the harm he has caused, but acknowledge that both accuser and accused are members of the community. According to John Braithwaite, a leading figure in the restorative justice movement, the core values of restorative justice are “about healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology, and making amends.”<sup>50</sup> Restorative justice processes can use shame productively by treating the offender with genuine respect.<sup>51</sup>

I am not the only one to appreciate and support the potential of restorative justice processes to address campus sexual misconduct.<sup>52</sup> In her important recent article, *Crime Logic, Campus Sexual Assault, and Restorative Justice*,<sup>53</sup> Professor Donna Coker argues compellingly that current Title IX processes suffer from being conceptualized within our dominant framework for addressing criminal behavior, in what Professor Coker calls “Crime Logic.”<sup>54</sup> Professor Coker advocates for a public health approach, and recommends what she calls “Transformative RJ [Restorative Justice]”, meaning restorative justice models that use insights from critical feminist and critical race theories, particularly those related to intersectionality and structural inequality.<sup>55</sup> “A Transformative RJ [Restorative Justice] model attends to the impact of intersecting subordination both in the life of the person who committed harm

50. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 6 (1999). Braithwaite has described restorative justice responses to crime as “a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime. The purpose is to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just.” John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999).
51. See JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).
52. For others making the same suggestion, see Alletta Brenner, *Transforming Campus Culture to Prevent Rape: The Possibility and Promise of Restorative Justice as a Response to Campus Sexual Violence*, HARV. J. L. & GENDER (Oct. 6, 2013), <http://harvardjlg.com/2013/10/transforming-campus-culture-to-prevent-rape-the-possibility-and-promise-of-restorative-justice-as-a-response-to-campus-sexual-violence>; Rebecca Ropers-Huilman, Kaaren M. Williamsen & Garrett Drew Hoffman, *Afterword: Questioning the Scripts of Sexual Misconduct*, in THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE, *supra* note 1, at 185, 187 (urging restorative justice to “facilitate healing, behavior change, and true accountability”); Mary P. Koss, Jay K. Wilgus & Kaaren Williamsen, *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE, & ABUSE 242 (2014).
53. Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEXAS TECH L. REV. 147 (2016).
54. *Id.* at 150. “Crime Logic is reflected in (1) a focus on individual culpability rather than on collective accountability; (2) a disdain for policy attention to social determinants of behavior; (3) a preference for narratives that center on bad actors and innocent victims; and (4) a preference for removing individuals who have harmed others as though excising an invasive cancer from the body politic.” *Id.*
55. *Id.* at 197-99.

as well as in the life of the person who was harmed.”<sup>56</sup> This approach is deeply appropriate in light of the university’s ongoing duties to all of its students, including the accuser and the accused.

Restorative justice processes should allow the accuser to articulate the seriousness of her experience of violation and injury. Rather than turning entirely on a binary question of consent or no consent, it can allow for a much more nuanced and full-throated engagement with any confusion about consent. Restorative justice processes could enhance the accused’s ability to take responsibility for the harm that he caused. They can acknowledge and use positively the web of relationships in which the accuser and accused find themselves. Rather than reinforcing the silence and shame surrounding sexual encounters, they can air them.

The restorative justice recognition that every offense is also a breach to the community is particularly relevant. Under current compliance procedures, an accused can be removed from his dorm, his dining hall, and his classes, even before any investigation. The interim (and later permanent) step of removing the accused from the dorm or the classroom is very strong message of shameful dishonor. Even when not characterized as punishment, these remedial steps may operate as such. This can be counterproductive to the larger goal of having an accused take responsibility for having caused suffering, and learning from that. Formal, professional restorative justice processes can hold the accused accountable without shunning him.

Some colleges and universities have implemented restorative justice programs to address sexual misconduct, and scholars and advocates are working to study their efficacy and make it easier for campuses to adopt successful restorative justice models.<sup>57</sup> As Professor Coker explains, “[restorative justice] scholarship and practice rest on a set of underlying beliefs about the human capacity to change.”<sup>58</sup> In an educational setting, the university has incentives to protect all students and to use processes that allow the participants to take responsibility for their actions, and to change attitudes and behaviors. I did not see enough protection, responsibility, or change in the adversarial Title IX adjudications in which I participated.

### Conclusion

The Title IX regulatory regime regarding campus sexual misconduct is a highly orchestrated and formal effort to reduce blame and shame of victims and impose responsibility and shame on perpetrators. Supported by strong activism and effective institutional leadership, it is also a stunning example

56. *Id.* at 197.

57. For a description of a particularly impressive restorative justice Title IX program, see *Project on Restorative Justice: Campus PRISM*, SKIDMORE COLLEGE <http://www.skidmore.edu/campusrj/prism.php>. Professor Coker provides an extensive description of current campus restorative justice programs, including relevant research, operational challenges, and case studies. See Coker, *supra* note 53, at 187-210.

58. *Id.* at 189.

of the power of a regulatory regime to change culture. The continuing positive impact of Title IX processes related to campus sexual violence and other misconduct demand attention to potential unfairness in current Title IX operations. Limiting overly expansive definitions of “sexual assault” and pursuing restorative justice approaches are two ways to improve Title IX complaint processes. We can hope that working to continually improve Title IX compliance procedures will make future generations of students less vulnerable to sexual violence and misconduct, whether serious sexual assault or any kind of sexual infraction or mistake.