EVADING TITLE IX'S ADVANCES: CAMPUS BANS ON FACULTY-STUDENT SEX

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It is no coincidence that the last decade witnessed the growing popularity of university bans on faculty-student sex, along with the great Title IX battle over survivors' and respondents' rights. Title IX is now closely scrutinized, heavily regulated, and often litigated. Bans on faculty-student sex, however, have escaped similar scrutiny. By labeling a faculty-student interaction a violation of a ban on faculty-student sex, rather than sexual harassment, university administrators can enable drastically different outcomes at the discretion of the enforcing official. In one context, the ban serves as a back-up plan to Title IX, increasing institutional leverage and ensuring some appropriate action as the result of an investigation. In other contexts, the ban presents an opportunity for select faculty to forego the stigma of sexual misconduct proceedings and an opportunity for university officials to turn noncompliance with Title IX procedural requirements into harmless error. While scholars have focused on the employment law and constitutional implications of regulating faculty-student sex, this article evaluates the impact of campus bans on Title IX proceedings in light of the justifications for the ban. While bans are hailed as one more tool for universities to prevent faculty student sexual harassment, this article highlights what the student loses in the process, from the right to an advisor, transparency in the process, the opportunity to be heard, the chance to review evidence and learn of the outcome of the proceedings, and the agency to consent to a university process that risks displacing the student's voice for that of the university.

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INTRODUCTION

Picture this: a university student finds a date online and they hit it off. The date leads to a brief, intimate relationship. At some point, the student learns that the date has an affiliation with their campus community. Later still, a community member complains to the university about the relationship. While, in this hypothetical story, the basis for the complaint may vary, in the real world, the outcomes vary drastically and that variation can depend entirely on the date's status with the university.

If the date is another student, the complaint is analyzed through a Title IX lens. Is the relationship consensual? Does the relationship create a hostile environment for the campus community? If there is an investigation, both parties are interviewed by someone trained to grapple with issues of sexual harassment and consent. Both parties, by design, have a voice in the process.

If, however, the date is a faculty member, the complaint may be processed at the discretion of a campus administrator. It could, as with the student-student scenario, become a Title IX matter, with its associated scrutiny and stigma, deadlines, and disclosure requirements. Yet, it might instead be treated as a different policy violation. Consent, along with the student's input, might be dispositive, but could also be reduced to irrelevance. In these cases, administrators processing such complaints wield significant power while students' voices can be silenced, or displaced, by the university's preferred narrative.

The last decade has seen two federal Dear Colleague Letters, associated guidance, and regulations that make Title IX compliance more complex and that

make complainants' rights to participate in pending Title IX matters more robust.[1] The 2020 regulations and 2022 proposed amendments reinforce Title IX's unique structure within university compliance regimes, including 1) enforcement exceptions that limit the university's reach and preserve spheres of autonomy, 2) the need for incentive realignment, because a finding of sexual harassment risks an admission of university liability, and 3) additional accountability through complainant sovereignty and participation rights.

The last decade has also seen an increasing number of colleges passing a policy declared distinct from Title IX: bans on faculty-student sex. These bans become part of the university administrative state, in which universities adopt and enforce rules that set community norms and uniquely govern members of the campus community, subject only to broadly applicable theories of liability such as due process and breach of contract.[2]

These bans come at a substantial cost to the students they purport to protect, a cost commonly subsumed within the university's proclaimed benefits of expediency. At a key decision point, the decision to charge a faculty member with violating a policy involving either Title IX or the ban, it is not always clear whether consent is at issue, whether the student involved wants some more or less involvement in the university's process, whether student involvement in the investigation creates more barriers to the student's education, and whether student exclusion from the investigation perpetuates the student's loss of autonomy. The ban provides no variation in process to reflect the fact that these circumstances may vary.

With a ban, an allegation that a faculty member had sex with a student can be resolved without consultation with the student. With Title IX, the same allegation cannot be resolved without actual or attempted student consultation. With the ban, the discretion to grant these entitlements reverts to the university. Without the incentive realignment of Title IX, university officials may be inclined to use the student's experience for all the value it provides: less process means resource savings, less complexity means fewer liability risks, and a reduction in Title IX claims means decreased risk of reputational damage to the university and its faculty. This is a form of institutional appropriation of the student narrative, in that the university becomes complainant, declares the existence and implications of consent, and eliminates the student role in the process. In exchange,

1. Letter from Russlynn Ali, Assistant Sec'y for C.R., U.S. Dep't of Educ., Off. for C.R., to Title IX Coordinators (Apr. 4, 2011), https://perma.cc/4TNF-8QHH [hereinafter 2011 Dear Colleague Letter]; U.S. DEP'T OF EDUC., OFF. FOR C.R., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (APR. 29, 2014), https://perma.cc/DC9A-TZGB [hereinafter 2014 Q&A]; Letter from Candice Jackson, Acting Assistant Sec'y for C.R., U.S. Dep't of Educ., Off. for C.R. (Sept. 22, 2017), https://perma.cc/AJ62-CABR [hereinafter 2017 Dear Colleague Letter] (rescinding 2011 Dear Colleague Letter and 2014 Q&A); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) [hereinafter 2020 Regulations] (to be codified at 34 C.F.R. pt. 106).

2. For a detailed list of laws constraining university processes, see *Compliance Matrix*, HIGHER EDUC. COMPLIANCE ALL., https://perma.cc/FUG2-RVPZ.

the process is faster and flexible, but the discretion to decide the beneficiary of that flexibility rests with the university.

Scholars have analyzed the ban as an employment regulation,[3] as a threat to guarantees of personal liberty embedded in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments,[4] and as one of several tools to address ethical and pedagogical failures.[5] Bans on faculty-student sex exist just outside the margins of the intersection of important First and Fourteenth Amendment rights, implicating privacy,[6] intimate association[7] and expressive association[8] but falling just out of reach of a successful challenge.[9] More recently, Professor Amia Srinivasan has

3. Paul M. Secunda, *Getting to the Nexus of the Matter: A Sliding Scale Approach to Faculty-Student Consensual Relationship Policies in Higher Education*, 55 SYRACUSE L. REV. 55 (2004).

4. Gary E. Elliot, *Consensual Relationships and the Constitution: A Case of Liberty Denied*, 6 MICH. J. GENDER & L. 47, 48 (1999).

5. Neal Hutchens, *The Legal Effect of College and University Policies Prohibiting Romantic Relationships Between Students and Professors*, 32 J.L. & EDUC. 411 (2003); Sherry Young, *Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education*, 4 AM. U. J. GENDER & L. 269, 270, 279-80 (1996); Margaret H. Mack, *Regulating Sexual Relationships Between Faculty and Students*, 6 MICH. J. GENDER & L. 79 (1999); *see also* AMIA SRINIVASAN, THE RIGHT TO SEX: FEMINISM IN THE TWENTY-FIRST CENTURY 127-28 (2021) ("Is it too sterile, too boring to suggest that instead of sleeping with his student, this professor should have been—*teaching* her?") (emphasis in original) (discussing feminist critiques of faculty-student sex policies as anti-feminist and reinforcement of hierarchy).

6. Elliot, *supra* note 4, at 49 (arguing that consensual sexual relationship policies violate the right to privacy because such relationships are fundamental).

7. Courts refer to decisions to "enter into" intimate relationships as activity that may be protected, but the right to date does not appear to be protected. *See* U.S. Citizens Ass'n v. Sebelius, 705 F.3d 588, 598 (6th Cir. 2013). The fundamental and deeply rooted interest in intimacy with the partner of one's choice may be cast as a de minimis interest in dating a student while the student is enrolled, which is an interest that is never substantially burdened by a ban so long as graduation offers an end in sight to the ban's application.

8. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984); Kukla v. Village of Antioch, 647 F. Supp. 799, 807 (N.D. Ill. 1986) ("[T]he Supreme Court has never expressly held that sexual decisions rank among the fundamental rights."); 832 Corp. v. Gloucester Twp., 404 F. Supp. 2d 614, 626 (D.N.J. 2005) ("Having sex, without more, is not expressive conduct protected by the First Amendment."). *But see* Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."). The more faculty-student sex is communicated to other members of the campus community, however, the more interest a university has in preventing disruption and addressing community impacts.

9. *See, e.g.*, Hughes v. City of N. Olmsted, 93 F.3d 238, 241-42 (6th Cir. 1996) ("[T]he Supreme Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits a state (or state actor) from regulating the private consensual sexual behavior of adults."); Briggs v. N. Muskegon Police Dep't, 563 F. Supp. 585, 589 (W.D. Mich. 1983) ("The Supreme Court has observed that it 'has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults.'"); Doe v. Univ. of N. Ala., No. 3:17-CV-01344-CLS, 2020 WL 6081966, at *54 (N.D. Ala. Oct. 15, 2020) (rejecting student's argument that the university violated her right to equal protection when it treated her claims of sexual misconduct by a faculty member "as a 'University Policy Issue' rather than a 'Title IX issue'" because "none of these allegations constitute violations of clearly established constitutional rights.").

explored faculty-student sex as gender discrimination necessarily disrupting faculty-student roles and the pedagogical process.[10] This is the first article focusing on the ban's role in disrupting the balance of procedural participation and oversight roles in the student-university relationship as modified by Title IX.

Part I describes why Title IX has become the process to avoid and the concomitant spread of consensual sexual relationship policies. Part II examines the benefits and the costs of university reliance on the ban. Released from the incentive realignment imposed by Title IX, officials may default to the high-discretion, low-accountability procedural mechanisms that characterized the university's pre-Title IX administrative state. The university takes ownership of the student narrative, the student complainant is relieved of the right and obligation to participate in proceedings, and in a category of cases unique to faculty respondents, significant deficiencies in Title IX regulations become a non-issue.

Part III reframes the decision to opt for the ban from the key to protection and prevention to an under-scrutinized tool to undercut the formalities of Title IX. Modifying the process to create a space for student participation rights is a valuable alternative to popularizing a policy that otherwise stems from, yet sidesteps, the important lessons learned in Title IX.

I. THE HISTORY OF BANS AS AN ADDENDUM TO THE HISTORY OF TITLE IX

Institutional discretion permeates policies (or codes of conduct) in which enforcement is between the university, acting to effectuate the interests of students, faculty, and the campus community, and the accused. To investigate a violation, a university administrator must first decide what policies may have been violated.[11] These policies go into a "charge," which is provided to the person accused so that person may respond.[12] Whether it is called an initial assessment, a "lower case i" investigation, or a prima facie review, there is a step where the judgment of the reviewing official is critical to deciding the process that will apply to address the complaint.

The university, acting through its enforcement arm, which may be the director of student conduct, a committee of the faculty senate, or a human resources employee, has discretion to pursue or drop charges. Whether witnesses are called and whether the person who complained has further involvement depends on the charge, what has been specified in policies and procedures, and on the discretion of the enforcing official, but one constant if the matter proceeds is the right to

10. Amia Srinivasan, *Sex as a Pedagogical Failure*, 129 YALE L.J. 1100 (2020).

11. *See, e.g.*, *Conduct Guidelines and Grievance Procedures for Students*, MONT. STATE UNIV., 610.000 Judicial Authority and Jurisdiction G (Nov. 6. 2019), https://perma.cc/5XCR-QM2E; *Student Code of Conduct,* PENN STATE STUDENT AFFS., Section V. Resolution Process 3. Formal Student Conduct Action (Aug. 15, 2022), https://perma.cc/CJ7M-3EMA.

12. *See, e.g.*, *Conduct Guidelines and Grievance Procedures for Students*, MONT. STATE UNIV., 610.000 Judicial Authority and Jurisdiction G (Nov. 6, 2019), https://perma.cc/5XCR-QM2E; *Student Code of Conduct*, PENN STATE STUDENT AFFS., Section V. Resolution Process 3. Formal Student Conduct Action (Aug. 15, 2022), https://perma.cc/CJ7M-3EMA.

participate for the person accused.

These policies and their proceedings constitute the university administrative state. The policies announce enforceable community norms or bring the university into compliance with law.[13] They typically extend to matters arising on campus or that have an impact on the campus community.[14] Procedures detail how the policy applies, often identifying timelines and what happens at each stage of the process.[15] Generally, this process designates the university as benevolent enforcer, with its administrators serving as complainant, prosecutor and adjudicator in proceedings not subject to close judicial scrutiny because they are deemed educational[16] or because steps not delineated are checked primarily by reference to the accused's opportunity to be heard.[17]

Title IX is different. Title IX is a federal law that protects individuals from discrimination on the basis of sex by threatening educational institutions with the loss of federal funding.[18] Title IX's passage triggered national scrutiny of dis-

13. The constitutional right to due process manifests in policies as notice and the opportunity to be heard. *See, e.g.*, *Student Code of Conduct Due Process Procedure*, HENRY FORD COLL., Section I. Disciplinary Process (Nov. 2, 2018), https://perma.cc/B4WK-EVJ8. Other constraints in the university administrative state arise under constitutional law (freedom of speech, search, and seizure, along with due process and equal protection), other state and federal requirements (such as federal financial aid requirements under Title IV), and contractual obligations (such as a university handbook).

14. *See, e.g.*, *Student Code of Conduct*, UNIV. OF N. FLA., Applicability of Student Code of Conduct (Nov. 18, 2022), https://perma.cc/3SDS-RUYS (extending the code to conduct that "1. materially disrupts the University's learning environment; 2. substantially interferes with another student's ability to pursue their education in a safe environment; 3. involves substantial disorder or breaches of the peace; or 4. invades of the rights of others."); *Student Conduct Code,* UNIV. OF OR., Section III: Scope, Authority, Jurisdiction (Aug. 15, 2021), https://perma.cc/EX5T-37J6 ("The Student Conduct Code applies to all activities on University Premises and during any University Sponsored Activity regardless of location. The University may apply the Student Conduct Code to Student behavior which occurs off-campus in which the University can demonstrate a clear and distinct interest as an academic institution regardless of where the conduct occurs and a) which causes substantial disruption to the University community or any of its members, b) which involves academic work or any University records, documents, or identifications, or c) which seriously threatens the health or safety of any person.").

15. *See, e.g.*, *Community Values & Restorative Practices,* WILLIAM & MARY, Section. VI. Student Conduct Procedures, https://perma.cc/BQ59-AUJB.

16. *See* Korf v. Ball State Univ., 726 F.2d 1222, 1228 (7th Cir. 1984) (finding the committee drawn from the university senate was "well-qualified" to decide "what is and is not acceptable faculty conduct within an academic setting"); *see also* Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (describing in the "'essential freedoms' of a university" is the power "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study").

17. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

18. Alexander v. Yale Univ., 459 F. Supp. 1, 5 (D. Conn. 1977), *aff'd on other grounds*, 631 F.2d 178, 185 (2d Cir. 1980); 2020 Regulations, *supra* note 1, at 30026 ("These regulations are intended to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities."); 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex,

crimination in the university setting, particularly in admissions, athletics, hiring,[19] and, in the past 20 years, sexual misconduct. Title IX has two objectives; one is to avoid providing federal government support for discrimination, and the other is "to provide individual citizens effective protection" against discriminatory practices.[20] With accompanying federal regulations detailing mandatory training, party participation rights, and procedural requirements, Title IX processes often exist in stark contrast to other university adjudications.[21]

Title IX's reach extends to faculty-student sex if the student is subjected to different treatment based on sex or if the faculty member's conduct is sexually harassing. A faculty member who exploits a position of power to try to exchange benefits for sex with a student (quid pro quo sexual harassment), or who makes unwelcome sexual advances toward a student that are sufficiently serious and sufficiently connected to the campus environment (hostile environment sexual harassment), engages in sexual harassment.[22] Without discrimination, which can manifest as coercion or pressure, or different treatment based on sex, consensual sex falls outside the purview of Title IX.[23]

Against this backdrop, bans on faculty-student sex straddle two worlds. Bans provide an alternative process which increases the possibility of sanction, and the discretion to dismiss, without having to begin or complete the Title IX process. Bans apply to faculty-student sexual relationships where consent appears to be present.[24] Title IX applies to sexual relationships where consent appears to be absent. If a complaint does not address consent, enforcement officials can choose between Title IX and the ban.

Bans often arise in the context of political pressure for universities to respond better to sexual harassment. They are announced as part of the university commitment to prevent sexual harassment, conflating sex with sexual harassment, and conflating the passage of a relationships policy with a commitment to Title IX enforcement. Yet bans exist independent of Title IX policies. A ban violation can be charged along with a Title IX violation, in which case, Title IX procedures govern. Yet if a ban violation is charged without an accompanying Title IX violation, adjudicating officials can revert to the typical process of the university administrative state. Ban policies justify the ban by conflating sex and sexual harassment, but when it is time to respond to an allegation and decide which violation to charge, when it is a close call whether a relationship involves

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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 . . . .") (emphasis added).

19. 2020 Regulations, *supra* note 1, at 30028.

20. Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979).

21. *See infra* Parts I.A. and I.B.

22. 34 C.F.R. § 106.30 (defining "Sexual harassment").

23. This leaves open the possibility of consensual sex as discrimination, a possibility not explored in this article.

24. *See, e.g.*, Montana State Univ., *Relationships with Students Policy* (Feb. 5, 2020), https://perma.cc/WAB5-NYNB [hereinafter Montana State University Policy].

coercion or consent, the ban offers an alternative to heavy scrutiny.

Title IX's progress illustrates the need to counter the insularity of the university administrative state where sex, power, and institutional control are involved. While Title IX realigns institutional incentives from favoring the status quo to taking a harder look at allegations of sexual misconduct, ban enforcement proceedings permit a reversion to the university administrative state, which emphasizes the primacy of the university oversight and is subject to limited external accountability. While Title IX constrains an institution's discretion to dismiss and requires consultation with both parties, bans require neither.[25]

Rather than a blatant attempt to counter Title IX, the ban presents mixed uses, as it can supplement a Title IX charge or serve as an attractive option by itself where an enforcement official deems it necessary to speak on behalf of a student. I call this the institutional appropriation of the student narrative. The preferences of the student are displaced by an institutional judgment about those preferences and the appropriate means to address them. This move, difficult to resist considering the costs of Title IX, can slowly and quietly undercut the effectiveness of further reforms to Title IX.

A. Title IX becomes professionalized and scrutinized

Because of Title IX, investigations of sexual misconduct on college campuses are heavily scrutinized. Before Congress signed Title IX into law in 1972, sexual misconduct was often excused as personal or natural,[26] or exempted from interference because it arose in the context of marriage or family relationships the state had prioritized protecting.[27] Institutions of higher education were con-

25. The 2020 Regulations made dismissal mandatory in certain circumstances and required any complainant request for dismissal to be in writing. *See* 34 C.F.R. § 106.45(b)(3)(ii). The 2022 proposed amendments to those regulations would require a university to make reasonable efforts to clarify allegations with a complainant prior to dismissal. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 418390, 41575-76 (proposed July 12, 2022) [hereinafter 2022 Proposed Amendments] (to be codified at 34 C.F.R. § 106.45(d)(1)).

26. *See, e.g.*, Miller v. Bank of Am., 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979) (describing attraction as "a natural sex phenomenon" that "plays at least a subtle part in most personnel decisions," and stating that it "would seem wise for the Courts to refrain from delving into these matters") (citation omitted); Barnes v. Costle, 561 F.2d 983, 992 (D.C. Cir. 1977) (noting that the lower court's decision described a sex discrimination complaint as "a controversy underpinned by the subtleties of an inharmonious personal relationship"); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) (finding no sex discrimination under Title VII because the "conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism").

27. Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1113 n.15 (1996) ("Until recently, marital rape was an oxymoron because rape was defined as forcible sex with a person not the defendant's wife. But it has since progressed from a privilege toward a crime.") (citation omitted); Commonwealth v. Fogerty, 74 Mass. 489, 491 (1857) ("Of course, it would always be competent

sidered special and therefore exempt from generally applicable sex discrimination laws, until Title IX.[28]

For decades, sexual harassment policies existed as vague and noncommittal admonitions, or didn't exist at all.[29] Without oversight, universities could charge sexual harassment as another policy violation with leeway to decide whether and how to handle reports of sexual misconduct.

Incentive realignment. With binding regulations and the threat of litigation, Title IX has evolved to increase the cost of inaction and force campus officials to treat sexual misconduct differently and seriously. Title IX was not intended to shield universities from liability.[30] In fact, recourse through Title IX manifests in lawsuits against educational institutions[31] and in enforcement action by the Department of Education.[32] Title IX has been critical to enabling student, community, and judicial oversight of university responses to sexual misconduct.

In 1997 the Department of Education released guidance prescribing grievance procedures for schools and explaining that schools are responsible for educators who use their positions of power to exchange benefits for sex.[33] The Supreme Court weighed in, and universities learned that students may use Title IX to successfully sue for monetary damages when faculty sexually harass students.[34]

In the past ten years, the Department of Education has released Dear Col-

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for a party indicted to show, in defence [sic] of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife."); *Spousal Rape Laws: 20 Years Later*, NAT'L CTR. FOR VICTIMS OF CRIME (2004), https://perma.cc/VVJ6-DCAW (describing the last state shielding spousal rape from criminalization was North Carolina in 1993).

28. *The History, Uses, and Abuses of Title IX*, 102 BULL. AM. ASS'N UNIV. PROFESSORS 69, 70 (2016), https://perma.cc/D8M8-H9N7.

29. *See* Michelle L. Kelley & Beth Parsons, *Sexual Harassment in the 1990s: A University-Wide Survey of Female Faculty, Administrators, Staff, and Students*, 71 J. HIGHER EDUC. 548, 548 (2000) ("Much of the existing research examining sexual harassment was conducted when awareness of sexual harassment was low and policies were uncommon."); Heather M. Karjane et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond,* EDUC. DEV. CTR. 49 (2002), https://perma.cc/E84P-7RRY (noting 27 schools indicating they had no sexual assault policy).

30. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 638-39 (1999) (describing Title IX's "unmistakable focus on the benefited class" which is persons discriminated against "on the basis of sex").

31. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998); *Davis*, 526 U.S. at 644.

32. 20 U.S.C. §1682.

33. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039 (Mar. 13, 1997) [hereinafter 1997 Guidance] ("Under agency principles, if a teacher or other employee uses the authority he or she is given (e.g., to assign grades) to force a student to submit to sexual demands, the employee 'stands in the shoes' of the school and the school will be responsible for the use of its authority by the employee or agent.").

34. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992) (finding that a damages remedy is available to enforce Title IX).

league Letters and guidance documents requiring universities to pivot to implement purported improvements to prior interpretations of Title IX.[35] The 2011 Dear Colleague Letter was pressure to "take a hard stance on sexual assault on campus,"[36] the 2020 regulations have been described as restoring due process protections for the accused,[37] and the proposed 2022 regulations have been described as "restor[ing] crucial protections for students who are victims."[38] With each iteration of guidance realigning incentives to adjudicate sexual misconduct, the guidance acts as a pendulum swinging toward and away from due process.[39] The 2020 changes and 2022 proposed amendments have elements that reinforce complainant autonomy and require enforcement to be more targeted and, at times, more complicated.

Actual notice. Without notice to an appropriate university official, the university has no duty to respond to sexual harassment on campus.[40] That university officials should have known better does not matter.[41] The notice requirement is meant to "respect[] the autonomy of students at [universities] to decide whether or when to report sexual harassment."[42] In theory, the notice requirement, along with designations of university officials as responsible employees or designated reporters with reporting obligations, lets students know who they can talk to that

35. 2017 Dear Colleague Letter, *supra* note 1 ("[S]chools face a confusing and counterproductive set of regulatory mandates . . . . "); *id.* ("The 2011 and 2014 guidance documents may have been well-intentioned, but those documents have led to the deprivation of rights for many students—both accused students denied fair process and victims denied an adequate resolution of their complaints."); 2020 Regulations, *supra* note 1.

36. Rolph v. Hobart & William Smith Colls., 271 F. Supp. 3d 386, 401-02 (W.D.N.Y. 2017).

37. 2020 Regulations, *supra* note 1; U.S. Dep't of Educ., *Title IX: Fact Sheet: Final Title IX Regulations* (2020), https://perma.cc/TTE3-Y9ZW ("Bureaucracy created in our Nation's institutions of higher education have often stacked the deck against the accused, failing to offer protections such as a presumption of innocence or adequate ability to rebut allegations."); Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER ED (May 7, 2020), https://perma.cc/2E3Z-6274 (discussing "restoring balance" or "silencing survivors").

38. Press Release, U.S. Dep't of Educ., The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment (June 23, 2022), https://perma.cc/GP4Z-BCLM.

39. *See, e.g.*, Trudy Saunders Bredthauer, *Twenty-Five Years Under Title IX: Have We Made Progress?*, 31 CREIGHTON L. REV. 1107, 1128-29 (1998).

40. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (describing that liability pursuant to Title IX is triggered when the university knew about the harassment); 2020 Regulations, *supra* note 1, at 30039 ("[T]hese final regulations adopt the *Gebser/Davis* condition describing a recipient's actual knowledge as resulting from notice to an official with authority . . . .").

41. *See* Morse v. Regents of the Univ. of Colo., 154 F.3d 1124, 1127 (10th Cir. 1998) ("*Gebser* clearly rejects the theories of vicarious liability and agency liability as bases for institutional liability in Title IX teacher-student sexual harassment cases."); Adams v. Ohio Univ., 300 F. Supp. 3d 983, 995 (S.D. Ohio 2018) ("Title IX does not create a cause of action for strict liability, even for quid pro quo harassment.").

42. 2020 Regulations, *supra* note 1, at 30034. The 2022 proposed amendments extend the requirement to provide notice of allegations from complaints of sex harassment to all complaints of sex discrimination. 2022 Proposed Amendments, *supra* note 25, at 41473.

will trigger a formal process.

Consent. The predominant approach to a sexual misconduct report has shifted away from a world in which only "no" means no,[43] marriage served as a shield to claims of sexual misconduct,[44] decisionmakers focused on evidence of the victim's provocative dress and sexual history,[45] and the respondent's perspective was dispositive to resolving whether misconduct occurred.[46] Title IX says nothing of consent,[47] yet important but limited strides from the doctrine of consent in criminal and employment law have made their way into Title IX.

The 2020 regulations prohibited universities from using a complainant's prior sexual history to generally discredit the complaint.[48] Some institutions have gone further to conclude that prior consensual relationships are never an indicator of consent.[49] The affirmative consent standard adopted at some colleges shifts

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43. *See* Jake New, *The 'Yes Means Yes' World*, INSIDE HIGHER ED (Oct. 17, 2014), https://perma.cc/C8L5-YQF3 (noting that "[n]o means no" is out and "will be an outdated or irrelevant concept in 10 years"); *id.* (citing a source noting that "the traditional definition is telling them that it's O.K. to do this until the victim says 'no'").

44. Kennedy Holmes, Note, *Shining Another Light on Spousal Rape Exemptions: Spousal Sexual Violence Laws in the #MeToo Era*, 11 U.C. IRVINE L. REV. 1213 (2021) (discussing the history of the spousal rape exemption, its elimination from some states and continued existence in others); *see also* S.B. 320, 2019 Leg., Reg. Sess. (Ala. 2019) (amending ALA. CODE § 13A-6-60 by removing the "not married to the actor" exception from deviate sexual intercourse laws); State in Interest of M.T.S., 609 A.2d 1266, 1274-75 (N.J. 1992) (noting that the revised Code of Criminal Justice "eliminates the spousal exception based on implied consent. It emphasizes the assaultive character of the offense by defining sexual penetration to encompass a wide range of sexual contacts, going well beyond traditional 'carnal knowledge.'").

45. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 69 (1986) ("[A] complainant's sexually provocative speech or dress . . . is obviously relevant.").

46. U.S. DEP'T OF EDUC., OFF. FOR C.R., QUESTIONS AND ANSWERS ON THE TITLE IX REGULATIONS ON SEXUAL HARASSMENT, 15 (JULY 2021) (Updated June 28, 2022) [hereinafter 2021 Q&A] ("Some schools' definitions of consent "'require a verbal expression of consent,'" and other schools' definitions of consent "'inquire whether based on circumstances the respondent reasonably understood that consent was present (or absent).'").

47. *See* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 896 (2016) ("[T]he federal bureaucracy's agnosticism on what is nonconsent—the very concept on which the definition of sex offense relies—combined with the need to have some definition, has led schools to overshoot, and to define consent to render most sexual interactions nonconsensual."). The word consent does not appear in the text of Title IX, nor does it appear in the federal regulations translating Title IX for colleges, except as an exception to an evidentiary rule. 34 C.F.R. § 106.45(b)(6)(i) (2020); 2022 Proposed Amendments, *supra* note 25, at 41423 ("The Department's position remains, as stated in the preamble to the 2020 amendments, that 'the definition of what constitutes consent for purposes of sexual assault within a recipient's educational community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies.'").

48. 34 C.F.R. § 106.44(b)(6)(i) (2020). The 2020 regulations restrict the use of such questions and evidence on the basis of relevance. The 2022 proposed amendments clarify that the use of these questions and evidence is impermissible regardless of relevance, subject to narrow exceptions. 2022 Proposed Amendments, *supra* note 25, at 41472.

49. *See, e.g.*, CAL. EDUC. CODE § 67386(a)(1) (West 2022) ("The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them,

the focus from the perspective of the respondent to consider that of the complainant, and clarifies confusion about whether acquiescence precludes a claim of sexual harassment (it does not).[50] Now, as a matter of law and policy, a student's failure to object may mask the fact that a faculty member's sexual conduct is unwelcome, but is no bar to liability for the faculty or the university.[51]

Even though it declined to define consent, the Department of Education's Office of Civil Rights ("OCR") explained the factors to consider when purportedly consensual relationships between college students and employees are at issue:

> "[T]he nature of the conduct and the relationship of the school employee to the student, including the degree of influence (which could, at least in part, be affected by the student's age), authority, or control the employee has over the student. Whether the student was legally or practically unable to consent to the sexual conduct in question. For example, a student's age could affect his or her ability to do so. Similarly, certain types of disabilities could affect a student's ability to do so."[52]

In declining to adopt a standard making it easier to prove sexual harassment,[53] OCR explained in its 2020 regulations that unlike workplaces, which "are generally expected to be free from conduct and conversation of a sexual nature," in college, "it has become expected that . . . students enjoy personal freedom during their higher education experience, and it is not common for an institution to prohibit or discourage students from engaging in romantic interactions in the college environment."[54] In proposing to adopt a standard making it easier to prove sexual harassment, OCR explained that extending protection against

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should never by itself be assumed to be an indicator of consent.").

50. *See, e.g.*, Sexual and Gender-Based Harassment, Sexual Violence, Relationship and Interpersonal Violence and Stalking Policy, BROWN UNIV. 6-7 (n.d.), https://perma.cc/G4JM-SW5D; Sexual Violence and Sexual Harassment Interim Policy, UNIV. OF CAL. 2-3 (2021), https://perma.cc/8PUL-UR68; Definition of Affirmative Consent, Sexual Violence Prevention Workgroup, STATE UNIV. OF N.Y. (n.d.), https://perma.cc/J2WW-XKEZ.

51. *See* T.C. *ex rel* of S.C. v. Metro. Govt of Nashville, 378 F. Supp. 3d 651, 672 (M.D. Tenn. 2019) ("[A] student might face unwanted, harassing sexual overtures but ultimately consent to sexual activity out of a sense of social pressure. The student's decision to engage in the sex act itself, however, does not absolve the school of its responsibility to take appropriate steps to address the environment that allowed the unwanted advance to happen, if it has notice that a discriminatory environment had arisen.").

52. 1997 Guidance, *supra* note 33, at 912040-41. This guidance, effective since 1997, has yet to be overturned or modified.

53. Specifically, OCR declined to define sexual harassment as conduct that is either severe or pervasive. In 2013, the Department of Education proposed defining consent as "the affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during a sexual encounter," but the definition of consent did not make it into the 2014 final rule. Violence Against Women Act, 79 Fed. Reg 35417, 35423 (June 20, 2014) (to be codified at 34 C.F.R. pt. 668).

54. 2020 Regulations, *supra* note 1, at 30037.

unwelcome conduct that is either severe or pervasive "provide[s] more effective protection against sex discrimination."[55]

Evolving notice and consent standards reveal three important points about university enforcement proceedings. First, Title IX matters. Without it, university self-governance looks different. Other university policies announce a commitment to enforce community standards, but the university's discretion to fulfill that commitment rests solely with the officials tasked with policy enforcement. Second, liability for sexual harassment can distort institutional incentives. A finding that a faculty member sexually harassed may mean the university is responsible for sexual harassment. Third, Title IX erects barriers to inaction and realigns incentives using third party accountability; there are mandatory mechanisms for student observation and participation, including the opportunity to control the consequences of a disclosure, the ability to describe an interaction as consensual or not, and the right to appeal. Title IX investigators must continue to sharpen their skills at applying the affirmative consent standard,[56] signaling the significance of the student's perspective. These changes reveal Title IX as an evolving opportunity to shape process and substance in colleges' identification of and response to sexual misconduct.

B. The process required by Title IX

As a result of this pressure, here is what a Title IX process can look like, focusing on the legally required steps and their impact on the student.[57] These steps were designed to redress a lack of specificity in policies and procedures and promote an "adequate, fair, and reliable" process.[58]

Someone reports sexual misconduct involving a student complainant. The report is routed to a Title IX office, and a Title IX officer must decide whether the report on its face describes facts that could constitute sexual harassment. The student's voice must matter: the student is consulted and is offered support.[59]

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55. 2022 Proposed Amendments, *supra* note 25, at 41414; *id.* at 41569 (proposing a new 34 C.F.R. §106.2 defining hostile environment harassment).

56. 34 C.F.R. § 106.45(b)(1)(iii) (2020) (requiring that decisionmakers receive training on when complainant's prior sexual behavior may be relevant to consent). From 2011 until 2017, the Department of Education also told colleges they were required to ensure employees involved in any Title IX process be trained on consent. *See* 2014 Q&A, *supra* note 1, at 40.

57. These steps reflect the requirements of the 2020 regulations that would not be significantly changed by the 2022 proposed amendments unless otherwise indicated.

58. 2020 Regulations, *supra* note 1, at 30047; U.S. DEP'T OF EDUC., OFF. FOR C.R. REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) (stating that the process "cannot be prompt or equitable" unless students know it exists and how it works, and that the process must be "easily understood, and widely disseminated").

59. 2020 Regulations, *supra* note 1, at 30127 ("The Department believes that the final regulations benefit complainants by obligating recipients to offer complainants supportive measures regardless of whether the complainant files a formal complaint . . . .").

The student has the right to file a complaint,[60] to withdraw the complaint,[61] and to appeal the dismissal of that complaint.[62] Once there is a complaint, with few exceptions the university must investigate, regardless of whether the reviewing university official believes the complaint has merit.[63] At this point, the official must charge the respondent with a violation of its sexual misconduct policy.

Before the matter proceeds, the student and respondent learn what the process will look like,[64] including the applicable standard of review[65] and the range of potential sanctions.[66] The student and respondent get details of the allegations.[67] They are entitled to an advisor of their choice, who can discuss the allegations with them, review evidence and discuss next steps with them, and come to hearings with them.[68] The student receives supportive measures to mitigate the impacts of the incident and the process on the student's access to an education.[69] The student and respondent must be treated equitably including the right to present facts and witnesses,[70] and the university must not presume the respondent is responsible until there is a finding.[71] Credibility determinations may not

60. 34 C.F.R. § 106.30(a) (2020). The student must submit a formal written complaint, or the Title IX coordinator must sign a formal complaint, but only the person who experienced the conduct at issue can be a complainant. *Id.*

61. 34 C.F.R. § 106.45(b)(3)(ii) (2020).

62. 34 C.F.R. § 106.45(b)(8)(i) (2020).

63. 34 C.F.R. § 106.45(b)(3) (2020); *see also* 2020 Regulations, *supra* note 1, at 30126 ("We agree that defining a formal complaint and requiring a recipient to initiate a grievance process in response to a formal complaint brings clarity to the circumstances under which a recipient is required to initiate an investigation into allegations of sexual harassment."). The 2022 proposed amendments would create some flexibility in dismissal and the obligation to investigate, recognizing that "in most cases, it will not be clear whether alleged conduct could constitute sex discrimination under Title IX . . . ." 2022 Proposed Amendments, *supra* note 25, at 41475.

64. 34 C.F.R. § 106.45(b)(2)(A) (2020).

65. 34 C.F.R. § 106.45(b)(1)(vii) (2020).

66. 34 C.F.R. § 106.45(b)(1)(vi) (2020); DEP'T OF EDUC., OFF. FOR C.R., QUESTIONS AND ANSWERS ON CAMPUS SEXUAL MISCONDUCT, 6 (2017) ("In its annual security report, a postsecondary institution must list all of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking.").

67. 34 C.F.R. 106.45(b)(2)(B) (2020). The 2022 proposed amendments expand the right to notice of sexual harassment allegations to include any claim involving sex discrimination. *See* 2022 Proposed Amendments, *supra* note 25, at 41575.

68. 34 C.F.R. § 106.45(b)(2)(i)(B) (2020); 34 C.F.R. § 106.45(b)(5)(iv) (2020).

69. 34 C.F.R. § 106.30 (2020); 2020 Regulations, *supra* note 1, at 30182, 30401 (These measures vary, as the school must consider "each set of unique circumstances" to decide what is appropriate. They may include "counseling, extensions of deadlines or other course-related adjustments, modification of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures."); *see also* 2022 Proposed Amendments, *supra* note 25, at 41421-22 (retaining the definition of supportive measures from 2020 while distinguishing supportive measures from disciplinary measures and remedies).

70. 34 C.F.R. § 106.45(b)(5)(ii) (2020).

71. 34 C.F.R. § 106.45(b)(1)(iv) (2020).

turn on a person's status as complainant or respondent, or on sex stereotypes.[72]

The student has the right to review any evidence obtained, including inculpatory evidence,[73] has the right to discuss the allegations under investigation without fear of retaliation by the university,[74] and has the right to be notified when additional information is discovered that will become the subject of the investigation.[75] When the investigation is complete, the Title IX office produces a final report, and the student has the right to know when and why there is delay in the process, the outcome, and the sanction.[76] The regulations do not allow a Title IX office to, formally or informally, resolve a complaint against a respondent without letting the student know what happened.[77] Nor may a Title IX officer informally resolve the complaint without the voluntary consent of the student.[78]

If the Title IX office finds no violation of the sexual misconduct policy, the next step depends on whether the respondent has been or will be charged with violations of other policies. The Title IX official may have charged the respondent with a violation of other applicable policies along with sexual misconduct in case the respondent would admit to other violations of university rules but not sexual harassment.[79] The final report either resolves all charges or develops the facts necessary for other designated university units to make a finding. For example, after a Title IX officer has found there is insufficient evidence of sexual harassment, a Provost may find sufficient evidence of a violation of a ban on faculty-student sex, based on the same facts set forth in the Title IX office's report.

Where in any instance the university may have had the incentive to align with the respondent in finding no wrongdoing, Title IX provides the student party participation rights that serve as a check on that incentive.

In Title IX, procedural rights have been increasingly standardized: the standard of review must be published, the complainant is entitled to an advisor to help navigate the standard, and the complainant has a right to participate that is equivalent to the participation rights of the respondent.

These rights, responsibilities, and incentive realignment should not be taken

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72. 34 C.F.R. § 106.45(b)(1)(ii) (2020); 34 C.F.R. § 106.45(b)(1)(iii) (2020).

73. 34 C.F.R. § 106.45(b)(5)(vi) (2020).

74. *See* 34 C.F.R. § 106.45(b)(5)(iii) (2020).

75. 34 C.F.R. § 106.45(b)(2)(ii) (2020).

76. 34 C.F.R. § 668.46 (2020).

77. 34 C.F.R. § 106.45(b)(7) (2020).

78. 34 C.F.R. § 106.45(b)(9) (2020) (enrollment or employment or other rights cannot be conditioned on a party waiving their right to an investigation, the parties cannot be forced to participate in an informal process, and an informal resolution is not allowed if the matter involves employee sexual harassment of a student).

79. *See* Tara N. Richards et al., *An Exploration of Policies Governing Faculty-to-Student Consensual Sexual Relationships on University Campuses: Current Strategies and Future Directions*, 55 J. COLL. STUDENT DEV. 337, 340 (2014) ("A consensual sex policy may function as a prudent extension to the sexual harassment policy or as a supplement to the existing policy so there is no gap in protection.").

for granted.[80] Before 1997, institutions needed guidance as to whether Title IX applied to sexual harassment.[81] Before the 2011 Dear Colleague Letter, Title IX processes favored resolving matters quietly. The 2011 Dear Colleague Letter was hailed as clarifying expectations for colleges and protecting victims' rights while prompting a "wave of litigation" about procedural fairness and respondents' rights.[82] A half decade after the 2011 Dear Colleague Letter, critical analysis of university Title IX processes persists:

> "Some colleges and universities fail even to give students the complaint against them, or notice of the factual basis of charges, the evidence gathered, or the identities of witnesses. Some schools fail to provide hearings or to allow the accused student's lawyer to attend or speak at hearings. Some bar the accused from putting questions to the accuser or witnesses, even through intermediaries. Some schools hold hearings in which the accuser participates while remaining unseen behind a partition. Some schools deny parties the right to see the investigative report or get copies for their lawyers for preparing an appeal."[83]

C. The problems created by Title IX

The perceived justice gap between procedures mandated by Title IX and those warranted by fairness principles incentivizes the reframing of allegations where Title IX arguably, but does not necessarily, apply. There are significant reasons to want to avoid Title IX processes. Title IX prescribes an expensive[84] morass of procedural protections that require specialization to successfully navigate. A 2016 study of Title IX coordinators found that administrators deviate

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80. *See* Elizabeth Bartholet et al., *Fairness for All Students Under Title IX* 3 (Aug. 21, 2017) ("It is extremely important for colleges and universities to have robust policies and procedures to address sexual wrongdoing on campus. Schools' struggles with providing fair procedures have led some observers to throw up their hands."); Letter from John E. Palomino, Reg'l C.R. Dir., Off. for C.R., Dep't of Educ., to Dr. Ruben Armiñana, President, Sonoma State Univ., (Apr. 29, 1994) (notifying Sonoma State of the complaint filed by OCR, No. 09-93-2131, against the University, and explaining how its procedures to address sexual harassment an assault failed to meet Title IX requirements); HILLARY PETTEGREW, UNITED EDUCATORS, REVIEW OF STUDENT-PERPETRATOR SEXUAL ASSAULT CLAIMS WITH LOSSES 7 (2017) ("An institution's sexual misconduct policy did not specify which standard of proof would apply in internal disciplinary proceedings. A perpetrator sued after he was found responsible for sexual assault in a final determination that also failed to clarify the standard applied.").

81. *See* 1997 Guidance, *supra* note 33.

82. *See* Doe v. Brown Univ., 166 F. Supp. 3d 177, 181 (D.R.I. 2016).

83. Bartholet et al., *supra* note 80, at 2.

84. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30547 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) (citing a large state-coordinating body's estimate that the costs for implementing the proposed rules would be $500,000 for institutions with few cases and $1.8 million for institutions with many cases); 2020 Regulations, *supra* note 1, at 30565 (estimating the final regulations to result in a net cost of between $48.6 and $62.2 million over ten years).

from compliance with Title IX "to address the needs of survivors or alleged perpetrators, out of frustration with the inefficiencies of excessive formalism, and to address the organization's interest in resolving disputes and avoiding liability."[85] A Title IX investigation is a long, complicated, high stakes process whose outcome or publication can end a career and ruin reputations. To charge a faculty member with a Title IX violation is to invite scrutiny of an office that is an attractive target for influential political pressure.

Checking every regulatory box of Title IX's litany of mandatory procedural protections risks retraumatizing complainants. Investigators may focus on the student complainant with potentially inappropriate questions, checking motives, credibility, sexual history, and reality, in a process that is increasingly adversarial and akin to courtroom battle where consent is on trial.[86] The stigma associated with this process is not alleviated by equitable denigration, in which caricatures of the lecherous professor[87] are compared to seductive students scorned from whom unwary professors need protection. The process is painful.

Universities have "beefed up" bureaucracies to deal with Title IX risks,[88] and just as some become experts in navigating Dear Colleague Letters, regulations and litigation, the rules change. These changes at times eliminate flexibility to adapt the process to the needs of the campus community and the contextualized risk of erroneous deprivation.

The pall of liability hovers over each procedural choice. Title IX enforcement is the subject of more lawsuits than ever,[89] which have fueled the development of a new legal practice area and significant investment in legal consultants.

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85. Brian A. Pappas, *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct*, 52 TULSA L. REV. 121, 163 (2016):

> Departures from the legal archetype occur primarily to address the needs of survivors or alleged perpetrators, out of frustration with the inefficiencies of excessive formalism, and to address the organization's interest in resolving disputes and avoiding liability. Overall, the picture of university Title IX compliance is one motivated more by symbolic enforcement than true dedication to ensure . . . a hostility-free campus.

86. The regulations do have protections described by the Department of Education Office of Civil Rights as mirroring the rape shield protections of federal courts. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30103 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

87. BILLIE WRIGHT DZIECH & LINDA WEINER, THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS 86 (2d ed. 1990).

88. Anemona Hartocollis, *Colleges Spending Millions to Deal with Sexual Misconduct Complaints*, N.Y TIMES (Mar. 29, 2016), https://perma.cc/42V4-NCQH (describing staff at universities to support Title IX, including nearly 30 faculty and staff members working at Yale in support of Title IX efforts, 11 at Columbia, and 50 at Harvard).

89. Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED (Oct. 3, 2019), https://perma.cc/F69A-QW7R (describing increased demand for attorneys); *see, e.g.*, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104, 132 (D. Mass. 2021) (challenging the 2020 regulations' narrowed definition of sexual harassment, refined jurisdiction, grievance procedures, presumption of innocence, heightened notice requirements, and restrictions

Universities have won as many federal Title IX cases as they have lost.[90] Title IX investigations are a subject of public records act requests,[91] and Title IX offices are becoming professionalized, formally trained,[92] liability conscious, and ultimately responsible for more federally mandated procedures than ever. Sexual harassment on campus has been subject to extraordinary scrutiny, while campus bans have not.

II. BANS AND THEIR HIDDEN COSTS

A. Background on bans

As Title IX processes have become more complicated and constrained, universities have increasingly adopted another policy to regulate faculty-student sex: the ban on faculty-student sex. Bans are also known as consensual sexual relationship policies. This policy is simpler. It requires no procedures and is subject to no additional oversight. Importantly, it is also more stable as it is situated within the familiar, non-Title IX, university administrative state.

Faculty-student sex may not be new, but policies targeting faculty-student sex are.[93] In 1984, seven years after a federal court recognized a Title IX claim for sexual harassment in the university context,[94] the first consensual sexual relationship policy appeared.[95] In 2011, the Department of Education released a groundbreaking Dear Colleague Letter that successfully pushed campuses to overhaul their Title IX sexual misconduct investigations. Three years later, a study of 55 universities with consensual sexual relationship policies found 2% of universities adopted a ban on all faculty-student relationships.[96] Seven years later at least 14% of the universities studied had adopted a ban on faculty-student relationships.[97]

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on statements not subject to cross-examination).

90. Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. OF LEGIS. & PUB. POL'Y 49, 104 (2019).

91. *See id.* at 95 n.313.

92. Campus officials participating in a Title IX process must be trained on definitions and processes, on bias and conflicts, and must not rely on sex stereotypes. *See* 34 C.F.R. § 106.45(b)(1)(iii) (2020).

93. Srinivasan, *supra* note 5, at 126-27 (describing the growth of consensual sexual relationship policies since the 1980s).

94. Alexander v. Yale, 459 F. Supp. 1, 4 (D. Conn. 1977).

95. Courtney A. Crittenden et al., *Exploring Faculty and Students' Attitudes About Consensual Sexual Relationships and Sexual Harassment on College Campuses*, 35 EDUC. POL'Y 41, 46 (2018).

96. Richards et al., *supra* note 79, at 343. The policies that ban faculty-student sex often restrict all faculty-student intimate relationships. For simplicity, I refer to the policies as a ban on faculty-student sex.

97. *See* Richards et al., *supra* note 79, at 343. By 2021, the following universities had adopted a ban: Cornell, Dartmouth, Montana State University, Princeton, Rutgers (with exceptions), Northern Michigan University, UT Austin (with exceptions), and Stanford (went

For example, Princeton went from prohibiting faculty sex with undergraduates to banning all sexual and romantic relationships between faculty and students in 2019, Rutgers discouraged faculty-student sex in 2010 and banned faculty sex with undergraduate students in 2020, Michigan State University used a conflict of interest approach in 2004 and adopted a ban in 2019, and the University of Texas at Austin went from discouraging sex to banning sex with undergraduates in 2017.

The recent popularity of campus bans on faculty-student sex should be no surprise[98] given the cost to universities when faculty-student sex becomes sexual

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from strongly discouraging in 2002 to prohibiting in 2017). *See* CORNELL UNIV. POL'Y OFF., POLICY 6.3: CONSENSUAL RELATIONSHIPS (2022), https://perma.cc/937L-ULEZ [hereinafter Cornell University Policy] ("Cornell demands ethical behavior" and that every person should be free to learn without "coercion." Faculty-student intimate relationships can compromise professional judgment, "undermine collegial dynamics . . . because of rumored or actual favoritism," tarnish reputation, and "can lead to . . . legal claims."); Montana State University Policy, *supra* note 24, at 1 (expressing concern about ethics and that the "relationship may exist only as a result of the power differential" or decisions are "influenced by the power differential;" also noting the "negative impacts" on "students and colleagues," and "potential institutional liability"); PRINCETON UNIV., CHAPTER V.C. CONSENSUAL RELATIONS WITH STUDENTS (2019), https://perma.cc/Y2KS-A7YU ("Faculty members shall not initiate or engage in romantic or sexual behavior with undergraduate or graduate students."); RUTGERS UNIV., SECTION 60.1.32 POLICY ON CONSENSUAL RELATIONSHIPS IN ACADEMIC SETTINGS (2020), https://perma.cc/85SB-HCZ4 [hereinafter Rutgers University Policy] ("[T]his Policy prohibits the following: Consensual relationships in which one party is [any faculty member employed by the University on a full-time or part-time basis] and the other party is an undergraduate student."); Northern Michigan University, *Consensual Relationship Policy* (2021), https://perma.cc/LL5J-TCQW [hereinafter Northern Michigan University Policy] (prohibiting those "in a position of power or authority" from entering a consensual relationship "with a student or subordinate"); UNIV. OF TEX. AT AUSTIN, HANDBOOK OF OPERATING PROCEDURES 3-3050 (2017), https://perma.cc/9CXQ-9Z4H [hereinafter UT Austin Policy] ("[T]he University prohibits any employee (including faculty) or affiliate of the University from engaging in a consensual relationship with any student currently enrolled as an undergraduate at the University" and "any employee (including faculty) or affiliate of the University from engaging in a consensual relationship with any graduate student whom they teach, manage, supervise, advise, or evaluate in any way."); STANFORD UNIV., ADMINISTRATIVE GUIDE 1.7.2 CONSENSUAL SEXUAL OR ROMANTIC RELATIONSHIPS IN THE WORKPLACE AND EDUCATIONAL SETTING (2017), https://perma.cc/J6PQ-JM89 ("[B]ecause of the relative youth of undergraduates and their particular vulnerability in such relationships, sexual or romantic relationships between teachers and undergraduate students are prohibited—regardless of current or future academic or supervisory responsibilities for that student."). From 2015 to 2019, Dartmouth banned faculty-undergraduate sexual relationships. *See* DARTMOUTH COLL., CONSENSUAL RELATIONSHIPS POLICY (2015), https://perma.cc/U5CK-X3UM [hereinafter Dartmouth's Prior Policy] ("[B]ecause of the heightened risk of a real or perceived power imbalance where undergraduate students are involved, no Instructor shall have a romantic or sexual relationship with a Dartmouth undergraduate, regardless of whether the Instructor has or is likely to have academic responsibility over the student."). Dartmouth no longer bans consensual faculty graduate student sexual relationships. DARTMOUTH COLL., POLICY ON SEXUAL AND GENDER BASED MISCONDUCT (2020), https://perma.cc/2HN7-XV48 ("[C]onsensual relationships between Faculty, Staff and Employees who occupy inherently unequal positions of authority are not prohibited outright as a presumed abuse of power.").

98. Srinivasan, *supra* note 10, at 1103 ("Given the decades of resistance that [Yale's Deputy Provost]'s campaign faced, it is interesting that, when the policy did finally change, it

harassment and must be assessed under Title IX. The attractiveness of the ban explains why, rather than a nefarious strategy to avoid liability and silence students, the ban produces these consequences incidental to institutional relief from the pressure of Title IX compliance.

B. The attractiveness of the ban

What's wrong with student-faculty sex? Typically, in an "Overview" or "Reason for Policy" (hereinafter, Reasons for Policy), policies prohibiting faculty-student sex include an explanation for their existence.[99] For some, a faculty member who dates a student is, by default, a faculty member who sexually harasses. Using this lens, the status of the parties as faculty and student is dispositive. Proponents of this view need not go so far as to portray the professor as predator; they need only call consent into question, such that actions indicating assent mask the inability to convey that the interaction is unwelcome, and even an apparently voluntary sexual relationship qualifies as sexual harassment. The argument, bolstered when accompanied by the language of Title IX, has begun to prevail on college campuses, subject to exceptions for preexisting relationships.

The emphasis in the justification for the ban can modify the defense of the process. For example, an emphasis on pedagogy prioritizes community rights and reduces the importance of individual rights. Student and faculty preferences matter less than preserving an environment conducive to learning. An emphasis on quid pro quo harassment prioritizes the needs of the student. Drawing from universities' Reasons for Policy, the core concerns driving regulation of faculty-student sex can be understood broadly as (1) power and consent, which resembles the coercion and unwanted sexual advances elements of Title IX policies, (2) disruption to the campus community, which resembles the hostile environment harassment of Title IX policies, and (3) dignitary harm to the institution. Each of these concerns has been used to reinforce the ban's importance as an expedient mechanism to protect the interests of the university.

The first concern is rooted in abuse of power and preventing harm to the student. In the Reasons for Policy, the emphasis is on coercion and the university's need to preserve the student's right to learn.[100] Of paramount concern is

prompted little outcry and, indeed, much apparent approval from other universities.") (discussing Yale's shift in 2010 from a conflict of interest based policy to an outright ban on intimate relationships between faculty and undergraduate students).

99. *See, e.g.*, Cornell University Policy, *supra* note 97.

100. *See, e.g.*, *id.* ("The university strives to protect the integrity of the university experience of students and postgraduates, with the freedom to pursue academic, training, research, and professional interests in an environment without preferential or unfair treatment, discrimination, harassment, bias, or coercion."); Michigan State University, Consensual Amorous or Sexual Relationships with Students, Faculty Handbook (2019), https://perma.cc/543C-QHVZ ("[T]he student's most essential right is the right to learn."); Rutgers University Policy, *supra* note 97 (noting that these relationships "risk undermining the essential educational purpose of the University").

the unresolved question of consent: whether it matters, and whether it can exist given the inequality of the parties.[101] The university declares faculty sexual advances as unwelcome by students, and students' interest in faculty members as non-sexual. What the student wants from the faculty member is not sex, and but-for the faculty member's decision to allow academic power to overtake the sexual agency of the student, there would be no sexual relationship between faculty and student. The student has experienced a loss of agency, and the university positions itself as rectifying that loss when it prevents the "appropriate, scholarly-focused" faculty-student relationship from becoming a sexual one.[102] This harm prevention role justifies the university's appropriation of the student's narrative to hold faculty accountable for the common good.

The second concern highlights the disruption faculty-student sex has on the campus community. Faculty-student sex is not academic,[103] and the shift in energy from pedagogy to sex has a negative impact on other students, faculty, and community morale. It may give rise to conflicts of interests[104] fueling actual or perceived bias and exploitation.[105] Students do not want to see their colleagues dating their professors, and if they do, it may be difficult or impossible to rebut the presumption that the dating distorts incentives and provides selected students with unfair advantages.[106] Whether there is consent or not, someone must protect the perceived legitimacy of faculty authority. The risk of disruption becomes justification for deference to the university's choice of intervention.

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101. DZIECH & WEINER, *supra* note 87, at xviii ("Physical intimacy with students is not now and never has been acceptable behavior for academicians . . . Where power differentials exist, there can be no 'mutual consent.'"); Richards et al., *supra* note 79, at 338 ("The point of contention between [bans and prohibitions only where faculty members hold academic responsibility], is whether a sexual relationship between faculty and students can ever be consensual (i.e., voluntary) due to the inherent power differentials"); AAUP, *Consensual Relations Between Faculty and Students*, 81 ACADEME 64 (1995) ("The respect and trust accorded a professor by a student, as well as the power exercised by the professor in an academic or evaluative role, make voluntary consent by the student suspect."); Naca v. Macalester Coll., No. 16-CV-3263 (PJS/BRT), 2017 WL 4122601, at *4 (D. Minn. Sept. 18, 2017) ("Sexual contact between a professor and a student is widely prohibited because of disparities in their relationship. There is always a disparity in power and authority . . . ."); Dornbusch v. State, 156 S.W.3d 859, 867 (Tex. App. 2005) (finding employee's status as educator as an indication that the employee had power and the student would be less likely to have freedom to refuse).

102. *See* Montana State University Policy, *supra* note 24, at 1.

103. *See, e.g.*, U.S. DEP'T OF EDUC. OFFICE FOR C.R., SEXUAL HARASSMENT: IT'S NOT ACADEMIC (2008), https://perma.cc/LU3E-Q3UB (explaining that sexual conduct directed by an educator toward a student detracts from a healthy learning environment).

104. AAUP, *supra* note 101, at 64 ("In their relationships with students, members of the faculty are expected to be aware of their professional responsibilities and avoid apparent or actual conflict of interest, favoritism, or bias.").

105. *See, e.g.*, Rutgers University Policy, *supra* note 97.

106. *See* Richard R. Carlson, *Romantic Relationships Between Professors and Their Students: Morality, Ethics and Law*, 42 S. TEX. L. REV. 493, 497 (2001) ("No assurance and no safeguard will ever completely allay the fear of many students that the system tilts against them, especially when a professor's conduct displays an undeniable bias for one student over all others.").

The third concern addresses a dignitary harm to the institution, as a collection of academic professionals, when a scholar's personal conduct becomes a professional liability. As Professor Amia Srinivasan put it, faculty-student sex is both a pedagogical failure, in that the faculty does not fulfill a responsibility to educate, and a patriarchal failure, in that the relationship reinforces gender discrimination by diminishing women's status as students.[107] The university claims the authority to make this decision about faculty-student sex on behalf of the student because the university's interest in preventing faculty-student sex is an interest in preserving the integrity of the educational mission.[108]

The ban offers the benefits of a bright-line rule that allows universities to skip the fraught process of evaluating intent in an intimate relationship. The ban appears clearer and more expedient than alternatives such as regulations prohibiting moral turpitude, or those that are not violated until the conduct is sufficiently severe, pervasive, and objectively offensive.[109] With the ban, no longer can faculty raise a defense of welcomeness to shift an inquiry onto a platform to scrutinize the actions of the student. Claiming consent becomes an admission of wrongdoing. The student avoids trauma, the faculty member avoids the harassment stigma, and if the ban works in their favor, it is an attractive alternative to the cost of a sexual harassment investigation.

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107. Srinivasan, *supra* note 10, at 1104; *see* Neal Hutchens, *The Legal Effect of College and University Policies Prohibiting Romantic Relationships Between Students and Professors*, 32 J.L. & EDUC. 411, 412-13 (2003) (exploring university motivations for enacting consensual relationship policies, including protecting the educational mission, addressing power disparity, harm to third parties and liability concerns); *see also* Seligman et al., *General Report of the Committee On Academic Freedom and Academic Tenure*, BULL. OF THE AM. ASSOC. OF UNIV. PROFESSORS 15, 25-26 (1915) ("To the degree that professional scholars, in the formation and promulgation of their opinions, are, or by the character of their tenure appear to be, subject to any motive other than their own scientific conscience and a desire for the respect of their fellow-experts, to that degree the university teaching profession is corrupted."); Galia Schneebaum, *What is Wrong with Sex in Authority Relations? A Study in Law and Social Theory*, 105 J. CRIM. L. & CRIMINOLOGY 345 (2016) (describing policies regulating relationships in which one party may be dependent upon another as anticorruption regulations).

108. Korf v. Ball State Univ., 726 F.2d 1222, 1227 (1984) (citing the AAUP Statement on Professional Ethics); Wilkerson v. Univ. of N. Texas By and Through Bd. of Regents, 878 F.3d 147, 153 (5th Cir. 2017) (finding that a professor's "amorous overtures" to incoming graduate student reflected "poor professional judgment" because it "placed the [U]niversity in a compromising situation").

109. *Compare* Comm. on Legal Ethics of the W. Va. Bar v. Six, 181 W. Va. 52, 54 (1989) (stating "'moral turpitude' is an elusive concept incapable of precise definition" and "'[m]oral turpitude' has also been defined as any conduct that is 'contrary to justice, honesty and good morals'"), *with Important Concepts & Definitions*, RUTGERS UNIV.: DIV. OF STUDENT AFFS., https://perma.cc/QRP6-2HDH (defining "covered sexual harassment" as "[u]nwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity"); Rutgers University Policy, *supra* note 97 ("[T]his Policy prohibits the following: Consensual relationships in which one party is [any faculty member employed by the University on a full-time or part-time basis] and the other party is an undergraduate student."). The 2022 proposed amendments would change the requirement to severe or pervasive. 2022 Proposed Amendments, *supra* note 25, at 41569 (defining "Hostile environment harassment").

Where the complaint is a report that a faculty member has had sex with a student, allowing discretion in the decision to charge Title IX or the ban, the ban's apparent procedural flexibility and substantive inflexibility creates a strong incentive to opt for the ban. For example, when it comes to sexual harassment, consent matters, and university administrators may struggle to find it in student to student sexual harassment matters.[110] It may need to be affirmative, voluntary, and revocable, but it matters. When it comes to faculty-student sex, consent does not matter. Yes may not mean yes, and even if it does, it can harm third parties by changing the dynamics of student-faculty relationships by inappropriately adding sex to the menu of options to strengthen connections between students and faculty.

Whether the adoption of the ban better reflects an effort to comply with recommended steps to minimize the potential for sexual harassment or represents symbolic structures[111] erected by the university in favoring form over function to prevent legal liability[112] need not matter. Enforcement of the ban can produce results considered "right" (sanction of a professor who subtly coerced a relationship with a student) without the pitfalls of Title IX, while also developing a record that the university took appropriate steps to prevent sexual misconduct.

Here are two examples of how a university can enforce the ban upon receipt of a report from a campus community member that a faculty member and student have a sexual relationship:

Option 1. Begin with mandatory steps from Title IX, but add that the faculty member is charged with a violation of the ban. When the investigation concludes, the faculty member may be sanctioned for the violation of two university policies, the Title IX policy and the ban, or, if the conduct falls short of the robust jurisdictional standards or rules that limit Title IX to conduct that is sufficiently severe, pervasive, and objectively offensive, the university may still sanction the faculty member under the ban. If the faculty member's defense to the Title IX charge is that the sex with the student was consensual, the faculty member has admitted to a violation of the ban.

Option 2. The official reviewing the complaint may not be trained on issues of consent and welcomeness.[113] Instead of pursuing a Title IX process, a ban

110. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (noting that "the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact").

111. LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 219 (2016).

112. Some have argued litigation has become of primary concern. *See, e.g.*, Elliot, *supra* note 4, at 47 ("[P]rotected liberties and rights became secondary to insulating educational institutions from damage suits in their pursuit of a selective social and political agenda."); Richards et al., *supra* note 79, at 345 (finding 21 of the 55 university policies studied mentioned the risk of liability for either the faculty member or the university); Montana State University Policy, *supra* note 24, at 1 ("Any relationship involving a power differential . . . may lead to . . . potential institutional liability.").

113. *See, e.g.*, Doe v. Univ. of N. Ala., 3:17-CV-01344-CLS, 2020 WL 6081966, at *15, 50 (N.D. Ala. Oct. 15, 2020) (describing complaint that Title IX deputy was unsure whether

enforcement official can process the complaint as a reported violation of the ban. Bans do not require enforcement by officials trained on consent or Title IX.[114] Upon receipt of evidence of nonconsensual sex, the administrator must route the matter to the Title IX office. Until that point, however, the student need not be consulted. The student does not know whether the matter is reported and is not informed of what will happen next. Even as the faculty member is interviewed and has the right to provide evidence, the student need not be interviewed at all. If the student is involved and talks to someone about what happened, the student may not (contrary to a Title IX process) be informed whether that person is a mandatory reporter or a confidential resource. The student does not have the right to an advisor.

The university does not have to provide supportive measures and does not have to document why they were not provided. The university can dismiss the matter without clarifying the allegations with the student. The student may not be informed when the review is finished or what happened as a result of the review and does not have the right to appeal. Even if there is no mechanism to object to the proceeding, if the student fails to object, it is unclear whether the student will be barred from bringing a sexual harassment complaint about the same conduct later, or whether the university can use the proceeding to defend against a subsequent claim by the student.

Either process may result from a ban that exists independent of the Title IX policy. Absent the codification of student participation rights, the extent to which a student who wishes to participate gets to participate is entirely dependent on those tasked with selection of the charge(s) and enforcement of the ban.

How is this possible? While Title IX creates both the authority and the obligation for universities to respond to sexual harassment, it also allows the process to revert to the university administrative state to address conduct of a sexual nature that does not rise to the level of sexual harassment. Title IX is mandatory when sexual harassment is at issue and adjudication of the matter is not outside the scope of Title IX's jurisdictional requirements. Otherwise, Title IX leaves administrators the flexibility to resolve complaints about conduct that implicates but does not violate sexual harassment prohibitions.[115] Title IX is not optional,

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the report violated Title IX or the university policy restricting faculty-student sexual relationships, and the university allowed the Chair of the Managing and Marketing Department to conduct her interview, even though the Chair did not have Title IX training).

114. The 2022 proposed amendments would require all university employees to be trained on the scope of Title IX's coverage (proposed 34 C.F.R. § 106.8(d)(1)). 2022 Proposed Amendments, *supra* note 25, at 41570.

115. The preamble to the 2022 proposed amendments acknowledges the impact that mandatory dismissal, or the absence of alternatives, may have on the university's decision. 2022 Proposed Amendments, *supra* note 25, at 41478:

> Prohibiting a recipient from continuing its grievance procedures, as the mandatory dismissal provision of the current 2020 amendments does, may require a recipient to make a hasty judgment call at the outset of the complaint about whether the allegations, if proven, would constitute sex discrimination under Title IX. However, in

but when its mandates do not apply, Title IX is not meant to constrain other university responses. Title IX regulations were not intended to forbid the investigation of conduct that falls short of sexual harassment, and they allow universities to apply other codes of conduct where, for example, the complaint does not describe conduct that could be sufficiently severe to count as sexual harassment. Other options exist where Title IX falls short; the complication arises where Title IX triggers depend on the framing chosen by enforcement officials, on officials not burying their heads in the sand,[116] and on the narratives of students who need not be invited to participate in ban enforcement.

The flexibility to use different processes where Title IX mandates do not clearly apply is a good thing. It allows for state experimentation with different approaches to sexual misconduct prevention where the conduct falls short of the parameters of Title IX. There is a point, however, at which someone must decide whether the requirements of Title IX apply. The training, capacity, and incentives of the decisionmaker will enable them to promote or undercut the principles of Title IX.

C. Noninterference with marriage

The ban's flexibility permits reversion to archaic procedural and substantive standards that Title IX abandoned. Some universities exempt marriage and preexisting relationships from the ban.[117] The reasons for this are rooted in archaic assumptions about consent within marriage,[118] whose endorsement in the

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> the early stages of the complaint process, gathering more information may help to confirm whether the allegations, if true, would amount to sex discrimination.

116. 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, 205 (2011).

117. *See, e.g.*, *Improper Relationships Between Students and Employees*, APPALACHIAN STATE UNIV.: POL'Y MANUAL (Dec. 19, 2014), https://perma.cc/ER6N-URGA (explaining that amorous relationships as prohibited by Appalachian State University are those "without the benefit of marriage"); *see also* Dartmouth's Prior Policy, *supra* note 97 (exceptions may be allowed for student taking a course taught by a spouse or partner); *see also* UT Austin Policy, *supra* note 97 ("This policy is not intended to apply to marriage relationships."); *ACD* 402: *Romantic or Sexual Relationships Between Faculty Members and Students*, ARIZ. STATE UNIV. (Apr. 13, 2017), https://perma.cc/LS4S-BEXX ("This policy does not apply to a romantic or sexual relationship between a faculty member or academic professional and a student who are spouses or domestic partners.").

118. Until the 1970's, states commonly exempted marriage from the criminalization of sexual violence. Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1262 (2009) ("[T]he legal understanding of marriage as a status relationship to which the parties had freely consented, and from which they could not retract their consent, precluded criminalizing unwanted marital sex as rape."); *see also* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genius of Illicit Sex*, 115 YALE L.J. 756, 776-77 (2006) ("State fornication laws, for example, criminalized sex outside of marriage. Marriage rendered the very same sexual acts licit."); Judith A. Lincoln, *Abolishing the Marital Rape Exemption: The First Step in Protecting Married Women from*

law served as de jure assurance of power disparities in the marital relationship.[119] They rested in part on the belief that consent to intimate activity in one context necessarily results in consent to intimate activity in other contexts, that harm cannot occur within existing relationships, and that such harm is not a matter for external review.[120]

Marriage and preexisting relationships are not exempt from having a beginning or end and can be just as disruptive to other members of the community. The potentials for coercion, favoritism, and inherent power differential exist notwithstanding marriage or a preexisting relationship. The same justifications for the existence of a ban on faculty-student sex extend to those in a marital or preexisting relationship. Title IX has no exception for marriage. Bans, however, are at times explicit in exempting preexisting relationships from scrutiny regardless of whether the bans' stated purpose is addressing coercion, disruption, or liability.

D. Hidden costs of the ban

A complaint about faculty-student sex is a complaint that implicates Title IX along with its mandatory resolution of consent, the ban along with its assumption the interaction at issue is consensual, or both. By avoiding the need to adjudicate consent, with all the factors that may vary such as power, agency, and welcomeness, affirmative consent and the potential for its withdrawal, and the relationship dynamics that impact how a person communicates desire or the lack thereof, the ban sidesteps the need for student participation rights required by Title IX. These rights, notable for their absence from Option 2 described above, include access rights, or the right to know the status and outcome of the investigation, and symbolic rights, or the right to take space and express preferences even if those preferences do not control the administrative outcome.

By charging just the ban, the enforcing official shifts review of the conduct from a process with carefully delineated and mandatory student participation rights to a discretion maximizing one in which the student role is not yet codified

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Spousal Rape, 35 WAYNE L. REV. 1219, 1220-21 (1989) (describing three common law presumptions: 1) a woman gave up her right to refuse sex with her husband upon marriage, 2) upon marriage a woman merged with her husband, and 3) a woman became the chattel of her husband).

119. Murray, *supra* note 118, at 1262 ("By characterizing domestic violence and marital rape as private family matters, [feminist legal scholars] argued, the law allowed the family to shelter gender subordination and violence; and in so doing, impeded women's ability to function as equal citizens in and outside of the home.").

120. *But see, e.g.*, People v. Liberta, 64 N.Y.2d 152, 163 (Ct. App. N.Y. 1984) (finding "no rational basis for distinguishing between marital rape and nonmarital rape. The various rationales which have been asserted in defense of the exemption are either based upon archaic notions about the consent and property rights incident to marriage or are simply unable to withstand even the slightest scrutiny."); Pappas, *supra* note 85, at 125 ("The problem [of sexual misconduct] especially occurs within relationships (romantic as well as hierarchical), making it more difficult for survivors to come forward."); 2014 Q&A, *supra* note 1, at 31 ("[T]he mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence.").

in university policy and is left to the goodwill and discernment of the enforcing official.

The loss of procedural entitlements. The ban requires the university's narrative about what happened to the student to prevail.[121] Yet the similarities between abuse of power or unfair advantage and the use of power and unfair advantage that are endemic to the university environment,[122] indicates campus administrators may have difficulty distinguishing them, particularly in relationships that have elements of both, particularly where third-party complaints drive enforcement.[123] Third parties who complain may be swayed by identity or politics or both, popular notions of morality or propriety, or other factors, and the university risks equipping third party discrimination with the imprimatur of the university.[124] The alternative to reliance on third party reporting, a proactive and comprehensive effort to identify all faculty-student sexual relationships, has not manifested in the policies or processes of any of the 55 universities studied.

The Title IX process requires space for student involvement. This space concomitantly enables student oversight to serve as a check on the university's appropriation of the student's narrative. The opportunities for non-university oversight have evolved over time in Title IX. This evolution has not yet occurred in the university administrative state.

In complaints involving faculty-student sex, Title IX has evolved to provide students procedural entitlements that include the right to observe, the right to be heard, and the right to require more process.[125] While Title IX requires a formal process for every complaint to ensure results are consistent, transparent, and fair,[126] the ban allows the flexibility to resolve reports formally or informally,

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121. The primacy of the university's narrative echoes what has long been wrong with the displacement of the narratives of victims of sexual harassment. *See* Catharine A. MacKinnon, *Introduction, Symposium: Sexual Harassment*, 10 CAP. U. L. REV. I, viii (1981) ("The law against sexual harassment often seems to turn women's demand to control our own sexuality into a request for paternal protection, leaving the impression that it is more traditional morality and less women's power that is vindicated.").

122. Other relationships have the potential for or appearance of favoritism, such as faculty participation in student clubs, minority or women faculty actively advising minority or women campus organizations. Elliot, *supra* note 4, at 52 ("Favoritism and 'apparent favoritism' run deep throughout the academy.") (citing Professor Randall Kennedy's critique of a professor's practice of inviting Black students to his home for holiday dessert.).

123. *See, e.g.*, Naragon v. Wharton, 572 F. Supp. 1117, 1124 (M.D. La. 1983) (Naragon was denied teaching responsibilities "not . . . because she was a homosexual, but because she was acting in a manner considered by the University to be unprofessional, and in a manner in which the appointing authorities concluded was likely to be detrimental to the best interest of the University.") (rejecting a discrimination claim where a student's parents complained of student-faculty sexual relationship and said they believed a lesbian relationship was contrary to the tenets of their religion).

124. *See, e.g.*, *id.* at 1408 (Goldberg, J. dissenting) ("The University's consideration of pressure from Mr. and Mrs. Doe unavoidably infects the school's action with the biases of the parents.").

125. The student can require more process by filing a formal complaint, rejecting an informal resolution, or submitting an appeal.

126. 2020 Regulations, *supra* note 1, at 30214:

based on unspecified factors. While a student-complainant's prior consensual encounters with a professor are of limited probative value in the Title IX world, the ban provides a catch-all, allowing the university to find sanctionable conduct based on a consensual encounter without having to evaluate each interaction. While Title IX has shifted to a responsible employee approach so that university students have some control over whether to speak to a school official who will initiate a complaint, many bans do not identify the university employees, if any, who will support the student, confidentially or not.[127] If a third party complaint fails to include the magic words to trigger a Title IX inquiry, such as sexual harassment, unwelcome, or nonconsensual, the university is not required to consult with the person most likely to supply them, the student in the relationship.

Moreover, while a student's "subjective statement" that the conduct was unwelcome "suffices to meet the 'unwelcome' element" under Title IX regulations, making the student's perspective critical to the resolution of many Title IX complaints, bans revert to an administrative state that allows universities to proceed without interviewing the student at all.[128]

Whereas in Title IX, stakeholders have battled over the appropriate standard of review, the ban often specifies no standard. Whereas in Title IX, parties have challenged the scope of limits on the role of the advisor, with the ban there is no guarantee of the right to an advisor.[129] Whereas with Title IX the student complainant has rights, including the right to participate, the right to receive and review evidence, and the right to learn the outcome, with the ban, the complainant has none.[130] These rights serve both an actual function in ensuring accuracy in the selection of the charge and in fact-finding, and a symbolic function in allowing the narrative of the student experience to come from the student. These are

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> The purpose of the § 106.45 grievance process is to resolve allegations of sexual harassment impartially, without conflicts of interest or bias, and to objectively examine relevant evidence before reaching a determination regarding responsibility. Permitting a recipient to deem allegations meritless or frivolous without following the § 106.45 grievance process would defeat the Department's purpose in providing both parties with a consistent, transparent, fair process, would not increase the reliability of outcomes, and would increase the risk that victims of sexual harassment will not be provided remedies.

The 2022 proposed amendments eliminate the need for a formal complaint yet continue to constrain the grounds for dismissal. *See* 2022 Proposed Amendments, *supra* note 25, at 41427.

127. Richards et al., *supra* note 79, at 348. Michigan State University Policy, *supra* note 100; *but see* Montana State University Policy, *supra* note 24, at 5 ("Any faculty member, staff member, or other individual who reasonably believes or has received a credible report that there has been a violation of this policy shall report the concern to the Director of the Office of Institutional Equity."); UT Austin Policy, *supra* note 97, at 5 ("An employee (including faculty) or affiliate who is notified, or becomes aware of, an alleged violation of this policy has an obligation to report it timely.").

128. 2020 Regulations, *supra* note 1, at 30148.

129. *Supra* notes 65 and 68.

130. *Supra* notes 69 and 73.

the result of party participation rights developed in Title IX and absent from the ban.

When Harvard professors signed an open letter describing Title IX's procedural deficiencies, they described rules that allowed administrators to penalize conduct that is not sexual harassment, whether welcome or not, whether it creates a hostile environment or not, regardless of what the complainant said, and regardless of what the accused perceived.[131] With each effort to transform Title IX, including the 2011 Dear Colleague letter,[132] the 2020 federal regulations,[133] and 2022 proposed amendments to the regulations,[134] proceedings evolved to incorporate more steps to protect the rights of the parties. Ban enforcement proceedings have undergone no such transformations.

As a result, the gain in the institution's substantive reach, turning on the choice to call conduct sexual harassment or a sex ban violation, triggers drastically different processes for the student. Before 2011, student complainants in Title IX matters might not have learned of evidence relevant to the outcome of the proceeding. They might not have learned the standard of review. With the flexibility permitted before the 2020 regulations, a Title IX administrator might be ill-equipped yet charged with serving as investigator, adjudicator, and decider of sanctions.[135] While OCR proposed amendments in 2022 that would eliminate the prohibition on the single investigator model,[136] the tentative nature of changes appear to have no end, resulting in the need to continue investing in efforts to update Title IX policies to comply with the latest rules.

Training and consent requirements highlight the difference in process. With Title IX, the university at least purports to train professors to not sexually harass. With Title IX, the university's decision to dismiss a matter may turn on the student's statement that an encounter was welcome. With the ban, which is ostensibly concerned with coercion, faculty are not trained to look for welcomeness in an apparently consensual relationship, or how to ensure any intimate relationship

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131. Bartholet et al., *supra* note 80, at 2:

> Definitions of sexual wrongdoing on college campuses are now seriously overbroad. They go way beyond accepted legal definitions of rape, sexual assault, and sexual harassment. They often include sexual conduct that is merely unwelcome, even if it does not create a hostile environment, even if the person accused had no way of knowing it was unwanted, and even if the accuser's sense that it was unwelcome arose after the encounter.

132. 2011 Dear Colleague Letter, *supra* note 1.

133. 2020 Regulations, *supra* note 1.

134. 2022 Proposed Amendments, *supra* note 25.

135. Harris & Johnson, *supra* note 90, at 53 ("Most campus systems lack independent adjudicators, minimize the accused student's right to cross-examination and legal representation, rely on evidence that the parties disclose voluntarily, and do not require schools to turn over exculpatory evidence.").

136. 2022 Proposed Amendments, *supra* note 25, at 41467.

does not create a hostile environment for other members of the campus community.[137] Rather than "how to do it," the ban's approach is "don't do it" and "don't ask, don't tell."[138] The propensity for rights-avoidance offers expediency but enables harm to the student who experienced sexual harassment by the ban enforcement official who neglects to consult with the student.[139] It also reinforces harm to the autonomy of the student seeking privacy in intimate conduct whose statement of consent is transformed by the university into a complaint about coercion.

With the ban, freedom of choice matters less than preventing perceived abuse, and getting it right matters less than not having to get it at all.

Institutional appropriation of the student narrative. The ban sends a signal about students' actual and institutionally-enforced limited role in the process. The ban's breadth conveys that students' vulnerability, and concomitant need for university oversight in place of their own, extends outside the classroom, off campus grounds, and follows students wherever they may be, 24 hours a day. While the university's failure to intervene may perpetuate the power imbalance to be addressed, intervention on behalf of and in place of the student may do the same, substituting a faculty member's exploitation of a student's vulnerability with that of the university.

In *Uyar v. Seli*,[140] a Yale post-doctoral fellow dated a professor for two years and identified the relationship as consensual the entire time. After the breakup, after consultation with an attorney and friends, and after reconsideration of cultural differences that initially led the fellow to assume that the term "non-consensual" required rape or physical force, the fellow asserted "in retrospect" that the relationship was not consensual. After Yale found the professor responsible for violating its policy on faculty-student sex and recommended the professor be suspended for one year, trained, and limited in his interaction with students, the fellow sued to hold Yale vicariously liable for sexual harassment. In defense, to support its claim the relationship was consensual and therefore not sexual harassment, Yale cited the fellow's failure to object to its investigation of the violation of its non-Title IX policy governing faculty-student sex.

While the court decided the question was best left to a jury, Yale's defense reveals a strategic choice that universities may make to use the application of a non-Title IX policy on faculty-student sex as a mechanism to shield the univer-

137. *See* Richards et al., *supra* note 79 ("Rather than delineating specific processes to minimize circumstances susceptible to charges of liability, the majority of universities have omitted any guidance to faculty members, leaving them to bear the possibility of liability alone.").

138. *See id.*

139. The 2022 Proposed Amendments, *supra* note 25, at 41478 state that "a recipient must not exercise its discretion in a manner that predetermines witness credibility or the sufficiency of evidence nor would the recipient be permitted to dismiss complaints to avoid a complicated or contested investigation." This restriction applies if the process is a Title IX process.

140. No. 3:16-CV-00186 (VLB), 2018 WL 1587464, at *2-3, *7, *9 (D. Conn. Apr. 1, 2018).

sity from liability for sexual harassment based on the grounds that the relationship was, in fact, consensual. The student's silence, or failure to object, in the face of a university decision to call the relationship consensual, can become integral to the argument that the relationship was, in fact, consensual.

This decision, risk, or opportunity arises at two significant stages of any university investigation. The charge identifies the interest at stake. The way the interest is defined informs the process and the scope of permissible outcomes. When the allegation comes to the attention of an enforcement official, the official must decide which policy violations to charge, and this includes a decision about whether non-consent, therefore Title IX, is at issue. At the end of the investigation, after fleshing out the facts, the enforcement official must decide which of the charges has been substantiated to the applicable standard of review. For the student who has a future sexual harassment claim based on current or past faculty conduct, the ban can result in a premature declaration of consent. It can also create an institutional defense to liability because the passage of the policy and its enforcement serve as evidence of "appropriate steps" to prevent misconduct.[141]

With the ban, the student becomes instrumental as a tool to trigger the ban, and as justification for swift action, as there is a person to be protected, regardless of the messy details. The power to say whether an encounter was consensual, the right to have meaning attached to this decision, becomes a tool for the institution to wield ostensibly for a good cause, accountability, with less concern for the constraints of Title IX.

The student's interests in associational and privacy rights, the preservation of a Title IX claim, redressing an abuse of power personally experienced, and autonomy in the opportunity to declare for oneself whether intimate conduct is consensual or not, are reduced to the ban's reasons for policy and are defended by proxy in a ban enforcement proceeding. In exchange for expediency, the university reverts to the self-policing of the university administrative state. The sanction may even be the same, but the process, its insulation from external review, and the flexibility to exclude the student differentiate the ban from Title IX.

Ban enforcement proceedings can provide the university cover for the denial of Title IX procedural protections, whether those protections inure to the benefit of the professor or the student (or both). Professor Woytowicz was the subject of a student's Title IX complaint at George Washington University in 2016.[142] According to Professor Woytowicz's lawsuit, when she requested clarification of

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141. 1997 Guidance, *supra* note 33, at 12402:

> Once a school has notice of possible sexual harassment of students—whether carried out by employees, other students, or third parties—it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.

142. Woytowicz v. George Washington Univ., 327 F. Supp. 3d 105, 111 (D.C. Cir.

the "allegation of sexual harassment based on unequal power," the university investigator instead questioned her and encouraged her to agree to an informal resolution resulting in "only" a written reprimand. Professor Woytowicz refused. In a meeting described as "a supervisor-subordinate conversation outside the scope of Title IX proceedings," the department chair, university dean, and university counsel questioned Woytowicz and refused to answer Woytowicz's questions about the allegations. The university did not find Woytowicz violated the Title IX policy but did find that Woytowicz violated the university's consensual relationships policy. The likelihood of a successful Title IX claim arising from the failure to comply with required processes appears less valuable where the outcome has been solidified by the ban.

In light of the Title IX regulations, had the meeting with the dean, chair, and university counsel been recognized as part of a Title IX proceeding, Woytowicz and the student would have been entitled to all evidence relevant to the Title IX allegation. Today, had Woytowicz decided to accept the proposed resolution, the student complainant would have had the right to know about it, and to object. Yet still today, by calling it a ban enforcement proceeding outside the scope of Title IX proceedings, the enforcing administrator can press for an informal resolution without the knowledge or approval of the student and can "cure" the failure to follow Title IX requirements because the violation of the ban can render other procedural defects a harmless error.[143]

The court's decision focused on the professor, but the loss of Title IX protections cuts both ways. Outside of Title IX, if a respondent is excluded, recourse for this unusual move exists in due process review. If a student complainant is excluded, it is to be expected.

The chasm between the Title IX and ban enforcement processes cannot be bridged by reference to identical outcomes. One investigation process is heavily regulated, the student receives support, and the student's voice matters. In the other process, which enables ubiquitous regulation of faculty and student conduct, whether the student has access to proceedings and can contribute to those proceedings, it depends.

Reducing interest in Title IX. The ban's imperfect fit with established rights makes the faculty-student relationship an easy cover for campuses seeking public penance for past Title IX transgressions. Bans are at times announced in

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2018).

143. *See, e.g.*, Parfitt v. Llorens, 2020 WL 3452225, at *3 (M.D. Fl. June 23, 2020) (rejecting faculty member's argument that administrator "misled him with sexual harassment allegations" where administrator informed professor that the investigation involved sexual harassment, refused to provide more detail, explain evidence, or identify witnesses, and then found Parfitt in violation of policy for admitting to having a consensual relationship with a graduate student); *id.* ("Parfitt admitted to having a sexual relationship with a student while in some supervisory capacity over her. Undoubtedly, FGCU has a significant interest in quickly responding and disciplining a faculty member in that event."); Naca v. Macalester Coll., 947 F.3d 500 (8th Cir. 2020) (rejecting a professor's discrimination claim on the grounds that the decision to terminate her for having a sexual relationship with a student was a "legitimate, non-discriminatory reason for termination.").

response to intense scrutiny following a sexual harassment scandal.[144] A ban enforcement proceeding shows the university takes sexual harassment seriously, without having to admit that sexual harassment occurred.

One stated reason for the ban is that consent is difficult to discern in faculty-student relationships, in part because of the power dynamics between the parties.[145] Yet power differentials giving rise to challenging intimate relationship dynamics exist elsewhere, including between students and club officers or athletes, students of different grades, and tenured and untenured faculty. Whether by choice or by concession to regulatory strong-arming, universities do purport to have the capacity to discern consent and coercion. They do so regularly in matters involving student respondents. They get sued, and then they try again. Such experience says nothing about whether universities have become any good at resolving the question of consent. A bright-line rule is, at times, preferable to case-by-case decisions. It does, however, raise the question why students' expressions of consent should be uniquely disregarded with the ban, or why a university's difficulty discerning consent should be uniquely avoided when faculty are accused.

In these instances, the university sidesteps the work Title IX has done to align institutional incentives with party access and participation rights. For concerns about investigator bias, the ban's alternative to oversight through party participation rights is to purport to minimize discretion by requiring the simple application of a bright-line rule. For concerns that the process causes trauma to complainants, the ban's alternative to student agency in identifying responsible employees, choosing whether to file a formal complaint and choosing whether to appeal, is to eliminate the need for student complainant participation. If the problem is sexism and abuses of power, manifested in consensual relationships that are not truly consensual, then addressing the problem requires far more than assuming that consent is impossible and threatening to punish the faculty who get caught.[146]

What is missing when the language of Title IX is leveraged to popularize the

144. *See, e.g.*, Rebecca Tan, *Penn Bans Sexual Relations Between Faculty and Undergraduates in Significant Policy Change*, THE DAILY PENNSYLVANIAN (Mar. 25, 2018), https://perma.cc/25HT-WUYG (explaining that because "five anonymous respondents of a public survey reported incidents of sexual assault and harassment by Penn professors" and that "'[i]t is one of our highest priorities at Penn to sustain a campus free of sexual violence, sexual harassment, and all other forms of sexual misconduct,'" Penn "'updated the University's policy on Consensual Sexual Relations Between Faculty and Students, which was originally published in 1995.'"); Ashley Southall and Tamar Lewin, *New Harvard Policy Bans Teacher-Student Relations*, N.Y. TIMES (Feb. 5, 2015), https://perma.cc/68JF-CL2Z (noting that Harvard adopted a ban while under federal scrutiny for accusations of sexual assault).

145. *See, e.g.*, Montana State University Policy, *supra* note 24, at 1; Stanford University Policy, *supra* note 97.

146. *See* Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 120 (2013) (discussing the importance of reviewing the trauma perpetrated by universities and having the courage to own up to abuses and promote transparency on a systemic level). Of note, students are not subject to sanction in ban enforcement proceedings.

ban, is a mechanism to incorporate student oversight to ensure the reversion to the university administrative state is not simply a means to sidestep Title IX. Couched as a measure to prevent sexual harassment, the ban is difficult to oppose. No one wants to help the lecherous professor. The ban as solution fuels demands for the resignation or termination of a professor or, at a more structural level, for modification of the relationships covered by the institution's consensual sexual relationship policy.[147] It takes away student oversight through access rights and reduces the need for further investments to improve the effectiveness of this oversight within the Title IX regime.

While student respondents who claim consent may become fully invested in holding Title IX offices accountable to the university's published standards for adjudicating consent, faculty respondents lose incentive to do the same because with or without consent the outcome is a sanction, and the ban offers a more palatable result that avoids a sexual harassment finding. The ban also perpetuates faculty exceptionalism in causing faculty respondents lose common cause with student respondents. Powerful arguments about the faults in our sexual harassment systems hold water, and by using a ban, universities take a powerful player in university governance out of the long line of potential challengers who would otherwise hold the university accountable for better training[148] and more clear consent standards when sanctions can turn on one of these elements.[149]

Some believe colleges have no business adjudicating sexual misconduct.[150]

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147. The structural demands are cyclical: it does not matter if the university had a ban, a conflict of interest management policy, or admonishment, the latest high-profile faculty-student sex problem provides an impetus for change in any direction. Colleen Flaherty, *Relationship Restrictions*, INSIDE HIGHER ED (May 24, 2018), https://perma.cc/T239-G55D (identifying several changes in university policies, and noting Northwestern banned graduate student-supervisor relationships but subsequently subjected such relationships to disclosure and management); *see also* Jerome W.D. Stokes & D. Fank Vinik, *Consensual Sexual Relations Between Faculty and Students in Higher Education*, 96 ED. L. REP. 899, 901 (1999) (describing a pattern of retreat wherein institutions like William & Mary, the University of Texas at Arlington, and the University of Washington sought sweeping prohibitions on faculty-student sex only to soften such policies in the face of pressure). Yale regulated faculty-student sex using conflict of interest approaches until 2010, when it adopted a ban on sex between faculty and undergraduate students. Srinivasan, *supra* note 10, at 1102.

148. Letter from Catherine E. Lhamon, Assistant Sec'y for C.R., U.S. Dep't of Educ., Office for C.R., to Title IX Coordinators (Apr. 24, 2015), https://perma.cc/DAA6-PXVW ("[S]ome of the most egregious and harmful Title IX violations occur when a recipient fails to designate a Title IX coordinator or when a Title IX coordinator has not been sufficiently trained or given the appropriate level of authority to oversee the recipient's compliance with Title IX.") (rescinded).

149. PETTEGREW, *supra* note 80.

150. Bartholet et al., *supra* note 80, at 5:

> Schools' struggles with providing fair procedures have led some observers to throw up their hands and propose 1) that schools should not decide these cases at all; 2) that schools should toss these cases off to law enforcement instead; and 3) that schools should be legally required to refer all reports of criminal acts to law enforcement regardless of whether the schools also adjudicate the cases (sometimes called "mandatory referral"). These proposals are irresponsible.

Stakeholders jostling for another crack at changing Title IX identified legitimate systemic concerns about training and accountability, traumatizing complainants and respondents, and delays. These challenges are reasons to make Title IX better, to make Title IX processes more robust, rather than to short circuit the process and automate findings of responsibility using a different, less scrutinized, policy.

The ban illustrates how Title IX could benefit from increases in both flexibility and non-university oversight, and the 2022 proposed amendments to the Title IX regulations offer several such changes. A live hearing, opening the door to adversarial interrogations in every Title IX adjudication, may no longer be required when credibility is not in dispute.[151] A power imbalance between the parties is one factor that can be taken into account to assess whether conduct was welcome.[152] The proposed changes to Title IX extend many of its procedural requirements beyond sex harassment to allegations involving sex discrimination. This lowers the stakes of the charging decision, in that declaring conduct non-harassing does not eliminate Title IX's procedural protections, so long as the conduct may constitute discrimination.

However, Title IX continues to defer to institutions to come up with definitions of consent, and institutions continue to face litigation for their written or applied approaches to consent.[153] The 2022 proposed amendments to Title IX regulations recognize that mandatory dismissal provisions can increase the pressure to declare prematurely a matter is resolved, but the call in the proposed amendments for universities to gather more information before dismissal, to better understand whether a matter implicates Title IX, does not limit the application of other policies, such as the ban.[154] Title IX continues to prescribe procedures that are not always integral to fairness, and that the parties might waive if given the choice.[155] Title IX also continues to maintain space for institutional judgment to displace student preferences, including, for example, by designating responsible employees or designated reporters rather than allowing students to designate

151. 2022 Proposed Amendments, *supra* note 25, at 41576 (proposed 34 C.F.R. § 106.45(f)(4)).

152. *See* 2022 Proposed Amendments, *supra* note 25, at 41417.

153. *See, e.g.*, Doe v. Williams Coll., No. 3:20-cv-30024-KAR, 2022 WL 4099273, at *12 (D. Mass. Sept. 7, 2022); Doe v. Trustees of Dartmouth Coll., No. 22-cv-018-LM, 2022 WL 2704275, at *11 (D.N.H. July 12, 2022); Doe v. Brown Univ., 210 F. Supp. 3d 310, 333-34 (D.R.I. 2016).

154. 2022 Proposed Amendments, *supra* note 25, at 41478:

> Prohibiting a recipient from continuing its grievance procedures, as the mandatory dismissal provision of the current 2020 amendments does, may require a recipient to make a hasty judgment call at the outset . . . . However, in the early stages of the complaint process, gathering more information may help to confirm whether the allegations, if true, would amount to sex discrimination.

155. *See* 2022 Proposed Amendments, *supra* note 25, at 41458-59 (describing feedback OCR received about delays caused by steps required by Title IX).

such individuals.[156]

OCR has recognized the unique vulnerability of university students, but the same rationale for taking additional steps to protect students from sexual misconduct also supports taking additional steps to empower students to weigh in when faced with the potential appropriation of their experience. Title IX is far from perfect, but the ban helps to keep it that way.

III. TINKERING TOWARD INCLUSION

If bans are subject to any level of serious scrutiny, because of their breadth in implicating associational rights and privacy, or perhaps because of their lack of nuance in extending government control to intimate activity untethered to the university, they may not survive.[157] As institutions have moved from an intimate association lens that prioritized tradition to one that prizes autonomy,[158] the assumption that student-faculty dating relationships are to be freely regulated by educator-employers may no longer hold water.[159] In this section, I explore the work necessary to ensure the ban does not become the same exploitive maintenance of student dependency as the problem it is intended to address, by prioritizing student procedural autonomy and calling out the institutional appropriation of the student narrative.

A. The student's opportunity to be heard

The status quo of the university administrative state contemplates mandatory space for the involvement of respondents and the inconsequential exclusion of others such as student complainants. Some students may seek university protection from intimacy with faculty, just as some students need institutions of higher

156. *See id.* at 30039.

157. *See, e.g.*, Briggs v. N. Muskegon Police Dep't, 563 F. Supp. 585, 590 (W.D. Mich. 1983) (recognizing a "right of sexual privacy" and narrowly construing government employer regulations of off-duty conduct to require some nexus to the performance of government duties); Fisher v. Snyder, 346 F. Supp. 396, 398, 401 (D. Neb. 1972), *aff'd*, 476 F.2d 375 (8th Cir. 1973) (requiring a showing that teacher's out of school conduct "'materially and substantially' interfered with the school's work or rights of students," otherwise, at most, the evidence raised a question as to the teacher's "good judgment in her personal affairs"). *But see, e.g.*, Giebel v. Bonilla, No. CV-08-32-GF-SEH-RKS, 2008 WL 11393096, at *11-12 (D. Mont. Dec. 2, 2008), *aff'd*, 404 F. App'x 184 (9th Cir. 2010) (finding no constitutional interest in professor-student associations that go "beyond a professional relationship" because "[a] private, consensual, non-sexual professor/student relationship is not a 'deep commitment' nor have relationships of this type played a critical role in the culture and traditions of the United States").

158. The ability to choose is autonomy. *See* Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 974 (1989) ("[Some norms] mark the boundaries that distinguish respect from intimacy, and their very ability to serve this function depends upon their capacity for being enforced or waived in appropriate circumstances. In the power to make such personal choices inheres the very essence of the independent self.").

159. *See* Hutchens, *supra* note 5, at 428-29; Stokes & Vinik, *supra* note 147, at 911.

education to stop erecting barriers to the vindication of student rights. The challenge for universities is to create a process that recognizes the existence and validity of both.

With bans, the former category of students is recognized. In ban enforcement proceedings, the student is neither complainant, victim, survivor, or party. The right to participate is reserved for the institution and the faculty respondent. The latter category of students has no recourse. Together, Title IX and the ban present starkly different processes: either the university takes control and applies the ban, or the student is forced to be involved in a protracted, complicated process that raises the possibility of procedural justice and the risk of procedural trauma. Neither process is always appropriate.

I propose a middle ground, such that bans incorporate more student oversight and procedural protections, and Title IX rules incorporate more flexibility when all steps are unnecessary. The ban could benefit from the proposed Title IX amendments that require the parties be equipped with specific information about the implications of accepting an informal resolution.[160] Title IX could benefit from flexibility in dispensing with requirements that do not further the interest in fairness where, for example, credibility is not at issue, or all parties make an informed and voluntary selection of a more expedient version of the regulations.

The bans proliferating across the nation reflect universities reverting to the university administrative state absent an external check. That check can come in the form of legislation, such as Title IX and its regulation, guidance, and administrative enforcement. It can also come from the student, who has a narrative at stake, and at times so much more, including trauma and the potential for redress.

Bans are structured so that the student's failure to participate need not deter the university from taking enforcement action.[161] However, the failure to hear from the student may also result in the failure to craft an accurate allegation and provide appropriate notice to the faculty member of what is at stake. It may also result in sanctions that do not nearly reflect the most personal impact of the policy violation. *Uyar v. Seli* counsels caution;[162] a report about faculty-student sex may be, in the student's perspective, a report about coercion and abuse of power sufficient to trigger Title IX proceedings, but in the university's perspective, consent may be presumed until its absence is alleged. By talking to the student at a time when the student is willing to proceed, the investigator may discover facts that inform a decision to charge sexual harassment, the potential policy violations involved, or the range of possible sanctions.

160. 2022 Proposed Amendments, *supra* note 25, at 41454 (proposed 34 C.F.R. § 106.44(k)(3)).

161. *See, e.g.*, Montana State University Policy, *supra* note 24, at 5 (imposing mandatory reporting requirements on faculty and staff).

162. Uyar v. Seli, No. 3:16-CV-00186 (VLB), 2018 WL 1587464, at *9 (D. Conn. Apr. 1, 2018).

B. Borrowing from Title IX

The trend is to adopt a ban that presents as protection and prevention. This trend may result in systemic rights avoidance so long as complaint processes rest on dichotomous conceptions of the student experience. One student may want to shift full responsibility for complaint review and enforcement to the university. Another may wish to participate actively in the process, including giving voice to the student experience and having the opportunity to impact the sanctions imposed. Both may be true. By tinkering with the ban to create a process that in some ways resembles the Title IX process, university officials can continue to protect the inactive student while opening the door for student autonomy.

The university administrative state can, by borrowing from Title IX, create a space for student autonomy through changes to its baseline notice, consent, and participation rights. To concede the student might have something meaningful to say, to grant the student rights rather than salvation, is the first step to reinstate complainant sovereignty and to align universities' approaches to faculty-student sex with the values underlying Title IX. The ban can borrow from Title IX at several key stages. First, enforcement should lie with the office best equipped to deal with questions of consent and whether consent is at issue at all: the Title IX office. To mitigate bias challenges, the Title IX office's involvement offers additional options for review and oversight as appropriate.[163]

Second, the standard of review should match that of the university's chosen Title IX standard of review. A student who categorizes a relationship as consensual may subsequently provide facts that establish a Title IX violation. Those who adjudicate a ban may find themselves, partly into the fact gathering process, involved in what is in fact a Title IX investigation. Although the ban appears faster with fewer compliance concerns,[164] it may also cause delay, litigation, and reversal where the process fails to align with the student's intended report, and where inconsistent standards require repetition in the investigation. If an investigation reveals it was improper to assume that all sexual conduct between the parties was consensual, using the same investigation standard and initial investigator allows for clearer notice to the parties about which standard applies, and a more defensible outcome where the facts are found (or not) to the same level of review. The argument that the ban provides quicker closure only holds water when the ban's process, once complete, is not subject to challenges requiring the

163. The 2022 proposed amendments would provide universities discretion in whether to choose the single investigator model. *See* 2022 Proposed Amendments, *supra* note 25, at 41466-67.

164. *See, e.g.*, Doe v. Univ. of N. Ala., No. 3:17-CV-01344-CLS, 2020 WL 6081966, at *39 (N.D. Ala. Oct. 15, 2020) (noting the university's response was "quick and effective" as the "entire investigation was completed" in "less than a month," compared to a case involving a Title IX process that took over eight months); *id.* at *29, *48-49 (finding that although "no one with Title IX training ever met with Doe, or explained to her the possible outcomes of an investigation, or what the different methods of terminating [the professor]'s employment might mean for her," the Title IX office completed "the initial investigation" of a policy violation and therefore did not violate any clearly established rights).

university to start the process over again because it charged the wrong policy.

Third, because the right to participate is endemic to the right to be heard, Title IX caselaw identifies the procedural rights, notice, access to evidence, and updates, critical to enabling independent oversight. First, notice, including information about the policies that may apply and information about who decides what happens next and how, is a necessary precursor to accountability. Full disclosure to the student of what happens in ban enforcement proceedings, at the outset of a Title IX matter involving a faculty-student relationship, and full disclosure of the Title IX process at the outset of a ban enforcement proceeding, provide transparency of what is at stake in the charging decision. The student's right to access evidence is another step toward enabling the student to hold accountable those making decisions about the private intimate life of the student.[165] The right to learn the outcome of the proceeding enables the next right, to challenge the findings or the sanction by participating in the process or on appeal.

If universities provide the student the opportunity to participate in the ban enforcement proceeding, and ensure the student's participation is optional, voluntary, and free from pressure, they can preserve the student's ability to correct any categorical statements about the nature of the relationship. The student whose intimate relationship is at issue could benefit from the institution borrowing the participation rights and supportive measures described in Title IX, or by providing the student complainant rights equitable to those provided the faculty member as respondent. As attractive as control of the student's narrative may be from an institutional standpoint, students' oversight of the process intended to protect them serves as an important additional layer of accountability.

The right to request reasonable delays in the process may remove additional barriers to the right to be heard. Subject to time-sensitive evidentiary considerations, with the opportunity to request a reasonable stay in the proceedings, the student gains time that may be necessary to prepare to participate. Students may not be prepared to engage in a Title IX investigation while trying to successfully study and handle life. Forcing the choice on the university's timeline may coerce the student into characterizing a relationship as consensual and trigger the ban, not because of the facts but because of the substantive and procedural tradeoffs of participating in Title IX.[166] If a relationship is declared consensual before the student has had the opportunity to process what happened and prepare for what may be to come, a complaint of sexual misconduct may be precluded or, at best, undermined by a prior admission, by the student or the university, that the relationship is consensual. The option to delay realigns incentives to reduce the risk that student-complainant Title IX participation rights are sacrificed in favor of expediency. When the university's interest in expediency aligns with that of the

165. This is a reference to evidence other than redacted documents that reference the student, as such documents are otherwise accessible pursuant to federal student privacy laws. *See, e.g.*, 34 C.F.R. § 99 (2022).

166. 2020 Regulations, *supra* note 1, at 30086-87 (expressing concern about "arbitrarily denying remedies to sexual harassment victims").

student, the student declines the option to delay and the ban enforcement proceeding may proceed.

If provided the opportunity to be heard, the student may provide a narrative that clarifies that charging a faculty member with consensual sexual relations is factually inaccurate and an inappropriate back up plan to a sexual harassment charge. Unlike a Title IX proceeding involving faculty sexual misconduct with a student, where the faculty member is respondent and student is complainant, a student is typically not a complainant in a ban enforcement proceeding. One who is not the complainant has no right to access evidence from the proceedings or appeal. The denial of complainant status results in the complete denial of participation rights.

Fourth, ensuring the student's report is free from pressure requires addressing the potential influence stemming from the provision or withholding of benefits that are otherwise available for complainants in a Title IX process, such as interim measures and the right to an advisor. The student's ability to access supportive measures, "designed to restore or preserve equal access to the . . . education program or activity,"[167] and the right to an advisor should not be conditioned on an allegation of non-consent.

Finally, allowing for nuance in the characterization of the relationship, which may be consensual at times and nonconsensual at others, may mean the charge is more nuanced as well, and will better reflect reality than a bright-line rule predicated on overcoming the limits of Title IX. For example, consent at an individual level offers a helpful comparator to administrative proceedings at a structural level. Institutions have invested in developing the expertise to determine consent. The same standards used to determine welcomeness in student faculty relationships can be used to determine whether the student has authorized the university to declare a faculty-student relationship consensual. Whether characterized as an opt in or opt out approach, informed and voluntary student access to participation rights should remain available for the student's taking. With the student who has no interest in participating, the process may otherwise look no different than current ban enforcement proceedings. This approach will help avoid erring toward selection of the ban solely because of its attractive simplicity. It promotes respect for the agency of students in a process that purportedly exists to avoid their exploitation, and it is a standard that should be easy enough to impose on the administrators tasked with holding others to the same standard.

C. Problems with prevention

There is an argument that the ban is a necessary and more effective tool for a university to prevent and address sexual harassment of a student by a faculty member, especially where Title IX enforcement obligations are triggered too late and take too long. From a student's perspective, the likelihood of trauma as a result of reporting can well outweigh the harm of silence because upon reporting,

167. 34 C.F.R. § 106.30(a) (2020).

a student in a faculty-student relationship may expect to be investigated, interrogated, shamed, and ultimately disbelieved. The ban provides the student an impersonal basis to refuse unwanted advances, and the faculty member the clearest policy statement of conduct deemed unacceptable by the university.

Universities considering the ban should nonetheless consider the costs, the nuance necessary to protect the agency of students, and the lessons learned from Title IX. Conduct that implicates fundamental personal freedoms (privacy and intimate association) and eludes categorization as institutional responsibility is difficult enough to regulate in an environment (the college campus) that prizes the pursuit of autonomy and self-exploration and that opposes the ban.[168] Sex happens, and admonishing prospective participants not to do it, requiring participants to ask for permission, or oscillating between the ban and other consensual sexual relationship policies,[169] does not entirely eliminate its occurrence.

It is true that conflating a consensual sexual relationship with sexual harassment risks diminishing the importance of the harm and redress in sexual harassment proceedings.[170] Welcome sexual interaction is not sexual harassment and should not be treated as such. While this may be an argument to keep the ban and sexual harassment policies separate, it also highlights what is wrong with current bans. Error in choosing the applicable policy may mean the difference between recognizing student participation rights or silencing the student entirely, and the difference between crafting appropriate charges or pursuing a process that is ultimately reversed through the legal process for failure to provide appropriate notice to the faculty respondent. The risk of error may be reduced by providing the student a voice in the process. Since Reasons for Policy suggest the ban is intended to address sexual harassment, appropriating existing procedural protections for students already developed in Title IX reduces the risk of error and furthers interests underlying the ban.

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168. *See* Richards et al., *supra* note 79, at 341 (citing Marcia L. Bellas & Jennifer L. Gossett, *Love or the "Lecherous Professor": Consensual Sexual Relationships Between Professors and Students*, 42 SOCIO. Q. 529 (2001)) ("[E]vidence suggests that both faculty and students oppose blanket restrictions.").

169. These policies present as (and oscillate between) one of three categories: admonishment, conflict management, and a ban. The admonishment tells faculty not to have sex with students, or to be careful when doing so. The conflict management approach prohibits sex while the student is subject to the institutionally-bestowed power of the faculty, such as when the student is enrolled in an instructor's course. The ban prohibits sex based on the identity of the parties: If one is student and the other is faculty, sex breaks the rule. *Compare, e.g.*, Dartmouth Prior Policy, *supra* note 97 (banning faculty-undergraduate sexual relationships, effective 2015 to 2019) *with Dartmouth College Policy on Sexual and Gender-Based Misconduct*, DARTMOUTH (Aug. 14, 2020), https://perma.cc/2HN7-XV48 ("[C]onsensual relationships between Faculty, Staff and Employees who occupy inherently unequal positions of authority are not prohibited outright as a presumed abuse of power.").

170. Gersen & Suk, *supra* note 47, at 946 ("The sex bureaucracy regulates ordinary sex, to the detriment of actually addressing sexual violence, and unfortunately erodes the legitimacy of efforts to fight sexual violence.").

D. Liability considerations

The ban is arguably universities' best bet to avoid liability. To the extent some faculty argue that intimacy with students is pursuant to the performance of their official duties,[171] the ban is a blanket rebuttal and official disclaimer. Moreover, any student challenges to the university's investigation and enforcement process are less likely to succeed because the ban can turn a poorly managed Title IX investigation into harmless error.[172]

The ban may seem especially effective at limiting liability because it shields university officials from the notice required to trigger liability under Title IX.[173] Because the Supreme Court has ruled that subjecting schools to monetary liability for conduct when they have not had the opportunity to take remedial action would "frustrate the purpose" of Title IX,[174] Title IX damages are notice dependent, such that any deterrent to reporting to an appropriate authority, such as, perhaps, the ban for a student who has questions and prefers nuance, can be effective at protecting the university from financial liability.[175]

The ban provides the parties a reason to require each other not to reveal their relationship to other members of the campus community, resulting in even more chilled reporting.[176] Rather than give the parties reason to take steps to ensure their relationship has no discernable detrimental impact on others, the ban gives the parties in the relationship a compelling reason to proceed in secrecy and isolation, thus exacerbating the very issues it intends to address. It also means no university official has the notice required to trigger a duty to act.

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171. *See generally* JANE GALLOP, FEMINIST ACCUSED OF SEXUAL HARASSMENT (1997); *see also* Nadine Brozan, *Chronicle*, N.Y. TIMES (Sept. 30, 1993), https://perma.cc/WK54-4HYL (quoting William Kerrigan in the September 1993 publication of Harper's Magazine, stating there is a "kind of student . . . working through something that only a professor could help her with. I'm talking about a female student who, for one reason or another, has unnaturally prolonged her virginity").

172. *See* Doe v. Univ. of N. Alabama, No. 3:17-CV-01344-CLS, 2020 WL 6081966, at *44 (N.D. Ala. Oct. 15, 2020) (finding that when a student sued the university for applying its consensual sex policy rather than its Title IX policy to address her experiences, for failing to explain to her the difference in processes, and for failing to fire the professor, the university's decision was "not clearly unreasonable" when the school decided "not to renew [the professor's] employment contract for another year because it believed that solution was the quickest way to protect Jane Doe and the other students who comprised the intercollegiate team, while not forcing them to undergo the additional stress and trauma of testifying").

173. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 300-01 (1998) (Stevens, J., dissenting) ("As long as school boards can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability.").

174. *See id.* at 285 (majority opinion); *see also* Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1027 (7th Cir. 1997) (rejecting agency principles of institutional liability in Title IX cases).

175. *See, e.g.*, Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1352 n.43 (M.D. Ga. 2007) (explaining that a police officer is not an appropriate official for the purposes of establishing notice under Title IX).

176. Pappas, *supra* note 85, at 124 (describing chilled reporting due to fear of retaliation and lack of faith in the process).

However, limiting liability is not the goal of the ban.[177] Additionally, in a potential twist, the adoption of the ban may impose an unexpected, additional responsibility on the university. If a student argues the university should have known the relationship involved sexual harassment, universities have an out: Title IX does not recognize the concept of constructive notice. If, however, campus officials declare faculty-student intimate relationships to be coercive, as some bans do,[178] then notice of a faculty-student relationship may become notice of a potential Title IX violation,[179] transforming the exclusive use of a ban enforcement proceeding becomes the unlawful failure to provide applicable Title IX protections.[180]

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177. Some institutions mention liability as a concern in bans, but not as the primary concern. *See, e.g.*, Stanford University Policy, *supra* note 97 ("[S]uch relationships may expose the teacher to charges of misconduct and create a potential liability, not only for the teacher, but also for the University if it is determined that laws against sexual harassment or discrimination have been violated.").

178. *See, e.g.*, Michigan State University Policy, *supra* note 100 (describing the "inherent risk of coercion" in instructor and undergraduate student relationships). The ban may support a finding of coercion for sexual harassment purposes. *See* Flor v. Univ. of N.M., No. 1:20-CV-00027-JAP-LF, 2020 WL 1910306, at *10-11 (D.N.M. Apr. 20, 2020) (finding a quid pro quo harassment more likely than not occurred and explaining that "Essential to this analysis is UNM Policy 2215: Consensual Relationships and Conflicts of Interest. Although the OEO does not evaluate whether Policy 2215 has been violated, it must consider the strong university interest present in that policy to avoid difficulties which arise from relationships like that at issue here, due in no small part to the Policy's explicit recognition of the 'inherent power differential' between a faculty member and a student which can render consent difficult to assess or construe it to be coercive.").

179. *Contra* Liu v. Striuli, 36 F. Supp. 2d 452, 465-66 (D.R.I. 1999) (rejecting the argument that knowing the relationship is between faculty and student means an official "should have known that" the relationship was abusive," as "[t]his constructive notice argument is patently inadequate under the *Gebser* standard which requires actual knowledge of the harassment"); *id.* at 465 ("Although there is evidence that D'Arcy [(the school official)] knew of the sexual nature of the relationship between Liu and Striuli, there is no evidence that D'Arcy had actual knowledge that the relationship was anything but mutually consensual."); Escue v. N. Okla. Coll., 450 F.3d 1146, 1154 (10th Cir. 2006):

> The instances of dating two non-traditional students nearly his own age do not provide NOC with any knowledge that Mr. Finton posed a substantial risk of sexual harassment to NOC's students: even though one of these relationships may have been improper (the district court noted that one of the dating relationships did not even violate school policy, even though it was not condoned), there is no insinuation anywhere in the record that these relationships were non-consensual.

(citation omitted); *see also* P.H. v. Sch. Dist. of Kan. City, Mo., 265 F.3d 653, 662-63 (8th Cir. 2001) (finding no actual knowledge of sexual misconduct despite complaints that teacher "was spending too much time" with student); Doe v. Flaherty, 623 F.3d 577, 585 (8th Cir. 2010) (concluding that spending "excessive amount[s] of time" with students does not, "without more," create a "reasonable inference of sexual" conduct (quoting *P.H.*, 256 F.3d at 659)).

180. *See* 2020 Regulations, *supra* note 1, at 30115; *see also* Abraham v. Thomas Jefferson Univ., No. 20-2967, 2021 WL 4132566, at *6 (E.D. Pa. Sept. 10, 2021) ("Although allegations of imperfect proceedings are generally insufficient to raise an inference of gender-based discrimination, Plaintiff's Amended Complaint goes further than that, alleging a complete failure to investigate his report against Roe.") (citation omitted); Doe v. Univ. of the

CONCLUSION

The ban seems so simple. The search for consent is hard, and a bright line rule based on status provides notice of exactly which conduct is a violation of university policy. It seems a good thing that faculty not view students as part of their dating pool.

The problem with students' purported diminished capacity to consent could be reframed as the problem with universities' reduced capacity to *discern* consent. This is a problem the ban cannot and should not fix, as it reflects issues remaining with Title IX.

Sexual harassment rules evolved under Title IX to adapt to decades of pressure, including extensive litigation and changing federal guidance.[181] Over the course of decades, stakeholders have made sure universities' investment in sexual harassment prevention and redress have dramatically increased, and by categorizing a set of relationships as consensual, even when policy prefaces call this label into question, the ban sidesteps refined processes and the oversight that comes with it.

Bans reinforce students' loss of agency. Students' sexual preferences may be disregarded, not only hypothetically by professors who misconstrue or disregard any gaps between voluntary and welcome, but also by the university, per policy, as a matter of course.

Transferring the oversight arising from student participation rights in Title IX to the ban would promote Title IX's objective of providing "individual citizens effective protection" against discriminatory practices.[182] The loss of oversight that should be most concerning about the ban is that of the student, whose decisional autonomy may serve as the only effective real-time check on the mishandling of a Title IX matter.

Scis., 961 F.3d 203, 210-11 (3d Cir. 2020) (finding support for a plausible claim of sex discrimination in the failure to investigate upon receipt of an investigator's report to the Title IX coordinator that a person may have violated a Title IX policy).

181. *See generally* 2011 Dear Colleague Letter, *supra* note 1; 2014 Q&A, *supra* note 1 (guidance that was later rescinded). *See also* Doe v. Columbia Univ., 831 F.3d 46, 57 (2d Cir. 2016) (finding that allegations that the university faced criticism from the student body and the media for its handling of complaints of sexual assault, resulting in a town hall with the dean to discuss the issue, supported an inference that pressure to avoid liability and criticism resulted in a biased process); Doe v. Miami Univ., 882 F.3d 579, 594 (6th Cir. 2018) (noting pressure from the federal government, the threat of the loss of federal funds, and private lawsuits); Doe v. Oberlin Coll., 963 F.3d 580, 587 (6th Cir. 2020) ("'[P]ressure from the government to combat vigorously sexual assault on college campuses and the severe potential punishment—loss of all federal funds—if [the College] failed to comply' can likewise yield a 'reasonable inference' of sex discrimination." (quoting *Miami Univ.*, 882 F.3d, at 594)).

182. Cannon v. Univ. of Chi., 441 U.S. 677, 703 (1979).