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## Three Cohorts' Vulnerabilities on the Issue of Sexual Consent

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# INTRODUCTION: THREE COHORTS' VULNERABILITIES ON THE ISSUE OF SEXUAL CONSENT

ANITA BERNSTEIN\*

Getting to write this introduction to an octet of stimulating Articles is the second honor I received at this Symposium.<sup>1</sup> In October 2019, I joined the live event as a panel moderator. Both of these occasions—panel moderation then, synthesis now—have brought elegant and stimulating diversity to my tasks. Dividing the variation into subgroups that each unite around a theme had to be done at the live event, and now returns in this Introduction as I frame eight works that started as presentations in the Bell Courtroom in Norman, Oklahoma and are now Articles.

Erin Sheley, leader of the Symposium, arranged the nine October 2019 presentations into three panels, a familiar number. American legal education features many threes. Most students go to law school for that number of years, and take mostly three-credit courses in a calendar that for most of us has three seasons: fall semester, spring semester, and summer.<sup>2</sup> We nine authors in the Symposium are law professors, a group tasked with the tripartite job description of teaching, scholarship, and service.<sup>3</sup>

Panel 1, on higher education, had the narrowest focus of the October event. Titled “Where We Learn: Title IX and Sexual Assault,” it featured

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1. The original nonet was equally stimulating.

2. Exceptions like an occasional quarter system “prove the rule” in the sense of underscoring its dominance.

3. I find myself threeing all the time. Over three (3) decades of law teaching I’ve discussed and lectured on several doctrinal tests that have three elements needed for a plaintiff to prevail. Some of them arise in a field that features three types of tortious conduct. Another subject I teach has three types of product defects. Family Law in my classroom examines marriage by looking first at entry into this relation, then at regulation of the ongoing marriage, and lastly at divorce. For threesomes in my writings, see ANITA BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY* 171 (2018) [hereinafter BERNSTEIN, *THE COMMON LAW*] (reading *Roe v. Wade*, 410 U.S. 113 (1973), to find “two trinities” in it: “three segments to each pregnancy” and “three sets of interests to be balanced against one another”); Anita Bernstein, *Treble Damages in New York: A Field Guide*, N.Y.L.J. (Apr. 13, 2017, 2:02 PM), <https://www.law.com/newyorklawjournal/almID/1202783664927/treble-damages-in-new-york-a-field-guide/> (“Plaintiffs who prevail in court can collect extra money—more than compensatory damages, that is—by three different means.”).

Hannah Brenner Johnson, Erin Buzuvis, and Sarah Swan. The other two panels offered wider-ranging conversations. Panel 2, “Between Yesterday and Tomorrow: Change and Conflict in the Legal Discourse Around Sex Offenses,” included presentations from Kelly Behre, Donald Dripps, and one no longer here. Panel 3, which I had the privilege of moderating, “In the Boardroom and Beyond: Consent in the Institutional Context,” brought together Russell Christopher, Shawn Fields, and Erin Sheley.

In this introduction I offer a somewhat different arrangement of the Articles, a 2-2-4. This re-division is not a disagreement or superimposition with the layout that worked so well last fall but a second look that presents a thesis. In the array I offer here, eight Articles converge and divide around three vulnerabilities.

I use “vulnerabilities” plural rather than vulnerability singular because each of the groups I identify here is exposed to the possibility of a distinct category of harm with respect to sexual assault,<sup>4</sup> the issue that occupies this Symposium. Different dangers threaten different groups and individuals. Each of these very different eight Articles works to highlight one cohort’s perspective or vulnerability.

#### *The First Cohort: Persons Vulnerable to Sexual Predation*

Erin Sheley and Shawn Fields have put at center stage persons vulnerable to sexual predation. Professor Sheley writes about statements that describe victim impacts,<sup>5</sup> Professor Fields about dress codes for students in grade school.<sup>6</sup> While both authors have girls and young women in mind, they write about these protagonists with attention to different traits.

Sheley wades into the controversial waters of victim impact statements by finding a new place for them in claims of injury brought against institutional defendants. Narratives from persons who have suffered sexual abuse that they attribute to institutional wrongdoing “have the potential to

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4. I occasionally use “rape” as an approximate synonym for sexual assault and criminal sexual conduct, aware that for decades the word rape has been ebbing in codified crimes. See Wendy Rae Willis, *The Gun Is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L.J. 2197, 2199 n.23 (1992) (reporting the same authorial choice).

5. Erin Sheley, *Victim Impact Statements and Corporate Sex Crimes*, 73 OKLA. L. REV. 209 (2020).

6. Shawn E. Fields, *Institutionalizing Consent Myths in Grade School*, 73 OKLA. L. REV. 173 (2020).

serve a unique purpose: to transmit to the public the lived reality of something that may not seem intellectually plausible: sexual assault by an entity.”<sup>7</sup>

Retellings of a bad experience are thought of as communicating pain, but they also communicate power—by which Sheley means not the eloquence of a narrative but the rawer power that an institution has over a person. Sheley notes victims’ “comparative helplessness relative to a company.”<sup>8</sup> Impact statements end up saying more than just *Here’s how I was hurt*. They limn an otherwise abstract offender whose “continued temporal existence” is central to its capacity to do harm.<sup>9</sup>

Continuing this attention to persons vulnerable to sexual predation, Fields argues that “seemingly innocuous modesty-based dress codes” used in many American grade schools “perpetuate a male-centric system of implied consent and general entitlement to sexual conduct.”<sup>10</sup> School administrators who impose this regulation tend to defend it as a distraction-reducer that shelters young people from crashing waves of hormones. But even if dress codes increase levels of attention paid to the official curriculum—a claim that in my view should not be credited until it gets support from controlled studies, a politically infeasible prospect—they also bring in trouble:

This rationale . . . tells boys that it is “the girl’s responsibility to cover up, and if she doesn’t it’s her fault he got distracted” . . . [and it also] tells girls that they are responsible for preventing this irresistible urge of the opposite sex, and that it is their fault for dressing so provocatively if boys gaze, leer, whistle, catcall, or touch. As one dress code critic noted, this approach serves as a microcosm of “a culture that’s so used to looking at issues of harassment and assault through the wrong end of the telescope,” directed at “girls’ own clothing” rather than the kind of sexually predatory behavior directed at girls.”<sup>11</sup>

A second-order defense of gendered dress codes that interests Fields holds that compulsory modesty functions to liberate schoolgirls.<sup>12</sup>

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7. Sheley, *supra* note 5, at 226.

8. *Id.* at 221.

9. *Id.*

10. Fields, *supra* note 6, at 177.

11. *Id.* at 187 (citations omitted).

12. *Id.* at 180, 183.

Exploring the familiar idea that chains can set people free, critics have been observing for years that lately (in contrast to the more innocent earlier time they think they remember) a girl is pressed to look sexy and the age at which this pressure starts is now alarmingly low.<sup>13</sup> Fields does not deny this conventional wisdom; he complicates it. His Article reminds readers that clothes cover the surface of a human being—a person, not (just) a distraction-unit or provocation or trouble-stirrer.<sup>14</sup> Our heroine could chafe at being forced into sackcloth. She might “want to dress provocatively to attract attention from a particular person, be it a boyfriend or girlfriend, or simply a love interest,” Fields observes.<sup>15</sup> When she has this desire and acts on it, recall the Symposium theme of consent: “Inviting a consensual response from that singular individual . . . does not mean that she has granted general consent to all people in the public sphere.”<sup>16</sup>

Persons vulnerable to sexual predation bring ideas and feelings and wishes and experiences to the law. Sheley and Fields do not portray the girls and women in their Articles as necessarily correct, or always innocent in the sense of empty, blank, devoid. These individuals take actions for which they have reasons. They make an impact not only on the law but on the people around them and the institutions in which they live, work, and learn.

*The Second Cohort: Persons Vulnerable to Accusations  
of Sexual Predation*

Just as Erin Sheley and Shawn Fields do not idealize persons vulnerable to sexual predation, the Articles in this second of three divisions do not idealize those who are vulnerable to accusations of sexual assault. Donald Dripps and Russell Christopher care about the harm of sexual predation; they do not categorically question or disbelieve accusations that it occurred. To this reader at least, their attention to accused persons demonstrates the value of the symposium as a unit of legal scholarship in contrast to a solitary article, the monad that could have been published by itself. These pieces join a larger dialogue. I arrange Professor Dripps first in my

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13. Another October, a friend of mine sighed to me that Halloween costumes for young women she sees on offer “these days” seem limited to “slutty nurse, slutty French maid, slutty Harry Potter.”

14. Fields, *supra* note 6, at 186.

15. *Id.* at 201.

16. *Id.*

sequence because it is he who reminds us most explicitly why we readers must heed the interests of accused persons.

Sexual assault violates codified law, Dripps writes, and “criminal statutes ought to respect the legal virtues—fair warning, constraint of discretion, and neutral determinations of wrongfulness *ex ante*.”<sup>17</sup> Lack of consent, when included among the elements of a sexual-assault crime, raises the doctrinal and jurisprudential problem of vagueness: “Major areas of legal uncertainty include what the scope of consent, if given, may be, and what inducements other than force or threat of force make assent or acquiescence different from consent as used in the statute. The literature abounds with examples, many of them nothing but purely hypothetical.”<sup>18</sup> Reformers who find progressive potential in relative newcomers like “affirmative consent” and “no means no,” Dripps argues, face challenges of drafting and line-drawing when they write these ideals into law.<sup>19</sup>

Carefully reviewing decisions from the U.S. Supreme Court as well as rape cases adjudicated at the state level, Dripps finds dangers of both under- and over-prosecution in rape cases where consent is at issue. Dripps acknowledges that one danger is more prevalent than the other: “In the real world, criminal justice actors are far more likely to reject meritorious rape prosecutions than to press the envelope of statutory liability.”<sup>20</sup> Void for vagueness as a doctrine, however, condemns arbitrary discretion no matter which way it cuts.<sup>21</sup>

Stakes of over-prosecution also emerge in the Article by Russell Christopher. Writing about positive autonomy, Christopher highlights the choice to engage in a sexual act as a source of satisfaction for oneself.<sup>22</sup> Consent as a constituent of rape law focuses on the negative kind of autonomy, the right to refuse and reject.<sup>23</sup> Professor Christopher introduces

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17. Donald A. Dripps, *Due Process Overbreadth? The Void for Vagueness Doctrine, Fundamental Rights, and the Brewing Storm Over Undefined Consent in Sexual Assault Statutes*, 73 OKLA. L. REV. 121, 158 (2020).

18. *Id.* at 147.

19. *Id.* at 154–56.

20. *Id.* at 149.

21. *Id.*

22. Russell Christopher, *Unconditional Coercion and Positive Autonomy*, 73 OKLA. L. REV. 159, 160–61 (2020).

23. I share Professor Christopher’s keen interest in autonomy, although I focus more on the negative stripe. In my book about it, I call the object of my attentive negative liberty rather than negative autonomy because to my mind “liberty” makes helpful reference to the power of the state. BERNSTEIN, *THE COMMON LAW*, *supra* note 3, at 7–8; *cf.* RONALD

positive autonomy with horrific facts found in a decision by the California Court of Appeal, *People v. Hooker*:

[A] husband and wife kidnapped the adult victim at knifepoint and held her captive. The victim was held naked, bound, gagged, blindfolded, and chained to a bed. After several years of continuing captivity, the husband began having intercourse with the victim. Undoubtedly, one would believe the horrendous conditions sufficiently undermined the victim's capacity to consent.<sup>24</sup>

The *Hooker* husband-defendant would not have obtained the acquiescence he received if he hadn't first violated the negative autonomy of his "adult victim." Pre-intercourse acts done by Cameron Hooker were uncommon: Few people (I presume) kidnap another person at knifepoint and chain their captive gagged and blindfolded to a bed. But once his deviant pre-intercourse *actus rei* were behind him, Mr. Hooker moved to sexual conduct that from the outside looks close to ordinary. Christopher locates in *Hooker* a paradox wherein "factual consent under adverse conditions that have become institutionalized or normalized may constitute legal

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DWORKIN, JUSTICE FOR HEDGEHOGS 4 (2011) (defining liberty as covering "that part of your freedom that government would do wrong to constrain"). I have contended that positive liberty is less important than negative liberty. BERNSTEIN, THE COMMON LAW, *supra* note 3, at 35 ("[T]he common law does not address our unmet needs for good things. Instead it heeds and honors our objections, resistances, and protests.").

Closer to Christopher's point, I have also noted that the common law "cares nothing about the utility that a human being might hold as a sexual receptacle for another person, or the possibility that venturesome traveling into the geography of someone else might be more commendable than a closed-off refusal to consider an offer of penetration." *Id.* at 141.

24. Christopher, *supra* note 22, at 161 (footnotes omitted) (citing *People v. Hooker*, 244 Cal. Rptr. 337, 338–39 (Ct. App. 1988) (depublished)). The *Hooker* facts are uglier than Christopher's summary indicates. Rather than mention them all, I quote below one passage from the decision that reports some of what Cameron Hooker did to the victim, a young woman named Colleen:

During this time, Hooker regularly practiced bondage on Colleen, suspending her from the rafters, constricting her breathing, whipping her, keeping her head encased in the headbox, tying her to the rack, shocking her with electrical cords, burning her pubic area with a heat lamp, and immersing her in the bathtub until she was unable to breathe. Colleen once estimated that Hooker hung her and whipped her 90 to 100 times in the first six months.

*Hooker*, 244 Cal. Rptr. at 339.

consent.”<sup>25</sup> Both the initiator and the target of his initiative live under these conditions.<sup>26</sup> Sharing with one’s aggressor a “lifeworld,”<sup>27</sup> the set of material and political circumstances that no one can entirely exit or tune out, has an impact on what a recipient of sexual initiative wants.

Christopher ascribes a point of view to the famed feminist scholar Catharine MacKinnon: Those aforementioned social conditions make it difficult, perhaps impossible, to say whether a woman has consented to an act of sexual intercourse with a man.<sup>28</sup> To put the point of view in front of us, I’ll quote a different passage from an early article.

Women, says MacKinnon, are

violated every day by men who have no idea of the meaning of their acts to women. To them, it is sex. Therefore, to the law, it is sex. That is the single reality of what happened. When a rape prosecution is lost on a consent defense, the woman has not only failed to prove lack of consent, she is not considered to have been injured at all. Hermeneutically unpacked, read: because he did not perceive she did not want him, she was not violated. She had sex. Sex itself cannot be an injury. Women consent to sex every day. Sex makes a woman a woman. Sex is what women are *for*.<sup>29</sup>

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25. Christopher, *supra* note 22, at 165.

26. For acknowledgment that my diction is awkward, see Anita Bernstein, *The Communities That Make Standards of Care Possible*, 77 CHI.-KENT L. REV. 735, 736–37 n.6 (2002) [hereinafter Bernstein, *Communities*]; Anita Bernstein, *Reciprocity, Utility, and the Law of Aggression*, 54 VAND. L. REV. 1, 13–14 (2001) [hereinafter Bernstein, *Aggression*]. I thank Sarah Swan for her stimulating insights about the diction problem.

27. “The lifeworld is the unproblematic, taken-for-granted setting in which actors are located spatially, temporally, and socially. . . . Actors interpret and define their situation, and formulate their plans, in reliance upon a ‘stock of knowledge’—socially conditioned and transmitted, and differentially distributed among a society’s members.” Hugh Baxter, *System and Lifeworld in Habermas’s Theory of Law*, 23 CARDOZO L. REV. 473, 511–12 (2002) (footnotes omitted) (citing 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* 124–25 (Thomas McCarthy trans., 1987) (1981); ALFRED SCHUTZ & THOMAS LUCKMANN, *THE STRUCTURES OF THE LIFEWORLD* 3–6, 19, 35–92, 113–16, 122, 124–25, 304–18 (Richard M. Zaner & H. Tristram Engelhardt, Jr. trans., 1973)).

28. Christopher, *supra* note 22, at 170–71.

29. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 652–53 (1983).



At the live version of this Symposium, Christopher wove this perspective together with a strand from the dystopian novel *The Handmaid's Tale*. The protagonist Handmaid of this book, Offred (“belonging to Fred”), lives under harsh violations of her liberty in consequence of being female in a society that subordinates female persons.<sup>30</sup> Offred reports sexual desires that extend beyond the leave-me-alone negative half of an autonomy binary.

For Christopher, the unsettling—and arguably harmful or self-destructive—wishes of Offred in fiction and human beings in real life deserve respect because they originate in autonomy of a different sort, the other half of liberty. MacKinnon’s focus on sex as violation, Christopher writes, “too greatly diminishes our positive autonomy.”<sup>31</sup> That focus “protects our negative autonomy exceedingly well. But it not only violates our positive autonomy, it nearly completely eliminates it.”<sup>32</sup>

*The Third Cohort: Vulnerabilities of Institutions Obligated to Comply  
with Title IX of the Civil Rights Act*

Institutions of higher learning that cannot personally experience a sexual assault or an unjust accusation of misconduct are categorically different from persons vulnerable to sexual assault and persons vulnerable to accusations of sexual assault. Entities have “no soul to damn, no body to kick.”<sup>33</sup> Yet they matter, here in the Symposium as elsewhere: half the Articles assembled here focus on them. Concluding with this cohort pays a closing tribute to the person who envisioned this Symposium. Recall that victim impact statements for Erin Sheley “transmit to the public the lived reality of something that may not seem intellectually plausible: sexual assault by an entity.”<sup>34</sup>

Hannah Brenner Johnson, Sarah Swan, Kelly Behre, and Erin Buzuvis build on Sheley’s view that entities are responsible for some of the sexual assaults that occur on their campuses. Commendably, in my view, all four

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30. MARGARET ATWOOD, *THE HANDMAID’S TALE* (First Anchor Books Movie Tie-In ed. 2017) (1986).

31. Christopher, *supra* note 22, at 171.

32. *Id.*

33. John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); *see also* Sheley, *supra* note 5, at 213 (blaming “a lack of imagination” for the tendency of corporations to escape punishment).

34. Sheley, *supra* note 5, at 226.

authors cite recent litigation in their Articles. Their interest in law on the ground brings immediacy to writings that also deliver nuance and original thinking. Just as Sheley and Fields espouse no partisan agreement with stances taken by persons vulnerable to sexual predation and Dripps and Christopher do not side categorically with accused persons over accusers, the four Articles in this concluding third of the Symposium are emphatically not advocating for the Title IX interests of colleges and universities. Indeed, they each separately want *more* accountability for these institutions. Accountability for colleges and universities amounts to vulnerability.<sup>35</sup>

*Reading Title IX to Protect Non-Students Present on Campus*

Hannah Brenner Johnson leads with *Doe v. University of Kentucky*,<sup>36</sup> a decision that considers whether rights and entitlements provisioned to students in Title IX extend to persons on campus who are not enrolled.<sup>37</sup> In advocating a yes answer to that question some of the time, Brenner Johnson has in mind individuals who exhibit traits in common with enrolled

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35. Consider, for example, the so-called “Dear Colleague Letter” imposed on this cohort in 2011. Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. In it the federal Department of Education told Title IX-covered institutions to use a relatively low standard of proof for sexual harassment and sexual violence claims. *See id.* A firestorm ensued, and in 2017 the Department under a new presidential administration withdrew much of this guidance. *See generally* Peter C. Anderson, Note, *The Evidentiary Standard in Collegiate Sexual Assault Proceedings During the Trump Administration*, 22 J. GENDER, RACE & JUST. 107 (2019) (exploring consequences of this development for institutions). Having to tell the Department of Education each year how many campus rapes were reported to them presumably stirs discomfort among university managers because a relatively high score threatens to alienate prospective students. *See* Editorial, *Admit Enrollment Is Chronically Down Because of Rape*, MONTANA KAIMIN (Oct. 14, 2015), [http://www.montanakaimin.com/opinion/admit-enrollment-is-chronically-down-because-of-rape/article\\_5cda5d6c-7142-11e5-845a-b39fa41e6dbe.html](http://www.montanakaimin.com/opinion/admit-enrollment-is-chronically-down-because-of-rape/article_5cda5d6c-7142-11e5-845a-b39fa41e6dbe.html) (adverting, in a student newspaper, to reports of rape as depressing enrollment at a flagship university); *cf.* Libby Nelson, *Ranking Colleges Based on Reported Campus Rapes Is a Horrible, Dangerous Idea*, VOX (June 8, 2016, 4:00 PM EDT), <https://www.vox.com/2016/6/8/11879626/colleges-most-rapes-ranked> (urging consumers not to infer much from a low or a high number because low can mean reporting is discouraged and high can show confidence among complainants that they will be heeded) (“Rape statistics aren’t just misleading—they’re meaningless.”).

36. 357 F. Supp. 3d 620 (E.D. Ky. 2019).

37. *See* Hannah Brenner Johnson, *Standing In Between Sexual Violence Victims and Access to Justice: The Limits of Title IX*, 73 OKLA. L. REV. 15 (2020).

students, her phrase “campus visitors (non-students)” implies peers, friends, and colleagues of the matriculated population.<sup>38</sup> The pseudonymous plaintiff who sought redress from the University of Kentucky “lived on campus,” “was involved in campus life,” and, perhaps most important, had a rental agreement for her dormitory room that required her to abide by university codes that governed students.<sup>39</sup>

Brenner Johnson argues that the Kentucky federal trial court erred when it ruled in favor of the university and against this plaintiff. “Colleges and universities, while reliant on the presence of and tuition generated by their enrolled students, cannot entirely depend on insiders to succeed,” Brenner Johnson explains.<sup>40</sup> Instead, “[t]hese educational institutions actively solicit, depend on, and profit from engagement with outsiders every single day to fulfill their educational mission.”<sup>41</sup> From here, the court continued to err when it said that the plaintiff lacked standing. That’s not what standing means, Brenner Johnson argues.<sup>42</sup>

Standing as a barrier to relief rests on a concern that permitting this plaintiff to prosecute a claim threatens the quality of a judicial decision.<sup>43</sup> No such danger is present when visitors who suffer sexual assault seek redress under Title IX. These outsiders are in a sense insiders, because their presence on campus advances the purpose and goals of the institution. “Although colleges and universities are bound by their own unique rules and norms and exist somewhat like communities within a broader community,” Brenner Johnson writes, “they require a steady stream of outsiders to meet their stated educational objectives.”<sup>44</sup>

#### *Discrimination in the Enforcement of Title IX*

Articles by Sarah Swan and Kelly Behre come together under this heading. Continuing chronologically from where Hannah Brenner Johnson left off—the entrance point to making a complaint—Sarah Swan addresses

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38. *Id.*

39. *Id.* at 25–26 (citing *Univ. of Ky.*, 357 F. Supp. 3d at 621–22, 631–32).

40. *Id.* at 20.

41. *Id.*

42. *Id.* at 30–32.

43. Robert J. Pushaw, Jr., *Limiting Article III Standing to “Accidental” Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 3 (2010) (“Moreover, standing enhances the quality of judicial decisions expounding federal law by ensuring that they are made in the context of a concrete dispute between adverse parties with a genuine stake in the outcome—not a mere intellectual or ideological interest in the law.”).

44. Brenner Johnson, *supra* note 37, at 32.

the resolution of complaints that universities receive from persons alleging injury.<sup>45</sup> Echoing Donald Dripps' identification of both over- and under-enforcement of rape crimes, Swan posits two types of error here: unfairness to accused persons and unfairness to accusers. And similar to how Dripps united his two problems under one banner, vagueness, Swan applies one label on this two-sided wrong: "discriminatory dualism."<sup>46</sup>

Swan finds analogies in other pairings of both too much and too little doled out to a subordinated group. My favorite of her illustrations is mortgage lending. African American candidates for home loans experienced first too little credit, in the era of redlining (a problem that continues) and, more recently, too much credit, when predatory lenders targeted them for exploitative mortgages.<sup>47</sup> In the Title IX version of discriminatory dualism, Swan argues that "many schools continue to participate in the historical tradition of mishandling campus sexual assault allegations and skewing Title IX procedures against complainants," while "other schools have recently moved in the opposite direction."<sup>48</sup>

I admire Swan's construct of discriminatory dualism, and commend her brilliant recent article that explains the phenomenon and backs it with stunning evidence.<sup>49</sup> Her Title IX application of the construct is, to this reader, less well supported. In contrast to bias against victims of sexual assault (a group in which we can include persons who both do and do not report or complain), which scholars have described in well-documented research,<sup>50</sup> bias that harms respondents is reported only in writings published outside of academic journals that lament what Swan calls "overcorrection."<sup>51</sup> Swan gives a respectful read to "Fairness for All Students Under Title IX," an essay by Elizabeth Bartholet, Nancy Gertner,

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45. Sarah L. Swan, *Discriminatory Dualism in Process: Title IX, Reverse Title IX, and Sexual Assault*, 73 OKLA. L. REV. 69 (2020).

46. *Id.* at 74.

47. *Id.*; see also KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019) (positing, in a historical context, the wrong of "predatory inclusion").

48. Swan, *supra* note 45, at 79.

49. Sarah L. Swan, *Discriminatory Dualism*, 54 GA. L. REV. 869 (2020). Swan's readers also await "Marrying Discriminatory Dualism." See Swan, *supra* note 45, at 75 n.29.

50. For a recent overview of the record, see Tara N. Richards, *No Evidence of "Weaponized Title IX" Here: An Empirical Assessment of Sexual Misconduct Reporting, Case Processing, and Outcomes*, 43 L. & HUM. BEHAV. 180, 181 (2019).

51. See Swan, *supra* note 45, at 73 n.19 (citing three popular articles found by symposium contributor Erin Buzuvis).

Janet Halley, and Jeannie Suk Gersen,<sup>52</sup> that got dubbed *The Revolt of the Feminist Law Profs* in a *Chronicle of Higher Education* story.<sup>53</sup> The claim in the *Chronicle* essay is that even feminists, not just rearguard defenders of male prerogative, now think Title IX resolution has gone too far in crediting accusations and punishing accused persons.<sup>54</sup>

Maybe it has and maybe it hasn't. I'd like to see the evidence. I do not doubt that Title IX enforcement has treated some number of accused individuals unfairly and reached some wrong results. The same could be said about every dispute resolution mechanism ever used anywhere. Both sexual predation and being accused of sexual predation are unpleasant experiences; adding institutional attention fuels this fire.<sup>55</sup> After centuries of no remedy for sexual assault, the dawn of a new-ish era where respondents as well as victims are made to suffer is a setback for the respondent half of the binary.

Enter lamentations over due process, covered separately by Swan and Kelly Behre. In their essay Bartholet, Gertner, Halley, and Gersen complained that Title IX procedures have denied accused persons powers and opportunities they want, including confrontation of their accusers, the assistance of counsel, appeals of adverse results, and a high hurdle of proof before penalties may ensue.<sup>56</sup> Swan reviews two cases.<sup>57</sup> “Contrary to popular rhetoric,” counters Professor Behre, “students responding to complaints of student code violations involving sexual misconduct (as well as dating violence, domestic violence, and stalking) do not have fewer due

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52. Elizabeth Bartholet et al., *Fairness for All Students Under Title IX* (Aug. 21, 2017), <https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf?sequence=1&isAllowed=y>.

53. Wesley Yang, *The Revolt of the Feminist Law Profs: Jeannie Suk Gersen and the Fight to Save Title IX from Itself*, CHRON. HIGHER EDUC. (Aug. 7, 2019), <https://www.chronicle.com/interactives/20190807-feminist-law-profs>.

54. *Id.*

55. Adjudication will now and then lob a bit of good news to a plaintiff or defendant, I once wrote, but more often “it makes people feel like losers.” Bernstein, *Communities*, *supra* note 26, at 739.

56. *See* Yang, *supra* note 53.

57. Swan, *supra* note 45, at 79–80 (reviewing *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019)); *id.* at 80 (reviewing the disciplinary proceedings of Francisco Sousa at San Diego State University).

process rights than students responding to other types of student code violations. They have more.”<sup>58</sup>

Sexual misconduct occupies only a tiny percentage of behaviors proscribed in student codes.<sup>59</sup> Students may not rape or stalk, but they also may not commit theft, (nonsexual) assault, vandalism, illicit drug use, underage drinking, academic cheating, on and on.<sup>60</sup> For generations, those who broke these campus rules have been punished,<sup>61</sup> and if any of them had the chance to question their accusers or hire a lawyer or gain timely process or attack anyone’s credibility, what they enjoyed was a grace or privilege rather than a right.<sup>62</sup> But when the misbehavior is sexual, due process for the accused is apt to kick in. Behre gives a close read to *Doe v. Allee*, a recent decision holding that students accused of sexual misconduct within California colleges and universities have due process rights—rights that are not held by students accused of other code violations.<sup>63</sup>

*Toward More Accountability: Official Policy Liability*

Erin Buzuvis boldly suggests that universities might have “official policies of indifference to sexual misconduct.”<sup>64</sup> Not deliberate indifference, a different standard on which claims tend to founder,<sup>65</sup> but a policy of proceeding as if risks don’t exist and declining to learn about sources of danger.<sup>66</sup> When institutions take a stance of disbelief in the reality of this danger at a point when reasonable people would guard against it, their posture can fairly be called their policy.

Professor Buzuvis’s Article nicely illustrates the pattern I have found in the symposium: To understand the point of view held by a cohort is not

58. Kelly Alison Behre, *Rape Exceptionalism Comes to California: Institutionalizing the Credibility Discount of College Students Reporting Sexual Misconduct*, 73 OKLA. L. REV. 101, 109 (2020) (footnote omitted).

59. *Id.* at 107.

60. *Id.*

61. *Id.*

62. *Id.* at 106 n.27.

63. *Id.* at 102–05 (discussing *Doe v. Allee*, 242 Cal. Rptr. 3d 109 (Ct. App. 2019)).

64. Erin E. Buzuvis, *Title IX and Official Policy Liability: Maximizing the Law’s Potential to Hold Education Institutions Accountable for Their Responses to Sexual Misconduct*, 73 OKLA. L. REV. 35, 36 (2020).

65. “Deliberate indifference” as a Title IX judicial standard comes from *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 291 (1998), and *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999). See also Buzuvis, *supra* note 64, at 40–41 nn. 29–30, 36.

66. Buzuvis, *supra* note 64, at 42–43, 51–53.

necessarily to side with that cohort in litigation. More overtly than the other three writers who address the third cohort, Buzuvis wants to make universities more vulnerable to Title IX liability, not less. To Buzuvis, decisional law from 2016–2018 that accepted official policy liability points forward.<sup>67</sup> “[O]fficial policy liability possesses untapped potential for leveraging Title IX to hold educational institutions accountable for instances of sexual assault and misconduct.”<sup>68</sup>

### *Conclusion*

“Untapped potential,” the phrase applied three lines ago to an emerging doctrinal development,<sup>69</sup> also awaits in the works gathered in this Symposium. As contributors have shown, consent as an element of doctrine present in the resolution of sexual assault claims engages three cohorts. First, persons vulnerable to sexual predation might have consented to what they experienced. Second, persons accused of sexual predation might have engaged in what criminal law calls an actus reus without consent. Third, institutions tasked with adjudicating or otherwise processing accusations of sexual predation might have to determine the presence or absence of consent.

Authors gathered in these pages have identified these three cohorts while not necessarily identifying *with* them. Persons vulnerable to sexual predation, persons vulnerable to accusations of sexual predation, and institutions obliged to comply with Title IX of the Civil Rights Act form a triangle of responsibility and redress.<sup>70</sup> This Symposium gives us not only recommendations on what the law ought to provide but an anatomy of stakeholders and consequences.<sup>71</sup>

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67. See *id.* at 60 n.153 (citing *Doe v. Baylor Univ.*, 240 F. Supp. 3d 646, 654–56 (W.D. Tex. 2017); *Doe v. Baylor Univ.*, 336 F. Supp. 3d 763, 769–70 (W.D. Tex. 2018)); see also *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d 788, 807 (M.D. Tenn. 2016).

68. Buzuvis, *supra* note 64, at 67.

69. See *id.*

70. I borrow the phrase from a casebook title. JOHN C.P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS (4th ed. 2016).

71. Elsewhere I have explored the accuser-accused-adjudicator/observer triad at greater length. See Bernstein, *Aggression*, *supra* note 26.