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The Joy of Sex Bureaucracy

Susan Frelich Appleton* & Susan Ekberg Stiritz**

*This essay responds to *The Sex Bureaucracy*, in which Jacob Gersen and Jeannie Suk condemn regulations of sexual conduct they see metastasizing on college campuses, pursuant to Title IX's mandate for equal educational opportunities in institutions receiving federal funds. We focus on the authors' most trenchant critique, which slams efforts to teach sexual health principles and practices on the ground that, in doing so, universities are "regulating sex itself" and interfering with "ordinary sex." By placing recent sexual health and violence prevention measures in historical and cultural context, we challenge the authors' assumption that, absent such instruction, sex occurs naturally and unproblematically on college campuses. In addition, contrary to the authors' negative assessment, we highlight the value and promise of some of the newer developments they contest. We understand such interventions as a form of sex education, which we call "higher sex education," given both the campus loci and the advancements apparent when compared to many more familiar sex curricula. We show, in context, why such instruction belongs in higher educational institutions and how it has the potential to transform campus sexual cultures and enhance students' sexual unfolding—preparing them for healthier and more pleasurable sexual futures. We conclude by noting ways in which higher sex education might improve as it continues to evolve.*

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*Knowledge [about sex] . . . informs, improves, and optimizes the maps
of young people growing up.*

—Alex Comfort, *The Joy of Sex*¹

INTRODUCTION

In their article *The Sex Bureaucracy*,² Jacob Gersen and Jeannie Suk describe and criticize the regulations of sexual conduct that they see metastasizing on college campuses, pursuant to Title IX’s mandate for equal educational opportunities in institutions receiving federal funds. Although Gersen and Suk concede that sexual assault on campus and elsewhere constitutes a serious problem,³ they take aim at the emerging responses. They argue that these responses clash with the trend of deregulating sex in criminal and constitutional law, impose overbroad and intrusive morals rules,⁴ and exemplify the problem of institutional mismatch when the policies and directives come from outside the organization with primary responsibility for the regulated activity.⁵ The authors reserve their most trenchant critique, however, for their conclusion that “the federal bureaucracy is now regulating sex itself”⁶ or interfering with “ordinary sex,” which they define as “voluntary adult sexual conduct that does not harm others”⁷ and which they assume would, without interference, occur naturally and unproblematically.

We begin this response by contextualizing the bureaucracy that Gersen and Suk disapprove. This context, which includes historical information that Gersen and Suk omit, in turn provides a foundation for our principal argument: we challenge the authors’ suggestion that “sex itself” on campus occupied a regulation-free zone before the advent of the sex bureaucracy, and—contrary to

1. ALEX COMFORT, *THE JOY OF SEX* 78 (2008) (originally published in 1972).
2. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881 (2016).
3. *Id.* at 886.
4. *See id.* at 948.
5. *See id.* at 947–48.
6. *Id.* at 883.
7. *Id.* at 885.

the authors' negative assessment—we highlight the value and promise of some of the interventions that colleges and universities have undertaken with federal prodding. We understand such interventions as a form of sex education, and we call them “higher sex education,” given both their campus loci and the advancements they represent when compared to many more familiar sex curricula. In particular, we show, in context, why such instruction belongs in higher educational institutions and how such instruction has the potential to enhance students' sexual unfolding⁸—preparing them for healthier and more pleasurable sexual futures. This position in turn, however, raises concerns for us about young adults who do not have access to sexuality education and services, which the World Health Organization (WHO) has identified as essential to basic human rights.⁹

I.

CONTEXTUALIZING THE SEX BUREAUCRACY

Proposing to explore the “landscape” of a “new sex bureaucracy,” Gersen and Suk construct a timeline of regulatory “creep” to support their account of aggressive federal intrusion into the “ordinary sex” lives of U.S. citizens today.¹⁰ In this Section, we challenge their starting point in two ways, taking both a longer look and a broader look. First, we claim that their timeline is misleading because it is foreshortened. They use today's federal administration of Title IX as their evidence to support a more general claim about encroaching threats to personal freedoms.¹¹ In focusing on this contemporary development, however, they omit earlier chapters in a much longer story. We provide background material that could illuminate a more historical and relevant topography of federal involvement in sex, sexuality education, and gendered relations in American society and that could also afford a more nuanced understanding of the regulation of sex generally. Put differently, even if the cadre of Title IX officers and other staff recently hired by universities to

8. See generally Lorna J. Sarrel & Philip M. Sarrel, *Sexual Unfolding*, 2 J. ADOLESCENT HEALTH CARE 93 (1981).

9. In explaining the importance of sexuality education, WHO posits a right to be informed and relies on the World Association of Sexual Health to describe “sexual rights as an integral component of basic human rights and therefore as inalienable and universal.” WHO REGIONAL OFFICE FOR EUROPE AND BZGA, STANDARDS FOR SEXUALITY EDUCATION IN EUROPE: A FRAMEWORK FOR POLICY MAKERS, EDUCATIONAL AND HEALTH AUTHORITIES AND SPECIALISTS 21 (2010).

10. See Gersen & Suk, *supra* note 2, at 883–84, 886.

11. See *id.* at 897–905; see also Jacob E. Gersen, *How the Feds Use Title IX to Bully Universities*, WALL ST. J. (Jan. 24, 2016, 4:08 PM), <http://www.wsj.com/articles/how-the-feds-use-title-ix-to-bully-universities-1453669725> [<https://perma.cc/3U7U-TCWG>] (criticizing administrative shortcuts used to develop standards for university compliance with Title IX).

address problems of sexual assault constitutes a new phenomenon,¹² we contest the novelty of what this particular regulatory move represents.

Second, we challenge the assumption that, but for today's Title IX-inspired bureaucracy, campus sex would occupy a free, unregulated, and natural space. By widening the lens used by Gersen and Suk, we consider campus culture and other social forces that shape sexual practices. In contextualizing today's bureaucratic interventions in this manner, we shift the focus from the erroneous belief that we can deregulate sex to a more productive inquiry about how we might improve the unavoidable regulation of sex.

A. *Sex Curricula, Then and Now*

1. *The Federal Role*

Gersen and Suk attack the rise of a bureaucracy that they trace in large part to Title IX of the Education Amendments of 1972, which prohibits sex discrimination “under any education program or activity receiving Federal financial assistance.”¹³ Violations can subject an institution to loss of federal funds.¹⁴ Although enacted in 1972, Title IX's use as a means to combat sexual harassment and sexual violence on campus constitutes a much more recent development, officially launched by the Office of Civil Rights in 2011.¹⁵ In attempting to avoid Title IX violations, colleges and universities have become, according to Gersen and Suk, “bureaucrats of desire,”¹⁶ providing instruction to students about how to achieve “great sex and relationships”¹⁷ and “a positive sexual culture.”¹⁸

Our effort to provide historical context for these developments requires us to begin the story at an earlier point in time. Public sex education began as a sex-negative intervention in the Progressive Era, when government's activism sought to address problems and anxieties engendered by what some have described as the first sexual revolution.¹⁹ Victorian or Edwardian

12. See Anemona Hartocollis, *Colleges Spending Millions to Deal With Sexual Misconduct Complaints*, N.Y. TIMES (Mar. 29, 2016), <http://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html> [<https://perma.cc/X3FD-W8HJ>].

13. 20 U.S.C. § 1681(a) (1972); see Gersen & Suk, *supra* note 2, at 897.

14. 20 U.S.C. § 1682 (1972).

15. For additional details, see Gersen & Suk, *supra* note 2, at 900. Moreover, the trajectory is likely to continue, with additional reforms like the proposed bipartisan Campus Accountability and Safety Act, introduced in 2015 by Senator Claire McCaskill. S. 590, 114th Cong. (2015).

16. Gersen & Suk, *supra* note 2, at 924.

17. *Id.* at 925 (quoting *Consent*, BROWN UNIV., <https://www.brown.edu/campuslife/health/services/promotion/sexual-assault-dating-violence-consent/consent>).

18. *Id.* (quoting YALE UNIV., 2013 ANNUAL REPORT ON CAMPUS SECURITY AND FIRE SAFETY 2013, at 21 (2014), <http://publicsafety.yale.edu/sites/default/files/files/Yale%20Clery%20Report%202013.pdf>).

19. See KRISTIN LUKER, *WHEN SEX GOES TO SCHOOL: WARRING VIEWS ON SEX—AND SEX EDUCATION—SINCE THE SIXTIES* 37–44 (2006).

respectability—characterized by women’s sexual modesty, reticence, and maternal priorities—was giving way to greater openness about sexual behavior. According to Kristin Luker’s account, the first public sexual health education, launched in 1913, aimed to protect families from venereal disease brought home to wives and children by husbands and fathers.²⁰ With antibiotics not yet discovered, some put the venereal disease rate among males at almost 20 percent.²¹ Becoming scourges of families, gonorrhea and syphilis correlated with prostitution²² and rising divorce rates, which climbed dramatically between 1880 and 1920.²³ Family size shrunk from roughly seven children to just over three between 1800 and 1900.²⁴

Reformers sought to address the erotic excesses they saw. A group of white elite society leaders founded the American Social Hygiene Association (ASHA),²⁵ the nation’s first organization to propose national sex education. They saw changing sexual behavior as *the* salient actant in healing social and family distress.²⁶ The reformers sought to convince the government to intervene.²⁷

Eliminating the sexual double standard emerged as the ASHA’s core objective.²⁸ The organization aimed to foster in men gentler love and more spiritualized sexual expression similar to women’s in order to reinstate the family as the proper building block of society, to strengthen marriage, and to de-eroticize sex outside of marriage.²⁹

The reformers’ messages attracted the support of the Young Men’s Christian Association, the Young Men’s Hebrew Association, the General Federation of Women’s Clubs, and the predecessor of the Parent Teacher Association.³⁰ The reformers clearly communicated that only proper sexual

20. *Id.*; ALLAN M. BRANDT, NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880 at 38 (1985).

21. BRANDT, *supra* note 20, at 12–13.

22. *Id.* at 31; *see also* LUKER, *supra* note 19, at 41.

23. LUKER, *supra* note 19, at 47.

24. *Id.* at 46.

25. *See id.* at 38–39.

26. *Id.* at 38; *see also* JANICE M. IRVINE, TALK ABOUT SEX: THE BATTLES OVER SEX EDUCATION IN THE UNITED STATES 6 (2002).

27. BRANDT, *supra* note 20, at 25–26 (discussing the American Society for Sanitary and Moral Prophylaxis’s efforts to bring sex education to the classroom). Not only are today’s government-initiated interventions in “ordinary sex” not new forms of public action but examples arising in the early twentieth century also weren’t entirely new either. Members of ASHA could borrow the model of a longstanding governmental agency, becoming a sexual health Commission Corps, which was a public health program for sick and disabled seamen created by John Adams in 1798 and which eventually became the American Public Health Service in 1889 (renamed the Public Health Service in 1912). For such historical information, see *History*, COMMISSIONED CORPS OF THE U.S. PUB. HEALTH SERV. (Sept. 5, 2014), <http://www.usphs.gov/aboutus/history.aspx> [<https://perma.cc/3FA3-872L>].

28. LUKER, *supra* note 19, at 43.

29. *See id.* at 53–57.

30. *Id.* at 40–41.

behavior could cure what ailed American society. So compelling was their vision that, by World War I, the federal government was teaching it to draftees. The federal government distributed over a million pamphlets; gave over 775,000 men approved lectures; and commissioned a film, *Fit to Fight*, which at least 50,000 soldiers viewed.³¹ One million schoolboys saw a government slide show created to discourage masturbation and extramarital sex, in turn prompting preparation of a parallel one for girls.³²

The legacy of these earlier sex-negative programs lives on in abstinence-only education, which has received federal funding since 1981.³³ Abstinence-based lessons in primary and secondary schools, driven by federal support for sex education that meets prescribed conditions,³⁴ stand out for two reasons. First, such programs provide a well-established present-day precedent for sex education as a matter of federal interest and authority. (True, today's Title IX-based interventions are more coercive than the federal government's longstanding approach to sex education because violations of Title IX jeopardize all of an institution's federal funding rather than simply permitting or withholding funds for a sex education program itself.³⁵) Second, the content of abstinence programs has been shown to be misguided, ineffective, and highly gendered.³⁶ Even "comprehensive sex education," which can now receive federal funding, is sex negative to the extent it omits the topic of sexual pleasure.³⁷ Such instruction leaves students unprepared for mature and egalitarian sexual relationships. Thus, perversely, federally incentivized sex education for pre-college students has created conditions that make all the more compelling the need for interventions in higher education. In other words, "bad" sex education in elementary and high schools, supported by the federal government, leaves students in need of corrective lessons that are now beginning to emerge at the college level thanks to Title IX-driven pressure to eliminate sexually oppressive conditions on campus.

31. *Id.* at 59.

32. *Id.*

33. See John Santelli et al., *Abstinence and Abstinence-Only Education: A Review of U.S. Policies and Programs*, 38 J. ADOLESCENT HEALTH 72, 75 (2006).

34. 42 U.S.C. § 710 (2010).

35. See *supra* note 14 and accompanying text.

36. See, e.g., Jennifer S. Hendricks & Dawn Marie Howerton, *Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools*, 13 U. PA. J. CONST. L. 587 (2011); Santelli et al., *supra* note 33.

37. In 2010, Congress left abstinence-only grants in place but, as part of health care reform, also made funds available to the states for "personal responsibility education," which teaches about abstinence, contraception, and protection from sexually transmitted diseases. See 42 U.S.C. § 713 (2010). But even this more expansive approach typically omits more sex-positive emphases found in other countries. See, e.g., PEGGY ORENSTEIN, *GIRLS & SEX: NAVIGATING THE COMPLICATED NEW LANDSCAPE* 221 (2016).

2. Collegiate Sex Education

Until the late 1960s, many colleges and universities policed student sex and morality by assuming a parental role.³⁸ Although the doctrine of *in loco parentis* (in place of the parent) rationalized a variety of restrictions on student autonomy, curfews, single-sex dormitories, and rules about how and where males and females could socialize³⁹ were obviously designed to limit sexual interactions. *In loco parentis* atrophied in the 1960s and 1970s, with students attaining freedoms emphasized by important social movements in which many of them were participating—civil rights, women’s liberation, opposition to the Vietnam War, and the (second) sexual revolution.⁴⁰ The demise of *in loco parentis*, however, only helps to expose other campus sex regulations that have existed both before and after that time.

Sex education courses, which began as marriage courses, originated in two- and four-year colleges and universities in the 1920s.⁴¹ By 1949, 500 colleges and universities were offering such courses,⁴² some of which have provoked criticism for promoting conventional mores.⁴³ When Alfred Kinsey, a latecomer to the field, delivered his first course at Indiana University in 1938,⁴⁴ its sex positivity stood out.⁴⁵ Kinsey’s courses attest to the possibilities when facts are emphasized rather than biases accepted. A scientist more than a teacher, Kinsey distinguished his course by the knowledge he acquired from researching answers to questions his students asked. Kinsey discovered an extraordinary diversity in human sexual behavior⁴⁶ and taught, despite opposition, that sexual practice before marriage improved marital sexual experience.⁴⁷ Kinsey offered these courses for seven sessions, but then turned his efforts entirely to the research that ultimately exploded many misunderstandings about sexuality.⁴⁸

38. Philip Lee, *The Curious Life of In Loco Parentis at American Universities*, 8 HIGHER ED. IN REV. 65 (2011).

39. *See id.* at 67–69.

40. *See* ROBERT O. SELF, *ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S* 194 (2012). According to Luker, “some scholars even argue that the period from roughly 1880 to 1920 saw the *only* real sexual revolution in American history, and that the cultural changes in sexuality during the 1960s and 1970s were mere aftershocks.” LUKER, *supra* note 19, at 44.

41. Donna J. Drucker, “A Noble Experiment”: *The Marriage Course at Indiana University, 1938–1940*, 103 IND. MAG. HIST. 231, 232 (2007).

42. Beth Bailey, *Scientific Truth . . . and Love: The Marriage Education Movement in the United States*, 20 J. SOC. HIST. 711, 715 (1987).

43. *See id.* at 726.

44. Drucker, *supra* note 41, at 236.

45. *See generally id.*

46. *Id.* at 232–33.

47. *Id.* at 256.

48. *See id.* at 232.

Interventions dating from the early 1970s that aimed to facilitate “sexual unfolding”⁴⁹ provide a more recent example showing how post-secondary education can support young peoples’ growth beyond expanding the purely cognitive. Lorna and Phillip Sarrel, “sexologists”⁵⁰ who graduated from William Masters and Virginia Johnson’s training program in St. Louis in 1971,⁵¹ came to Yale University after it started accepting women students in 1969 to provide counseling and gynecological care for them. The sexologists recognized that post-secondary institutions should provide supportive environments for students’ sexual development to fulfill the mission of educating the whole person, and they insisted on including counseling and medical services for men as well as women. After ten years directing Yale’s Sexual Counseling Service (SCS), the Sarrels estimated that they had treated 4,000 students and educated 6,000 students in human sexuality classes.⁵²

The Sarrels saw support of students’ sexual development as a necessary part of humanistic education. They began their book *Sexual Unfolding: Sexual Development and Sex Therapies in Late Adolescence* with this caveat:

In concerning ourselves with the personality and emotional life of college students, we are following in a tradition of concern for the quality of life and for humanistic values as a vital and appropriate part of education—a tradition which extends back to the Greeks, but a tradition that is sometimes eclipsed by other concerns and other philosophies of education.⁵³

The Sarrels’ work was partially funded by the National Institute of Mental Health,⁵⁴ and they became recognized leaders in campus gynecological counseling and medical services. Many universities sought to imitate their success. In 1979 they published their book⁵⁵ as a guide for students and a

49. “Sexual unfolding” is a complex, multifaceted process Lorna and Philip Sarrel hypothesized occurring in young people between the ages of around fourteen and twenty-four. They explained that “[w]hen unfolding is successful the person becomes capable of satisfying sexual and psychological intimacy with another (nonfamily) person (or persons).” LORNA J. SARREL & PHILIP M. SARREL, *SEXUAL UNFOLDING: SEXUAL DEVELOPMENT AND SEX THERAPIES IN LATE ADOLESCENCE* 19 (softcover ed. 1995).

50. See Drucker, *supra* note 41, at 263.

51. SARREL & SARREL, *supra* note 49, at 2, 163.

52. See Sarrel & Sarrel, *supra* note 8, at 93. According to a recent account by Philip Sarrel, the program, which included a course called Topics in Human Sexuality, reached almost 80 percent of students who attended Yale between 1970 and 1995, while, during that period fifty thousand copies of a booklet entitled *Sex and the Yale Student* were distributed. Email from Philip Sarrel to Susan Stiritz (May 6, 2016, 12:02 PM EDT) (on file with authors).

53. SARREL & SARREL, *supra* note 49, at 3–4; see also Lorna Sarrel, *Sex Counseling at Yale*, *PERSONNEL AND GUIDANCE* J. 382, 383 (1976) (“[I]f higher education is truly committed to enhancing the quality of human existence, then what better place than to start with its own students?”).

54. Philip Sarrel provided this information via email. Email from Philip Sarrel, *supra* note 52.

55. See generally LORNA J. SARREL & PHILIP M. SARREL, *SEXUAL UNFOLDING: SEXUAL DEVELOPMENT AND SEX THERAPIES IN LATE ADOLESCENCE* (1979).

manual for others seeking instructions for running similar programs.⁵⁶ Ultimately, they advised more than thirty universities about developing sex education and counseling programs for students built on models from Yale.⁵⁷

According to the Sarrels, “sexual unfolding” requires learning over time,⁵⁸ and they taught their students that “ordinary sex,” which Gersen and Suk suggest constitutes sexual maturation, does not happen automatically.⁵⁹ The Sarrels saw sexual unfolding as a differentiated adolescent psychological growth process “involving a realization of sexual response capacity, recognition of sexual preferences, and development of the capacity for sharing sexual pleasure in a loving relationship.”⁶⁰ They noted the many skills young people needed to attain the openness, communication ease, and affectionate intimacy required for good sex, and—because they were sensitive to what Masters and Johnson taught them about the importance of first sexual experiences in conditioning a dysfunctional pattern of response⁶¹—the Sarrels paid close attention to students’ concerns and desires for help in this area.

One needs only to realize that the United States is the only industrial nation that emphasizes abstinence education to understand the low levels of sexual activity found among Americans. Abstinence education assumes that sex consists of actions one chooses to perform rather than part of a developmental process resulting in capability, for which one’s potential may be

56. In the Foreword to the Sarrels’ *Sexual Unfolding*, Ruth W. Lidz and Theodore Lidz call the book “a superb guide to how to offer sexual counseling services to a university community” and “how to provide guidance for the sexually perplexed.” SARREL & SARREL, *supra* note 49, at xi. A reviewer described it as “an essential text for college health services, for health care settings in which adolescents are followed into young adulthood, and for anyone who provides sexuality counseling.” Richard R. Brookman, *Book Review*, 2 J. ADOLESCENT HEALTH CARE 77, 78 (1981).

57. Email from Philip Sarrel, *supra* note 52.

58. Sarrel & Sarrel, *supra* note 8, at 96.

59. *Id.*

60. *Id.* at 93. They originally listed nine processes:

1. An evolving sense of the body—toward a body image that is gender specific and fairly free of distortion (particularly about the genitals);
2. The ability to overcome or modulate guilt, shame, fear, and childhood inhibitions associated with sexual thoughts and behavior;
3. A gradual loosening of the primary emotional ties to parents and siblings;
4. Learning to recognize what is erotically pleasing and displeasing and being able to communicate this to a partner;
5. Resolution of conflict and confusion about sexual orientation;
6. A sexual life, free of sexual dysfunction or compulsion;
7. A growing awareness of being a sexual person and of the place and value of sex in one’s life, including options such as celibacy;
8. Becoming responsible about oneself, one’s partner, and society, e.g., using contraception and not using sex as a means of exploitation of another; and
9. A gradually increasing ability to experience eroticism as one aspect of intimacy with another person—not that *all* eroticism occurs then, in an intimate relationship, but that this fusion of sex and love is possible.

Id. They later added a tenth process, first intercourse. SARREL & SARREL, *supra* note 49, at xiv.

61. SARREL & SARREL, *supra* note 49, at 179.

minimized or maximized.⁶² The “just say no” approach minimizes or extinguishes sexual capability.⁶³ American citizens ranked number twenty-four out of twenty-six countries in Durex’s rating of the frequency of sex.⁶⁴ About 15 percent of married men and women in this country have mostly sexless marriages.⁶⁵

B. *Sexual Scripts and the Hidden Curriculum*

Even if Gersen and Suk would reject as excessive regulation of “ordinary sex” all the past educational efforts that we have described, they would still need to confront another problem—the regulatory force of dominant sexual scripts and “the hidden curriculum.”⁶⁶ Put differently, we believe that Gersen and Suk idealize an essentialist view of human sexuality, directed by natural instincts and needing no purposeful intervention.

In contrast, script theorists like sociologist Ken Plummer understand *all* sexualities and sexual actions (including “ordinary sex” and “sex itself”) as learned behavior, shaped by local cultures and norms.⁶⁷ Accordingly, even as college students “gropingly attempt . . . to make ‘sexual sense’ of selves, situation and others,”⁶⁸ they follow “loose ‘scripts’ which ‘name the actors,

62. In describing their program, the Sarrels identified their goal as “realization of the potential that sexuality holds.” Lorna M. Sarrel & Philip J. Sarrel, *Birth Control Services and Sex Counseling at Yale*, 3 *FAM. PLANNING PERSPECTIVES* 33, 36 (1971); cf. Leonore Tiefer, *Sex Therapy as a Humanistic Enterprise*, 21 *SEX & RELATIONSHIP THERAPY* 359, 362 (2016).

63. The Sarrels found that 80 percent of patients with sexual dysfunction come from backgrounds of the major religions. SARREL & SARREL, *supra* note 49, at 180.

64. *The U.S. Ranks 24th in Frequency of Sex*, RANKING IN AMERICA (AUG. 17, 2010), <https://rankingamerica.wordpress.com/tag/sex/page/2/> [<https://perma.cc/P5D8-Y58M>].

65. EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 88–89 (1994) (combining numbers for those who had no sex in the past year and those who had sex a few times in the past year); Denise A. Donnelly & Elizabeth O. Burgess, *The Decision to Remain in an Involuntarily Celibate Relationship*, 70 *J. MARRIAGE & FAM.* 519, 519 (2008). A recent survey, based on almost 16,000 Americans between the ages of eighteen and sixty, found 12 percent had not had sex in last three months. AUSTIN INSTITUTE FOR THE STUDY OF FAMILY AND CULTURE, *RELATIONSHIPS IN AMERICA* 3, 33 (2014), <http://relationshipsinamerica.com/pdf/Relationships%20in%20America%202014.pdf>.

66. See, e.g., Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 *HARV. C.R.-C.L. L. REV.* 309, 317 (1980). The “hidden curriculum,” a term developed in analyses of elementary and high school education, refers to all the influences outside of the formal curriculum that necessarily inculcate values in students—“role models teachers provide, the structure of classrooms and of teacher-student relationships, the way in which the school is governed, the ways in which the child’s time is parceled out, learning subdivided and fragmented, attitudes and behaviors rewarded and punished.” *Id.* The idea aptly applies in the college and university settings as well even if the powerful influences might differ, such as whether the university has fraternities and sororities, how it structures residential life, how its disciplinary code operates, how it treats alcohol, and how students interact with their peers against these background factors, sexually and otherwise.

67. E.g., Ken Plummer, *Symbolic Interactionism and Sexual Conduct: An Emergent Perspective*, in *SEXUALITY AND GENDER* 20 (Christine L. Williams & Arlene Stein eds., 2002); see also JEFFREY WEEKS, *SEXUALITY* 23 (3d ed. 2010).

68. Plummer, *supra* note 67, at 23.

describe their qualities, indicate the motives for the behavior of the participants, set the sequence of appropriate activities – both verbal and non-verbal.”⁶⁹ Contemporary campus sexual cultures—for example, “the hook-up culture,”⁷⁰ “the rape culture,”⁷¹ and “the frat culture”⁷²—provide some of today’s most salient scripts for student populations. Yet, the positive hope underlying script theory is that scripts are amenable to change—that what is constructed can be deconstructed and reconstructed to accord more closely with contemporary values and aspirations.⁷³

Gersen and Suk use script theory for limited purposes when they write that sexual climate surveys help “construct the sexual norms and perceptions that the survey purports to measure.”⁷⁴ Yet, their critique seems to assume some sort of “natural” baseline, instead of appreciating that sex is *always* shaped and regulated by social processes.⁷⁵ Given this truism about the social construction of sexuality, the more significant issues concern “what kinds of regulations exist and to what end.”⁷⁶

In contemporary American cultures, including those subcultures that have long shaped sexual practices on college campuses, the short answer to the question about “what end” such regulations serve, according to several investigations, is the pleasure and supremacy of men.⁷⁷ What Gersen and Suk understand as “ordinary sex” on campus emerges as an artifact of patriarchal values. Many high school girls and college women have active sex lives in which they willingly participate, but studies show that they do so principally to please men and that they receive little enjoyment themselves.⁷⁸

69. *Id.* at 23–24.

70. Paula England et al., *Hooking Up and Forming Romantic Relationships on Today’s College Campuses*, in THE GENDERED SOCIETY READER 578 (Michael Kimmel & Amy Aronson eds., 4th ed. 2011); see Katharine K. Baker & Michelle Oberman, *Women’s Sexual Agency and the Law of Rape in the 21st Century*, 69 *STUD. L., POL. & SOC’Y.* 63 (2016).

71. *E.g.*, Deborah Tuerkheimer, *Rape on and off Campus*, 65 *EMORY L.J.* 1 (2015).

72. *See, e.g.*, Erich Schwartzel, *Nick Jonas Brings Examination of College Frat Culture to Sundance*, *WALL ST. J.* (Jan. 23, 2016, 11:10 AM), <http://blogs.wsj.com/speakeasy/2016/01/23/nick-jonas-goat-sundance/> [<https://perma.cc/R5NA-USJY>].

73. Missing from Gersen and Suk’s analysis is any contemporary model of cultural change in which definitions are in flux as conflicting groups vie for their version of truth. *Cf.* Gersen & Suk, *supra* note 2, at 931 (overlooking the ubiquity of change).

74. *Id.* at 891, 918–19; *see also id.* at 891 (conceding that sex is thoroughly regulated but asserting that regulation of sex is growing).

75. SELF, *supra* note 40, at 12 (“The question is not *whether* gender, sex, and family are structured and regulated by the state; the question is what kinds of regulations exist and to what end.”).

76. *Id.* Gersen and Suk raise a parallel question: “How is the federal bureaucracy regulating sex and to what end?” Gersen & Suk, *supra* note 2, at 886.

77. England et al., *supra* note 70; *see* MICHAEL KIMMEL, *GUYLAND: THE PERILOUS WORLD WHERE BOYS BECOME MEN* 217, 219 (2008) (“The Guy Code insists that men get as much sex as they can.”); *id.* at 237–40 (theorizing relationship among intense male bonding, competition, status, and gang rape on campus).

78. *See* ORENSTEIN, *supra* note 37, at 53–56; England et al., *supra* note 70, at 581–84; Baker & Oberman, *supra* note 70, at 93; *see also* MARCIA DOUGLASS & LISA DOUGLASS, *THE SEX YOU WANT: A LOVER’S GUIDE TO WOMEN’S SEXUAL PLEASURE* 3 (2002) (“Seventy-five percent of men

Observers might well disagree about whether this phenomenon poses a problem of sex discrimination under Title IX⁷⁹ or even causes harm—especially legally cognizable harm.⁸⁰ We think that the muting of female sexuality accustoms women to scripts that can mute success across their lives.⁸¹ But for those who might disagree, we emphasize a different point: the regulation of sex on campus is nothing new and, even if joyless sex proves harmless, it still leaves much room for improvement. Although Gersen and Suk deride what they dub “the foreplay bureaucracy,”⁸² we see promise in educational interventions if properly pursued: the promise of more pleasurable and joyful sex. To insist that “sex itself,” so long as consensual, should remain too private for any institutional attention necessarily entrenches the status quo, with all its shortcomings and its privileging of males’ interests.⁸³

II.

SEXUAL UNFOLDING AND HOLISTIC SEX EDUCATION

Where Gersen and Suk see unwarranted intrusion, overreaching preventive efforts designed to change social norms,⁸⁴ and discipline of harmless sex,⁸⁵ we see enormous opportunity. Higher sex education (“sex instructions reminiscent of guidance provided by sex therapists like Dr. Ruth”⁸⁶) holds promise as a corrective to the dismal sex education most students receive before they arrive on campus and the entrenched gender norms that permeate abstinence-only instruction and privilege the sexual interests of males.

Today’s interventions recall the Sarrels’ sex-positive counseling and education, which did not survive the 1980s panic over HIV and move to the right. Today, the Sarrels’ tradition seems to be reviving in the work of

have orgasm in partner sex on a regular basis, but only 29 percent of women do.”); ELISABETH A. LLOYD, *THE CASE OF THE FEMALE ORGASM: BIAS IN THE SCIENCE OF EVOLUTION* 21–43 (2005) (summarizing and reviewing studies).

79. See Gersen & Suk, *supra* note 2, at 898.

80. See *id.* at 885. Compare Robin L. West, *Sex, Law, and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 221 (Franklin G. Miller & Alan Wertheimer eds., 2010), with Baker & Oberman, *supra* note 70, at 95.

81. Gersen and Suk themselves quote a statement from Freud that supports this view: “The behavior of a human being in sexual matters is often a prototype for the whole of his other modes of reaction to life.” Gersen & Suk, *supra* note 2, at 882.

82. *Id.* at 924.

83. See Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 857 n.57 (1985) (“Privatizing sex reduces discussion that might lead to change. Sex is private in part because the state makes it private and because keeping sex private seems to serve the interests of those with power.”).

84. Gersen & Suk, *supra* note 2, at 912.

85. *Id.* at 930.

86. *Id.* at 925; *id.* at 929 (“how-to’s for sexual arousal, proposition, and seduction”); *id.* at 948 (“teaching people how to have good sex in healthy relationships”).

developmental psychologists Miriam Arbeit⁸⁷ and Lisa Diamond.⁸⁸ After years of sex-negative education, today's cutting-edge theorists are pushing for a focus on skills that young people need to become sexually self-efficacious and relational.⁸⁹ Arbeit lists sexual selfhood, sexual negotiation skills, and sexual empowerment as critical skill-based maturational attainments for young people.⁹⁰ These, she notes, require developing “personal agency, interpersonal intimacy, and social advocacy”⁹¹—all qualities that create better citizens as well as better lovers.

Additional support comes from looking abroad. Rarely does American sex education address the important topics that WHO has identified as critical⁹² or that students in the Netherlands routinely learn, including “masturbation, oral sex, homosexuality, and orgasm [as well as the way to communicate] exactly what feels good.”⁹³ Although ideally such learning should take place earlier, lessons for college and university students in negotiating “enthusiastic” consent,⁹⁴ if properly constructed, can fill the existing void. For example, we can imagine how Title IX-inspired interventions could help achieve the following outcomes emphasized by WHO in its promotion of holistic sexuality education:

- To be aware of and have knowledge about the human body, its development and functions, in particular regarding sexuality.
- To be able to develop as a sexual being, meaning to learn to express feelings and needs, to experience sexuality in a pleasurable manner and to develop one's own gender roles and sexual identity. . . .
- To be able to build (sexual) relationships in which there is mutual understanding and respect for one another's needs and boundaries and to have equal relationships. This contributes to the prevention of sexual abuse and violence.
- To be able to communicate about sexuality, emotions and relationships and have the necessary language to do so.⁹⁵

87. E.g., Miriam R. Arbeit, *What Does Healthy Sex Look Like Among Youth? Towards a Skills-Based Model for Promoting Adolescent Sexuality Development*, 57 HUMAN DEVELOPMENT 259 (2014).

88. E.g., Lisa M. Diamond, *Expanding the Scope of a Dynamic Perspective on Positive Adolescent Sexual Development—Commentary on Arbeit*, 57 HUMAN DEVELOPMENT 292 (2014).

89. See, e.g., JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 191–92 (2002).

90. Arbeit, *supra* note 87, at 261.

91. *Id.*

92. WHO, *supra* note 9.

93. ORENSTEIN, *supra* note 37, at 221.

94. See Gersen & Suk, *supra* note 2, at 925–26.

95. WHO, *supra* note 9, at 27; see also *id.* (identifying as an underlying principle: “Sexuality education is firmly based on gender equality, self-determination and acceptance of diversity”).

In disrupting longstanding assumptions and hierarchies about gender, higher sex education resembles contemporaneous responses to other discriminatory campus traditions. Within the past year, for example, Harvard University eliminated use of the title “house master”⁹⁶ and Harvard Law School abandoned the Royall Crest because of connections to slavery,⁹⁷ while Amherst College declared the demise of its mascot Lord Jeff, named for a commander who purposely spread smallpox among Native Americans in the 1700s.⁹⁸ All of these fundamental breaks from the past⁹⁹ demonstrate increasing awareness of discrimination that once was so taken for granted that it remained invisible.¹⁰⁰ Even if the prompt for higher sex education comes from the federal government, we can understand it as part of a larger transformation moving toward social justice.

III.

HIGHER SEX EDUCATION: REMAINING ASSIGNMENTS

We have centered our aspirations on higher sex education, which—implemented today on American campuses—remains at an early stage of development. We hope the practice continues to mature, eventually incorporating insights and commitments from experts we admire, including the Sarrels, Arbeit, and WHO. More research should yield still additional enhancements.

We want to make clear that we do not support censoring or even discouraging nonnormative sexual practices, such as “sex with partners you do not know, with multiple partners, or with one person being dominant.”¹⁰¹ At the same time, we have a much more optimistic view than Gersen and Suk of “training people not merely on how to conform conduct to criminal sex offense

96. Anemona Hartocollis, *At Harvard Dorms, “House Masters” No More*, N.Y. TIMES (Feb. 24, 2016), <http://www.nytimes.com/2016/02/25/us/at-harvard-dorms-house-masters-no-more.html> [https://perma.cc/LZF4-DS5U].

97. Anemona Hartocollis, *Harvard Law to Abandon Crest Linked to Slavery*, N.Y. TIMES (Mar. 4, 2016), <http://www.nytimes.com/2016/03/05/us/harvard-law-to-abandon-crest-linked-to-slavery.html> [https://perma.cc/LW5F-2SNV].

98. Jess Bidgood, *Amherst College Drops “Lord Jeff” as Mascot*, N.Y. TIMES (Jan. 26, 2016), <http://www.nytimes.com/2016/01/27/us/amherst-college-drops-lord-jeff-as-mascot.html> [https://perma.cc/W86L-NUK8].

99. *But see* Noah Remnick, *Yale Defies Calls to Rename Calhoun College*, N.Y. TIMES (Apr. 27, 2016), http://www.nytimes.com/2016/04/28/nyregion/yale-defies-calls-to-rename-calhoun-college.html?_r=0 [https://perma.cc/2SEA-K3ZF] (reporting Yale’s retention of a white supremacist’s name for one of its residential colleges).

100. *See* Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 68 (1987) (“Power is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussion or even imagination. Daily social practices that reinforce existing arrangements stand in the way of efforts to expose unstated assumptions about the power behind attributions of difference.”).

101. Gersen & Suk, *supra* note 2, at 947.

laws or campus sexual misconduct codes, but rather on how to have sex, with respect, equality, enthusiasm, even imagination and creativity.”¹⁰²

Even with improvements in the current approach, however, higher sex education leaves problems unaddressed. Most significantly, even optimal sex education for college and university students leaves large segments of the population without such opportunities—and without the protections such interventions seek to achieve. Deborah Tuerkheimer has noted how diverging treatments of “consent” to sex in campus disciplinary codes, on the one hand, and in the criminal justice system, on the other, result in significant legal disadvantage “to women who lack privileged collegiate status.”¹⁰³ Others have observed that women who do not attend college are more likely to be raped than those who do not.¹⁰⁴ To the extent that sexual autonomy and sexual satisfaction and pleasure, as well as the information necessary to realize these objectives, are important human rights, as WHO posits,¹⁰⁵ efforts should start much earlier than college and should aim for universal coverage.

In addition, as Gersen and Suk correctly point out, higher sex education must confront “the unconscious racial stereotyping”¹⁰⁶ infecting how particular sexual actors are understood. We share their concern that campus disciplinary responses might well reflect the racial disproportionality evident in the criminal justice system. Yet, just as we see promise for dismantling entrenched gender stereotypes in today’s institutional interventions, we hope for similar transformations in the dominant way of thinking about race in campus sex—a complex weave of white privilege, frequent exploitation of Black athletes,¹⁰⁷ and other entangled threads. Optimal sex education takes an intersectional approach,¹⁰⁸ incorporating all aspects of sexual identity; it exposes and targets oppression, including racial oppression.

With respect to the federalization that Gersen and Suk specifically challenge,¹⁰⁹ we appreciate their concerns; however, we also see some possible

102. *Id.*

103. Tuerkheimer, *supra* note 71, at 5.

104. See Callie Marie Rennison, *Privilege, Among Rape Victims*, N.Y. TIMES (Dec. 21, 2014), <http://www.nytimes.com/2014/12/22/opinion/who-suffers-most-from-rape-and-sexual-assault-in-america.html> [https://perma.cc/377S-EB25].

105. WHO, *supra* note 9, at 20–21, 27.

106. Gersen & Suk, *supra* note 2, at 944–45; see also *id.* at 915 (“Combining the CDC risk factors of hypermasculinity, poverty, and lack of institutional support from police and judicial systems creates a significant risk of precriminalizing minority men.”); *id.* at 931 (noting the likely disproportionate impact of changing laws on minorities).

107. See, e.g., Derek Van Rheenen, *Exploitation in College Sports: Race, Revenue and Educational Reward*, 48 INT’L REV. FOR THE SOC. OF SPORT 550 (2013).

108. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

109. Raising concerns about institutional mismatch and the absence of “institutional clarity,” Gersen and Suk ask, “Is the federal bureaucracy the right political institution to be regulating ordinary sex?” Gersen & Suk, *supra* note 2, at 947.

advantages when it comes to the additional work to be done. The federal government can spur research, some of which Gersen and Suk support.¹¹⁰ For example, we would welcome research on the effects of sexual cultures on campus diversity, given assertions that the hook-up culture, unexamined and supported by college social programs, encourages students from traditional communities to drop out at higher rates than others.¹¹¹ Likewise, research could help substantiate (or not) claims that teaching about nonnormative sites of pleasure, particularly male anal pleasure, can counteract sexism, homophobia, and male dominance.¹¹² Research that might help combat the racial stereotypes troubling Gersen and Suk provides yet another example,¹¹³ with federal antidiscrimination laws as a useful foothold for studying the problem and devising responses.

Up until now, however, university Institutional Review Boards have shown resistance to research concerning sex.¹¹⁴ Further, most would concede that, before federal intervention based on Title IX, sexual assault has been a serious but unaddressed problem on college campuses. No matter how valuable local experimentation, we suspect that—without federal prodding—little change would occur.

CONCLUSION

In a rhetorical appeal designed to convince the reader of the intrusiveness of present-day regulations into the “naturalness” of sex, Gersen and Suk deploy a drumbeat of repetitions of the phrase “ordinary sex”—three times in their abstract and seventeen times in the article itself.¹¹⁵ Yet, if we have learned anything from social constructionists, it is that sex is a powerful epistemological agent. The scripts that determine the course of our most personal relationships and activities provide rules for who gets what and how, in both private and public life.¹¹⁶

110. Compare *id.* at 891 (criticizing federal mandates to perform research on sexual climate), with *id.* at 918 (“One of the laudable components of the sex bureaucracy’s regulatory approach has been a renewed emphasis on research.”).

111. See Laura Hamilton & Elizabeth A. Armstrong, *Gendered Sexuality in Young Adulthood*, 23 GENDER & SOC. 589 (2009).

112. Jonathan Branfman & Susan Ekberg Stiritz, *Teaching Men’s Anal Pleasure: Challenging Gender Norms with “Prostage” Education*, 7 AM. J. SEXUALITY ED. 404 (2012).

113. See *supra* notes 106–08 and accompanying text.

114. See, e.g., Dale Carpenter, *Institutional Review Boards, Regulatory Incentives, and Some Modest Proposals for Reform*, 101 NW. U. L. REV. 687, 694 (2007); Janice M. Irvine, *Can’t Ask, Can’t Tell: How Institutional Review Boards Keep Sex in the Closet*, 11 CONTEXTS: UNDERSTANDING PEOPLE IN THEIR SOCIAL WORLDS 28 (2012).

115. Gersen & Suk, *supra* note 2, at 881, 882, 884, 885 & n.11, 886, 891, 894, 911, 925, 931, 936, 946, 947.

116. See Susan Frelich Appleton & Susan Ekberg Stiritz, *Going Wild: Law and Literature and Sex*, 69 STUD. L., POL. & SOC. 11, 16–18 (2016); see also *supra* note 81 (quoting Freud).

Contrary to what Gersen and Suk imply, the government's sexual health efforts have always been part of a strategy to further social justice. Sexuality education since its beginnings has aimed to level uneven playing fields between men and women and, when done well, has used teaching methods that encourage personal scrutiny of one's attitudes, actions, and impact upon others. Although uncomfortable (and perhaps for that reason perceived as intrusive), efforts to help students understand themselves, to challenge their assumptions, and to work for greater egalitarianism¹¹⁷ should be appropriate functions for institutions of higher learning.

117. The Sarrels listed eschewing exploitation of sexual partners as one of the developmental tasks of sexual unfolding, which requires seeing sex as activity taking place "among equals." Sarrel & Sarrel, *supra* note 8, at 98.