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# Something Old, Something New: Reflections on the Sex Bureaucracy

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## Something Old, Something New: Reflections on the Sex Bureaucracy

Melissa Murray and Karen Tani\*

*This essay responds to “The Sex Bureaucracy,” in which Jacob Gersen and Jeannie Suk identify a “bureaucratic turn in sex regulation”—one that has expanded the reach of sexual regulation to include “nonviolent, non-harassing, voluntary sexual conduct” (or in their words, “ordinary sex”). In their view, the Department of Education’s campaign against sexual assault on college campuses epitomizes this bureaucratic shift. While applauding the authors’ attention to the intersection of sexuality and governance, we challenge their account of the “bureaucratic turn” as an unprecedented event. Drawing on examples from across U.S. history, we show how administrative agencies and unelected bureaucrats have persistently and robustly regulated sex and sexuality, including “ordinary sex.” Building on this more historical and nuanced portrait of America’s “sex bureaucracy,” we then identify what is truly new and striking about the slice that Gersen and Suk explore. In the Department of Education’s regulation of sex, we see clearly how consent—and specifically, affirmative consent—has replaced marriage as the boundary marker between licit and illicit sexual conduct. At a time when marriage no longer holds force as the distinguishing feature of lawful sex and sexuality, enthusiastic, unambivalent expressions of consent provide the state with*

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*documentable signals of appropriate sex and sexuality, while also, we speculate, reinforcing an ascendant neoliberal logic of citizenship and governance. In short, the “sex bureaucracy” is old, but innovative, and very much deserving of our scrutiny.*

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#### INTRODUCTION

“We are living in a new sex bureaucracy.” Thus begins Jacob Gersen and Jeannie Suk’s important and provocative recent article, in which they describe “an elaborate and growing federal bureaucratic structure that,” in practice, regulates “ordinary sex.”<sup>1</sup> This development disturbs them, and with reason. In their telling, the “bureaucratic turn in sex regulation” has produced results that are not only deeply intrusive, but also undemocratic and violative of individual rights and liberties.<sup>2</sup>

In documenting and exploring this “bureaucratic turn,” Gersen and Suk draw on a powerful and controversial example: the ongoing campaign by the U.S. Department of Education (DOE), via its Office for Civil Rights (OCR), to address sexual violence on college campuses<sup>3</sup>—a serious and well-established problem.<sup>4</sup> Exercising its authority under Title IX of the Education Amendments

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1. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 883–84 (2016).

2. *Id.* at 883.

3. Although the DOE’s enforcement of Title IX on college campuses is the authors’ primary example, they also see the “sex bureaucracy” at work in the DOE’s regulation of primary and secondary schools, and possibly in the “extensive rules about sex in the contexts of the military and prison.” *Id.* at 884 n.7.

4. See Bonnie S. Fisher, Francis T. Cullen, & Michael G. Turner, *The Sexual Victimization of College Women*, U.S. DEP’T JUST. (December 2000) (finding that of a randomly selected national sample of women attending 2- or 4-year colleges or universities during the fall of 1996, 15.5 percent of respondents were sexually victimized during a single academic year, with 2.8 percent of respondents experiencing completed or attempted rape); Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study*, NAT’L INST. JUST. (October 2007) (reporting that of a randomly selected sample of undergraduate women at two large public universities, 19 percent of respondents and 26.3 percent of

of 1972,<sup>5</sup> as well as more recent statutes regarding the disclosure of campus crime statistics,<sup>6</sup> the DOE has required colleges and universities “to take immediate and effective steps to end sexual harassment and sexual violence.”<sup>7</sup> These steps include responding promptly to complaints with a campus-level adjudicative apparatus, reporting allegations of sexual misconduct to the federal government, and taking proactive measures to prevent sexual violence, such as educating community members on the importance and nature of consent.<sup>8</sup> Should the DOE suspect that an institution has failed to fulfill its responsibilities under federal law, it may launch (and publicly announce) a formal investigation. Ultimately, it may deny further institutional access to federal funds.<sup>9</sup>

The effects of these administrative efforts are significant, according to Gersen and Suk. The DOE now dictates what procedures and standards of evidence schools must use to evaluate allegations of sexual misconduct. These procedures and standards do not align with those of the criminal justice process—a disconnect that troubles Gersen and Suk.<sup>10</sup> The DOE also defines what kind of sexual conduct is impermissible, and by implication, Gersen and

senior respondents reported experiencing completed or attempted sexual assault since entering college); David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (September 21, 2015) (reporting that of respondents to a 27-campus survey, 26.1 percent of senior females, 6.3 percent of senior males, and 29.5 percent of students identifying as transgender, genderqueer, nonconforming, questioning or other had experienced “sexual contact involving penetration or sexual touching as a result of physical force or incapacitation”).

5. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (2012).

6. *E.g.*, Clery Act, 20 U.S.C. § 1092(f) (2012), *amended by* Campus SaVE Act, 20 U.S.C. § 1092(f) (Supp. II, Vol. 1 2014) (requiring campuses to disclose statistics annually to the Department of Education and empowering the Secretary to disseminate this information and coordinate with institutions to identify and recommend “exemplary” practices).

7. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

8. Gersen & Suk, *supra* note 1, at 897–98, 909; *see also* Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1973–75, 1980–81 (2016) (discussing OCR due process requirements, the evidentiary standard that OCR requires for campus proceedings, the steps OCR mandates to protect complainants, and the affirmative consent policies that colleges and universities have voluntarily adopted); Susan Hanley Duncan, *The Devil Is in the Details: Will the Campus SaVE Act Provide More or Less Protection to Victims of Campus Assaults?*, 40 J.C. & U.L. 443, 447–53 (2014) (detailing campus safety statutes and explicating the DOE’s guidance to institutions); Jill C. Engle, *Mandatory Reporting of Campus Sexual Assault and Domestic Violence: Moving to a Victim-Centric Protocol that Comports with Federal Law*, 24 TEMP. POL’Y & C.R. L. REV. 401, 402–08 (2015) (surveying the legal reporting requirements imposed on college and universities by federal law, including the Clery Act and the SaVE Act); *Title IX in Detail*, KNOW YOUR IX (Sept. 4, 2016), <http://knowyourix.org/title-ix/title-ix-in-detail/> (discussing requirements of prompt responses to complaints, campus employee training, and victims’ reporting options).

9. Gersen & Suk, *supra* note 1, at 897–98, 909. On DOE’s investigatory and enforcement efforts, *see* the *Chronicle of Higher Education’s* excellent database, *Title IX: Tracking Sexual Assault Investigations*, available at <http://projects.chronicle.com/titleix/>.

10. Gersen & Suk, *The Sex Bureaucracy*, *supra* note 1, at 932–46.

Suk argue, what kind of conduct is desirable, with scant attention to the bounds of the criminal law.<sup>11</sup> And, like an invasive weed, Gersen and Suk maintain, the DOE has “plant[ed] seeds of its own replication” within colleges and universities, via the requirement that these institutions have their own “mini-bureaucracies” devoted to the agency’s mission.<sup>12</sup> All the while, the DOE has insulated itself from public and judicial scrutiny by insisting that these developments are in furtherance of a clear and uncontroversial anti-discrimination mandate.<sup>13</sup>

We appreciate and applaud the authors’ detailed analysis of the DOE’s efforts, and we hope that the developments they chronicle will attract further scholarly attention. We take exception, however, to one of the article’s basic assumptions. Gersen and Suk proceed from the premise that the bureaucratic regulation of sexuality is not just disturbing and problematic, but also that it is unprecedented. Theirs is a story about bureaucracy “creeping into domains one would not have thought to be the subject of bureaucratic regulation”<sup>14</sup>—here, the domain of “ordinary sex,” which they define as “nonviolent, non-harassing, voluntary sexual conduct.”<sup>15</sup> This claim does important work for their argument, in that it helps cast their “sex bureaucracy” as un-American and illegitimate.

But how accurate is this claim of novelty? Sex, even what Gersen and Suk call “ordinary sex,” has *always* been regulated.<sup>16</sup> Regulation has occurred via the punitive apparatus of the criminal law, as Gersen and Suk note,<sup>17</sup> as well as through the benefits and burdens embodied in family law.<sup>18</sup> Most importantly,

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11. *Id.* at 924–31.

12. *Id.* at 905, 907.

13. *Id.* at 908–11.

14. *Id.* at 884.

15. *Id.* at 885. Elsewhere they define “ordinary sex” as “voluntary adult sexual conduct that does not harm others.” *Id.* We find this definition less helpful, as notions of “harm” can be subjective determinations. Indeed, applying Gersen and Suk’s definition, some might argue that the DOE is in fact only regulating *extraordinary* sex, because the agency is focusing on conduct where one party to the sexual interaction perceives harm, or where the conduct harms women more generally by preventing them from enjoying access to education on the same terms as men.

16. Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012) (“[T]here was little space for sex outside the rubrics of marriage and crime, and no refuge from state regulation of sex.”).

17. Gersen & Suk, *supra* note 1; *see also* Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1264–71 (2009) (discussing criminal law’s role in regulating intimate life); Murray, *supra* note 16, at 52 (discussing criminal law’s role in regulating sex and sexuality).

18. *See, e.g.*, PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA (2009) (discussing civil restrictions on interracial marriage); Adrienne L. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999) (connecting the historical law of intestate succession and testamentary transfers in the South to the regulation of sexual relationships between white men and black women); Murray, *supra* note 17, at 1264–67 (discussing family law’s regulatory effects); Murray, *supra* note 16, at 53 (same); Kimberly

for the purposes of this Essay, sexual regulation has long occurred via administrative agencies and the unelected bureaucrats who staffed them.

This Essay draws upon history, both distant and more recent, to sketch a more complete portrait of America's sex bureaucracy. We show that administrative agencies have routinely regulated sexuality, as they interpreted and enforced laws that, like Title IX, were not necessarily part of the criminal code—laws dealing with immigration, public health, public benefits, and more. We also show how public employers administratively regulated sexuality, via internal bureaucratic processes. And, like Gersen and Suk, we note the unequal ways in which the sex bureaucracy has figured into the lives of Americans.

This more complete portrait helps us identify what is distinct about the sex bureaucracy's current iteration. It also positions us to appreciate what is most compelling and interesting about the slice of that bureaucracy that Gersen and Suk explore. Historically, marriage marked the boundary between licit and illicit sexual conduct.<sup>19</sup> Focusing on the regulation of sexual violence on college campuses, Gersen and Suk have identified a new boundary: consent. They have also identified a regulatory preference for a particular species of consent: *affirmative* consent. These vital insights prompt questions that extend beyond bureaucracy, to *governance*, and thereby implicate all Americans, not merely the select segment of the population that concerns the DOE. If Gersen and Suk are correct and we have shifted to a consent-based system of sexual regulation—a system that appears to demand not only consent's explicit (and enthusiastic) articulation but also its documentation for subsequent review by the state—what does this say about our broader governing order?

The Sections that follow elaborate these insights. Drawing on historical examples from the fields of immigration, national security, and welfare, Part I documents federal administrative regulation of sex and sexuality well before the DOE began regulating sex on campus through Title IX. These earlier iterations of America's sex bureaucracy regulated many aspects of intimate life, including "ordinary sex." Building on these examples and drawing on case law from the more recent past, Part II evaluates Gersen and Suk's claim of a "bureaucratic turn" in the regulation of sex and sexuality. According to Gersen and Suk, the decriminalization of consensual adult sexuality in 2003's *Lawrence v. Texas* corresponded with a shift in the state's preferred mode of sexual regulation—away from the criminal law and toward the administrative state. While we agree with this theory of regulatory displacement, we show that

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Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 L. & SOC. REV. 285 (2002) (describing family law's historical commitment to a family form anchored in heterosexual marriage and exploring how child custody disputes have shaped and redefined the identities of gay and lesbian parents and would-be parents).

19. Murray, *supra* note 17, at 1268 (describing marriage's role in delineating the boundary between lawful and unlawful sex).

the shift occurred earlier—and in ways that showcase the breadth and depth of modern sexual regulation. Having canvassed the “old sex bureaucracy,” Part III identifies what is truly innovative about the slice of the modern sex bureaucracy that Gersen and Suk have captured: administrators’ use of consent as the boundary dividing licit from illicit sex. This focus on consent—a key feature of classical liberal theory—suggests the neoliberal underpinnings of the modern sex bureaucracy and prompts broader questions about the logic of our governing order. This essay then briefly concludes.

## I.

### THE OLD SEX BUREAUCRACY

The legal regulation of sexuality and sexual conduct is a persistent feature of American history. Regulated conduct has included actions that are violent and coercive, as well as what Gersen and Suk call “ordinary sex”—that is, adult sexual conduct that is entirely voluntary and that does not subordinate or do violence to one of the parties. The criminal law and its enforcers have had a vital role here, as Gersen and Suk note,<sup>20</sup> but so, too, have administrative agencies outside of the justice system (defined conventionally as local, state, and federal institutions devoted to identifying and apprehending suspected criminals, prosecuting and adjudicating crimes, and administering formal punishment).<sup>21</sup> Well before the DOE launched its crusade against sexual misconduct on college campuses, government bureaucrats in an array of fields regulated how people within the nation’s borders could act upon their sexual desires and what kind of sexual identities they could safely assume. Below we offer examples, drawing on a rich historical literature.<sup>22</sup>

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20. Gersen & Suk, *supra* note 1, at 887.

21. We focus on administrative agencies outside of the justice system in order to tether our argument closely to Gersen and Suk’s. In doing so, we do not wish to imply that law enforcement institutions are not themselves bureaucracies. Gersen and Suk never explicitly make such a claim, and indeed note the sexual-regulatory work of prison bureaucracies, *Id.* at 884 n.7, but by placing the “sex bureaucracy” in stark opposition to the criminal justice system, they could be read to imply that the work of law enforcement (ranging from policing, to prosecution, to probation and parole administration) falls outside the bounds of the administrative state. On the benefits of understanding police as “street-level bureaucrats,” see, for example, MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: THE DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE* (1983). On the benefits of treating federal prosecutors as agents of the administrative state, see Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* 869 (2009). For more general treatments of the bureaucratic capacities and characteristics of law enforcement regimes, see, for example, Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *CRIMINOLOGY* 449 (1992); Heather Schoenfeld, *The Delayed Emergence of Penal Modernism in Florida*, 16 *PUNISHMENT & SOC.* 258 (2014).

22. For the sake of brevity, we have omitted other examples that are well-documented in the historical literature. A fuller version of this Section would include a discussion of the enforcement of the Tariff Act of 1842, which prohibited the importation of obscene material, and the Comstock Law of 1873, which expanded that prohibition to the U.S. mails. As interpreted by customs inspectors and

To be responsive to Gersen and Suk's understanding of modern bureaucracy, we have focused on examples where the federal government's imprint is apparent and where the hallmarks of a Weberian bureaucracy are on display.<sup>23</sup> But we also note the interleaving of federal, state, and local administrative apparatuses, as well as the regulatory role of ostensibly private actors. Were we to exclude nonfederal actors from this history, we would obfuscate the way in which earlier iterations of America's "sex bureaucracy" were able to reach millions of Americans' intimate lives. As Gersen and Suk's DOE example powerfully demonstrates, these techniques remain in use today.

### A. Immigration

Historians of immigration agree that in the late nineteenth century, immigrant women's sexuality and sexual conduct were a source of deep

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Postal Service investigators, these prohibitions limited Americans' access to information about sex and sexuality and also sent a strong message about appropriate and inappropriate sexual behavior. Good points of entry into this topic include HELEN LEFKOVITZ HOROWITZ, REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH-CENTURY AMERICA 225–27, 386–418 (2003); PATRICIA CLINE COHEN, TIMOTHY GILFOYLE, & HELEN LEFKOVITZ HOROWITZ, THE FLASH PRESS 90 (2008); DONNA DENNIS, LICENTIOUS GOTHAM: EROTIC PUBLISHING AND ITS PROSECUTION IN NINETEENTH-CENTURY NEW YORK (2009); and ANDREW WENDER COHEN, CONTRABAND: SMUGGLING AND THE BIRTH OF THE AMERICAN CENTURY 132–33 (2015). We would also discuss the sexual regulation of American Indians, via one of the nation's earliest federal bureaucracies (the Indian Service and its subsequent iterations). Useful secondary sources on this topic include CATHLEEN D. CAHILL, FEDERAL FATHERS AND MOTHERS: A SOCIAL HISTORY OF THE UNITED STATES INDIAN SERVICE, 1869–1933 (2011); and MARK RIFKIN, WHEN DID INDIANS BECOME STRAIGHT? KINSHIP, THE HISTORY OF SEXUALITY, AND NATIVE SOVEREIGNTY (2011). And we would no doubt include a discussion of state liquor licensing laws, which administrators deployed to reach the intimate lives of bar patrons, and state eugenics policies, which administrators used to regulate the sexuality of those deemed unable to control their impulses or unfit to bear children. Scholars who have explored sexual regulation via the administration of state liquor licensing laws include William N. Eskridge, *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880–1946*, 82 IOWA L. REV. 1007, 1083–86 (1996); and Amanda H. Littaur, *The B-Girl Evil: Bureaucracy, Sexuality, and the Menace of Barroom Vice in Postwar California*, 12 J. HIST. SEX. 171 (2003). The literature on eugenics policies and sexual regulation is broader. Useful sources include Michael Willrich, *The Two-Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900–1930*, 16 L. & HIST. REV. 63 (1998); WENDY KLINE, BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM (2001); Katherine Castles, *Quiet Eugenics: Sterilization in North Carolina's Institutions for the Mentally Retarded, 1945–1965*, 68 J. S. HIST. 849 (2002); ALEXANDRA MINNA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA (2005). Last, there is at least one excellent historical work on the regulation of sexuality in prisons: REGINA KUNZEL, CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN AMERICAN SEXUALITY (2009).

23. In explaining the "bureaucratic turn," Gersen and Suk emphasize the administrative apparatus of the federal government; the bureaucracy they care most about is the federal bureaucracy, and the various "mini-bureaucracies" that it has incentivized within nongovernmental institutions. Gersen and Suk, *supra* note 1, at 883–84. They also associate bureaucracy with the idealization of expert knowledge (i.e., technocracy) and with Max Weber's notion of a "legal-rational" form. *Id.* at 883–85.

concern.<sup>24</sup> On the West Coast, this concern was bound up with fears about Chinese laborers and their potential to undermine and debase white men.<sup>25</sup> More broadly, this concern reflected anxieties about racial purity and about the sexual independence that accompanied young women's entrance into the paid labor force.<sup>26</sup> Immigrant women appeared to be a possible vector of contagion, capable of infecting the general population with looser moral standards and sexually transmitted diseases.<sup>27</sup> The job of protecting the nation from such contagion fell largely to federal administrators.<sup>28</sup> (As Lucy Salyer and others have noted, immigration officials comprised one of the earliest branches of what we now call the "administrative state.")<sup>29</sup>

As immigration authorities monitored the nation's borders and the sexual attributes of those seeking entry, they enjoyed a robust arsenal of legal tools, as well as vast discretion. The 1891 revision of the Immigration Act (Act) barred entry to anyone who had been convicted of a crime "involving moral turpitude," language that allowed administrators to interrogate women about adultery, bigamy, and other illicit sexual conduct.<sup>30</sup> (The term "moral

24. See generally Deirdre M. Moloney, *Women, Sexual Morality, and Economic Dependency in Early U.S. Deportation Policy*, 18 J. WOMEN'S HIST. 95, 99–100 (2006); DONNA GABACCACCIA, *FROM THE OTHER SIDE: WOMEN, GENDER, AND IMMIGRANT LIFE IN THE U.S., 1820–1990* (1994).

25. Moloney, *supra* note 24, at 98–99; Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 649–64 (2005); ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA* 25–27 (2003). On the endurance of anti-Asian immigrant sentiment into the twentieth century, see MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 96–126 (2004).

26. On the greater sexual freedom that accompanied women's entry into the paid labor force, see generally KATHY PEISS, *CHEAP AMUSEMENTS: WORKING WOMEN AND LEISURE IN TURN-OF-THE-CENTURY NEW YORK* (1986); JOANNE J. MEYEROWITZ, *WOMEN ADRIFT: INDEPENDENT WAGE EARNERS IN CHICAGO, 1880–1930* (1988). On the anxieties that this freedom caused and the reform campaigns that followed, see generally MARY E. ODEM, *DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885–1920* (1995); CHERYL D. HICKS, *TALK WITH YOU LIKE A WOMAN: AFRICAN AMERICAN WOMEN, JUSTICE, AND REFORM IN NEW YORK, 1890–1935* (2010).

27. EITHNE LUIBHÉID, *ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER* 14 (2002); NAYAN SHAH, *CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO'S CHINATOWN* 79–90 (2001); Abrams, *supra* note 25, at 661.

28. For much of the nation's history, state and local governments regulated the movement of foreigners into and within the United States, via settlement laws; the federal government's responsibility was largely limited to naturalization. After the Civil War, however, the federal government claimed jurisdiction over this arena. See generally KUNAL PARKER, *MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000* (2015).

29. LUCY SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995).

30. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084 (1891). The act also excluded polygamists. *Id.* The 1917 Immigration Act extended this exclusion to persons who "believe in or advocate the practice of polygamy." Immigration Act of 1917, ch. 29, §3, 39 Stat. 874, 875 (1917). These provisions were bound up with lawmakers' understandings of slavery, race, the Mormon faith, and federal power, and were thus about much more than sexual regulation. See generally SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002). Nonetheless, a more expansive version of this Section

turpitude,” notably, was the administrators’ to define.)<sup>31</sup> Even more powerfully, the Act deemed excludable any person “likely to become a public charge.”<sup>32</sup> Given women’s presumed economic dependence on men, this category provided a ready justification for interrogating women traveling without husbands and fathers.<sup>33</sup> Subsequent legislation placed even more stress on immoral conduct and “immoral purpose,” which administrators interpreted to mean everything from intention to engage in prostitution to planned reunification with a married lover.<sup>34</sup>

Other statutory provisions extended administrators’ reach well past the moment of admission, and, again, gave them considerable discretion to regulate immigrants’ intimate lives. Not only could a post-admission conviction for a crime of moral turpitude trigger deportation, but by 1907, a mere *finding* that a woman or girl had engaged in prostitution or was an “inmate” of a house of prostitution could result in the same, if the woman had been in the country for less than three years.<sup>35</sup> The 1910 Mann Act, which prohibited the importation and interstate transportation of women for immoral purposes, ensured that a range of federal, state, and local officials were on the alert for just such behavior.<sup>36</sup> By 1917, the net had expanded further still, to allow deportation of any alien “deriving any benefits from” any “place of amusement or resort habitually frequented by prostitutes.”<sup>37</sup> As for those who engaged in prostitution (as determined by an administrator), the three-year window gave way to no time restriction at all.<sup>38</sup>

In wielding these legal tools, administrators displayed a keen interest in criminally prohibited sex, but also went beyond the bounds of the criminal law to encroach on the “ordinary.” They questioned women extensively about their

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would discuss the full sexual-regulatory implications of the polygamy exclusion. For readers interested in this topic, a useful starting point is Abrams, *supra* note 25, at 641.

31. MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* 24 (2010).

32. Immigration Act of 1891, § 1.

33. Moloney, *supra* note 24, at 94–97; GABACCACIA, *supra* note 24, at 37; NGAI, *supra* note 25, at 78–79.

34. Immigration Act of 1907, ch. 1134, § 2, 34 Stat. 898 (1907); LUIBHÉID, *supra* note 27, at 10–11. For a fuller exploration of the meaning of the “immoral purpose” language in the 1907 Immigration Act, see Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 *YALE L.J.* 756, 777–81 (2006).

35. Grace Peña Delgado, *Border Control and Sexual Policing: White Slavery and Prostitution along the U.S.-Mexico Borderlands, 1903–1910*, 43 *W. HIST. Q.* 157, 160 (2012). On the Immigration Bureau’s keen interest in this issue and the investigative agents it sent to localities around the country, even before the enactment of the Mann Act, see JESSICA R. PLILEY, *POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI* 32–59 (2014).

36. LUIBHÉID, *supra* note 27, at 13. On the enforcement of the Mann Act in its early years, including the close cooperation between the Immigration Bureau and the Federal Bureau of Investigation, see PLILEY, *supra* note 35, at 84–105.

37. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874 (1917).

38. *Id.*; LUIBHÉID, *supra* note 27, at 15–16.

sexual histories, and would not hesitate to hang decisions on a single instance of nonmarital sex.<sup>39</sup> They inspected single women's prospective abodes, to ensure that their environments did not lend themselves to promiscuity.<sup>40</sup> For women traveling with fiancés, they sometimes demanded marriage ceremonies on the dock.<sup>41</sup> Even after admission, women could easily find themselves re-ensnared by the immigration bureaucracy—for example, if they came into contact with law enforcement, or if an angry relative or spurned suitor decided to level an accusation of sexual impropriety.<sup>42</sup> These practices combined to send a clear message to foreign-born women: in historian Deirdre Moloney's words, "any sexual activity outside a legally-recognized marriage contract" had potentially severe consequences.<sup>43</sup>

Federal immigration administrators also regulated men's sexuality, not only through the laws and administrative techniques discussed above, but also via administrators' inspection of immigrant bodies at points of entry. Historian Margot Canaday has explained the turn-of-the-century process as follows: if, during a cursory line inspection, an inspector flagged an immigrant as odd or frail, a full examination would follow, including questions about the immigrant's sexual desires and practices and close examination of the immigrant's body for signs of degeneracy, such as small or defective genitals.<sup>44</sup> Should any of these results prove too unsettling, the "likely to become a public charge" category once again provided a convenient grounds for exclusion: based on the prevailing assumptions of the time, men (and women) who did not conform to gender norms or who engaged in deviant sexual practices had poor economic prospects. For those immigrants who attracted the authorities' attention after gaining admission, the same logic justified deportation.<sup>45</sup>

Immigration authorities gained even more power to regulate sexuality in 1952, when Congress ordered the exclusion of aliens "afflicted with

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39. Moloney, *supra* note 24, at 106–07, 113; LUIBHÉID, *supra* note 27, at 43. This administrative interest in isolated sexual encounters is noteworthy, for even in this era of intense preoccupation with nonmarital sex, consensual sex between an unmarried woman and an unmarried man was not universally recognized as a crime. See JoAnne Sweeney, *Undead Statutes: The Rise, Fall, and Continued Use of Adultery and Fornication Criminal Laws*, 46 *LOY. U. CHI. L.J.* 127, 139–40 (2014) (noting that "although some [state] adultery and fornication statutes required only a single act of sex, other statutes required habitual intercourse or cohabitation, which was presumed to harm society in general").

40. DORIS WEATHERFORD, *FOREIGN AND FEMALE: IMMIGRANT WOMEN IN AMERICA, 1840–1930*, at 304–05 (1995).

41. *Id.* at 305–06.

42. NGAI, *supra* note 25, at 79.

43. Moloney, *supra* note 25, at 113.

44. CANADAY, *supra* note 31, at 33–35.

45. *Id.* at 34–35, 40–44; see also Eskridge, *supra* note 22, at 1045–48. Many of Canaday's examples involve men. For an account that focuses specifically on the exclusion of foreign-born women who appeared to be lesbians, see LUIBHÉID, *supra* note 27, at 77–101.

psychopathic personality.”<sup>46</sup> Lawmakers understood this term to encompass homosexuality but did not provide more specific guidance. Whether a particular individual suffered from such an “affliction” was thus up to administrators—to the Immigration and Naturalization Service and the Public Health Service, to be precise.<sup>47</sup> At the admission stage, these administrators based their decisions on physical examinations, “interviews for signs of mental aberration,” and other tests. At the deportation stage (the same law made homosexuality grounds for formal expulsion), federal authorities relied heavily on state and local law enforcement. For example, a mere arrest for loitering in a public restroom (a known site for homosexual encounters) was often enough to trigger deportation procedures.<sup>48</sup> Such a tight link between the states’ capacious police power and the federal government’s similarly capacious plenary power surely made nonnatives think twice about where they went, whom they consorted with, and whether to act on their sexual desires.

This narrative could continue,<sup>49</sup> but by now the point should be clear: via the administration of immigration laws, bureaucrats actively regulated sexuality, well before the DOE got in on the act. Moreover, this vein of administrative regulation had implications well beyond the particular individuals who came into contact with immigration officials. As historian Eithne Luibhéid has explained, immigration regulation is “a means to literally construct the nation and [its] people.”<sup>50</sup> In the case of the United States, one of the most striking and important acts of construction is of “patriarchal heterosexuality as the nation’s official sexual and gender order.”<sup>51</sup>

### B. War and National Security

Other examples of federal bureaucratic regulation of sexuality come from the arena of national security—from efforts to recruit and maintain soldiers, to reward them for their service, and to reintegrate them into civilian life at conflicts’ end. Like today’s DOE, the administrative apparatuses at issue here leveraged their responsibility over a discrete but sizeable domain to dictate what kinds of sexual identities and sexual conduct were acceptable.<sup>52</sup>

46. The Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163 (1952).

47. CANADAY, *supra* note 31, at 216–21.

48. *Id.* at 223–27.

49. For those interested in post–World War II developments, we recommend Eskridge, *supra* note 22; LUIBHÉID, *supra* note 27; Marc Stein, *Boutilier and the U.S. Supreme Court’s Sexual Revolution*, 23 L. & HIST. REV. 491 (2005).

50. LUIBHÉID, *supra* note 27, at xviii; *see also* NGAI, *supra* note 25, at 3 (“Immigration policy is constitutive of Americans’ understanding of national membership and citizenship, drawing lines of inclusion and exclusion that articulate a desired composition . . . of the nation.”).

51. WEATHERFORD, *supra* note 40, at xviii.

52. Gersen and Suk recognize the sexual-regulatory work that the military performs today. Gersen & Suk, *supra* note 1, at 884 n.7. This Section illuminates some of the many predecessors to these contemporary efforts.

One site of persistent sexual regulation was the civilian spaces around military bases and training camps. During World War I, as historian Christopher Capozzola has demonstrated, the War Department and its partners in the realms of private charity and local civic life vigilantly patrolled such spaces, looking for women who appeared to be prostitutes. No legal definition anchored these searches, allowing for the targeting of any woman who appeared willing to engage in casual sexual encounters with enlisted men.<sup>53</sup> War Department administrators and their vast network of private deputies not only detained such women, but also subjected them to medical examinations and, in some cases, internment, in settings ranging from hospitals and prisons to “no-privileges cottages” and workhouses.<sup>54</sup> As in the immigration context, formal criminal charges were sometimes part of the equation but were by no means a necessary precondition for administrative action.<sup>55</sup>

The World War II story is similar: Shortly after the United States officially entered the war, the Federal Security Administration created a special Social Protection Division (SPD) to protect soldiers against venereal disease, a mission that translated into identifying and disciplining promiscuous women. With the help of various public and private organizations, ranging from local law enforcement agencies to the American Bar Association, the SPD worked to shut down places likely to employ such women and to detain and treat those women who came to authorities’ attention.<sup>56</sup> Meanwhile, in other branches of the administrative state, such as the military and the Public Health Service, administrators signaled that they viewed servicemen’s (heterosexual) activity as perhaps unfortunate but inevitable. In contrast to the heavy-handed regulation of women, the regulation of men’s sexuality took the form of prophylactic materials and education on how to minimize health risks.<sup>57</sup>

The post-war administration of the G.I. Bill of Rights (G.I. Bill) is also illustrative of the forceful role that administrative agencies played in regulating ordinary sex, and here the affected population was truly vast. Best known for

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53. CHRISTOPHER CAPOZZOLA, *UNCLE SAM WANTS YOU: WORLD WAR I AND THE MAKING OF THE MODERN AMERICAN CITIZEN* 132–34 (2008).

54. *Id.*

55. *Id.* For more on this history, see NANCY K. BRISTOW, *MAKING MEN MORAL: SOCIAL ENGINEERING DURING THE GREAT WAR* (1996); COURTNEY Q. SHAH, *SEX ED, SEGREGATED: THE QUEST FOR SEXUAL KNOWLEDGE IN PROGRESSIVE-ERA AMERICA* 78–129 (2015). Shah also details the War Department’s efforts to educate women and girls on appropriate sexual behavior. SHAH, *supra*, at 113–17.

56. MARILYN E. HEGARTY, *VICTORY GIRLS, KHAKI-WACKIES, AND PATRIOTUTES: THE REGULATION OF FEMALE SEXUALITY DURING WORLD WAR II* 12–41 (2008). In an interesting example of administrative resourcefulness, New Deal-era Civilian Conservation Corps camps became warehouses for these women. *Id.* at 77.

57. *Id.* at 100–103. For more on this point, and for a discussion of the sharply contrasting approach that administrators took to servicewomen, see Leisa D. Meyer, *Creating G.I. Jane: The Regulation of Sexuality and Sexual Behavior in the Women’s Army Corps During World War II*, 18 *FEMINIST STUD.* 581 (1992).

offering generous education, unemployment, and home ownership benefits to World War II veterans,<sup>58</sup> the G.I. Bill also became a mechanism for sexual regulation, as shown by historian Margot Canaday. Via a 1945 ruling, the Veterans Administration (VA) made clear that no benefits would be available to soldiers to whom the military had issued an undesirable discharge “because of homosexual acts or tendencies.”<sup>59</sup>

A servicemember’s “undesirable” discharge was itself a product of administrative decisionmaking, by a three-officer board of the relevant military branch. Such boards made their decisions based on hearings, which were significantly less protective of the accused than formal court-martial proceedings. The boards were not bound by rules of evidence, nor did the accused soldier have the right to counsel.<sup>60</sup>

And yet the effect of an “undesirable” discharge was considerable. Potential employers and universities asked to see discharge papers, and the “undesirable” notation inevitably raised suspicion. The VA’s interpretation of the G.I. Bill dramatically heightened the consequences. According to Canaday’s estimates, the VA ruling prevented nine thousand veterans from accessing benefits that the statute arguably entitled them to enjoy.<sup>61</sup> In effect, VA administrators punished soldiers for deviating from heterosexual norms and implicitly encouraged many others to stay firmly in the closet.<sup>62</sup>

Ultimately, policymakers recognized the hardship that the VA’s policy caused and created a way for undesirably discharged veterans to regain some of what they had lost.<sup>63</sup> But here again, the mechanism provided federal bureaucrats with an opportunity to reinforce the imperative of respectable heterosexual behavior: Upon application, the Department of Labor was authorized to issue an “Exemplary Rehabilitation Certificate,” documentation that would not erase the black mark from the applicant’s military record but might ease the doubts of prospective employers and others.<sup>64</sup> That

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58. See Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91, 105 (2002) (describing the benefits associated with the G.I. Bill). On the enduring importance of these benefits to veterans and their families, see IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005); SUZANNE METTLER, *SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION* (2005).

59. Margot Canaday, *Building a Straight State: Sexuality and Social Citizenship Under the 1944 G.I. Bill*, 90 J. AM. HIST. 935, 935 (2003).

60. *Id.* at 950.

61. Statutory language and legislative history suggests that Congress intended to exclude only those who were discharged “dishonorably”; an “undesirable” discharge fell somewhere between “honorable” and “dishonorable.” *Id.* at 940–41.

62. *Id.* at 956–57.

63. *Id.* at 953.

64. *Id.* at 954.

administrative decision turned on how persuasively the applicant demonstrated reform—that is, on how thoroughly he embraced male, heterosexual norms.<sup>65</sup>

As with the previous discussion on immigration regulation, other examples could add depth and nuance.<sup>66</sup> But we hope that a fundamental point is clear: for many Americans who have come into contact with the nation's national security apparatus, Gersen and Suk's description of the modern "sex bureaucracy" would appear more familiar than strange.

### C. Welfare

Laws and policies governing public income support were another well-used avenue for administrative sexual regulation, one that, again, has implicated all levels of government, as well as ostensibly private actors. Policies from this realm are arguably the most similar to those of the education realm, the focus of Gersen and Suk's article. Americans often think of both welfare and education (especially higher education) as privileges or benefits, not basic entitlements. Nonetheless, these benefits have held deep significance to the millions of people who needed and wanted them and have therefore offered administrators considerable leverage over beneficiaries' intimate lives.<sup>67</sup>

The New Deal is a convenient starting point (although by no means the first instance of sexual regulation via poor relief).<sup>68</sup> Since 1935, the need-based program that we now call "welfare" has been the shared responsibility of the federal government and the states; the federal government subsidizes the cost and the states administer the program, subject to federal rules.<sup>69</sup> (This program was originally called Aid to Dependent Children; it is now Temporary Aid to Needy Families.)

As the demographics of the welfare rolls shifted in the 1940s and 1950s, to include more black Americans and more women who had never been married, many states responded by proposing policies targeting poor women's

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65. *Id.* at 953–54. For a broader exploration of the experience of gays and lesbians in the military during this era and the administration of antihomosexual policies and procedures, see ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN DURING WORLD WAR TWO* (1990); Eskridge, *supra* note 22, at 1087–93.

66. A fuller discussion would include the military's sexual regulation of soldiers and private contractors abroad, as well as the bureaucratic enforcement of the "Don't Ask, Don't Tell" policy (inaugurated under President William Clinton).

67. Charles Reich made this point powerfully fifty-two years ago. Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

68. For earlier examples, see MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* (1988).

69. See Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 *YALE L.J.* 314, 325–30 (2012) (explaining the basic structure and history of the program we now call "welfare").

sexual conduct.<sup>70</sup> These ranged from schemes to sterilize women who gave birth to multiple “illegitimate” children to proposals to condition assistance on a mother’s disavowal of “illicit” relationships.<sup>71</sup> Most common by the late 1950s, however, were proposals to simply deny benefits to children born out of wedlock, a signal to poor women that the cost of nonmarital sex would be the wellbeing of their families.<sup>72</sup>

Federal administrators had reservations about these proposed laws and dissuaded states from enacting them when possible,<sup>73</sup> but they had more difficulty when states framed their proposals as “suitable home” laws rather than blatant efforts to discriminate against illegitimate children.<sup>74</sup> “Suitability” determinations were a tradition within the state-level mothers’ pension programs that preceded the federally subsidized Aid to Dependent Children program, and these determinations seemed to fall within the discretion that Congress had given the states.<sup>75</sup> Federal dollars thus directly subsidized state and local bureaucracies as they policed nonmarital sex.<sup>76</sup>

Federal administrators took a more forceful stance in 1961, after Louisiana welfare officials used a suitable home policy to purge 22,500 children (mostly black) from the welfare rolls, all on the basis of their mothers’ alleged immorality.<sup>77</sup> Even after the federal prohibition of suitable home laws, however, sexual regulation of poor women continued. In some states, lawmakers quickly replaced suitable home laws with “man in the house” or “substitute father” restrictions, which denied public assistance benefits to households where there was evidence of a male presence. States could defend these restrictions on the grounds that they were not based on the mother’s morality, but rather on the family’s lack of need, in light of the income support that the “man in the house” presumably provided.<sup>78</sup> In their enforcement and effect, however, these policies performed the same regulatory work: state and

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70. In the mid-twentieth century, concerns about black women’s sexuality were bound up with fears of crumbling racial hierarchies and the decline of the nuclear, two-parent family. See RICKIE SOLINGER, *WAKE UP LITTLE SUSIE*, 45–53, 187–99 (2000); Anders Walker, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following Brown v. Board of Education*, 47 *DUKE L.J.* 399 (1997). These concerns gained further urgency from some Americans’ perception of themselves as besieged taxpayers, footing the bill for poor black women’s improprieties. MOLLY C. MICHELMORE, *TAX AND SPEND: THE WELFARE STATE, TAX POLITICS, AND THE LIMITS OF AMERICAN LIBERALISM* 3 (2012).

71. KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972*, at 206–08 (2016).

72. *Id.*

73. *Id.* at 208–09.

74. *Id.* at 210; WINIFRED BELL, *AID TO DEPENDENT CHILDREN* 67–75 (1965).

75. BELL, *supra* note 74, at 29–30.

76. *Id.* at 93–110; TANI, *supra* note 71, at 209–11.

77. TANI, *supra* note 71, at 212–21; Taryn Lindhorst & Leslie Leighninger, “Ending Welfare as We Know It” in 1960: Louisiana’s Suitable Home Law, 77 *SOC. SERV. REV.* 564 (2003).

78. See TANI, *supra* note 71, at 258.

local administrators focused not on whether children had adequate resources but on whether the children's mothers were having sex.<sup>79</sup> Administrators would sometimes ask women directly about sexual conduct; in other instances, they would interview the women's children, or solicit tips from neighbors.<sup>80</sup> There were also many reports of unannounced searches of women's homes, often at night or in the early morning.<sup>81</sup>

Ultimately, in 1968, the Supreme Court invalidated "man in the house" laws,<sup>82</sup> but sexual regulation continued, both via state administrators who refused to respect the Court's decision<sup>83</sup> and via new and different welfare policies (which, like the suitable home laws, often targeted black women in particular). Welfare policies aimed at procuring child support for poor children are one example. As administered, these policies have required women to identify previous sexual partners, on pain of losing government support.<sup>84</sup> Heterosexual marriage promotion and abstinence education policies, such as those authorized by the Personal Responsibility and Work Opportunity Reconciliation Act (1996), are another example.<sup>85</sup> Encouraged by federal incentives, state administrators (along with state-funded private contractors) have discouraged poor women from engaging in sexual activity outside of traditional marriage.<sup>86</sup> Notably, some of these educatory and preventative state programs have drawn on the extensive state-local bureaucracy of education to reach well beyond the poor, capturing all children in the public school system.<sup>87</sup>

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79. Alison Lefkowitz, *Men in the House: Race, Welfare, and the Regulation of Men's Sexuality in the United States, 1961–1972*, 20 J. HIST. SEXUALITY 594, 600–01 (2011).

80. *Id.* at 601, 605; LISA LEVENSTEIN, *A MOVEMENT WITHOUT MARCHES: AFRICAN AMERICAN WOMEN AND THE POLITICS OF POVERTY IN POSTWAR PHILADELPHIA* 51 (2009).

81. See SOLINGER, *supra* note 70, at 52–53; Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963); BELL, *supra* note 74, at 87–92.

82. *King v. Smith*, 392 U.S. 309 (1968) (holding that Alabama's morality-based "suitable home" policy violated federal law); see also *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (finding a violation of the Equal Protection Clause where a state welfare law denied benefits to children born out of wedlock).

83. Lefkowitz, *supra* note 79, at 605.

84. Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 139–44 (2002); see also JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 31 (2001); Gwendolyn Mink, *From Welfare to Wedlock: Marriage Promotion and Poor Mothers' Inequality*, 11 GOOD SOC. 68, 69 (2002).

85. Pub. L. No. 104-193, 110 Stat. 2105 (1996); see also Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1675–78 (2005).

86. See, e.g., Phoebe G. Silag, Note, *To Have, To Hold, To Receive Public Assistance: TANF and Marriage Promotion Policies*, 7 J. GENDER, RACE & JUST. 413 (2003); Smith, *supra* note 84, at 184–209. For the racial politics of these policies, see Onwuachi-Willig, *supra* note 85.

87. Silag, *supra* note 86, at 423–25. On the well-established role of the federal government and its administrative agencies in shaping young people's understandings of sex and sexuality, see, for example, Alexandra M. Lord, *Models of Masculinity: Sex Education, the United States Public Health*

*D. Public Employment*

In their discussion of the “sex bureaucracy,” Gersen and Suk associate both bureaucracy and administrative governance more generally with federal agencies. These agencies, however, are only one of many venues in which the government may exercise regulatory authority over sex. Indeed, the government, in its role as a federal, state, and local public employer, has long regulated seemingly private sexual conduct. This regulatory work belongs in our account of the “sex bureaucracy” because it has generally occurred via bureaucratic disciplinary and grievance procedures (procedures that have themselves been informed by legal-bureaucratic mandates).

For the sake of hewing as closely as possible to Gersen and Suk’s article, however, we will begin with a public employment example where federal agencies were, in fact, deeply implicated: the federal government’s systematic investigation of its employees for homosexual tendencies, on the grounds that such employees posed loyalty-security risks.<sup>88</sup> The Cold War–era “lavender scare”—carefully documented by historian David Johnson—began with a 1947 State Department investigation and rippled outward, soon implicating all federal agencies.<sup>89</sup>

As in the immigration and national security examples detailed above, the detection of homosexuals within government ranks was a bureaucratic affair, and often a deeply intrusive one. Loyalty-security investigators not only checked police records but also made inquiries at employees’ former schools, workplaces, and residences; investigated employees’ friends and associates, in an effort to establish “guilt by association”; questioned employees about their sexual habits and histories; and encouraged those under investigation to implicate others.<sup>90</sup> Johnson estimates that thousands of federal employees lost their jobs as a result of the anti-gay purges of the early Cold War years.<sup>91</sup> Johnson also details the purges’ broader effects: government workers and private contractors concealed their sexual identities, curtailed their social

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*Service, and the YMCA, 1919–1924*, 58 J. HIST. MED. & ALLIED SCI. 123 (2003); and see also SHAH, *supra* note 55; GABRIEL N. ROSENBERG, *THE 4-H HARVEST: SEXUALITY AND THE STATE IN RURAL AMERICA* (2016).

88. Anti-communists portrayed gay men and lesbian women as deviant, soft, prone to debauchery, and, for all of these reasons, vulnerable to the seductions and manipulations of communist agents. DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* 5–10, 31–37 (2005); LANDON R. Y. STORRS, *THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT* 90–97 (2015). These characterizations were closely related to popular assumptions about the ways that totalitarian regimes suppressed “natural and proper gender roles.” STORRS, *supra*, at 90.

89. JOHNSON, *supra* note 88, at 79–99. Johnson also describes how the tactics pioneered in the federal administrative state spread to businesses and universities. *Id.* at 168.

90. *Id.* at 73–74, 149–61.

91. *Id.* at 166.

activities, abandoned their preferred careers, and sometimes even took their own lives.<sup>92</sup>

By the late 1950s, anti-communist loyalty programs became less aggressive, lowering the stakes of alleged homosexuality. But public employers continued to regulate sex and sexuality that did not hew to the marital model. We are aware of no comprehensive history of this issue, but reported cases are suggestive. Consider, for example, the facts of *Andrade v. City of Phoenix*<sup>93</sup>: When evidence surfaced that three Phoenix police officers had engaged in adultery (technically a criminal offense in their jurisdiction, but one that rarely led to prosecution), the Phoenix police department initiated administrative disciplinary actions against the officers for violating the department's professional code of conduct.<sup>94</sup> Two of the officers lost their jobs for engaging in conduct "unbecoming an officer."<sup>95</sup>

The facts of *Hollenbaugh v. Carnegie Free Library*<sup>96</sup> are also instructive. There, a public library's Board of Trustees initiated an administrative disciplinary process, whereby board members voted to terminate the employment of two employees whose adulterous office romance resulted in pregnancy and cohabitation.<sup>97</sup> The board was especially concerned that the couple had no plans to "'normalize[]' their relationship through marriage."<sup>98</sup>

For a third variation on this theme, see *Andrews v. Drew Municipal Separate School District*,<sup>99</sup> a case that arose after a school superintendent promulgated a county-wide regulation that rendered unwed mothers ineligible for employment as teachers and teachers' aides. Although based primarily on the superintendent's "personal convictions concerning morality," the policy had a broad impact, reaching all women employees and all potential job applicants.<sup>100</sup> As with the previous examples, this policy was an administrative attack on "deviant" sexuality at a time when the criminal regulation of sexuality appeared to be waning. As importantly, all of these examples involved what Gersen and Suk would term "ordinary" sex—that is, a type of

92. *Id.* at 149–167. On the fear and trauma that came from being ensnared in anti-communist purges, see also ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* 359–68 (1998).

93. 692 F.2d 557, 559 (9th Cir. 1982).

94. *Id.* at 558.

95. *Id.* For a much earlier example of this phenomenon, see Eskridge, *supra* note 22, at 1082 (discussing the case of Henry Gerber, whose advocacy on behalf of the rights of homosexuals in the 1920s led to disorderly conduct charges and who lost his job with the U.S. Postal Service—for "conduct unbecoming a postal worker"—after his lawyer succeeded in having those charges dismissed).

96. 436 F. Supp. 1328, 1332 (W.D. Pa. 1977) *aff'd*, 578 F.2d 1374 (3d Cir. 1978).

97. *Id.* at 1330–32.

98. *Id.* at 1331.

99. 371 F. Supp. 27 (N.D. Miss. 1973), *aff'd*, 507 F.2d 611 (5th Cir. 1975), *cert. granted*, 423 U.S. 820 (1975), *cert. dismissed as improvidently granted*, 425 U.S. 559 (1976).

100. *Id.* at 30.

sex that was nonviolent, nonharassing, and consensual, and in which law enforcement officials apparently perceived no societal harm, and thus no pressing need for criminal prosecution. As others have noted, these administrative actions ensured that, even as criminal law declined as an engine of sexual regulation, the private lives and choices of individual citizens remained a matter of public concern and regulation.<sup>101</sup>

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The historical regulatory efforts we have discussed differ from each other in many regards, including the goals advanced and the techniques employed. What they collectively suggest, however, is a well-established and multi-sited sex bureaucracy, with the ability to reach deep into at least *some* Americans' intimate lives.

This last point includes an important caveat—one that validates a vital strand of Gersen and Suk's argument. Although the "sex bureaucracy" they describe has made headlines for intruding on the prerogatives of elite, heterosexual men,<sup>102</sup> Gersen and Suk worry deeply about its potential disparate impact on a less privileged subset of this group: men of color. As they note, the DOE's own Office for Civil Rights has recognized in other contexts that "African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students."<sup>103</sup>

The history recounted above validates these concerns about selective enforcement. Indeed, we should also ask whether contemporary bureaucratic processes accord fair treatment to *victims* of color, as well as to victims who are gay, lesbian, and transgender—groups whose rights to bodily autonomy have historically been vulnerable.<sup>104</sup> We should ask, too, whether these

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101. See generally Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573 (2016). On the *Andrews* case, see also Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1316–27 (2015).

102. See, e.g., Peter Berkowitz, *College Rape Accusations and the Presumption of Male Guilt*, WALL ST. J. (Aug. 20, 2011), <http://www.wsj.com/articles/SB10001424053111903596904576516232905230642>; Valerie Bauerlain, *In Campus Rape Tribunals, Some Men See Injustice*, WALL ST. J. (Apr. 10, 2015), <http://www.wsj.com/articles/in-campus-rape-tribunals-some-men-see-injustice-1428684187>; Fred Barbash, *Former Ivy League Athlete Suspended for Alleged Sexual Assault Wins Important—and Surprising—Court Victory*, WASH. POST (Aug. 1, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/08/01/former-ivy-league-athlete-suspended-for-alleged-sexual-assault-wins-important-and-surprising-court-victory/>.

103. Gersen & Suk, *supra* note 1, at 943; see also Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 106–10 (2015) (drawing on history and contemporary cases to elucidate concerns about "bias against and disproportionate impact on sexually stigmatized minorities" who may be accused of sexual assault).

104. There is abundant literature on the vulnerability of nonwhite women to sexual violence and the inadequacy of the state's response. Classic examples include Kimberlé Crenshaw, *Mapping*

processes accord fair treatment to victims who are heterosexual men and whose experiences thereby contradict dominant characterizations of sexual assault.<sup>105</sup>

The harsh truth is that although America's sex bureaucracy has had a broad reach, it has never prioritized equality. Rather, it has tended to police and perpetuate difference.

More generally, however, the history we have summarized raises questions for Gersen and Suk's argument. Other than the relative privilege of the regulated group,<sup>106</sup> what precisely differentiates today's sex bureaucracy from its previous iterations? In the following Section we offer additional observations about the contemporary sex bureaucracy in order to identify what has changed in recent years and why Gersen and Suk's slice of this bureaucracy is so fascinating and arguably so troubling.<sup>107</sup>

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*the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); and Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992). More recent examples, directly relevant to concerns about unequal treatment by bureaucratic decision makers, include Geneva Brown, *Ain't I a Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J.L. & GENDER 147 (2012); I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 860–71 (2013); Kate Sablosky Elengold, *Structural Subjugation: Theorizing Racialized Sexual Harassment in Housing*, 27 YALE J.L. & FEMINISM 227, 264 (2016). On sexual violence against persons who are gay, lesbian, and transgender and access to justice, see, for example, Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 201 YALE J.L. & FEMINISM 75 (2008); Rebecca L. Stotzer, *Violence and Transgender People: A Review of United States Data*, 14 AGGRESSION & VIOLENT BEHAVIOR 170 (2009); Emily F. Rothman, Deiner Exner, & Allyson L. Baughman, *The Prevalence of Sexual Assault Against People Who Identify as Gay, Lesbian, or Bisexual in the United States: A Systematic Review*, 12 TRAUMA, VIOLENCE, & ABUSE 55 (2011); Rannveig Sigurvinsdottir & Sarah E. Ullman, *The Role of Sexual Orientation in the Victimization and Recovery of Sexual Assault Survivors*, 30 VIOLENCE & VICTIMS 636 (2015).

105. See Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1264 (2011) (arguing that rape remains a gendered crime and calling attention to the “unjust silence surrounding male rape victimization”); Bennett Capers, *On “Violence Against Women,”* 13 OHIO STATE J. CRIM. L. 347, 353 (2016) (noting the current overlap between the concepts of “violence against women” and “sexual assault” in law and policy and identifying male victims as a casualty of that overlap).

106. To be clear, we are not implying that all college students are “privileged.” Indeed, we know that is not the case. See Vicki Madden, Op-ed, *Why Poor Students Struggle*, N.Y. TIMES (Sept. 21, 2014), available at <http://www.nytimes.com/2014/09/22/opinion/why-poor-students-struggle.html>; Jason DeParle, *For Poor, Leap to College Often Ends in Hard Fall*, N.Y. TIMES (Dec. 22 2012), available at <http://www.nytimes.com/2012/12/23/education/poor-students-struggle-as-class-plays-a-greater-role-in-success.html>. We are drawing a contrast between a regulated population consisting of all college students (of all genders, classes, races, and so on) and the regulated populations we have discussed elsewhere in this Section.

107. What we do *not* do, in the Sections that follow, is compare the DOE's precise practices to those of their sexual-regulatory predecessors elsewhere in the administrative state. We have reason to suspect that in at least one dimension—procedural protections—the DOE's regulatory efforts demonstrate greater respect for regulated individuals than in the past, despite the DOE's imposition of an evidentiary standard (“preponderance of the evidence”) that is less protective of the rights of the accused than the standard used in criminal trials. (The lack of process historically accorded to immigrants, for example, is well known.) But we flag this as an empirical question that deserves exploration.

## II.

## “THE BUREAUCRATIC TURN”: A MORE NUANCED PORTRAIT

If the administrative regulation of sex and sexuality has a deeper history, dating at least back to the late nineteenth century, what distinguishes Gersen and Suk’s modern sex bureaucracy? Gersen and Suk would likely direct our attention to the decriminalization and displacement aspect of their argument—that is, to the recent migration of sexual regulation away from the enforcement of criminal prohibitions to the realm of civil and administrative law. To use constitutional law as a convenient tool of periodization, they are interested in the world that *Lawrence v. Texas*<sup>108</sup> made. As Gersen and Suk argue, it was after *Lawrence* that we see the “transmut[ation]” of sexual regulation into the kind of regime that could truly be called “bureaucratic.”<sup>109</sup>

We share Gersen and Suk’s commitment to identifying and exploring shifts in the modes of sexual regulation,<sup>110</sup> and we agree in general with this narrative of decriminalization and transmutation.<sup>111</sup> We note, however, that, like the sex bureaucracy itself, the phenomena that Gersen and Suk describe have a history, one that places their examples in a different light.

As an initial matter, the decriminalization of sex that was so apparent in *Lawrence* had, in fact, been underway for at least fifty years.<sup>112</sup> As historian Lawrence Friedman noted in 1993, ten years prior to *Lawrence*, “much of the criminal fabric of the sex laws” had simply “rotted away” in the second half of the twentieth century.<sup>113</sup> Indeed, it is possible to see a large-scale decriminalization effort as early as 1951, in the launch of the American Law Institute’s Model Penal Code (MPC) project, which sought to rationalize and reform the diverse state-level criminal codes into a modern penal code that could be adopted in whole or in part by jurisdictions.<sup>114</sup> In doing so, the MPC drafters recognized that most state-level criminal prohibitions on fornication, adultery, cohabitation, and consensual sodomy went unenforced.<sup>115</sup> Concerned that a lack of consistent enforcement would lead to selective enforcement against vulnerable populations, and would cultivate disrespect for the justice system, the drafters sought to decriminalize those offenses that involved private sexual conduct between consenting adults—that is, the types of sexual conduct

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108. 539 U.S. 558 (2003).

109. Gersen & Suk, *supra* note 1, at 887.

110. See Murray, *supra* note 101.

111. Although we are committed to showing that “ordinary sex” has always been regulated, including by administrative agencies, we have no interest in claiming that it was always regulated in the same ways, with the same tools. See Murray, *supra* note 101.

112. See generally Melissa Murray, *Griswold’s Criminal Law*, 47 CONN. L. REV. 1045 (2015) (discussing the history of sexuality’s decriminalization and liberalization).

113. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 341 (1993).

114. This discussion relies generally on Murray, *supra* note 112.

115. *Id.* at 1051–52.

that Gersen and Suk would now term “ordinary sex.”<sup>116</sup> Although the MPC reforms were not adopted uniformly,<sup>117</sup> the effort to reform criminal sexual regulation sparked a broader conversation about whether it was appropriate to use the criminal law to police and enforce sexual norms.<sup>118</sup> By the 1980s, most criminal prohibitions on “ordinary sex” were either eliminated by judicial or legislative fiat, or languished in a state of desuetude, on the books but infrequently enforced.<sup>119</sup>

With this history in mind, *Lawrence* is less a line in the sand, marking a clear shift away from criminal sexual regulation, and more the culmination of an ongoing project of decriminalization that was underway decades before the Supreme Court sounded the final death knell for the criminal regulation of “ordinary sex.”

In the decades preceding *Lawrence* we can also discern the displacement or transmutation effect that so troubles Gersen and Suk—that is, the deployment of administrative adjudication and discipline *in lieu of* criminal prosecution.<sup>120</sup> Consider the three cases discussed earlier, *Andrade*, *Hollenbaugh*, and *Andrews*. These cases are not simply evidence of the administrative state’s long-standing role in regulating sex and sexuality; they can also be read as illustrations of the displacement effect—well before the DOE began to regulate sexual conduct on college and university campuses. In all three cases, criminal prohibitions on the sexual conduct at issue were on the books, but went unenforced. Instead, administrative disciplinary processes filled the regulatory role that criminal law might have occupied. By threatening the livelihoods and hard-earned professional status of the sexual transgressors, these administrative processes punished the transgressive behavior and sent strong signals to everyone in the transgressors’ orbit.

We would go further to argue that not only is the displacement or transmutation dynamic older than the DOE’s recent regulatory efforts, but that it has also been more sweeping in its breadth. Gersen and Suk have helpfully trained our eyes on the federal administrative state, and specifically on those administrators charged with enforcing federal anti-discrimination laws. But we

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116. *Id.*

117. See Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813, 819 (2001) (“Over the course of the next two decades, twenty-two states followed the lead of the American Law Institute and decriminalized sodomy and other adult consensual sex acts.”).

118. Murray, *supra* note 112, at 1054 (noting “the emergence of a robust debate about whether and how to draw limits on the state’s authority to criminalize private consensual sex between adults”).

119. See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 235–36 (2007); see, e.g., Model Penal Code § 213.6 note on adultery and fornication, at 435 (Official Draft and Revised Comments 1980) (describing laws against fornication and adultery as “dead-letter statutes”).

120. See Murray, *supra* note 101, at 586–91.

maintain that the sex bureaucracy implicates the *entire* administrative state, including bureaucratic apparatuses at the state and local level.

Two post-*Lawrence* cases concerning “ordinary sex” by public employees are suggestive of this breadth: *Seegmiller v. LaVerkin City*<sup>121</sup> and *Anderson v. City of LaVergne*.<sup>122</sup> In *Seegmiller*, Sharon Johnson, a police officer in the midst of a contentious divorce, attended an out-of-town training conference paid for in part by her employer, the LaVerkin City police department.<sup>123</sup> During the conference, but after the training sessions had ended for the day, Johnson had “a brief affair with an officer from another department who was also attending the conference.”<sup>124</sup> Based on her estranged husband’s allegations of other professional misconduct, the LaVerkin City Council investigated Johnson’s activities on and off the job and ultimately issued a formal reprimand for the affair, based on a provision in the law enforcement code of ethics requiring an officer to “keep [her] private life unsullied as an example to all and [to] behave in a manner that does not bring discredit to [the officer] or [the] agency.”<sup>125</sup> Future violations of the professional code, the city warned Johnson, would result in “additional discipline up to and including termination.”<sup>126</sup>

In *Anderson*, Michael Anderson and Lisa Lewis, coworkers at the LaVergne police department, began a romantic relationship after meeting on the job.<sup>127</sup> Anderson was a police officer, and Lewis worked as an administrative assistant for the department.<sup>128</sup> Three months after the couple began their relationship, the police chief, concerned that “intra-office dating between employees of different ranks . . . might lead to sexual harassment claims against the department,” issued an administrative order directing Anderson and Lewis to “cease all contact with each other” outside of the workplace.<sup>129</sup> Despite the order, Anderson and Lewis continued to be “romantically and sexually involved.”<sup>130</sup> Anderson was eventually fired for failing to follow his supervisor’s order to stop seeing Lewis outside of the office.<sup>131</sup>

Like Gersen and Suk’s DOE example, these two cases demonstrate the persistence of sexual regulation in the post-*Lawrence* era, and again show how administrative discipline can be functionally very similar to its criminal analog.

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121. 528 F.3d 762 (10th Cir. 2008).

122. 371 F.3d 879 (6th Cir. 2004).

123. 528 F.3d at 764.

124. *Id.* at 765.

125. *Id.*

126. *Id.* at 766.

127. *Anderson*, 371 F.3d at 880.

128. *Id.*

129. *Id.* (internal quotation marks omitted) (quoting Chief of Police Howard Morris).

130. *Id.* at 882.

131. *Id.* at 880.

Johnson's and Anderson's employers reiterated, albeit in more muted tones, the kind of normative condemnation that we associate with pre-*Lawrence* criminal law. Further, these cases also suggest the crucial importance of administrative methods and venues outside of the DOE and other federal agencies. As more and more scholars of administrative law and history are beginning to note, the American administrative state is vast and we should not ignore its state and local tendrils.<sup>132</sup> These, after all, are the sites of many Americans' most frequent contact with the state.

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In providing this more complete account of the “bureaucratic turn”—its longer arc, its wider sweep—we are not so much questioning Gersen and Suk's findings as supplementing them with evidence that the authors may not have considered. The result, we hope, is to underscore one of their key points: In its current form, the administrative regulation of sexuality is at odds with the ethic of sexual liberalism that *Lawrence* represents. Americans may have bought into the principles of sexual liberty and privacy undergirding *Lawrence*, but that does not mean the state treats these principles as sacrosanct. Indeed, we see the opposite.

If we are correct about the timing and scale of the “bureaucratic turn,” the problem is in fact even more significant than Gersen and Suk suggest. A modern sex bureaucracy that includes a range of federal, state, and local bureaucracies, rather than simply one pocket of the federal administrative state, has a vast cache of regulatory tools and agents at its disposal. Gersen and Suk have begun to illuminate the world of federal grants and subsidies, where federal agencies may leverage the power of the purse to promote their

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132. For recent historical work, see, for example, PASCOE, *supra* note 18; LEVENSTEIN, *supra* note 80; TRACY STEFFES, *SCHOOL, SOCIETY, & STATE: A NEW EDUCATION TO GOVERN MODERN AMERICA, 1890–1940* (2012); BRIAN BALOGH, *THE ASSOCIATIONAL STATE: AMERICAN GOVERNANCE IN THE TWENTIETH CENTURY* (2015); Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15 (2016); TANI, *supra* note 71; Marie Amelie-George, *Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents*, 51 HARV. C.R.-C.L. L. REV. 363 (2016). The Pascoe, Levenstein, and George cites bear particular note here, because of their salience to sexual regulation. For recent work in administrative law, see, for example, Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L. J. 1256 (2009); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L. J. 534 (2011); Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443 (2014); Elizabeth Chambliss & Dana Remus, *Nothing Could Be Finer? The Role of Agency General Counsel in North and South Carolina*, 84 FORDHAM L. REV. 2039 (2016). The history we have recounted here suggests the value of even more research in the Chambliss and Remus vein, investigating the regulatory work of state and local agencies apart from their important role in administering federal law. See, e.g., Michael Asminow, *The Fourth Reform: Introduction to the Administrative Law Review Symposium on State Administrative Law*, 53 ADMIN. L. REV. 395 (2001) (a symposium on state administrative law).

regulatory agendas.<sup>133</sup> What we have emphasized in this Section is that, in addition to the power of the purse and other tools common to federal regulatory agencies, the sex bureaucracy may deploy other powerful tools, including professional codes of conduct, employee grievance procedures, and the like. Insulated from public scrutiny, these, too, may be used to enforce a particular vision of normative sexuality, and they may reach populations well beyond those living and working on college and university campuses.

### III.

#### AFFIRMATIVE CONSENT AS THE NEW MARRIAGE? SEXUAL REGULATION'S NEOLIBERAL FORM

The thrust of our argument so far has been to underscore the importance of studying the sex bureaucracy, including the evolution of its scope and logic. In doing so, we risk downplaying the novelty of Gersen and Suk's findings. But having canvassed the "old sex bureaucracy" and offered a more complete portrait of the new, we can now emphasize what is most insightful and interesting about the regulatory work that Gersen and Suk have described. In our view, their most important contribution is neither their identification of a "bureaucratic turn" nor their sharp condemnation of the DOE, but rather their illumination of what appears to be a fundamental shift in the government's rationale for sexual regulation, in and outside of the administrative state.

Historically, as Gersen and Suk note, marriage marked the boundary between legal and illegal sex. "Good sex" occurred in the marital bed; "bad sex" happened outside of it.<sup>134</sup> Indeed, some laws implied that "bad sex" was all but impossible within marriage;<sup>135</sup> some law enforcement practices

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133. Grants-in-aid often appear to be a relatively innocuous policy-making tool, but their regulatory power should not be understated. *See generally* MARTHA DERTHICK, *THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS* (1970); Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 *YALE L. J.* 248 (2014); TANI, *supra* note 71.

134. Gersen & Suk, *supra* note 1 at 888; *see also* Murray, *supra* note 17, at 1268 (discussing marriage's place as "licensed locus for sexual activity"); Murray, *supra* note 16, at 12 (discussing "a social system that cordoned off marriage as the licensed locus of sexual expression"); JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 16 (2d ed. 1997) (noting prohibitions on sex were not intended to "squell sexual expression, but rather to channel it into what they considered to be its proper setting . . . marriage"); FRIEDMAN, *supra* note 113, at 127 (discussing marriage's place as the approved site for sexual activity); MORRIS PLOSCOWE, *SEX AND THE LAW* 1 (1951) ("Only in marriage is sex expression socially and legally acceptable. The jailer and the social censor cast their shadow across non-marital and extra-marital sexual behavior."); Dubler, *supra* note 34, at 777 ("Marriage, in other words, was the core legal site for licit sex."); HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 285 (2005) (noting that well into the 1950s, "[m]arriage, or at least the promise of marriage, was the usual precondition for sexual relations").

135. We refer here to the lack of legal protection against forcible sexual encounters within marriage. *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 *CALIF. L.*

suggested that marriage could alter, as if by alchemy, the character of prior sexual encounters.<sup>136</sup> The legal liberalization of sex that has occurred over the last fifty years has complicated matters. As lawmakers, judges, and prosecutors invalidated or ignored criminal prohibitions on nonmarital sex, marriage's utility as a boundary marker diminished.<sup>137</sup>

Recognizing the important work that marriage performed in the past, scholars have wondered what, if anything, would emerge to fill the vacuum.<sup>138</sup> Gersen and Suk identify the emergence of “an alternative marker”: violence or subordination in the commission of the sexual conduct at issue. They also identify the characteristic that now distinguishes appropriate sexual conduct from inappropriate violence or subordination: consent (or lack thereof). As Gersen and Suk explain, if one party to the sexual conduct at issue does not or cannot consent, the sexual conduct is presumptively impermissible.<sup>139</sup>

To be clear, Gersen and Suk are not saying that the DOE caused this shift, or that the shift occurred during the relatively short time span of the DOE's campaign against sexual assault on college campuses. They are aware that a broader project of sexual liberalization, underway for decades, did much to bring consent to the fore of conversations about what constitutes lawful and unlawful sex and sexuality.<sup>140</sup> But in paying such close attention to the work of

REV. 1373 (2000); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

136. Dubler, *Immoral Purposes*, *supra* note 34, at 776–78; Stephen Robertson, *Making Right a Girl's Ruin: Working-Class Legal Cultures and Forced Marriage in New York City, 1890-1950*, 36 J. AM. STUDIES 199 (2002); Stephen Robertson, *Seduction, Sexual Violence, and Marriage in New York City, 1886-1955*, 24 L. & HIST. REV. 331 (2006).

137. Gersen & Suk, *supra* note 1, at 888; see also Melissa Murray, *The Space Between: The Cooperative Regulation of Criminal Law and Family Law*, 44 FAM. L.Q. 227, 239–40 (2010).

138. Murray, *supra* note 17, at 1302–04 (discussing possibilities for sexual regulation after *Lawrence*); Murray, *supra* note 16, at 60–61 (discussing the post-*Lawrence* landscape); Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2685–87 (2008) (considering the absence of regulation after *Lawrence*).

139. Gersen & Suk, *supra* note 1, at 889. On the emergence of consent as a defining feature of the modern landscape of sexual regulation, see also JOSEPH J. FISCHER, SEX AND HARM IN THE AGE OF CONSENT 6–7 (2016) (identifying “(non)consent as the gravamen adjudicating sexual harm” and asking if “our nationally privileged sexuality” has shifted from heterosexuality to “adult consensuality”); Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. REV. 665, 665–66 (2016) (“[T]he unmistakable trend in the recent legislation, jurisprudence, and academic writing is to the effect that, as the FBI definition now puts it, rape is “[sexual] penetration without consent.”); Judith Shulevitz, *Regulating Sex*, N.Y. TIMES (June 27, 2015), <http://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html> (discussing the rise of affirmative consent and the American Law Institute's recent effort to integrate affirmative consent into the Model Penal Code).

140. We also recognize that for some American adults, the boundary-drawing mechanisms of marriage and consent have never been as distinct as we portray them here. Persons perceived as disabled have often found themselves doubly sexually regulated—by laws restricting their access to marriage and by laws deeming them unable to consent to sexual contact. On disability and access to marriage, see Rabia Belt, *Disability: The Last Marriage Equality Frontier* (Stan. Pub. Law, Working Paper No. 2653117, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2653117](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2653117). On disability

the DOE, Gersen and Suk move the ball forward, prompting us to reflect on the concrete implications of the shift towards consent. Whether on college campuses or in the world outside the ivory tower, what does it mean for marriage to be “out” and consent to be “in”?

Consider, first, how marriage operated as a boundary-drawing mechanism. When marriage marked the line between lawful and unlawful sex, the relevant determination was whether the parties were bound by a state-recognized marriage. This was not always an easy determination,<sup>141</sup> but once made, all sexual conduct fell into neat and tidy boxes. Generally speaking, if the parties were validly married, their sexual conduct was presumptively lawful, even if violent and coercive.<sup>142</sup> If, on the other hand, the parties were not validly married, their sexual interactions were *de facto* illicit.<sup>143</sup> With marriage as the lodestar, sexual regulation was relatively straightforward and efficient.

The determination of consent is considerably more difficult. For many decades now, marriage in the United States has been a public, documented, and easily recognized status. Entry into marriage is often celebrated, in front of many witnesses; licenses are signed and filed at city hall. By contrast, the giving of consent, especially with regard to sex, often occurs in private and is often communicated in terms that are implicit rather than explicit, creating the possibility of conflicting interpretations.

Complicating matters further, unlike a marriage-based system, a consent-based system of sexual regulation requires treating each sexual interaction as a separate transaction for which consent must be secured. Two persons might happily engage in sexual conduct on one occasion, but on another occasion, one or more parties might find that same conduct undesirable. In short, a consent-based regime of sexual regulation leaves the line between licit and illicit sex unstable and perpetually subject to individual negotiation.

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and legal capacity to consent, see Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L. J. 1201 (2015).

141. See, e.g., Ariela Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957 (2000); Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1 (2012); ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: *RHINELANDER V. RHINELANDER* AND THE LAW OF THE MULTIRACIAL FAMILY (2013).

142. *People v. Liberta*, 474 N.E.2d 567, 571 (N.Y. 1984) (discussing the marital rape exemption).

143. Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 6 (1998) (observing that sexuality was once considered a “a force so dangerous that it could not safely be left to self-regulation, but rather should be closely confined, by state law, within marital relationships”); JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 27–38 (1988) (stating that laws against nonmarital sexuality were vigorously enforced in the colonies, carrying “harsh penalties” for both men and women and punishing “[e]ven behaviors that might lead to sex outside marriage”); see also ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 454–56 (3d ed. 1982) (tracing the historical development of the crimes of adultery and fornication).

For some women's rights advocates and others who have fought for victims of sexual assault, this kind of disaggregation and instability is a good thing, or at least an improvement over the alternative. A consent framework sees women as autonomous individuals, untethered to their sexual pasts and relationships. As Joseph Fischel explains, in the context of rape, a consent framework does not interpret a woman's sexual encounters as a potential "violation of one man's property (daughter or wife) by another man," but rather focuses on the intentions of "a rights-bearing person."<sup>144</sup>

Whatever one's view, however, the crucial question is how a consent framework operates *in practice*. This is where Gersen and Suk's article is most illuminating. The DOE, they assert, has encouraged institutions to embrace a specific understanding of what counts as consent: affirmative, verbal agreement.<sup>145</sup> Fearing the wrath of the state as regulator, institutions have pushed further, toward not only affirmative agreement but also enthusiasm and excitement in the articulation of consent.<sup>146</sup> The DOE, they note, has also urged specific procedures for identifying nonconsensual sexual encounters in the event that one party feels aggrieved. One hallmark of these procedures, Gersen

144. FISCHEL, *supra* note 139, at 10. Relatedly, a consent rubric also shifts the focus from whether one party imposed physical force on the other party (a traditional element of the crime of rape, and one that often worked to the disadvantage of victims) to whether both parties agreed to the sexual encounter. Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L. J. 1940, 1951 (2016). We have offered just a taste of a large literature on sexual violence and consent. On consent more generally—its nature, its significance—we also note a vast literature in political theory (a literature that we do not attempt to capture here).

145. Gersen & Suk, *supra* note 1, at 924–31. To be clear, the DOE has never purported to require that colleges and universities adopt affirmative consent policies. It has, however, defined "sexual violence" to refer to "physical sexual acts perpetrated against a person's will *or where a person is incapable of giving consent* due to the victim's use of drugs or alcohol," and it has instructed regulated entities to "take immediate and effective steps to end sexual harassment and sexual violence." OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER, *supra* note 7, at 1 (emphasis added), 2. In informal guidance, the DOE has also "recommended" that institutions provide students with sexual violence training that includes "the school's definition of consent . . . , including examples." OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, 2014, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (last accessed Oct. 3, 2016). Eager to stay on the right side of the law, institutions have understandably been drawn toward affirmative consent policies. See Janet Halley, *The Move Toward Affirmative Consent*, SIGNS (2015), <http://signsjournal.org/currents-affirmative-consent/halley/> (last accessed Aug. 22, 2016) (noting the appearance of affirmative consent requirements in campus sexual conduct codes and "in a parallel campaign for reform of state-based criminal law"); Sandy Keenan, *Affirmative Consent: Are Students Really Asking?* N.Y. TIMES (July 28, 2015), <http://www.nytimes.com/2015/08/02/education/edlife/affirmative-consent-are-students-really-asking.html> (reporting that approximately 1,400 institutions of higher education now use an affirmative consent standard in their sexual assault policies).

146. Gersen & Suk, *supra* note 1, at 931; see also Janet Napolitano, "Only Yes Means Yes": *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POLICY REV. 387, 389–90 (2014) (explaining why the University of California adopted an affirmative consent policy, six months before state law required it to do so).

and Suk explain, is that they invite parties to give different meanings to their encounter. Another hallmark is that they make ambiguity entirely consistent with a finding of sexual assault. For those who wish to avoid any allegation of impropriety, the implication is clear: affirmative, enthusiastic consent is the safest path.<sup>147</sup>

As for why the DOE's current regulatory framework has privileged affirmative consent, part of the answer is surely a grassroots "yes means yes" movement, led by a younger generation of activists seeking to transform societal approaches to sex and empower female sexuality. But note how nicely affirmative consent coheres with the practices of modern bureaucracy. In much the same way that banks, schools, hospitals, and other regulated institutions are required to maintain records that authorities might review at a later date, college students are urged to practice sexual record-keeping, so to speak, in the form of securing clear, lucid assurances of affirmative consent from sexual partners and also of registering their own manifestations of enthusiastic consent. These "records," in turn, make it easier for regulators, adjudicators, and enforcers to later determine whether the line between licit and illicit sex has been crossed. There are, of course, enormous differences between the affirmative consent requirements that have emerged from the administrative enforcement of Title IX and the actual record-keeping requirements imposed on other regulated institutions, and by drawing this analogy we do not intend to imply that affirmative consent standards are anything less than good-faith efforts to prevent sexual assault. Our point is that the model of consent that the DOE has advanced has a decidedly *bureaucratic* cast, training the subjects of regulation to seek and voice consent in specific, cognizable, and ultimately documentable ways.

For Gersen and Suk, these observations would likely only lend urgency to their warnings about the bureaucratization of sex and the more general phenomenon of "bureaucratic creep." If consent has become as important as we and other observers believe, should we not worry about unelected bureaucrats exercising such significant authority over what consent is and how it is established?<sup>148</sup>

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147. Gersen & Suk, *supra* note 1, at 931–46.

148. We phrase Gersen and Suk's concern as a question because we think that it actually is an open question. As Gersen and Suk note, anti-democratic decision making is a real concern in the DOE example, because of the dearth of opportunities for formal public comment and the limited possibility of judicial review. Gersen & Suk, *supra* note 1, at 908–11. But these are not the only mechanisms for public influence on administrative decision making. Indeed, the DOE's campaign against sexual violence on college campuses might be viewed not as anti-democratic bureaucratization, but rather as a direct response to what some at least one commentator has labeled a "new civil rights movement," comprised of survivors of gender-based violence and their allies. Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281 (2016). For journalistic coverage of grassroots activism and its relationship to the DOE's efforts, see, for example, Lisa W. Foderaro, *At Yale, Sharper Look at Treatment for Women*, N.Y. TIMES (Apr. 7, 2011),

To this valid question, we add two broader ones: Setting to one side whether the shift toward consent represents progress in women's long fight against sexual violence, what does it mean to live in a society where consent—and more specifically, *affirmative* consent—may be the new marriage? And what might this trend suggest about the broader regime of governance under which we live? These questions are difficult and warrant sustained scholarly attention. In the interest of furthering the conversation that Gersen and Suk have initiated, we offer a few tentative observations.

As a number of scholars have noted, consent is an essential feature of contract; contract, in turn, is at the heart of classical liberalism.<sup>149</sup> This ideology imagines the good society as one in which sovereign, self-governing individuals pursue their interests—and thereby achieve their just deserts—via private ordering; the state's role is limited to that of a neutral “nightwatchman,” there to ensure that private agreements are honored but otherwise fading into the background.<sup>150</sup> A consent-based system of sexual regulation would thus appear to amplify and promote the values that classical liberalism seeks to advance and protect, including individualism, autonomy, liberty, and freedom from government paternalism. For many Americans, this would be a good thing, at least in the realm of sex.

But does the move toward consent actually insulate Americans from undue state interference? Under this new regime of sexual regulation, few sexual encounters are presumptively permissible or impermissible; the legitimacy of every encounter turns on consent. But even (and perhaps especially) in this “yes means yes” era, expressions of consent are subject to interpretation, and thus disagreement—which in turn creates opportunities for the state to intervene. In the Title IX context, Gersen and Suk note, the college

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<http://www.nytimes.com/2011/04/08/nyregion/08yale.html>; Vanessa Grigoriadis, *Meet the College Women Who Are Starting a Revolution Against Campus Sexual Assault*, N.Y. MAG. (Sept. 21, 2014), <http://nymag.com/thecut/2014/09/emma-sulkowicz-campus-sexual-assault-activism.html>; Caroline Heldman & Danielle Dirks, *Blowing the Whistle on Campus Rape*, MS., Winter 2014, at 32, 32–37. If we take this grassroots activism seriously, the sex bureaucracy might very well be an expression of popular will. And if the sex bureaucracy does reflect popular will, perhaps the more pressing concern, from an administrative law perspective, is accountability: Who is ultimately responsible for the administration of the sex bureaucracy? And if we can say with certainty who is responsible, do all relevant stakeholders share that knowledge?

149. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY*, 33 (1992) (“[T]he institution of contract . . . represented the legal expression of free market principles.”); Christopher Waldrep, *Law and Society: Structuring Legal Revolutions, 1870–1920*, 5 J. GILDED AGE & PROGRESSIVE ERA 309, 316 (2006) (referring to contract as “the legal articulation of classical liberalism”).

150. In American history, classical liberalism enjoyed its heyday in law and policy during the decades bracketing the turn of the twentieth century. For examples of how deeply this ideology pervaded American life and legal thought, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1994); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998).

and university administrators acting in the DOE's shadow determine whether consent has been secured or whether the boundary has been breached. This stands in stark contrast to a status- or marriage-based regime of sexual regulation. As feminist scholars have long noted, marriage is a public institution with a private valence.<sup>151</sup> Once individuals married, the states' role in their affairs was sharply circumscribed—for better or for worse.<sup>152</sup> Where there was an intact marriage, the state was loath to cross the threshold.<sup>153</sup> Where is the threshold in a consent-based regime? It does not exist.

If this argument strikes readers as ironic, it should. The face of consent, particularly affirmative consent, is profoundly libertarian. How can a consent-based regime of sexual regulation be as statist as we suggest? In this seeming paradox lies the most important insight to be gained from Gersen and Suk's article, for this is the very same paradox that scholars have identified in neoliberalism itself.

We deploy the word "neoliberalism" with caution, acknowledging that it has become a tempting "shorthand for 'everything [we] think is wrong and horrible.'"<sup>154</sup> Used carefully, however, the word still captures better than any other a particular "political rationality"—one that has deeply marked American governance for the last forty-some years.<sup>155</sup> To paraphrase David Harvey, neoliberalism is at bottom a theory about how to best advance human well-being—a theory based on the idea of "maximiz[ing]" "entrepreneurial freedoms" within a framework of "private property rights, individual liberty, unencumbered markets, and free trade."<sup>156</sup> It extends a market logic to all realms—that is, not only to the actual buying and selling of goods and labor,

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151. See, e.g., Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1512 (noting the duality of marriage as a both a "public institution" and a "private relationship"); NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2002) (documenting the many ways in which marriage has served as a "pillar of the state," despite common perceptions that marriage is a private matter).

152. On the "worse" side of the equation, see Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974 (1991) ("Historically, male battering of women was untouched by law, protected as part of the private sphere of family life.").

153. For the sake of our argument, we have painted with broad brushstrokes here. For a more nuanced description of the state's role in regulating the behavior of married parties, see Elizabeth Katz, *Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative*, 21 WM. & MARY J. WOMEN & LAW 379 (2015).

154. Dag Einar Thorsen, *The Neoliberal Challenge: What Is Neoliberalism?* 2 CONTEMP. READINGS L. & SOC. JUST. 188, 206 (2010).

155. Wendy Brown, *American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization*, 34 POL. THEORY 690, 693 (2006); see also DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005).

156. David Harvey, *Neoliberalism as Creative Destruction*, 610 ANNALS AM. ACADEMY POL. & SOC. SCI. 22, 22 (2007).

but to the education of children, the policing of crime, the provision of public infrastructure, and the relief of poverty.<sup>157</sup>

Proponents of neoliberal policies often emphasize the importance of keeping the government out—of letting the market do its work, as if the market existed apart from the state. Of course, it does not and never has.<sup>158</sup> Neoliberalism requires a state that creates and protects its preferred institutional framework.<sup>159</sup> It also relies on the state to define citizenship in a particular way—namely, with an emphasis on assuming individual responsibility and pursuing self-sufficiency via “active engagement with the world of work.”<sup>160</sup> In the United States, at least, entrenching this particular definition of citizenship has required heavy-handed government policies, ranging from complicated schemes of “workfare” to the expansion of carceral apparatuses. In short, neoliberalism is anti-statist in principle, but deeply statist in practice.<sup>161</sup>

By illuminating the same paradox in the realm of sexual regulation, Gersen and Suk help us to see how deeply neoliberalism has pervaded American governance. It has now captured realms—such as civil rights enforcement—that we tend to associate with a very different political rationality (that of modern or “New Deal” liberalism). Our challenge, going forward, is not only to interrogate the latest instantiation of our “sex bureaucracy,” but also to interrogate the neoliberal order of which it is a part.

#### CONCLUSION

As we hope this response has made clear, *The Sex Bureaucracy* is an invaluable and timely article, filled with insights into administrative behavior, institutional responses, and shifting sexual norms. Although we have questioned the authors’ portrait of the modern sex bureaucracy and its

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157. Sanford Schram, et al., *The Third Level of US Welfare Reform: Governmentality Under Neoliberal Paternalism*, 14 CITIZENSHIP STUD. 739, 742 (2010); Brown, *supra* note 155, at 694.

158. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011).

159. Harvey, *supra* note 156, at 22.

160. Andrew Woolford & Amanda Nelund, *The Responsibilities of the Poor: Performing Neoliberal Citizenship Within the Bureaucratic Field*, 87 SOC. SERV. REV. 292, 293 (2013); see also Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L. J. 783, 786 (2003) (“In this vision, citizens’ primary role is to maximize their private rational self-interest as buyers and sellers in market exchanges.”); Brown, *supra* note 155, at 694 (noting that neoliberalism measures citizens’ “moral autonomy” by “their capacity for ‘self-care’”).

161. See Miguel A. Centeno & Joseph N. Cohen, *The Arc of Neoliberalism*, 38 ANN. REV. SOCIOLOG. 317, 325 (2012) (noting that although neoliberalism valorizes limited government, neoliberal reformers have rarely chosen to shrink the size of the state “in any substantial, absolute sense”); Loïc Wacquant, *Crafting the Neoliberal State: Workfare, Prisonfare, and Social Insecurity*, 25 SOC. F. 197, 214 (2010) (observing that while the neoliberal state “embraces laissez-faire at the top, . . . it is anything but laissez-faire at the bottom”).

relationship to the regulatory efforts that preceded it, we agree with many of their core concerns and indeed have marshaled additional evidence to support them. Most notably, we agree that when it comes to regulating sex and sexuality, government bureaucrats have at their disposal sophisticated tools and multiple levers of power, and that we have every reason to worry about inequality in the operation of these tools and levers. As contemporary scholars and policymakers develop normative conclusions about particular slices of the sex bureaucracy, we hope that our holistic and historical account will join Gersen and Suk's important article in informing that work.

Indeed, our greatest aspiration for this response is that it will encourage more scholars to follow in Gersen and Suk's footsteps, building an ever-more nuanced picture of the quotidian ways in which the state regulates the intimate lives of its subjects, and thus an ever-more robust empirical basis for normative claims and policy proposals. Sexual regulation, Gersen and Suk helpfully remind us, is not an artifact of a morals-obsessed Victorian age, but a crucial aspect of modern American governance. Celebratory narratives of sexual liberation, such as those contained in canonical Supreme Court opinions, too often lull us into missing this point, by encouraging us to mistake formal promises of liberty for a system of governance that is so restrained and chastened as to merit little critical attention. Regardless of whether one's views on bureaucracy and sexuality align with Gersen and Suk's, this complacency comes at a cost. It is the cost of missing opportunities to shape and contest the forces that will structure some of our most personal and meaningful choices.