

2020

## Title IX & the Civil Rights Approach to Sexual Harassment in Education

Nancy Chi Cantalupo

Follow this and additional works at: <https://digitalcommons.wayne.edu/lawfrp>



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Education Law Commons](#), [Law and Gender Commons](#), [Law Enforcement and Corrections Commons](#), and the [Sexuality and the Law Commons](#)

---

## Keynote Speech

# Title IX & The Civil Rights Approach to Sexual Harassment in Education

**Nancy Chi Cantalupo\***

Thanks very much, Caitlyn, and my thanks to the entire *Roger Williams Law Review* for inviting me to speak today. Some of you may wonder why I start a keynote address for a symposium about Title IX and investigating claims of “sexual misconduct” with photos of people, mainly women, but plenty of men, too, engaged in political protest. I do so because I want to keep reminding us that Title IX is a civil rights law, one that protects equality and equal treatment, which have been the central demands of most mass protests in the United States, including the 2017 Women’s March, which is the center photo in this slide. I also start with these photos because I want to remind us that what has been happening on college campuses since about 2013 with regard to Title IX is intertwined, in countless ways, with much more recent protests happening as a result of the “Me Too” movement and the

---

\* Nancy Chi Cantalupo is an Associate Professor at Barry University School of Law. Her past positions include Associate Vice President for Equity, Inclusion & Violence Prevention at a higher education professional association (NASPA); Assistant Dean at Georgetown Law; and attorney with Drinker Biddle & Reath LLP. Her scholarship focuses on the use of law to combat discriminatory violence, particularly gender-based violence.

Kavanaugh hearings, which have also been protests about sexual harassment and violence as a form of inequality. These protesters and movements understand that, to paraphrase the Secretary-General of the United Nations, Kofi Annan, sexual harassment is both a cause and a consequence of gender inequality.<sup>1</sup>

Finally, I start with these photos because these protests are a reflection of resistance to a broader attack on civil and human rights by the current administration, and I think it is important to look at the proposed changes to Title IX enforcement that Secretary of Education Betsy DeVos is endeavoring to make in this larger context. Although the current administration's rhetoric is that its proposed Title IX rules advance human rights, specifically rights to due process, when we place them in the broader, proper context we can see that they are instead completely consistent with the administration's overall attacks on communities of color, on immigrants, and on religious and gender minorities, just to name a few. I will return to this point in greater detail at the end of my remarks today, but I want to emphasize here, at the outset of these remarks, that our overall failure to see Title IX policy and enforcement as connected to these other civil rights struggles shows how we have lost sight of Title IX's fundamental character as a civil rights law. Even the use of "sexual misconduct" instead of "sexual harassment" reflects this misunderstanding.

Sexual harassment is a civil rights term. It was coined by women at Cornell University in the 1970s to describe the kind of unequal treatment women faced in the workplace.<sup>2</sup> Sexual misconduct is about the behavior of individual people who do not know how to act right. The term sexual misconduct also brings to mind the criminal law because that is the main way that our society deals with misconduct of all kinds. In this way, the term sexual misconduct does what most of the conversation about Title IX and sexual harassment has done over the last decade: it conflates sexual harassment with criminal sexual assault or sexual violence.

---

1. Press Release, Kofi Annan, Secretary-General, United Nations, Atrocious Manifestation of Continued Systematic Discrimination, Inequality (Nov. 25, 2005), <https://www.un.org/press/en/2005/sgsm10225.doc.htm> [<https://perma.cc/8DH7-CXGJ>].

2. Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 8 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003).

To be clear, some kinds of sexual harassment, especially the most severe kinds like sexual assault, are criminal. But they are not *only* criminal. They are also civil rights violations and the conflation of sexual harassment with criminal sexual violence also has specific legal implications. It influences how we investigate and resolve accusations of sexual violence, for instance. And conflating Title IX and the criminal law inevitably means importing criminal law and procedure into the Title IX context. Experience shows that this only happens in one direction; we are not importing civil rights premises or principles into the criminal law.

Importing criminal law and procedure into how we implement and enforce Title IX is a problem because civil rights laws and criminal laws are very different, with different purposes and methods for fulfilling their purposes. So, if we import criminal law and procedure into Title IX proceedings, we undermine, even eliminate, Title IX's ability to fulfill its purpose, which is to protect civil rights and ensure gender equality in our schools.

For the remainder of my remarks today, I am going to explain in more detail why I say that conflating Title IX and the criminal law is destructive to Title IX and civil rights goals and principles, before turning back to the larger context that I have just mentioned. Here I should note that almost everything I am about to say about Title IX is based on how Title IX worked prior to this administration. I focus on how Title IX worked prior to the Trump Administration because the administration's attempts to change the enforcement of Title IX are not final and are unlikely to be final for a long time, as they will almost certainly be challenged in court the minute that they are published. I also focus on how Title IX worked prior to the Trump Administration because this is how Title IX is supposed to work. This administration's attempts to change the enforcement of Title IX are, in fact, attempts to undermine Title IX's effectiveness in protecting civil rights by turning it into a quasi-criminal law.

Let me get more specific about how and why turning Title IX into a quasi-criminal law would undermine and ultimately destroy Title IX's ability to protect civil rights. I start with what I regard as the four most important of the many, many ways in which a civil rights approach differs from a criminal approach when it comes to sexual harassment. As already explained, the civil rights approach is concerned with equality, in Title IX's case with equal educational

opportunity and educational environments that are equally supportive of the learning of all students regardless of their gender identity.

The criminal system is focused on keeping the abstract community as a whole safe from violence and basically relies on incarceration of criminal actors to achieve that safety. But that incarceration needs to be just, and we cannot be depriving citizens of their liberty under the Constitution based on crimes that they did not commit. So, this means that the focus of the criminal system is on the defendant's rights, not on the victim's needs. In contrast, incarceration is not the focus of the equality-based Title IX approach, not only because schools cannot lock people up, but also because incarceration does nothing to make people more equal.

Instead of focusing on the accused perpetrator's rights not to be unjustly imprisoned, the civil rights approach is fundamentally focused on the victim because the right to be free of gender discrimination in school is the victim's right. This is one of the reasons why there is an effort to turn various civil rights laws, and Title IX in particular, into quasi-criminal laws: because doing so changes our focus from the rights of the discrimination victim to the rights of the accused harasser. This tactic allows those who are often quite powerful and privileged to claim that they are the real victim—the victim of a supposed due process violation or a “witch hunt.” Psychologists have named this phenomenon DARVO, which stands for “Deny, Attack and Reverse Victim and Offender,”<sup>3</sup> and we can see in, for instance, Harvey Weinstein's, Brett Kavanaugh's, and Donald Trump's reactions to being accused of sexual harassment and violence just a few of the many recent examples of the DARVO phenomenon.

The second difference between the criminal and civil rights approaches deals with what each system is structured to do. Victims have an extremely wide range of needs as a result of sexual violence, and the downward spiral that victims can experience if these needs are not met can seriously derail and even ruin their lives. Sexual violence causes serious health problems, including increased risk of substance use and re-victimization, eating

---

3. Jennifer J. Freyd, *What is Darvo?*, U. OR., <https://dynamic.uoregon.edu/jjf/defineDARVO.html> [<https://perma.cc/JV7P-7USP>] (last visited Mar. 21, 2020).

disorders, sexual risk behaviors, pregnancy, self-harm, and suicidality.<sup>4</sup> These health problems then require time off and usually cause a drop in grades and educational performance.<sup>5</sup> Both result in economic losses to, for example, financial aid and tuition dollars and, in the worst cases, a student ends up dropping out or transferring to a less desirable school.<sup>6</sup> The negative impact on future earning potential is likely to be large, so students' equal employment opportunities are likely to be diminished even before they start working.<sup>7</sup> Like with people already working, these dynamics have a larger impact on certain students, such as first generation college students, because you need resources to create the time and space to heal and these students and their families often have fewer of such resources.<sup>8</sup>

All of these needs mean that to re-establish an equal education for a student victim, the school must do more than simply punish the perpetrator. Most importantly, the school must provide the victim with accommodations like changes to living, working, transportation, and academic arrangements, ordering stay-away orders, and refunding tuition or providing other relief to victims whose trauma makes it impossible for them to continue with their education in the same way as they did before the violence. The criminal law, even if it wanted to, is not structured to provide such assistance. This is true even if the criminal system worked *perfectly*, 100% of the time, and police and prosecutors never made

---

4. Nicole Spector, *The Hidden Health Effects of Sexual Harassment*, NBC NEWS (Oct. 13, 2017), <https://www.nbcnews.com/better/health/hidden-health-effects-sexual-harassment-nena810416> [https://perma.cc/X743-TD6X].

5. See Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 396 (2005) ("The end result for victims is falling grades, prolonged school absence, and for many, eventual school drop out or failure. Simply put, sexual assault is a significant barrier to equal education for young women today.").

6. Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. FORUM 281, 295 (2016) (citing Rebecca Marie Loya, *Economic Consequences of Sexual Violence for Survivors: Implications for Social Policy and Social Change* 93–100 (June 2012) (unpublished Ph.D Dissertation, Brandeis University) (on file with The Heller School for Social Policy and Management)).

7. See *id.* at 296 (citing Loya, *supra* note 6, at 95).

8. *Id.* at 295–96 (citing Loya, *supra* note 6, at 104–10).

any errors in doing their jobs. The criminal system is just not set up to make a victim whole in the way that civil rights law can.

The third difference between the civil rights and criminal law systems has to do with who gets to decide whether an investigation of a victim's report will happen. When people report crimes, the expectation is that their report will be investigated, but police and prosecutors are the ones who actually decide what happens with that investigation. Police and prosecutors make the decision to advance very few cases through the criminal system, as you can see from this inverted pyramid aggregating the findings of many studies that, of 100 rapes committed, only 5–20 are reported to police, 0.4–5.4 are prosecuted, 0.2–5.2 result in conviction, and 0.02–2.8 result in any incarceration.<sup>9</sup>

What is also clear here is that an even smaller number of survivors will even give police and prosecutors the chance to make that decision.<sup>10</sup> Instead, the vast majority of survivors will use the victim's veto, described by Professor Douglas Beloof when he says that “[t]he individual victim of crime can maintain complete control over the process only by avoiding the criminal process altogether through non-reporting.”<sup>11</sup> Although this description is for crime victims generally, this analysis is completely consistent with the dynamics of campus sexual harassment. Student survivors give very similar reasons for not engaging in the criminal system and often with their campus systems, especially when the campus system imitates the criminal system, and it looks like reporting to campus officials is the same thing as going to the criminal system.

The list of major reasons given by survivors in decades of studies about campus sexual harassment and sexual violence<sup>12</sup>

9. Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 157 (2012).

10. *Id.* at 156–157.

11. Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 306 (1999).

12. The reasons, as displayed during the presentation, were: fear of hostile treatment or disbelief by legal and medical authorities; not thinking a crime had been committed or what happened was serious enough to involve law enforcement; not wanting family or others to know; not wanting to get assailants who victims know in trouble; lack of faith in or fear of police, police ability to apprehend the perpetrator, court proceedings; lack of proof; fear of retribution from the perpetrator; belief that no one will believe the victim and nothing will happen to the perpetrator.

echoes Professor Beloof's list, including survivors' desires to retain their privacy, their concern about participating in a system that may do them more harm than good, and their skepticism about the ability of the system to effectively solve many crimes.<sup>13</sup> Equally evident in this list are victims' concerns that they are going to be treated badly by systems in which they lack the ability to exert any meaningful control over the terms of their participation in the system.<sup>14</sup> Many victims, especially victims of color, may also reject the model of retributive justice that the criminal law uses or have reasons to be suspicious of criminal justice system actors like police and prosecutors, especially police.<sup>15</sup>

In contrast to the criminal system, where police and prosecutors decide what happens with the victim's case, the Title IX civil rights approach allows the *survivor* to decide. The Office for Civil Rights in the Department of Education approved of this approach in 2014 when it recognized that schools could establish a two-path reporting system.<sup>16</sup> This system was basically modeled on the system that was already being used with significant success in the U.S. Military<sup>17</sup> and, although the 2014 guidance has been rescinded, schools can still use this structure without violating Title IX. Both the military and Title IX systems give survivors at least two choices for how to report. Under the first option, they can make an official report to a responsible employee or to the Title IX coordinator, and that person must investigate unless the victim explicitly requests that there be no investigation and the Title IX coordinator can grant that request. The Title IX Coordinator may not be able to grant the request if the Title IX coordinator has access to information, such as multiple reports naming the same accused harasser, requiring an investigation despite the survivor's request for confidentiality. Thus, the survivor takes a chance in going to the Title IX coordinator because the survivor could lose some

---

13. Beloof, *supra* note 11, at 306.

14. *Id.*

15. *Id.*

16. See U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND CAMPUS SEXUAL MISCONDUCT 21–24 (Apr. 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [https://perma.cc/5EEH-C8GY].

17. DEPT OF DEF., REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE 9 (2014).



control over the process. If survivors want to maintain complete control over the process, they can choose to report in a confidential path, which would get them access to services and accommodations like the ones just discussed. However, reporting in a confidential path would not result in an investigation unless the survivor later decided to report to a responsible employee or to the Title IX coordinator, a switch from the confidential to the non-confidential path that the survivor can make at any time.

What the social science research and Professor Beloof's analysis about the victim's veto also shows us is that survivors who want an investigation and therefore decide to use the non-confidential path will take into consideration in making their decision how and under what procedural rules the investigation will operate.<sup>18</sup> This reality brings us to the final difference between the criminal system and the civil rights approach: Title IX and all civil rights statutes use procedures that treat the parties to the proceeding equally.

Once again, this approach is a stark contrast to criminal proceedings where victims are mere "complaining witnesses" with no party status and none of the procedural protections that come with party status. Indeed, the criminal law treats accused assailants and victims radically *unequally*.<sup>19</sup> Because their roles are limited to that of witness in criminal proceedings, victims enter the courtroom, give their testimony, and then are often not even allowed to remain in the courtroom for the rest of the trial.<sup>20</sup> Their lack of party status means that victims have no legal representation in a criminal proceeding, since the prosecutor represents the State, which may have very different interests

---

18. See Beloof, *supra* note 11, at 306.

19. See Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 849 (1997) (noting the various procedures developed to protect defendants and that no comparable body of law has developed to protect victims).

20. See, e.g., ARK. CODE ANN. § 16-90-1103(a) (West 2018) (excluding victim from proceedings when "necessary to protect the defendant's right to a fair trial"); UTAH R. EVID. 615(d) (sequestering victim witnesses from proceedings unless "prosecutor agrees with the victim's presence"); Cellini, *supra* note 19, at 849. But see 18 U.S.C. § 3510 (2012) (prohibiting district courts from sequestering victim witnesses during the trial of the accused); ALASKA STAT. ANN. § 12.61.010(a)(1) (West 2018) (listing the right of a crime victim to be present during any prosecution).

from the victim.<sup>21</sup> Further, victims do not get equal evidentiary access or privacy protections from either the prosecution or defense, neither of whom is accountable to the victim.<sup>22</sup> Without party status, victims also have no right to appeal.<sup>23</sup> The procedurally equal system required by a civil rights approach is starkly different, since it considers the victim an equal party to the proceeding and follows the principle that any procedural right provided to one party must be provided to the other.

In fact, the procedural equality of the Title IX and other civil rights systems is the closest to full fairness that any system can get. It nevertheless is experienced as unfair by those who are accused of wrongdoing because of the ongoing comparison of Title IX to criminal procedures. Whereas the civil rights system does not privilege either party, criminal procedures give so many more procedural rights to the accused than they do to the victim that the accused will, of course, experience equal rights as a *loss* of rights that seems unfair. This adds to the pressure exerted by some to turn Title IX into a quasi-criminal law, because doing so would import the privileges that the criminal system gives to the accused over the victim.

Nowhere is this pressure heavier than with the fight over the standard of evidence, which the Trump Administration's proposed rules would push schools to change from "preponderance of the evidence" to "clear and convincing evidence."<sup>24</sup> The preponderance standard has become such a focal point because the preponderance standard is the most procedurally equal of all standards of proof,

---

21. See RUSSELL L. WEAVER ET AL., PRINCIPLES OF CRIMINAL PROCEDURE 5–6 (4th ed. 2012) (noting the policies and authorizations that affect federal and state prosecutors in practice); Cellini, *supra* note 19, at 851 (observing that prosecutors try to use time and resources efficiently, which closely relates to defense attorneys' objective of certainty in the outcome rather than the victim's desire for justice).

22. See WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW §§ 1.2(e), 1.3(a) (2d ed. 2010); Cellini, *supra* note 19, at 841.

23. 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3902.1 (2d. ed. 1991).

24. See Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence & Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 312-317 (2019) (discussing the proposed changes to the Title IX regulations that deal with the evidentiary standard).

and therefore gives neither accused students nor student victims an advantage in the fact-finding process.

Indeed, the preponderance of the evidence standard is the only truly civil rights standard for many reasons, but I am going to discuss only the two most relevant in my comments today. First, the preponderance standard gives both parties equal assumptions of truth-telling. In contrast, the criminal standards give heavy presumptions in favor of the accused and against the victim. This signals skepticism of the victim's account and *only* the victim's account. We can see this in the very language of the clear and convincing evidence standard, which requires that the fact finder be *clearly convinced* that the victim—and again, *only* the victim—is telling the truth. Adopting a standard that signals such skepticism is arguably discriminatory on its face, but it also relies on stereotypes that victims lie about being sexually victimized, stereotypes that have been around for centuries and have been rejected by criminal law reformers as gender discriminatory for decades.<sup>25</sup>

Second, the preponderance standard reflects the equal stakes of the parties. The rhetoric of the administration about its proposed rules implies that criminal standards of proof are more accurate, but as all lawyers and judges know, no standard of proof is more accurate than another. Standards of proof are chosen for the *kind* of inaccuracy that they risk and that choice reflects the relative stakes of the parties and other values of the system.<sup>26</sup>

This is another way in which the preponderance standard is the most equal standard of proof: it balances the risks between false positives (or “wrongful convictions” in criminal law terms) and false negatives (or “wrongful acquittals”). Criminal and quasi-criminal standards tolerate a much greater risk of false negatives, reflecting the stakes of those involved in criminal proceedings. The defendant could go to jail or have to register as a sex offender. The victim is not perceived as facing any consequences at all from the criminal

---

25. See Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 645 (2010) (“The marital rape exemption and the historical requirements in rape law of resistance, corroboration, and chastity continue to infect both statutory law and the way that actors with[in] the criminal justice system—police, prosecutors, judges, and juries—see the crime of rape.”).

26. See Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 742–744 (2012).

proceeding. Thus, we have crafted the evidentiary standard to avoid false positives, or wrongful convictions, even if that means risking many false negatives, or wrongful acquittals.

But in a campus Title IX investigation, both students have the same stakes in the outcome. Both wish to continue attending the school of their choice and both will likely be pushed to leave if the other one stays. On the one hand, the accused harasser may be suspended or expelled, and an expulsion may affect the accused student's ability to go to school elsewhere. Now I should note that the limited research and data that is out there indicates that accused harassers are rarely expelled<sup>27</sup> and, when they are, I have come across no research—and I have looked fairly extensively—indicating how often, if ever, accused students are unable to transfer to another school and to complete their education. Despite this lack of evidence, I am unwilling to dismiss this possibility on that basis. Consistent with the civil rights emphasis on equality, I believe we should be concerned about this danger and bear it in mind in structuring the rules of the proceedings, including with regard to the standard of proof.

On the other hand, research does show, and has shown repeatedly over many years, that many victims will transfer schools or drop out of school entirely as a result of an accused student remaining at that institution. Because encountering someone with whom the victim has had a traumatic experience triggers the trauma over and over again, making it impossible to continue with one's education,<sup>28</sup> victims are compelled to leave that school. Thus, the stakes are equal in these cases. The evidentiary standard should reflect these equal stakes, and the preponderance standard is the only standard that does.

This analysis is further confirmed by the fact that the preponderance standard is also the standard of proof that schools are expected to use in investigating and resolving complaints of racial harassment. My research has established that the Office for Civil Rights in the Department of Education has enforced, in both sexual and racial harassment cases, an expectation that schools use

---

27. See Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 13–14 (2019).

28. *Id.* at 14.

the preponderance of the evidence standard when investigating any complaints of discriminatory harassment.<sup>29</sup> This enforcement approach dates back at least to 1995 in sexual harassment cases and was used as recently as 2014 for racial harassment cases.<sup>30</sup> The proposed rules that the current administration issued in November 2018 would break this consistent and equal treatment of sexual and racial harassment victims.

As you can see from the text of the proposed rule,<sup>31</sup> it drives schools to use a clear and convincing evidence standard in sexual harassment cases and this breaks the consistent, across the board enforcement that was done in the past with regard to discriminatory harassment cases. The proposed rules only apply to sexual harassment cases, thus presenting the immediate question: if a school uses clear and convincing evidence for sexual harassment, but preponderance of the evidence for racial harassment, what happens when a woman of color is both sexually and racially harassed? When it comes to the investigation and what kind of standard is going to be used, will the victim be a woman first or will she be a person of color first?

These are especially troubling questions because we know from decades of research that women of color are sexually harassed more—and more severely—than white women.<sup>32</sup> We also know that they are harassed in ways in which gender and race discrimination are so intertwined that they cannot be separated, as

---

29. *Id.* at 5.

30. *See id.*

31. [I]n reaching a determination regarding responsibility, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard. The recipient may, however, employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61477 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

32. Cantalupo, *supra* note 27, at 45, 47–48, 54; *see also* Cantalupo, *supra* note 24, at 317.

this quote from an actual letter from a white male professor to a woman student of color shows.<sup>33</sup>

Despite this disproportionate targeting, women of color are also less likely to be believed when they complain of harassment because they face stereotypes that are both racist and sexist.<sup>34</sup> Racialized stereotypes dating back to slavery and colonialism treat women of color as prostitutes or as promiscuous, with each group of women of color, as you can see here, having its own very special stereotype of how we are all whores or sluts.<sup>35</sup> Then, sex stereotypes about supposedly unchaste women being essentially unrapable cause many people to assume that women of color are lying when they say that they did not consent to sexual activity.<sup>36</sup> As I have already explained, the proposed rules, especially the one that would push schools to use clear and convincing evidence, will make it harder for

---

33. See Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, in *CRITICAL RACE FEMINISM: A READER* 349, 349 (Adrien Katherine Wing ed., 2d ed. 2003).

I'll get right to the point, since the objective is to give you, in writing, a clear description of what I desire . . . . Shave between your legs, with an electric razor, and then a hand razor to ensure it is very smooth

. . . .

I want to take you out to an underground nightclub . . . like this, to enjoy your presence, envious eyes, to touch you in public . . . . You will obey me and refuse me nothing . . . . I was dreaming of your possible Tokyo persona since I met you. I hope I can experience it now, the beauty and eroticism.

*Id.*

34. See Cantalupo, *supra* note 24, at 317–18; Cantalupo, *supra* note 27, at 16–20, 25–26, 27–28, 30.

35. African American women are stereotyped as “Jezebels.” Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates Over Implicit Bias and Intersectionality*, 37 *HARV. J.L. & GENDER* 185, 214 (2014). Latinas are stereotyped as “hot-blooded” and Asian Pacific Islander and Asian Pacific American women as “submissive and naturally erotic.” Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 *GOLDEN GATE U. L. REV.* 817, 819–820 (1993). American Indian/Native American women are stereotyped as “sexual punching bag(s).” See Debra Merskin, *The S-Word: Discourse, Stereotypes, and the American Indian Woman*, 21 *HOW. J. COMM.* 345, 353 (2010). Finally, multiracial women are stereotyped as “tragic and vulnerable.” See Jessica C. Harris, *Centering Women of Color in the Discourse on Sexual Violence on College Campuses*, in *INTERSECTIONS OF IDENTITY AND SEXUAL VIOLENCE ON CAMPUS: CENTERING MINORITIZED STUDENTS’ EXPERIENCES* 42, 49 (Jessica C. Harris & Chris Linder eds., 2017).

36. See Anderson, *supra* note 25, at 645.

all victims to be believed. But the stereotyping that women of color face will make those additional barriers particularly damaging for survivors of color.

Many of you may be thinking: but I had heard that the proposed rules would address race discrimination against men of color because they are disproportionately accused, and falsely so, of sexual harassment on college campuses. Such a narrative has been circulating for quite a few years now, and it actually does not originate with the current administration. That narrative alleges that the wave of accusations of sexual violence on college campuses is yet another iteration of the white supremacist excuse for lynching during the Jim Crow period in the American South: white women falsely accusing black men and boys of sexual assault.

The reality is that campus investigations of sexual harassment are not public, and there is almost no data indicating what the racial demographics are of either accusers or accused in sexual harassment cases. But the little data we do have, from both the criminal system and the educational system, shows that men and boys of color are not disproportionately disciplined in *sexual harassment and violence* cases—even though they are subject to discriminatory discipline for other kinds of misconduct when that misconduct primarily harms white people.<sup>37</sup>

For instance, in an extensive study from the criminal system, the researchers concluded, after looking at over 40,000 cases, that only defendants of color who were accused of primarily *inter-racial* crimes, such as robbery or other property crimes, were treated more harshly than white defendants.<sup>38</sup> Defendants of color who were accused of primarily *intra-racial* crimes, like sexual assault, were treated more *leniently*.<sup>39</sup> This study echoes research with which many of us are familiar, at least in law schools, regarding the death penalty, which has shown over and over again that the most likely defendants to receive death sentences are defendants of color who killed a white person.<sup>40</sup>

---

37. See Cantalupo, *supra* note 27, at 73, 78–79.

38. See *id.* at 35; see also Christopher D. Maxwell et al., *The Impact of Race on the Adjudication of Sexual Assault and Other Violent Crimes*, 31 J. CRIM. JUST. 523, 523 (2003).

39. See Maxwell, *supra* note 38, at 523.

40. See Cantalupo, *supra* note 27, at 16.

This insight is also corroborated by the very limited research and data that we have from the K-12 educational context. The Department of Education Civil Rights Data Collection shows that K-12 students engaging in sexual harassment are disciplined both less and without major racial disparities even when there were large racial disparities for other kinds of discipline in schools.<sup>41</sup>

The current administration's rhetoric around its proposed Title IX rules ignores this data and pretends that its proposed rules are going to advance racial justice by decreasing discriminatory discipline of men of color. In actuality, however, they do nothing to address the real discriminatory discipline problems that are faced by male students of color, even as the proposals enable the intersectional, racial, and gender discrimination against women of color that I have already discussed. And it is important to point out that if this administration had conceived of women of color as being common sexual harassment victims—or even victims at all—it could not possibly have created the intersectional legal conflict I've already mentioned in the first place. Only an administration that held racialized gender stereotypes and therefore did not think that women of color could be sexually victimized would have proposed such rules.

Meanwhile, as the administration takes actions in the Title IX context that expose the intersectionally racist and sexist nature of its goals, it has dismantled protections against *real* discriminatory discipline problems facing students of color. These problems are those that have been extensively documented as leading to the school-to-prison pipeline in education. In addition, they are not only problems that affect particularly African American students in large numbers, but, as already noted, they overwhelmingly do *not* involve sexual harassment. Thus, although there is simply no evidence to support claims that changing *Title IX* enforcement on sexual harassment would help men and boys of color, the administration is attempting to make such changes anyway. It is doing so while also deliberately and quietly halting *proven* methods of reducing discriminatory discipline that is well-documented, serious, and widespread.

And when I say “quietly,” I mean about as quietly as the federal government can do anything. The administration announced that

---

41. *See id.* at 77, 78 n.440.



it was rescinding the Obama-era guidance on discriminatory discipline in December 2018, in the early evening of the Friday before the nation's longest annual holiday, with what would turn out to be the longest ever federal shutdown pending.<sup>42</sup> This is in contrast to how Secretary DeVos announced the rescission of the Title IX guidance, which was done via a splashy speech at George Mason University's Antonin Scalia Law School.<sup>43</sup> Thus, the impact of any changes to the Title IX rules would be a net loss to communities of color, particularly to African American communities. They would harm women and girls of color and then, when combined with what the Department of Education is doing in the discriminatory discipline context, they would also harm men and boys of color, especially African American men and boys, although it is worth noting here that the research shows that disproportionately high numbers of African American girls face discriminatory discipline as well.<sup>44</sup>

So, the civil rights of students of color are under serious attack and that attack is coming from all sides despite the claims that the changes in Title IX are going to be protective. The actual solution, or at least the necessary first step towards a solution, is not changing the Department of Education's enforcement approach, but collecting more and more relevant data about what is going on in education with regard to sexual harassment, including demographic information. That way we can have a clearer and more accurate understanding of what the problem looks like so we can create the right solutions.

Most critically, we need to consider the data on who is accusing whom and who is being disciplined for sexual harassment. And it's

---

42. See Laura Meckler, *Trump Administration Revokes Effort to Reduce Racial Bias in School Discipline*, WASH. POST (Dec. 21, 2018), [https://www.washingtonpost.com/local/education/trump-administration-revokes-effort-to-reduce-racial-bias-in-school-discipline/2018/12/21/3f67312a-055e-11e9-9122-82e98f91ee6f\\_story.html?noredirect=on&utm\\_term=.8b519a6f49ec](https://www.washingtonpost.com/local/education/trump-administration-revokes-effort-to-reduce-racial-bias-in-school-discipline/2018/12/21/3f67312a-055e-11e9-9122-82e98f91ee6f_story.html?noredirect=on&utm_term=.8b519a6f49ec) [https://perma.cc/J2XR-H65U] (explaining that the Trump Administration rescinded Obama-era guidance that put schools on notice that they could be violating civil rights laws by punishing minority students at higher rates).

43. Susan Svrluga, *Transcript: Betsy DeVos's Remarks on Campus Sexual Assault*, WASH. POST (Sept. 7, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devos-remarks-on-campus-sexual-assault/?utm\\_term=.abc3866968fc](https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devos-remarks-on-campus-sexual-assault/?utm_term=.abc3866968fc) [https://perma.cc/GH7V-99UB].

44. See Verna L. Williams, *Title IX and Discriminatory School Discipline*, 6 TENN. J. RACE, GENDER & SOC. JUST., 67, 75 (2017).

important to note that these are different inquiries. The current administration and its allies' rhetoric conflates them and, in doing so, they imply that the problem is racism on the part of the accusers, not racism embedded in the campuses that are disciplining accused harassers. Although certainly there could be a level of coordination between accusers and disciplinarians as there arguably was during the lynching period in the American South, we do not have any data to prove, or even support, *any part* of such a claim. And the data that we do have indicates that many of the accusations that are being made in this context are again being made by women survivors of color, as well as against accused individuals who are not people of color.

As already mentioned, we do not have all of this data because schools are generally not required to disclose any information about disciplinary complaints. Therefore, they don't have to tell us what disciplinary complaints they have received or what result they have reached after an investigation of those complaints. And that would obviously include demographic information about who is accusing whom and what disciplinary decisions are being made in those cases. This lack of transparency has long been a target for Title IX survivor activists who have championed, for instance, new legal requirements for mandated climate surveys. In contrast, the last fully Republican-controlled Congress introduced legislation that would prohibit the Department of Education from *ever* requiring a climate survey among their students. This opposition was mounted even though the rhetoric that there are widespread false accusations directed at college men of color by white college women could be tested by requiring more transparency such as mandated climate surveys. As such, it must increase our skepticism of such rhetoric. We have to ask: why on earth would you oppose collecting data that would prove your point if you believe your point is actually accurate?

As all of this evidence shows, the proposed Title IX changes have nothing to do with advancing racial justice or gender justice. They are not only discriminatory in terms of gender, but they are also discriminatory in terms of race and, therefore, anyone who cares about either or both racial and gender justice should oppose them. Thank you.