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Dog Whistles and Beachheads: The Trump Administration, Sexual Violence, and Student Discipline in Education

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DOG WHISTLES AND BEACHHEADS: THE TRUMP ADMINISTRATION, SEXUAL VIOLENCE, AND STUDENT DISCIPLINE IN EDUCATION

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Beachhead: "A defended position on a beach taken from the enemy by landing forces, from which an attack can be launched."

—Oxford English Dictionary[1]

Beachhead: "A strategy to infiltrate academia, push back Obama-era policies, undermine collective civil rights, and impose large-scale federal deregulation."

—Dr. Anne McClintock, Who's Afraid of Title IX[2]

Dog whistle: "A coded message communicated through words or phrases commonly understood by a particular group of people, but not by others."

—Merriam-Webster[3]

On November 29, 2018, the Trump Administration's Department of Education ("ED"), published a Notice of Proposed Rulemaking ("NPRM") which proposed expansive changes to ED's regulations under Title IX of the Educational

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1. *Definition of Beachhead in English*, ENG. OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/beachhead (last visited Apr. 17, 2019).

2. Anne McClintock, *Who's Afraid of Title IX?*, JACOBIN, https://www.jacobinmag.com/2017/10/title-ix-betsy-devos-doe-colleges-assault-dear-colleague (last visited Apr. 17, 2019).

3. *This is the Definition of 'Dog Whistle Politics'*, MERRIAM-WEBSTER (April 2017), https://www.merriam-webster.com/words-at-play/dog-whistle-political-meaning.

Amendments of 1972 ("Title IX"). These changes focus on Title IX's prohibition of sexual harassment, which includes sexual violence as a severe form of sexual harassment. The NPRM lifts the historical expectation that schools will use a preponderance of the evidence standard of proof in their internal sexual harassment investigations. Instead, the NPRM proposes a rule that would push schools to adopt a clear and convincing ("C&C") evidence standard for sexual harassment and other forms of discriminatory harassment.

This Article maps the ways in which the NPRM's attempt to replace the civil rights-based preponderance standard with the quasicriminal C&C evidence standard seeks to establish a beachhead in a larger war against civil rights and uses a "due process" dog whistle as a key weapon in the establishment of that beachhead. If successful, this broad attack on civil rights will undermine the rights of not only sexual harassment victims, but all discriminatory harassment victims, especially women students of color and other intersectional populations who are disproportionately vulnerable to harassment. ED's encouragement to adopt an inappropriate standard for sexual harassment opens the door for schools to do the same for other forms of discriminatory harassment, resulting in fewer protections from all discriminatory harassment, not just sexual harassment. In addition, although ED claims to have issued the NPRM to enhance accused students of color's due process rights and to promote racial justice, the NPRM actually is a part of a larger campaign. This campaign includes efforts by a number of coordinated groups to undermine the due process rights of accused students who are overwhelmingly African American. This dog whistle seeks to convince the public that dismantling Title IX protections for sexual harassment victims will better protect students of color's due process rights, while actually tapping into potential stereotypes that can be summed up as "sexual harassment victims lie." In doing so, the dog whistle enables the Trump/DeVos ED both to attack and undermine civil rights for harassment survivors, thus establishing an anti-civil rights beachhead, and to distract attention from its enabling of discriminatory school discipline of students of color, especially black students.

An alternative to cosigning this dog whistle and enabling the Trump Administration's establishment of this beachhead can be found in the potential and actual use of the "commenting power" to defend Title IX and its intended beneficiaries (i.e., sexual harassment victims)—as well as the classes protected by civil rights laws that can be attacked via an anti-Title IX beachhead. The results of a previous comment call, asking for public "input on regulations that

may be appropriate for repeal, replacement, or modification," showed high levels of democratic support for Title IX, as well as the undemocratic nature of agency actions such as the NPRM. The resistance strategy of using the commenting power has important implications for the NPRM as well as the Administrative Procedure Act, which is fundamentally concerned with reining in antidemocratic impulses by nonelected officials.

TABLE OF CONTENTS

I. INTRODUCTION

On November 29, 2018, the Trump Administration's Department of Education ("ED"), under the leadership of Secretary Betsy DeVos, published in the Federal Register a Notice of Proposed Rulemaking ("NPRM") proposing expansive changes to ED's regulations under Title IX of the Educational Amendments of 1972 ("Title IX").[4] These changes focus on Title IX's prohibition of sexual harassment, which includes sexual violence as a severe form of sexual harassment.[5] The

4. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018) (codified at 34 C.F.R. pt. 106).

5. *See* Sarah Brown & Katherine Mangan, *What You Need to Know About the Proposed Title IX Regulations*, CHRON. OF HIGHER EDUC. (Nov. 16, 2018), https://www.chronicle.com/article/What-You-Need-to-Know-About/245118 (explaining that the Trump Administration's proposed rule significantly narrows the definition of sexual harassment). Note that certain terms are used deliberately in this Article. First, subsequent uses of "sexual harassment" in this Article will not generally specify sexual violence because "sexual harassment" is used to refer to sexual conduct that is unwelcome to the target of the conduct, including sexual violence as a severe form of harassment. In this usage, sexual harassment also significantly overlaps with "gender-based violence," which refers to violence directed at cisgender women or gender minorities, including cisgender men and boys who are targeted because they are perceived as insufficiently masculine, as well as transgender and gender nonconforming persons.
Second, with regard to the terms used for those involved in sexual harassment cases, this Article tries to consistently follow certain guidelines. When discussing other authors' research, this Article endeavors to use the same terminology in those authors' research. Otherwise, this Article generally uses "victim" and

NPRM, among a very long list of other starkly unequal proposals, suggests lifting the historical expectation that schools will use a preponderance of the evidence standard of proof in their internal sexual harassment investigations.[6] Instead, the NPRM proposes a rule that would push schools to adopt a clear and convincing ("C&C") evidence standard for not only sexual harassment but also other forms of discriminatory harassment.[7]

According to DeVos, the general goal of the proposed rules is to ensure that students who are accused of sexual harassment receive "due process."[8] This concern about due process has only been expressed with regard to named harassers—not the victims who named them. Moreover, when viewed in the larger context of DeVos's apparent agenda for ED, the NPRM appears to use Title IX, particularly Title IX's prohibition on sexual harassment, to establish a "beachhead" in a larger war on civil rights and equal educational opportunity.

The term "beachhead" is usually defined in military terms as a way to establish a military presence in an otherwise hostile location or as a starting point from which to establish a larger military

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"survivor" interchangeably to refer to those who have reported or disclosed in some way that they have experienced harassment; "accuser," "complainant," or "plaintiff" refers to victims or survivors in the context of claims, complaints, or lawsuits when they have accused a specific person of harassing or victimizing them. This Article mainly uses "accused" either as an adjective or a noun to designate someone who has been accused of harassing or victimizing someone else. This Article also uses "alleged" or "reported" as synonyms for "accused," but only uses "defendant" in the context of the criminal justice system. These terms are selected self-consciously with a goal of capturing and respecting, admittedly imperfectly, the self-identification of the people to whom these terms refer. For example, this Article uses terms such as "accused" and "victims" regardless of whether a neutral factfinder has found an accused individual responsible for harassing or victimizing someone. This is because, based on the author's nearly twenty-five years of experience working on sexual harassment in education as a student activist, university administrator, attorney, researcher, and scholar, the author has observed that those who report or disclose in some way that they have experienced sexual harassment self-identify as victims, survivors, accusers, complainants, and plaintiffs at different points in time and in different contexts. But these self-identities almost never have anything to do with the judgment of a neutral factfinder. Likewise, those who have been accused of harassing or victimizing someone else generally refer to themselves as "accused" even when they have been found responsible for such conduct by a neutral factfinder.

6. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. at 61,477.

7. *Id.*

8. *Id.* at 61,462, 61,472; *see also* Press Release, U.S. Dep't of Educ., Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All (Nov. 16, 2018), https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all (providing that the new rule would ensure all students receive appropriate due process protections). Although of course the proposed rules would apply to accused faculty, staff, and third parties as well.

campaign against those hostile forces.[9] Merriam-Webster indicates that the first usage of the term was in 1920 in the military sense,[10] and perhaps the most commonly known example of a real invasion from a beachhead was the D-Day invasion of Normandy.[11] Outside the military context, the term is used to indicate the establishment of a foothold, one that can be used to launch an effort to expand on that foothold.[12] Princeton University Professor Anne McClintock has adopted Jane Mayer's use of the term in her book *Dark Money* to suggest its applicability to a particular political strategy involving Title IX.[13]

Although Professor McClintock does not elaborate on the beachhead metaphor, her analysis is well supported when one looks closely at the NPRM and its context. Indeed, the NPRM functions as an attempt to establish a beachhead in several respects. First, as a matter of legal doctrine, it stakes out a position that is hostile to what surrounds it, attempting to force schools to adopt rules that are fundamentally unequal under the authority of a law designed to advance and protect equality. In other words, it encourages schools to "comply" with a law that prohibits discrimination on the basis of sex by adopting policies and procedures that discriminate against the class of persons the law seeks to protect. Second, in terms of the democratic support it enjoys, the NPRM is again in enemy territory because Title IX has overwhelming public support,[14] including with regard to its goal of preventing sexual harassment, yet the NPRM takes affirmative steps to make such prevention harder and less effective. Third, as a strategy, the NPRM attempts to use an issue and a group—sexual harassment and sexual harassment victims—who are particularly vulnerable to such attacks in an effort to establish a starting point from which to attack the civil rights of other vulnerable groups—chief among them racial and ethnic minority students.

It is on this last point that the NPRM and its drafters have enlisted the dog whistle. As Professor Ian Haney Lopez has demonstrated, "dog whistle politics" have successfully caused many

9. *Beachhead*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/beachhead (last visited Apr. 17, 2019).

10. *Id.*

11. Duncan Anderson, *D-Day: Beachhead*, BBC (Nov. 17, 2011) http://www.bbc.co.uk/history/worldwars/wwtwo/dday_beachhead_01.shtml.

12. *Beachhead*, DICTIONARY.COM, https://www.dictionary.com/browse/beachhead (last visited Apr. 17, 2019).

13. McClintock, *supra* note 2.

14. *See* Press Release, Nat'l Women's Law Center, New Poll Finds Broad, Deep Support for Existing Title IX Protections, Even Among Trump Voters (May 17, 2017), https://nwlc.org/press-releases/new-poll-finds-broad-deep-support-for-existing-title-ix-sexual-assault-protections-even-among-trump-voters/ (showing that 78% of Republicans, Democrats, and Independents support Title IX, and 94% of voters supported using the preponderance of the evidence standard in disciplinary proceedings).

Americans to support public policies against their own interests through coded messages that favor those in power, whether they be rich, white, male, or some combination of the three.[15] The NPRM makes a more subtle use of the dog whistle, deploying "due process" towards (and occasionally by) those generally affiliated with the political left to inaccurately suggest a goal of racial justice, while having a very different meaning to those usually affiliated with the political right. Indeed, those who can hear the dog whistle understand correctly that increasing "due process" actually protects and strengthens the already powerful privileges reserved for white, cisgender men, privileges that equality fundamentally threatens because no truly equal system can systemically privilege one group over others. The NPRM's dog whistling adopts a particular narrative regarding Title IX, race, and sexual harassment—one with virtually no research or empirical evidence to support it but nevertheless suggesting that the primary accused students whose due process rights are being violated are black male students falsely accused of sexual assault due to their race.[16] This suggestion relies on analogizing sexual assault accusations by college women (who the narrative misrepresents as all white) against accused assailants (who the narrative equally misrepresents as all black) with accusations of white women in the Jim Crow South during the lynching period.[17]

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15. *See* IAN HANEY LOPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE WRECKED THE MIDDLE CLASS 169–72 (Oxford Univ. Press, 2014).

16. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. at 61,465, 61,474; *see also* Cynthia M. Allen, Opinion, *Title IX Changes Should Help Address Role of Race in Campus Sexual Assault*, FORT WORTH STAR-TELEGRAM (Sept. 29, 2017), https://www.star-telegram.com/opinion/opn-columns-blogs/cynthia-m-allen/article176099666.html (referring to both Halley, *infra* note 17 and Yoffe, *infra* note 16); Lara Bazelon, Opinion, *I'm a Democrat and a Feminist. And I Support Betsy Devos's Title IX Reforms*, N.Y. TIMES (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/opinion/-title-ix-devos-democrat-feminist.html (referring to both Halley, *infra* note 17 and Yoffe, *infra* note 16); Erika Sanzi, Opinion, *With Title IX Rewrite, DeVos Gets it Right for Accusers and Accused*, HILL (Nov. 22, 2018), https://thehill.com/opinion/education/417762-with-title-ix-rewrite-devos-gets-it-right-for-accusers-and-accused (referring to both Halley, *infra* note 17 and Yoffe, *infra* note 16, then another opinion piece citing to an analysis that "*predicted* 33 percent of the time, campus Title IX tribunals *would* return *guilty* findings in cases involving *innocent* students" but not quoting anything in either source indicating that this study included data on race) (emphasis added to highlight the speculative, nonempirical nature of the conclusions, as well as the criminal legal terminology of guilt and innocence that inaccurately suggest that a noncriminal, campus proceeding can have the same consequences as the criminal system; Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases*, ATLANTIC (Sept. 11, 2017), https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/ (referring to Halley, *infra* note 17).

17. *See* Ruth Lawlor, Opinion, *How the Trump Administration's Title IX Proposals Threaten to Undo #MeToo*, WASH. POST (Feb. 4, 2019), https://www.washingtonpost.com/pb/outlook/2019/02/04/how-trump-

This comparison then allows those who agree with the NPRM to spin their concern with "due process" as one about combatting race discrimination against black men,[18] even though they and others who can hear the dog whistle understand that it does *not* protect against discrimination but actually protects and may even add to the unequal *privileges* that primarily benefit white, cisgender men.

This spin is a dog whistle because DeVos, other Trump Administration ED officials, and those allied with them know that college men named as sexual harassers and assailants are not only black students.[19] In fact, the campus proceedings used to resolve complaints of sexual harassment are overwhelmingly nonpublic and therefore provide almost no actual data about the demographics of campus sexual harassment.[20] Nevertheless, when one considers the racial demographics of the few groups of accused harassers whose identities are public, such as those exposed by #MeToo, such named harassers are at least a racially diverse group, and likely predominantly white.[21] Similar demographics are also known to those who work with students involved in real campus sexual harassment cases.[22] Therefore, the unequal (because more

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administrations-title-ix-proposals-threaten-undo-metoo/?nid=menu_nav_accessibilityforscreenreader&outputType=accessibility&utm_term=.60cd4b3625fe; *see also* Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. 103, 106–07 (2015) ("From Emmett Till to the Central Park Five, American racial history is laced with vendetta-like scandals in which black men are accused of sexually assaulting white women that become reverse scandals when it is revealed that the accused men were not wrongdoers at all.").

18. Bazelon, *supra* note 16 (referencing Halley's article, *supra* note 17 and Yoffe's article, *supra* note 16, discussing data collected by OCR indicating possible disparate discipline at Colgate University, in an investigation where OCR did not find enough evidence to support a violation of Title VI).

19. *See* Lucia Graves, Opinion, *Does Betsy DeVos Care More About Those Accused of Rape than its Victims*, GUARDIAN (Sept. 8, 2017), https://www.theguardian.com/commentisfree/2017/sep/08/does-betsy-devos-care-more-about-those-accused-of-than-its-victims (providing that those accused of sexual assault are "overwhelmingly white").

20. *See* Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671, 676–78 (2018); Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*, 18 NEV. L. J. 107, 107 (2017).

21. *See, e.g.*, *Post-Weinstein, These Are the Powerful Men Facing Sexual Harassment Allegations*, GLAMOUR (Dec. 1, 2018), https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations (showing a list of ninety-five male celebrities of all races facing sexual assault allegations).

22. *See* Jessica C. Harris & Chris Linder, *Preface to* INTERSECTIONS OF IDENTITY AND SEXUAL VIOLENCE ON CAMPUS: CENTERING MINORITIZED STUDENTS' EXPERIENCES xiii–xiv (Jessica C. Harris & Chris Linder eds., 2017) (noting media focus on "stereotypically pretty, apparently white, cisgender, heterosexual women" victims and "[b]lack male athletes as perpetrators," which "allows the

protective) "due process" protections that the NPRM gives to reported harassers will likely mainly benefit white men. Further, DeVos's allies are aware that ED's professed concern for racial justice is not borne out in reality, since DeVos rescinded Obama-era ED guidance that sought to protect black students, in particular, from discriminatory discipline,[23] a major factor widely recognized to trap many students of color in the "school to prison pipeline."[24] In other words, when faced with a *documented* racial disparity in school discipline that has clear and deeply problematic connections to the criminal justice system, the Trump Administration seeks to undermine due process, not increase it. Moreover, even as ED loudly promoted due process for named harassers, it undermined due process for students of color *quietly* by announcing its rescission late Friday afternoon before the Christmas holiday while a government shutdown was imminent.[25] Thus, the general public is likely to think ED is promoting racial justice, even if it is not actually doing so. In this way, the "due process" dog whistle is born.

This dog whistle seeks to reassure those "in the know" that the beachhead ED and its allies among Men's Rights[26] and similar groups[27] are trying to establish with the NPRM will in fact operate as a beachhead—one from which they can launch attacks against other previously well-established civil rights, especially those guaranteeing

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dominant perpetrator—an economically privileged, straight, cisgender white man—to continue to commit sexual violence.").

23. *See* Lydia Wheeler, *DeVos Review of Racial Bias Guidance Stirs Controversy*, HILL (Apr. 11, 2018), https://thehill.com/regulation/382574-devos-review-of-racial-bias-guidance-stirs-controversy.

24. AMERICAN BAR ASS'N, ABA TASK FORCE ON REVERSING THE SCHOOL-TO-PRISON PIPELINE REPORT, RECOMMENDATIONS, AND PRELIMINARY REPORT 3, 5–6, 31, 36 (2018) https://www.americanbar.org/content/dam/aba/images/racial_ethnic_justice/Final%20School2PrisonPipeline-2nd-012618.pdf.

25. *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 (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).

26. *See generally* Alison Lefkovitz, *Jordan Peterson and the Return of the Men's Rights Movement*, WASH. POST (July 24, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/07/24/before-jordan-peterson-there-were-mens-rights-activists/?utm_term=.d3aff85048e4 (noting that men's rights activists see men as the victims of gender oppression and urge women to "embrace lives as housewives").

27. *See* Christina Cauterucci, *Betsy DeVos Plans to Consult Men's Rights Trolls About Campus Sexual Assault*, SLATE (July 11, 2017), https://slate.com/human-interest/2017/07/betsy-devos-is-asking-mens-rights-trolls-to-advise-her-on-campus-sexual-assault.html (explaining that Betsy DeVos was planning to meet with the National Coalition for Men to discuss options for campus sexual assault guidance).

protection from discrimination based on race. And indeed, many of the proposals in the NPRM provide the opportunity, once Title IX has been successfully robbed of its central purpose of protecting against sex discrimination, to undermine other civil rights protections. In particular, the NPRM's proposed changes to the evidentiary standard will enable attacks against the rights of other protected classes, including victims of racial and other forms of discriminatory harassment, not just sexual harassment.

Accordingly, Part II will first map the ways in which the NPRM's attempt to replace the historically used civil rights preponderance standard with the quasi-criminal C&C evidence standard attempts to establish a beachhead in a larger and longer war against civil rights and equal educational opportunity. This broad attack on civil rights in education will undermine the rights of not only sexual harassment victims but also other discriminatory harassment victims, especially women students of color and those in other intersectional populations (e.g., girls with disabilities) who are disproportionately vulnerable to such harassment. ED's permission to adopt an inappropriate standard for sexual harassment will open the door for schools to do the same for other forms of discriminatory harassment. This will result in fewer protections from all discriminatory harassment, not just sexual harassment, and at precisely a time, post-2016 election, when such harassment is skyrocketing.[28]

Part III will then demonstrate how the due process dog whistle is a key weapon in the establishment of that beachhead. Specifically, it will show that although ED claims to have issued the NPRM to enhance accused students of color's due process rights and promote racial justice, the NPRM actually acts as a part of a campaign by a number of coordinated groups, many of which are men's rights groups or groups funded by organizations like the Koch Foundation, to undermine the rights of not only harassment victims but also those accused students who are overwhelmingly African American. As a dog whistle, it seeks to convince the public that dismantling Title IX protections for sexual harassment victims will better protect students of color's due process rights, while distracting attention from Trump officials' quiet dismantling of Obama-era efforts to stop disproportionate school discipline of black students.

Finally, Part IV will discuss the potential and actual use of the "commenting power" to defend Title IX and its intended beneficiaries

28. *See, e.g.*, Meghan Keneally, *What to Know About the Violent Charlottesville Protests and Anniversary Rallies*, ABC NEWS (Aug. 8, 2018, 4:44 PM), https://abcnews.go.com/beta-story-container/US/happen-charlottesville-protest-anniversary-weekend/story?id=57107500; Edwin Rios, *Donald Trump Inspired a Sickening Tide of Bullying in America's Schools*, MOTHER JONES (Dec. 1, 2016, 11:00 AM), https://www.motherjones.com/politics/2016/12/trump-effect-schools-bullying-racism/; Holly Yan, et al., *'Make America White Again': Hate Speech and Crimes Post-Election*, CNN (Dec. 22, 2016, 4:24 PM), https://www.cnn.com/2016/11/10/us/post-election-hate-crimes-and-fears-trnd/.

(i.e., sexual harassment victims) as well as the classes protected by civil rights laws that can be attacked via an anti-Title IX beachhead. This Part will use the results of a June through September 2017 ED comment call, asking for public "input on regulations that may be appropriate for repeal, replacement, or modification,"[29] to show the high level of democratic support for Title IX, as well as the undemocratic nature of agency actions such as the NPRM. It will also discuss the important implications of this resistance strategy under the Administrative Procedure Act, which is concerned with reining in antidemocratic impulses by unelected officials.

II. ESTABLISHING THE BEACHHEAD

The suggestion that the NPRM is attempting to establish a beachhead from which ED can launch a wider-range attack on civil rights and equal educational opportunity is best exemplified by the NPRM's provision on the evidentiary standard. The NPRM proposes:

> [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.[30]

The NPRM thus departs from ED's consistent and at least twenty-four-year-old practice of requiring schools to use the preponderance of the evidence standard in investigating and resolving sexual harassment complaints.[31] Available records of enforcement actions show that, in 1995, during the Clinton Administration, ED's Office for Civil Rights ("OCR") required the Evergreen State College to use the preponderance standard in its investigation of a case where a student victim had complained that a professor had sexually harassed her.[32] In 2004, under the George W. Bush Administration, OCR again required a school, Georgetown University, to change its evidentiary standard in sexual harassment

29. Evaluation of Existing Regulations, 82 Fed. Reg. 28,431 (June 22, 2017).

30. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,477 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

31. Letter from Gary D. Jackson, Reg'l Civil Rights Dir., Office for Civil Rights, U.S. Dep't of Educ., to Jane Jervis, President, The Evergreen State Coll. (Apr. 4, 1995) (on file with author).

32. *Id.*

claims to the preponderance standard.[33] Finally, first in 2011[34] and then in 2014,[35] OCR issued proactive guidance documents warning schools that OCR would expect them to use a preponderance standard in sexual harassment cases. This meant that if OCR investigated a school and discovered that the school was not using the preponderance standard, the school was at risk of a finding that it violated Title IX.

The Trump Administration has long signaled that it would depart from this consistent previous enforcement regarding the preponderance standard. In September 2017, it rescinded the 2011 and 2014 guidance documents issued by the Obama Administration and issued a "Q&A on Campus Sexual Misconduct" ("Interim Guidance").[36] As the Interim Guidance's title suggests, this departure from its historical enforcement only applied to sexual harassment; the evidentiary standard for racial harassment investigations was unchanged.[37] This fact is relevant because before September 2017, schools had to use a preponderance of the evidence standard in *both* sexual[38] *and* racial harassment[39] cases. The Interim Guidance authorizes schools to adopt a C&C evidence standard of proof only in "campus sexual misconduct" cases.[40] The Interim Guidance says nothing about OCR changing its requirements for

33. Letter from Sheralyn Goldbecker, Team Leader, Office for Civil Rights, U.S. Dep't of Educ., to Dr. John J. DeGioia, President, Georgetown Univ. (May 5, 2004), https://www.ncherm.org/wp-content/uploads/2017/08/199-GeorgetownUniversity—11032017DeGeoia.pdf.

34. *See* Letter from U.S. Dep't of Educ. and U.S. Dep't of Justice, Dear Colleague Letter: Sexual Violence (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter 2011 DCL].

35. *See* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND CAMPUS SEXUAL MISCONDUCT (Apr. 24, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [hereinafter OCR Questions and Answers].

36. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, Q&A ON CAMPUS SEXUAL MISCONDUCT (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [https://perma.cc/D2PE-XFWZ] [hereinafter Interim Guidance]. The issuance of the Interim Guidance was preceded by Secretary of Education Betsy DeVos's announcement that she was rescinding Title IX guidance regarding how schools should respond to sexual harassment, issued in 2011 and 2014 under President Obama's Administration. *See* Press Release, U.S. Dep't of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct [https://perma.cc/3GQJ-68YC].

37. *See generally* Interim Guidance, *supra* note 36.

38. *See* 2011 DCL, *supra* note 34.

39. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, VOLUNTARY RESOLUTION AGREEMENT WALLINGFORD BD. OF EDUC., http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01131207-b.pdf [https://perma.cc/UU4H-3UXG] [hereinafter Wallingford Bd. of Educ.].

40. *See* Interim Guidance, *supra* note 36, at 5.

racial harassment cases, however, so the preponderance standard remains.[41]

A. Intersectional Legal Conflicts

The Interim Guidance changed the allowable evidentiary standards so that they are no longer consistent across all of the statutes OCR enforces. This creates a particular problem for women victims of color, should they be harassed in a manner that is both racial and sexual. Under the Interim Guidance, such racialized sexual harassment (or sexualized racial harassment) leads to the following questions: if a school has adopted different evidentiary standards for sexual and racial harassment, what happens when a woman of color[42] is sexually and racially harassed? What standard

41. Note that footnote nineteen of the Interim Guidance says: "The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases," thereby implying that schools should not adopt different standards for racial harassment and sexual harassment. *Id.* at 5 n.19. Because the Interim Guidance does not state explicitly that schools may adopt "clear and convincing evidence" for racial harassment investigations—as it does with sexual harassment—footnote nineteen may operate to discourage schools from exercising the option that the Interim Guidance otherwise suggests they have: to adopt "clear and convincing evidence" in sexual harassment cases. The facial approval of a "clear and convincing evidence" option combined with footnote nineteen's potential practical undermining of that option may also simply sow confusion into schools' expectations of how OCR will enforce the civil rights laws under its jurisdiction, should OCR investigate a particular school for potential violations of those laws. Such confusion is likely to undercut meaningful enforcement by OCR because schools can credibly argue that OCR's own guidance is contradictory. As former Assistant Secretary for Civil Rights Catherine Lhamon explained to Senator Lankford, OCR's guidance should not be categorized as "law" or "regulation," but is designed to inform schools of what to expect when OCR investigates their compliance with the applicable civil rights statute. *See* Letter from Catherine E. Lhamon, Ass't Sec'y for Civil Rights, U.S. Dep't of Educ., to Hon. James Lankford, Chairman, Subcomm. on Reg. Affairs & Fed. Mgmt. Comm. on Homeland Sec. & Gov't Affairs, U.S. Senate (Feb. 17, 2016), https://www2.ed.gov/about/offices/list/ocr/correspondence/congress/20160217-apa-2010-2011-guidance.pdf [https://perma.cc/X6Y4-Z3DW]. The effect of footnote nineteen is to obfuscate what OCR will do should it undertake an investigation of a school that has adopted "clear and convincing evidence" only for sexual harassment cases or for both sexual and racial harassment cases. Thus, a school could reasonably decide that there would be little risk of OCR finding a civil rights violation if the school exercised its "clear and convincing evidence" option, even though there would be zero risk of such a violation if the school opted to keep the preponderance standard for investigations involving racial, sexual, and all other forms of discriminatory harassment.

42. "Woma(e)n of color" refers to individuals who identify as women and as nonwhite and thus includes both cisgender and transgender women, as well as individuals whose racial identity is in whole or in part African, Asian, Latinx, or Native American. For specific racial groups and identities, this Article uses multiple terms interchangeably, such as "African American" and "black," or "Latino/a" and "Latinx." This is because, in the author's experience, different individuals who identify as a particular race may prefer different terms for their

will be used if she experiences racialized sexual harassment or sexualized racial harassment? Will she be a woman first or a person of color first? Which of her identities will the school declare to be the important one? These questions are fundamentally "intersectional" and "multidimensional" ones[43] in that they recognize the multiple communities with which women of color identify or may be identified,

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racial identity, with multiple terms often being simultaneously recognized as legitimate, including "of color" to refer to numerous groups that share a racial identity associated with racial or ethnic minorities. The times this Article departs from the usages described here are limited to when the author's discussion of another author's work requires adopting that author's terminology. Note that the author also recognizes that "women of color" is used as both a biological as well as a political term adopted to build solidarity between nonwhite women of different races and ethnicities. *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, 46 (Jessica C. Harris & Chris Linder eds., 2017) [hereinafter INTERSECTIONS OF IDENTITY]. Similarly, race itself is a socially constructed concept that is not stable and can be redefined at will by those in power. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 8 (2d ed. 2012).

43. Both "intersectional" and "multidimensional" are terms used first by academics but increasingly found—at least in the case of "intersectional" and "intersectionality"—in mainstream conversation. Intersectionality was first articulated by Professor Kimberlé Crenshaw as a way to describe women of color's (particularly black women's) experience of multiple, intersecting forms of discrimination based on gender and race. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991). It has since become a "feminist buzzword." *See, e.g.*, Christine Emba, Opinion, *Intersectionality*, WASH. POST (Sept. 21, 2015), https://www.washingtonpost.com/news/in-theory/wp/2015/09/21/intersectionality-a-primer/. Indeed, the Women's March included the term in the organization's mission and shared the concept with the millions of people who marched in 2017 and 2018. *See Mission and Principles*, WOMEN'S MARCH, https://www.womensmarch.com/mission-and-principles/ (last visited Apr. 17, 2019). While "multidimensionality" has a long history in legal theory, intersectionality has informed and altered this term's use. Since the mid-1990s, it has been used by legal scholars struggling to understand the position of individuals whose experiences involve intersecting discrimination and privilege, such as men of color who experience discrimination due to racial identity but benefit from the power associated with masculinity. Multidimensionality is grounded in two principles: "(1) identities are co-constituted and (2) identities are context dependent. A multidimensional approach argues that since identities are co-constituted, race, gender, class, sexual orientation, and other discrete identities are actually imbricated within one another and cannot be understood in isolation." Ann C. McGinley & Frank Rudy Cooper, *Masculinity, Multidimensionality, and Law: Why They Need One Another*, *in* INTRODUCTION TO MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 1, 6–7 (Frank Rudy Cooper & Ann C. McGinley eds., 2012); *see also* Athena D. Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*, 13 NEV. L.J. 341, 351–54 (2013); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 309–10 (2001).

as well as the discrimination likely faced as a result of that identification.[44]

The NPRM appears to recognize the inconsistency of the Interim Guidance because the proposed change quoted above requires consistency in certain circumstances. However, such consistency is not required in all circumstances, and the NPRM uses two methods to push schools to adopt the C&C standard. First, many campuses use C&C evidence for faculty discipline cases,[45] a choice that may be a result of collective bargaining by a faculty union such as the American Association of University Professors ("AAUP"), which insists that C&C evidence is the appropriate standard for faculty misconduct, even in cases of sexual harassment.[46] In addition, many colleges and universities have adopted the AAUP's standards even without a collective bargaining agreement because norms of faculty governance in American higher education give faculty great power to set such policies even outside of a collective bargaining context.[47] Thus, at many schools, particularly where a collectively bargained agreement is in place, changing the C&C standard for faculty misconduct will be more challenging than changing the evidentiary standard for sexual harassment, compelling many institutions to adopt the C&C standard for sexual harassment rather than changing the evidentiary standard for faculty misconduct or even making an exception for complaints of faculty sexual harassment.

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44. As will be discussed in greater detail in Part IV, both intersectionality and multidimensionality recognize that all individuals have multiple identities and are simultaneously part of different groups or communities and that most of these communities and identities carry markers of privilege or subordination. While each individual will identify with or be a part of groups or communities such as those related to one's work or profession (e.g., janitor, nurse, small business owner) or one's position in one's family (e.g., parent, spouse, middle child), intersectionality and multidimensionality—particularly in legal discourse—are concerned with investigating and connecting these to broader systems of domination and inequality, such as those based on gender, race, sexuality, socioeconomic class, (having a) disability, etc. Law and legal theory are focused primarily on these identities and communities because they too often translate into discrimination against subordinated groups and preferential treatment for privileged groups, both of which offend national and international commitments to equal protection of the law.

45. *See, e.g.*, MICH. STATE UNIV., FACULTY HANDBOOK (2018), https://hr.msu.edu/policies-procedures/faculty-academic-staff/faculty-handbook/tenure_discipline_dismissal.html; UNIV. S.C. COLUMBIA, FACULTY HANDBOOK 42 (2018), http://www.sc.edu/policies/facman/Faculty_Manual_Columbia.pdf; YALE UNIV., FACULTY HANDBOOK 26 (2018), https://provost.yale.edu/sites/default/files/files/Faculty%20Handbook_10-17-18(2).pdf.

46. *See AAUP Comments on the Department of Education's Proposed Title IX Regulations*, AM. ASS'N OF UNIV. PROFESSORS (Jan. 28, 2019), https://www.aaup.org/file/AAUP%20title%20IX%20exec%20summary_0.pdf.

47. *See* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 946, 962, 966 (2009).

Second, because the NPRM's proposed rule only requires consistent standards for student misconduct if a school adopts the preponderance standard for sexual harassment,[48] the NPRM allows schools to adopt the C&C standard for sexual harassment but to keep the preponderance standard for racial harassment. Without a requirement of consistent standards if a school adopts the C&C evidence standard, a school can still adopt policies that create the potential intersectional legal conflict for women students of color that was made possible by the Interim Guidance. This intersectional legal conflict is both a reflection of and an addition to the intersectional and heightened vulnerability that women of color face with regard to sexual harassment.

Decades of studies in the workplace, education system, and criminal justice system have shown that women of color are disproportionately targeted for sexual harassment and face particular barriers to getting legal redress.[49] Several factors likely contribute to this vulnerability, but racialized sex stereotypes (or sexualized racial stereotypes) have a particularly pernicious effect, regularly erasing women of color from recognition by harassers, employers, schools, courts, and society in general as sexual harassment victims.[50] Racialized sex stereotypes and sexualized racial stereotypes accomplish this by stereotyping women of color as prostitutes or promiscuous. African American women are stereotyped as "Jezebels,"[51] Latinas as "hot-blooded,"[52] Asian Pacific Islander and Asian Pacific American women as "submissive and naturally erotic,"[53] multiracial women as "tragic and vulnerable,"[54] and American Indian/Native American women as "sexual punching bag(s)"[55] who

48. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,477 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

49. *See* Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J. L. & GENDER, (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3168909.

50. *Id.* at 21.

51. 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); *see also* Harris, *supra* note 42, at 49.

52. Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 820 (1993); *see also* Darlene C. DeFour, *The Interface of Racism and Sexism on College Campuses*, *in* IVORY POWER: SEXUAL HARASSMENT ON CAMPUS 45, 48 (Michele A. Paludi ed., 1990).

53. Ontiveros, *supra* note 52, at 819; *see also* Harris, *supra* note 42, at 49; Ciera V. Scott et al., *The Intersections of Lived Oppression and Resilience: Sexual Violence Prevention for Women of Color on College Campuses*, *in* INTERSECTIONS OF IDENTITY 119, 125–26 (2017).

54. Harris, *supra* note 42, at 49.

55. *See* Debra Merskin, *The S-Word: Discourse, Stereotypes, and the American Indian Woman*, 21 HOW. J. COMM. 345, 353 (2010).

are "sexually violable"[56] as a "tool of war" and colonization.[57] As is clear from each of these examples, race and gender are so intertwined in these stereotypes that they cannot be separated into discrete categories of discrimination based on race versus gender. These stereotypes then combine with stereotypes deriving from centuries of discrimination against sexual violence victims in criminal proceedings, in which a series of special requirements for the common law crime of rape included the rule that a woman had to be chaste (meaning as close to a virgin as possible) in order to credibly allege rape.[58]

This combination of stereotypes about women of color as unchaste with stereotypes of unchaste women as "unrapeable" renders women of color simultaneously more likely to be victimized, since harassers believe these stereotypes, and invisible as victims, as the stereotypes make it nearly impossible for women of color to get legal redress. These dynamics have been confirmed by research on criminal cases. For instance, a 2003 study involving a weighted sample of 41,151 cases adjudicated between 1990 and 1996 from the seventy-five most populous U.S. counties found that even though most male defendants of color were treated more harshly than white defendants when they were charged with crimes that tend to be *inter*-racial, "African-Americans and Hispanics arrested for sexual assault are significantly less likely to be found guilty and receive significantly fewer months of incarceration compared to whites arrested for sexual assault."[59] Thus, this study shows that defendants of color who were accused of what the research establishes as the primarily *intra*-racial crime of sexual assault were treated more *leniently* than white defendants, but defendants of color who were accused of primarily *inter*-racial crimes were treated more *harshly*.[60]

The limited data available in the educational context is consistent with this 2003 study of criminal cases. A 2018 General Accounting Office report analyzed data in ED's 2013–2014 Civil Rights Data Collection that examined discipline disparities for black

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56. Harris, *supra* note 42, at 49.

57. Scott et al., *supra* note 53, at 126.

58. 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.").

59. 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, 533 (2003).

60. *Id.* at 526–27, 534; *see also* I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1370 (2010) ("[T]he vast majority of rapes involving white victims are intraracial.").

students, for boys, and for students with disabilities.[61] The report found that, although discipline rates for sexual harassment between white and black boys differed by only 0.1% (and were quite low across the board: 0.2% for white boys and 0.3% for black boys),[62] general discipline rates differed by nearly 13% (18% of black boys sanctioned with out-of-school suspensions versus 5.2% of white boys).[63] While these data are for K–12 students only, when combined with the criminal justice system data for adults, there is a strong case for the existence of a similar college discipline picture.

The erasure of women of color as sexual harassment victims[64] is reflected not only by the NPRM's and the Interim Guidance's tolerance of the intersectional legal conflict that these documents potentially create but also by the narrative, introduced in Part I, which began to develop around race and sexual harassment in education well before the 2016 election. In this narrative, accusations of sexual assault by college women have been likened to a modern iteration of the white supremacist excuse for lynching, wherein false accusations by white women of sexual harassment by black boys and men provided a pretext for murdering those boys and men.[65] Because the narrative presents all complainants as white women and all accused students as black men, it treats women of color as invisible, even when women of color are *actually* complainants. The treatment, by the media and some of her own professors, of a student survivor who appeared in *The Hunting Ground* provides an example of this phenomenon. In the documentary, Kamilah Willingham shared her experience of being sexually assaulted while at Harvard Law.[66] Both she and a friend were assaulted by another Harvard Law student while unconscious.[67] She did not name the accused assailant in the

61. U.S. GOV'T ACCOUNTABILITY OFFICE, K–12 EDUCATION DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES (2018), https://www.gao.gov/assets/700/690828.pdf. Special appreciation to Alyssa Peterson of Know Your IX for drawing my attention to this report.

62. *Id.* at 94.

63. *Id.* at 77

64. Note that this erasure of women of color in criminal cases is not limited to victims of gender-based violence by private individuals or individuals acting in a private capacity. Recently published research documents how women of color face endemic levels of similar kinds of police violence (i.e., not private but done as a part of their jobs) as the police violence most commonly thought of as mainly or exclusively directed at men of color. *See generally* ANDREA RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017). The intersectionally racialized, gendered, and sexualized nature of much of this police violence is clear. These are the same characteristics that have been observed about police violence directed at men of color, as well. PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 98–103 (2017).

65. *See* Halley, *supra* note 17, at 106–07; Antuan M. Johnson, *Title IX Narratives, Intersectionality, and Male-Biased Conceptions of Racism*, 9 GEO. J.L. & MOD. CRITICAL RACE PERSP. 57, 72, 74 (2017).

66. THE HUNTING GROUND, at 14:44-16:49 (RADiUS-TWC 2015).

67. *Id.*

film,[68] but because he had been charged in criminal court for assaulting Ms. Willingham's friend, the record was public. Former Dear Prudence columnist Emily Yoffe published his name, Brandon Winston, and characterized the night in question as "an ambiguous sexual encounter among young adults that almost destroyed the life of the accused, a young black man with no previous record of criminal behavior."[69] Although Ms. Yoffe later noted that Willingham and Winston are black and Willingham's friend is white, her discussion of Winston's criminal conviction (for "simple or 'non-sexual' assault" on Willingham's unnamed friend)[70] made no mention of how the decision in that case to charge an accused assailant for violence to a white woman but not to a black woman exemplifies the documented racist sexism and sexist racism that faces women victims of color, particularly black women, in most criminal courts. Five months later, a group of Harvard Law professors, including Elizabeth Bartholet, Nancy Gertner, Janet Halley, and Jeannie C. Suk,[71] issued a press release expressing support for Winston,[72] leading Ms. Willingham to address the professors directly:

> You omit key facts of the case, including the perpetrator, Brandon Winston's own statements [e.g., a text message in response to Ms. Willingham's question regarding her friend and whether he had "put {his} p into her v," stating "No!! I passed out after some minor touchings no more than what you and I were doing a finger briefly in the v at most Tell her not to worry!"], to advance your own false narrative in his defense under the guise of racial justice.
>
> Even while claiming without evidence that Black men are disproportionately and wrongly implicated in on-campus sexual assault proceedings, you—charged with shaping some of the brightest legal minds in the country—ignore well-established

68. *See* Tyler Kingkade, *Harvard Law Grad Kamilah Willingham Fights Back Against Sexual Assault Doubters*, HUFFPOST (Apr. 4, 2016, 7:07 PM), https://www.huffpost.com/entry/kamilah-willingham-harvard_n_57029258e4b0a06d580631c5.

69. Emily Yoffe, *How* the Hunting Ground *Blurs the Truth*, SLATE (June 1, 2015, 11:07 AM), https://slate.com/news-and-politics/2015/06/the-hunting-ground-a-closer-look-at-the-influential-documentary-reveals-the-filmmakers-put-advocacy-ahead-of-accuracy.html.

70. *See* Kamilah Willingham, Opinion, *To the Harvard Law 19: Do Better*, MEDIUM (Mar. 24, 2016), https://medium.com/@kamily/to-the-harvard-law-19-do-better-1353794288f2 (arguing indictment for "simple or 'non-sexual' assault" shows the grand jury was "not convinced of the seriousness of this action").

71. *Id.*

72. *See* Cara Buckley, *Professors Dispute Depiction of Harvard Case in Rape Documentary*, N.Y. TIMES (Nov. 13, 2015), https://www.nytimes.com/2015/11/14/movies/professors-dispute-depiction-of-harvard-case-in-rape-documentary.html.

> research on the disproportionate rate at which women of color are sexually assaulted. It is for these women that I write.[73]

Since the NPRM was issued, this narrative, and in particular articles by both Ms. Yoffe and Professor Halley, have once again been cited, most notably in an op-ed by Professor Lara Bazelon in support of the NPRM.[74] The op-ed by Professor Bazelon, the attorney to an accused student—a black man enrolled at one of the California State Universities—[75] echoes the public discussion of the Harvard case so completely that it is both eerie and eerily predictable. This op-ed specifies that the survivor who accused Bazelon's client of sexual assault is white and that her accusation resulted in the accused student getting suspended for a little less than one year.[76] However, the op-ed acknowledges in parentheses that a second survivor's accusation against the same student was found to be "unsubstantiated" and is on appeal, without specifying this second survivor's race.[77] Although this omission was initially relevant because the first survivor's race, as well as the accused student's race, had been specified at the beginning of the op-ed (the parenthetical statement regarding the second survivor occurs in the tenth paragraph),[78] a Letter to the Editor from the first survivor revealed that the second survivor, whose accusation was found to be "unsubstantiated," is a woman of color.[79] The first survivor wrote:

> The story Ms. Bazelon relates about a rape accusation was never hers to tell. It's mine.
>
> I am the sexual assault survivor she refers to. She omitted key facts and weaponized my story — a white survivor who brought a complaint about a black student who was later suspended from college — such that it could be used against my fellow survivors, especially survivors of color, who would be the most harmed by Betsy DeVos's proposed reforms. Women of color experience sexual violence at disproportionate rates and have more barriers to reporting and face disbelief.

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73. Willingham, *supra* note 70.
74. *See* Bazelon, *supra* note 16.
75. *Id.*
76. *Id.*
77. *Id.*
78. Somewhat confusingly for the op-ed's implication that the first survivor's accusation was based on race, the op-ed also mentions that the first survivor had been dating a teammate of the accused student, who is also a black man. *Id.* However, the op-ed does not indicate that the first survivor is accusing her ex-boyfriend of sexual assault. *Id.*
79. Amelia W., Letter to the Editor, *Reforming How Colleges Handle Sexual Assault Cases*, N.Y. TIMES (Dec. 11, 2018), https://www.nytimes.com/2018/12/11/opinion/letters/colleges-sexual-assault.html.

> If Ms. Bazelon truly cared about racial justice in the Title IX process, she would center on survivors of color and not reduce them to a parenthetical. The second accuser of my assailant to whom she refers is my friend, a woman of color; in her case, she wasn't believed.[80]

As this survivor specifies, the NPRM is likely to hurt women students of color the most. Despite its attempt to appear to value consistency of evidentiary standards, the NPRM leaves in place—even worsens—the dilemma that the Interim Guidance creates. Should this provision of the NPRM be finalized, any school that has adopted the C&C standard for faculty misconduct will likely have to choose between changing its faculty misconduct standards, which may require renegotiating an agreement with the faculty union, or setting itself up to make a second impossible choice that will likely open the institution up to charges of both racism and sexism. True, that second impossible choice might never arise if no woman student of color ever files a complaint alleging the kind of intersectional racialized sexual harassment or sexualized racial harassment commonly directed at women of color. But if a woman of color did make such allegations, the school would have to decide whether to treat the complaint as alleging only race discrimination or only sex discrimination, since that decision would determine the evidentiary standard used. Moreover, in light of the disproportionate amount of harassment directed at women of color and the likelihood that it will be intersectional harassment, the odds are against any school that takes this gamble.

Of course, a school could decide to gamble in a different way: use the more difficult-to-prove C&C evidence standard in racial harassment investigations despite past indications by ED that this violates Title VI of the Educational Amendments of 1972 ("Title VI")[81] and hope that no student complains to OCR, that OCR finds a reason not to investigate the complaint, or that OCR investigates but finds no violation. If a school wagers in this way, the result will play into the "beachhead" strategy, as the current administration will have succeeded in not only making it more difficult for schools to discipline students for sexual harassment but also for racial harassment.

Some may be less concerned about raising the standard of proof in the case of racial harassment, not believing that doing so will, as a practical matter, harm victims of racial harassment, on the assumption that most racial harassment is done publicly and therefore less likely to be a "word-on-word" case where there are no witnesses. However, word-on-word racial harassment cases are both easy to realistically hypothesize and to find in real life. For instance, one might imagine a situation where a student sees another student

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80. *Id.*

81. *See supra* notes 31–36 and accompanying text.

surreptitiously hanging a noose in a place where it is likely to harass African American students but where there are no video cameras or other witnesses besides the single student observer. When the student observer confronts the noose-hanging student, a fist fight develops, and both students end up in the emergency room with injuries. Imagine, furthermore, that neither student is African American (because if either student were African American, their identity would likely influence the credibility of a charge of racial harassment). If the student observer files a complaint against the accused noose-hanger and the accused student denies the charge, the case is a word-on-word racial harassment case.

While such a case is presented hypothetically here, it is hardly outlandish: surreptitious hanging of nooses and the use of other similarly threatening visual or verbal symbols is distressingly frequently on college campuses.[82] In addition, nonhypothetical cases of private racial harassment exist as well. For instance, a white University of Hartford student privately harassed her African American roommate for months, such that the African American woman decided to move out, prompting the white roommate to brag online about the "shockingly gross" ways she had harassed her roommate.[83] Had the African American roommate experienced that harassment without the white roommate bragging online about it, it would again have been a word-on-word case.

It is also worth keeping in mind that misconduct that gets dismissed as "unproveable" because it is word-on-word may have more to do with stereotypes about the victims of that misconduct than it does about the ability to prove the conduct that the victim alleges. In fact, the common use of "he said, she said" to describe word-on-word cases recalls the centuries of de jure discrimination against sexual violence victims already mentioned[84] and keeps such discrimination alive even though most of the discriminatory rules

82. *See, e.g.*, Mariah Bohanon, *Three Incidents Involving Nooses on College Campuses Are Being Investigated as Hate Crimes*, INSIGHT INTO DIVERSITY (May 9, 2017), http://www.insightintodiversity.com/three-incidents-involving-nooses-on-college-campuses-are-being-investigated-as-hate-crimes/; Rachel Chason, *Student Admits to Hanging Noose on Duke Campus*, USA TODAY (Apr. 3, 2015), http://college.usatoday.com/2015/04/03/duke-investigation-underway-after-noose-found-on-campus/; Veronica Hilbring, *It Never Stopped: Here Are 5 Recent Cases of Attempted Lynchings and Noose Intimidation*, ESSENCE (Sept. 15, 2017), https://www.essence.com/news/recent-cases-lynching-noose-intimidation; Jingwen Zhang, *Noose Discovery Sparks Campuswide Response*, AMHERST STUDENT (Sept. 12, 2017) https://amherststudent.amherst.edu/?q=article/2017/09/12/noose-discovery-sparks-campus-wide-response.

83. *White College Student Arrested for Bullying 'Jamaican Barbie' Roommate in Shockingly Gross Ways*, MADNESS HUB (Nov. 1, 2017), http://www.madnesshub.com/2017/11/white-college-student-arrested-for.html.

84. Allison Leotta, *I Was a Sex-Crimes Prosecutor. Here's Why 'He Said, She Said' Is a Myth*, TIME (Oct. 3, 2018), http://time.com/5413814/he-said-she-said-kavanaugh-ford-mitchell/.

themselves have been written out of black letter criminal rape law.[85] In addition to the chastity requirement already mentioned, these ancient, "special" rules for proving criminal rape included the requirement that a rape victim's testimony had to be corroborated by third party evidence[86] and that "cautionary instructions" had to be given to juries warning them "to treat a rape complainant's testimony with suspicion" because of the supposed tendency of rape victims to level false accusations.[87] Indeed, plenty of so-called "he said, she said" cases are actually "he said, *they* said," and the use of "he said, she said," by evoking stereotypes, can dismiss not only the victim's testimony but also corroborating evidence that actually exists.[88] While the use of such stereotyping can most often be seen with regard to sexual violence victims, racial stereotypes can also undermine the credibility of witnesses, as has been shown in the cases of third party witnesses who are testifying in nonsexual harassment cases.[89]

Ultimately, with regard to both racial and sexual harassment—and any other kind of discriminatory harassment case—if the case is truly word-on-word, it is fundamentally inequitable to *systematically* and *structurally* privilege the truth-telling presumption given to one party over the other. Although such systematic and structural inequality is built into the criminal justice system, civil rights approaches, whether under Title IX, Title VI, or any other civil rights law, cannot tolerate such inequality. If they did, they would drastically undermine their own effectiveness.

B. Using "Criminalization" to Undermine Civil Rights Protections

In fact, undermining the effectiveness of civil rights laws is part of the beachhead strategy. Attacks on the preponderance standard

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85. *Id.*

86. *Id.*

87. Anderson, *supra* note 58, at 645–47 ("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.").

88. An example of such dismissal can be found in the discussion of Dr. Christine Blasey Ford's allegations regarding Brett Kavanaugh assaulting her in high school. Although Dr. Ford's allegations had plenty of corroborating evidence, and multiple accusers had come forward with similar allegations that indicated a potential pattern of behavior, there was a persistent tendency to describe the case as "he said, she said," as well as a concerted effort to discount the other accusers' allegations. *See* Aaron Blake, *The Brett Kavanaugh Accusation Isn't a 'He Said, She Said' Anymore*, WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/politics/2018/09/18/why-brett-kavanaugh-accusation-isnt-really-he-said-she-said-anymore/?utm_term=.00f434c83b08. Neither of the other accusers were asked to testify before the Senate, and one accuser was not even interviewed by the FBI.

89. *See* Gabriel J. Chin, *"A Chinaman's Chance" in Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 U.C. IRVINE L. REV. 965, 967–68 (2013).

are part of an overall effort to "criminalize" a civil rights law and appropriate its operation so that it cannot and will not advance its equality goals.[90] Criminalization impedes civil rights laws' functions because equality is not a goal.[91] The criminal justice system is focused on keeping the abstract, generalized community safe from violence and primarily relies on incarceration of criminal actors to protect that community.[92] The system will not—because it structurally *cannot*—protect victims' rights to equal treatment and protection. In other words, even if criminal law enforcement officials did their jobs perfectly one hundred percent of the time, they would not be able to offer student survivors—of any kind of discriminatory harassment—the type of protection that a civil rights approach can. Thus, if Title IX is criminalized with regard to how it protects students from harassment, it will be unable to reach its equality goals and will be sapped of its power. Moreover, successful criminalization of Title IX establishes the beachhead "from which an attack can be launched"[93] on other civil rights laws, since criminalization is just as damaging to other equality goals as it is to gender equality goals, and as already demonstrated, criminalized evidentiary standards under Title VI will leave students of color more vulnerable to racial harassment, just as criminalization of Title IX does with regard to sexual harassment.

In light of the critical role that the standard of proof can play in damaging (by criminalizing) Title IX (and other civil rights statutes), the choice of evidentiary standard is best understood in the context of four main differences between the criminal law and Title IX. In the course of explaining those differences, this Subpart discusses several historical (i.e., pre-2017) civil rights enforcement innovations made by both the Clinton-Bush-Obama OCRs and the courts, prompted by Title IX's prohibition on sexual harassment. Each of these innovations plays a critically important role in realizing the promise of using a civil rights approach to address discriminatory harassment and violence, of which sexual harassment and gender-based violence are only one form. Each has accordingly been attacked via criminalization efforts, and these attacks, while thus far focused on Title IX, have negative implications for using similar innovations under other civil rights laws to address and comprehensively prevent

90. *See* OCR Questions and Answers, *supra* note 35, at 32–33 (describing the measures schools must undertake after a sexual violence allegation); OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENT BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, 3–4 (2001), www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (summarizing the extensive obligations schools undertake under Title IX to avoid sex discrimination).

91. WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW §§ 1.2(e), 1.3(a) (2d ed. 2010).

92. *Id.*

93. *Definition of Beachhead in English*, *supra* note 1.

other forms of discriminatory harassment and violence, including based on race and disability.

Thus, establishing a beachhead by criminalizing Title IX puts a stop not only to fulfilling the promise of using civil rights laws to end sexual harassment and gender-based violence as forms of gender inequality. It also halts any potential that these Title IX innovations have for suggesting new civil rights strategies that might help dismantle, in particular, the race discrimination that haunts our educational system and relies heavily on criminalization to accomplish that discrimination.[94] As countless legal scholars, including Professors Michelle Alexander in *The New Jim Crow*,[95] Andrea Ritchie in *Invisible No More: Police Violence Against Black Women and Women of Color*,[96] and Paul Butler in *Chokehold: Policing Black Men*,[97] have extensively documented, the criminal system is an even more obvious and direct threat to the civil rights of people of color, especially African Americans. The beachhead strategy has focused its criminalization "offensive" (another appropriate military term) on the Title IX innovations discussed below because of their potential power to lift not only cisgender women and gender minorities but also people of color out of the harmful, toxic mire of the criminal system and carceral state.

The first of the differences between Title IX's innovations and the criminal system deals with whose rights are the focal point of institutional interventions into harassment and violence. The focus of the criminal justice system is on defendants: the people who might be incarcerated as a result of investigation and prosecution.[98] This focus derives from, as noted, the criminal justice system's reliance on incarceration to achieve its goals. Because such incarceration needs to be just, and as a society we have rejected depriving citizens of their liberty based on crimes they did not commit, procedural protections in the criminal system are guaranteed virtually exclusively to the defendant.[99] In fact, crime victims are not even parties to criminal proceedings; they are "complaining witnesses" whose participation is limited to giving testimony.[100] For these reasons, the criminal justice

94. *See infra* Part III.

95. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

96. RITCHIE, *supra* note 64.

97. BUTLER, *supra* note 64

98. LAFAVE, *supra* note 91, § 1.4 (discussing the high evidentiary and constitutional standards that are designed to protect the innocent even if the guilty may go free).

99. *See id.* §§ 1.2(e), 1.3(a).

100. *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) (observing that the victim is sometimes excluded from the courtroom to ensure that the defendant has a fair trial).

system is not focused on—or even much concerned with—the victim's needs.

The exact opposite is true for civil rights laws' equality-based regimes. For one thing, civil rights laws are not concerned with incarceration[101] because, as a practical matter, schools cannot incarcerate individuals—they are not empowered to enforce the criminal law.[102] More importantly, however, Title IX is concerned with discrimination and therefore protects the rights of discrimination victims.[103] Its focus is on the victim and the victim's legal rights, not on protecting a defendant from unjust incarceration.

This first difference not only underpins the other three but also leads very directly to the second difference. That is, unlike the limited scope of what the criminal law can accomplish, because Title IX is concerned with the victims' needs, the innovations it has prompted aim to and empower schools to get out of the criminal mindset of punishment to work on reestablishing equal education for the victim. So, unlike the criminal system, Title IX is not limited to investigating the victim's report and, where warranted, punishing the perpetrator. Punishment of the perpetrator is almost never at the top of the survivor's list of priorities. Title IX's focus enables schools to recognize the wide range of needs that many victims have after experiencing sexual harassment—needs that cannot be addressed by investigation and punishment.

Most importantly, the trauma- and civil rights-informed innovation of providing educational accommodations to harassment victims helps schools address the many needs left unaddressed by punitive criminal methods. Indeed, if schools do not focus on accommodations, victims' needs will not be met, and they will often be at risk of experiencing a downward spiral that can seriously derail and even ruin their lives.[104] Sexual harassment often causes grave health problems.[105] In the case of students, those health problems can require time off from school, usually causing a drop in grades and even a decline in overall educational performance.[106] The effect on

101. *See* OCR Questions and Answers, *supra* note 35, at 27.

102. *See* LAFAVE, *supra* note 91, §1.4(c) (describing the many actors of criminal justice including the victim, police officers, prosecutors, juries, and judges).

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

104. Terry Nicole Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 39, 44–47 (1991) (detailing the possible physical and psychological harms that can affect sexual violence victims long after the initial incident).

105. Nicole Spector, *The Hidden Health Effects of Sexual Harassment*, N.Y. TIMES (Oct. 13, 2017), https://www.nbcnews.com/better/health/hidden-health-effects-sexual-harassment-ncna810416.

106. *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,

educational performance can then result in economic losses, such as loss of financial aid, tuition dollars, or scholarship money.[107] And in the worst cases, the student may drop out or transfer to a less desirable school because of the cumulative effects of the sexual harassment.[108] The negative impact on future earning potential can be large, diminishing a student's equal employment opportunities as well, even before he, she, or they enter the workforce.[109] Even more problematic, certain groups of students, such as first-generation college students, often cannot depend on getting help from their families to heal after harassment, since their families often have fewer resources,[110] resulting in the sexual harassment having an even greater negative impact on their lives.

For all of these reasons, a school must provide accommodations for victims whose trauma makes it impossible for them to continue with their education on the same trajectory that they had before being traumatized. These accommodations may include, but are not limited to: making changes to the victim's housing, working, commuting, and academic arrangements, possibly obtaining a stay-away order, and refunding tuition.[111] The criminal law—again, even if it operated flawlessly—is not structured to provide the kind of assistance that these accommodations can provide to victims and cannot aim to make a victim whole like the civil rights approach can.[112]

The third difference between the criminal and the civil rights innovations of Title IX focuses on who decides whether and how an investigation of a victim's report will occur. For criminal cases, police and prosecutors will decide whether to conduct an investigation[113] and dictate the course of that investigation.[114] In instances of sexual violence, police and prosecutors decide to advance very few cases through the criminal system,[115] and few survivors give police or

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sexual assault is a significant barrier to equal education for young women today.").

107. Annie Kerrick, *Justice is More than Jail: Civil Legal Needs of Sexual Assault Victims*, 57 ADVOCATE 38, 40 (2014)

108. *Id.*

109. *Id.*

110. *Cf.* Leah Fessler, *The Poorest Americans Are 12 Times as Likely to Be Sexually Assaulted as the Wealthiest*, QUARTZ (Jan. 4, 2018), https://qz.com/1170426/the-poorest-americans-are-12-times-as-likely-to-be-sexually-assaulted/.

111. *See* OCR Questions and Answers, *supra* note 35, at 32.

112. *See* LAFAVE, *supra* note 91, § 1.3(b) (noting that the purpose of the criminal justice system is to protect the community, not to make the victim whole as in a tort claim).

113. Tamara F. Lawson, *A Shift Towards Gender Equality in Prosecutions: Realizing Legitimate Enforcement of Crimes Committed Against Women in Municipal and International Criminal Law*, 33 S. ILL. U. L.J. 181, 188 (2008).

114. LAFAVE, *supra* note 91, § 1.4(c).

115. Lawson, *supra* note 113, at 188–90.

prosecutors the chance to make that decision at all.[116] This is because the vast majority of survivors will use what Professor Douglas Evan Beloof characterizes as the "victim's veto," a decision not to report sexual violence,[117] which thirty years of social science research on campus sexual violence shows is just as relevant to campus sexual violence survivors as to sexual violence survivors generally.[118] In light of this unwillingness to come forward, rather than adopting the criminal system's traditional approach to reporting, a civil rights approach will—and Title IX's innovations do—give victims options through which to exercise their power to decide whether to launch an investigation. Schools were in fact expected to provide such an empowering reporting system by the Obama Administration in its 2014 *Questions and Answers on Title IX and Sexual Violence ("2014 Q&As")*,[119] the same guidance that DeVos rescinded in 2017.[120]

Despite that rescission, the two-path reporting system that the *2014 Q&As* set up remains relevant as an example of a reporting system that is consistent with a civil rights approach. In addition, schools remain free to use such a reporting system as a best practice. In fact, such reporting systems have been shown to be a best practice in multiple contexts, as the Title IX system sought to imitate the restricted and unrestricted reporting system used in the military for many years with significant success.[121] With two choices of how to report, survivors can essentially make the decision whether to initiate an investigation. If a survivor makes an official report to a responsible employee or to the Title IX coordinator, the school must

116. *See* Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 147 (2012) (finding that only 5% to 20% of victims will report a sexual assault to law enforcement).

117. Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 306 (1999) (arguing that the "victim's veto" occurs when the victim does not report the wrongdoing to law enforcement).

118. *See* Lonsway & Archambault, *supra* note 116, at 159 (explaining that factors such as "poor evidence gathering by police (especially victim interviews), intimidating defense tactics, incompetent prosecutors, and inappropriate decision making by jurors" result in low sexual assault conviction rates).

119. *See* OCR Questions and Answers, *supra* note 35, at 21–22 (describing the relevant factors for reports in weighing a student's request for confidentiality versus a request for a full investigation).

120. Stephanie Saul & Kate Taylor, *Betsy DeVos Reverses Obama-era Policy on Campus Sexual Assault Investigations*, N.Y. TIMES (Sept. 22, 2017), https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html.

121. *See Restricted Reporting*, U.S. ARMY, http://www.sexualassault.army.mil/policy_restricted.aspx (last visited Apr. 17, 2019); *Unrestricted Reporting*, U.S. ARMY, http://www.sexualassault.army.mil/unrestricted_reporting.aspx (last visited Apr. 17, 2019). The author knows that the Title IX system was designed along the military model because she proposed its adoption to the White House Task Force prior to release of the *2014 FAQs*, which subsequently incorporated a similar system in the guidance it offered to schools.

investigate unless the victim explicitly requests that there be no investigation and the Title IX coordinator grants that request based on multiple factors that the Title IX coordinator should consider.[122] If survivors choose the confidential path, survivors can access services and accommodations for healing, but cannot initiate an investigation unless or until they change their mind and report to a responsible employee or to the Title IX coordinator.[123] In the military system, this process would be described as turning a restricted report into an unrestricted report,[124] which is commonly done.[125]

Because, as the "victim's veto" demonstrates, victims will factor into their reporting decision the processes and parameters by which the investigation will be conducted, the empowering civil rights approach to reporting is intertwined with Title IX's fourth civil rights-informed innovation and its final major difference from the criminal law. Put quite simply, a civil rights approach uses procedures that treat the parties to the proceeding equally—both victims and named harassers.[126] This "procedural equality" contrasts drastically with how the criminal law treats accused assailants and victims, who are radically *unequal* in the criminal process, due largely to the victim's lack of party status in the criminal proceeding.[127] Because victims are merely complaining witnesses in criminal proceedings, they enter the courtroom, give their testimony, and then are often not even allowed to remain in the courtroom for the rest of the trial.[128] Their lack of party status means that victims have no

122. OCR Questions and Answers, *supra* note 35, at 21, 24 (including factors like risk of additional acts of sexual violence, whether a weapon was involved, means of obtaining relevant evidence, and age of the students involved).

123. *Id.* at 22 (noting that a student who initially requests confidentiality may later request a full investigation).

124. *Reporting Options*, DEP'T DEF. SAFE HELPLINE, https://www.safehelpline.org/reporting-options.cfm (last visited Apr. 17, 2019).

125. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES, ACADEMIC PROGRAM YEAR 2014–2015, APPENDIX D: STATISTICAL DATA ON SEXUAL HARASSMENT AND ASSAULT 16 (2015), http://sapr.mil/public/docs/reports/MSA/APY_14-15/Appendix_D_Statistical_Data.pdf.

126. *See* OCR Questions and Answers, *supra* note 35, at 26 (listing the equal procedural requirements provided to both parties).

127. *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).

128. *See* 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 127. *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).

legal representation in a criminal proceeding, since the prosecutor represents the State, which may have very different interests from the victim.[129] 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.[130] Without party status, victims also have no right to appeal.[131] 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.[132]

C. *The Procedurally Equal Standard of Proof*

Procedural equality simply cannot exist without the preponderance standard. Those seeking to criminalize Title IX insist that only the criminal standards of proof are fair to accused students,[133] an argument showing in and of itself that criminalization proponents are not concerned about the rights of *all* students but simply with those of accused students. However, if one considers *all* students, then it quickly becomes clear that the preponderance standard is the only appropriate standard for a civil rights proceeding. This is so because, of all the potential evidentiary standards, the preponderance standard comes closest to treating both parties equally.

The first reason why the preponderance standard is the most equal of evidentiary standards is because it gives as equal as possible presumptions of truth telling to both parties. The reasonable doubt and C&C standards give heavy presumptions in favor of the accused and signal that factfinders should be so skeptical of the truth of victims' accounts that they have to be at least clearly convinced of that truth before they can believe it.[134] Creating a presumption in

129. *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 127, 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).

130. *See* LAFAVE, *supra* note 91; Cellini, *supra* note 127, at 841.

131. 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3902.1 (2d. ed. 1991).

132. *See generally* Nancy Chi Cantalupo, *Address: The Civil Rights Approach to Campus Sexual Violence*, 28 REGENT U. L. REV. 185 (2016) (describing the framework of a Title IX claim within a civil rights approach).

133. *See* Nancy Chi Cantalupo & John Villasenor, *Is a Higher Standard Needed for Campus Sexual Assault Cases?*, N.Y. TIMES (Jan. 2, 2017), https://www.nytimes.com/roomfordebate/2017/01/04/is-a-higher-standard-needed-for-campus-sexual-assault-cases.

134. *Id.* ("Criminal law-based standards of proof make protecting the equal rights of all of their students *harder* for schools because they require victims to

favor of one party while signaling skepticism of the other's account is, by definition, treating the parties unequally.

Second, in light of the centuries of de jure discrimination against sexual violence victims accomplished through the special corroboration rules[135] and "cautionary instructions . . . to treat a rape complainant's testimony with suspicion,"[136] selecting a standard of evidence that signals skepticism of only the victim's account is a form of gender stereotyping.[137] Such gender stereotyping is a clear civil rights violation recognized repeatedly under our civil rights statutes dealing with sex discrimination.[138]

Third, the preponderance standard properly reflects the equal stakes of the parties involved in the proceeding. Although standards of proof are often assumed to reflect the accuracy of the factfinding—an assumption that implies that some evidentiary standards are more accurate than others—each evidentiary standard simply selects what kind of inaccuracy to risk. Such selections are made based on factors such as societal values and the stakes of the parties involved in that proceeding's outcome.[139]

Efforts to criminalize Title IX, including by changing the standard of proof, rely on the perceived unbalanced stakes of victim and accused in criminal proceedings and the knee-jerk analogy of the criminal law to Title IX. Such arguments invoke the high stakes of defendants in the criminal justice system, where a "false positive" or wrongful conviction of a sex offense could lead to unjust incarceration or lifetime registry as a sex offender, but a "false negative" or wrongful acquittal is not perceived as having an important effect on the victim's or complaining witness's future.[140] In light of these different stakes, the criminal law selects standards of proof with higher chances of false negatives and lower chances of false positives.[141]

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carry a much heavier evidentiary burden than accused students—'stacking the deck' against them.").

135. *See generally* Leotta, *supra* note 84 (discussing the history of the "corroboration requirement" in the United States).

136. Anderson, *supra* note 58, at 647 ("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.").

137. *See generally* Cantalupo, *supra* note 132, at 195 (providing examples of how female stereotypes lead to the belief among college men that victims lie).

138. *See* Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 924 (2016) (explaining the recent success of sex discrimination lawsuits that rely on the legal theory of stereotyping).

139. Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 744 (2012).

140. Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 700, 702–05 (2014).

141. For a discussion of how procedural choices lead to different balances between wrongful convictions and wrongful acquittals, see *id.* at 702–04 (opining how the adversarial system produces more wrongful convictions); David Alan

However, these implicit and explicit analogies between criminal and civil rights proceedings are once again inapposite. Unlike the unbalanced stakes in criminal proceedings, all students have equal stakes in campus sexual harassment proceedings regardless of whether they are victims or reported harassers. Because schools do not have the powers of the criminal justice system and cannot incarcerate students found responsible of misconduct,[142] accused students' stakes in civil rights law-based sexual harassment proceedings are not analogous to criminal defendants' stakes. Instead, the stakes of students are created by the nature of campuses and similar educational environments, which are usually small communities where all students live and attend class in a small geographic area. Accordingly, each student has an equal stake in the ability to remain at the school of the student's choice and to complete his, her, or their education there. Accused students could potentially be wrongfully sanctioned, most critically through expulsion, for committing sexual harassment and could conceivably experience unjust difficulties in completing their education elsewhere, even though no research has confirmed that this actually occurs in significant numbers, and several bits of anecdotal evidence indicate that the opposite is true.[143] Likewise, the consequences of a wrongful

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Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1688 (2009) (arguing the American criminal justice system may benefit from the use of more inquisitorial procedures).

142. LAFAVE, *supra* note 91.

143. The press has covered several instances of students who were suspended or expelled due to being found responsible for severe sexual harassment and who then transferred to other schools to continue their college educations. *See, e.g.*, Tyler Kingkade, *Brandon Austin, Twice Accused of Sexual Assault, Is Recruited by a New College*, HUFFPOST (July 28, 2014, 3:44 PM), http://www.huffingtonpost.com/2014/07/28/brandon-austin-northwest-florida_n_5627238.html [https://perma.cc/HF39-ZZCP] (discussing a college basketball player who was suspended along with a teammate for sexual assault at Providence College, then transferred to the University of Oregon, where he was suspended again with two other teammates for another joint sexual assault, and finally went on to attend and play basketball at a third school, Northwest Florida State College); Todd South, *Jury Finds Sewanee and Student at Fault; Awards Student $26,500*, CHATTANOOGA TIMES FREE PRESS (Sept. 3, 2011), http://www.timesfreepress.com/news/news/story/2011/sep/03/jury-finds-sewanee-and-student-fault-awards-50000-/58021/ [https://perma.cc/67SB-NVS3] (noting that a student expelled from University of the South for sexually assaulting a classmate has "continued his education at another college"); James Taranto, Opinion, *An Education in College Justice*, WALL ST. J. (Dec. 6, 2013, 6:25 PM), https://www.wsj.com/articles/behind-the-auburn-curtainbehind-the-auburn-curtain-1385756706 [https://perma.cc/GDB8-S5T7] (noting that a student expelled from Auburn University after being found responsible for sexual harassment had transferred to University of South Carolina Upstate and was expected to graduate in May). In addition, the few efforts to gather less anecdotal evidence have found that schools expel students only in a minority–sometimes an extreme minority–of cases. *See* Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFINGTON POST (Sept. 29,

failure to sanction are equally serious for the student victim, and here research has confirmed that a high number of student victims transfer schools or drop out entirely[144] to avoid an accused student who is not meaningfully sanctioned. In light of the drop in grades that most victims experience,[145] many have been unable to gain admission at equally prestigious schools,[146] and at least some victims have had difficulties obtaining admission at any other school.[147] For instance, one student survivor reported submitting fourteen transfer applications to other colleges before finally being accepted to one.[148]

Once the stakes of student victims and reported harassers are accurately understood as equal, the preponderance standard once again emerges as the appropriate evidentiary standard for a civil rights issue such as sexual harassment.[149] Indeed, all of these reasons combine to explain why the preponderance standard is the standard used and traditionally required in other civil rights matters. However, it is also the standard selected for other cases where the parties' stakes are equal, including those involving disputes between two or more private (i.e., non-State) parties,[150] and in any case where victims have party status as they do in civil rights cases but not in criminal cases.[151] Indeed, the vast majority of cases in our legal system use the preponderance standard.[152] Besides other civil rights

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2014, 8:59 AM), https://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html [https://perma.cc/QF5H-DZEU]; THE HUNTING GROUND, *supra* note 66, *passim* (detailing numerous cases in which students accused of sexual assault, including students found responsible, were not expelled).

144. *See* Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. 2106, 2109–10 (2016).

145. *Id.* at 2116.

146. *See* KATHARINE K. BAKER ET AL., TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER 2 (2016), http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17.pdf.

147. *See* IT HAPPENED HERE, at 1:13:16 (Neponsit Pictures 2014); *cf.* Rebecca Marie Loya, Economic Consequences of Sexual Violence for Survivors: Implications for Social Policy and Social Change 100 (June 2012) (unpublished Ph.D. dissertation, Brandeis University), http://pqdtopen.proquest.com/doc/1102751005.html?FMT=AI (explaining how the long-lasting effects of sexual violence can prevent college students from successfully transferring).

148. *See* IT HAPPENED HERE, *supra* note 147.

149. For further argumentation on why the preponderance standard is the correct standard for Title IX cases, *see* BAKER ET AL., *supra* note 146, at 4–12.

150. *See generally* Ruth Maurice, *Legal Standards of Proof*, NOLO, https://www.nolo.com/legal-encyclopedia/legal-standards-proof.html (last visited Apr. 17, 2019) (explaining the general functions of the preponderance standard of proof).

151. *Differences Between Civil and Criminal Cases*, SILVERMAN THOMPSON SLUTKIN WHITE, https://www.mdattorney.com/differences-between-civil-and-criminal-cases.html (last visited Apr. 17, 2019).

152. *See Judicial Business 2018*, U.S. COURTS (Sept. 30, 2018), https://www.uscourts.gov/statistics-reports/judicial-business-2018 (showing the

cases, the preponderance standard has been selected in administrative proceedings conducted by private entities and government actors and most school disciplinary proceedings for any student misconduct.[153] And it is the preponderance standard that is used in the vast majority of civil court cases, including those that would be brought by students against their schools for either Title IX violations or for allegations of due process violations on the part of the school.[154] Thus, if we used a different evidentiary standard in campus sexual violence cases under Title IX, we would essentially be saying that victims of sexual harassment should be treated unequally compared to all other analogous cases and compared to all other students in our system.[155]

Despite these reasons showing that the preponderance standard is the only appropriate one for Title IX and all other investigations of discrimination claims, the NPRM pushes schools in the opposite direction, in particular by requiring that the standard of proof must be consistent with the evidentiary standard used in faculty discipline.[156] Thus, in two respects, ED is dog whistling. First, its proposed rule on evidentiary standards is written in such a way that only those who understand that faculty disciplinary systems tend to adopt C&C evidence standards would understand how the proposed rule will operate to compel schools to adopt C&C evidence for at least sexual, and possibly also racial, harassment. Second, this particular dog whistle is consistent with the general dog whistling used in ED's

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number of filings for criminal defendants represented less than a third of all federal case filings in 2014).

153. *See* 2011 DCL, *supra* note 34, at 8, 11.

154. For examples of judicial description of the preponderance standards in Title IX cases, see, for example, Bostic v. Smyrna Sch. Dist., 418 F.3d 355, 360 (3d Cir. 2005); Williams v. Paint Valley Local Sch. Dist., 400 F.3d 360, 363 (6th Cir. 2005); Bernard v. E. Stroudsburg Univ., No. 3:09-CV-00525, 2016 WL 755486, at *1, 34 (M.D. Pa. Feb. 24, 2016).

155. It is important to note that there are other categories of campus student misconduct in addition to gender-based violence that could be both subject to civil rights laws and result in criminal charges. Indeed, the National Center for Education Statistics reports that "[i]n 2016, there were 1,070 criminal incidents classified as hate crimes on the campuses of postsecondary institutions that were reported to police and security agencies, [including, from most common to the least common] . . . destruction, damage, and vandalism . . . intimidation . . . simple assault . . . larceny and aggravated assault . . . forcible sex offenses . . . burglary . . . and robbery and arson . . . . About three-fourths of the total reported on-campus hate crimes in 2016 were motivated by race, religion, or sexual orientation . . . . The other one-fourth of hate crimes were motivated by ethnicity . . . gender . . . gender identity . . . and disability." *Indicator 22: Hate Crime Incidents at Postsecondary Institutions*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/crimeindicators/ind_22.asp (last updated Apr. 2019). As a result, it would be inaccurate to suggest that it is appropriate to treat sexual harassment and violence differently from other forms of campus misconduct because sexual harassment and violence have a unique status.

156. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. at 61,477.

spin that the proposed rules increase "due process" rights, the issue that this Article next addresses.

III. THE "DUE PROCESS" DOG WHISTLE

Title IX has been selected as the metaphorical beach on which to establish the anti-civil rights beachhead at issue here not only because of the perceived threat of the new interventions into discriminatory harassment and violence, discussed *infra*, which have been advanced under Title IX's mantle. In addition to the desire to eliminate these civil rights innovations and to return to criminal and criminalized systems that are still dominated and primarily controlled by white men[157] (who are also, as noted above, the likely primary beneficiaries of the NPRM's proposals), Title IX's civil rights protections are vulnerable to attack due to several years of sustained political backlash against them.[158] That backlash and its effectiveness, moreover, is a function of the historical vulnerability of sexual harassment and sexual assault survivors due to the legacy of stereotypes about survivors' lack of credibility and chastity.[159] Thus, similarly to how leaders talking to white residents of the Jim Crow South said "states' rights" to communicate "protect segregation,"[160] the NPRM's authors' and their allies' may hope that when they say "due process," it will be heard by many as "victims lie." If successful with a sufficient number of people, this strategy will allow the dog whistlers to discredit the message of the Title IX civil rights activists, many of whom are open about being survivors themselves, that sexual harassment is: (1) a serious problem and (2) a type of discrimination and inequality antithetical to the values of the American public and polity. Although, as Part IV details, phenomena like #MeToo may significantly undermine the ultimate effectiveness of this dog whistle strategy, it has gotten enough airtime in mainstream media venues that it is important to understand its dog whistle status. The remainder of this Part therefore seeks to map the forces that created this dog whistle and the methods they are using to deploy it.

Such mapping must start with events and agendas that began well before the 2016 election but continue through the current

157. Jamie R. Abrams, *The #MeToo Movement: An Invitation for Feminist Critique of Rape Crisis Framing*, 52 U. RICH. L. REV. 749, 749 (2018).

158. *See* Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys*, 65 DRAKE L. REV. 293, 311–12, 312 n.67 (2017); Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 823–24 (2017); Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 71–72 (2017); Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 634 (2018).

159. *See infra* Subpart II.A

160. My thanks to Professor Jonathan Glater for this dog whistle example.

moment.[161] Over the years since Title IX-inspired activism around campus sexual harassment could first be described as a "movement" (circa 2013),[162] student survivors have had to defend themselves from a variety of attacks reminiscent of 1980s "backlash,"[163] a nonexclusive list of which includes: (1) private investigators, hired by the accused harassers, following and intimidating survivors as well as tricking and interrogating their friends and family;[164] (2) aggressive defamation lawsuits brought by accused harassers;[165] (3) proposed or successful state legislation designed to force schools to give accused students, under the guise of protecting their "due process" rights, procedural rights that are criminalized, and therefore inequitably greater, in school investigations of sexual harassment complaints;[166]

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161. *See infra* text accompanying notes 174–77.

162. The organizing and movement-building in which students across the country began engaging first gained national prominence in 2013, when the mainstream media began covering how student survivors in particular were breaking their silences and connecting their experiences to similar ones experienced by students on campuses across the country. These connections quickly turned into protests and activism directed at the Obama Administration and the U.S. Department of Education in particular. *See, e.g.*, Alexandra Brodsky, *Title IX Enforcement is Getting Better, but the Education Department Needs to Do More*, FEMINISTING, rfeministing.com/2013/11/15/title-ix-enforcement-is-getting-better-but-the-education-department-needs-to-do-more/ (last visited May 5, 2019); *Department of Education: Hold Colleges Accountable that Break the Law by Refusing to Protect Students from Sexual Assault*, CHANGE.ORG, https://www.change.org/p/department-of-education-hold-colleges-accountable-that-break-the-law-by-refusing-to-protect-students-from-sexual-assault (last visited May 5, 2019); Richard Pérez-Peña, *College Groups Connect to Fight Sexual Assault*, N.Y. TIMES (Mar. 19, 2013), https://www.nytimes.com/2013/03/20/education/activists-at-colleges-network-to-fight-sexual-assault.html. This activism arguably helped lead President Obama and Vice President Biden to form the White House Task Force to Protect Students Against Sexual Assault. *See* Molly Bangs *Will the White House Continue the Fight Against Campus Sexual Violence*, THE CENTURY FOUND. (Jan. 10, 2017) https://tcf.org/content/commentary/will-white-house-continue-fight-campus-sexual-violence/?agreed=1.

163. SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (2006).

164. *See* Harry Shukman, *Male Students Charged with Rape Are Hiring Private Investigators to Follow Their Accusers*, BABE (Dec. 8, 2017), https://babe.net/2017/12/08/the-untold-story-of-how-private-investigators-are-set-on-the-women-who-speak-out-about-rape-24157 [https://perma.cc/B2YB-N85U].

165. *See* Tyler Kingkade, *As More College Students Say "Me Too," Accused Men Are Suing for Defamation*, BUZZFEED NEWS (Dec. 5, 2017), https://www.buzzfeed.com/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing [https://perma.cc/PA5Q-BWGD].

166. *See* ANDREW MORSE ET AL., STATE LEGISLATIVE DEVELOPMENTS ON CAMPUS SEXUAL VIOLENCE: ISSUES IN THE CONTEXT OF SAFETY 15–16 (2015), https://www.naspa.org/images/uploads/main/ECS_NASPA_BRIEF_DOWNLOAD3.pdf [https://perma.cc/739J-QBXC] (discussing North Carolina's legislation requiring that schools allow accused students to be represented by legal counsel

(4) proposed or successful state legislation seeking to criminalize Title IX matters by mandating that schools pass reports of sexual harassment (and only sexual harassment) received from student victims to law enforcement, regardless of the victim's consent;[167] (5) accusations that those who report sexual harassment are simultaneously too weak to handle opinions and ideas different from their own while at the same time they are aggressively attacking the free speech and academic freedom of others;[168] and (6) the narratives previously discussed equating campus sexual assault allegations with the national travesty and trauma of lynching in the Jim Crow South.[169]

Despite stretching back half a decade at least, these backlash techniques can be seen very prominently in recent events. For example, protests that reports of sexual harassment violate the due process rights of those accused of such harassment gained national prominence outside of the Title IX context during the hearings for Justice Brett Kavanaugh's confirmation to the Supreme Court. When then-Judge Kavanaugh was accused of sexually harassing and assaulting multiple teenage girls when he was in high school and college, both Senate Republicans[170] and Donald Trump[171] suggested that his due process rights were being violated by the confirmation hearings. For instance, references that Kavanaugh should be given a "presumption of innocence"[172] referred to the criminal, beyond a reasonable doubt standard of proof,[173] even though it was repeatedly pointed out that the hearings were not a criminal proceeding but a

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in student conduct proceedings but creating no similar guarantee for complainants).

167. *See* Dana Bolger, *Quote of the Day: "If You Feel Triggered, Trigger Somewhere Else,"* FEMINISTING (Mar. 2, 2017), http://feministing.com/2017/03/02/quote-of-the-day-if-you-feel-triggered-trigger-somewhere-else [https://perma.cc/558H-XTBN].

168. *See* Cantalupo & Kidder, *supra* note 20; McClintock, *supra* note 2; *see also* David Schaper, *University of Chicago Tells Freshmen It Does Not Support 'Trigger Warnings'*, NPR (Aug. 26, 2016), https://www.npr.org/2016/08/26/491531869/university-of-chicago-tells-freshmen-it-does-not-support-trigger-warnings [https://perma.cc/T2B9-ZUL3] (describing pushback against trigger warnings at the University of Chicago).

169. *See* Johnson, *supra* note 65, at 72–74; Halley, *supra* note 17, at 106.

170. *See, e.g.*, Anna North, *Susan Collins Was Supposed to be Different*, VOX (Oct. 5, 2018), https://www.vox.com/2018/10/5/17943200/brett-kavanaugh-susan-collins-speech-confirmation-trump.

171. *See* David Jackson, *Donald Trump: Kavanaugh Allegations Show It's a 'very scary time for young men in America'*, USA TODAY (Oct. 2, 2018), https://www.usatoday.com/story/news/politics/2018/10/02/donald-trump-says-very-scary-time-young-men-america/1498770002/.

172. *See* North, *supra* note 170.

173. *See Presumption of Innocence; Proof Beyond a Reasonable Doubt*, USCOURTS, http://www.mad.uscourts.gov/resources/pattern2003/html/patt4cfo.htm (last visited Apr. 17, 2019).

high-level job interview.[174] Donald Trump made a similar reference, stating: "It's a very scary time for young men in America, when you can be guilty of something that you may not be guilty of."[175] In earlier remarks Trump mocked the last of three accusers, lamenting that "a man's life is in tatters."[176]

After Senate Republicans stood unwaveringly behind Kavanaugh throughout the initial refusal to convene an FBI investigation,[177] the testimony of the first accuser who came forward, Dr. Christine Blasey Ford, the testimony of Kavanaugh regarding her allegations,[178] the rushed and suspiciously circumscribed FBI investigation eventually conducted,[179] and Kavanaugh's ultimate confirmation,[180] no evidence exists that his life was ever in "tatters." In fact, whereas Blasey Ford received so many death threats she had to move houses four times and hire a private security detail, Kavanaugh appears to have been spared such direct harassment.[181] More than a month after the hearings, Blasey Ford was still receiving so many threats that she had not been able to return to work and a GoFundMe site was started to pay for her security.[182] In contrast, press coverage suggests that the threats and harassment affecting Kavanaugh were directed at his *wife*,[183] while Kavanaugh himself had round-the-clock security

174. *See* Ephrat Livni, *"Innocent Until Proven Guilty" Doesn't Apply to Job Interviews*, QUARTZ (Sept. 25, 2018), https://qz.com/work/1401422/brett-kavanaugh-confirmation-innocent-until-proven-guilty-doesnt-apply-to-job-interviews/.

175. *Donald Trump Says it is a 'Scary Time for Young Men' in Wake of Brett Kavanaugh Accusations*, ABC NEWS (Oct. 2, 2018), https://www.abc.net.au/news/2018-10-03/trump-says-its-a-scary-time-for-young-men/10331238.

176. *Id.*

177. *See* Margaret Hartmann, *Republicans Reject Kavanaugh Accuser's Call for FBI Probe After Claiming They Want 'All the Facts'*, INTELLIGENCER (Sept. 19, 2018), http://nymag.com/intelligencer/2018/09/republicans-fbi-probe-kavanaugh.html.

178. *See* Seung Min Kim et al., *Kavanaugh Vote: Senate Republicans Leaders Agree to New FBI Background Investigation of Kavanaugh*, WASH. POST (Sept. 28, 2018), https://www.washingtonpost.com/powerpost/senate-committee-prepares-to-vote-on-kavanaugh-nomination-as-key-senators-remain-silent/2018/09/28/0b143292-c305-11e8-b338-a3289f6cb742_story.html?utm_term=.5ec90f0e8567.

179. *See* Jeremy Herb et al., *Sources Describe FBI's Limited Investigation on Kavanaugh*, CNN (Oct. 4, 2018), https://www.cnn.com/2018/10/04/politics/fbi-investigation-parameters-kavanaugh/index.html.

180. *See* Seung Min Kim & John Wagner, *Kavanaugh Sworn in as Supreme Court Justice After Divided Senate Votes for Confirmation*, WASH. POST (Oct. 6, 2018), https://www.washingtonpost.com/politics/kavanaugh-vote-divided-senate-poised-to-confirm-trumps-nominee/2018/10/06/64bf69fa-c969-11e8-b2b5-79270f9cce17_story.html.

181. Anna North, *Christine Blasey Ford Has a Security Detail Because She Still Receives Threats*, VOX (Nov. 8, 2018), https://www.vox.com/2018/11/8/18076154/christine-blasey-ford-threats-kavanaugh-gofundme.

182. *Id.*

183. *See* Christal Hayes & William Cummings, *Death Threats Target Brett Kavanaugh's Family, Woman Who Accused Him of Sexual Assault*, USA TODAY,

provided by the U.S. Marshal Service,[184] which, like all federal judges' security, is funded by the government.[185] These differences between the rhetoric and actual facts led many to agree with comedian Trevor Noah's use of the phrase "weaponizing victimhood" to describe comments that turn named harassers into victims of those who originally reported that harassment.[186] Social scientists have named this phenomenon DARVO, for "Deny, Attack, and Reverse Victim and Offender," to describe "a reaction perpetrators of wrong doing, particularly sexual offenders, may display in response to being held accountable for their behavior." A DARVO techniques relevant to this discussion is "when an actually guilty perpetrator assumes the role of 'falsely accused' and attacks the accuser's credibility and blames the accuser of being the perpetrator of a false accusation."[187]

In a previous Supreme Court confirmation involving sexual harassment allegations against the nominee, when now-Justice Clarence Thomas called Professor Anita Hill's accusations a "high-tech lynching,"[188] his rhetoric used our nation's history of racist brutality as a DARVO technique. Thomas, of course, was not lynched, and is now in the twenty-seventh year of his lifetime appointment on the Supreme Court.[189] Nor do his claims of figurative lynching even make much sense, since lynching was led and perpetrated overwhelmingly by white men,[190] whereas Hill is a black woman and the Senators who supported and voted for Thomas were all white men except for one white woman.[191]

(Sept. 20, 2018), https://www.usatoday.com/story/news/politics/onpolitics/2018/09/20/death-threats-brett-kavanaugh-christine-blasey-ford/1371995002/.

184. *See* Kaitlan Collins, *Brett Kavanaugh and Christin Blasey Ford Receiving Death Threats*, CNN (Sept. 20, 2018, 4:09 PM), https://www.cnn.com/2018/09/20/politics/kavanaugh-ford-death-threats/index.html.

185. David Schaper, *Federal Judges Get More Home Security*, NPR (July 14, 2006, 4:00 PM), https://www.npr.org/templates/story/story.php?storyId=5558345.

186. Matt Wilstein, *Trevor Noah's Powerful Message on Trump and Male Victimhood During #MeToo*, DAILY BEAST (Oct. 5, 2018, 12:29 AM), https://www.thedailybeast.com/trevor-noahs-powerful-message-on-trump-and-male-victimhood-during-metoo.

187. Jennifer J. Freyd, *What is Darvo?*, U. OREGON, https://dynamic.uoregon.edu/jjf/defineDARVO.html (last visited Apr. 17, 2019).

188. Michael S. Rosenwald, *'A High-Tech Lynching': How Brett Kavanaugh Took a Page From the Clarence Thomas Playbook*, WASH. POST, (Sept. 27, 2018), https://www.washingtonpost.com/history/2018/09/25/high-tech-lynching-how-clarence-thomass-fury-saved-his-supreme-court-nomination/?utm_term=.2e89cf6e7aa6.

189. *Clarence Thomas*, OYEZ, https://www.oyez.org/justices/clarence_thomas (last visited Apr. 17, 2019).

190. *See History of Lynchings*, NAACP, https://www.naacp.org/history-of-lynchings/ (last visited May 5, 2019).

191. *See* Francine Kiefer & Linda Feldmann, *What Has Changed Since Anita Hill? Female Senators Who Were There Weigh in*, CHRISTIAN SCIENCE MONITOR (Sept. 18, 2018), https://www.csmonitor.com/USA/Politics/2018/0918/What-has-changed-since-Anita-Hill-Female-senators-who-were-there-weigh-in; Sabrina

The United States' history of racist violence has also been used in the due process, anti-Title IX narrative to suggest that college women who accuse college men of sexual harassment are replaying the strategy of using false accusations of sexual harassment by white women to justify brutality against black men.[192] As with Thomas's hyperbole, there is no indication of actual lynching occurring on college campuses as a result of sexual harassment allegations, and even a figurative analogy to lynching fails to hold together when looked at even a little closely. First, as I and others have noted, the ability of schools to keep their investigations and resolutions of sexual harassment complaints confidential makes it very difficult to know the racial demographics of either of two questions raised by the analogy.[193] These questions, which must carefully be kept separate, include: (1) who is reporting sexual harassment by whom, and (2) who the college or university is finding responsible for sexual harassment on the basis of whose accusations.[194] To answer either or both questions requires much more transparency on the part of schools, transparency that has been a major push of Title IX activists in the past.[195] Yet efforts to get schools to be more transparent through, for instance, mandated climate surveys, have been flipped on their head since the 2016 election of a Republican-majority Congress and a Republican President. Instead, legislation proposed in 2017[196] took the exact opposite tack and would codify a prohibition on the Secretary of Education *ever* regulating the content of the surveys or using "the results of [campus climate] surveys to make comparisons

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Siddiqui, *Kavanaugh Hearing Recalls Clarence Thomas Case: Will History Repeat Itself?*, GUARDIAN (Sept. 27, 2018), https://www.theguardian.com/us-news/2018/sep/27/brett-kavanaugh-clarence-thomas-anita-hill-hearings; The Associated Press, *The Thomas Confirmation; How the Senators Voted on Thomas*, N.Y. TIMES, (Oct. 16, 1991), https://www.nytimes.com/1991/10/16/us/the-thomas-confirmation-how-the-senators-voted-on-thomas.html.

192. *See* Halley, *supra* note 17, at 106 (referring to Emmett Till, the black teenage boy who was lynched because he was falsely accused by a white woman for making a sexual advance toward her).

193. *See* Cantalupo & Kidder, *supra* note 20; Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*, 18 NEV. L.J. 107, 107 (2017).

194. Cantalupo, *supra* note 49.

195. *See, e.g.*, Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 244 (2011); Zoe Ridolfi-Starr, *Transformation Requires Transparency: Critical Policy Reforms to Advance Campus Sexual Violence Response*, 125 YALE L.J. 2156, 2159 (2016). Several of the op-eds here dealt with transparency. *Doing Enough to Prevent Rape on Campus?*, N.Y. TIMES (Aug. 12, 2014), https://www.nytimes.com/roomfordebate/2014/08/12/doing-enough-to-prevent-rape-on-campus.

196. *See* Kara Voght, *GOP Bill Could Make it Harder for Colleges to Crack Down on Sexual Assault*, MOTHER JONES (Dec. 21, 2017), https://www.motherjones.com/politics/2017/12/gop-bill-could-make-it-harder-for-colleges-to-crack-down-on-sexual-assault.

between institutions of higher education,"[197] setting out *barriers* to making such information available and enabling the demographics of this problem to remain shrouded in secrecy.

Second, similar to the flipped racial demographics of Thomas's "high-tech lynching" versus actual lynching, those employing the due process narrative in a way that implies an analogy to lynching with regard to Title IX are mainly people who appear to be white.[198] Moreover, as Professor Deborah Brake has pointed out, prior to the Obama Administration's increased enforcement of Title IX, when most legal action related to campus peer sexual harassment focused on accused black male athletes, there was little protest over the enforcement of Title IX.[199] It was not until the Obama Administration started requiring schools to take action even in cases where the accused student was "the average college boy" at "Ivy League schools and/or elite colleges, such as Columbia, Yale, Harvard, Princeton, Duke, the University of Virginia, Stanford, and Dartmouth," that a concerted backlash to OCR's Title IX enforcement began.[200] In other words, once the public image of college men accused of sexual violence did not fit with racialized sexual stereotypes of black men as rapists,[201] "public sympathy for the college men accused of sexual assault [grew, along with] . . . concerns about unfounded accusations."[202]

However, the organizations and individuals using the due process dog whistle are not merely engaging in sins of omission with regard to issues of racial justice. When two University of Oklahoma students were expelled, and the university closed its chapter of the Sigma Alpha Epsilon fraternity for singing a song full of racial slurs (including a line stating "you can hang him from a tree, but he'll never sign with me"), an organization that has been heavily involved in the "due process" narrative, the Foundation for Individual Rights in Education ("FIRE"), took a leading role in defending the fraternity members.[203] The organization based this support on protection of the

197. PROSPER Act, H.R. 4508, 115th Cong. § 162(d)(2)(B) (2017).

198. *See, e.g.*, Allen, *supra* note 16 (referring to both Halley, *supra* note 17 and Yoffe, *supra* note 16); Bazelon, *supra* note 16 (referring to both Halley, *supra* note 17 and Yoffe, *supra* note 16); Erika Sanzi, *With Title IX Rewrite, DeVos Gets it Right for Accusers and Accused*, HILL (Nov. 22, 2018), https://thehill.com/opinion/education/417762-with-title-ix-rewrite-devos-gets-it-right-for-accusers-and-accused (referring to both Halley, *supra* note 17 and Yoffe, *supra* note 16); Yoffe, *supra* note 16 (referring to Halley, *supra* note 17, which refers to Emmett Till's lynching).

199. *See* Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109, 146–47 (2017).

200. *Id.* at 147–48.

201. *See generally* Angela Davis, *Rape, Racism and the Myth of the Black Rapist*, *in* WOMEN, RACE & CLASS 172 (1981).

202. Brake, *supra* note 199, at 148.

203. *See* Peter Jacobs, *There Might be a Big Legal Problem With the Decision to Expel 2 Oklahoma Students for Racist Remarks*, BUS. INSIDER (Mar. 11, 2015),

students' free speech, yet has engaged in no similar impassioned defense of the free-speech rights of students to kneel in protest during the national anthem. Instead, with regard to anthem protests, FIRE gave the *Chronicle of Higher Education* a tepid statement that "students have the right to free expression as long as it does not disrupt the 'proper functioning' of the school or the athletics program."[204] While these positions seem contradictory at first glance, they make perfect sense when FIRE's commitment to "due process" is understood as a dog whistle that is not actually objecting to students of color being disciplined discriminatorily but is seeking to undermine victims' credibility and/or the seriousness of the discriminatory harassment victims experience. The victims of the harassment represented by the University of Oklahoma lynching song, for instance, were men of color, and FIRE exhibited no similar compassion for them as its positions on "due process" for named harassers imply the organization has for men of color subjected to discrimination.

Indeed, evidence suggests that there is more to FIRE's positions on these issues affecting students of color than just some contradictions and internal inconsistencies. According to Professor Jim Sleeper, author of *Liberal Racism*, FIRE's major grant funding comes from "ultra-conservative" foundations, including "the Scaife family foundations [and] the Koch-linked Donors Trust," funders that they share with other organizations such as "the David Horowitz Freedom Center (whose 'Academic Bill of Rights' would mandate more hiring of conservative faculty and would monitor professors' syllabi for 'balance') and Campus Watch (which tracks and condemns liberal professors' comments on the Middle East)."[205] Notably, Betsy DeVos herself has given at least ten thousand dollars to FIRE.[206]

In addition to funding FIRE, the Koch and Scaife foundations fund the American Legislative Exchange Council ("ALEC"), an organization characterized by Dr. McClintock, in her discussion of beachheads in the context of Title IX, as "one of the most powerful, secretive organizations in the United States," known for accomplishing its conservative agenda through techniques like

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https://www.businessinsider.com/oklahoma-students-expelled-free-speech-first-amendment-2015-3.

204. Emma Pettit, *Southern Illinois U. Says it Won't Tolerate Activism by Athletes in Uniform, Then Backs Off*, CHRON. OF HIGHER EDUC. (Aug. 20, 2018), https://www.chronicle.com/article/Southern-Illinois-U-Says-It/244404; *see also* McClintock, *supra* note 2.

205. Jim Sleeper, *The Conservatives Behind the Campus 'Free Speech' Crusade*, AM. PROSPECT (Oct. 19, 2016), https://prospect.org/article/conservatives-behind-campus-%E2%80%98free-speech%E2%80%99-crusade.

206. *See* Benjamin Wermund, *DeVos' Donations Spark Questions About Her Stance on Campus Sexual Assault*, POLITICO (Jan. 9, 2017), https://www.politico.com/story/2017/01/betsy-devos-education-sexual-assault-233376.

drafting model bills for state legislators.[207] A former national director of ALEC, Earl Ehrhart,[208] is another vocal opponent of Title IX who says that he is concerned about due process, maintaining that "[y]oung men who are accused of assaulting women should have due process . . . . Legally, there is still a presumption of innocence in this country."[209] Ehrhart, now a state representative in Georgia, pushed hard to pass a bill that "mandated that any campus sexual-assault report be forwarded to the police, with or without the complainant's consent, and forbade schools to take final disciplinary action for any possible felony until there was a conviction or a no-contest plea."[210] Ehrhart openly admits that this bill was designed to force a legal challenge to Title IX and the Obama Administration's enforcement of it.[211] Although the bill did not pass, by using his power as a legislator, Ehrhart pressured Georgia schools to reverse findings of responsibility for rape and claims that he can "cut funding from state universities investigating sexual assault allegations."[212]

In the course of the legislative fight over the Georgia bill, where "[h]undreds of student protesters went to the state's Capitol, [and] legislators challenged women seeking to testify about their assaults during a preliminary hearing," men's rights lobbyists also harassed student protesters, calling one "a 'pretty little liar'" on social media and bringing "to the Capitol a man suspended for having assaulted another" survivor protester.[213] That student victim (or the victim of a different student also suspended after being found responsible for sexual assault and brought to the Georgia capitol)[214] expressed concern to her university's officials that the student who had been suspended "might be there to intimidate her," and those officials called him in for a meeting. FIRE then protested that the university was investigating the student and contacted Ehrhart,[215] who sent an "angry email" to the university, the same school he had demanded the year before to fire an assistant dean, "LaRonda Rena Brewer . . . for her 'thuggish behavior'" in conducting the university's standard background check on a transfer applicant who happened to be under

207. McClintock, *supra* note 2.

208. *Id.*; Kathryn Joyce, *The Takedown of Title IX*, N.Y. TIMES (Dec. 5, 2017), https://www.nytimes.com/2017/12/05/magazine/the-takedown-of-title-ix.html.

209. Tyler Kingkade, *Meet the Republican Lawmaker Who's Taken up the Cause of Defending College Men Accused of Rape*, BUZZFEED NEWS (Dec. 21, 2017), https://www.buzzfeednews.com/article/tylerkingkade/meet-the-republican-lawmaker-whos-taken-up-the-cause-of.

210. Joyce, *supra* note 208.

211. *Id.*

212. Kingkade, *supra* note 209; *see also* Joyce, *supra* note 208.

213. Joyce, *supra* note 208.

214. These articles discuss a controversy involving a student who was suspended for assaulting another for showing up at the Capitol, but without enough details to know if both articles are discussing the same people. Joyce, *supra* note 208; Kingkade, *supra* note 209.

215. Kingkade, *supra* note 209.

investigation for sexual assault at his original school.[216] Once FIRE and Ehrhart teamed up, the university concluded that the previously suspended student "had done nothing wrong."[217]

Similar to FIRE, Ehrhart does not have a reputation for fighting for racial justice in other contexts. For instance, Ehrhart convened a due process hearing to object to a fraternity being punished for individuals at its house allegedly yelling racial slurs, telling administrators from the school: "Hear me clearly . . . You got a bond project? If you don't protect students of this state with due process, don't come looking to us for money."[218] And even more pointedly and openly than FIRE, Ehrhart has made clear not only that his commitment to free speech ends when Ehrhart disagrees with the content of that speech but also that he tends to disagree when the speech is seeking greater racial justice.[219] Indeed, as demonstrated in October 2017, Ehrhart will go as far as enlisting law enforcement to intimidate university officials into doing his bidding in shutting down certain speech, including speech protesting racial inequality.[220] In one such example, he pressured the Kennesaw State University ("KSU") president to bar the university's cheerleaders from the field after several knelt during the national anthem.[221] Not only did Ehrhart contact the KSU president directly about the cheerleaders' protest, Buzzfeed reporter Tyler Kingkade obtained through records requests text messages Ehrhart sent to the Cobb County Sheriff, Neil Warren, who also contacted the KSU president via a call from Warren's wife to the president, until they compelled the president to keep the cheerleaders from the field.[222] This prompted Ehrhart to crow to Warren that "with you and I pushing he had no choice."[223]

In an even greater contradiction, Ehrhart took a very different position on due process rights when the due process rights in need of protection were those of students of color. Specifically, in 2004, Ehrhart supported a bill that "critics said . . . denied due process to young offenders, most of them black teens who could not afford to hire their own defense attorneys," and that "imposed mandatory minimum 10-year prison sentences for juveniles convicted of any one of seven specific felonies, including rape."[224] Although the consequences of being expelled from college, the most serious sanction

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216. *Id.*
217. *Id.*
218. *Id.*
219. Meris Lutz, *Cobb Sheriff, Lawmaker Pushed to Keep KSU Cheerleaders Off Field*, ATLANTA J.-CONST. (Oct. 17, 2017), https://www.ajc.com/news/local-govt—politics/ksu-cheerleader-protest-sheriff-lawmaker-say-olens-caved/y4VLs2DlTY82rOskdXvfcJ/.
220. *Id.*
221. *Id.*
222. Kingkade, *supra* note 209.
223. *Id.*
224. *Id.*

a school can levy, are nowhere near as serious as ten or more years in prison, Ehrhart has declared college and university processes for responding to sexual harassment a "nationwide tragedy of Due Process of law denied," but dismissed the fates of the juvenile offenders likely affected by the mandatory minimums statute because "[m]ost of these kids are pretty far gone."[225]

In this sense, Ehrhart's positions, while internally contradictory, are consistent with ED's own internally contradictory positions on due process since the Trump Administration came into office. Indeed, one of Betsy DeVos's "first official conversations about Title IX,"[226] barely two months after taking office,[227] was with Ehrhart, a meeting from which Ehrhart "came away . . . gratified."[228] Moreover, all of ED's actions since that point[229] confirm why Ehrhart would have such a reaction. Notably, ED's most recent anti-civil rights action, which rescinded the Obama-era guidance that sought to protect students of color from discriminatory discipline, were taken late on the Friday afternoon before the 2018 Christmas holiday, with a government shutdown looming and dominating press coverage.[230] ED has in fact been expected to rescind this guidance for almost as long as Betsy DeVos has been expected to attack Title IX (her donations to FIRE caused concern about her position on Title IX before she had even been confirmed as Secretary).[231] Reports that DeVos was meeting with the "staunchest critics" of the Obama discriminatory discipline guidance (issued in 2014 as a "Dear Colleague Letter"), began as early as November 2017.[232] In addition, the Trump Administration hired staff attorney Hans Bader, who "accused the Obama administration of creating 'racial quotas' in school discipline" and claimed that "disparities in discipline 'reflect higher rates of misbehavior among blacks.'"[233] In 2012, Bader had published a stream-of-consciousness, page-long single paragraph for the Competitive Enterprise Institute's

225. *Id.*

226. Joyce, *supra* note 208.

227. *See* Press Release, U.S. Dep't of Educ., Readout of U.S. Secretary of Education Betsy DeVos' Meeting with Chancellor Steve Wrigley of the University of Georgia System and Georgia State Rep. Earl Ehrhart (Apr. 12, 2017), https://www.ed.gov/news/press-releases/readout-us-secretary-education-betsy-devos-meeting-chancellor-steve-wrigley-university-georgia-system-and-georgia-state-rep-earl-ehrhart.

228. Joyce, *supra* note 208.

229. *See supra* text accompanying notes 4–8.

230. Anya Kamenetz, *DeVos To Rescind Obama-Era Guidance on School Discipline*, NPR (Dec. 18, 2018, 9:52 AM), https://www.npr.org/2018/12/18/675556455/devos-to-rescind-obama-era-guidance-on-school-discipline.

231. *See* Wermund, *supra* note 206.

232. *See* Mark Keierleber, *Is DeVos Near Ending School Discipline Reform After Talks on Race, Safety?*, 74 MILLION (Nov. 20, 2017), https://www.the74million.org/article/is-devos-near-ending-school-discipline-reform-after-talks-on-race-safety/.

233. *Id.*

website objecting that the Violence Against Women Act was threatening due process rights, including the rights of college students, and citing approvingly to both FIRE and a men's rights group called Stop Abusive and Violent Environments ("SAVE"),[234] which has been named by the Southern Poverty Law Center "as a planet in the 'manosphere' of misogynist online forums."[235]

Although the criticism of the 2014 discriminatory discipline guidance[236] initially focused on arguments about "racial quotas" in discipline and objections to the use of the "disparate impact" theory of discrimination,[237] by April 2018, the discussions for reasons why ED would shift the guidance had focused on arguments that "the guidance has made schools less safe and contributed to the deadly Parkland, Fla., high school shooting."[238] Ultimately, the Parkland shooting would factor prominently in the announcement of the rescission as a primary recommendation of a report by the Federal Commission on School Safety, which convened after the shooting with the explicit caveat that it would not focus on gun control, the solution for which the student survivors of the shooting were pressing.[239]

While a review of the extensive literature on discriminatory school discipline and how it is a major cause of the school-to-prison pipeline is beyond the scope of this Article, the critical point to emphasize here is that this literature is in fact extensive. The school-to-prison pipeline, "a disturbing national trend wherein children are funneled out of public schools and into the juvenile and criminal justice systems," is incredibly well-documented.[240] Also well-documented is that this funneling happens as a result of "'[z]ero-tolerance' policies that criminalize minor infractions of school rules," which the increased presence of "cops in schools lead[s] to students being criminalized for behavior that should be handled inside the school," and that these policies disproportionately push out students of color.[241] As its name suggests, in the school-to-prison pipeline, how schools are disciplining students and the mass incarceration problem in the United States[242] are inextricably

234. *See* Hans Bader, *Troubling Provisions Being Added to the Violence Against Women Act: Due Process Rights Threatened*, COMPETITIVE ENTERPRISE INST. (Mar. 23, 2012), https://cei.org/blog/troubling-provisions-being-added-violence-against-women-act-due-process-rights-threatened.

235. *See* Cauterucci, *supra* note 27.

236. *See* Letter from U.S. Dep't of Educ. and U.S. Dep't of Justice, Dear Colleague Letter: Nondiscriminatory Administration of School Discipline (Jan. 8, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf [hereinafter 2014 DCL].

237. *See* Keierleber, *supra* note 232.

238. Wheeler, *supra* note 23.

239. *See* Kamenetz, *supra* note 230.

240. *School-to-Prison Pipeline*, ACLU, https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline (last visited Apr. 17, 2019).

241. *Id.*

242. *Id.*

intertwined. The racism of the mass incarceration problem is the subject of even more extensive research,[243] as well as mass protest movements such as Black Lives Matter.[244]

While the research regarding both the school-to-prison pipeline and the U.S. criminal justice system has focused on the discrimination against boys and men of color, especially black boys and men,[245] women and girls of color, especially black girls and women, are also disproportionately affected by these crises.[246] Moreover, in the context of education, scholars have demonstrated that women and girls of color experience discriminatory discipline in intersectional ways. For instance, Professor Verna Williams has pointed out that black girls are more likely to be suspended from school than white or Latina girls, and that this discipline often stereotypes black girls in intersectional ways:[247]

> Teachers perceive Black girls as "angry, hostile, . . . and hypersexualized," as well as "assertive, independent, and emotionally resilient, expressing their emotions and thoughts freely . . . ." Such attitudes stand in sharp contrast to behaviors coded as traditionally female. The manner in which educators perceive African-American girls appears to affect the discipline they receive. Thus, when Black girls misbehave, teachers punish them not only for the underlying misconduct, but also for transgressing feminine norms that require "girls . . . [to] be silent, passive . . . reserved, and submissive."[248]

These statistics and attitudes are a reflection of what black women experience, as research shows that "African-American women's involvement in the criminal justice system is expanding beyond other groups of women,"[249] and women of color face similarly rampant levels of police violence, including horrifying racialized sexual violence at hands of police.[250] Moreover, a common stereotype that has been used to discriminate against black women up to and

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243. *See generally* ALEXANDER, *supra* note 95. Many recognize this book as the beginning of the social movement trying to end the pipeline-to-prison and mass incarceration problems.

244. *See What We Believe*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/what-we-believe/ (last visited Apr. 17, 2019); Emily Deruy, *How Black Lives Matter Activists Plan to Fix Schools*, ATLANTIC (Aug. 5, 2016), https://www.theatlantic.com/education/archive/2016/08/the-ambitious-education-plan-of-the-black-lives-matter-movement/494711/.

245. *See, e.g.*, BUTLER, *supra* note 64.

246. *See #SayHerName*, AFR. AM. POL'Y F., http://www.aapf.org/about-the-campaign/ (last visited Apr. 17, 2019).

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

248. *Id.* at 75–76.

249. *Id.* at 69.

250. RITCHIE, *supra* note 64.

including Michelle Obama is the "angry black woman,"[251] a stereotype that allows women of color's protests of police brutality to be dismissed, once again rendering women of color invisible as victims.

In addition, in a 2015 report a team of researchers from the Human Rights Project for Girls, Georgetown Law Center on Poverty and Inequality, and Ms. Foundation for Women discuss how girls, especially girls of color, end up in the criminal justice system because they have been victims of sexual abuse.[252] Entitled *The Sexual Abuse to Prison Pipeline: The Girls' Story*, this report

> exposes the ways in which we criminalize girls — especially girls of color — who have been sexually and physically abused, [through] the detention of girls who are victims of sex trafficking, girls who run away or become truant because of abuse they experience, and girls who cross into juvenile justice from the child welfare system.[253]

The researchers discuss how "sexual abuse is one of the primary predictors of girls' entry into the juvenile justice system," including too many situations "when girls who are victims of sex trafficking are arrested on prostitution charges — punished as perpetrators rather than served and supported as victims and survivors."[254] Furthermore, once girls are incarcerated, the juvenile justice system is "ill-equipped to identify and treat the violence and trauma that lie at the root of victimized girls' arrests," and it runs significant risk of "re-trigger[ing] girls' trauma and even subject[ing] them to new incidents of sexual victimization."[255]

The sheer volume and overwhelming agreement of these studies were a factor in the issuance of the 2014 discriminatory discipline Dear Colleague Letter.[256] The letter itself cites directly to its own analysis of data collected by the Civil Rights Data Collection:

> African-American students without disabilities are more than three times as likely as their white peers without disabilities to be expelled or suspended. Although African-American students

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251. Ritu Prasad, *Serena Williams and the Trope of the 'Angry Black Woman'*, BBC NEWS (Sept. 11, 2018), https://www.bbc.com/news/world-us-canada-45476500.

252. MALIKA SAADA SAAR ET AL., THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS' STORY, CENTER ON POVERTY AND INEQUALITY: GEORGETOWN LAW (2015), https://rights4girls.org/wp-content/uploads/r4g/2015/02/2015_COP_sexual-abuse_layout_web-1.pdf.

253. *Id.* at 5.

254. *Id.*

255. *Id.*

256. *See U.S. Departments of Education and Justice Release School Discipline Guidance Package to Enhance School Climate and Improve School Discipline Policies/Practices*, U.S. DEP'T OF EDUC. (Jan. 8, 2014), https://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-school-discipline-guidance-package-.

> represent 15% of students in the CRDC, they make up 35% of students suspended once, 44% of those suspended more than once, and 36% of students expelled. Further, over 50% of students who were involved in school-related arrests or referred to law enforcement are Hispanic or African-American.[257]

In addition to its own analysis, other rigorous studies are credited with influencing ED's and the U.S. Department of Justice's move to issue the letter, in particular a 2011 study

> by the Council of State Governments Justice Center, which studied nearly a million Texas students over six years and controlled for 83 variables — including demographics, attendance, and course completion rates — to isolate the effects of race on discipline. While 97 percent of suspensions and expulsions were handed out for "discretionary" offenses like classroom disruption, black students were 31 percent more likely to be punished for that kind of behavior than their white or Hispanic peers, the report found.[258]

Although the 2014 guidance did not set out mandatory rules,[259] it did provide extensive information—at a level so detailed that there are two flowcharts provided—designed to walk school officials through the necessary steps and reasoning required to make disciplinary decisions in a nondiscriminatory manner.[260] Although the letter only uses the term "due process" once, stating that schools must "ensure that appropriate due process procedures are in place and applied equally to all students and include a explained opportunity for the student to appeal the school's disciplinary action,"[261] the entire document is focused on the disciplinary process and the same process rights as the current Administration claims are being violated under Title IX.

The explicit and extensive guidelines that the 2014 letter gave also appear to have influenced school behavior, spurring many large school districts to institute reforms and many states to revise their laws to support and be consistent with the guidance.[262] In addition, a study released in 2018—ironically just days before the rescission of the guidance—showed that there was a drop in suspensions and expulsions across the country.[263] Although notably black students are still disproportionately disciplined (twice as much as white students),

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257. 2014 DCL, *supra* note 226, at 3–4.
258. Keierleber, *supra* note 222.
259. *See* Wheeler *supra* note 23.
260. 2014 DCL, *supra* note 226.
261. *Id.* at 5, Appendix.
262. *See* Kamenetz, *supra* note 230.
263. Anya Kamenetz, *Suspensions are Down in U.S. Schools but Large Racial Gaps Remain*, NPR (Dec. 17, 2018, 3:52 PM), https://www.npr.org/2018/12/17/677508707/suspensions-are-down-in-u-s-schools-but-large-racial-gaps-remain?live=1.

this percentage still represents a significant and positive drop from the "more than three times as likely" rate mentioned in the 2014 guidance.[264] Thus, the guidance does seem to have encouraged schools to "Rethink Discipline," which was the name for the Obama Administration's coordinated efforts on this topic, in a helpful and more equal direction.[265]

Both the copious research establishing the need for the 2014 guidance, as well as the very recent aforementioned data showing the serious and hopeful effects it has had, show that Obama's ED officials were committed to ensuring fair and due process in student conduct matters. The research pre- and post-2014 Dear Colleague Letter, viewed in light of the vociferously stated commitments of the Trump Administration and its allies to "due process," make ED's December 2018 rescission that much more baffling. If the current Administration is so committed to "due process," why would it rescind a document that has advanced fair and "due" process so much? This rescission is especially confusing because the discipline in schools addressed by the 2014 guidance is significantly more intertwined with the criminal justice system than Title IX processes are—as with Ehrhart's *opposition* to increasing the criminalized due process rights of child defendants in the actual criminal system but *support* for such criminalized (and therefore inapposite) rights in a civil rights system. For instance, disciplined children in schools are diverted into the juvenile justice system in ways such as criminal prosecutions of girls—even when they are under the legal age of consent to sexual activity—for prostitution, despite their actual status as victims of sex trafficking.[266] They are also often treated like adult criminals by police in schools, such as the "resource officer" nicknamed "Officer Slam" by students, who was filmed in 2015 hooking his arm around an African American girl student's neck, "flip[ing] her over as she sat in her desk, and dragg[ing] her across the floor."[267]

As suggested at the outset of this Article, the only way to make sense of the seemingly contradictory messages sent by ED's rhetoric regarding due process in Title IX sexual harassment cases on the one hand and its rescission of Obama-era guidance that was intended to and actually did increase the fairness of school disciplinary processes on the other, is to recognize the first as a dog whistle. This dog whistle has been coded so that the Trump Administrations' allies, such as FIRE, Ehrhart, and their funders and associates in right-wing foundations and organizations (Koch, Scaife, etc.) understand that "due process" means "victims [who are mainly cisgender women and

264. *Id.*

265. *White House Report: The Continuing Need to Rethink Discipline*, U.S. DEP'T OF EDUC. (Dec. 9, 2016), https://www.ed.gov/news/press-releases/white-house-report-continuing-need-rethink-discipline.

266. SAAR ET AL., *supra* note 252, at 19–20.

267. Williams, *supra* note 247, at 67.

gender minorities] lie," but many members of the general public may not hear its true meaning.[268] Indeed, these Trump and DeVos allies' positions are so internally contradictory, yet so consistent with each other's internally contradictory positions, it is highly unlikely that they do not understand each other's use of "due process" very clearly.

IV. DOG WHISTLES, ADMINISTRATIVE LAW, AND DEMOCRACY

What is less clear is how effectively the dog whistle is working outside of the DeVos-Koch-FIRE-ALEC group. On the one hand, if one judges by what is published in the mainstream media, the dog whistle is working, either in a self-acknowledged or subconscious way, to give cover to those who need it as a more palatable way of tapping into stereotypes about victims lying. On the other hand, indications such as #MeToo and increased public participation in the previously largely unused administrative law notice-and-comment process suggest that most real people are increasingly seeing these stereotypes for what they are and rejecting them. With regard to the first group, consider the example of an opinion piece on the substance of a draft of the NPRM (that was leaked to the *New York Times*) by *Washington Post* commentator, Ruth Marcus. In this essay, Marcus states that she finds herself "in the unexpected position of writing not to lambaste DeVos but to praise her, albeit tentatively and preliminarily, for announcing plans to rework the department's approach to Title IX."[269] In support of her approval of the (leaked) NPRM, Marcus cites to similar sources as Professor Bazelon does in her *New York Times* op-ed,[270] including the four law professors among the group that issued a press release supporting the African American male student who was accused of sexual assault by his African American woman classmate and her white female friend.[271] Marcus has written quite a bit about due process, and although her standards for what constitutes due process are not always clear,[272] it

268. *See Definition of Dog Whistle*, MERRIAM–WEBSTER, https://www.merriam-webster.com/words-at-play/dog-whistle-political-meaning (last visited Apr. 17, 2019).

269. *See* Ruth Marcus, Opinion, *Betsy DeVos Could Change Sexual Assault Policy for the Better*, WASH. POST (Sept. 8, 2017), https://www.washingtonpost.com/opinions/betsy-devos-could-change-sexual-assault-policy-for-the-better/2017/09/08/893adc04-94ce-11e7-89fa-bb822a46da5b_story.html?utm_term=.31f1c9a962aa.

270. *See id.*; *supra* text accompanying notes 69–71.

271. *See* Marcus, *supra* note 269; *supra* text accompanying notes 65–67.

272. *Compare* Ruth Marcus, Opinion, *What Is a Week's Delay Compared to a Lifetime on the Supreme Court?*, WASH. POST (Sept. 29, 2018), https://www.washingtonpost.com/opinions/what-is-a-weeks-delay-compared-to-a-lifetime-on-the-supreme-court/2018/09/29/6af0f5a2-c35e-11e8-b338-a3289f6cb742_story.html?utm_term=.5ce0cad52bc7 (implying that "[e]ven a scintilla of additional evidence on either side of the ledger," a description very similar to the preponderance standard's "more likely than not" standard, regarding Dr. Blasey Ford's accusation of sexual harassment by Justice

is clear that she values fair process,[273] and is concerned about false accusations based on race, such as with Donald Trump's insistence that the African American youth exonerated from the false accusation that they raped a woman in Central Park were still guilty.[274] Moreover, Marcus' writings on #MeToo and the accusations against Kavanaugh certainly do not suggest that she automatically disbelieves victims of sexual harassment.[275] For example, in a piece during the height of #MeToo about sexual harassment among Hillary Clinton's campaign staff, Marcus wrote, referring to a staffer's complaint of an incident of harassment, "It's never just once, people."[276] Given these contrasts, it remains unclear whether Marcus hears the "due process" dog whistle and whether her collaboration with the DeVos-Koch-FIRE-ALEC group is knowing or not.

The question is whether the opinions selected for publication by the mainstream media are representative of opinions held by the general public, particularly opinions held by "ordinary" people (i.e., without a media platform like Marcus's), especially cisgender woman and gender minorities, on a topic such as sexual harassment. Certainly, #MeToo has provided many reasons to be skeptical of the accuracy of the mainstream media's representation of such matters

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Kavanaugh would help her decide who to believe), *with* Marcus, *supra* note 269 (supporting Title IX decisions "based on a standard higher than a mere preponderance of evidence"). Similarly, on the one hand, Marcus has said, with regard to the sexual harassment accusations against Donald Trump, Roy Moore and John Conyers, "Public service is a privilege, not a right. The presumption of innocence and the need for proof beyond a reasonable doubt, essential in the criminal context, need not blind us in the real world to credible allegations of improper behavior." Ruth Marcus, Opinion, *Was Al Franken's Punishment Fair?*, WASH. POST (Dec. 7, 2017), https://www.washingtonpost.com/opinions/was-al-frankens-punishment-fair/2017/12/07/6296f580-db99-11e7-a841-2066faf731ef_story.html?utm_term=.6146cac19030. On the other hand, in campus sexual harassment cases, she believes that a "finding of liability can ruin a life . . . with a student potentially expelled and branded a sexual predator," despite the fact that it is also a privilege, not a right, to attend a college or university of one's choice, and Title IX does not require anything similar to a criminal sex offender registry. Marcus, *supra* note 269.

273. *See* Ruth Marcus, Opinion, *We Need the Fullest Possible Airing of the Accusation Against Brett Kavanaugh*, WASH. POST (Sept. 15, 2018), https://www.washingtonpost.com/blogs/post-partisan/wp/2018/09/15/we-need-the-fullest-possible-airing-of-the-accusation-against-brett-kavanaugh/?utm_term=.04fe035f14a7.

274. *See* Ruth Marcus, Opinion, *Trump Says He's Concerned About Due Process. Since When?*, WASH. POST (Feb. 10, 2018), https://www.washingtonpost.com/blogs/post-partisan/wp/2018/02/10/trump-says-hes-concerned-about-due-process-since-when/?utm_term=.cc743359c92f.

275. *See, e.g.*, Ruth Marcus, *Hillary Clinton: #MeToo, Meet #SoWhat*, WASH. POST (Jan. 27, 2018), https://www.washingtonpost.com/blogs/post-partisan/wp/2018/01/27/hillary-clinton-metoo-meet-sowhat/?utm_term=.71b71e3f5a2d; Ruth Marcus, Opinion, *Was Al Franken's Punishment Fair?*, *supra* note 272; Ruth Marcus, Opinion, *What Is a Week's Delay Compared to a Lifetime on the Supreme Court?*, supra note 272.

276. Marcus, *Hillary Clinton: #MeToo, Meet #SoWhat*, *supra* note 275.

and women's views on them. For instance, Matt Lauer's, Mark Halperin's, and Charlie Rose's exposure as sexual harassers caused the public to look at their coverage of the 2016 presidential campaigns and treatment of Hillary Rodham Clinton differently.[277] However, as journalist Rebecca Traister has pointed out, these individual men are just examples of a larger phenomenon that #MeToo exposed:

> [F]or the first time [we're] getting a view of the matrix in which we've all been living: We see that the men who have had the power to abuse women's bodies and psyches throughout their careers are in many cases also the ones in charge of our political and cultural stories . . . . Ours is an industry, like so many others, dominated by white men at the top; they have made the decisions about what to cover and how, and they still do. The pervasiveness of these power imbalances and the way they affect how even this story itself is being told are instructive. Here is something you should know, from inside a publication: For every one of these stories of harassment and predation finally seeing the light of day, reporters are hearing dozens more that will not be published, because women won't go on the record in an industry still run by the people they want to name, or because the men in question aren't powerful enough to interest those who *are* powerful enough to decide what has news value, or because the damage these men are alleged to have done seems insignificant on a scale that has recently been drawn to accommodate the trespasses of Harvey Weinstein. . . . This tsunami of stories doesn't just reveal the way that men have grabbed and rubbed and punished and shamed women; it shows us that they did it all while building the very world in which we still have to live.[278]

Indeed, the reality of this "matrix" likely was the reason why Jill Abramson, the first female executive editor of the *New York Times*, when asked for her "one best idea for ending sexual harassment,"[279] answered "having more newsrooms run by women," and concluded that "[e]mpowering more women will help change the culture and the prevalence of sexual misconduct."[280]

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277. *See* Jill Filipovic, Opinion, *The Men Who Cost Clinton the Election*, N.Y. TIMES (Dec. 1, 2017), https://www.nytimes.com/2017/12/01/opinion/matt-lauer-hillary-clinton.html.

278. Rebecca Traister, *Our National Narratives Are Still Being Shaped by Lecherous, Powerful Men*, CUT (Oct. 27, 2017), https://www.thecut.com/2017/10/halperin-wieseltier-weinstein-powerful-lecherous-men.html. *See generally* REBECCA TRAISTER, GOOD AND MAD: THE REVOLUTIONARY POWER OF WOMEN'S ANGER (2018)

279. Post Op. Staff, Opinion, *The One Best Idea for Ending Sexual Harassment*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/blogs/post-partisan/wp/2017/12/08/the-one-best-idea-for-ending-sexual-harassment/?utm_term=.70fcc78603cd.

280. *Id.*

As #MeToo did (and continues to do), when public opinion is presented without or with less heavy of a mainstream media filter, one often sees a very different picture. Moreover, #MeToo was not the first example in recent history of such massive numbers of cisgender women, gender minorities, and their allies speaking out in a fashion that could not be easily filtered. Certainly, the voices of the millions of people who have marched in not one, but three Women's Marches could not contain their minimization by the mainstream media.[281]

However, marches on Washington, D.C., and viral social media disclosures of rampant sexual harassment are not the only ways that members of the public can express opinions without a mainstream media filter and in a manner that should get the government's attention. Even aside from the usual methods of civic participation in a democracy (e.g., voting and communicating with elected representatives), in the United States we have the ability to share our views with the government through the administrative notice-and-comment process. Although providing extensive details about how the notice-and-comment process works is beyond the scope of this Article, the most critical information about this process is that it was created to deal with fundamental concerns regarding whether our "constitutional democracy should permit unelected administrators to define fundamental regulatory policies,"[282] since administrative agencies are not authorized by the U.S. Constitution. The Administrative Procedure Act ("APA") was passed in 1946 with a primary goal of dealing with this constitutional problem, and it created "a brilliantly crafted check and balance on governmental regulation . . . [that] rests in the people," rather than another branch of government.[283] In this "commenting power"—structured so that, "[w]hen an agency proposes a rule, individuals get a chance to comment, and an agency must respond to significant comments raised during the rulemaking before the rule can become final and effective"[284]—lies what many consider "one of the most fundamental, important, and far-reaching of democratic rights."[285]

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281. *See* Susie Madrak, *Rebecca Traister: Media Ignores Women's Marches at Their Own Risk*, CROOKS & LIARS (Jan. 23, 2018, 5:52 AM), https://crooksandliars.com/2018/01/rebecca-traister-media-treats-womens; *Why Is This Happening?: Rebecca Traister Explains Why Women Are so Furious: Podcast & Transcript*, NBC NEWS (Oct. 2, 2018, 9:58 AM), https://www.nbcnews.com/think/opinion/rebecca-traister-explains-why-women-are-so-furious-podcast-transcript-ncna915646.

282. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1513 (1992).

283. Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 601–02 (2018).

284. *See id.* at 601.

285. *Id.* at 602.

Simultaneously a democratic power and a check on bureaucratic power, the commenting power implicates civil rights. In a nation with a history of slavery and constitutional provisions that once counted enslaved persons as three-fifths of a person but did not allow them to vote,[286] and where women's right to vote has only been recognized by the Constitution for less than one hundred years,[287] we must be especially vigilant to guarantee equally all rights fundamental to the full participation of all persons in democratic processes.

Here, the commenting power is also giving us a potential barometer by which to judge how effectively the due process dog whistle is working. As with the matrix that Traister identifies as having been exposed by #MeToo, the notice-and-comment process may be exposing that many who neither have nor are seeking a mainstream media platform see the dog whistle for precisely what it is. And because a democratic government is compelled by both legal and practical considerations to listen to these voices as closely as those who are regularly published in the *New York Times* or the *Washington Post*, wide public awareness of the dog whistle *as a dog whistle* is particularly important. Moreover, given the centrality of the democratic checks and balances goals to the commenting power, and the equal protection implications of protecting it, a government with respect for democratic and constitutional norms will take that wide public awareness very seriously.

It is for these reasons that the events that occurred in the summer and fall of 2017 with regard to Title IX and sexual harassment are such an important backdrop to the even more recent issuance of the NPRM with which this Article begins. Beginning in June and ending on September 21, 2017, ED opened a comment period during which the public was invited to share ideas with ED regarding the Trump Administration's Executive Order 13,777, establishing a federal policy to "alleviate unnecessary regulatory burdens."[288] Thousands of comments were filed,[289] and this flood prompted two of my law students, a colleague, and myself to read all of the comments, to code the comments that addressed Title IX to see how many commenters urged the Trump Administration to change its enforcement of Title IX, and to write a report on our findings.

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286. Selwyn Carter, *African–American Voting Rights: An Historical Struggle*, 44 EMORY L.J. 859, 863–64 (1995).

287. Steve Kolbert, *The Nineteenth Amendment Enforcement Power (but First, Which One Is the Nineteenth Amendment, Again?)*, 43 FLA. ST. U. L. REV. 507, 538 (2016).

288. TIFFANY BUFFKIN, NANCY CHI CANTALUPO, MARIKO COOL, & AMANDA ORLANDO, WIDELY WELCOMED AND SUPPORTED BY THE PUBLIC: A REPORT ON THE TITLE IX-RELATED COMMENTS IN THE U.S. DEPARTMENT OF EDUCATION'S EXECUTIVE ORDER 13777 COMMENT CALL 2 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3255205 (last revised Dec. 31, 2018).

289. *Id.* at 3.

We found that of the 16,376 comments filed with ED, 12,035 comments addressed Title IX, and 99% (n=11,893) of these comments were filed in support of Title IX and ED's Obama-era and historical enforcement of the statute.[290] Furthermore, 96% of these comments (n=11,528) specifically urged ED to uphold the Obama Administration's 2011 Dear Colleague Letter on Sexual Violence (the "2011 DCL").[291] Only 1% (n=137) filed comments opposing Title IX, of which even fewer (n=123) specifically urged that ED rescind the 2011 DCL.[292]

Of the 11,893 comments that were filed in support of Title IX, 0.9% (n=104) were posted anonymously,[293] whereas 44.5% (n=61) of the 137 comments that opposed Title IX were posted anonymously.[294] Commenters included those who self-identified as attorneys; college or university professors (of multiple disciplines, including law); family members or friends of accused students or student victims and survivors; nonprofit professionals; people who work in state Departments of Education, school principals; students accused or found responsible of sexually harassing or assaulting other students; teachers; therapists and counselors (including those working in schools and colleges or universities); U.S. veterans; and victims and survivors of sexual violence (both students and nonstudents).[295] As our report documents, many of the comments filed by Title IX supporters were quite substantive and many included deeply personal accounts of the commenter's own experiences or her, his, or their friends or family members' experiences with sexual harassment.[296]

One group of comments (n=10,363) used similar language, with 749 of these comments including unique language added by the individual commenter. Even if all of these 10,363 comments (including the 749 with unique individual additions) were counted as only one comment, those supporting Title IX were still among the overwhelming majority. According to this count, 1,673 total comments on Title IX were filed,[297] and of those comments, 92% supported Title IX and only 8% opposed Title IX.[298]

In addition, two nonprofit organizations filed comments that represented individual members of the public who signed petitions or similar joint statements, including one comment representing 38,713 signatories to a petition and 60 comments collectively representing 10,190 individuals in all 50 states, as well as the District of Columbia,

290. *Id.*
291. *Id.* at 2.
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *See id.* at 9–13.
297. *Id.* at 2.
298. *Id.*

U.S. territories, and commenters serving in the military, all in support of Title IX and the 2011 DCL.[299] Thus, when all the individual comments, as well as the petition and jointly signed comments, are included, 60,796 expressions of support for Title IX were filed by members of the public, in marked contrast to the 137 comments in opposition.[300]

Of course, ED's call for comments on Executive Order 13,777 was not part of an official notice-and-comment rulemaking process. Therefore, ED was not legally required to respond or engage in the specific steps set out by the APA, nor did it do so. Nevertheless, the Executive Order 13,777 call for comments seems to have been intended to function as a measure of the public's views on ED's work and could have sought to fulfill the democratic purposes that the commenting power was created to serve. Had they done so, the comments on Executive Order 13,777 could not be interpreted as anything other than a loud indication to ED that a wide swath of the public was deeply concerned about the civil rights of survivors and potential victims of sexual harassment and saw the enforcement of Title IX existing at that time and historically (i.e., before ED's subsequent rescission of the 2011 DCL) as important to retain in some meaningful way.

Instead, Secretary DeVos gave a speech weeks *before* the comment period closed but after thousands of pro-Title IX comments had already been filed, stating that the Obama Administration's enforcement of Title IX was a "failed system" that had been "widely criticized."[301] On the basis of this gross misrepresentation of what the public had actually said (and was still saying at the time she gave the speech), DeVos announced her intention to issue an NPRM in comments riddled with due process dog whistles.[302] In that speech, she discussed "due process" ten times, never once mentioning equality, equal rights, or anything similar (a very strange omission when discussing a civil rights statute that protects equal educational opportunity), and the only "discrimination" she denounced was so-called reverse discrimination against accused harassers (a claim repeatedly rejected by courts).[303]

Two weeks later and less than twenty-four hours after the Executive Order 13,777 comment period closed, ED rescinded the

299. *Id.*

300. *Id.*

301. 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-devoss-remarks-on-campus-sexual-assault/?utm_term=.abc3866968fc; *see* Press Release, Dep't of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct.

302. Svrluga, *supra* note 301.

303. *See* Buzuvis, *supra* note 158 at 73.

2011 DCL, along with other Obama-era guidance and replaced it with the 2017 Interim Guidance.[304] The rescission was announced by Acting Assistant Secretary for Civil Rights, Candice Jackson,[305] in a letter that made no mention of the comments filed in the Executive Order 13,777 comment call. Jackson, of course, is the Trump appointee who, months earlier, had been quoted by the *New York Times* as saying, "90 percent of [sexual assault accusations by students] — fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'"[306] In a press release announcing the lawsuit against ED brought by a group of civil and victims' rights organizations challenging these actions, Democracy Forward stated:

> While [ED] was considering the new Title IX policy, Jackson and other senior officials solicited input and were in regular contact with men's rights activists who espouse similar views of sexual assault survivors. It wasn't until she received public pressure that Secretary DeVos even met with survivors to hear their concerns. [307]

Such events must be viewed in light of how the United States has failed to equally protect the rights of all Americans to full participation in democratic processes, in combination with the important democratic and constitutionally influenced rights given to the public through the commenting power. When considered with those two facts in mind, these events suggest that the Trump and DeVos ED is not merely extremely tone deaf but is engaging in direct gender discrimination against victims of sexual harassment. As already noted, these victims are mainly cisgender women and girls and gender minorities, so refusing to address—or even acknowledge—their comments regarding a law passed to protect their rights to equal treatment, all while cherry-picking and giving outside influence to the comments of not only men, but mainly (if not exclusively) white men, is biased and discriminatory. Thus, the events surrounding the Executive Order 13,777 comment call

304. BUFFKIN ET AL., *supra* note 288, at 3.

305. Letter from U.S. Dep't of Educ. and U.S. Dep't of Justice, Dear Colleague Letter (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf [hereinafter 2017 DCL].

306. Katie Mettler, *Trump Official Apologizes for Saying Most Campus Sexual Assault Accusations Come After Drunken Sex, Breakups*, WASH. POST (July 13, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/07/13/trump-official-apologizes-for-saying-most-campus-sexual-assault-accusations-come-after-drunken-sex-breakups/?utm_term=.0659e1772358.

307. Adam Grogg, *SurvJustice, Equal Rights Advocates & Victim Rights Law Center v. DeVos*, DEMOCRACY FORWARD, https://democracyforward.org/lawsuits/survjustice-equal-rights-advocates-victim-rights-law-center-v-devos/ (last visited Apr. 17, 2019).

constitute yet another, if less obvious, example of this Administration's attacks on civil rights.

The comments overwhelmingly supporting Title IX in the Executive Order 13,777 comment call poured into regulations.gov (the online portal that collects public comments) months *before* #MeToo took the world by storm. Since then, in addition to #MeToo, the American public has experienced the protests and other events surrounding the three accusations of sexual harassment by Kavanaugh. Thus, there are additional reasons to be skeptical that the approval of the DeVos NPRM featured so prominently in the mainstream media is a real indication that the due process dog whistle is working.

V. CONCLUSION: RE-ESTABLISHING DEMOCRATIC ACCOUNTABILITY VIA NOTICE & COMMENT

In the end, the public comments filed in response to the NPRM will tell us what the dog whistle's effect has been and whether the effect has been significant enough to establish the Title IX beachhead that the DeVos-Koch-FIRE-ALEC group is endeavoring to establish. ED issued the NPRM approximately fourteen months after the end of the 2017 Executive Order 13,777 comment call, the rescission of the 2011 DCL, and the issuance of the Interim Guidance.[308] Ultimately, the NPRM drew over 112,000 comments.[309] During and beyond the intervening year, millions of survivors disclosed having suffered sexual abuse as a part of #MeToo,[310] resulting in hundreds of powerful men being credibly accused and many removed from their influential positions,[311] as well as research (re)confirming that large majorities of women and significant minorities of men have experienced such abuse.[312] The multiple sexual assault allegations against Justice Kavanaugh during his Supreme Court confirmation process generated massive protests by survivors and their allies, including disrupting the Senate Judiciary Committee hearings, blocking streets

308. The 2017 Executive Order 13,777 comment call ended August 21, 2017. 82 Fed. Reg. 28,431 (proposed June 22, 2017). The 2011 DCL was rescinded September 22, 2017. 2017 DCL, *supra* note 292. The Interim Guidance was issued in September 2017. Interim Guidance, *supra* note 36. The NPRM was issued November 29, 2018. 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

309. *Title IX of the Education Amendments of 1972: Docket*, REGULATIONS.GOV, https://www.regulations.gov/docket?D=ED-2018-OCR-0064 (last visited May 5, 2019).

310. *See* Katie Underwood, *One Year After #MeToo, We're Only Just Starting to Have the Right Conversations*, FLARE (Oct. 3, 2018), https://www.flare.com/news/metoo-movement-anniversary/.

311. Riley Griffin et al., *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), https://www.bloomberg.com/graphics/2018-me-too-anniversary/.

312. *See* Elly Belle, *#MeToo Study Shows Sexual Harassment and Assault Scope*, TEENVOGUE (Feb. 23, 2018), https://www.teenvogue.com/story/metoo-study-shows-sexual-harassment-and-assault-scope.

around the Capitol, occupying a senate building, and confronting Senator Jeff Flake on live television in a manner that appears to have influenced him to call for an FBI investigation.[313] The Time's Up Legal Defense Fund raised $22 million in a single year,[314] and women candidates running for state legislatures, Congress, and governorships broke record after record for women's representation in elected office, first in Virginia's 2017 elections,[315] and then in the 2018 federal and state governor elections.[316]

Without reading and coding every comment, it is impossible to know whether the comments filed so far reflect the same extreme imbalance between those who support Title IX and those who oppose it that the Executive Order 13,777 comments did, and opponents of Title IX seem hopeful that "public awareness is on [their]side."[317] The co-president of Families Advocating for Campus Equality ("FACE"), "a group that represents students who say they've been falsely accused of sexual assault" spoke about FACE's work with "men's rights groups Stop Abusive and Violent Environments and the National Coalition for Men" and likened their groups' efforts to "'the little engine that could,'" complaining that they "'just don't have the resources'" to mount the same kind of effort as the Title IX civil rights activists are.[318] Given the connections between FACE, SAVE, FIRE, ALEC, and funders such as the Koch and Scaife foundations,[319] it is hard to believe that monetary resources are a problem. Nevertheless, the comments filed in the Executive Order 13,777 comment call indicate that *human* resources might be a significant difficulty. The title of an article published in January, before the comment period

313. *See* Dana R. Fisher, *Here's Why the Protests Against Kavanaugh (and the Trump Administration) Won't Go Away*, WASH. POST (Oct. 6, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/06/heres-why-the-protests-against-kavanaughs-confirmation-and-trumps-administration-wont-go-away/.

314. Avery Anapol, *Time's Up is the Largest Fundraiser in GoFundMe History*, HILL (Dec. 6, 2018, 12:16 PM), https://thehill.com/blogs/blog-briefing-room/news/420062-times-up-is-the-largest-fundraiser-in-gofundme-history.

315. Fenit Nirappil, *Women Hit a Record High in Va. House. Can They Break the Boys' Club?*, WASH. POST (Jan. 11, 2018), https://search.proquest.com/docview/1986556729?OpenUrlRefId=info:xri/sid:summon&accountid=14868#_ga=2.91684316.753085056.1557081269-2010494257.1517761255.

316. Leslie Shapiro et al., *125 Women Won the Election*, WASH. POST, https://www.washingtonpost.com/graphics/2018/politics/women-congress-governor/ (last visited Apr. 17, 2019).

317. Benjamin Wermund, *Got a Comment on the DeVos Title IX Rules? Join the Crowd*, POLITICO (Dec. 18, 2018, 1:48 PM), https://www.politico.com/story/2018/12/18/betsy-devos-title-ix-rules-congress-education-1026991.

318. *Id.*

319. *See supra* text accompanying notes 206–13, 234–36 (demonstrating funding for these organizations from the Koch and Scaife foundations, and ideological links with prominent Title IX critics Ehrhart and Bader).

had closed, "There's a Quiet #MeToo Movement Unfolding in Government's Comments Section" corroborates this suspicion.[320]

In light of this situation, the Trump Administration's best hope of succeeding in finalizing the rules proposed in the NPRM may very well be dog whistling its way into it. After all, in the past, dog whistle politics has been used quite effectively to divide Americans along racial lines.[321] If "due process" dog whistles are similarly successful here, the Trump Administration will likely be successful in establishing its Title IX beachhead in its larger war on civil rights. In that sense, this NPRM is a test of us all. We the people will have to use the check and balance power the APA gives us and all say #MeToo in rejecting dog whistles if we wish to prevent establishment of the beachhead.

320. *See* Madison Pauly, *There's a Quiet #MeToo Movement Unfolding in the Government's Comments Section*, MOTHER JONES (Jan. 15, 2019), https://www.motherjones.com/politics/2019/01/betsy-devos-title-ix-sexual-assault-harassment-metoo/.

321. *See generally* LOPEZ, *supra* note 15 (addressing the use of racially charged coded language in American politics).