
TITLE IX'S FUTURE: AN EXPANSIVE STATUTE'S BREADTH CONTINUES TO GROW

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As we celebrate Title IX's first fifty years, I am reminded of its sheer breadth. In the abstract, Title IX has always prohibited sex discrimination in federally funded education, but the last fifty years have witnessed its broad scope repeatedly become a reality as activists, advocates, and attorneys have invoked and applied Title IX to dismantle particular inequalities among the many that unfortunately permeate U.S. education.

Yet over these fifty years, most among the American public who had heard of Title IX thought its scope very narrow, even as that narrow meaning shifted from one specific area of inequality to another. The common perception in its early decades was that Title IX was limited to equal athletic opportunities for girls and women in school. This perception shifted about fifteen years ago, as student survivor-activists began relying on Title IX to demand protection from campus sexual assault.¹ By 2015, its applicability to sexual harassment and gender-based violence came to dominate public discussions of the statute.² Today, with transgender students at the center of various culture wars, I wonder if the public will soon perceive Title IX as being "about" transgender rights.

The reality is that Title IX can be applied not only to *all* of these inequalities, but also to many, many more. It can be used to prevent and remedy intersectional discrimination based on, for example, gender and race, or gender and disability, or all three. It can protect women staff and faculty from inequitable pay, discrimination in hiring and promotions, and from retaliation when they assert their or others' Title IX rights. It has also been used to address and remedy discrimination against pregnant, parenting, and menstruating students. If the last fifty years are any judge, this list will continue to grow into the future.

This wide scope also applies to Title IX's beneficiaries, including everyone who has experienced, is experiencing, or may experience gender discrimination while participating in a federally funded educational program (which implicates, as a practical matter, almost all of U.S. education). With the pervasiveness of

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¹ See generally Nancy Chi Cantalupo, *The Title IX Movement Against Campus Sexual Harassment: How a Civil Rights Law and a Feminist Movement Inspired Each Other*, in THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES (Deborah Brake, Martha Chamalls & Verna Williams eds., 2021) [hereinafter Cantalupo, OXFORD HANDBOOK OF FEMINISM & LAW CHAPTER].

² *Id.*

gender discrimination in education, this group is potentially enormous. It includes even people who would not normally be perceived as vulnerable to gender discrimination, such as cisgender boys and men, whom Title IX protects, for instance, from same-sex bullying.³

The shifting sands of public [mis]perceptions of Title IX's focus also obscure Title IX's impacts on gender equality outside of education. One example is the U.S. women's soccer team's dominance at the World Cup, rightly attributed to the opportunities, support, and resources that Title IX mandated schools provide to girls' and women's athletics.⁴ With their unparalleled winning record and with the expectation of equality fostered by Title IX, U.S. women's soccer team members demanded and won equal pay, potentially benefiting a much larger group than just themselves.⁵ Here, not only did Title IX ensure those athletes' rights to equal opportunities to develop their athletic talents and abilities at school, but it also laid the groundwork for those athletes to challenge gender inequality outside of education.

In the particular slice of Title IX that I know best (using Title IX to combat sexual harassment and gender-based violence), we can see a similar example. Title IX is one of the rare places—possibly the only place—in U.S. law where gender-based violence has been widely recognized not only as a violation of criminal law, but *also* as a violation of *civil rights law*. This acceptance is a product of student sexual harassment and gender-based violence survivors' insistence that their schools prevent and remedy such abuse by understanding and addressing it as a cause and a consequence of gender and other inequalities. These activists' persistence over more than a decade has not only led to a Title IX national civil rights movement of students and allies,⁶ it has modeled strategies—such as using social media—that are linked to similar civil rights movements like the #MeToo Movement.⁷

Finally, we can see Title IX's breadth in the movement's plans for the future, many of which combine traditional civil rights perspectives with interventions developed outside civil rights legal contexts. For instance, because the years when Betsy DeVos was running the Department of Education were ones of particularly intense backlash against not only Title IX but civil rights generally,

³ Nancy Chi Cantalupo, *Masculinity & Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887, 891 (2014).

⁴ One statistic: From 1972 to 1991, U.S. high schools experienced a 17,000% increase in girls playing soccer. Moira Donegan, *USA's Formidable Women's Soccer Team Is No Accident. It's a Product of Public Policy*, GUARDIAN (July 6, 2019), <https://www.theguardian.com/commentisfree/2019/jul/06/usa-womens-world-cup-netherlands-title-xi>.

⁵ Andrew Das, *U.S. Soccer and Women's Players Agree to Settle Equal Pay Lawsuit*, N.Y. TIMES (Feb. 22, 2022), <https://www.nytimes.com/2022/02/22/sports/soccer/us-womens-soccer-equal-pay.html>.

⁶ Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281, 281-83 (2016).

⁷ Cantalupo, OXFORD HANDBOOK OF FEMINISM AND LAW CHAPTER, *supra* note 1.

they spurred a new level of understanding regarding the intersections between sexual harassment and gender-based violence.⁸ Along with those insights, activists realized that future efforts to address such discrimination must be equally intersectional and done in coalition⁹ with those engaged in other civil rights and related struggles, including those against systemic racism, economic inequality, anti-immigrant xenophobia, gun violence, and more.

The backlash to which these insights and the resulting coalition-building responses relied upon a narrative that combines racial and gender-based stereotyping. In its most extreme form, this narrative—advanced by individuals on the “left” and “right” of the political spectrum—links campus sexual harassment accusations to one of the Jim Crow era’s most pernicious racist legacies: using white women’s false sexual assault accusations to justify the white supremacist lynching of Black men and boys.¹⁰ Unpacking this anti-Title IX narrative exposes how it strategically and disingenuously exploits this racist history.

First, although the narrative assumes that Black men are disproportionately accused of campus sexual assault, no empirical evidence—and very little anecdotal evidence—backs up this assumption.¹¹ More importantly, those ostensibly concerned about such racial disparities have *opposed* measures that would mandate greater transparency by schools regarding investigations into sexual harassment and gender-based violence allegations, including with regard to the racial demographics of those involved.¹² The Trump Administration’s weakening of schools’ incentives to address racial disparities in school discipline across the board (i.e. not only in cases of sexual harassment and gender-based violence) also belies this concern.¹³

Second, this narrative blames survivors for such unconfirmed racial disparities in school-imposed discipline for sexual misconduct by incorrectly suggesting that survivors rather than schools have the power to discipline other students. Not only is there no evidence that Title IX accusers are collaborating with disciplinarians (as there was in the lynching era), but the little research that does exist points in the opposite direction, consistently showing that most sexual assault is *intra-* rather than *interracial*.¹⁴ Thus, the narrative that accusers of

⁸ Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J. L. & GENDER 1, 4-6 (2019) [hereinafter Cantalupo, *And Even More of Us Are Brave*].

⁹ *Id.* at 60-61; see also Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence & Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 314-24 (2019) [hereinafter Cantalupo, *Dog Whistles and Beachheads*].

¹⁰ Cantalupo, *Dog Whistles and Beachheads*, *supra* note 9, at 308; Cantalupo, *And Even More of Us Are Brave*, *supra* note 8, at 11.

¹¹ Cantalupo, *Dog Whistles and Beachheads*, *supra* note 9, at 321-22.

¹² *Id.* at 341.

¹³ *Id.*

¹⁴ *Id.* at 318.

Black men are lying likely blames women accusers of color, Black women in particular, for using false rape allegations to launch racist attacks against Black men. Thus, then-Judge Clarence Thomas was able to accuse Anita Hill, a Black woman with “no political connections,” of leading a “high-tech lynching.”¹⁵ Similarly, the fact that two campus cases—one amplified by former *Dear Prudence* columnist Emily Yoffe, and one discussed in a lengthy *New York Times* op-ed by Lara Bazelon, the attorney representing the accused assailant in the case—were brought by women of color was elided or ignored entirely in those published accounts.¹⁶

Third, this narrative combines stereotypes depicting women of color as hypersexual and promiscuous with criminal law-based stereotypes that only chaste women can credibly allege rape, rendering women of color fundamentally “un-rapable” and invisible as sexual harassment victims.¹⁷ This invisibility then makes women of color more vulnerable to sexual harassment because abusers are more likely to target those victims who are the least likely to be believed if they report their assaults. This reality is confirmed by evidence that women of color are sexually harassed both more frequently and more severely than white women.¹⁸

Pitting the civil rights of people of color (whom such narratives assume to be all men) against those of women (assumed to be all white) is an old technique—dating back at least to the nineteenth-century abolition and suffrage movements—for disrupting the advancement of civil rights in terms of both race and gender. Indeed, Sojourner Truth named the tactic during the debates over limiting the 15th Amendment’s guarantee of the right to vote only to African American men, which the white men in power used as a wedge to divide what had previously been a unified suffrage movement.¹⁹ The backlash against Title IX similarly sought to use criminal law-based stereotypes as a wedge to turn back advancements in both gender and racial equality resulting from using a civil rights approach to address sexual harassment and gender-based violence.

Fortunately, civil rights law already has tools for exposing the harmful discrimination perpetuated by stereotypes. As legal scholar Stephanie Bornstein points out, even as the U.S. Supreme Court has generally made legal redress for discrimination harder to achieve, “sex discrimination cases relying on the legal theory of sex stereotyping . . . [especially those] related to family caregiving responsibilities or transgender status have [been instrumental in pushing] . . . courts toward a contemporary understanding of the operation of

¹⁵ ANITA HILL, BELIEVING: OUR THIRTY-YEAR JOURNEY TO END GENDER VIOLENCE 41 (2021).

¹⁶ Cantalupo, *Dog Whistles and Beachheads*, *supra* note 9, at 319-22.

¹⁷ Cantalupo, OXFORD HANDBOOK OF FEMINISM & LAW CHAPTER, *supra* note 1.

¹⁸ Cantalupo, *And Even More of Us Are Brave*, *supra* note 8, at 24-41.

¹⁹ REBECCA TRAISTER, GOOD AND MAD: THE REVOLUTIONARY POWER OF WOMEN’S ANGER 118 (2018).

bias.”²⁰ I therefore anticipate that Title IX movement activists will increasingly use stereotype-based analyses to combat sexual harassment and gender-based violence in the future.

Moreover, activists are not relying exclusively on civil rights litigation to combat sexual harassment and gender-based violence. They are also looking to strategies drawn from non-legal fields, such as the comprehensive prevention methods developed in the public health field,²¹ which informed the American Bar Association Commission on Domestic and Sexual Violence’s *Recommendations for Improving Campus Student Conduct Processes for Gender-Based Violence*.²² Those recommendations embrace another highly effective comprehensive prevention strategy: coordinated community response teams (CCRTs),²³ a method recently adopted for the first time via a class action settlement²⁴ related to serial sexual harassment.²⁵ CCRTs are organized and collaborative groups of those in any particular community who have a stake in that community’s comprehensive prevention needs, goals, and plans. On campuses these stakeholders can include everyone from survivors themselves, to women’s and gender studies faculty whose research focuses on gender-based violence, to attorneys in the university counsel’s office, or to professionals in the campus victims’ advocacy office.

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

²¹ Nancy Chi Cantalupo, *Civil Rights Investigations & Comprehensive Prevention of Campus Gender-Based Violence*, in ADJUDICATING CAMPUS SEXUAL MISCONDUCT AND ASSAULT: CONTROVERSIES AND CHALLENGES 91 (Claire M. Renzetti & Diane R. Follingstad eds., 2020).

²² AM. BAR ASS’N COMM’N ON DOMESTIC & SEXUAL VIOLENCE, RECOMMENDATIONS FOR IMPROVING CAMPUS STUDENT CONDUCT PROCESSES FOR GENDER-BASED VIOLENCE (2020), <https://www.americanbar.org/content/dam/aba/publications/domestic-violence/campus.pdf> [<https://perma.cc/2NG7-MKGN>].

²³ SHANNON COLLINS, BARBARA PARADISO, MARÍA CRISTINA PACHECO ALCALÁ, & ANDREA THYRRING, BUILDING COORDINATED COMMUNITY RESPONSE TEAMS TO ADDRESS DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, AND STALKING ON CAMPUS: A TOOLKIT FOR INSTITUTIONS OF HIGHER EDUCATION (2020), <http://changingourcampus.org/wp-content/uploads/2020/12/OVW-CCRT-Toolkit-Final-ENGLISH.pdf> [<https://perma.cc/YF84-L9EE>].

²⁴ Shannon Stocking, *UMich and Students Reach Settlement of Lawsuit over Handling of Sexual Misconduct*, MICH. DAILY (Mar. 24, 2022), <https://www.michigandaily.com/news/umich-and-students-reach-settlement-of-lawsuit-over-handling-of-sexual-misconduct/> [<https://perma.cc/5LGB-L48S>].

²⁵ See Nancy Chi Cantalupo & William Kidder, *Systematic Prevention of a Serial Problem: Sexual Harassment and Bridging Core Concepts of Bakke in the #MeToo Era*, 52 U.C. DAVIS L. REV. 2349, 2360-70 (2019).

Most recently, the Consolidated Appropriations Act of 2022, which President Biden signed into law in March 2022,²⁶ resuscitates legislative provisions that I helped to write in 2014 mandating nationally standardized and publicly disclosed climate surveys that measure the prevalence of sexual harassment and gender-based violence campus by campus.²⁷ Such surveys give prospective and current students, faculty, and staff across the country the ability to correct existing counterintuitive incentives that encourage schools to passively and actively suppress victim reporting, to everyone's detriment.²⁸ Current campus crime disclosure requirements require schools to publish statistics regarding gender-based violence that victims or third parties have reported to the school.²⁹ However, because campus sexual harassment and gender-based violence are massively underreported, these statistics say nothing about how much harassment and violence is actually occurring on a particular campus. More disturbingly, because putting resources into prevention will probably encourage more victims to report, at least in the short-term, schools that do more to protect their students look more dangerous than schools that are doing nothing. Mandatory, nationally standardized, and publicly disclosed climate surveys measure actual prevalence rates, independent of reporting, and thus allow for *accurate* comparisons of schools' success at harassment/violence prevention. They also help schools assess their prevention methods so as to continually improve them, information that can once again improve prevention efforts outside of education.³⁰

Title IX's breadth makes new directions difficult to predict, but its potential is nearly endless. Indeed, the Title IX movement stands to make Title IX an even more powerful tool for dismantling inequality during the next fifty years than it was in the last fifty.

²⁶ Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49 (codified in scattered sections of 31 U.S.C.).

²⁷ Nancy Chi Cantalupo, *Accurate Reporting of Sexual Assault on Campus Without Shame*, N.Y. TIMES (last updated Jan. 3, 2017), <https://www.nytimes.com/roomfordebate/2014/08/12/doing-enough-to-prevent-rape-on-campus/accurate-reporting-of-sexual-assault-on-campus-without-shame>.

²⁸ 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, 236-38 (2011).

²⁹ 34 C.F.R. § 668.46(a)-(c) (2015).

³⁰ Nancy Chi Cantalupo, *Institution-Specific Victimization Surveys: Addressing Legal and Practical Disincentives to Gender-Based Violence Reporting on College Campuses*, 15 TRAUMA, VIOLENCE, & ABUSE 227, 228 (2014).