

2021

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Recommended Citation

Scarlett, Kelsey and Weyrick, Lexi (2021) "Transforming the Focus: An Intersectional Lens in School Response to Sex Discrimination," *California Western Law Review*. Vol. 57 : No. 2 , Article 12.
Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol57/iss2/12>

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TRANSFORMING THE FOCUS: AN INTERSECTIONAL LENS IN SCHOOL RESPONSE TO SEX DISCRIMINATION

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Intersectionality refers to the reality that a person's different identities (such as race, gender, and class, among others) exist simultaneously and when taken as a whole are what inform the discrimination they face. When Title IX, a law prohibiting sex discrimination in educational settings, was first passed by Congress in 1972, the only identity that was taken into consideration was a person's biological sex. Its original purpose solely focused on increasing the participation of white women in education—in part due to the lack of a nuanced understanding of sex discrimination, and in part due to the lack of people holding other identities in educational spaces. However, as these spaces have become more accessible to people of color, individuals with disabilities, individuals who identify as queer, those who are lower-income, and individuals who do not have legal status in the United States, among other identities, Title IX has continually failed to evolve to include them. The current system ignores the reality that discrimination, particularly through sexual misconduct, is based on more than one identity at a time. As a result, students are either forced to choose which of their identities to pursue a complaint under, or, even worse, the choice is made for them. With President Biden and Vice President Kamala Harris now occupying the White House, there is an opportunity to make real and lasting change with regard to the way students are treated by institutions

* Third-year law students at Boston University School of Law and Title IX activists. We want to express our undying gratitude to Naomi Mann—our mentor, our advocate, and our champion. We also want to thank Nancy Chi Cantalupo, William Kidder, Jade Brown, Jaclyn Tayabji, and our friends and family for believing in us and in this work. We are dedicating this piece to all survivors, especially those made to feel that their voices matter less. We see you; we hear you; and we believe you. Always.

regardless of the identities they hold. In this article, we argue that how schools handle sex discrimination needs to be reimagined in a way that: (1) does not compartmentalize the identities of students; and (2) is cognizant of the different identities that students hold. From the resources available on campuses before and after sexual misconduct occurs to the disciplinary processes implemented, the response to sex discrimination needs to be broadly reevaluated through an intersectional lens.

INTRODUCTION

[S]exual violence knows no race, class or gender, but the response to it does. . . . Ending sexual violence will require every voice from every corner of the world and it will require those whose voices are most often heard to find ways to amplify those voices that often go unheard.¹

– Tarana Burke

In theory, Congress enacted Title IX to provide equal educational opportunities for all students but, in practice, the “all” is painted white. Sexual misconduct² impacts many people, but the systems currently in place, including Title IX, do not offer enough protections for anyone, particularly for people with marginalized identities. The response to sexual misconduct often amplifies the voices of white women,³ and fails to hold space for students who are Black,

1. Tarana Burke, *#MeToo Was Started for Black and Brown Women and Girls. They're Still Being Ignored*, WASH. POST (Nov. 9, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too/> (Tarana Burke is a civil rights activist and founder of the #MeToo movement).

2. We use the term “sexual misconduct” to be inclusive of the myriad ways people can be harmed through “violence that uses power, control, and/or intimidation to harm another.” This definition includes, but is not limited to, sexual harassment, sexual assault, rape, intimate partner violence, and other forms of sexual violence. *What is Sexual Misconduct?*, CLARK COLL., <http://www.clark.edu/about/governance/policies-procedures/title-IX/what-is-sexual-misconduct.php> (last visited Mar. 17, 2021).

3. Throughout this article we are making the conscious choice to capitalize the “B” in Black, the “A” in Asian, the “L” in Latinx and Latina, and the “N” in Native

Indigenous, and people of color (BIPOC).⁴ Further, there is also a lack of protection for students who hold other marginalized identities—including, but not limited to, those who are queer, disabled, low-income, and/or do not hold citizenship status within the United States.⁵ While this problem is apparent in many different sectors of society, educational institutions are unique because a lack of access to education can adversely impact a person—as indicated by Title IX’s passage in pursuit of equality.⁶

to signal that, respectively, each race holds a collective identity which are “products of social forces,” not of natural occurrences. Race is a social construct, born from the historic convictions and current perpetuation of white supremacy. We made a conscious choice to lowercase the “w” in white to emphasize that whiteness is the social norm in the United States. Capitalizing it would not only be equating the experiences of white Americans to those who are most racially marginalized but would be to preserve the writing and rhetoric of white supremacist organizations. See Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, THE ATLANTIC (June 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159/>.

4. While we are using BIPOC for purposes of readability and consistency, it is important to recognize that all BIPOC students do not have the same experiences, and that this phrase is in no way intended to essentialize the experiences of BIPOC students into a single narrative. As will be discussed *infra* Part II, essentialism can lead to harmful effects on intersectional students. See *About Us*, BIPOC PROJECT, <https://www.thebipocproject.org/about-us> (last visited Mar. 17, 2021) (“The BIPOC Project aims to build authentic and lasting solidarity among Black, Indigenous and People of Color (BIPOC), in order to undo Native invisibility, anti-Blackness, dismantle white supremacy and advance racial justice. We use the term BIPOC to highlight the unique relationship to whiteness that Indigenous and Black (African Americans) people have, which shapes the experiences of and relationship to white supremacy for all people of color within a U.S. context. We unapologetically focus on and center relationships among BIPOC folks.”).

5. This article particularly focuses on how the response to sexual misconduct on college and university campuses impacts students, in particular. This is not to ignore or dismiss the ways individuals with marginalized identities are disproportionately impacted by sexual misconduct outside of campus settings. A close look at Title IX’s history clearly illustrates who Congress considered in its foundational policies and who was not. See 118 CONG. REC. 5803 (1972).

6. It should be noted that education does not always function in this manner. For a deeper discussion on how household income and living situations impact future success, see Nick Hanauer, *Better Schools Won’t Fix America*, THE ATLANTIC (Jun. 10, 2019), <https://www.theatlantic.com/magazine/archive/2019/07/education-isnt-enough/590611/>.

Educational institutions affirmatively hold the purpose of educating their communities both academically and socially. Participation in higher education programs are contingent on compliance with the terms and conditions of academic and social guidelines prescribed in schools' codes of conduct. These codes are tools to teach students how to be community members—while in college and upon them leaving. Therefore, disciplinary measures rooted in retributive models are incongruent with the educational purpose of schools.⁷ Schools are not meant to be courts of law⁸ and their educational spaces are suited to the concepts of restorative and transformative justice. While in recent years restorative justice models have gained popularity, we argue that transformative justice is more appropriate in this context as it is more accessible to individuals with marginalized identities and solutions.

Title IX cannot continue on its current path. Traditional Title IX implementation and structures have always failed to protect all students. Title IX must transform to adopt an intersectional lens and use a non-disciplinary model. Instead, the model should be transformative justice.⁹ Transformative justice is an approach to responding to harm with the goal of not perpetuating any further harm.¹⁰ This model does not begin as a response to an incident of harm, but it involves ongoing development within the community, creating a system of accountability without the reliance on institutional actors.¹¹

Part I outlines a brief history of inequality in education and Title IX, explaining how the concept of Title IX and its implementation

7. Naomi Mann, *Classrooms into Courtrooms* 5 (2021) (unpublished manuscript) (on file with author).

8. *Id.*

9. For a related critique, see Katharine Silbaugh, *Reactive to Proactive: Title IX's Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. Rev. 1049, 1073 (2015) (discussing the limited reach of Title IX when the focus is almost exclusively on adjudications after the fact).

10. See *infra* Part III for a more detailed discussion of transformative justice.

11. See *infra* Part III for a more detailed discussion of transformative justice; see also Generation 5, *What Are Community Accountability and Transformative Justice?*, TRANSFORMATIVE JUST. KOLLEKTIV BERLIN, <https://www.transformativejustice.eu/en/what-are-ca-and-tj/> (last visited Mar. 17, 2021).

have historically catered to white women.¹² A close look at the history of the statute clearly illustrates who the legislature—either implicitly¹³ or explicitly—considered in its foundational policies, and who it did not.¹⁴ Part II examines the 2020 Title IX rule and why, historically, implementing Title IX has never fulfilled the promise of protecting all students. Specifically, this section discusses Title IX’s failure to include the voices and experiences of BIPOC students, queer students, disabled students, low-income students, and students without U.S. citizenship status, as well as students with other and/or multiple marginalized identities.¹⁵ Finally Part III analyzes how to leverage

12. It is significant to understand the reality that white women, specifically white women whose marginalization falls on a single axis, have been essentialized as the model survivor. Indeed, it is important to acknowledge that despite society’s placement of increased value on white women, Title IX still does not work for them. Further, the essentialism of white women perpetuates the problematic notion that women cannot be perpetrators of sexual violence and that men cannot be survivors of sexual violence. Although, outside the scope of this essay, there is a problematic conflation of sexual assaults against those who identify as men and LGBTQ+ identities. We fully acknowledge that as survivors, men are excluded from the conversation, and men of all identities should be recognized in a Title IX system. See Kaitlin M. Boyle & Kimberly B. Rogers, *Beyond the Rape “Victim”—“Survivor” Binary: How Race, Gender, and Identity Processes Interact to Shape Distress*, 35 SOCIO. F. 323, 339 (2020). For a related discussion on how white women are often complicit in oppressive systems, see Cady Lang, *How the ‘Karen Meme’ Confronts the Violent History of White Womanhood*, TIME (Jul. 6, 2020, 4:11 PM), <https://time.com/5857023/karen-meme-history-meaning/>.

13. See *Welcome to Project Implicit!*, PROJECT IMPLICIT, <https://www.projectimplicit.net/> (last visited Mar. 17, 2021). Around the time Title IX was passed, popular advertisements portrayed women as white women, wanting to look beautiful and not positioned as particularly strong or powerful. See, e.g., Lindsey M. Case, *From Femininity to Feminism: A Visual Analysis of Advertisements Before and After the Femvertising Movement*, 10 ELON J. UNDERGRADUATE RSCH. COMM. 35, 43–44 (2019).

14. See 118 CONG. REC. 5803 (1972); *Our History*, WOMEN’S COLL. COAL. [hereinafter *Our History*], <https://www.womenscolleges.org/history#:~:text=The%20earliest%20women’s%20colleges%20were,could%20be%20unhealthy%20for%20women> (last visited Mar. 17, 2021).

15. We recognize that this list is not reflective of every identity that is marginalized with respect to Title IX. We are examining these specific marginalized identities because of the particular historical sexual and bodily oppression these identities have faced in the U.S., but we note that our coverage is limited by the available research we were able to obtain with regards to these identities.

the education and prevention aspects of the Title IX framework before examining the possibility of using transformative justice principles to strengthen Title IX protections.

I. A HISTORY OF TITLE IX AND INTERSECTIONALITY

The congressional record of Title IX focused on women on a single axis of identity.¹⁶ In the record, there is no mention of survivors holding any other marginalized identity.¹⁷ Presumptively, this category consists of cis-gender, middle-class, able-bodied, heterosexual white women, as they are the ones whose discrimination lies on a single axis.¹⁸ In congressional record, Senator Birch Bayh quoted a March 1971 study: “Discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community.”¹⁹ This quote pits the category of “women” against the category of “minorities” and directly implies that the category of “women” means “white (non-minority) women.”

Senator Bayh also introduced a chart, indicating that Black men and Black women were enrolled in college at significantly lower rates than their white counterparts.²⁰ Yet, he made no reference to race in his discussion of this chart, and he did not bring it up at any other point in his support for Title IX.²¹ This omission is critical. Before the Senate, was data in favor of race-based and gender-based solutions being pursued, but the Senate declined to pursue this line of inquiry. Senator Bayh played a central role in enacting Title IX, and the fact that he did not value this connection illustrates how the

16. See 118 CONG. REC. 5803 (1972). See also Devon W. Carbado & Kimberle W. Crenshaw, *An Intersectional Critique of Tiers of Scrutiny: Beyond “Either/Or” Approaches to Equal Protection*, 129 YALE L.J. 108, 115 (2019) (Carbado and Crenshaw’s literature focuses on the tension anti-discrimination laws create by viewing individuals on a “single-axis,” in which the law only recognizes individuals’ discrimination based on one identity at a time. This view fails to recognize the intersectional dimensions of discrimination. Because Title IX is an anti-discrimination statute which focuses only on sex, Carbado and Crenshaw’s framework extends to the limitations of Title IX.)

17. See 118 Cong. Rec. 5803 (1972).

18. See Carbado & Crenshaw, *supra* note 16, at 115.

19. 118 Cong. Rec. 5803, 5804 (1972).

20. *Id.* at 5805.

21. *Id.* at 5803.

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perception of sex-discrimination has often pushed away other axes of identity.

A. Access to Education and Title IX's Ignorance

Historically, white men have dominated educational spaces, excluding women of all identities. In the colonial United States, most boys were educated through “dame schools.”²² The schools aimed to prepare boys to move on to town schools and academies.²³ Until the 19th century, girls were barred from attending schools, and once they were allowed, they were often educated when the boys were not present.²⁴ While compulsory state-specific law required attendance from kindergarten to twelfth grade, by 1930,²⁵ women²⁶ were still woefully underrepresented in higher education, despite a substantial number of female-only colleges that existed throughout the country.²⁷

Although women were able to gain a stronger foothold in co-educational colleges and universities, it remained apparent that systems were still in place to limit their access.²⁸ Some of the barriers facing women included quotas, administrative hurdles, and even legal restrictions.²⁹ By the mid-1950s, women only accounted for

22. Dame schools are “defined as a school influenced by the English model of home instruction for small groups of children usually led by a woman in her home.” Jennifer C. Madigan, *The Education of Girls and Women in the United States: A Historical Perspective*, 1 *ADVANCES GENDER & EDUC.* 11, 11(2009).

23. *Id.*

24. *Id.*

25. Dustin Hornbeck, *Federal Role in Education Has a Long History*, *THE CONVERSATION* (Apr. 26, 2017), <https://theconversation.com/federal-role-in-education-has-a-long-history-74807>.

26. While the term “women” excludes those who were denied access to these spaces and those who do not identify as women, we use this term because it reflects the data available on this issue. We want to note that those who do not identify as male or female have had, and continue to have, less access to education than individuals who identify along the gender binary. Clio Hartzler, *Non-Binary Students: A Guide for Public School Educators*, *MEDIUM* (Jan. 31, 2020), <https://medium.com/bein-enby/non-binary-students-5867563dc61f>.

27. *See generally Our History*, *supra* note 14.

28. Patsy Parker, *The Historical Role of Women in Higher Education*, 5 *ADMIN. ISSUES J.: CONNECTING EDUC., PRAC., & RSCH.* 1, 4 (2015).

29. For example, Stanford’s policy of admitting three men for every woman. *Id.*

approximately 21% of students on college campuses,³⁰ and little had changed by the 1970s when Harvard's male-to-female ratio was 4:1.³¹

Growing theoretical support for increased female presence in education and various professions, coupled with increased national civil rights legislation, helped contribute to Title IX's passage. Title IX states: "No person in the United States shall, on the basis of sex³² . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance."³³ The statute authorizes federal agencies to create enforcement procedures by withdrawing funding from educational institutions that violate its requirements.³⁴ While BIPOC women were permitted access to any institution that allowed access to all BIPOC students, they historically remained excluded from higher education institutions compared to white women.³⁵ With BIPOC women less able to access higher educational institution, and with the dominant view of college women, and women generally, as white,³⁶ it is evident Title IX was not drafted or passed with BIPOC students in mind.

Congress's primary focus during Title IX's enactment appeared to be on the harmful sex stereotypes that kept women out of higher education, from engaging in certain areas of study, and from being

30. *Id.* at 9.

31. This is after students fought for the ratio of male to female students to drop to 1:1. Pat Harrison, *The Complicated History of Women at Harvard*, HARV. RADCLIFFE INST. (Aug. 1, 2012), <https://www.radcliffe.harvard.edu/news-and-ideas/the-complicated-history-of-women-at-harvard>.

32. At the time of Title IX's establishment, the term "sex" exclusively refers to biological sex. While we use the term "sex," especially in our discussion regarding the statutory history and the implementation of Title IX, we believe the term "sex" encompasses sexual orientation and gender identity, particularly in light of *Bostock v. Clayton County* as will be discussed further later in this section. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

33. 20 U.S.C.A §1681.

34. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280 (1998).

35. See Madeline St. Amour, *What Happens Before College Matters*, INSIDE HIGHER ED (Oct. 20, 2020), <https://www.insidehighered.com/news/2020/10/20/black-students-need-changes-policies-and-structures-beyond-higher-education> (historically Black students have had less access to colleges and other institutions of higher education).

36. Kathy Deliovsky, *Normative White Femininity: Race, Gender and the Politics of Beauty*, 33 ATLANTIS 49, 56 (2008).

paid and promoted equal to men.³⁷ Yet, Senator Bayh's sex stereotype examples primarily focused on white women.³⁸ Senator Bayh spoke of the harm related to assuming women go to college to find a husband, ultimately resulting in schools' belief that they are wasting a spot better suited for a man.³⁹ At the time, women married for the first time at a median age of 20, and were often perceived to be in college to receive their "MRS. degree."⁴⁰ Still today, while 84% of college-educated white women marry college-educated men, only 49% of Black women do so,⁴¹ indicating a trend that has not changed much over the decades.⁴² Moreover, Senator Bayh also mentioned few women held administrative positions at law schools and in higher education generally.⁴³ Of course, women of color remained disproportionately excluded from these opportunities. Approximately thirty years after Title IX's passage, women of color still only hold 2% of tenured professor positions.⁴⁴

B. The Residual Effects of Essentializing White Women

Even now, as more Black, Indigenous, and women of color are attending college and earning degrees, Title IX, as a whole, has not evolved to incorporate their identities and attendant remedies.

37. 118 CONG. REC. 5803 (1972).

38. *Id.*

39. *Id.* at 5804.

40. Brittany Brolley, *Bizarre Ways Women Were Encouraged To Find a Husband in the 1950s*, THE LIST (Jan. 14, 2019), <https://www.thelist.com/142847/bizarre-ways-women-were-encouraged-to-find-a-husband-in-the-1950s/>.

41. Sheryl Estrada, *College-Educated Black Women Least Likely to Have a Well-Educated Spouse*, DIVERSITYINC (Apr. 15, 2015, 3:54 PM), <https://www.diversityinc.com/college-educated-black-women-least-likely-to-have-a-well-educated-spouse-2/>.

42. Gillian B. White, *Marrying Your Peer, A Tougher Prospect for Black Women*, THE ATLANTIC (Apr. 28, 2015), <https://www.theatlantic.com/business/archive/2015/04/marrying-your-peer-a-tougher-prospect-for-black-women/391586/>.

43. 118 CONG. REC. 5803, 5805 (1972).

44. Vilna Bashi Treitler, *Stand for Tenure for Women Scholars of Color*, FEMINIST WIRE (July 18, 2018), <https://thefeministwire.com/2016/07/stand-tenure-women-scholars-color/>.

Students of color face barriers in academic spaces that their white peers do not have to endure.⁴⁵ As race scholar, Stephanie Evans, noted in a 2007 publication, “The challenges of having to be twice as good to get half the recognition that are present for [w]hite women are magnified for scholars of color who don’t have the credibility that [w]hiteness provides.”⁴⁶ Fortunately, in recent years, colleges have begun to make resources available for BIPOC survivors specifically.⁴⁷ While these resources are important to fill a gap for BIPOC, the gap itself shows how Title IX caters to white survivors and does not go far enough to support and respond to the needs of BIPOC survivors. The mere fact that colleges need to qualify the term “survivors” when channeling resources to BIPOC students is indicative of the fact that when confronting the failures of Title IX, we should be mindful, at least in practice, Title IX reads more like “No [white] person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

It is clear, whether intentional or not, Title IX primarily sought to cure the social ills white women⁴⁸ faced—marginalized students were not factored into the debate. There is not a single mention of LGBTQIA+ individuals, individuals with disabilities, socioeconomic status, or any other identity that compounds the experience of those

45. *Fast Facts: Women of Color in Higher Ed*, AAUW, <https://www.aauw.org/resources/article/fast-facts-woc-higher-ed/> (last visited Mar. 17, 2021).

46. Peter McLaren & Lilia D. Monzó, *Growing the Revolutionary Intellectual, Creating the Counterpublic Sphere*, in *THE OXFORD HANDBOOK OF METHODS FOR PUBLIC SCHOLARSHIP* 681 (Patricia Leavy ed., 2019).

47. Though recognizing there are inequities is not the same as fixing the inequities. See, e.g., *Survivors Who Are BIPOC (Black, Indigenous, People of Color)*, U.C. SANTA BARBARA CAMPUS ADVOC., RES. & EDUC., <https://care.ucsb.edu/communities-we-care/survivors-who-are-bipoc-black-indigenous-people-color> (last visited Mar. 17, 2021); *People of Color Survivor Resources*, UMASS AMHERST, <http://www.umass.edu/titleix/resources/people-of-color-survivor> (last visited Mar. 17, 2021).

48. When we describe “white women” in this context, we are discussing “white women” who hold positions of privilege over marginalized identities with the exception of gender. For example, “white women” in this context does not refer to white women who identify as LGBTQIA+, have one or more disabilities, are without citizenship status in the United States, or who are of lower socioeconomic status.

not identifying as a cisgender, heterosexual males in educational spaces.⁴⁹ However, the need to consider these marginalized students is critical to realize Title IX's goals. As of 2015, only 25% of LGBTQ⁵⁰ women were predicted to earn a bachelor's degree compared to the predicted 34% of heterosexual women.⁵¹ Further, women with disabilities are significantly less likely to attend college than students without disabilities.⁵² Additionally, approximately 70% of wealthy women "who were high school sophomores in 2002 [received] bachelor's degrees by 2013, compared to 17.6 percent of women from low socioeconomic status."⁵³

Sex-discrimination will not be eradicated until students of every identity no longer face sex discrimination. Due to higher education's history of excluding and mistreating students with marginalized identities, it is particularly important for students to view their schools as hospitable to their needs.⁵⁴ Students will not rely on the systems in place if they cannot trust those systems to effectively address issues in a nuanced manner without perpetuating harm to themselves or to the campus community as a whole. Especially if they are not able to see themselves as members of that community.

49. See 118 CONG. REC. 5803 (1972).

50. This acronym is used here because it is the acronym used in the statistic. This acronym is not fully reflective of the entire LGBTQIA+ community.

51. *Factsheets: LGBTQ Students in Higher Education*, POSTSECONDARY NAT'L POL'Y INST.(Jun. 12, 2020), <https://pnpi.org/lgbtq-students-in-higher-education/>.

52. Anna Landre, *Teen Finds Gap in College Access for Those With Disabilities*, WOMEN'S ENEWS (Oct. 31, 2016), <https://womensenews.org/2016/10/teen-finds-gap-in-college-access-for-those-with-disabilities/> (last visited Mar. 17, 2021).

53. Alana Semuels, *Poor Girls Are Leaving Their Brothers Behind*, THE ATLANTIC (Nov. 27, 2017), <https://www.theatlantic.com/business/archive/2017/11/gender-education-gap/546677/>.

54. Patricia Gándara, *Lost Opportunities: The Difficult Journey to Higher Education for Underrepresented Minority Students*, in THE RIGHT THING TO DO, THE SMART THING TO DO: ENHANCING DIVERSITY IN THE HEALTH PROFESSIONS – SUMMARY OF THE SYMPOSIUM ON DIVERSITY IN HEALTH PROFESSIONS IN HONOR OF HERBERT W. NICKENS, M.D. 234, 252–53 (2001), <https://www.nap.edu/read/10186/chapter/10>.

C. The Evolution of Title IX to Include Sexual Misconduct

Interpretations and meanings of Title IX have evolved to incorporate new understandings of sex discrimination, including sexual harassment, but not new understandings of how sex discrimination harms individuals differently. The Supreme Court reinterpreted Title IX to include sexual misconduct and a school's duty to address such misconduct.⁵⁵ In *Franklin v. Gwinnet County Public Schools*, the Court recognized sexual misconduct as a form of sex discrimination protected by Title IX.⁵⁶

In 2001, the Office for Civil Rights (OCR) released guidance on how schools should handle cases of sexual misconduct (2001 Guidance).⁵⁷ The OCR issued the 2001 Guidance in response to the series of Supreme Court cases that expanded the scope of Title IX protections and clarified definitions of sexual misconduct.⁵⁸ The 2001 Guidance defined sexual harassment as “unwelcome conduct of a sexual nature.”⁵⁹ Following the Court's expansion of Title IX, the OCR labeled sexual harassment a form of sex discrimination prohibited by Title IX; however, the OCR also stated it does not extend to all behaviors.⁶⁰

55. NASPA STUDENT AFFAIRS ADM'RS IN HIGHER EDUC., BACKGROUND BRIEF: CAMPUS RESPONSIBILITIES FOR SEXUAL HARASSMENT PREVENTION AND RESPONSE 2 (2019), https://www.naspa.org/images/uploads/main/Title_IX_Sexual_Assault_Background_Brief_NSADA19_FINAL.pdf.

56. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992). *See also* 20 U.S.C.A §1681; *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). *But see* Silbaugh, *supra* note 9, at 1061–62.

57. *See* OFF. FOR C.R., U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE], <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf/> (rescinded by the Trump administration August 26, 2020)..

58. *Id.* at 2–3 (Notably, this was the last bipartisan guidance on the implementation of Title IX from the DOE—it was started under the Clinton administration and released by President Bush's DOE.).

59. *Id.* at 2.

60. *Id.* (The 2001 Guidance also states, “It is important to recognize that Title IX's prohibition against sexual harassment does not extend to legitimate nonsexual touching or other nonsexual conduct.”).

Additionally, in its 2011 Dear Colleague Letter, the Obama administration worked to flesh out governmental expectations on implementing Title IX consistently across the country.⁶¹ In response to troubling sexual misconduct statistics across the nation,⁶² the Dear Colleague Letter added a clear focus on sexual assault that recognized the case law coverage: “Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX.”⁶³ Although the Obama administration’s guidance sought, in part, to remedy the history of lax sexual assault responses by schools, this guidance still failed to address the impacts of schools’ traditional focus on protecting white, cisgender, heterosexual male respondents on marginalized survivors, making it a limited approach.⁶⁴ These policies instigated backlash and laid the foundation for the sweeping overhaul of Title IX issued by the DeVos Department of Education (DOE).

61. Dear Colleague Letter from Russlynn Ali, Assistant Sec’y, Office for Civil Rights, United States Department of Education (Apr. 4, 2011) [hereinafter Dear Colleague Letter], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

62. The Letter referenced a National Institute of Justice report stating, “1 in 5 women are victims of completed or attempted sexual assault while in college, [and] approximately 6.1 percent of males were victims of completed or attempted sexual assault during college.” *Id.* at 2. While these were the statistics at the time, it is important to note, based on recent data, “[a]mong all students, 41.8 percent reported experiencing at least one sexually harassing behavior since enrollment.” ASS’N OF AM. UNIVS., REVISED AGGREGATE REPORT AND APPENDICES, xiii (2020), [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_\(01-16-2020_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf).

63. Dear Colleague Letter, *supra* note 61, at 3. The Letter required schools (1) to immediately begin investigating any incidents of sexual misconduct that they “know[] or reasonably should know about,” (2) to make their Title IX policies readily and publicly available, and (3) to properly train anyone who would be involved in Title IX implementation, including the investigation process. *Id.* at 4.

64. Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J. L. GENDER 1, 19 (2019) [hereinafter Cantalupo, *And Even More of Us Are Brave*].

II. THE TITLE IX PROBLEM

As it currently stands under the 2020 rule, Title IX fails to consider the implications that sexual misconduct can have on a community and its individuals. Sexual harassment has profound impacts on one's livelihood. Unlawful harassment affects a student's ability to "best perform academically and to have equal access to all aspects of a recipient's educational programs and activities."⁶⁵ Sexual assault survivors experience educational harms, incur financial hardships, and suffer adverse health consequences.⁶⁶ Often, survivors' grades drop, they lose present and future scholarships, their health insurance increases, have life-long lower earning potentials, and often have depressive symptoms or resort to self-harm.⁶⁷ Given the serious consequences to their community members, schools have a responsibility to respond to sexual misconduct in a manner that promotes healing for all students, not just some—a responsibility the 2020 Rule falls far short of fulfilling.

A. Title IX Under the Trump Administration and Betsy DeVos

The Obama administration's attempts to center sexual assault survivors was met with strong backlash that found a home in the Trump administration. Although there was ample evidence that these changes were necessary to remedy the barriers that sexual assault survivors faced in schools,⁶⁸ the Trump administration was explicitly animated about the belief that a criminal model for due process was necessary given the Administration's skewed belief that sexual assault survivors are not credible. Thus, under former Secretary of Education

65. OFF. FOR C.R., U.S. DEP'T OF EDUC., TITLE IX RESOURCE GUIDE 15 (2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf> [hereinafter TITLE IX RESOURCE GUIDE].

66. KATHARINE K. BAKER ET AL., TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER 1 (2017), <http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf>.

67. *Id.* at 1–3.

68. See Mann, *Classrooms into Courtrooms*, *supra* note 7, at 1–4; Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 639–40 (2018) (stating that educational institutions have different conduct codes and disciplinary systems than criminal or civil court).

Betsy DeVos, President Trump's DOE rescinded the Title IX guidelines issued under President Obama, stating the policies, "created a system that lacked basic elements of due process and failed to ensure fundamental fairness."⁶⁹ The DOE believed respondents were being treated unfairly in school investigations because of notions set forth in the 2011 Dear Colleague Letter.⁷⁰ As a result, the 2020 rule clearly favors respondents over survivors,⁷¹ making reporting and investigating Title IX claims unduly burdensome for survivors—particularly marginalized survivors—to pursue.⁷²

Previously, schools could initiate a Title IX investigation whether there was a formal complaint or not, and the formal complaint could be made orally to the school's Title IX coordinator or equivalent.⁷³ Complainants were also not required to attend the investigative hearing or participate in questioning.⁷⁴ Now, however, the 2020 Rule requires all Title IX complaints to be written and either filed by the complainant or signed by the Title IX coordinator when the complaint is submitted to the school.⁷⁵ Complainants must also submit to live cross-examination. Otherwise, any oral or written statement they

69. *Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, U.S. DEP'T OF EDUC. (Sep. 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>.

70. *Id.*

71. The Trump administration and former Secretary DeVos's discriminatory stereotypes of female college students motivated this new rule. On various occasions, former Secretary DeVos mischaracterized the 2011 and 2014 Guidances as unfair to respondents, refused to acknowledge the rarity of false accusations, and expressed doubt about the gravity of sexual harassment claims. Complaint for Declaratory and Injunctive Relief at 27–28, *Victim Rights Law Center v. DeVos* (2020) (No. 1:20-cv-11104) [hereinafter *Victim Rights Law Center Complaint*], <https://nwlc.org/wp-content/uploads/2020/06/20-11104-Complaint.pdf>.

72. Complaint for Declaratory and Injunctive Relief at 6, *State of New York v. U.S. Dep't of Educ.* (2020) (No. 20-cv-4260) [hereinafter *State of New York Complaint*], https://ag.ny.gov/sites/default/files/01_-_complaint_-_2020.06.04.pdf.

73. OFF. FOR C.R., U.S. DEP'T. OF EDUC., *QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE* 15–16 (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

74. *Id.* at 37.

75. *Summary of Department of Education's Title IX Final Rule*, U.S. DEPT. OF EDUC. 3–4 <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf> (last visited Apr. 5, 2021).

submit cannot be considered when the school makes a final determination in the investigation.⁷⁶

Additionally, the 2020 Rule narrows the definition of sexual harassment to “severe, pervasive, *and* objectively offensive,”⁷⁷ diverging from precedent and other civil rights statutes.⁷⁸ This means that students may be subject to increased sexual misconduct before schools intervene.⁷⁹ For example, one act of sexual harassment may not meet the new definition under Title IX because although it may meet the severe requirement of the new definition, without other actions, it is unlikely to meet the pervasive requirement. However, under Title VII, the same single act of sexual harassment, on its own, is enough to merit a response. Further, schools must still “respond to harassment of students based on race, ethnicity, national origin, or disability under the more inclusive standard” using the “severe, pervasive, or persistent” standard.⁸⁰ This means BIPOC students must endure the dehumanizing process of discerning which aspects of their discrimination were related to race and which constituted sex-based discrimination.⁸¹ At its core, the 2020 Rule forces schools to dismiss Title IX complaints that do not fall squarely within this new definition.⁸²

Further, Title IX prohibits school from investigating complaints when a survivor transfers, graduates, or drops out of school, or if the sexual assault occurs off-campus,⁸³ and allows schools to dismiss complaints when the respondent is no longer a part of the campus community.⁸⁴ For example, if a sexually abusive teacher no longer works at the school, then schools are not required to investigate the

76. *Id.* at 7.

77. Victim Rights Law Center Complaint, *supra* note 71, at 38.

78. *Id.* at 39, 40.

79. *Id.* at 39.

80. *Id.* at 40.

81. State of New York Complaint, *supra* note 72, at 60. *See Cantalupo, And Even More of Us Are Brave*, *supra* note 64, at 71 (“Furthermore, it would be dangerous to assume that racial harassment is different from sexual harassment as a practical matter.”).

82. Victim Rights Law Center Complaint, *supra* note 71, at 39.

83. *Id.* at 48, 49.

84. *Id.* at 50.

complaint.⁸⁵ Further, if the assault occurs during a U.S. school-sponsored study abroad program, camp, or foreign field trip, schools are barred from responding.⁸⁶ Survivors already struggle to access and locate resources that are mindful of their identities, and the 2020 Rule compounds this by further denying survivors agency and critical tools over their safety.⁸⁷

The 2020 Rule also prohibits many supportive measures for survivors.⁸⁸ Supportive measures are “non-disciplinary, non-punitive individualized services . . . designed to restore or preserve equal access to the recipient’s education program and activity.”⁸⁹ Supportive measures that are determined to be “disciplinary,” “punitive,” or “unreasonably burden the other party,” are unavailable under the 2020 Rule, unless a finding of responsibility has been made.⁹⁰ Survivors whose harassment falls outside of the DOE’s narrow definitions will be unable to obtain supportive measures entirely.⁹¹ The 2020 Rule also adds a presumption of non-responsibility, which states that “schools will be required to presume that the reported incident did not occur.”⁹² This presumption is contrary to Title IX’s equitable resolution of complaints because the presumption sets parties on inequitable ground.⁹³

85. *Id.*

86. *See* Complaint for Declaratory and Injunctive Relief at 26, Commonwealth of Pennsylvania v. DeVos (2020) (No. 1:20-cv-01468) [hereinafter Commonwealth Complaint], https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/TitleIX_Complaint.pdf. It is also important to note that even if the survivor faced sexual harassment on social media and the survivor becomes “too afraid to attend class and face” the respondent or the assault occurred in off-campus housing in which “nearly 9 in 10 college students” live, the survivor is again blocked from Title IX’s protections. Victim Rights Law Center Complaint, *supra* note 71, at 47.

87. *See infra* Part II.C.

88. Victim Rights Law Center Complaint, *supra* note 71, at 54.

89. *Id.*

90. *Id.*

91. *Id.* at 55.

92. The presumption signals a favorability for respondents. *Id.* at 56.

93. It is important to note that while the loss of supportive measures further compromises the resources available to survivors, we must acknowledge that supportive measures have not always been accessible by all survivors, in particular survivors who do not hold U.S. citizenship. *Id.*

Additionally, the 2020 Rule requires a cross-examination of all witnesses, the complainant, and respondent.⁹⁴ The DOE believes cross-examination helps to determine the facts.⁹⁵ Finally, the 2020 Rule mandates use of an advisor during the hearing, which can lead to inequitable outcomes based on the parties' resources. Advisors are responsible for conducting cross-examinations during the hearing,⁹⁶ which is problematic because a selected advisor could be the respondent's parent or even the survivor's teacher.⁹⁷

As DeVos so fervently stated "if everything is harassment, then nothing is."⁹⁸ And, under DeVos, the DOE took steps towards ensuring that less conduct *could* be harassment. Unfortunately, while many students experience sexual harassment, the chilling effects of the 2020 Rule's narrow definition of sexual harassment will slowly exclude what "counts" as sexual harassment until the answer is eventually nothing.

B. *What is Intersectionality?*⁹⁹

The residual effects of Title IX's white-centric implementation and conceptualization continue to leave those with marginalized identities on the outskirts of its protections. While Kimberlé Crenshaw coined the term "intersectionality," efforts to include Black

94. *Id.* at 60.

95. *Id.* at 60–61. Additionally, if a witness or complainant does not submit to cross-examination, a school is required to "disregard as evidence all oral and written statements of any party or witness who declined to testify at a live hearing or who declines to answer every single question they receive during cross-examination." *Id.* at 62.

96. *Id.* at 60, 67.

97. Commonwealth of Pennsylvania Complaint, *supra* note 86, at 34.

98. Victim Rights Law Center Complaint, *supra* note 71, at 28.

99. While the term "intersectionality" was originally intended to bring attention to the exclusion of Black women from race- and sex-discrimination efforts in law, we use the term intersectionality to also highlight the lack of consideration of non-white, non-heterosexual, non-cisgender, non-male identities when adopting legal solutions to sex-discrimination on college campuses, particularly as it relates to sexual misconduct. For further exploration of the concepts surrounding intersectionality, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); FRANK RUDY COOPER & ANN C. MCGINLEY, *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* (2012).

women and Black women from lower socioeconomic backgrounds in the fight against race and sex discrimination existed long before.¹⁰⁰ Intersectionality examines the axes on which those who face multiple layers of oppression sit.¹⁰¹ Focusing on the intersectionality of Blackness and womanhood, Crenshaw highlights how feminist theory and antiracist policies exclude Black women because their gender marginalizes them within their race, and their Blackness marginalizes them within the feminist movement.¹⁰² As a result, the focus on “the most privileged group members”—Black men in race and white women in gender— “marginalizes those who are multiply-burdened.”¹⁰³

Using the experiences of white women and Black men to establish guiding principles of gender-based and race-based issues excludes the “double-discrimination” Black women face.¹⁰⁴ Even more crucial than the need for race-based or gender-based policies to account for this double-discrimination, is the need to acknowledge reality: Black women experience discrimination as Black women, “not the sum of race and sex discrimination, but as Black women.”¹⁰⁵ As Moya Bailey, a Black queer feminist, scholar, writer, and activist explains, Black women endure a specific type of misogyny—misogynoir.¹⁰⁶ Bailey states, “If you can’t replace the person being targeted with a

100. See Kathy Davis, *Who Owns Intersectionality? Some Reflections on Feminist Debates on How Theories Travel*, 27 EUR. J. WOMEN’S STUD. 113, 115 (2019).

101. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEG. F.139, 140 (1989) [hereinafter Crenshaw, *Demarginalizing*].

102. *Id.*

103. *Id.* at 140.

104. *Id.* at 149. (Double-discrimination refers to the “combined effects of practices which discriminate on the basis of race, and on the basis of sex.”).

105. *Id.*

106. *Misogynoir and Kamala Harris*, MOYA BAILEY (Oct. 16, 2020), <https://www.moyabailey.com/tag/misogynoir/> (Misogynoir “is not simply the racism that Black women encounter, nor is it the misogyny Black women negotiate; it is the uniquely synergistic force of these two oppression amalgamating into something more harmful than its parts.”).

woman of another race or someone of another gender, you know misogynoir is in play.”¹⁰⁷

Crenshaw poignantly assesses that, when it comes to the law, Black women must make the impossible choice between their gender and their race.¹⁰⁸ For example, in analyzing *DeGraffenreid v. General Motors*, Crenshaw found that the court’s refusal to provide Title VII protections implied “the boundaries of sex and race discrimination doctrine [were] defined respectively by white women’s and Black men’s experiences.”¹⁰⁹ As a result, Black women’s protections only go so far as “their experiences coincide with” Black men or white women.¹¹⁰ Therefore, when Black women face sexism in a way that is contrary to white women and racism that differs from that of Black men, Black women “can expect little protection.”¹¹¹ Specific problems need to be addressed with a specific and expanded solution; a one-size-fits-all approach will just not do.

Although intersectionality began with Black women, it is not exclusive to Black women.¹¹² And, although education systems resist

107. Rebecca Ruiz, *Why You Need to Know What ‘misogyny’ Means Right Now*, MASHABLE (Apr. 7, 2020), <https://mashable.com/article/misogynoir-black-women-sexism-racism/>.

108. See Crenshaw, *Demarginalizing*, *supra* note 101, at 148.

109. *Id.* at 143. Currently courts have varied; thus, the precedent is unclear. Certain courts followed suit with *DeGraffenreid* and failed to acknowledge intersectional identities. See *Jefferies v. Harris Cnty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (“We agree with Jefferies that the district court improperly failed to address her claim of discrimination on the basis for both race and sex.”); *Lim v. Citizens Sav. & Loan Ass’n*, 430 F. Supp. 802, 817 (N.D. Cal. 1976) (“Summary judgment is proper where, in a Title VII case, defendant’s affidavits clearly indicating absence of discrimination remain substantially uncontroverted or are opposed solely by plaintiff’s conclusory assertions.”). *But see Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417 (10th Cir. 1987) (“... evidence on racial treatment should be considered for this combined purpose here with the sexual harassment evidence.”); *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 484 (9th Cir. 1983) (“Nor may a prima facie case be established by assuming that any generalized pool of black females within the EAST unit is the appropriate pool for measuring disparate impact...”).

110. Crenshaw, *Demarginalizing*, *supra* note 101, at 143.

111. *Id.*

112. Kimberlé Crenshaw, *Why Intersectionality Can’t Wait*, WASH. POST (Sep. 24, 2015, 12:00 PM), <https://www.washingtonpost.com/news/in-theory/wp/2015/09/24/why-intersectionality-cant-wait/> (“Intersectional erasures are

adapting Crenshaw's intersectional framework to include the needs of Black women, systems of oppression must evolve to respond to the urgency and changing incentives that warrant all marginalized identities to be considered. Similar to Title VII, Title IX excludes students with marginalized, intersecting identities. Title IX elevates white, heterosexual, cisgender, able-bodied women as the image of survivorhood when, in reality, survivors fundamentally face many different forms of discrimination.¹¹³ The longer the implementation of Title IX continues to ignore students' diverse needs, the less likely Title IX will achieve its fundamental goal—equal educational opportunities for all students.

1. The Need for an Intersectional Lens in Title IX

Title IX implementation has always lacked an intersectional lens.¹¹⁴ As a result, students with marginalized identities have often been erased or excluded from Title IX's protections. Significant to understanding why Title IX needs to be intersectional requires examining how intersectionality affects sexual assault on college and university campuses.¹¹⁵ Students with marginalized identities experience sexual harassment differently than their peers who are white, cisgender, heterosexual, middle and upper class, able-bodied, and/or have U.S. citizenship status. This section discusses the societal stereotypes and sexualization, BIPOC women and students, students with disabilities, LGBTQIA+ students, and students without U.S.

not exclusive to black women. People of color within LGBTQ movements; girls of color in the fight against the school-to-prison pipeline; women within immigration movements; trans women within feminist movements; and people with disabilities fighting police abuse—all face vulnerabilities that reflect the intersections of racism, sexism, class oppression, transphobia, able-ism and more. Intersectionality has given many advocates a way to frame their circumstances and to fight for their visibility and inclusion.”).

113. Survivors come in many different shades, with many different lived experiences, with many different abilities, and fundamentally face many different types of discrimination.

114. See 118 CONG. REC. 5803 (1972).

115. See *generally* BAKER ET AL., *supra* note 66 (discussing how evidence suggests that women students of color report sexual harassment at disproportionately high rates).

citizenship status experience on campuses.¹¹⁶ Further, this section explains why marginalized students experience sexual misconduct at a disproportionate rate compared to their non-marginalized peers and underreport sexual misconduct. While each of the above identities are discussed individually, it is important to emphasize that these identities do not exist in a vacuum—they intersect with each other. We are choosing to separate various identities throughout our discussion because of the data limitations.¹¹⁷ Although we primarily focus on peer-to-peer assault, as Title IX scholars, William C. Kidder and Nancy Chi Cantalupo note, when a faculty member is the harasser, students who “already face intersectional and multidimensional disadvantages can unfairly experience even greater negative consequences and economic costs after suffering from [this] sexual harassment.”¹¹⁸

Before analyzing these identities, it is necessary to acknowledge the role class plays within this discussion. Class compounds the marginalization students face and creates different layers of oppression for different identities.¹¹⁹ Specifically, one study found

116. See, e.g., *id.* at 25 (“African American women are stereotyped as ‘Jezebels,’ Latinas as ‘hot-blooded,’ Asian Pacific Islander and Asian Pacific American (API/APA) women as ‘submissive, and naturally erotic,’ multiracial women as ‘tragic and vulnerable’ and historically ‘products of sexual and racial domination,’ and American Indian/Native American women as ‘sexual punching bag(s)’ who are ‘sexually violable’ as a ‘tool of war’ and colonization.”).

117. See Cantalupo, *And Even More of Us Are Brave*, *supra* note 64, at 78.

118. 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, 700 (2018).

119. WHITE? DEVELOPING WHITE RACIAL LITERACY 215 (2012) (“For example, poor whites, while oppressed through classism, are also elevated by race privilege, so that to be poor and Asian, for example, is not the same experience as being poor and white. Further, because of sexism, to be a poor white female will create barriers that a poor white male will not face due to gender privilege. However, while the poor white female will have to deal with sexism and classism, she will not have to deal with the racism that a poor Latina female will face. Thus, while all women experience sexism, they experience it differently based on its interaction with their other social group identities. Facing oppression in one area of social life does not “cancel out” your privilege in another; these identities will be more or less salient in different situations.”).

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that low-income women faced violent sexual assault at high rates.¹²⁰ Sexual trauma also comes with a cost: the cost of mental health services, additional tuition costs, payment for course change fees, or even the loss of scholarships.¹²¹ While one is never able to put a price on the trauma and harm survivors carry, low-income students with marginalized identities have less access to the necessary resources for their safety, well-being, and support services.

i. BIPOC Women and Students

For BIPOC women, both their womanhood and their race result in a racialized hyper-sexualization, stemming from a history of sexual exploitation.¹²² For Native women, rape was a tool for cultural genocide, rooted in the idea that only Christian women were in a “position of honor and respect.”¹²³ White males hypersexualize Asian and Pacific Islander (“API”) women as “exotic sexual toys,” using them as “economic pawns in the game of patriarchy and white supremacy.”¹²⁴ Some men purchase API women as mail-order brides,

120. Heather Littleton et al., *Beyond the Campus: Unacknowledged Rape Among Low-Income Women*, 14 VIOLENCE AGAINST WOMEN 269, 282 (2008).

121. See, e.g., Dana Bogler, *Gender Violence Costs: Schools Financial Obligations Under Title IX*, 125 YALE L.J. 2106, 2115 (2016) (discussing a 2008 study which placed the total pre-offense societal cost of rape and sexual assault at \$240,776 in 2008 dollars, or \$265,400 in 2015 dollars).

122. The following are merely examples of ways BIPOC women are subjected to sexual exploitation. This is not meant to capture the many, varied experiences BIPOC women have.

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

124. JESSICA C. HARRIS & CHRIS LINDER, *INTERSECTIONS OF IDENTITY AND SEXUAL VIOLENCE ON CAMPUS* 49–50 (2017); SUMI K. CHO, *CONVERGING STEREOTYPES IN RACIALIZED SEXUAL HARASSMENT* 352 (Adrien K. Wing ed., 2nd ed. 2003), <http://www.faculty.umb.edu/heike.schotten/readings/Cho,%20Racialized%20Sexual%20Harassment.pdf> (“Military involvement in Asia, colonial and neocolonial history, and the derivative Asian Pacific sex tourism industry establish power relations between Asia and the West, which in turn shape stereotypes of Asian Pacific women that apply to those in and outside of Asia.”).

forcing them to enter the United States.¹²⁵ API women continue to be plagued by the model minority myth, resulting in the sexualization of their stereotyped submissiveness.¹²⁶ The unveiling of Arab women's bodies was "a goal of colonial domination."¹²⁷ South Asian women are in a "state of constant facelessness" due to their erasure in conversations of sexuality.¹²⁸ For Black women, white men brutalized Black women's bodies through chattel slavery and perpetuated the belief that Black women were "sexually promiscuous, oversexed, [] corrupt women," and lacked agency over their bodies.¹²⁹ Historically, Latina women "endured rape as part of European colonialization by Spaniards."¹³⁰ As a result, the "hot-blooded" image of Latina women soon became a norm often met with the perception that they were "readily available and accessible for sexual use."¹³¹ Further, multiracial individuals were often the product of sexual violence.¹³² In each of these cases it is impossible to draw the line where race begins and gender ends.¹³³ The violence and harm these women experience is inextricably tied to both race and gender.¹³⁴

125. See Lisa Belkin, *The Mail-Order Bride Business*, N. Y. TIMES MAG. (May. 11, 1986), <https://www.nytimes.com/1986/05/11/magazine/the-mail-order-bride-business.html>.

126. CHO, *supra* note 124, at 351 ("Model minority traits of passivity and submissiveness are intensified and gendered through the stock portrayal of obedient and servile Asian Pacific women in popular culture.").

127. Meenakshi Gigi Durham, *Displaced Persons: Symbols of South Asian Femininity and the Returned Gaze in U.S. Media Culture*, 11 COMM. THEORY 201, 207 (2001) ("The concealment of Arab women's bodies behind the veil is a target of colonialist discourse...[t]he female body is located at the center of the techniques of colonial control and domination.").

128. *Id.* at 207 ("This visual absence is an injunction or code of command that bids South Asian women 'to be silent, to remove ourselves from areas or places where we may be seen.'").

129. HARRIS & LINDER, *supra* note 124, at 49–50.

130. Katherine Giscombe, *Sexual Harassment and Women of Color*, CATALYST BLOG (Feb. 13, 2018), <https://www.catalyst.org/2018/02/13/sexual-harassment-and-women-of-color/>.

131. Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 820 (1993).

132. HARRIS & LINDER, *supra* note 124, at 138.

133. Crenshaw, *Demarginalizing*, *supra* note 101, at 151.

134. *Id.* at 152.

In addition to the harmful stereotypes BIPOC women face, they also experience barriers to reporting sexual misconduct and are targets for sexual harassment. BIPOC women may find it difficult to believe they were wronged, speak up and pursue a formal reporting process, and gain justice through the formal reporting processes. Author and legal scholar, Maria Ontiveros, illustrates this with an example of a Mexican immigrant who did not report sexual harassment.¹³⁵ When asked why she did not report this misconduct, the woman responded “[A] woman who is raped in Mexico is the one at fault[.]”¹³⁶ In another instance, race scholar Sumi K. Cho describes how an API woman, after being appointed chair of the anatomy department, was called a “stupid slut,” a “dumb bitch,” and a “whore,” from a senior member of the department.¹³⁷ She initially filed a complaint but nothing was done. She had to take the case to federal court in order to be heard.¹³⁸ While these examples focus on sexual misconduct in the workplace, BIPOC women on college campuses face similar experiences of sexual misconduct. Often, BIPOC women turn to their race-based and gender-based communities for support. As a result, pressure to not report acts of sexual misconduct may manifest itself in two key ways—loyalty and essentialism.¹³⁹

When examining loyalty through the lens of race, “the community in which a woman [of color] lives and the culture in which she was raised” is integral to her understanding of sexual misconduct.¹⁴⁰ For example, if a BIPOC woman was raised to be more passive because of her intra-racial community, she may attempt not to bring attention to

135. Ontiveros, *supra* note 131, at 822–23 (Ontiveros’s article also describes how two-female coworkers urged one Latina worker not to report a sexual harassment incident, despite experiencing harassment themselves. The coworkers believed “exposing the perpetrators would undermine their movement and embarrass the Latino community.”).

136. *Id.* at 822.

137. CHO, *supra* note 124, at 354–55 (“Gender stereotypes with racial overtones painted [Ms.] Jew as an undeserving Asian Pacific American woman who traded on her sexuality to get to the top.”).

138. *Id.* at 356.

139. It is important to note that while BIPOC students struggle with these pressures of loyalty and essentialism, these are pressures that *all* intersectional identities face when it comes to sexual assault on college campuses.

140. Ontiveros, *supra* note 131, at 821.

herself.¹⁴¹ BIPOC women face factors like: submissiveness, taboos when discussing sexual matters, concerns about victim blaming, and impulses to deny harassment when the harasser is a member of their community as to not undermine the cohesion and reputation their community.¹⁴² In some instances, the concept of sexual harassment, itself, may be unknown across cultures and countries.¹⁴³ In fact, studies suggest that white women classify more behaviors as sexual harassment.¹⁴⁴ Exacerbating this loyalty BIPOC women feel towards their race-based community is the reality of how BIPOC men are treated in society.¹⁴⁵ Historically, BIPOC men have been viewed as sexually aggressive, particularly against white women, a myth still in full effect today, with Black men being incarcerated for sexual assault and rape at rates disproportionate to white perpetrators.¹⁴⁶ When their perpetrator is another BIPOC student, BIPOC women face the additional burden of choosing between perpetuating this myth by reporting or jeopardizing their own protection by remaining silent.¹⁴⁷

Another reason BIPOC women are particularly vulnerable on college campuses stems from essentialism.¹⁴⁸ As noted from the

141. *Id.*

142. Cantalupo, *And Even More of Us Are Brave*, *supra* note 64, at 29.

143. In Japanese, Mandarin, and Cantonese, there are “no words for sexual harassment.” Ontiveros, *supra* note 131, at 823. This emphasizes that if certain cultures “do not even have words to encompass the concept of sexual harassment, it is predictable that many women in those cultures are less likely to recognize harassing in behavior when it presents itself.” *Id.*

144. Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1241 (2006).

145. Mann, *Classrooms into Courtroom*, *supra* note 7, at 47.

146. See LAWRENCE A. GREENFELD, U.S. DEP’T OF JUST., SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 27 (1997) <https://www.bjs.gov/content/pub/pdf/SOO.PDF>.

147. See Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women’s Fight Against Race and Gender Ideology*, 3 UCLA WOMEN’S L.J. 1, 9–13 (1993) (discussing the myth of the “Black Rapist” and the “Promiscuous White Woman”).

148. We use the term “essentialism”, coined by Angela P. Harris, to refer to the idea that white women have been seen, and continue to be seen, as the default image of the campus survivor. This excludes marginalized, intersectional survivors. Fundamentally, essentialism is “. . . the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual

historical views of rape and sexual violence, white women have been, and continue to be, seen as the primary individuals who are victimized by sexual violence. Though, “when white women are essentialized as the sole survivors of sexual violence, the experiences of women of color become unnecessary to telling the story of sexual violence on campus.”¹⁴⁹ Meanwhile, BIPOC women are used to discriminatory behavior and are less inclined to report sexual harassment. BIPOC women are also less likely to complain or take any official action against white men.¹⁵⁰ As a result, when BIPOC women are not centered in conversations of campus sexual violence they are erased. This makes policies, practices, procedures, resources, and campaigns preventing sexual violence unaware of BIPOC women’s interests, further elevating the privilege of white women in these spaces.¹⁵¹

*ii. Students with Disabilities*¹⁵²

Society often views individuals with disabilities as incomplete, and when it comes to sexuality, they are typically thought to be asexual.¹⁵³ As a devalued community in society, individuals with

orientation, and other realities of experience. The result of this tendency toward gender essentialism, [Harris] argue[s], is not only that some voices are silenced in order to privilege others (for this is an inevitable result of categorization, which is necessary both for human communication and political movement), but that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice of ‘We the People’—among them, the voices of black women.” Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990). For a deeper discussion see Mann, *Classrooms into Courtrooms*, *supra* note 7, at 33–34.

149. HARRIS & LINDER, *supra* note 124 at 46.

150. *Id.*

151. *Id.*

152. In this section, we discuss students with all disabilities. Because disability is a broad term, we have decided to examine disabilities through the lens of physical, cognitive, and mental health disabilities. We want to ensure that we are not essentializing the experiences of students with disabilities, leaving space for the individual experiences students with disabilities have while also acknowledging that we are unable to delve into the many types of disabilities students have.

153. Shelby Hughes, et al, *(Dis)abling Blame: the Influence of Disability Status on Attributions of Blame Toward Victims of Sexual Assault*, 17 SEXUALITY RES. & SOC. POL’Y 219, 220 (2019), (In addition to the depictions, individuals with

disabilities are often dehumanized, leading perpetrators to feel justified in objectifying them.¹⁵⁴ When a survivor has a cognitive disability, society deems them as less credible, liars, or non-victims.¹⁵⁵ Essential to the empowerment of survivors with disabilities is the acknowledgement that “[a]ggregating diverse disabilities into one homogeneous category misses the nuanced relationships that various disabilities have with different types of sexual assault risk.”¹⁵⁶ This section explores the experiences survivors with physical, cognitive, and mental health disabilities and conditions face, explaining why disabilities need to be incorporated into Title IX solutions.

Survivors with disabilities disproportionately experience sexual violence on college and university campuses.¹⁵⁷ Some studies estimate that “as many as 80 percent of people with disabilities have been sexually assaulted more than once. . . . [D]ata from the U.S. Department of Justice [found that] people with disabilities are more than three times as likely to be sexually assaulted than non-disabled people.”¹⁵⁸ Specifically on college campuses, students with disabilities, perceived as “easy prey,” can become targets for serial perpetrators.¹⁵⁹ An Association of American Universities study “revealed that college students with disabilities were victims of sexual

disabilities are also seen as “lacking the capacity or desire for normal and satisfying sexual relationships.”).

154. *Id.* Often, perpetrators view those with disabilities as easier to dominate, and stereotype persons with disabilities as weak, undesirable, and lacking agency. *Id.*

155. Robyn Powell, *How Betsy DeVos’ Title IX Actions Will Hurt Students with Disabilities*, REWIRE NEWS GRP. (Oct. 24, 2017, 12:57 PM), <https://rewirenewsgroup.com/article/2017/10/24/betsy-devos-title-ix-actions-will-hurt-students-disabilities/>.

156. Margaret I. Campe, *College Campus Sexual Assault and Female Student with Disabilities*, J. INTERPERSONAL VIOLENCE, April 2019, at 19.

157. NAT’L COUNCIL ON DISABILITY, NOT ON THE RADAR: SEXUAL ASSAULT OF COLLEGE STUDENTS WITH DISABILITIES 11 (2018) [hereinafter NAT’L COUNCIL ON DISABILITY], https://ncd.gov/sites/default/files/NCD_Not_on_the_Radar_Accessible.pdf.

158. Powell, *supra* note 155.

159. *Id.* (Deaf students “experience high rate of sexual assault as well as inadequate supports for survivors.”); Campe, *supra* note 156, at 5 (two studies specifically looking at college students with disabilities and sexual assault further confirmed that college students with disabilities and sexual assault were at an increased risk of experiencing sexual assault.).

violence at higher rates than students without disabilities—31.6 percent of undergraduate females with disabilities reported nonconsensual sexual contact involving physical force or incapacitation, compared to 18.4 percent of undergraduate females without a disability.”¹⁶⁰

Survivors with physical¹⁶¹ and cognitive disabilities¹⁶² face many obstacles when pursuing Title IX claims on college and university campuses. The 2020 Rule requires that complaints and statements be in writing in order to begin the reporting process.¹⁶³ This can be prohibitive to meaningful participation in the process for survivors with disabilities, whether their disability is physical, cognitive, or both.¹⁶⁴ Additionally, campus authorities who lack requisite training to support students with disabilities prevent survivors with disabilities from reporting.¹⁶⁵ Past studies further note that students with disabilities are not provided accommodations at their institution for sexual misconduct services.¹⁶⁶ Students with disabilities also lack knowledge of the services their institution provides and fear administrators will not believe them.¹⁶⁷ Unfortunately, a lack of compliance with federal disability laws and the absence of

160. NAT’L COUNCIL ON DISABILITY, *supra* note 157, at 11 (“Female students with disabilities faced higher rates of sexual assault, compared to female peers without disabilities.”).

161. 42 U.S.C. §12102 (“major life activities include but are not limited to limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. . . . [And] the operation of major bodily function[s], including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”).

162. *See generally What is Intellectual Disability*, SPECIAL OLYMPICS, <https://www.specialolympics.org/about/intellectual-disabilities/what-is-intellectual-disability> (last visited Mar. 1, 2021).

163. 34 C.F.R. § 106.45(b)(2)(i) (2021).

164. State of New York Complaint, *supra* note 73, at 60–61.

165. Powell, *supra* note 155. This lack of training, plus the prior difficulties many students have had accessing disability related rights and services, chill survivors with disabilities from reporting. *See id.*

166. Patricia A. Findley et al., *Exploring the Experiences of Abuse of College Students with Disabilities*, 31 J. INTERPERSONAL VIOLENCE 2801, 2807 (2015).

167. *Id.*

institutional policies that outline how staff should respond to students with disabilities fundamentally compromises survivors with disability's abilities to obtain the resources that may be available to them.¹⁶⁸ Exacerbating this, a campus's practice of "siloeing" resources means that Title IX staff may not receive training regarding disability advocacy because the staff may believe that "disability issues" solely fall under the purview of their institution's disability office.¹⁶⁹ These failings by schools become inextricably tied to students with disabilities' mistrust in the institution, impacting how they choose to engage or disengage with the sexual assault reporting processes.

Mental health conditions "are health conditions involving changes in emotion, thinking or behavior (or a combination of these)" and are often "associated with distress and/or problems functioning in social, work, or family activities."¹⁷⁰ As a result, survivors with mental health conditions face increased vulnerabilities. For survivors with mental health conditions, "sexual assaults often exacerbate symptoms."¹⁷¹ For example, survivors of sexual assault "are three times more likely to suffer from depression, six times more likely to have Post Traumatic Stress Disorder [PTSD], thirteen times more likely to abuse alcohol, twenty-six times more likely to abuse drugs, and four times more likely to contemplate suicide."¹⁷² All of these conditions play a role in how survivors interact with their educational institution and the Title IX process.

168. Students are more likely to access resources for sexual assault if they know their college policies. *See* NAT'L COUNCIL ON DISABILITY, *supra* note 157, at 47.

169. *Id.* at 48, 50.

170. *What is Mental Illness?*, AM. PSYCHIATRIC ASS'N (Aug. 2018), <https://www.psychiatry.org/patients-families/what-is-mental-illness>.

171. Powell, *supra* note 155.

172. National Women's Law Center Complaint, *supra* note 71, at 18.

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iii. LGBTQIA+¹⁷³ Students

LGBTQ students face disproportionate rates of sexual assault on college and university campuses and are less likely to report acts of sexual assault than their non-LGBTQ counterparts. Students who identify as transgender (“trans”), genderqueer, non-conforming, or questioning experience sexual assault at the highest rates.¹⁷⁴ In particular, bisexual, lesbian, and transgender individuals face disproportionate rates of victimization with nearly half of all bisexual women and roughly two-thirds of transgender individuals experiencing sexual assault in their lifetimes.¹⁷⁵ The disproportionate rates of victimization of the LGBTQ community is critical to understanding the scope of the problem.

Those within the LGBTQ community are often targeted because of their marginalized status. Trans BIPOC feminine individuals are at

173. While the title of this section is LGBTQIA+, which in this article stands for lesbian, gay, transgender, queer, intersex, asexual, and leaves space for other identities, the unfortunate reality is that there has not been a lot of research about the intersection of Title IX and intersex students, asexual students, and students represented in the plus sign. As a result, this piece will only be focusing on the LGBTQ community. However, in order to be inclusive and representative, we wanted to make sure that we acknowledged that LGBTQ goes beyond just those identities. While we wholeheartedly believe that intersex students, asexual students, and students represented in the plus sign experience disproportionate rates of sexual assault on college and university campuses and have similar trends of underreporting incidents of sexual assault, we are unable to include these communities because we do not have literature to back these assertions in our analysis. Further, we also want to acknowledge the intersectionality within the LGBTQIA+ community. For this reason, inclusive data collection is essential to guard against the erasure of certain identities, as will be discussed *infra* Part III. *LGBTQ+ Glossary*, IT GETS BETTER (Apr. 28, 2020), <https://itgetsbetter.org/blog/lesson/glossary/>.

174. Adrienne Green & Alia Wong, *LGBT Students and Campus Sexual Assault*, THE ATLANTIC (Sept. 22, 2015), <https://www.theatlantic.com/education/archive/2015/09/campus-sexual-assault-lgbt-students/406684/>.

175. *Id.*; Laura J. Blauenstein, *Sexual Consent: Perception of Ambiguous Sexual Encounters of LGBTQ+ and Cisgender, Heterosexual Individuals* 28 (Aug. 2018) (unpublished Master thesis, University of Nevada, Reno), https://scholarworks.unr.edu/bitstream/handle/11714/4526/Blauenstein_unr_0139M_12663.pdf?sequence=1&isAllowed=y.

an even higher risk of sexual victimization.¹⁷⁶ One study found that disclosing LGBTQ status “is associated with having a greater risk of victimization.”¹⁷⁷ For example, there is “a perception that LGBTQ+ people consent to a higher degree than their cisgender, heterosexual counterparts to a sexual interaction” where sexual consent was explicitly revoked,¹⁷⁸ and that LGBTQ behavior is stereotyped as being very sexually permissive and promiscuous.¹⁷⁹ The disproportionate targeting and devaluing of members of the LGBTQ community stems from the notion that a perpetrator’s sexual assault against LGBTQ persons does not “count” as sexual assault because consent is inherent.¹⁸⁰ This perception of consent is used to justify the sexual violation of LGBTQ individuals. Although members of this community are disproportionately impacted by high rates of sexual misconduct, the lack of attention on this issue renders the prevalence of sexual assault against LGBTQ individuals on campuses seemingly invisible.

Historically, the LGBTQ community has been viewed as sexually deviant and immoral.¹⁸¹ Society also views members of the LGBTQ community as hypersexual.¹⁸² Gay men are “assumed to be more promiscuous and less inhibited in their sexual expressions.”¹⁸³ Trans bodies are seen as “sexual curiosities” rather than “whole people,”¹⁸⁴ with trans women facing transmisogyny.¹⁸⁵ Moreover, transmisogyny

176. See Sara Matsuzaka & David E. Koch, *Trans Feminine Sexual Violence Experiences: The Intersection of Transphobia, and Misogyny*, 34 J. WOMEN & SOC. WORK 28, 28 (2019); Mirella J. Flores et al., *Transgender People of Color’s Experiences of Sexual Objectification: Locating Sexual Objectification Within a Matrix of Domination*, 65 J. COUNSELING PSYCHOL. 303, 314 (2018).

177. Matsuzaka & Koch, *supra* note 176, at 31.

178. Blauenstein, *supra* note 175, at 72.

179. *Id.* at 78.

180. See *id.* at 87.

181. Sarah Jane Brubaker et al., *Measuring and Reporting Campus Sexual Assault: Privilege and Exclusion in What We Know and What We Do*, 11 SOC. COMPASS e12543, e12553(2017).

182. *Id.*

183. *Id.*

184. Flores et al., *supra* note 176, at 314.

185. Transmisogyny is “the intersection of transphobia and misogyny” or “the irrational fear of transgender identities that manifests in attitudes and beliefs, and behaviors that devalue, stigmatize, or render invisible transgender populations” and

aids in the sexual victimization of trans women,¹⁸⁶ where trans women face both misogynistic attitudes and transphobia.¹⁸⁷ Bisexual women are also seen as promiscuous,¹⁸⁸ and although bisexual people make up more than half of the lesbian and gay population, their sexuality is assumed based on their partner.¹⁸⁹

Magnifying the disproportionate rate of sexual assault in the LGBTQ college community, is that LGBTQ students are less likely to report sexual assault than their cisgender and heterosexual peers. When environments are more homophobic, biphobic, transphobic, or sexist they devalue sexual and gender minorities, resulting in violence against LGBTQ populations.¹⁹⁰ College campuses failing to include LGBTQ students¹⁹¹ and institutions failing to provide appropriate responsive healthcare¹⁹² creates barriers to LGBTQ sexual assault survivors reporting incidents of assault. Ignorant campus and Title IX staff may misgender survivors or completely invalidate survivors of same-sex encounters. Furthermore, loyalty to one's identity group can force LGBTQIA+ survivors to choose between their own safety (and the safety of other students) or solidarity with their campus's LGBTQIA+ community.¹⁹³

With the Supreme Court's recent decision in *Bostock v. Clayton County*, Title IX jurisprudence and interpretations will likely grow to include LGBTQ students. *Bostock* held that the word "sex" in Title

misogyny "an intense dislike and/or dismissal of those who are feminine." Matsuzaka & Koch, *supra* note 176, at 29.

186. *Id.* at 30.

187. *Id.*

188. Heron Greenesmith, *We Know Biphobia Is Harmful. But Do We Know What's Behind It?*, REWIRE NEWS GRP. (Apr. 25, 2018, 12:17 PM), <https://rewirenewsgroup.com/article/2018/04/25/know-biphobia-harmful-know-whats-behind/>.

189. Heron Greenesmith, *Addressing the Most Forgotten Letter in LGBT*, ADVOCATE (Sept. 27, 2016, 5:02 AM), <https://www.advocate.com/commentary/2016/9/27/addressing-most-forgotten-letter-lgbt>.

190. Robert W.S. Coulter & Susan R. Rankin, *College Sexual Assault and Campus Climate for Sexual-and-Gender-Minority Undergraduate Students*, 35 J. INTERPERSONAL VIOLENCE 1351, 1353 (2020).

191. *See id.*

192. Blauenstein, *supra* note 175, at 42.

193. For a discussion on loyalty, *See supra* Part II.C.

VII applies to discrimination based on sexual orientation and gender identity.¹⁹⁴ Despite *Bostock* being a Title VII case, the 11th Circuit and the 4th Circuit both applied *Bostock's* interpretation of “sex” to Title IX cases involving bathroom usage.¹⁹⁵ While this is a step in the right direction, Title IX still has a long way to go, both in incorporating this definition as applied to sex discrimination, and in addressing the particularized harms the LGBTQIA+ community experiences from sexual assault on college campuses.

*iv. Students Without U.S. Citizenship Status*¹⁹⁶

Students without U.S. citizenship status (“citizenship status”) face countless stressors that other students do not have to face. Depending on the unique circumstances of these students, these stressors may look different. For some, it may include being in a new country, learning a new language, and engaging with a new culture. For others, it may include balancing familial expectations and generational trauma, and the stress and fear of deportation of themselves or their family members. Sexual assault further compounds these stressors for students without citizenship status.

As a student in scholar Jessica Harris’s article powerfully stated:

I need people to understand what . . . sexual violence looks like in an immigrant household, and why that happens, and the anxieties and stressors of being in a house like that. What immigration does to you. Intergenerational trauma is so big, you need to understand that when I talk about sexual violence . . . I carry that pain.¹⁹⁷

194. *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731, 1757 (2020).

195. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020); *Adams v. Sch. Bd. of St. Johns City*, 968 F.3d 1286, 1296 (11th Cir. 2020).

196. This section will focus on students without U.S. citizenship status. We broadly define this group of students, including but not limited to international students studying in the U.S. with a Visa, undocumented students, permanent residents, and beyond. While citing specific studies and texts we use their prescribed terms of “international” or “undocumented,” the overarching phrase we use throughout this section will be the more inclusive “students without U.S. citizenship status.”

197. Jessica Harris, *Women of Color Undergraduate Students’ Experiences with Campus Sexual Assault: An Intersectional Analysis*, 44 REV. HIGHER EDUC. 1, 17 (2020).

In 2019, the total number of international students enrolled in U.S. higher education totaled 1,096,299, or 5.5 percent of the total U.S. higher education study body.¹⁹⁸ Additionally, statistics suggest that in 2018, 2% of students were undocumented.¹⁹⁹ This highlights the particular importance of addressing citizenship and immigration status on college campuses.

Students without citizenship status are more likely to be sexually assaulted than students who have U.S. citizenship status.²⁰⁰ These students are more likely to be victimized due to their perceived vulnerabilities in reporting sexual misconduct, especially as it relates to involving police.²⁰¹ For example, female international students are at-risk of entering a relationship with a male partner that has a power imbalance.²⁰² More surprisingly, only two major survey conducting campus climate surveys for sexual harassment measured nationality or citizenship.²⁰³ Neither survey reported any findings related to this variable.²⁰⁴ While we are unable to provide empirical data in regards to sexual harassment on campus, it is important that we acknowledge these students' experiences.

Similarly, to other marginalized identities, students without citizenship status also underreport instances of sexual assault they face on college campuses. One reason students without citizenship status do not report is because they may feel unwelcome on campuses.²⁰⁵

198. *International Student Enrollment Statistics*, EDUC. DATA (Apr. 12, 2020), <https://educationdata.org/international-student-enrollment-statistics#us-students-abroad> (International students refers to those students who utilize a student visa to study in the U.S.).

199. Miriam Felblum et al., *Undocumented Students in Higher Education How Many Students are in U.S. Colleges and Universities, and Who Are They?*, NEW AM. ECON. 1 (Apr. 2020), <https://www.presidentsalliance.org/wp-content/uploads/2020/07/Undocumented-Students-in-Higher-Education-April-2020.pdf> (New American Economy's 2018 American Community Survey indicates that more than 450,000 students are undocumented, meaning that they do not have or no longer have the requisite documentation to legally be within the U.S.).

200. Brubaker, *supra* note 181, at 8.

201. Emily J. Bonistall Postel, *Violence Against International Students: A Critical Gap in Literature*, 21 TRAUMA, VIOLENCE & ABUSE 71, 73 (2017)..

202. Brubaker, *supra* note 181, at 8.

203. *Id.*

204. *Id.*

205. Brubaker, *supra* note 181, at 11.

Differences in communication methods, language barriers, and overall cultural ideals and behavioral norms can reinforce the feeling that the student is an outsider.²⁰⁶ Important to this discussion is the idea of cultural capital or “the experiences of an individual, including education, maternal language, and accent among other advantages that encourage social mobility in a particular society.”²⁰⁷ Some students without citizenship status, particularly international students, have to transition into a new country with a new culture, and for many this cultural adaptation is fraught with challenges, making it easier to feel like an outsider.²⁰⁸

Race can exacerbate this feeling. A 2016 study found that more than 60% of all international students came from China, India, Saudi Arabia, and South Korea.²⁰⁹ Although cultural differences may increase international students’ vulnerability for sexual victimization,²¹⁰ findings indicate that white international students are more accepted²¹¹ and did not report negative race-based experiences. In contrast, international BIPOC students, “reported feelings of inferiority, encountered hostility related to their non-fluency in English,” and experienced racial discrimination, further emphasizing the role race plays.²¹²

Another reason students without citizenship status, and particularly international students, underreport is that they may lack knowledge of their campus’s sexual assault and Title IX policies.²¹³ The lack of knowledge is a failure on the part of the educational institution, not on the part of international students. International

206. *Id.* at 13.

207. See Shannon Hutcheson & Sarah Lewington, *Navigating the Labyrinth: Policy Barriers to International Students’ Reporting of Sexual Assault in Canada and the United States*, 27 EDUC. L. 81, 93 (2017).

208. *Id.*

209. Bonistall Postel, *supra* note 201, at 72.

210. *Id.* at 80.

211. A 2007 study found that “[s]tudents from Europe, Canada, and New Zealand did not report negative experiences based on their race or culture and found the host country to be warm and welcoming.” *Id.* at 74.

212. The same study specifically found that BIPOC students from Asia, India, Latin America, and the Middle East faced this negative treatment in the host country. *Id.*

213. Brubaker, *supra* note 181, at 13.

students may not have an understanding of how the U.S. or their particular institution defines sexual misconduct.²¹⁴ As a result, students without citizenship status may not understand the Title IX reporting process, including their rights, their options to seek help, and the procedural classification of the violence they experienced.²¹⁵ A study conducted at Southern Arkansas University found that while domestic students did not have a sufficient understanding of Title IX, students without citizenship status had extremely limited knowledge of Title IX.²¹⁶

Finally, students without citizenship status may fear the consequences that arise from reporting, such as deportation, or risking their or their family's status in the U.S.²¹⁷ Students who are on visas may worry that reporting may compromise their opportunity for education. For example, students under an F-visa must maintain full-time enrollment and notify officials if they drop below full-time status.²¹⁸ If students without citizenship status do not comply with the conditions of declaring a change to their enrollment status, it may mean the loss of their visa status.²¹⁹ Students without citizenship status who face sexual assault on campus, like all survivors, may be unable to concentrate, and struggle to perform academically, professionally, or personally.²²⁰ As a result, students may need to drop classes, but without first obtaining the requisite approval, students may have to reapply for and risk losing student status.²²¹ While Title IX may provide resources like course load adjustments, housing accommodations, additional time to complete course requirements, or even school transfers, students without citizenship status may not be able to benefit from these accommodations and may be left struggling in silence.²²²

214. *Id.*

215. *Id.*

216. Hutcheson & Lewington, *supra* note 207, at 90.

217. Brubaker, *supra* note 181, at 12.

218. Hutcheson & Lewington, *supra* note 207, at 86.

219. *Id.*

220. *Id.*

221. Reapplying for a student visa “can be an arduous process and may require the student to return to his or her home country.” *Id.* at 86–87.

222. *See* Bonistall Postel, *supra* note 201, at 78.

III. ADDRESSING THE PROBLEM

The heightened vulnerabilities of students with marginalized identities and the shortcomings in Title IX implementation require the DOE to implement an intersectional framework in addressing sexual misconduct. While Title IX under the Obama administration did a better job of balancing the interests of survivors and respondents as monolithic categories, its focus on the discipline process resulted in too many students being excluded from its protections.²²³ DeVos's DOE made it clear that there is existing support to narrow Title IX even further by focusing on discipline and neglecting education and prevention efforts.²²⁴ With the Biden administration, comes the possibility for change.²²⁵ The best way forward for the DOE is to first, leverage Title IX's focus on education and prevention by centering voices of marginalized students, working to prevent sexual misconduct, and fostering an inclusive campus community. Second, where sexual misconduct does occur, the DOE should focus on a transformative justice approach to create space for an intersectional analysis in place of current disciplinary processes.

Part III.A. explains why Title IX needs to implement preventative and educational measures. Part III.B. then argues that schools should implement a transformative justice model as an alternative process to the Title IX discipline procedures. The section first discusses how some schools began to utilize restorative justice in place of traditional disciplinary procedures. It then analyzes restorative justice's inherent shortcomings that can be solved through transformative justice.²²⁶

223. See Silbaugh, *supra* note 9, at 1073 (“Maybe it is *not* too much to ask that instead of solely responding to rapes that happen, they are required to do the evidence-based prevention programming and design interventions that change the culture and incidence of sexual assault, precisely because they do rise to this kind of challenge well.”).

224. National Women's Law Center Complaint, *supra* note 71, at 27–28.

225. Jeremy Bauer-Wolf, *Biden Said He Wants to Undo DeVos' Title IX Rule. How Would He Replace It?*, HIGHER EDUC. DIVE (Oct. 28, 2020), <https://www.highereddive.com/news/biden-said-he-wants-to-undo-devos-title-ix-rule-how-would-he-replace-it/587853/>.

226. Transformative justice is one example of how marginalized survivors may be centered in the transformation process and their intersectional identities included. This is only *one* example, but not the *only* example of establishing intersectional processes for marginalized survivors and respondents.

A. Building Community Through Education and Prevention

Instead of focusing on the disciplinary aspects of the statute, universities and colleges should utilize Title IX in a comprehensive way to include preventative and educational measures.²²⁷ Even brief training efforts “can result in significant decreases in rape-supportive attitudes,” which in turn can lead to both a decrease in incidents of and tolerance for sexual misconduct.²²⁸ Title IX needs to move beyond consent and bystander training, and instead take a holistic and “multisectoral approach that [among other things] focuses on diversity, substance use, mental health, and sex and sexual assault education.”²²⁹ Centering marginalized identities in prevention and education efforts surrounding sexual misconduct on campuses ensures that institutions are accountable to all students within their community; thus, enabling schools to foster a community based in consent that is inclusive of the nuanced experiences of all students.

The Clery Act drives most of the prevention and education efforts in schools.²³⁰ Enforced by the DOE, one of the provisions of the Clery Act mandates schools provide awareness and prevention training on sexual misconduct.²³¹ Through the Clery Act, the current programs aimed at prevention and education are required to “include material on bystander intervention and risk reduction aimed at

227. See Silbaugh, *supra* note 9, at 1073.

228. Jessica Ann Ueland, Effects of Sexual Assault Education on College Students’ Rape-Supportive Attitudes (May 2011) (unpublished Honors Program Thesis, University of Northern Iowa) (on file with University of Northern Iowa).

229. While we agree with the authors’ claim that we need more comprehensive prevention and education measures on college campuses, we disagree with some of their conclusions. In particular, the claim that many offenders do not intend to harm, among other things. Additionally, though the authors use the term to refer to members of a community, we also note that their use of the term “citizens” inherently excludes students without citizenship status. JENNIFER S. HIRSCH & SHAMUS KHAN, SEXUAL CITIZENS: A LANDMARK STUDY OF SEX, POWER, AND ASSAULT ON CAMPUS²⁶⁴ (2020).

230. Silbaugh, *supra* note 9, at 1073–74.

231. *Id.*; *Summary of the Jeanne Clery Act: A Compliance and Reporting Overview*, CLERY CTR. [hereinafter *Summary of the Jeanne Clery Act*], <https://clerycenter.org/policy-resources/the-clery-act/> (last visited Mar. 2, 2021).

recognizing the warning signs of these crimes.”²³² While these training programs are crucial, they do not go far enough. They are not the Clery Act’s main focus; the Clery Act is primarily concerned with “the accurate reporting of crimes.”²³³ The Clery Act’s more limited scope restricts the DOE’s ability to set additional education standards for schools with the aim of creating equal educational opportunity.²³⁴ Consequently, oversight of school compliance and the efficacy of consent and bystander trainings is not as comprehensive as it would be if prevention and education were instead mandated by Title IX.²³⁵ Under Title IX, the DOE has much greater capacity to compel colleges to take the necessary steps to reduce sexual misconduct.²³⁶

The DOE’s “ability to develop a far more comprehensive approach to assault prevention under Title IX” enables it to account for marginalized students in attempting to improve campus communities.²³⁷ One way the Biden administration can effectively do this is through gathering data on the unique needs of each campus community, as this data is unconscionably sparse.²³⁸ Data can help determine whether schools’ disciplinary policies have racial disparities and prevent the erasure of marginalized students’ experiences of sexual violence from sexual misconduct narratives on campus.²³⁹ Institutions of higher education are in positions to help facilitate the gathering of this information,²⁴⁰ although we caution the

232. *Victim Rights, Options, and Resources*, under *Summary of the Jeanne Clery Act* *supra* note 236.

233. *See* Silbaugh, *supra* note 9, at 1073–74.

234. “While the focus of the Clery Act remains the accurate reporting of crimes, it will serve as a limited and defined mechanism for getting colleges to introduce education and prevention strategies to students. However, the Clery Act, unlike Title IX, does not mandate equality in the provision of education; a school can check off requirements under the new Clery Amendments without evaluating their efficacy or revising them toward the particular goal of equal educational opportunity.” *Id.* at 1074.

235. *Id.*

236. *Id.*

237. *Id.*

238. Cantalupo, *And Even More of Us Are Brave*, *supra* note 64, at 74–75, 77–78.

239. *Id.* at 77–78.

240. *See* Mann, *Classrooms into Courtrooms*, *supra* note 7, at 53.

overreliance on schools in this role.²⁴¹ From an administrative perspective, it is not in a school's best interest to collect data on the ways it fails students, and many individuals in leadership positions do not have the preparation or knowledge necessary to collect this data.²⁴² Instead, the DOE should commission third-party researchers and solicit direct input from the marginalized students differently impacted by sexual misconduct. Community building efforts will not be effective if student experiences are ignored.

In addressing sexual misconduct on campus, a shift in both culture and the understanding of how students relate to one another is crucial. The DOE leveraged Title IX to make these massive shifts before in the restructuring of college sports, successfully calling on schools to create a culture of equality if one did not already exist.²⁴³ In creating a culture where students see themselves as having a duty to each other and their safety, schools will help provide a basis for non-punitive community healing when addressing harm that occurred on campus.²⁴⁴

241. "A generation of researchers had toiled to collect and analyze data, many with very little support from their home institutions and sometimes facing active opposition." HIRSCH & KHAN, *supra* note 229, at 254.

242. "Assessment and accountability are viewed by many as evils to be avoided rather than as tools for improving what[educational institutions] do or the quality of their institution." Robert M. Diamond, *Why Colleges Are So Hard To Change*, INSIDE HIGHER ED (Sept. 8, 2006), <https://www.insidehighered.com/views/2006/09/08/why-colleges-are-so-hard-change>.

243. Silbaugh, *supra* note 9, at 1074–75.

244. Johonna Turner, *Creating Safety for Ourselves*, in COLORIZING RESTORATIVE JUSTICE: VOICING OUR REALITIES 299–300 (Edward C. Valandra & Waṅbli Wap̄háha Hokšíla eds., 2020).

*B. Using Transformative Justice in Place of the Formal
Title IX Process*²⁴⁵

Transformative justice was largely born out of the labor of women, particularly BIPOC women, to address harm in a way that does not perpetuate further violence.²⁴⁶ As one of the activists that helped develop transformative justice, Ruth Morris viewed crime as “an opportunity to build a more caring, more inclusive, more just community.”²⁴⁷ Transformative justice expands upon the principles of restorative justice by addressing the historical injustices and social inequities of acts of harm.²⁴⁸ Unlike restorative and retributive justice,²⁴⁹ it seeks to enact change on a structural level “while helping those whose lives were affected by interpersonal harms.”²⁵⁰ Morris found the rhetoric of “restorative” as problematic, because it sought to change the world back to the way it was prior to the crime.²⁵¹ Instead,

245. It is important to be mindful that alternative processes are often inequitably applied. Any system that either replaces or supplements the traditional Title IX process must account for these gaps in justice. Rebecca Beitsch, *States Consider Restorative Justice As Alternative to Mass Incarceration*, PBS (Jul. 20, 2016), <https://www.pbs.org/newshour/nation/states-consider-restorative-justice-alternative-mass-incarceration> (“It’s only offered to people perceived as being good candidates, and those are often white people and wealthy people,” [Liz Porter-Merrill] said. “In some decisions it’s unintentional, but I think the big problem is subconscious discrimination.”)

246. *Understanding Transformative Justice and Restorative Justice*, SEXUAL ASSAULT CTR. EDMONTON, <https://www.sace.ca/learn/transformative-restorative-justice/> (last visited Mar. 2, 2021).

247. M. Kay Harris, *Transformative Justice: The Transformation of Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE* 555, 558 (Dennis Sullivan & Larry Tiff eds., 2006) [hereinafter Harris, *Transformative Justice*].

248. Unlike retributive justice and restorative justice, transformative justice is “more able to include in its analysis and in its processes the critical role that social class and race play in defining who is a victim and who is a criminal.” See Ray Morris & Ruth Morris, *What is Transformative Justice?* 1 (Feb. 2001) (unpublished material), See Ray Morris & Ruth Morris, *What Is Transformative Justice?* 1 (Feb. 2001) (unpublished material), http://www.justiceaction.org.au/actNow/Briefs_PDF/CalltoTJWhatisTJ.pdf.

249. *Id.*

250. Harris, *Transformative Justice*, *supra* note 248, at 559.

251. *Id.* at 557.

she saw this alternative framework of transformative justice allowed survivors of harm to “recognize they can transform the world positively from their pain.”²⁵² For offenders, Morris argued that no one wanted to restore offenders to the marginalized, enraged, and disempowered conditions they were previously in.²⁵³ This section first defines restorative justice and discusses its usage in campus discipline procedures. It then examines the shortcomings of restorative justice, before arguing that transformative justice is the best model to implement in lieu of the punitive Title IX process.

*1. Restorative Justice and its Usage in Campus
Discipline Procedures*

In order to understand the importance of transformative justice as compared to restorative justice, it is essential to lay a foundation of what restorative justice is and how it has been used in schools. Restorative justice is influenced by the practices of Indigenous groups in North America.²⁵⁴ While the robust Indigenous legal traditions helped shape restorative justice, there is also evidence that restorative justice influenced modern day Indigenous justice programs.²⁵⁵ Additionally, not all Indigenous justice systems incorporate restorative justice practices, and, of those who do, these practices often differ among systems.²⁵⁶ Efforts to address community and individual harm helps reestablish these bonds and repair harm without criminal labels.²⁵⁷ Beginning in the 1970s, restorative justice was used as an

252. *Id.*

253. *Id.* at 557.

254. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 43, 62 (2d ed. 2015); LARRY CHARTRAND & KANATASE HORN, *A REPORT ON THE RELATIONSHIP BETWEEN RESTORATIVE JUSTICE AND INDIGENOUS LEGAL TRADITIONS IN CANADA* 5 (2016) <https://www.justice.gc.ca/eng/rp-pr/jr/rjilt-jrtja/rjilt-jrtja.pdf>.

255. CHARTRAND & HORN, *supra* note 255, at 14.

256. Matthew L.M. Fletcher, *Tribal Justice Systems* 2, 27 (Jan. 14, 2014) (Legal Studies Research Paper No. 11-23, Michigan State University), <http://ssrn.com/abstract=2378526>.

257. Angelique EagleWoman, *Jurisprudence and Recommendations for Tribal Court Authority Due to Imposition of U.S. Limitations*, 47 *MITCHELL HAMLINE L. REV.* 339, 357 (2021).

institutional vehicle²⁵⁸ to work toward healing community trauma, finding success in the Truth and Reconciliation Commission used by South Africa to address its brutal history of apartheid, in limited applications within the U.S. criminal justice system, and as an alternative to discipline in some schools.²⁵⁹

Fundamentally, restorative justice begins with a concern for survivors²⁶⁰ and helps them to obtain control over the harm done to them, while helping offenders (when appropriate) work to understand how their actions impact the survivor and the greater community.²⁶¹ Restorative justice allows survivors of harm to “define their needs rather than having others or a system define needs for them,”²⁶² while also emphasizing that any participation on the part of the survivor is completely voluntary.²⁶³ There may be the perception that survivors *must* forgive their offender, but this is not the case.²⁶⁴ For those who have caused harm, restorative justice frameworks hold them accountable to the survivor and the survivor’s needs,²⁶⁵ with the responsibility to repair the harm falling on the offender.²⁶⁶ Thus, a restorative justice framework will not work if those that have harmed cannot acknowledge their responsibility.²⁶⁷ While the trauma or

258. Importantly, restorative justice has also sometimes been used to oppress marginalized communities, as well. Juan M. Tauri, *An Indigenous Commentary on the Globalisation of Restorative Justice* 12 BRITISH J. COMM. JUST. 35, 40 (2014).

259. ZEHR, *supra* note 254, at 34.

260. *Id.* at 34.

261. *Id.* at 25, 27, 36.

262. The three foundational questions in restorative justice ask: (1) “Who has been hurt?”; (2) “What are their needs?”; and (3) “Whose obligations are these?” *Id.* at 33, 34.

263. *Id.* at 60 (“This journey belongs to victims—no one else can walk it for them—but an effort to put right can assist in this process, although it can never fully restore.”).

264. There is no pressure on the survivor to forgive or reconcile. *Id.* at 15.

265. *Id.*

266. *Id.* at 35.

267. *Id.* at 60 (“Normally, conferences are not held if the offending person denies all responsibility, though often they do not acknowledge full responsibility prior to the conference.”).

victimization of offenders²⁶⁸ does not “absolve responsibility for offending behavior,” addressing it can help prevent the continuation of the harmful conduct.²⁶⁹

In the U.S., schools commonly implement restorative justice, including higher education institutions.²⁷⁰ While Title IX allows for informal resolution of complaints, provided both parties voluntarily agree to participate,²⁷¹ schools maintain discretion on whether to allow such processes to take place.²⁷² Restorative justice is a type of informal resolution, and conferences usually include: “(1) referral and intake; (2) preparation; (3) conference; and (4) monitoring and reintegration.”²⁷³ At any time the survivor or the offender may choose to no longer pursue this process.²⁷⁴ The respondent prepares “by creating a statement, meeting with facilitators, and brainstorming how they can address the harm they created and rebuild trust.”²⁷⁵ The conference is a meeting where the survivor, the respondent, and other community members attend, and the respondent describes and takes responsibility for his or her acts.²⁷⁶ At its closing, a redress plan, theoretically established by all involved, identifies the “ways in which the accused will be held accountable.”²⁷⁷ While restorative justice is

268. *Id.* at 43 (“And even when they have not been directly victimized, many people who offend perceive themselves to be victims. These harms and perceptions of harms may be an important contributing cause of crime.”).

269. “And even when they have not been directly victimized, many people who offend perceive themselves to be victims. These harms and perceptions of harms may be an important contributing cause of crime. . . . [W]e cannot expect offending behavior to stop without addressing this sense of victimization.” *Id.* at 43.

270. *Id.* at 13.

271. 34 C.F.R. § 106.45(b)(9) (2021).

272. *Id.*

273. This is one way, but not the only way, that a restorative justice model can operate. We include an example to illustrate how the process can look to those unfamiliar with restorative justice. See Katie Vail, Comment, *The Failings of Title IX For Survivors of Sexual Violence: Utilizing Restorative Justice on College Campuses*, 94 WASH. L. REV. 2086, 2110 (2019).

274. *Id.*; § 106.45(b)(9), *supra* note 271.

275. Vail, *supra* note 273, at 2110.

276. Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365, 393 (2016).

277. For example, plans “may include reparations, counseling, accommodations in class scheduling to avoid contact between the parties, and a

growing in popularity as an alternative to punitive disciplinary processes, there are some shortcomings in the way the U.S. implements it.²⁷⁸ Implementing a transformative justice model can resolve these shortcomings.

2. *Why Transformative Justice Works: The Shortcomings of Restorative Justice*

While restorative justice can be an effective tool in addressing harm in schools,²⁷⁹ its shortcomings cannot go unaddressed. One of the primary critiques is that the restorative justice model does not address pre-existing power dynamics.²⁸⁰ The term “restoring” implies that there was previously justice, when, in reality, most individuals who experience harm have long been survivors of systemic oppression.²⁸¹ Ignoring this runs contrary to the use of an intersectional lens. Understanding the privilege and/or marginalization of survivors and offenders is essential in validating the unique experiences marginalized survivors have on campuses and in offering a fuller picture of the scope of the harm to the individuals involved and the community.²⁸²

Another criticism of restorative justice is that it is often only utilized in response to harm.²⁸³ The restorative justice’s harm-then-response model fails for the same reasons Title IX’s exclusive focus on the disciplinary process fails—it leaves little, if any, space designated “to improve conditions and relations so that [harm] and other injury are less likely to occur.”²⁸⁴ Focusing on this harm-then-response model also reinforces harm as the “status quo,” viewing it as

specification that if the accused fails to meet these requirements a traditional sanctioning mechanism will be used.” *Id.*

278. *Id.* at 394.

279. See Katherine Knott, *How One University Went All-In on Restorative Justice*, CHRON. HIGHER EDUC. (Oct. 18, 2016), https://www.chronicle.com/article/how-one-university-went-all-in-on-restorative-justice/?cid2=gen_login_refresh&cid=gen_sign_in.

280. Collins, *supra* note 276, at 395.

281. Harris, *Transformative Justice*, *supra* note 247, at 557.

282. Turner, *supra* note 244, at 291–92.

283. Harris, *Transformative Justice*, *supra* note 247, at 557.

284. *Id.* at 557–58.

a single instance between individuals and communities rather than as part of large-scale, destructive systems of oppression.²⁸⁵ Instead of “recogniz[ing] that these restorative processes have applicability to all areas of our lives,”²⁸⁶ this narrowing of restorative justice means those instances of harm that do not fall within an institution’s discipline process may go unaddressed. For example, while microaggressions may not reach the level of harm considered to initiate a discipline process, they impact the way individuals navigate social encounters, how safe students feel on campus, and ultimately can dictate the culture within the campus community.²⁸⁷ Microaggressions against, stereotyping of, and fetishizing marginalized students leads to their being devalued and can perpetuate the justification of their harm.²⁸⁸

Finally, and perhaps the biggest criticism, is the involvement of an institutional actor in restorative justice.²⁸⁹ In the U.S., this presents a barrier to participation for students with marginalized identities who are forced to seek help from the same institutions that have oppressed them.²⁹⁰ Confidence in processes that involve institutional actors is difficult because marginalized groups have historically been “defined as threats, deemed unworthy of protection, or targeted for violence by the state.”²⁹¹ Many times, survivors are punished when they seek help from institutions to address harms.²⁹² Further, the presence of institutional actors in restorative justice makes it difficult to address harm through broader social movements.²⁹³ When institutions hold

285. *Id.* at 558.

286. *Id.*

287. Jake New, *A ‘Chilly Climate’ on Campus*, INSIDE HIGHER ED (Jan. 8, 2015), <https://www.insidehighered.com/news/2015/01/08/report-details-microaggressions-campus-students-color-and-women>.

288. *See supra* Part II.

289. Turner, *supra* note 244, at 291.

290. *Id.*

291. *Id.* at 293.

292. Examples of this include “when undocumented women have called the police to report domestic violence, they have been arrested and deported. Multiple survivors of gender-based violence have been incarcerated when the actions they took to survive were criminalized.” *Id.* at 295.

293. Sheryl Wilson, *Calling Out Whiteness*, in *COLORIZING RESTORATIVE JUSTICE: VOICING OUR REALITIES* 108–09 (Edward C. Valandra & Waṅbli Wap̓háha Hokšíla eds., 2020).

power over the process and individual participants, it is more difficult, if not impossible, to create an authentic, healing space, for individuals and the community.²⁹⁴

Transformative justice models account for these shortcomings of restorative justice. Transformative justice addresses inequities whenever they arise,²⁹⁵ actively incorporating those societal issues that often go unrecognized and unchallenged in retributive justice systems, such as economic, political, and criminal justice issues.²⁹⁶ While restorative justice models primarily focus on a harm-then-response approach, transformative justice models can address an unlimited array of issues, ranging from victimization to consumer protection, in addition to addressing the individual harm that has occurred.²⁹⁷ In its framework, transformative justice constantly challenges societal assumptions and community dynamics that perpetuate harm.²⁹⁸ Unlike restorative justice, which focuses on the healing of the harmed individuals, their community, and the offender,²⁹⁹ transformative justice is committed to ending all forms of oppression and actively “building a society that affirms the dignity, value, and self-determination of every person,” not only those involved in the individual’s harm.³⁰⁰

Transformative justice removes the institutional actor from the process.³⁰¹ While working to repair the harm that occurred, transformative justice “aims to transform the conditions that enabled the harm.”³⁰² Specifically, transformative justice seeks to “nam[e] the state’s role in perpetuating violence,” and its disproportionate impact on marginalized survivors and offenders.³⁰³ The over-reliance of institutions on one-size-fits-all responses to harm ignores nuance and

294. *Id.* at 111.

295. Harris, *Transformative Justice*, *supra* note 247, at 558.

296. *Id.* at 559.

297. *Id.* at 558.

298. Turner, *supra* note 244, at 300.

299. ZEHR, *supra* note 254, at 20.

300. Turner, *supra* note 244, at 301.

301. *Understanding Transformative and Restorative Justice*, *supra* note 246.

302. *Id.*

303. Turner, *supra* note 244, at 294–95.

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fails to address societal issues.³⁰⁴ At its core, transformative justice is based in community, and how it operates “in practice is also dependent on the needs of each specific community.”³⁰⁵

Although transformative justice may seem like a revolutionary change to the U.S. educational disciplinary system, Title IX is not working as it is currently being implemented. Restorative justice offers an alternative framework for schools.³⁰⁶ However, in order to be effective in addressing campus sexual misconduct, schools need to adopt transformative justice practices. This will ensure that underlying systems of oppression are being acknowledged and efforts to address societal harm remain ongoing.³⁰⁷ Finally, schools need to incorporate third-party facilitators to reduce barriers present when institutional actors are involved in the process.³⁰⁸

CONCLUSION

For too long, Title IX neglected students with marginalized identities. It is time to demand more from educational systems. Marginalized students experience disproportionate rates of sex-based discrimination and underreport incidents of sexual misconduct on college and university campuses.³⁰⁹ The DOE needs to reimagine a system that accounts for students as individuals instead of monoliths, one that incorporates the lived experiences of students with marginalized identities into any education, prevention, and response to sexual assault. Race, gender and gender identity, sexual orientation, socioeconomic status, citizenship status, and disability status are just some of the identities Title IX needs to include within all aspects of its reach. Until all students are protected and included in education, prevention, and response efforts, it remain impossible for a true community to be built on college campuses. Yet, this community is

304. *Id.* at 299–300.

305. *Understanding Transformative Justice and Restorative Justice*, *supra* note 246.

306. ZEHR, *supra* note 254, at 34.

307. Harris, *Transformative Justice*, *supra* note 247, at 558; Turner, *supra* note 244, at 300–01.

308. *Understanding Transformative Justice and Restorative Justice*, *supra* note 246.

309. Cantalupo, *And Even More of Us Are Brave*, *supra* note 64, at 79.

necessary to address the deep social harms that sexual misconduct and discrimination in all its forms inflict.

The DOE needs to leverage the framework that exists within Title IX to educate students, staff, and faculty about sex discrimination in a way that makes visible the experiences of students with marginalized identities. Incorporating transformative justice will establish a system of rehabilitation and reeducation that is sorely lacking in the current Title IX discipline process. In utilizing models of transformative justice, it is imperative that educational institutions do not appropriate Indigenous cultures or artifacts in their implementations.³¹⁰ It is also crucial that schools provide transformative justice as an option to all survivors and respondents in lieu of a formal discipline process, so as to avoid inequitable access to non-punitive resolutions.

Adequately addressing sexual misconduct across campuses will require a huge paradigm shift, not only in the way we, as a society, view sex discrimination but also in how we view all forms of discrimination. We need to reimagine punishment, push back on traditional notions of retributive justice, and center all those who are harmed by sexual misconduct. Survivors do not deserve to be viewed based on the identity box(es) they check; they deserve to be viewed as complete individuals.

310. Tauri, *supra* note 258, at 40.