

TITLE IX PROTECTION: ON THE BASIS OF PRIVILEGE

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I. INTRODUCTION

Sexual discrimination in institutions of higher education is a public health and public safety issue with far-reaching consequences. Despite the passage of Title IX in 1972, there currently exists an epidemic of gender-based violence on college campuses, with approximately 26.4% of women experiencing some form of sexual assault during their time in college.¹ Our understanding and research of these forms of violence has improved substantially in recent years. However, less is known about how these forms of violence impact specific intersections of the population differently than the general population. Under Title IX, the three main responsibilities of a school in matters of sexual misconduct can be described as requiring proper prevention, response, and resolution of Title IX cases.² According to Professor Diane Rosenfeld, a leading expert in the study of Gender Violence, this obligation takes the form of a three-legged stool, meaning that if any one of the three obligations is missing from the school's sexual misconduct policy, the stool cannot stand.³ In this paper, I argue that the failure to consider cultural differences, socioeconomic status, documentation status, and power dynamics in the application of Title IX has led to the exclusion of Latinas in the United States from access to the proper prevention, response, and resolution of Title IX cases under their school's sexual misconduct policies. By providing a critical examination of the ways Title IX has been framed, whose perspectives have been considered in its interpretation and implemen-

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¹ "Sexual Assault" for the purposes of this statistic refers to behaviors with sexual connotations that interfered with an individual's academic or professional performance, limited the individual's ability to participate in an academic program, or created an intimidating, hostile, or offensive social, academic, or work environment. See *Campus Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/campus-sexual-violence>, archived at <https://perma.cc/5VPD-9CHJ>; see also BONNIE S. FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, U.S. Dep't of Just., *The Sexual Victimization of College Women* 10, 17 (2000).

² See Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. 359, 362 (2015) (stating that this tripartite obligation of providing proper prevention, response, and resolution gives rise to an informational feedback loop among students: Students conform their behavior depending on how seriously their schools take sexual assault, thus also affecting victims' willingness to report such behavior).

³ See *id.*

tation, and which areas remain under-examined, we can ensure the expansion of Title IX protection to the voices that have so far remained silenced.

II. THE HISTORY OF TITLE IX

While it is commonly believed that Title IX was a responsive measure that was used to improve opportunities for female athletes in college athletics programs, this was not the main intention or motivation behind the legislation.⁴ The 1960s offered a cultural revolution in the United States evidenced by the passing of the Civil Rights Act of 1964 (“the Act”).⁵ This piece of legislation demonstrated a transformation in society where individuals were empowered to demand legal protection of their rights. However, women were widely excluded from this transformation.

The Act included Title VII, which banned discrimination in the workplace on the basis of race, color, religion, nation origin, *or sex*.⁶ Yet, discrimination based on sex was not initially included in the proposed bill and was only added as an amendment to Title VII in an attempt to prevent its passage.⁷ A staunch opponent of civil rights and the Act’s passage, Congressman Howard Smith (D-VA) let the bill go to the full House only under the threat of a discharge petition.⁸ During the floor debate, he offered an amendment that would add sex to the original protected categories within Title VII, Equal Employment Opportunity—not to the Act as a whole.⁹ Against Smith’s intent to kill the bill’s passage, the Civil Rights Act was signed into law by President Johnson on July 2, 1964,¹⁰ with protection on the basis of sex being limited exclusively to the context of the workplace.¹¹

After the bill was passed, the government addressed the implementation of and compliance with the Civil Rights Act in President Johnson’s Executive Order 11246.¹² However, the executive order made no mention of dis-

⁴ See Elizabeth J. Meyer, *Who is (Not) Protected by Title IX? A Critical Review of 45 years of Research*, TEACHERS COLLEGE REC., Feb. 2021, at 1, 4.

⁵ Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e17 (2018)).

⁶ See Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e17 (2018)).

⁷ See Allen Fisher, *Women’s Rights and the Civil Rights Act of 1964*, NATIONAL ARCHIVES, <https://www.archives.gov/women/1964-civil-rights-act>, archived at <https://perma.cc/NU5A-6TEV>.

⁸ See *id.* After a bill has been introduced and referred to a standing committee for 30 days, a member of the House can file a motion to have the bill discharged, or released, from consideration by the committee. See RICHARD S. BETH, CONG. RSCH. SERV., 97-552, THE DISCHARGE RULE IN THE HOUSE: PRINCIPAL FEATURES AND USES 1 (2015). Once a discharge petition reaches 218 members, the House considers the motion to discharge the legislation. See *id.* If the vote passes, then the House will take up the measure. See *id.* at 2.

⁹ See Fisher, *supra* note 7.

¹⁰ See Civil Rights Act of 1964, *supra* note 5.

¹¹ See Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (1964) (current version at 42 U.S.C. §§ 2000e–2000e17) (reflecting that Title VII provisions, as originally enacted, addressing discrimination in employment based on “race, color, religion, sex, or national origin”).

¹² See Exec. Order No. 11246, 3 C.F.R. 339 (1964–1965).

crimination on the basis of sex.¹³ As a response, many women's groups advocated for the need to expand the order to correct the omission. Specifically, they argued for the issuance of a new Executive Order or the modification of the present Order on Equal Employment Opportunity to reinforce actions already taken to prevent discrimination on account of sex.¹⁴ Eventually, the advocacy proved successful, leading to the rectification of the Order in 1967.¹⁵ The Executive Order's wording finally prohibited federal contractors from discriminating in employment on the basis of race, color, religion, national origin, and sex, allowing for equitable recognition of women in the workplace.¹⁶ With this success came the acknowledgment that women were still excluded from the rest of the protections of the Civil Rights Act, specifically protections applying to educational institutions and other federally-funded organizations.¹⁷

During this period, schools from elementary through postsecondary levels limited the participation of girls and women in educational opportunities.¹⁸ In the rare instances where colleges and professional schools admitted women as students, these co-ed schools often had higher standards for female applicants compared to their male counterparts and implemented quotas designating the maximum number of female students allowed to be admitted into the institution.¹⁹ Additionally, women who were admitted were often excluded from fields that were deemed unsuitable, such as science and engineering.²⁰ This gender discrimination also extended to faculty members.²¹ In elementary and secondary schools, few women were allowed to hold higher-paying faculty positions such as school principal.²² In the 1966–67 school year, 75% of elementary school principals were men, and in the 1964–65 school year, 96% of junior high school principals were men.²³ During the period of 1967–1969, female professors represented a lower percentage of college professors and administrators in colleges and universities, especially in the subsection of tenured professors.²⁴ Women faculty members

¹³ See Fisher, *supra* note 7.

¹⁴ See *id.*

¹⁵ Exec. Order No. 11375, 3 C.F.R. 684 (1966–1970).

¹⁶ See Fisher, *supra* note 7.

¹⁷ See *id.* The Act also included Title VI, which prohibited discrimination on the basis of race, color or national origin under any program or activity receiving federal financial assistance but did not include protection on the basis of sex. See Civil Rights Act of 1964, *supra* note 5.

¹⁸ See NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AT 25: REPORT CARD ON GENDER EQUITY 6–7 (1997), <https://files.eric.ed.gov/fulltext/ED408693.pdf>, archived at <https://perma.cc/9FVQ-PFC8>.

¹⁹ See *id.* at 10.

²⁰ See *id.* at 33–34.

²¹ See *id.* at 7.

²² See *id.* at 24.

²³ See PRESIDENTIAL TASK FORCE ON WOMEN'S RIGHTS & RESPS., A MATTER OF JUSTICE: THE REPORT OF THE PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS & RESPONSIBILITIES 6–7 (1970), <https://www.archives.gov/files/research/women/images/task-force-report-1970.pdf>, archived at <https://perma.cc/K2ZM-P8YZ>.

²⁴ See NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 18, at 20–25.

were also excluded from faculty clubs and were instead encouraged to join faculty wives' clubs.²⁵

As a response to this widely acknowledged cultural issue, Bernice Sandler and Congresswoman Edith Green, in collaboration with the Women's Equity Action League, filed a class-action lawsuit against colleges and universities for employment discrimination against women, citing President Johnson's Executive Order 11246.²⁶ This led President Johnson to convene a task force made up of sixteen women to document discrimination in education and recommend responsive legislation. Among other requests, the task force demanded that "[t]he Executive [b]ranch of the [f]ederal [g]overnment . . . be as [s]eriously [c]oncerned [w]ith [s]ex [d]iscrimination as [r]ace [d]iscrimination and [w]ith [w]omen in [p]overty as [m]en in [p]overty."²⁷ The official report included statistics demonstrating that minority women faced additional challenges due to their intersectionality; for example, the median earnings of a white woman employed year-round and full-time in 1970 was \$4,279 while the median earnings of a similarly situated African American woman was \$3,194.²⁸ This initial report on gender discrimination considered issues of race and intersectionality²⁹ when developing arguments for responsive legislation and intended to provide protection to individuals faced with compounded prejudice.

Congressional hearings on sex discrimination in education then began in 1970,³⁰ which exposed this pervasive discrimination against women with respect to educational opportunities.³¹ These hearings led to Senator Birch Bayh sponsoring a proposal, which later became Title IX of the Education Amendments of 1972.³² Title IX was then passed by Congress and signed by President Richard Nixon on June 23, 1972, with two objectives in mind: "to avoid the use of federal resources to support discriminatory practices," and "to provide individual citizens effective protection against those practices."³³ To accomplish these objectives, Congress delegated authority to the United States Department of Education through its Office of Civil Rights

²⁵ See *id.* at 7.

²⁶ See Meyer, *supra* note 4, at 4.

²⁷ See PRESIDENTIAL TASK FORCE ON WOMEN'S RIGHTS & RESPS., *supra* note 23, at 18.

²⁸ See, e.g., *id.* at 24–26.

²⁹ In this paper, "intersectionality" is used to describe how marginalized identities interact with one another to create differing realities and experiences of discrimination for individuals; Latina women, for example, experienced discrimination at the junction of race and gender, which leaves them vulnerable to racialized sexual violence that separates them from Latino men and white women. See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

³⁰ See generally *Discrimination Against Women: Hearing on H.R. 16098 Before the Subcomm. on Educ.*, 91st Cong. (1970).

³¹ See Meyer, *supra* note 4, at 4.

³² See *id.*

³³ *Cohen v. Brown Univ.*, 101 F.3d 165, 165 (1st Cir. 1996) (reemphasizing that to accomplish these objectives, Congress directed all agencies extending financial assistance to educational institutions to develop procedures for terminating financial assistance to institutions that violate Title IX).

(“OCR”) to promulgate regulations for determining whether programs complied with Title IX.³⁴ While Title IX remains widely known for its significant impact on removing barriers for women and girls’ participation in sports programs, the statute’s history and general language gives it the potential to be widely applied to protect *all students*, not just athletes, and *all women*, not just white women, from sexual violence and assault on college campuses based on gender discrimination. Yet, Title IX’s interpretation and application to sexual discrimination and sexual violence in higher education has so far been analyzed with middle-class heterosexual white women as its central focus, limiting its reach and benefits to Latina women.

A. *Early Interpretations and Applications of Title IX*

While the passage of Title IX was initially celebrated as an important step in the right direction for the protection of women against discrimination in institutions of higher education, its existence proved to be of little consequence. In the first few decades of its life, OCR neither devoted resources to its enforcement nor provided schools with substantial guidance on its requirements. By 1998, there were twenty-four published federal district court decisions as well as six circuit court decisions on the subject of determining liability for schools that allowed for “hostile environments” and “harassment.”³⁵ Yet without formal guidance on Title IX, the federal court decisions were inconsistent regarding which liability standard to apply. The rulings ranged from finding liability only if the school treated “sexual harassment of boys more seriously than sexual harassment of girls,” to finding liability only if the school had “actual knowledge” of the behavior and failed to take corrective action.³⁶ A federal district court judge in New Hampshire noted that whether and to what extent school districts can be found liable under Title IX for peer sexual harassment was given little attention in the legislative history of the statute and remained undecided by the Supreme Court.³⁷ As a result, he urged Congress in 1997 to “carry out its legislative responsibilities and to address these issues squarely so that policy will be made where it should be made – in Congress – and not by default in the courts.”³⁸ But Congress remained silent.

In the face of this regulatory uncertainty and threat of significant punitive damages, school officials looked to OCR to explain what Title IX re-

³⁴ See *id.*

³⁵ See R. SHEP MELNIK, *THE TRANSFORMATION OF TITLE IX: REGULATING GENDER EQUALITY IN EDUCATION* 186 (2018); see also *Doe v. Londonderry School Dist.*, 970 F. Supp. 46, 71 (D.N.H. 1977) (listing the decisions to date regarding liability standards under Title IX).

³⁶ See MELNIK, *supra* note 35, at 186; see also *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996).

³⁷ See *Doe*, 970 F. Supp. at 71 (listing the decisions to date regarding liability standards under Title IX).

³⁸ See MELNIK, *supra* note 35, at 186; see also *Doe*, 970 F. Supp. at 71–72. The court took note of OCR’s 1997 guidelines, but declined to follow them in full, adopting a standard closer to that eventually announced by the Supreme Court. See *id.* at 72–75.

quired of them. OCR first issued a set of comprehensive guidelines on Title IX in 1997,³⁹ relying heavily on the regulations and case law previously developed under Title VII of the Civil Rights Act, which imposes monetary penalties on employers who engage in discrimination.⁴⁰ This heavy reliance on Title VII precedent risked overlooking key differences between the purpose of the laws: Title VII governs the workplace where most individuals are adults, while Title IX governs schools where most individuals are minors.⁴¹ Additionally, Title VII imposes monetary penalties by courts on employers who engage in discrimination, while Title IX imposes conditions on recipients of federal grants. But the Court quickly recognized implied private rights of action under Title IX and authorized judges to award monetary damages to victims of discrimination.⁴² Thus, Title IX developed a two-tiered enforcement process: one that is administrative and backed by the threat of termination of funds, and one that is judicial and backed by the threat of injunction and monetary damages. In this 1997 guidance, OCR interpreted the responsibilities broadly enough that it seemed unlikely for a school district to not be found responsible for any form of harassment by a school employee.⁴³ However, a notable difference between the two statutes was that OCR did not interpret Title IX to include the strict liability standard for harassment by teachers that exists under Title VII for employers.

The courts, too, remained silent in the initial years of the statute's life. Five years after the statute was created, several female students enrolled at Yale College filed the first sexual harassment case under Title IX against Yale University in the United States District Court for the District of Connecticut.⁴⁴ They alleged that Yale had violated Title IX regulations because they failed to "combat sexual harassment of female students" and refused "to institute mechanisms and procedures to address complaints and make investigations."⁴⁵ The plaintiffs claimed that the harassment itself interfered

³⁹ U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997), <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>, archived at <https://perma.cc/5GGD-5HJG>. One way that Title IX guidelines diverged from those developed under Title VII was by recognizing that school policies must take into account the ages of their students. OCR "will never view sexual conduct between an adult school employee and an elementary school student as consensual." *Id.* But for postsecondary students many more factors would need to be considered. *See id.*

⁴⁰ Title VII had been interpreted to include sexual harassment as a form of sex discrimination actionable under the statute. *See generally* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

⁴¹ *See* U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., *supra* note 39.

⁴² *See* Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 65–66, 77 (1992) (ruling that when the judiciary finds an "implied" private right of action, it must infer that Congress intended to create an effective judicial remedy). Justice Scalia stated that this means "the most questionable of private rights will also be the most expansively remediable." *Id.* at 78 (Scalia, J., concurring). The Court refrained from clarifying any other standard or requirement under Title IX in cases of sexual harassment. *See generally id.*, at 61–62.

⁴³ *See* U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., *supra* note 39.

⁴⁴ *See* Alexander v. Yale Univ., 631 F.2d 178, 180 (2d Cir. 1980).

⁴⁵ *Id.* at 181 (internal quotations omitted).

with the educational process and the University's failure to address the harassment denied them equal opportunity in education. The Court, however, granted the defendant's motion to dismiss the claims of all but one plaintiff due to claiming the courts should not "indulge in speculation of the sort required" to find injury in these instances,⁴⁶ leaving both victims and universities with little to no guidance on the force of the statute.

It was not until June 1998 that the Supreme Court issued the first of two decisions on a school's liability for sexual harassment under Title IX: *Gebser v. Lago Vista Independent School District*.⁴⁷ *Gebser* involved an inappropriate sexual relationship between a female high school student and her teacher.⁴⁸ After the misconduct was discovered, Gebser and her mother filed suit against Lago Vista Independent School District raising a claim for money damages under Title IX.⁴⁹ Writing for the majority, Justice O'Connor concluded that a school district would not be held liable for teacher-on-student sexual harassment "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."⁵⁰ The Court found a strict liability standard would be at odds with that basic objective of the statute, as liability would attach without actual knowledge from the school district.⁵¹ Additionally, the Court argued that Title IX does not aim "centrally to compensate victims," but "focuses more" on preventing discrimination by those who receive federal funds.⁵²

A year later, the Court addressed the issue of peer-on-peer harassment under Title IX in *Davis v. Monroe County School Board*.⁵³ *Davis* involved repeated and offensive behavior by an elementary school boy aimed at an elementary school girl. Again, writing for the majority, Justice O'Connor applied the lenient "deliberate indifference" standard set out in *Gesber*.⁵⁴ In this case, however, Justice O'Connor added a further limitation that such an action will lie only for harassment that is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."⁵⁵

Together, these cases established the liability standards that federal courts apply in Title IX cases brought by private parties for monetary damages. The modern doctrinal test for recovery in a Title IX suit alleging peer sexual harassment requires a survivor to demonstrate that their school (1)

⁴⁶ *Id.* at 185.

⁴⁷ 524 U.S. 274, 275 (1998) ("Whether an educational institution can be said to violate Title IX based on principles of *respondeat superior* and constructive notice has not been resolved by the Court's decisions.").

⁴⁸ *Id.* at 277.

⁴⁹ *Id.* at 283.

⁵⁰ *Id.* at 277.

⁵¹ *Id.* at 289.

⁵² *Id.* at 288.

⁵³ 526 U.S. 629, 629–30 (1999) (explaining that "[t]he standard set out in *Gesber*, 524 U.S. 274 (1998), . . . also applies in cases of student-on-student harassment").

⁵⁴ *Id.* at 633.

⁵⁵ *Id.*

received federal funds; (2) had actual, as opposed to constructive, knowledge of the harassment; (3) responded to such known acts of harassment with deliberate indifference; and (4) deprived her of equal access to educational opportunities through its “clearly unreasonable” response to “severe, pervasive, and objectively offensive” harassment.⁵⁶ This test practically immunizes schools from liability in Title IX suits involving peer sexual harassment in all but the most extreme cases. This leaves students without protection and schools without sufficient incentives to take the necessary steps to prevent or remedy harassment. As a response to the framework established by the Court, OCR proposed its own revised guidance which imposed more demanding requirements on educational institutions.⁵⁷ In January 2001, it rejected the Supreme Court’s framework by maintaining that the Court’s interpretation applied only to lawsuits for money damages and not to the conditions attached to federal funding.⁵⁸ In the following decade, OCR intervened at specific universities to clarify that their interpretation of a school’s responsibility for monitoring and punishing misconduct by students and university employees goes far beyond the Supreme Court’s interpretation. For instance, “OCR and the Department of Justice negotiated an agreement with the University of Montana that they described as a ‘blueprint’ for future accords.”⁵⁹ In this model, OCR objected to the university’s definition of sexual harassment as conduct “sufficiently severe or pervasive as to . . . unreasonably interfere with a person’s work or educational performance,” which was clearly modeled after the Supreme Court’s interpretation.⁶⁰ OCR revised this definition to include “any unwelcome conduct of a sexual nature,” explaining that the previous, more narrow, definition leaves uncertainty as to when a student should report unwelcome conduct and when the University must step in to prevent the harassment from creating a hostile environment.⁶¹ This split between the Supreme Court and OCR allowed those unhappy with the *Gebser/Davis* standard to expand protection for women on campuses through the administrative process.

III. PREVENTION

Still, administrative regulations paid little attention to decreasing the rate of sexual violence. These regulations mostly focused on the aftermath of sexual violence on campus, such as adjudication procedures, expanding defi-

⁵⁶ *Id.* at 638–53.

⁵⁷ See U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES i (2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>, archived at <https://perma.cc/Z26M-U9FQ> [hereinafter U.S. DEP’T OF EDUC., STUDENTS] (clarifying that the guidance was revised “in limited respects in light of subsequent Supreme Court cases relating to sexual harassment in schools”).

⁵⁸ See *id.* at ii.

⁵⁹ MELNIK, *supra* note 35, at 200.

⁶⁰ *Id.* at 201.

⁶¹ See *id.*

nitions of what constitutes sexual harassment, and providing *ex-post* resources for survivors.⁶² Furthermore, there is evidence to suggest that “racial stereotyping, cultural stigmas, and perceived economic disparities” leave women of color more vulnerable to being targets of sexual harassment than their white counterparts.⁶³

Tanya Hernandez, a professor at Fordham Law, found empirical evidence in her original study on female employees in the workforce indicating that women of color were “consistently overrepresented as complaining parties” whereas their white female counterparts “were underrepresented despite their larger presence in the female labor force.”⁶⁴ This is consistent with the limited data available on reporting rates of women of color in the educational context.⁶⁵ Law professors Nancy Chi Cantalupo and William Kidder recently conducted a study systematically reviewing a random selection of forty-two university sexual harassment cases decided between 1998 and 2015.⁶⁶ According to their research, 45.2% of the plaintiffs were women of African American, Asian Pacific Islander, Latina, or Middle Eastern descent.⁶⁷ This is true despite women students of color accounting for only 19.6% of students enrolled in college and university programs during that period.⁶⁸ These studies indicate that women of color are targeted at disproportionately higher rates than their white counterparts.⁶⁹ Thus, a failure to address the necessity of preventative measures against sexual discrimination on college and university campuses imposes a disproportionate harm to minority women who are already facing compounded prejudice.

In 2011, the U.S. Department of Education transformed the focus and obligations for colleges and universities under Title IX from being response-focused to including preventative measures.⁷⁰ In the Department’s 2011 “Dear Colleague Letter,” the Department stated that it believed in “providing all students with an educational environment free from discrimination . . .” which included providing students with an environment free from sex-

⁶² See Letter from Russlynn Ali, Assistant Sec’y for Civ. Rts., U.S. Dep’t of Educ., to Colleague (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>, archived at <https://perma.cc/N4GK-TK8P> [hereinafter Ali Letter].

⁶³ Haley C. Carter, *Under the Guise of “Due Process”: Sexual Harassment and the Impact of Trump’s Title IX Regulations on Women Students of Color*, 36 BERKELEY J. GENDER, L. & JUST. 180, 186 (2021) (stating that “[t]hese sexualized racial stereotypes contribute to beliefs commonly held by harassers that women of color are sexually available or promiscuous and will welcome any sexual attention or conduct directed at them”).

⁶⁴ Tanya Kateri Hernandez, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1239 (2005).

⁶⁵ See Carter, *supra* note 63, at 185.

⁶⁶ Nancy C. Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. REV. & GENDER 1, 43 (2019).

⁶⁷ See *id.* at 44.

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE, BACKGROUND, SUMMARY, AND FAST FACTS (2011), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.pdf>, archived at <https://perma.cc/HZB8-3P49> [hereinafter U.S. DEP’T OF EDUC., DEAR COLLEAGUE].

ual harassment and sexual assault.⁷¹ To do so, the guidance recommended that schools implement preventative education programs in their orientations for new students, faculty, staff and employees, provide training for students, and take proactive measures to prevent sexual violence.⁷² It was recommended that these programs include discussions of what constitutes sexual harassment and sexual violence, the school's policies and disciplinary procedures, and the consequences of violating these policies.⁷³ However, in practice, many schools across the United States distribute incomplete preventative sexual harassment training that is difficult to understand, does not clearly define sexual harassment or assault, leaves students unclear about their rights under Title IX, and does not address or respond to specific issues of intersectionality.⁷⁴ Students who do not know their rights are unable to assert them.⁷⁵

A. *Preventative Education, When Offered, Fails to Effectively Reach Latinas Because it Neglects the Effect of Diverging Experiences*

Sexual harassment trainings given to incoming students on college campuses rarely analyze sexual harassment from a gendered lens, much less from a racial or ethnic lens.⁷⁶ This is problematic because examining and describing women's experiences independently from race, ethnicity, and class creates distinct female voices of the majority that often ignore experiences of those on the margin. Many experiences Latinas face are not accounted for within the traditional boundaries of exclusively racial or gendered discrimination. This unique intersection of racism and sexism factors into Latina women's lives in ways that cannot be captured wholly by analyzing the effects of race or gender separately. Thus, this single-axis framework that is dominant in anti-discrimination law limits access to Title IX protection to otherwise privileged members of the group by responding to, representing, and normalizing only the experiences of a subset of the group while ignoring the compounded discrimination and differing social experience faced by others, such as Latina women.

Part of the political movement towards addressing sexual harassment on campuses has been the inclusion of education regarding "affirmative consent" between individuals when defining how people must act for sex to be consensual.⁷⁷ Affirmative consent is defined as a clear, unambiguous, and voluntary agreement to engage in specific sexual activity.⁷⁸ However, this

⁷¹ Ali Letter, *supra* note 62, at 1.

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *See generally Affirmative Consent Campus Policy Report*, CONSENT & RESPECT, <http://affirmativeconsent.com/consentpolicy/>, archived at <https://perma.cc/4EDJ-VXPV>.

⁷⁵ *See Rosenfeld, supra* note 2, at 362.

⁷⁶ *See Affirmative Consent Campus Policy Report, supra* note 74.

⁷⁷ *See generally id.*

⁷⁸ *See id.*

standard continues to be mandated in only a minority of states, with the majority of colleges and universities lacking a definition or even mention of consent within their sexual misconduct policy.⁷⁹ Even within the subset of schools that implement this higher standard of consent, these lessons on affirmative consent establish the bounds of normative sexuality that are usually limited to verbal communication and may not necessarily converge with the sexual or gender norms of other cultures. When defining what consensual interactions should look like in preventative procedures, it is important for sexual misconduct policies to understand and address cultural boundaries that may prevent individuals from exercising their agency under these models of consent.

Culture-specific gender norms influence the ways Latinas define abuse and, consequently, how they perceive and respond to its occurrence. The “acceptance” of violence within traditional Latina/o culture has been attributed to *marianismo*, the expectation for women to fulfill a traditional passive role, and *machismo*, the cultural script dictating social expectations for Latino men in relation to women.⁸⁰ *Machismo* socialization has traditionally emphasized the importance of a man’s physical strength, manliness, aggression, and male dominance, often leading to deeply embedded acceptance of aggression and sexual objectification of Latinas.⁸¹ Many Latinas and first generation students on campus are raised in or near these cultural traditions. These established roles working in the background of Latinas’ social and sexual interactions can lead to them being more vulnerable to experiencing sexual pressure or violence in an environment where counterparties expect objections and boundaries to be clearly vocalized. This is why teachings of consent must be more nuanced than simply providing a definition of what affirmative consent entails. Emphasizing that a problem arises only when there is a *lack of affirmative consent* overlooks many other layers of the problem. But preventative teachings remain largely uniform, giving little consideration to different cultures and contexts.⁸² Teachings that are strictly modeled after traditionally white middle class social and gender dynamics are insensitive and unresponsive to the learned experiences of a large percentage of individuals that the trainings are meant to protect. The failure of these trainings to confront culture specific gender norms and address cultural vulnerabilities demonstrates a key failure of current Title IX policy on college campuses.

An illustration of this complexity can be seen through the personal experience of Charisma, a Latina student at Columbia University who voluntarily shared her experience with the Sexual Health Initiative to Foster

⁷⁹ See *id.*

⁸⁰ See Eryn N. O’Neal & Laura O. Beckman, *Intersections of Race, Ethnicity, and Gender: Reframing Knowledge, Surrounding Barriers to Social Services Among Latina Intimate Partner Violence Victims*, 23 VIOLENCE AGAINST WOMEN 643, 648 (2017).

⁸¹ See *id.*

⁸² See *id.*

Transformation (SHIFT) project.⁸³ Charisma was a college freshman who had been interacting with another Columbia student named Raymond.⁸⁴ After texting back and forth for weeks, Raymond invited her to his apartment late on a Saturday night.⁸⁵ While she agreed to go over, she quickly lost control of her circumstances: on her walk from the train, a torrential down-pour soaked her and her belongings.⁸⁶ Her cell phone then died soon after, leaving her without the ability to look up directions when already far from home. Thankfully, she had written Raymond's phone number down on a piece of paper. She found a nearby bodega with a working payphone where she called him to come get her. "Sodden and demoralized," she was thankful to finally arrive at his apartment to dry off.⁸⁷ They watched TV, drank some alcohol, smoked a joint, and then began making out. Charisma was fine with this but stated that she had not been expecting things to progress beyond that.⁸⁸ However, things did progress. As she recounted her experience, she told the researchers that she "didn't really want" more to happen and she tried to convey that with her body language.⁸⁹ When Raymond began touching her, she explained:

I wasn't expecting that to happen. So I was like, "Okay, let me move his hand." And then his hand didn't move so I was like oh, okay, this is happening. So then it's like he started taking his clothes off, I started taking mine off, just like let it happen. 'Cause it's like I don't know how to say no. 'Cause it's like my way of saying no was through body language, trying to move his hand, 'cause that's what had worked in the past to slow things down if I didn't want to be touched in a certain area. But in this moment that didn't work. So it was like my plan, I never had a plan B It's like plan A was always just body language, just move their hand. Like, they get it. But this time plan A didn't work, and I didn't, like, plan B would be saying no. But I just, I didn't know how to, I didn't know what to do Verbal wasn't really my form of communication⁹⁰

Charisma conveyed in nonverbal ways that she wasn't enjoying herself.⁹¹ She eventually expressed her lack of comfort verbally, telling him that

⁸³ Charisma's story is one of many documented in *Sexual Citizens*. *Sexual Citizens* draws upon the SHIFT research to provide detailed portraits of a wide range of undergraduates' sexual experiences at Columbia University. This research included nearly thirty researchers and spanned five years, making it one of the most comprehensive studies of campus sex and sexual assault. See generally Jennifer S. Hirsch & Shamus Khan, *SEXUAL CITIZENS: A LANDMARK STUDY OF SEX, POWER, AND ASSAULT ON CAMPUS* (1st ed. 2020).

⁸⁴ See *id.* at 14.

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 15.

⁹¹ *Id.*

he was hurting her.⁹² Instead of listening, he simply tried a different position.⁹³ Refusing sex was not a skill that Charisma had been given the opportunity to learn. For Charisma, having unwanted sex felt easier than having a difficult conversation. She did not have the vocabulary to talk about her sexual comfort. She had not been given the space or opportunity to develop a strong sense of her sexual self-determination. Here, socioeconomic factors also weighed heavily against Charisma. She was far from home late at night in a downpour. The train would take her almost two hours to get home and it was not necessarily safe at this hour. Some students wouldn't hesitate to spend the \$60 on a cab ride home, but she was not one of those students.⁹⁴ It quickly became a complex situation where her partner was not responsive or empathetic to her comfort levels.

Oftentimes, people fail to understand that someone might go along with something because of their cultural scripts or because it feels awkward to say no. A failure to see the social power one has over another, or failure to be empathetic to the different controls one has over the environment, might render another unable to say no. In other words, a person's ability to say "yes" or "no" is heavily influenced by the interplay of power, identity, and privilege between those involved. Limiting the teachings of consent to a definition that is so bare-boned that it allows situations such as Charisma's to be seen as acceptable produces individuals whose feeling about their own right to sexual self-determination is so impoverished that they spare someone else an awkward conversation, even if that means enduring an unwelcomed violation to their body.⁹⁵ For these reasons, it is necessary for preventative education to expand the discussion of consent beyond an expectation of vocalization to discussions of pressure, non-verbal communication, cultural sensitivity training, and training on what it means to have bodily autonomy and voice. Furthermore, it is necessary that these discussions and preventative trainings address the broader cultural elements of gendered violence head-on to provide a safer school culture for *all women*, including Latina women.

Just as important is a school's responsibility to measure the effectiveness of its preventative trainings and education. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, better known as the Clery Act, is a federal law passed in 1990.⁹⁶ The Clery Act requires universities and colleges that receive federal financial aid to disclose information about crime on and around the campus, including incidents of sexual assault.⁹⁷ However, consistently low reports of sexual assaults from universi-

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ *See id.*

⁹⁶ Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990, Pub. L. 101-542, 104 Stat. 2381 (codified as amended at 20 U.S.C. §1092(f)(8)).

⁹⁷ *See id.*

ties⁹⁸ should raise questions about the campus climate. These statistics generally do not indicate low occurrence of violations but that the school is not making efforts to understand, address, or accurately receive violation reports, or to transparently discuss campus sexual assault. Unfortunately, fears of legal liability often prevent institutions from honestly evaluating training materials for their measurable impact on reducing harassment and improving campus culture.⁹⁹ Until the legal and pecuniary incentives of these institutions encourage a demonstration that their prevention efforts are effective, trainings will likely go unevaluated. Judicial interpretations of Title IX so far have incentivized these institutions to create policies, procedures, and trainings on sexual harassment and assault that focus on symbolic compliance with current law to avoid liability, not on preventing harassment in the first place. In this sense, adhering to legal requirements may be necessary but not sufficient to mediate the issue of sexual harassment; the responsibility lies in academic institutions to take the initiative to move beyond what is required of them by law. They must instead consider the benefits that effective preventative trainings would have on their culture, their students, and their employees.

B. Universities are Uniquely Positioned to Address and Prevent a Culture of Sexual Discrimination on Campus

As the grim sexual assault statistics on college campuses demonstrate, many institutions have failed to take adequate steps to prevent the occurrence of sexual violence.¹⁰⁰ A common approach among many of these institutions has been to take a strictly legal approach to the problem, addressing only legal requirements and responding to discrete violations. This framework ignores the ways in which social and cultural norms contribute to a culture that allows for sexual violence to occur. As much as sexual violence is acknowledged to be a serious issue, the social and institutional environment in which it occurs is largely forgotten. Yet in many ways, colleges and universities are in a unique position to create a campus culture that is safe for all students and faculty.

Campuses offer a rich environment where students are encouraged and expected to explore different ideas and perspectives. With this comes the opportunity for students to engage with individuals from various backgrounds, cultural scripts, experiences, and standards of behavior. The institu-

⁹⁸ See *Campus Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/campus-sexual-violence>, archived at <https://perma.cc/5VPD-9CHJ>.

⁹⁹ NAT'L ACADEMIES OF SCI., ENG'G, & MED., *SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES* 98 (Paula A. Johnson, Sheila E. Widnall & Frazier F. Benya eds. 2018).

¹⁰⁰ See Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 *LOY. U. CHI. L.J.* 205, 209–24, 233–43 (2012) (discussing deficiencies in colleges and universities' systems for responding to sexual violence and the way that inadequate enforcement of federal laws aimed at improving responses exacerbates the problem).

tional culture can either benefit from this diversity or allow the university culture to become a microcosm that further marginalizes those traditionally harmed by the power structures of wider society.

A rape-supportive culture is an environment containing a set of beliefs and values that are conducive to rape and promote sexual violence.¹⁰¹ Within this environment, there are key traits shown to support such violence including acceptance of rape myths, promotion of hegemonic masculinity, and peer support.¹⁰² Rape myths are defined as false attitudes and beliefs, generally following stereotypes and prejudices, that help remove responsibility from perpetrators and encourage sexually aggressive behavior towards women.¹⁰³ A widely accepted common rape myth is that if the victim does not scream, fight back, or show signs of physical injury from the incident, then it was not rape. Allowing myths such as this one to continue leads perpetrators to believe their actions were not wrong. In addition to rape myths, gender scripts such as hypermasculinity contribute to false understandings of what constitutes sexual violence.¹⁰⁴ On college campuses, male-dominant groups and fraternities have been shown to have a high risk of creating environments where hegemonic masculinity, aggression, a desire for high status positions among men, and security in gender identity through sex all lead to a wider culture of objectification and aggression towards women.¹⁰⁵ These power imbalances are further exacerbated when combined with racial and ethnic stereotypes and objectification of minority women. In these ways, a university may not itself actively support sexual violence, but the environment in which it allows its students and faculty to exist becomes conducive to and supportive of beliefs and behaviors that are consistent with the concept of rape-supportive cultures.

For this reason, institutional efforts to create a productive campus culture offer profound promise for college campuses to assure the meaningful protection and respect for all their members. If this position is taken seriously, universities can cultivate spaces that create broad social transformation and eliminate rape-supportive environments through preventative teachings, community engagement, and bias and diversity sensitivity training that stop these beliefs and attitudes at their source. Prevention goes beyond raising awareness and reducing risk. Prevention work requires the engagement of the entire campus community to create long-term solutions to social and cultural issues. Without addressing the root cause and social

¹⁰¹ See Sarah J. Argiero, Jessica L. Drydahl, Sarah S. Fernandez, Laura E. Whitney & Robert J. Woodring, *A Cultural Perspective for Understanding How Campus Environments Perpetuate Rape-Supportive Culture*, 2010 J. IND. UNIV. STUDENT PERS. ASSOC. 26, 28 (2010) (clarifying that although it is named a *rape* culture, it focuses on the promotion of all types of sexual violence).

¹⁰² See *id.* at 28.

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ *Id.* at 28–29.

scripts that allow for sexual violence to exist, preventative programs will fail to meet their purpose.

IV. RESPONSE

While preventative efforts aimed at eliminating the occurrence of sexual assault are necessary, it is also important to consider how further trauma can be prevented among those already victimized. Victims of sexual assault may suffer severe psychological and emotional trauma which can be long-lasting and debilitating; for example, it is common for victims of sexual harassment and assault to experience panic attacks, depression, dissociation, sleeping disorders, post-traumatic stress disorders, hopelessness, difficulties with interpersonal relationships, poor work or academic performance, suicidal ideation, and anxiety that prevents them from the ability to lead their lives as they did pre-assault.¹⁰⁶ As a response to these severe concerns, schools are obligated to provide academic accommodations to ensure that the survivor can safely continue attending classes while on campus.¹⁰⁷ Additionally, schools must provide ample emotional and psychological support to help survivors cope with the remaining trauma that results from their assault.¹⁰⁸ In this way, schools are arguably in the best position to set a student on the path towards recovery through an appropriate and holistic response. By allowing for accessible and effective support resources, universities can effectively eliminate what is known as “the second rape,” defined as the experience of degradation and betrayal that rape survivors encounter when they come forward but are instead left with a sense of hopelessness and helplessness due to an inadequate institutional response.¹⁰⁹

A. *Latinas Face Unique Obstacles that Are not Accounted for in the Deployment of Response Resources Post-Assault, Leading to Their Exclusion from the Benefits of these Supportive Measures*

Studies have revealed that stressors such as lack of English proficiency, documentation status, and cultural differences serve as barriers preventing Latina women from communicating issues of intimate partner violence to medical professionals and from seeking social services after experiencing an

¹⁰⁶ See *Victims of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence>, archived at <https://perma.cc/E9Y9-V7UP>.

¹⁰⁷ See U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES i (2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>, archived at <https://perma.cc/Z26M-U9FQ>.

¹⁰⁸ See *id.*

¹⁰⁹ Diane L. Rosenfeld, *Schools Must Prevent the “Second Rape”*, HARV. CRIMSON (Apr. 4, 2014), <https://www.thecrimson.com/article/2014/4/4/Harvard-sexual-assault/>, archived at <https://perma.cc/XW8L-UQXY>.

event of sexual violence.¹¹⁰ Often, when a victim fails to report an incident of sexual violence or to seek supportive measures, it is the individual who is blamed, not the institution. But analyzing these barriers within an institutional context can help us examine failures surrounding service provider environments as opposed to failures of individual victims' willingness to seek out resources. For example, if institutions do not provide adequate victim resources in various languages, such as bilingual staff and mental health resources, this can clearly create barriers to Latinas' access to services when seeking solace, protection, and other responsive measures.

The current requirements under Title IX provide no such assurance of access to resources, let alone access to resources in languages other than English.¹¹¹ Under the implementation requirements, schools are required to designate at least one employee to serve as a Title IX Coordinator on campus. These employees are tasked with responsibilities crucial to the development, implementation, and monitoring of meaningful efforts to comply with Title IX.¹¹² The skills and competencies recommended by the United States Department of Justice for the effective administration of such responsibilities are limited to: "in-depth knowledge of Title IX regulation; general knowledge of other federal and state non-discrimination laws; knowledge of the recipient agency's Title IX grievance procedures; knowledge of personnel policies and practices of the recipient agency/institution; . . . and ability to establish a positive climate for Title IX compliance efforts."¹¹³ There are no requirements that the coordinator be specifically skilled in trauma response, cultural sensitivity, navigating language barriers, or any other qualification that could help the coordinator and associated staff respond to even the most basic concerns faced by intersectional victims with an effective and sensitive approach.¹¹⁴ As a result, Latina women are inherently disadvantaged when seeking response resources from a school's Title IX office because they do not share the same vulnerabilities experienced by the subsection of the gender that the current environment and training level is intended to respond to.

¹¹⁰ See U.S. DEP'T OF JUST., OFF. FOR JUST. PROGRAMS, BUREAU OF JUST. STATS., CRIMINAL VICTIMIZATION IN THE UNITED STATES (2008), <https://bjs.ojp.gov/content/pub/pdf/cvus08.pdf>, archived at <https://perma.cc/9ELP-DFAY>; Cecilia Menjivar & Olivia Salcido, *Immigrant Women and Domestic Violence: Common Experiences in Different Countries*, 16 GENDER & SOC'Y 898, 903 (2002) (explaining that language "is a barrier in accessing and communicating their needs to community service providers"); Julia L. Perilla & Josephine Vasquez-Serrata, *Integrating Women's Voices and Theory: A Comprehensive Domestic Violence Intervention for Latinas*, 35 WOMEN & THERAPY 93, 96–97 (2012).

¹¹¹ See Letter from Catherine E. Lhamon, Assistant Sec'y for Civ. Rts., U.S. Dep't of Educ., to Colleague (Apr. 24, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>, archived at <https://perma.cc/979X-CV5G> [hereinafter Lhamon Letter]; *Federal Coordination and Compliance Section*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/federal-coordination-and-compliance-section-152>, archived at <https://perma.cc/9C8W-4PBZ>.

¹¹² See Lhamon Letter, *supra* note 111.

¹¹³ See *Federal Coordination and Compliance Section*, *supra* note 111.

¹¹⁴ See *id.*

Aside from these implementation requirements, OCR has long issued guidance on campus sexual assault to provide additional recommendations to schools on how to comply with Title IX. However, OCR's guidance on response requires only that a recipient respond promptly to actual knowledge of sexual harassment and that "response . . . treat the complainant and respondent equitably by offering supportive measures to the complainant . . ." ¹¹⁵ There is no additional mandatory guidance or requirement defining what "supportive measures" a recipient must assure students have access to. ¹¹⁶ The failure to require Title IX coordinators and campus faculty to meet this great responsibility with even minimal preparation and specialized training for intersectional victims makes the response resources not only less appealing, but also less effective and likely counterproductive when implemented.

University response resources greatly run the risk of exacerbating rather than reducing the trauma that the student is experiencing from the assault. One example of this exacerbation can be seen in an anonymous Harvard student's editorial titled "Dear Harvard: You Win," written as a response to her university's failure in handling her sexual assault. ¹¹⁷ The anonymous student describes how her desperate plea to receive accommodation and support from her University was met instead with encouragement to forgive her assailant and "move on." ¹¹⁸ She describes her exhaustion from "sending emails to [her] resident dean, to [her] House Master, to [her] Sexual Assault/Sexual Harassment tutors, to counselors from the Office of Sexual Assault Prevention and Response, to [her] attorney," to have Harvard administration move her assailant to a different House. ¹¹⁹ She describes how a staff member at her University Health Services asked her if it was possible that her drinking habits were the source of the problem, because it is what seemed to have led to her sexual assault. ¹²⁰ Additionally, she describes how the resident dean compared living in the same House as her assailant to a divorced couple working in the same factory. ¹²¹ Meanwhile, the school's limited response amounted to the equivalent of a slap on the hand for her assailant, ¹²² further disempowering the victim. While she acknowledged that these administrators were sincerely trying to be supportive, she also expressed that they did more harm than good in using insensitive language, empty phrases to avoid liability, and having insufficient training to adequately respond to a sexual assault survivor's needs. ¹²³ The anonymous student described the

¹¹⁵ 34 C.F.R. § 106.44 (2020).

¹¹⁶ *See id.*

¹¹⁷ *See Dear Harvard: You Win*, HARV. CRIMSON (Mar. 31, 2014), <https://www.thecrimson.com/article/2014/3/31/Harvard-sexual-assault/>, archived at <https://perma.cc/9ESE-HXZT>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *See id.*

¹²¹ *See id.*

¹²² *See id.*

¹²³ *See id.*

school officials' refusal to validate her emotions as equally damaging and disempowering as the actual sexual assault.¹²⁴ This lack of support in responsive measures is extremely dangerous for the wellbeing of survivors and goes against the right to experience an environment free from discrimination on the basis of sex. Rather, gender and racial stereotypes and victim blaming perpetuated in society through the lack of training further add to the hostile and discriminatory nature of the environment, completely negating the intended benefit of providing students access to these administrators. Thus, institutional supportive measures *must* consider the need for gender, cultural, and trauma sensitivity training to assuage the threat of imposing the second rape upon victims seeking support from the very institutions that are meant to protect them.

With respect to social support, studies have found that Latina immigrants are likely to be geographically removed from their friends and family, and therefore lack support networks.¹²⁵ Additionally, help-seeking research indicates that even when Latinas do have access to a support network, they are less likely to seek help from family when compared to their European and African American counterparts, often leaving them to suffer in silence.¹²⁶ This may be due to the reinforced cultural and gender norms that insist sex is a private matter not to be discussed openly and that the female is expected to play a passive role in relationships.¹²⁷ Another variable limiting Latinas' access to responsive measures is their own and their families' unfamiliarity with university resources. Latinos are much more likely to be first-generation college students than other racial or ethnic groups, with 44% of Hispanic or Latino students being the first in their family to attend an institution of higher education.¹²⁸ Thus, it can be more difficult for Latinas to receive guidance from their families regarding response resources due to the foreign nature of navigating institutions of higher education for individuals who make up their support system.¹²⁹ Therefore, supportive resources available on campuses may be crucial for the successful recovery of Latina survi-

¹²⁴ See *id.*

¹²⁵ Amy C. Denhman, Pamela York Frasier, Elizabeth Gerken Hooten, Leigh Belton, & Warren Newton, *Intimate Partner Violence Among Latinas in Eastern North Carolina*, 13 VIOLENCE AGAINST WOMEN 123, 133 (2007) (stating that Latina immigrants were geographically far removed from their friends and family in addition to having limited access to formal support services).

¹²⁶ See O'Neal & Beckman, *supra* note 80, at 648.

¹²⁷ See *id.* at 647–48 (clarifying that fewer social networks, whether formal or informal, may account for one obstacle preventing Latinas from gaining access to post-assault resources).

¹²⁸ See DEBORAH A. SANTIAGO, JULIE LAUREL, JANETTE MARTINEZ, CLAUDIA BONILLA & EMILY LABANDERA, EXCELENCIA IN EDUCATION, LATINOS IN HIGHER EDUCATION: COMPILATION OF FAST FACTS 6 (2019), <https://www.edexcelencia.org/Excelencia-Compilation-Fast-Facts>, archived at <https://perma.cc/WQX8-4RMW>.

¹²⁹ See JEREMY REDFORD & KATHLEEN MULVANEY HOYER, FIRST-GENERATION AND CONTINUING-GENERATION COLLEGE STUDENTS: A COMPARISON OF HIGH SCHOOL AND POSTSECONDARY EXPERIENCES 6 (2017), <https://nces.ed.gov/pubs2018/2018009.pdf>, archived at <https://perma.cc/SSB3-TPP4>.

vors who are less likely to seek effective emotional and psychological support from other existing networks at their disposal.

In the face of inadequate response measures that do not consider the specific challenges of Latina women, Latinas are confronted with compounded barriers to the already inadequate resources that are made available to victims by universities. For these reasons, response efforts by universities completely fail to reach Latina women seeking support in the aftermath of a traumatic sexual assault, leaving them more vulnerable to severe and long-lasting mental, psychological, and physical health concerns.

V. RESOLUTION

Under Title IX, schools are obligated to investigate and remediate a hostile environment in a prompt and equitable manner.¹³⁰ The current discussions framing resolutions have focused on misdeeds and punishment of individuals who have already been reported rather than focusing on the greater environment in which they occur. This can lead to assumptions that society can eliminate the problem of sexual harassment and assault in institutions of higher education by sanctioning individual harassers under formal Title IX Complaints. However, discussing resolution in the framework of the entire academic community reveals how futile our efforts to resolve sexual abuse and harassment on campuses have been.

Sexual discrimination in the form of harassment and assault is often a function of asymmetries in power, where the perpetrator generally possesses more of it and the victim possesses less.¹³¹ In academia, these power imbalances can come in several forms: control of access to resources; biases and stereotypes; professional reputations; differences in economic and political resources; organizational positions; or differences in privilege that are based on characteristics of the individuals.¹³² The result is that victims of abuse are required to pursue complaints in the very institutions and organizations where the abuser holds an advantage. These complaints can come at a high cost, affecting a victim's entire educational experience, and as a likely consequence, their careers as well. While formal resolution systems on campuses have expanded, this has not necessarily led to an increase in the reporting of assaults. Research indicates that students rarely report sexual victimization: "less than 20% seek assistance from sexual assault or women's centers; less than 11% report to the police; and less than 6% file a formal complaint

¹³⁰ See Ali Letter, *supra* note 62.

¹³¹ See Valeria A. Sulfaro & Rebecca Gill, *Title IX: Help or Hindrance?*, 40 J. WOMEN, POL. & POL'Y 204, 205 (2019) (defining sexual assault as "an abuse of power by those who possess it against those who do not. The Title IX process does not remedy this power imbalance. And, academic institutions often have interests that compete with the welfare of their students, and which may enable harassers").

¹³² See *id.*

through the campus conduct process.¹³³ Resolution resources are rendered useless if individuals do not feel comfortable utilizing them.

The fact that the complaint process is intrusive, disruptive, and prolonged likely leads survivors to forgo the Title IX Office's formal grievance procedures.¹³⁴ Other reasons they might not use the formal procedures include shame or embarrassment from the assault, the fear of their peers knowing what happened to them, and the fear that they will not be believed.¹³⁵ These issues are only amplified by the fact that institutions vary widely in the ways they define sexual harassment or sexual assault, in the resources they devote to investigating Title IX complaints, and in the transparency they provide about the ongoing process.¹³⁶

Some additional reasons that Latinas and other minority students have low reporting rates include the possibility of being blamed for the incident due to the sexualization and objectification of minority women, the fear of facing additional stigmatization, their lack of trust in the institution, or their worry that they will be further marginalized in their environment. Additionally, undocumented immigrants have been the target of controversial policies and heated debates in the past several decades, resulting in the undocumented status becoming increasingly stigmatized.¹³⁷ This may lead to documentation status being an absolute barrier to reporting, regardless of the severity of the assault or the amount of evidence available. Thus, if survivors do not anticipate that the environment in which they will be reporting the sexual assault will be supportive or if they believe that the campus grievance process itself is unlikely to lead to a meaningful remedy, they are much less likely to report the assault at all. These additional barriers emphasize the importance of addressing the community's climate in regard to racial and ethnic biases as a means of increasing minority reporting of sexual assaults. Data and reporting statistics of Latina women in response to sexual assault and harassment remains an understudied topic, with underrepresentation of Latinas in climate and sexual response surveys being a consistent concern. However, institutions must have a commitment to active and personal engagement with Latinas on campuses. Only then will they be able to receive a level of insight into the cultural mores and experiences that are uniquely

¹³³ Davis Karp, *Restorative Justice and Responsive Regulation in Higher Education: The Complex Web of Campus Sexual Assault Policy in the United States and a Restorative Justice Alternative*, in *RESTORATIVE AND RESPONSIVE HUMAN SERVICES* 143, 147 (Gale Burford, John Braithwaite, & Valerie Braithwaite eds., 2018).

¹³⁴ *See id.*

¹³⁵ *See* Marjorie R. Sable, Fran Danis, Denise L. Mauzy, & Sarah K. Gallagher, *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 *J. AM. COLL. HEALTH* 157, 157 (finding that student rape victims often do not report the crime to authorities out of embarrassment or shame, concerns about confidentiality, fear of not being believed).

¹³⁶ *See* Sulpharo & Gill, *supra* note 131, at 207.

¹³⁷ *See* Leisy J. Abrego, *Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants*, 45 *L. & SOC'Y REV.* 337, 350, 353, 354 (2011).

affecting Latinas to properly provide alternative resolution avenues that better fit their specific needs and experiences.

Even students who do eventually choose to file a formal Title IX complaint may receive only minimal benefits from the process. Many schools currently limit the victim's resolution resources to either an intensive investigation or the suspension of the accused. Both avenues require a process of fact-finding that can often become difficult to confirm due to sexual assaults being linked to a wider culture of hook-ups, binge drinking, and hegemonic masculinity that disproportionately disadvantages minority women.¹³⁸ As a result, it can be an extremely difficult and invasive experience to find evidence sufficient to result in a finding of a sexual misconduct policy violation. These formal responses also create increasing risk for the allowance of the "second rape" of victims. Rather than offering survivors an opportunity to be heard and seek meaningful recognition and remedy to their harms, such grievance proceedings can instead further traumatize and silence survivors. The personal experience of Angie Epifano, a victim of sexual assault at Amherst College in 2012, illustrates the fear of this re-traumatization:

They told me: We can report your rape as a statistic, you know for records, but I don't recommend that you go through a disciplinary hearing. It would be you, a faculty advisor of your choice, him, and a faculty advisor of his choice in a room where you would be trying to prove that he raped you. You have no physical evidence, it wouldn't get you very far to do this. Hours locked in a room with him and being called a liar about being raped? No thank you, I could barely handle seeing him from the opposite end of campus.¹³⁹

Angie's response is not an outlier. It is a demonstration that survivors may prefer to not participate in an adversarial grievance procedure that threatens to impose additional pain, even at the expense of their aggressor going without consequence. For many survivors, these mechanisms are the only means of validation and acknowledgment of their experience available to them. When the process denies the student justice or dissuades them from participating, it denies them the opportunity to heal. For the perpetrator, these processes do little to force them to acknowledge and take accountability for their actions. Instead, they are incentivized to deny responsibility for the harm they caused to avoid the possibility of receiving serious sanctions. The goal and purpose of campus grievance mechanisms is to ensure the safety and wellbeing of students and to prevent reoccurrence of harm. Yet, these adversarial mechanisms do little to meet these demands.

¹³⁸ See Karp *supra* note 133, at 143.

¹³⁹ Angie Epifano, *An Account of Sexual Assault at Amherst College*, AMHERST STUDENT (Oct. 17, 2012), <https://amherststudent.amherst.edu/article/2012/10/17/account-sexual-assault-amherst-college.html>, archived at <https://perma.cc/L844-KH7V> (alleging that sexual assault perpetrators at Amherst experienced "less punishment than stealing" and recounting how she was pressured to take time off instead of pursuing disciplinary action against her rapist).

A. *High Profile Showings of Failures to Provide Adequate Resolution Resources in College Campuses Across the United States*

OCR has promulgated vague guidelines addressing “a number of elements [used] in evaluating whether a school’s grievance procedures are prompt and equitable.”¹⁴⁰ With vague guidance comes a wide latitude in developing and implementing procedures meant to resolve sexual harassment complaints and violations. Additionally, OCR has established relatively weak sanctions for violating the prompt and equitable hearing requirement. In the event of a violation, “the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively.”¹⁴¹ This standard is merely a restatement of the school’s original duty to resolve sexual harassment complaints in a prompt and equitable fashion and does little to assure university policies actually remedy violations under their misconduct policies. In order to demonstrate how schools have failed to implement adequate resolution mechanisms that flow from these guidances, this article will examine the lawsuits arising from alleged sexual improprieties of the University of Colorado’s football team (“CU football team”).

1. The University of Colorado’s Failure to Address and Remediate a Culture of Sexual Assault Within its Athletic Department

There exists no OCR investigation concerning the liability of the University of Colorado (CU) under its guidance for this specific incident. However, two female students did file a private action under Title IX against the university in early 2004,¹⁴² claiming that the university deprived them of an equal education by allowing a pattern of sexual harassment to go unchecked within the football recruiting program.¹⁴³ The evidence and finding of this action will be used to analyze the University of Colorado’s response and resolution under its Sexual Misconduct Policy. During the period of these allegations, the CU football team was one of the premier programs in the country. CU’s success on the field was said to be partly due to an effective recruiting program that attracts the attention of the country’s elite high school football prospects.¹⁴⁴ Under these recruiting programs, which are regulated by the NCAA, schools such as CU are allowed to bring up to 62 high-

¹⁴⁰ See U.S. DEP’T OF EDUC., STUDENTS, *supra* note 57.

¹⁴¹ See *id.*

¹⁴² See Shane Laflin, *Ex-Soccer Player Fed Up with Legal Guerrilla Warfare*, ESPN (Dec. 13, 2004), <http://sports.espn.go.com/nfl/news/story?id=1945583>, archived at <https://perma.cc/AT7T-FFLW> (reporting that a third student, ex-University of Colorado soccer player Monique Gillaspie, had originally been part of this suit against the university, but she dropped the case in December 2004 after what she described as legal ‘guerilla warfare’ was employed against her by the university).

¹⁴³ See *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1173–74 (10th Cir. 2007).

¹⁴⁴ See *id.* at 1180.

school-aged prospects to campus each fall during the football season.¹⁴⁵ The prospects are paired with an “Ambassador,” usually a female student, who escorts the recruits around campus.¹⁴⁶ The prospects are also paired with current players who are selected by the coaching staff. According to Robert Chichester, an attorney in the CU counsel’s office at the time, the player-hosts, who were usually underclassmen, were chosen because “they know how to party and how to show recruits a good time,” and would “do a good job at entertaining them.”¹⁴⁷ The CU football team won the Big 12 Conference championship on December 1 and welcomed high-school recruits to campus a few days later.¹⁴⁸

The two female students, Ms. Simpson and Ms. Gilmore, alleged that several Colorado football players and recruits sexually assaulted them while attending a party at Ms. Simpson’s apartment that weekend in December 2001.¹⁴⁹ CU football players had spoken with a female CU student who worked as a tutor for the athletic department about having a gathering with her and other female students that Friday, December 7.¹⁵⁰ At least one of the players understood that the purpose of the gathering was to provide recruits with a chance to have sex with the female students.¹⁵¹ Ms. Simpson and the tutor agreed to host four football players that night.¹⁵² Between 11:30 and 11:45 PM, about 20 football players and recruits arrived at their home.¹⁵³ When some of the recruits tried to leave not long after arriving, the tutor told them they “should stay because it was about to go down.”¹⁵⁴ Within the hour, Ms. Simpson, who was intoxicated, went to her room to sleep.¹⁵⁵ She was awoken by two men sexually assaulting her, with recruits and other players watching.¹⁵⁶ In the same room, two players and a third man were sexually engaged with Ms. Gilmore, who was too intoxicated to consent.¹⁵⁷ Ms. Simpson ended up withdrawing from the university, and Ms. Gilmore left Colorado for a year.¹⁵⁸

According to the OCR guidelines, a school will be responsible for violating Title IX’s prohibition on sexual discrimination if the school knew or should have known about a hostile environment on campus.¹⁵⁹ To this point, the school arguably should have known about the hostile campus environment. CU had seen a continuous pattern of sexual misconduct for years prior

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See U.S. DEPT OF EDUC., STUDENTS, *supra* note 57, at 13.

to this incident, specifically within its athletic department, and had taken no action to remedy it. As early as 1989, *Sports Illustrated* released an article detailing a pattern of unlawful conduct by CU football players, including a number of cases of sexual violence and assault.¹⁶⁰ In the article, the head coach at the time, Bill McCartney, was quoted as saying, “Rape by definition is a violent act; an act whereby there’s real physical violence involved, and so I don’t think that’s what we’re talking about here.”¹⁶¹ With the continuation of these rape myths within the athletic department came a continuation of sexual assault violations by its players. Following a 1998 rape by a CU football player, then District Attorney Mary Keenan met with CU’s officials to recommend the university develop policies and procedures for supervising recruits, stating that CU was now “on notice.”¹⁶² Yet, CU’s primary response was to simply not admit the two recruits involved in the assault and suspend the player for a semester.¹⁶³

The football team then received a new head coach, Gary Barnett, in 1999.¹⁶⁴ As a response to the pervasive assaults by the football team, Barnett began distributing a football handbook to his players.¹⁶⁵ However, only one page of the 88 addressed the issue of date rape and policy.¹⁶⁶ This measure proved insufficient for Barnett to solve the problem of sexual assault in his recruiting program. In 2000, Dr. David Hnida, the father of Katharine Hnida, a female player on the CU football team, repeatedly told Barnett about multiple instances of sexual harassment by CU football players that the coaching staff allowed to continue.¹⁶⁷ Barnett allegedly retaliated against Katharine Hnida’s continued complaints by preventing her from staying on the football team.¹⁶⁸ Then, just two months prior to Ms. Simpson and Ms. Gilmore’s assaults, a female student and trainer in the athletic department was raped by CU football player.¹⁶⁹ The trainer met with Barnett to report the incident but was met instead with no support.¹⁷⁰ Barnett asked her twice if she planned to press charges and told her that if she did, her “life would change,” and that if the player told a different version of what happened, “he would support the player.”¹⁷¹ The trainer further alleged that when asking Barnett what he would do about punishment, he responded that “he was the player’s coach

¹⁶⁰ See Rick Reilly, *What Price Glory?*, SPORTS ILLUSTRATED VAULT, (Feb. 27, 1989), <https://vault.si.com/vault/1989/02/27/what-price-glory-under-coach-bill-mccartney-colorado-football-has-taken-off-but-so-has-ugly-criminal-behavior-among-the-buffalo-players>, archived at <https://perma.cc/WLH6-Z2NU>.

¹⁶¹ *Id.*

¹⁶² See Simpson, 500 F.3d at 1181–82.

¹⁶³ See *id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1183.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

and not his father and that he would not punish him.”¹⁷² She eventually decided against pressing charges.¹⁷³

This pattern of hostility towards those alleging sexual harassment or sexual assault and the lack of preventative measures or oversight of the recruiting program at the University, despite multiple sexual assault allegations throughout the years, demonstrates a clear showing of a hostile environment on campus. In response to Ms. Simpson’s assault and her reporting the incident to the police, CU revoked spring-semester scholarships for four football players who were allegedly involved in the assault.¹⁷⁴ CU however did not deny the players eligibility for the January 2002 Fiesta Bowl. Coach Barnett reacted by continuing to support recruitment and admission of one of the alleged perpetrators, despite being told that evidence of his involvement in the assaults was “overwhelming.”¹⁷⁵ In response to this evidence, the court in *Simpson* found that by the time of the assault on Plaintiffs:

(1) Coach Barnett . . . had general knowledge of the serious risk of sexual harassment and assault during college-football recruiting efforts; (2) Barnett knew that such assaults had indeed occurred during CU recruiting visits; (3) Barnett nevertheless maintained an unsupervised player-host program to show high-school recruits “a good time”; and (4) Barnett knew, both because of incidents reported to him and because of his own unsupportive attitude, that there had been no change in atmosphere since 1997 (when the prior reported assault occurred) that would make such misconduct less likely in 2001.¹⁷⁶

The coaches and administrators at the University of Colorado were repeatedly put in a position to respond to and resolve cases of sexual assault and harassment on campus. They failed at their responsibilities to care for victims and to provide an environment free from discrimination in the form of sexual harassment at every step of the way. This is a university that has a sexual misconduct policy in place and supposedly compliant resources under Title IX for students on campus. However, these ineffective and inaccessible resources are evidently only a shield for liability. Sadly, the University of Colorado is not unique in its inadequate response to sexual assaults. Similar high-profile cases have been seen in universities such as Baylor,¹⁷⁷ Virginia Tech,¹⁷⁸ University of Iowa,¹⁷⁹ University of Georgia,¹⁸⁰ and Florida State,¹⁸¹

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1184.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See Glynn A. Hill, *NCAA Doesn’t Punish Baylor for Sexual Assault Scandal but Finds Other Violations*, WASH. POST (Aug. 11, 2021), <https://www.washingtonpost.com/sports/2021/08/11/baylor-ncaa-probation-sexual-assault-scandal/>, archived at <https://perma.cc/33AE-53QC>.

¹⁷⁸ See *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949, 949 (4th Cir. 1997).

to name a few. Clearly, the resolution mechanisms and resources offered by universities as they exist are insufficient to assure the protection of students and non-recurrence of violations.

B. The Addition of Restorative Justice as a Supplement to Existing Resolution Resources in a University's Sexual Harassment Policy

Many therefore argue that additional avenues under a school's policy must be created to address these and other culture-specific obstacles to finding successful resolution outside the adversarial approach. One such avenue is the potential application of restorative justice to sexual assault cases under Title IX which could provide for healing and accountability in forms other than invasive adjudication. The goal under this restorative justice approach is to improve the resolution of sexual assault and harassment cases by giving primacy to addressing harm and to create conditions in which it is safe for perpetrators to acknowledge and take responsibility for the harm they have caused.¹⁸² In this sense, restorative justice may align the incentives of the perpetrators and victims to heal, rather than perpetuate the conditions under adjudication that provoke denials and minimizations of responsibility by perpetrators.¹⁸³ This approach has the potential to create a space of healing for victims who are unwilling or unable to find resolution through the formal Title IX process. The approach also addresses the issues embedded in the greater community that allow for such violations to occur that were previously ignored through the individually focused adversarial process, such as stereotypes, bias, language barriers in formal procedures, and fear of further traumatization.

Restorative justice takes the form of a facilitated conference that involves all affected parties, including not only the individual offender and the victim, but affected community members.¹⁸⁴ These community members can include specially trained advocates, counselors, and those close to the victim

¹⁷⁹ See Matt Belinson, *How Has Iowa State Athletics Handled Past Sexual Misconduct Cases?* IOWA STATE DAILY (Oct. 10, 2021), https://www.iowastatedaily.com/sports/how-has-iowa-state-athletics-handled-past-sexual-misconduct-allegations-iowa-state-basketball-sexual-assault-history-sports-cyclone-basketball-bubu-palo-athletics-case-sports/article_1be8f7f8-2a39-11ec-b154-3fa94224a267.html, archived at <https://perma.cc/SU9R-JERC>.

¹⁸⁰ See Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 95–98 (2010).

¹⁸¹ See Marc Tracy, *Florida State Settles Suit over Jameis Winston Rape Inquiry*, N.Y. TIMES (Jan. 25, 2016), <https://www.nytimes.com/2016/01/26/sports/football/florida-state-to-pay-jameis-winstons-accuser-950000-in-settlement.html>, archived at <https://perma.cc/4KVH-MSGP>.

¹⁸² See U.S. DEP'T OF EDUC. STUDENTS, *supra* note 57, at 20.

¹⁸³ See *id.*

¹⁸⁴ CHARLES K. B. BARTON, RESTORATIVE JUSTICE: THE EMPOWERMENT MODEL 42–47 (2003) (discussing and comparing different restorative justice models and providing a detailed description and analysis of how to conduct restorative justice conferences that are geared towards the empowerment and emotional engagement of the participants in order to maximize its benefits).

and the offender.¹⁸⁵ The inclusion of the community is meant to encourage honesty, accountability, productivity, and communication. Both parties are given the space to speak about what transpired from their perspectives and to respond to the other participants' testimony.¹⁸⁶ In this way, restorative justice approaches respond to situations where the relevant evidence is not physical but testimonial in nature. Additionally, restorative justice, in contrast to traditional adversarial methods, allows the victims to have a central role in determining the proper remedy that adequately responds to their needs for resolution. In this sense, restorative justice gives victims a feeling of control over their trauma and their path to healing that is not available under traditional grievance mechanisms. These models offer the victim an opportunity to receive meaningful validation and redress while also giving perpetrators the incentive to acknowledge and face the consequences of their actions. Restorative justice offers one promising avenue that universities could adopt as part of a comprehensive model to address the varying situations that responsive measures are meant to deal with. The burden falls on the institutions to create such alternative spaces for victims who do not fit the typical mold necessary for a productive adjudication.

VI. CONCLUSION

Institutions of higher education have not addressed the underlying causes of harassment in academia, nor have they effectively eradicated behaviors of discrimination and abuse. It is important to remind institutions that regulations only set forth the *minimum* steps that institutions must take to comply with Title IX. They remain free to implement and enforce policies and procedures that they believe are best suited to protect their students on campus. Title IX's language and its intent to remedy instances of discrimination on the basis of sex, if interpreted expansively and applied correctly, provide limitless potential for the protection of all students. To be effective, the resources and obligations under Title IX must be analyzed through a racial and ethnic lens to allow for its protection to reach the interests and realities of non-white women. However, the current implementation of Title IX fails to reach Latina women in the proper prevention, response, *and* resolution of their claims, ultimately failing an entire subgroup of vulnerable students.

In making sure that these measures of proper prevention, response, and resolution for Latinas are implemented, the importance of OCR's guidance and its interpretation cannot be overstated. The Dear Colleague Letter released by the Department of Education's OCR under the Obama Administration reiterated previous OCR policy and extended its reach.¹⁸⁷ The policy

¹⁸⁵ *See id.*

¹⁸⁶ *See id.* at 66–67.

¹⁸⁷ *See* U.S. DEP'T OF EDUC., DEAR COLLEAGUE, *supra* note 70; *see also* U.S. DEP'T OF EDUC., OFF. OF CIV. RTS., QUESTIONS & ANSWERS ON TITLE IX & SEXUAL VIOLENCE (Apr. 29,

expanded the definition of sexual harassment to include sexual violence, which it defined as “rape, sexual assault, sexual battery, and sexual coercion.”¹⁸⁸ Additionally, the letter and subsequent Question & Answer document offered a more precise explanation of institutional responsibilities for adjudicating alleged sexual misconduct on campuses.¹⁸⁹ The letter also required that schools respond to incidents of sexual harassment and violence, including off-campus incidents, and required the school to take “prompt and effective steps” to end sexual violence, prevent its recurrence, and address its effects, regardless of whether the sexual violence was or became the subject of a criminal investigation.¹⁹⁰ Perhaps most importantly, the letter emphasized that the correct evidentiary standard to use in resolving complaints of sexual harassment was a “preponderance of the evidence” standard (i.e., it is more likely than not that the sexual harassment/sexual discrimination occurred).¹⁹¹ This made the required evidentiary standard consistent across statutes prohibiting discrimination, as it is the same evidentiary standard applied in civil rights litigation involving discrimination under Title VII, another statute prohibiting discrimination on the basis of sex, as well as Title VI, a statute prohibiting discrimination on the basis of race in educational institutions.¹⁹² This interpretation allowed for the broadest reach of Title IX protection to all on campus, requiring institutions of higher education to implement policies with inclusive language and to provide victims a more favorable evidentiary standard in resolution mechanisms.

Devoting a separate section to Title IX, the 2016 Republican platform declared that the Obama Administration’s “distortion of Title IX to micromanage the way colleges and universities deal with allegations of abuse contravenes our country’s legal traditions and must be halted.”¹⁹³ Betsy DeVos, the Trump Administration’s Secretary of Education, vowed in 2017 to replace the “failed system” of adjudicating campus sexual harassment claims under Title IX.¹⁹⁴ In a speech explaining her proposed changes, DeVos claimed that insufficient rights for the accused and university bias in favor of survivors required narrowed investigatory requirements, heightened evidentiary standards, and expanded rights for the accused.¹⁹⁵ DeVos implemented interim guidance and then promulgated new regulations doing just that.¹⁹⁶ DeVos justified these actions by claiming that the Obama-era gui-

2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>, archived at <https://perma.cc/DQM8-MGWW>.

¹⁸⁸ See U.S. DEPT OF EDUC., DEAR COLLEAGUE, *supra* note 70, at 1.

¹⁸⁹ See *id.*

¹⁹⁰ *Id.* at 2.

¹⁹¹ *Id.*

¹⁹² See *id.*

¹⁹³ MELNIK, *supra* note 35, at 186.

¹⁹⁴ Susan Svrluga, *Transcript: Betsy DeVos’s Remarks on Campus Sexual Assault*, WASH. POST (Sept. 7, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/>, archived at <https://perma.cc/L4HF-3PND>.

¹⁹⁵ See *id.*

¹⁹⁶ See Carter, *supra* note 63, at 193.

dance “lacked basic elements of fairness and that procedures implemented under the guidance treated accused students unfairly.”¹⁹⁷

The most important change implemented was allowing schools the discretion to choose between two evidentiary standards—preponderance of evidence or clear and convincing—in adjudicating sexual harassment claims.¹⁹⁸ This change increases the already difficult to reach threshold required to prove harassment given the lack of evidence usually available surrounding violations. This also permits a less rigorous institutional response from the one that exists, further separating Latinas from proper institutional support. In other words, the regulations may further discourage women of color from reporting sexual harassment due to the already common fear that their incident will fail to meet the standard of being “sufficiently severe.”¹⁹⁹ This analysis not only leads to underreporting, but to a likely increase in the rate at which claims of minority women are dismissed.

President Biden signed an Executive Order—*Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*—that directs the Department of Education to review the Title IX regulations issued under the Trump Administration and any other agency actions taken pursuant to those regulations.²⁰⁰ The Executive Order specifies that the review of these materials shall be “for consistency with governing law, including Title IX, and with the policy” announced in the Executive Order that “all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity.”²⁰¹ As demonstrated throughout this article, detailed and expansive guidances are necessary conditions for there to be hope that university sexual misconduct policies will adequately prevent, respond to, and remedy violations on their campuses. Vague guidances, discretionary standards, and limited requirements thus far have led to an epidemic of sexual violence against women on college campuses across the United States. Therefore, it is vital that the Biden Administration take seriously the responsibility to issue new guidances and regulations, raising the minimum standard that universities must abide by under Title IX.

The complexity surrounding sexual harassment combined with the increased vulnerability of Latina women underscores the necessity for legislative and regulatory reform that accounts for the interplay between race and gender. Alleviating this compounded negative impact on female students of color requires recognizing and embracing the intersection of race and gender and adopting a holistic approach to addressing and preventing sexual assault and harassment under Title IX. By using the theory of intersectionality to

¹⁹⁷ *Id.*

¹⁹⁸ *See id.* at 194.

¹⁹⁹ *Id.* at 200.

²⁰⁰ *See* Exec. Order No. 14021, 86 Fed. Reg. 13,803 (Mar. 11, 2021).

²⁰¹ *Id.*

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offer insight into the experiences of Latinas, we can begin responding to the interests and vulnerabilities of Latina victims that have been ignored in mainstream inquiries of sexual assaults and gender discrimination on college campuses. Without examining the numerous aspects of identity that shape the experiences of these marginalized victims, resources will continue to be relatively uniform as to *ex-ante* services and *ex-post* support. When more research focused on gendered and racial perspectives examines these barriers faced by Latinas, improved prevention, response, and resolution strategies can be implemented in the existing Title IX framework that would allow Latinas to be protected under the statute, as was originally intended. Only then will Title IX truly provide protection on the basis of sex instead of merely on the basis of privilege.

