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# The Criminalization of Title IX

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# The Criminalization of Title IX

Erin Collins\*

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## INTRODUCTION

Feminist-influenced criminal rape law reform has been heralded as a success. The criminal law has changed to abolish, for the most part, the utmost resistance requirement, corroboration requirement, and marital exemption to sexual assault, while evidence law has expanded to shield victims from cross-examination about their sexual history.<sup>1</sup> Nevertheless, there is a growing belief that these formal legal changes in how we define and prosecute sexual assault have not brought about the

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\* Executive Director, NYU School of Law Clemency Resource Center. Many thanks to Aya Gruber for her helpful comments and for organizing this symposium. The views expressed here are my own.

<sup>1</sup> See I. Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. 1259, 1305–06 (2011) (listing formal legal changes to rape law). See generally ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 1–3 (2013) (recounting the “ubiquitous, triumphalist accounts of the anti-rape movement”). In many jurisdictions, evidence law has also changed to authorize admission of a sexual assault defendant’s history of sex offenses. See, e.g., FED. R. EVID. 413.

behavioral and cultural changes many envisioned.<sup>2</sup> The recent spate of media and political attention to sexual assault on college campuses serves as a reminder that, despite decades of focused advocacy, theorizing, and reform, sexual assault remains an entrenched and troubling issue. Moreover, critical scholars have revealed that these formal legal victories came at a cost; they were secured through an alliance between feminist advocates and conservative actors whose efforts increased the reach of punitive state polices<sup>3</sup> and prioritized the desires of more privileged victims over—and at the expense of—others.<sup>4</sup> This counterintuitive embrace of punitive tactics by certain schools of feminist thought has come to be known as “carceral feminism.”<sup>5</sup>

While sexual assault on college campuses is emblematic of the continuing problem of sexual assault, how we respond to it may also provide insights to the solution. The rather recent clarification that Title IX’s prohibition against sex discrimination at federally-funded educational institutions extends to peer-to-peer sexual assault<sup>6</sup> presents an opportunity to craft a response to rape beyond the criminal justice system. Title IX, as interpreted by the Department of Education’s Office for Civil Rights (OCR), imposes on universities three primary duties vis-à-vis sexual violence: a duty to respond effectively to individual acts of violence (response duty), a duty to prevent future violence (prevention duty), and a duty to remedy the effects of such violence on victims and the broader student community (remedial duty).<sup>7</sup> As Title IX is a civil, not criminal, law that imposes responsibility on institutions, not individuals, the implementation of Title IX can—and, I contend, should—lead to policies and procedures that depart in remarkable ways from the criminal justice approach. It provides an opportunity to draw

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<sup>2</sup> Capers, *supra* note 1, at 1305–06 (“The simple fact is that rape reforms over the last thirty years have not had the effect feminists desired.”); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 17 (1998) (“The legislative changes inspired by the feminist antirape movement accomplished very little.”).

<sup>3</sup> See Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007); see also KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 7 (2008) (describing how “[m]ainstream feminist demands for more certain and severe punishment for crimes against women fed into . . . reactionary forces” and promoted the “the crime control business”).

<sup>4</sup> For example, Beth E. Richie has recounted the relationship between the movement against violence against women and the “buildup of America’s prison nation” and concludes that although “some women are safer in 2012 than they were 25 years ago,” “women with less power . . . are in as much danger as ever, precisely because of the ideological and strategic direction the anti-violence movement has taken.” See BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION 2–4 (2012).

<sup>5</sup> See *infra* Part I.

<sup>6</sup> See *infra* Part II. For the text of Title IX, see 20 U.S.C. §§ 1681–1688 (1988), and its implementing regulations, 34 C.F.R. § 106.

<sup>7</sup> See *infra* Part II.

lessons from rape law reform efforts and expand accountability and justice in the sexual assault context beyond the punitive criminal law framework.

Nevertheless, this essay demonstrates that this opportunity is being overlooked as current Title IX practices are coming to resemble an extension of, rather than a diversion from, the criminal justice framework. Under the guidance of Congress and the Office for Civil Rights and the influence of activists, media outlets, and risk management consultants, many universities have embraced the notion that the primary way to demonstrate that they take sexual assault seriously is to punish individuals accused of such offenses harshly and swiftly. Toward that end, there has been disproportionate emphasis on universities' response duty, with calls for processes and standards that increase the likelihood that a student accused of sexual misconduct will be found responsible and even the adoption of "mandatory minimum" punishments for students found responsible for sexual assault.<sup>8</sup> The prevention duty is likewise coming to mimic the criminal justice approach, promoting disciplinary practices that shift the responsibility of managing the risk of assault to potential victims and bystanders and incorporating an incapacitatory logic that counsels in favor of removing offending students from the community.

Like criminal law reform itself, this interpretation and application of Title IX's mandates appears, at first blush, to be an unmitigated success story for feminism. And, unsurprisingly, some feminist legal theorists celebrate Title IX for enabling pursuit of offenders unhampered by the defendant-protective rights and standards of criminal law.<sup>9</sup> To those who laud the increasingly punitive focus of Title IX policy, the current Title IX regime represents an enticing alternative to the criminal justice system, an opportunity to achieve the punishment and accountability denied to many under the current criminal law regime.

This essay contends, by contrast, that these punitive interpretations of Title IX, like criminal law reform itself, will be limited in their ability to change behaviors and provide meaningful relief and should trouble feminists concerned with the consequences of tough on crime policies. The essay argues that the prevailing interpretations of Title IX sacrifice structural critiques of the origins of gendered violence in favor of a myopic focus on individual responsibility as the key to remedying the problem of campus sexual assault. It is a largely reactive approach that, while not carceral in the technical sense because it does not lead to incarceration or expand the prison state, embraces criminal law's fundamental dedication to punitive, rather than redistributive, solutions to social issues.<sup>10</sup>

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<sup>8</sup> See *infra* Part II.

<sup>9</sup> See, e.g., Nancy Chi Cantalupo, "Decriminalizing" *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 487–90 (2012); Katharine Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221 (2015).

<sup>10</sup> See Aziza Ahmed, *When Men Are Harmed: Feminism, Queer Theory, and Torture at Abu Ghraib*, 11 UCLA J. ISLAMIC & NEAR E. L. 1, 5 (2012) (describing carceral feminism as "a move

But this criminal law-like interpretation of Title IX's mandates is not inevitable. There is another way, also rooted in feminist legal theory, to interpret and implement Title IX. From this perspective, Title IX is not an avenue for securing the justice unavailable in the criminal justice system but is instead a way to redefine what justice means in the context of sexual assault. It emphasizes the transformative potential of the Title IX framework for thinking critically about the power of institutions to promote cultural changes that discourage sexual violence and to adopt accountability regimes that may go a long way toward changing, instead of simply punishing, behavior. This interpretation both revives early second-wave feminist intuitions about the sources of sexual violence and applies more contemporary feminist insights about the need for responses beyond harsh punishment. It capitalizes on the difference between Title IX and the criminal law by emphasizing Title IX's requirement of institutional responsibility for preventing and responding to sexual assault.

This analysis is related to, but separate from, the ongoing debate over whether schools should import criminal law standards and procedures into internal disciplinary proceedings.<sup>11</sup> In contrast to those who focus on the amount of process due to the parties involved in campus adjudication, this paper highlights, and critiques, the influence of punitive criminal law discourse on emerging Title IX policies, specifically the focus on individual punishment and responsibility.

This essay proceeds in three parts. Part I provides a brief overview of the history of feminist-influenced criminal rape law reform and the rise of carceral feminism. Part II demonstrates how key tenets of the criminal law approach have been imported into emerging Title IX policies. Part III engages in a brief distributional analysis to identify who benefits and who loses from this approach. Then, drawing on insights from critical feminist critiques of rape law reform, begins to identify ways to use the opportunity Title IX presents to craft a very different kind of response to sexual assault—one that focuses on non-punitive prevention, seeks to identify and change institutional norms and practices that contribute to sexual violence, and provides victims with access to accountability mechanisms beyond traditional punishment.

## I. RAPE, CRIMINAL LAW, AND THE RISE OF CARCERAL FEMINISM

To understand how Title IX is coming to replicate errors of the criminal rape law reform, this section provides a brief overview of how those errors were made—and the complicated role of feminist theory and activism in bringing about

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towards market-based (neoliberal) and punitive rather than redistributive solutions to contemporary social problems.”).

<sup>11</sup> See *infra* Part II.

that reform.<sup>12</sup> When second-wave feminists<sup>13</sup> first turned their attention to rape reform, many situated their insights within a larger critique of structural subordination and inequalities.<sup>14</sup> Although rape was an act committed by an individual perpetrator, many feminists understood the state itself as complicit in the perpetuation of gender subordination, generally, and sexual violence, specifically.<sup>15</sup> Toward that end, many feminists were skeptical of enlisting the state's power to redress sexual violence.<sup>16</sup>

By the 1980s, however, criminal law had become a primary focus of mainstream feminist activism. Though feminists offered different, and competing, articulations of the causes of rape and the specific harms that flowed therefrom,<sup>17</sup> they were largely united in their call for formal changes to the criminal law. This approach met much success. Due, in large measure, to the focused efforts of feminist activists and academics, the law that governs the definition and prosecution of rape looks quite different than it did just a few decades ago. Criminal law, for the most part, no longer excuses men who rape their wives or requires proof of utmost physical resistance by a victim of rape or corroboration of her account.<sup>18</sup> Furthermore, changes to evidence law upended the normal rules of admissibility for rape prosecutions in many jurisdictions by strictly limiting the scope of cross-examination of rape complainants about their sexual history,<sup>19</sup> while

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<sup>12</sup> For a full account of this history see Gruber, *supra* note 3. See also RICHIE, *supra* note 4; BUMILLER, *supra* note 3.

<sup>13</sup> "Second-wave feminists" were those who organized and theorized between the 1960s and 1990s. See Aya Gruber, *Neofeminism*, 50 Hous. L. Rev. 1325, 1331 (2013). They generated "several feminist schools of thought, ranging from purely liberal (those dedicated to giving women 'equal' rights to men) to extremely radical (those calling for an overhaul of the 'male' legal and social structure)." *Id.* at 1331–32.

<sup>14</sup> RICHIE, *supra* note 4, at 68 (noting that early movement against gender violence "focused on structural change") and 71 (noting early work in rape crisis centers "reflected an analysis of male violence that understood the multifaceted nature of the harm that women faced. Class-based oppression, racial discrimination, and exploitation based on sexuality were targets in the work against the root causes of male violence, even though challenging gender inequality dominated as the undisputed primary political goal.").

<sup>15</sup> Gruber, *supra* note 3, at 754–55 (noting that feminists initially resisted the notion that rape was merely the result of "individual 'deviant' males asserting illegitimate power over individual women. Rather such crimes reflected larger social inequalities.>").

<sup>16</sup> See CORRIGAN, *supra* note 1, at 30 ("Law and its functionaries were typically viewed as antagonistic to, rather than allies with, the kinds of larger changes feminists sought.>").

<sup>17</sup> Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 591–94 (2009) (discussing the differences between predominant feminist theories of rape).

<sup>18</sup> See Capers, *supra* note 1, at 1305–06 (listing formal legal changes to rape law); Gruber, *supra* note 17, at 593 (discussing elimination of resistance and corroboration requirements).

<sup>19</sup> See, e.g., FED. R. EVID. 412. These are generally referred to as "rape shield" laws.

empowering the prosecution to elicit the defendant's history of sexual violence to prove criminal propensity.<sup>20</sup>

Unfortunately, these changes to substantive and procedural laws did not bring about the behavioral, institutional, and cultural changes feminists believed would follow.<sup>21</sup> Indeed, sexual assault continues to occur at a seemingly unrelenting rate;<sup>22</sup> the statistic that one-in-five college women have experienced sexual assault has remained a mainstay of rape activism for decades.<sup>23</sup> Moreover, those tasked with enforcing criminal law continue to discount and undervalue the accounts of those who report sexual violence,<sup>24</sup> particularly when those reports come from racial and sexual minorities.<sup>25</sup> Despite feminist urgings to adapt rape law and policy to reflect the reality that most sexual assaults are committed by individuals known to the victim, the state continues to focus disproportionately on the anomalous rape committed by a stranger, with physical force.<sup>26</sup> It remains generally inept at responding to sexual assaults perpetrated by acquaintances and

<sup>20</sup> See, e.g., FED. R. EVID. 413. I. Bennett Capers calls these "rape sword" laws. I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 828 (2013). This practice also occurs commonly in domestic violence prosecutions. See Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. REV. 397 (2015).

<sup>21</sup> See Gruber, *supra* note 17, at 603 ("Reformers expected the criminal law to shape a new culture valuing female sexual agency and counseling restraint and respect in sexual relationships."); CORRIGAN, *supra* note 1, at 33 (noting that feminists believed that "new attitudes about sexual violence would result from and reflect a broadened legal understanding of and response to rape."). See generally Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 623–25 (2000) (discussing why the "hard shove" of rape law reform was ineffective in changing "sticky norms" about date rape).

<sup>22</sup> The U.S. Department of Justice reports that 284,350 instances of rape or sexual assault occurred in 2014. See JENNIFER L. TRUMAN & LYNN LANGTON, U.S. DEP'T. OF JUST., CRIMINAL VICTIMIZATION, 2014 2, tbl.1 (2015), <http://www.bjs.gov/content/pub/pdf/cv14.pdf>. Only 33.6 percent of these were reported to the police. *Id.* at 7, tbl.6. There is reason to believe these statistics capture only a fraction of the number of sexual assaults that actually occur. See, e.g., Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1206 (2014).

<sup>23</sup> Nancy Chi Cantalupo, "Decriminalizing" Campus Institutional Responses to Peer Sexual Violence, 38 J.C. & U.L. 481, 482 n.3 (2012) (citing statistics dating back to 1993 demonstrating that between 20 and 25% of college women "are victims of attempted or completed nonconsensual sex during their time at college or university").

<sup>24</sup> For example, Rose Corrigan's recent qualitative analysis of rape crisis centers demonstrates that people who have been sexually assaulted "are still likely to face overwhelming resistance, reluctance, and even outright contempt from legal and medical systems targeted by the feminist anti-rape movement" and that the "goals of justice and care for rape victims are still largely unfulfilled." CORRIGAN, *supra* note 1, at 3–4.

<sup>25</sup> See generally RICHIE, *supra* note 4, at 91 (discussing the "erasure" of "lesbians, women of color in low-income communities, and other marginalized groups" from the "dominant view of victimization").

<sup>26</sup> See Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CAL. L. REV. 1553 (2014).

intimate partners,<sup>27</sup> and particularly inept at acknowledging, let alone reacting to, assaults that defy prevailing gendered, heteronormative assumptions.<sup>28</sup> And even when state authorities do pursue charges, jurors continue to acquit or convict based on gendered and racialized rape myths that persist despite legal changes.<sup>29</sup>

At the same time, serious negative, albeit unintended, consequences have accompanied feminist-involved criminal law reform. Changing the criminal law was prioritized over demands for affirmative rights to be free from gendered violence or substantive rights to benefits and supportive services that empower those who experience violence to craft a response that is effective for them.<sup>30</sup> The myopic focus on punishing individual offenders has muted articulations of the systemic causes of sexual violence and stilted demands for remedies beyond the criminal justice system.<sup>31</sup> Consequently, as Mari Matsuda explains, “if a woman is raped, we look to the rapist for recourse” and not from a “system that creates and condones rape.”<sup>32</sup> We absolve from liability those who may be best suited to “predict and prevent rape,” such as law enforcement, and those who “create an ideological system that makes rape possible.”<sup>33</sup> And while absolving the state of responsibility, this approach concomitantly reifies state power and positions the state as the savior of women.<sup>34</sup>

Moreover, to achieve these legislative successes mainstream feminists aligned with conservative victims’ rights advocates and tough-on-crime pundits to ride the wave of punitive neoliberal criminal justice reform.<sup>35</sup> Unfortunately, “rather than the criminal justice system adopting a feminist agenda, feminist reformers

<sup>27</sup> Susan Estrich famously identified rape that occurs between acquaintances as “real rape.” See SUSAN ESTRICH, *REAL RAPE* (1988).

<sup>28</sup> See, e.g., Capers, *supra* note 1, at 1264 (describing how the criminal justice system and legal scholars have “turned a blind eye to male rape victimization.”).

<sup>29</sup> See Capers, *supra* note 20, at 865–871.

<sup>30</sup> Aya Gruber, *A “Neo-Feminist” Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER RACE & JUST. 583, 612 (2012) (“a collateral harm of the . . . rape reform campaigns is that criminalization efforts diverted an enormous amount of feminist academic and political capital away from distributive and dialectic efforts that could help secure the well-being, not just of women victims, but of all women.”); CORRIGAN, *supra* note 1, at 8 (describing how feminists came to focus on statutory victories instead of “far-reaching demands on the state to recognize sexual violence as a kind of injustice against women as a class,” and thus “never developed an affirmative, rights-based language to talk about the causes, or the harms, or appropriate redress for gendered violence”).

<sup>31</sup> See Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2202–03 n.33 (2000); Gruber, *supra* note 17, at 585.

<sup>32</sup> Matsuda, *supra* note 31, at 2202–06.

<sup>33</sup> *Id.* at 2202–03.

<sup>34</sup> See CORRIGAN, *supra* note 1, at 39 (“Rape law reform affirmed criminal law as the proper governmental forum for addressing sexual violence, legitimated law enforcement agencies as the primary state actors responsible for responding to rape”).

<sup>35</sup> See Gruber, *supra* note 17, at 583–585. See also BUMILLER, *supra* note 3, at 7.



essentially adopted the criminal justice system's agenda."<sup>36</sup> Consequently, the notion of taking rape seriously has become synonymous with expanding the state's power to punish, both in society at large and many feminist schools of thought. The resultant, and counterintuitive, orientation of feminism toward market-based, punitive responses has come to be characterized as "carceral feminism."<sup>37</sup>

As many scholars have highlighted, the demand for a strong criminal justice response to sexual assault is antithetical to the anti-subordination and distributive goals that inspire much feminist legal theory.<sup>38</sup> Moreover, it privileges the experience of those who want and are able to effectively enlist the state to intervene in response to violence and overlooks how race, class, and sexual orientation impact how criminal justice is meted out.<sup>39</sup>

Thus, while feminist-involved criminal rape law reform has been successful in changing the formal law, it has been less impressive in changing behaviors, and this success has been achieved at a substantial cost. For many reasons, it is time for feminists to "take a break"<sup>40</sup> from criminal rape law reform and push for

<sup>36</sup> Gruber, *supra* note 30, at 588.

<sup>37</sup> See Ahmed, *supra* note 10, at 5. See also Janet Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 MELB. J. INT'L L. 78, 79 (2008) (describing "carceral feminism" as the "turn of Western feminism to criminal law as its preferred mode of deploying their power in policy- and law-making" and as "intent on criminalising, indicting, convicting, and punishing perpetrators of sexual violence in numerous domains of domestic law"). Professor Elizabeth Bernstein first articulated the term "carceral feminism" in 2007. See Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism,"* 18 DIFFERENCES 128, 143 (2007). See also Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS 45 (2010).

<sup>38</sup> See, e.g., Gruber, *supra* note 30, at 609–10 ("if being a feminist means pursuing 'a larger, critical agenda originating in the experiences of gender subordination,' then strengthening the already ubiquitous criminal justice system, especially in its current anti-distributive form, appears inconsistent with the feminist identity as a philosophical matter.") (internal citations omitted); NANCY A. MATTHEWS, *CONFRONTING RAPE: THE FEMINIST ANTI-RAPE MOVEMENT AND THE STATE* 151–152 (1994) ("The liberal view of the state as the appropriate institution to control violence is in tension with a radical analysis of the state as using violence repressively to uphold power relations, including oppressive gender relations.").

<sup>39</sup> See e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991) ("Women of color are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile."). See also MATTHEWS, *supra* note 38, at 151–152 (contrasting the expectations of white, liberal, middle-class women involved in Los Angeles's anti-rape movement, whose "reflex" was "to call the police when in trouble," with "Black and Latina women [who] had experiences of police racism, including harassment, trivializing their complaints, threats of deportation, and assault, so they were more likely to view the police as another potential threat rather than to assume protection.").

<sup>40</sup> I am borrowing this phrase from Janet Halley, who argues that it is time to "take a break from" feminism. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

responses to sexual assault beyond the criminal justice system. For instance, as Aya Gruber has suggested, feminists should “begin the complicated process of disentangling feminism and its important anti-sexual coercion stance from a hierarchy-reinforcing criminal system that is unable to produce social justice.”<sup>41</sup>

Title IX presents an opportunity to think differently about how to respond to sexual violence. The issue of campus rape has gained new prominence since the 2011 “Dear Colleague Letter,”<sup>42</sup> and is currently a focal point for renewed national conversations about crafting effective responses to sexual assault.<sup>43</sup> And yet, as the following section demonstrates, this opportunity is being overlooked as Title IX policy is quickly coming to replicate, rather than diverge from, the standard criminal justice model.

## II. CARCERAL FEMINISM GOES TO COLLEGE

Title IX is an anti-discrimination law that entitles students of federally-funded educational institutions, including universities, to a learning environment free of sex discrimination.<sup>44</sup> Though Title IX has existed since 1972, it was not recognized as a mechanism for redressing sexual harassment until 1992.<sup>45</sup> Sexual harassment constitutes discrimination under Title IX if it is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”<sup>46</sup> Generally, a single sexual assault, even if committed off campus, will suffice to satisfy this standard.<sup>47</sup>

The primary purpose of Title IX is to protect students from discrimination, not compensate them for their loss.<sup>48</sup> Significantly, when a university is liable under Title IX for sexual violence committed by one student upon another, it is not because the student perpetrator was acting as an agent of the university, but rather

<sup>41</sup> Gruber, *supra* note 17, at 653.

<sup>42</sup> See See Russlynn Ali, U.S. Dep’t of Educ., Dear Colleague Letter 3 (Apr. 4, 2011) [hereinafter “Dear Colleague Letter”], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. For further discussion of the Dear Colleague Letter, see *infra*, Part II.

<sup>43</sup> KnowYourIX.org started in 2013 as a “survivor-run, student-driven campaign to end campus sexual violence” by educating students about their rights under Title IX and pushing for legislative changes. ABOUT KYIX, KNOWYOURIX, <http://knowyourix.org/about-ky9/> (last visited Mar. 15, 2016).

<sup>44</sup> See 20 U.S.C. §§ 1681–1688 (2006), and its implementing regulations, 34 C.F.R. § 106.

<sup>45</sup> Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992) (recognizing sexual harassment as a form of sex discrimination under Title IX).

<sup>46</sup> Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999).

<sup>47</sup> See Dear Colleague Letter, *supra* note 42, at 3 (“a single instance of rape is sufficiently severe to create a hostile environment.”).

<sup>48</sup> Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998) (“whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on ‘protecting’ individuals from discriminatory practices carried out by recipients of federal funds.”).

because the university failed to prevent and/or respond adequately to such violence. In other words, a university is liable for its actions (and inactions) as an institution, not the actions of its students.<sup>49</sup>

The Supreme Court first clarified in 1999 that student-on-student sexual harassment may trigger Title IX liability.<sup>50</sup> But it was not until 2011, when the Department of Education's Office for Civil Rights (OCR)<sup>51</sup> published its infamous "Dear Colleague" Letter, that Title IX garnered widespread attention as a vehicle for redressing sexual violence.<sup>52</sup> The Dear Colleague Letter was issued as a "significant guidance document" to assist university administrators in enacting policies and procedures that satisfied Title IX.<sup>53</sup> Aspects of this letter were recently codified in the Campus Sexual Violence Elimination Act (SaVE Act).<sup>54</sup>

As will be delineated below, Title IX, as interpreted in the Dear Colleague Letter and the SaVE Act, imposes upon universities three duties that extend well beyond disciplining individual acts of sexual violence: a duty to respond "promptly and equitably" to instances of sexual violence (hereinafter the "response duty"), a duty to "prevent its recurrence" (hereinafter the "prevention duty"), and a duty to "address its effect" on the victim and the student body (hereinafter the "remedial duty").<sup>55</sup>

Thus, at its core, Title IX and its administrative regime aim to make *universities* behave better and to create better learning environments. As a civil, not criminal, law that targets institutions, not individuals, the implementation of Title IX should look quite different from the criminal justice system. And yet, as this section shows, to date the duties are being interpreted and applied through a reactive lens that replicates the discourse and practices of the criminal justice system. Though not "carceral" in the sense that incarceration is not on the table, the carceral feminist mindset—that a punitive response is *the* way to respond to, prevent, and remedy sexual assault—drives much of the current Title IX policy and procedure. Moreover, those pushing for tough Title IX policies are utilizing

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<sup>49</sup> See *Davis*, 526 U.S. at 633, 641–643.

<sup>50</sup> *Id.* at 633.

<sup>51</sup> The Office of Civil Rights is responsible for investigating and pursuing administrative Title IX complaints.

<sup>52</sup> See Dear Colleague Letter, *supra* note 42. This letter drew much attention because in it the OCR mandated that universities employ a preponderance of the evidence standard in adjudicating allegations of sexual violence. See *id.* at 10–11.

<sup>53</sup> *Id.* at 1 n.1.

<sup>54</sup> The SaVE Act was passed as part of the 2013 Violence Against Women reauthorization. It amends the Clery Act, which requires schools to collect and publicize data about certain criminal activity that occurs on campus, including sexual assault. See 20 U.S.C. § 1092(f) (2012).

<sup>55</sup> Dear Colleague Letter, *supra* note 42 at 4, 18 ("If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.").

tactics similar to those that contributed to criminal rape law reform: publicizing narratives involving brutally violent rapes and permissive university responses, characterizing such incidents as indicative of an epidemic, and using this image of an epidemic to advocate for more punitive policies.<sup>56</sup>

Of course, current Title IX law, policy, and practices are not simply the product of an application of carceral feminist attitudes about sexual violence. As in the criminal law context, the increasingly punitive focus of Title IX is magnified by the influence of risk reduction principles. Certainly, universities are motivated to implement robust policies that they believe will meaningfully address the perceived epidemic in sexual violence by a desire to ensure student safety. But the risk of severe financial liability for failing to do so undoubtedly shapes their policies as well. The Title IX duty runs from the university to its students, and if the university violates its duty, it is vulnerable to monetary damages awards to aggrieved students and may lose its federal funding. There are two mechanisms for enforcing Title IX: a student may sue the university for violating his or her Title IX rights and can recover damages upon proof that the school acted with “deliberate indifference to known acts of harassment.”<sup>57</sup> Alternatively, the student may file an administrative complaint with OCR, which will conduct an independent investigation and may order that the school take affirmative measures to remedy its failures. OCR is empowered to revoke an institution’s federal funding if it finds a university has failed in its Title IX duties.<sup>58</sup>

Unsurprisingly, then, as universities struggle to understand and fulfill these newly acknowledged duties, they are interpreting them through a discourse of risk management. Tellingly, many universities place their Title IX Coordinator within their Department of Risk Management and Compliance and, in some instances, assign individuals duties as both Title IX coordinators and risk compliance assessors.<sup>59</sup> Moreover, as Title IX has expanded to sexual violence, so, too, has the

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<sup>56</sup> Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 *FORDHAM L. REV.* 3211, 3231 (2015) (“Progressive and feminist criminal law commentators often set out to prove that a certain spectacular harm, likely publicized by the media, is serious and widespread—‘an epidemic’—as a precursor to suggesting criminalization.”). See, e.g., Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 *LOY. U. CHI. L.J.* 205, 209–219 (2011) (using statistics and anecdotal data to demonstrate that it is “fair to characterize campus peer sexual violence as an epidemic”); cf. Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 *HARV. L. REV. F.* 103, 106 (2015) (acknowledging the “pressure on schools to hold students responsible for serious harm even when—precisely when—there can be no certainty about who is to blame for it” and calling for feminists to “pull back from this brink.”).

<sup>57</sup> See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

<sup>58</sup> 20 U.S.C. § 1682 (2006).

<sup>59</sup> See, e.g., *Title IX Coordinator*, BINGHAMTON UNIV., <https://binghamton.interviewexchange.com/jobofferdetails.jsp;jsessionid=B7EDF7480B4BB2EFCBE48940B8CB1001?JOBID=59975> (last visited Mar. 15, 2016) (announcing position for Title IX Coordinator, which is placed in the Department of Risk Management and Compliance); *Title IX Coordinator*, STONY BROOK UNIV.,

field of professional higher education risk management consultants who schools hire to help them prevent or respond to Title IX complaints.<sup>60</sup> As universities are more likely to be held liable for failing to discipline a student accused of sexual assault than for doing so erroneously or too harshly,<sup>61</sup> risk management principles caution in favor of punishing harshly and swiftly when confronted with an allegation of sexual assault.

As the following discussion illumines, these twin incentives—a desire to demonstrate zero tolerance for sexual violence through punitive responses and to hedge risk by overcompensating with harsh sanctions—have had great influence on nascent Title IX policies and procedures. At the direction of OCR and Congress, institutions are creating policies and procedures that emphasize reacting aggressively to individual incidents and preventing future violence by removing bad actors from the community and changing the behaviors of potential victims, instead of measures that are less punitive but may go further to change cultural and institutional practices.

#### A. *Response Duty*

Under Title IX, a university must respond to all acts of sexual violence it knows or reasonably should know about and faces liability if it fails to adequately

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<http://www.stonybrook.edu/diversity/titleix/coordinator.html> (last visited Mar. 15, 2016) (providing contact information for the Director for Title IX and Risk Management); *Title IX: Sexual Discrimination, Sexual Harassment, Sexual Assault & Violence*, TEX. A&M UNIV., <http://urc.tamu.edu/title-ix/> (last visited Mar. 15, 2016) (identifying the Associate Vice President for Risk Compliance and Title IX Coordinator).

Some schools make other choices. For example, Wesleyan University's Title IX Coordinator works in the Office of Equity and Inclusion. See *Office of Equity and Inclusion*, WESLEYAN UNIV., <http://www.wesleyan.edu/inclusion/titleix/titleix.html> (last visited Mar. 15, 2016). See also *Title IX Office: The Office of the Provost*, HARVARD UNIV., <http://diversity.harvard.edu/pages/title-ix-sexual-harassment> (last visited Jan. 3, 2016); *Office for the Prevention of Harassment and Discrimination*, UNIV. OF CAL., BERKELEY, <http://ophd.berkeley.edu/about/staff> (last visited Mar. 15, 2016).

<sup>60</sup> See, e.g., Tovia Smith, *Curbing Sexual Assault Becomes Big Business on Campus*, NPR (Aug. 12, 2015), <http://www.npr.org/2015/08/12/430378518/curbing-sexual-assault-becomes-big-business-on-campus>; Sara Lipka, *The 'Fearmonger': As Liability Worries Rise, Advising Colleges on Risk Becomes Big Business*, CHRON. OF HIGHER ED. (Nov. 20, 2011), <http://chronicle.com/article/The-Fearmonger/129833/>.

This business is quite lucrative; in 2011, for example, the National Center for Higher Education Risk Management held a seminar for college Title IX coordinators, charging \$2,500 for each of the 170 attendees for a gross revenue of \$425,000. Sandy Hingston, *The New Rules of College Sex: How the Federal Government and a Malvern Lawyer are Rewriting the Rules on Campus Hookups—and Tagging Young Men as Dangerous Predators*, PHILA. MAG. (Aug. 22, 2011), <http://www.phillymag.com/articles/the-new-rules-of-college-sex/4/#aW0MhWV2dhJEjRyv.99>.

<sup>61</sup> See Cantalupo, *supra* note 56, at 207 (“When one of a school’s students sexually assaults or is otherwise sexually violent toward another of the school’s students, that school faces much greater liability from inadequately protecting student victims of such peer sexual violence than schools do from expelling and otherwise disciplining students found responsible for perpetrating the violence.”).

do so.<sup>62</sup> The desire to avoid liability can lead a university to two diametrically opposed responses: to avoid knowledge about instances of sexual violence, or, alternatively, to encourage broad mandatory reporting and to react swiftly and punitively to reported acts so that it does not face liability for failure to protect the complainants. The former approach governed the first years of Title IX's use as an avenue for redressing sexual violence.<sup>63</sup> Increasingly, however, under the guidance of the Department of Education and at the urging of activists, scholars, politicians, and risk management consultants, universities are beginning to overcorrect and demonstrate that they take this offense seriously by construing sexual assault broadly, mandating reporting, and disciplining individuals accused of sexual violence.

Under current law and guidance documents, a school fulfills its response duty by adopting procedures to investigate and adjudicate allegations of sexual violence. Title IX's implementing regulations mandate schools adopt procedures that provide for the "prompt and equitable resolution" of allegations of sexual violence.<sup>64</sup> The Dear Colleague Letter makes clear that such procedures can come in only one form: formal investigation and hearings.<sup>65</sup> While a school need not institute separate grievance procedures for sexual violence complaints, it cannot employ informal grievance mechanisms, such as mediation, "even on a voluntary basis" and even if it allows such responses to resolve other types of student complaints.<sup>66</sup>

The disciplinary hearings that flow from this response duty—and the standards and procedures employed therein—have become a focal point of policy and popular discourse around Title IX, particularly after the Dear Colleague letter.<sup>67</sup> Prior to 2011, some institutions employed a reasonable doubt standard to

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<sup>62</sup> Actual knowledge is required for monetary damages in a private lawsuit. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642 (1999). OCR can subject a university to administrative sanctions for failure to respond adequately to incidents it reasonably should know about. See Dear Colleague Letter, *supra* note 42, at 4 (explaining Title IX requires universities to respond to acts of harassment that a school "knows or reasonably should know about").

<sup>63</sup> See Cantalupo, *supra* note 56.

<sup>64</sup> 34 C.F.R. § 106.8(b) (2015).

<sup>65</sup> Dear Colleague Letter, *supra* note 42, at 10 (noting that schools generally "conduct investigations and hearings" as part of their "equitable grievance procedures.").

<sup>66</sup> *Id.* at 8.

<sup>67</sup> For example, in October 2014, 28 Harvard Law professors signed a statement that criticized the University's policies for adjudicating allegations of sexual assault for lacking "the most basic elements of fairness and due process." See Elizabeth Bartholet et al., Opinion, *Rethink Harvard's Sexual Harassment Policy*, THE BOSTON GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [hereinafter *Rethink Harvard's Policy*]. Others contend that Title IX policies are too protective of the accused. See Cantalupo, *supra* note 9, at 487–90 (critiquing use of criminal law standards of proof, evidentiary rules, and due process requirements in Title IX disciplinary proceedings). See generally Opinion, *Room for Debate: Why Should*

assess sexual assault allegations, even if they used a lesser standard for other disciplinary violations.<sup>68</sup> In the Dear Colleague Letter, however, OCR mandated that schools adjudicate allegations of sexual assault under a preponderance of the evidence standard,<sup>69</sup> *even if they employ a different standard for other types of disciplinary infractions*. This preponderance standard mandate has led to much contention over how much process is due to a student accused of sexual assault. The Dear Colleague Letter specifies that disciplinary hearings must afford the alleged perpetrator with “due process,” but, in unusual language, cautions that these due process rights should not “restrict or unnecessarily delay the Title IX protections for the complainant.”<sup>70</sup> Some scholars advocate for procedural practices that borrow key principles from criminal procedure, such as the right to have an attorney present and the right to cross-examine witnesses.<sup>71</sup> Others contend that these are purely civil matters, and civil procedural standards are appropriate.<sup>72</sup>

The debate over how closely Title IX hearings should mimic criminal procedures is relevant to this discussion in two ways. First, the emphasis on the adjudicatory mechanisms in popular discourse and existing scholarship leaves the impression that a school’s Title IX duties are coextensive with providing a sufficient amount of process for complainants and accused students. Yet, Title IX requires much more than a hearing, regardless of whether it employs procedures that more closely approximate the civil or criminal system. Second, the volume and tenacity of the debate conveys that it is not a forgone conclusion that Title IX hearings are simply administrative disciplinary proceedings; many think of them—for better or worse—as criminal law “light,” and for good reason: their purpose is to determine whether an act of sexual violence occurred as a precursor to imposing sanction.

And there are increasingly loud calls that tough punishment should follow from a finding of responsibility. Drawing a move directly from the criminal law playbook, some are pushing for “mandatory minimum” punishments for sexual assault. For example, in March, 2015, California State Assembly Member Das Williams introduced a bill that would require a “minimum standard of discipline of

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*Colleges Judge Rape Accusations?*, N.Y. TIMES (Mar. 12, 2013), <http://www.nytimes.com/roomfordebate/2013/03/12/why-should-colleges-judge-rape-accusations>.

<sup>68</sup> For example, Stanford University and the University of North Carolina used a “beyond a reasonable doubt” standard. See Allie Grasgreen, *Tide Shifts on Title IX*, INSIDE HIGHER ED (Apr. 24 2012), <https://www.insidehighered.com/news/2012/04/24/ocr-dear-colleague-letter-prompts-big-change-sexual-assault-hearings-unc>.

<sup>69</sup> Dear Colleague Letter, *supra* note 42, at 10–11 (“Clear and convincing” evidence standards are impermissible because they are “not equitable”).

<sup>70</sup> *Id.* at 12.

<sup>71</sup> See, e.g., *Rethink Harvard’s Policy*, *supra* note 67. See also Open Letter from Members of the Penn Law Sch. Fac. 3 (Feb. 18, 2015), <http://media.philly.com/documents/OpenLetter.pdf>.

<sup>72</sup> See, e.g., Cantalupo, *supra* note 9, at 487–90.

at least two years suspension, up to expulsion,” for any act of completed or threatened sexual assault.<sup>73</sup> The California State Assembly and Senate passed an amended version with overwhelming support.<sup>74</sup> Citing concerns that the bill would prevent university administrators from using their “better judgment to discipline according to relevant circumstances,” Governor Brown vetoed the bill in October, 2015.<sup>75</sup>

There is reason to believe that schools will adopt a disciplinary regime that equates harsh punishment with adequate response, even if such approach is not legislatively mandated. In April, 2015, for example, a task force at Stanford recommended that if a student is found responsible for sexual assault as it is defined in the school’s administrative code, “the expected sanction . . . should be permanent separation from the university—expulsion.”<sup>76</sup> When a committee finds a student responsible for sexual misconduct that falls short of sexual assault, the task force recommends that the disciplinary panel “begin [its] consideration of sanctions with the most serious sanction, expulsion, and only then should the panel consider the less serious sanctions.”<sup>77</sup>

Proponents of this punitive response emphasize the distinction between civil and criminal penalties, dismissing critiques of the reduced procedural protections available in university disciplinary proceedings because the sanctions that flow from a finding of responsibility in this arena are “not comparable to sending someone to jail and potentially requiring registration as a sex offender.”<sup>78</sup> Of course, universities lack the power to incarcerate and it is up to the individual university—for now—to determine what punishment is proper.<sup>79</sup> However, expulsion from an institution of higher education carries great financial and personal consequences. Moreover, that these are civil proceedings raises cause for caution when meting out punishment: campus disciplinary codes capture a much wider swath of activity than does the criminal law, and therefore subject individuals to possibly severe sanction for behavior that falls short of that

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<sup>73</sup> See A.B. 967, Reg. Sess. § (1)(a)(2)(B) (Ca. 2015), [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB967](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB967) (emphasis added).

<sup>74</sup> The bill passed the Assembly with a vote of 52 to 28, and the Senate with 68 in favor and only 4 in opposition. See [http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=201520160AB967](http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB967). See also Eliza Gray, *This Is the New Frontier in the Fight Against Campus Rape*, TIME (June 5, 2015), <http://time.com/3910602/campus-rape-sexual-assault-california-law/> (describing support for the bill in the Assembly as “overwhelming”).

<sup>75</sup> Letter from Edmund G. Brown, Jr., Governor of California, to the California State Assembly (Oct. 11, 2015), [https://www.gov.ca.gov/docs/AB\\_967\\_Veto\\_Message.pdf](https://www.gov.ca.gov/docs/AB_967_Veto_Message.pdf).

<sup>76</sup> STAN. U., REPORT ON THE PROVOST’S TASK FORCE ON SEXUAL ASSAULT POLICIES AND PRACTICES 15 (Apr. 2015), [https://notalone.stanford.edu/sites/default/files/provost\\_task\\_force\\_report.pdf](https://notalone.stanford.edu/sites/default/files/provost_task_force_report.pdf).

<sup>77</sup> *Id.*

<sup>78</sup> Cantalupo, *supra* note 9, at 517. See also Baker, *supra* note 9.

<sup>79</sup> But see *supra* notes 73–74 and accompanying text (discussing California legislation for statewide “mandatory minimum” punishments for campus sexual assault).



considered criminal. Stanford University, for example, defines sexual assault as including intercourse or penetration accomplished by “knowingly taking advantage of an incapacitated person.”<sup>80</sup> One is incapacitated when he or she is “unable to appreciate the nature and quality of the act” due to an intoxicating substance.<sup>81</sup> And recall that this same task force recommended expulsion for any act of sexual assault.<sup>82</sup> Therefore, under the task force’s recommendation, the disciplinary committee is expected to expel someone who has sex with someone who is drunk—even if he or she is drunk, too.<sup>83</sup>

Moreover, a finding of responsibility for sexual misconduct can carry serious tangible and reputational consequences even if the behavior involved falls well short of assault, and even if the disciplinary remedy falls short of expulsion. For example, a senior student of Wesleyan University was suspended for two semesters, just a month before he was scheduled to graduate, after being found responsible for sending inappropriate text messages to a female student one night earlier that year and kissing another student without her consent—*four years earlier*, on his first night on campus freshman year.<sup>84</sup> During his suspension, he started a new job, which he lost a month later after the employer found out about his disciplinary infractions for sexual misconduct.<sup>85</sup>

The point of the preceding discussion is not that sexual assault disciplinary proceedings should be deemed criminal, nor that the beyond a reasonable doubt standard should be applied; but rather to challenge the notion that these are “simply” civil proceedings with low stakes and to highlight that many universities are using punitive discourse to seek criminal law-like justice from these administrative proceedings.

In any event, the already murky civil/criminal distinction is quickly disintegrating. For example, some jurisdictions have adopted or are considering laws to mandate that universities report rape allegations to the police.<sup>86</sup> Perhaps

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<sup>80</sup> See *Stanford Administrative Guide, Policy 1.7.3 Prohibited Sexual Conduct: Sexual Misconduct, Sexual Assault, Stalking and Relationship Violence*, § 4(b), STANFORD UNIV. (Mar. 11, 2016), <https://adminguide.stanford.edu/chapter-1/subchapter-7/policy-1-7-3>

<sup>81</sup> See *id.* § 4(d).

<sup>82</sup> See *supra*, note 76 and accompanying text.

<sup>83</sup> See *id.* (“It is not a defense that the [accused’s] belief in affirmative consent arose from his or her intoxication.”).

<sup>84</sup> Katie J. M. Baker, *The Accused*, BUZZFEED (Nov. 20, 2014, 5:20 PM), <http://www.buzzfeed.com/katiejmbaker/accused-men-say-the-system-hurting-college-sexual-assault-su#.dbNDDRYZ1B>.

<sup>85</sup> *Id.* The accused student sued Wesleyan under Title IX. *Id.* The complaint is available at <https://www.documentcloud.org/documents/1364482-wesleyan-complaint.html>.

<sup>86</sup> See, e.g., TENN. CODE ANN. § 49-7-129(b) (2004) (requiring that when a school’s security officer “is in receipt of a report from the victim alleging that any degree of rape has occurred on the property of the institution,” the officer “shall immediately notify, unless otherwise provided by federal law, the local law enforcement agency with territorial jurisdiction over the institution”). Following the *Rolling Stone*’s report of a rape at the University of Virginia, state legislators began

most troublingly, this blurring is encouraged by those empowered to set laws, who look to these civil proceedings to do the work of criminal law. For example, New York State recently enacted the “Enough is Enough” bill, which requires all universities in the state to adopt affirmative consent policies and otherwise largely reiterates the duties imposed by Title IX and the Clery Act.<sup>87</sup> It also contains a provision that authorizes funding for the creation of a sexual assault victims unit in the state police force. Although the primary purpose of this bill is to outline the duties of universities in the state in responding to sexual assault, upon signing it, New York State Governor Cuomo announced that it made “a clear and bold statement: sexual violence *is a crime*, and from now on in this state *it will be investigated and prosecuted like one*.”<sup>88</sup> Exhibiting the clear influence of a tough on crime mentality, he celebrated the bill as “the most aggressive policy in the nation to fight against sexual assault on college campuses.”<sup>89</sup>

### B. Prevention Duty

In addition to responding quickly and effectively to acts of sexual assault, universities have a duty to “take proactive measures” to prevent the recurrence of such acts.<sup>90</sup> This prevention duty, first articulated in the Dear Colleague Letter, was codified in the Campus Sexual Violence Elimination Act (SaVE Act).<sup>91</sup> Risk management and individualization principles permeate the interpretation and application of the prevention duty. As Janet Halley recently noted, “[i]ncreasingly, schools are being required to institutionalize *prevention*, to control the *risk* of harm, and to take regulatory action to protect the *environment*.”<sup>92</sup> She added that academic administrators embrace these incentives, as they “harmonize with their

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calling for policies that require university officials to report rape allegations to the local police or face misdemeanor charges. See Jenna Portnoy, *Virginia Lawmakers Call for Mandatory Reporting of Campus Sexual Assault*, WASH. POST (Dec. 1, 2014), [http://www.washingtonpost.com/local/virginia-politics/virginia-lawmakers-call-for-mandatory-reporting-of-campus-sexual-assault/2014/12/01/993faa12-7992-11e4-9a27-6fdb6c12bfff\\_story.html](http://www.washingtonpost.com/local/virginia-politics/virginia-lawmakers-call-for-mandatory-reporting-of-campus-sexual-assault/2014/12/01/993faa12-7992-11e4-9a27-6fdb6c12bfff_story.html).

<sup>87</sup> The bill is codified at N.Y. EDUC. LAW §§ 6439–6448 (2015). Governor Cuomo signed it on July 7, 2015. See *Governor Cuomo Signs “Enough Is Enough” Legislation to Combat Sexual Assault on College and University Campuses*, N.Y. STATE (July 7, 2015), <http://www.governor.ny.gov/news/governor-cuomo-signs-enough-enough-legislation-combat-sexual-assault-college-and-university>.

<sup>88</sup> *Id.* (emphasis added).

<sup>89</sup> *Id.*

<sup>90</sup> Dear Colleague Letter, *supra* note 42, at 14.

<sup>91</sup> The SaVE Act amends the Clery Act, which requires universities to publicize data about rates of certain types of criminal activity on campus. See 20 U.S.C. § 1092(f) (2015). Interestingly, the SaVE Act was passed as part of the 2013 reauthorization of the Violence Against Women Act, which is notorious in feminist legal scholarship for its codification of a criminalized response to domestic violence. For further discussion, see Collins, *supra* note 20.

<sup>92</sup> Halley, *supra* note 56, at 116 (emphasis in original).

risk-averse, compliance-driven, and rights-indifferent worldviews and justify large expansions of the powers and size of the administration generally.”<sup>93</sup>

This desire to manage risk and individualize responsibility is manifesting in trends that mimic developments in criminal justice policy, in particular the growth of sex offender notification and registration policies. Sexual violence is increasingly being framed as the responsibility of individual bad actors who can—and will—be identified and removed from the community and of potential victims to avoid and bystanders to intercept risk as it unfolds.<sup>94</sup> Thus, although Title IX is primarily concerned with institutional responsibility, prevailing interpretations of Title IX focus inordinately on the responsibility of individual students of preventing sexual violence.

### 1. Prevention Through Education (of Victims and Bystanders)

The Dear Colleague Letter emphasized the role of educational programming in a university’s duty to prevent sexual violence and the SaVE Act elaborated upon and codified the requirements. The Act mandates that universities adopt policies to “prevent . . . sexual assault”<sup>95</sup> through educational programs that “promote the awareness of” sexual violence.<sup>96</sup> Schools must administer such programs for all incoming students and as part of an “ongoing prevention and awareness campaign” for returning students.<sup>97</sup>

Interestingly, it appears that a school’s educational duties vis-à-vis potential perpetrators under the Dear Colleague Letter and the SaVE Act are fulfilled as long as they provide information sufficient to deter the rational actor offender, much like the criminal law. While the SaVE Act requires that schools warn students that sexual assault is prohibited, define relevant terms (such as consent), and delineate the consequences of violating these prohibitions,<sup>98</sup> universities need

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<sup>93</sup> *Id.*

<sup>94</sup> See generally Mona Lynch, *The Contemporary Penal Subject(s)*, in *AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION*, 89–105 (Mary Frampton et al. eds., 2008) (arguing that “state penal administrators and policymakers have shifted responsibility for dealing with the problem of crime onto those subjected to criminal victimization and those subject to punishment . . . the job of reducing crime falls on would-be crime victims who are told how to minimize their risks of victimization, and the offenders are increasingly told to simply ‘choose’ to obey the law.”) (internal citations omitted).

<sup>95</sup> The programs must also aim to prevent “domestic violence, dating violence . . . and stalking.” 20 U.S.C. § 1092(f)(8)(A)(i) (2015).

<sup>96</sup> 20 U.S.C. § 1092(f)(8)(B)(i) (2015).

<sup>97</sup> 20 U.S.C. § 1092(f)(8)(B)(i)(I)–(II) (2015).

<sup>98</sup> OCR suggested a university might do this by creating programs to inform students about the relevant definitions of sexual violence as well as “the school’s policies and disciplinary procedures, and the consequences of violating these policies.” Dear Colleague Letter, *supra* note 42, at 14–15.

not offer educational programs that seek affirmatively to change the attitudes or actions of potential perpetrators. However, the SaVE Act details requirements about education *for potential victims of and bystanders to sexual assault*. Specifically, it requires schools to implement programs that educate students about “risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks” and “safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene when there is a risk of . . . sexual assault.”<sup>99</sup> In addition, it provides exhaustive details about information schools must provide about “procedures victims should follow” if a sex offense has occurred, including the “importance of preserving evidence as may be necessary to the proof of criminal . . . sexual assault,” options for reporting the incident to the police and/or campus authorities, and “[p]rocedures for institutional disciplinary action.”<sup>100</sup>

Thus, the preventative education component the Dear Colleague Letter and SaVE Act require is in fact largely reactive: the programs assume that sexual assault will be attempted or will occur and put the onus on potential victims and bystanders to prevent it. Under this regime, schools must teach students how to avoid risky situations,<sup>101</sup> how to intervene if they see a suspect situation unfolding, and what to do in the aftermath of an assault. They are not required, however, to adopt programs that seek to change cultural norms and behaviors so that such reaction is unnecessary.

Furthermore, recent media and political attention to risk reduction and bystander intervention programs provide reason to believe this disparate emphasis on the behavior of potential victims and bystanders will continue. For example, recently, an educational pilot program in Canadian colleges aimed at reducing an individual’s risk of rape received much media attention. The program trained women “to avoid rape” by attending sessions on “assessing risk, learning self-defense and defining personal sexual boundaries.”<sup>102</sup> The risk of completed and attempted rape was “significantly lower” for the women who attended these sessions than those in the control group.<sup>103</sup> Unsurprisingly, some have called for the immediate replication of this program. For example, University of Arizona psychologist and prominent sex assault researcher Mary Koss described the results

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<sup>99</sup> 20 U.S.C. § 1092(f)(8)(B)(i)–(ii) (2015).

<sup>100</sup> 20 U.S.C. § 1092(f)(8)(B)(iii)–(vii) (2015).

<sup>101</sup> Jan Hoffman, *College Rape Prevention Program Proves Rare Success*, N.Y. TIMES (June 10, 2015), <http://nyti.ms/1KX3toM>; Melissa Healy, *Women’s Program Shown to Reduce Rapes by Nearly Half*, WASH. POST (June 15, 2015), [https://www.washingtonpost.com/national/health-science/showing-women-how-to-resist-sexual-aggression-reduced-chances-of-rape/2015/06/15/3935ba14-1067-11e5-9726-49d6fa26a8c6\\_story.html](https://www.washingtonpost.com/national/health-science/showing-women-how-to-resist-sexual-aggression-reduced-chances-of-rape/2015/06/15/3935ba14-1067-11e5-9726-49d6fa26a8c6_story.html).

<sup>102</sup> See Hoffman, *supra* note 101. For the full study, see Charlene Y. Senn et al., *Efficacy of a Sexual Assault Resistance Program for University Women*, 372 NEW ENG. J. MED. 2326 (June 11, 2015), <http://www.nejm.org/doi/full/10.1056/NEJMsa1411131>.

<sup>103</sup> Senn et al., *supra* note 103, at 2331.

of the program as “startling” and called on universities to “move right away to figure out how they can implement a program like this.”<sup>104</sup>

The White House recently spearheaded a national campaign to promote bystander intervention. In September 2014, its Task Force to Protect Students from Sexual Assault launched the “It’s On Us” campaign. The campaign aims to “inspir[e] everyone to see it as their responsibility to do something . . . to prevent [sexual assault]”<sup>105</sup>—to convey that “it’s on us—all of us” to stop sexual assault.<sup>106</sup> Though the program prioritizes “engaging men” in the conversation about campus sexual assault, it does not target men who assault, but rather those who are bystanders to potential assaults.<sup>107</sup>

These preventative educational programs pass responsibility for risk reduction onto individuals who may be the target of or witnesses to sexual assault. They convey that the responsibility for ending sexual assault is not on the potential offender or the institutional behaviors or actors who may create conditions in which rape occurs, but rather on “us”—the non-offenders and the potential victims. In this way, the programs are reminiscent of the responsabilization strategies that emerged in criminal justice policy discourse.<sup>108</sup>

Though additional research is required, these programs may effectively reduce rates of sexual assault.<sup>109</sup> Significantly, however, any reductions in sexual assault that flow from these programs result because potential victims and witnesses have changed their behaviors, while the attitudes and behaviors of

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<sup>104</sup> Assoc. Press, *Study: Rape Prevention Training Works, Cuts Sex Assault Risk* (June 12, 2015), <http://www.foxnews.com/health/2015/06/12/study-rape-prevention-training-works-cuts-sex-assault-risk.html>. See also Jocelyn Hollander, *Why Isn't Self-Defense Training Available to Every Woman Who Wants It?*, HUFFINGTON POST (June 17, 2015), [http://www.huffingtonpost.com/jocelyn-hollander/why-isnt-self-defense-training-available-to-every-woman-who-wants-it\\_b\\_7577472.html](http://www.huffingtonpost.com/jocelyn-hollander/why-isnt-self-defense-training-available-to-every-woman-who-wants-it_b_7577472.html).

<sup>105</sup> Press Release, The White House, Fact Sheet: Launch of the “It’s On Us” Public Awareness Campaign to Help Prevent Campus Sexual Assault (Sept. 19, 2014) [hereinafter Fact Sheet], <https://www.whitehouse.gov/the-press-office/2014/09/19/fact-sheet-launch-it-s-us-public-awareness-campaign-help-prevent-campus->.

<sup>106</sup> See *It’s On Us, It’s On Us: Sexual Assault PSA*, YOUTUBE (Sept. 18, 2014) <https://www.youtube.com/watch?v=wNMZo31LziM> (quoting V.P. Joe Biden).

<sup>107</sup> Fact Sheet, *supra* note 106. In addition to public service announcements featuring celebrities, It’s On Us encourages people to pledge to “recognize that non-consensual sex is sexual assault,” “identify situations in which sexual assault may occur,” “intervene in situations where consent has not or cannot be given,” and “create an environment in which sexual assault is unacceptable and survivors are supported.” *The Pledge, IT’S ON US*, <http://itsonus.org/#pledge>.

<sup>108</sup> See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 124–127 (2001) (describing responsabilization strategies).

<sup>109</sup> CTRS. FOR DISEASE CONTROL AND PREVENTION, *PREVENTING SEXUAL VIOLENCE ON COLLEGE CAMPUSES: LESSONS FROM RESEARCH AND PRACTICE* 8 (Apr. 2014), <https://www.notalone.gov/assets/preventing-sexual-violence-on-college-campuses-lessons-from-research-and-practice.pdf> (discussing two “rigorous evaluations” of the efficacy of bystander intervention programs that “found a mix of positive and null effects on risk factors for sexual violence (including attitudes about violence and bystander skills, intentions and behavior).”).

institutions and potential offenders persist. Additionally, such reductions come at a cost. For example, an emphasis on victim “awareness”—even if intended to empower—can shift focus away from the assailant’s behavior to the victim’s and morph into victim-blaming. For this reason, the Center for Disease Control has refused to suggest self-defense training as part of its proposed plan for preventing sexual violence.<sup>110</sup>

## 2. Prevention through Incapacitation

Thus, educational prevention campaigns essentially bypass potential offenders altogether. Whether deliberate or unintentional, this oversight extends into university sexual assault policies a presumption that has motivated much criminal justice policy and procedure about sex offenders: that they are deviants who are essentially beyond rehabilitation, and that behavioral interventions are a waste of time and resources. If perpetrators cannot be deterred from offending through the threat of harsh sanctions, the best we can do is identify and incapacitate them.<sup>111</sup> Unsurprisingly, the specter of the monstrous, repeat sex offender is beginning to influence Title IX policies and the prevention duty is being interpreted as requiring identification of such offenders, removing them from the community, and putting others on notice of their disciplinary history. Brett Sokolow, founder of the National Center for Higher Education Risk Management (NCHERM), summarizes this sentiment thusly: “If you’re a predatory rapist . . . I can’t educate you or make you feel empathy. But I can teach the people around you to recognize you.”<sup>112</sup>

A 2002 study by David Lisak and Paul Miller has played an influential role in advancing such incapacitatory policies. Lisak and Miller surveyed 1,882 male students at a university and found that 120 (6.4 %) admitted to committing acts that “met criteria for rape or attempted rape.”<sup>113</sup> Most of those 120 participants, 63.3%, admitted to committing “repeat rapes, either against multiple victims, or more than once against the same victim.”<sup>114</sup> Officials at the highest level have embraced this study: The White House Council on Women and Girls cited the

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<sup>110</sup> See Hollander, *supra* note 105.

<sup>111</sup> See McLeod, *supra* note 26.

<sup>112</sup> Hingston, *supra* note 60.

<sup>113</sup> David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 78 (2002). The key questions were whether they had ever had (or attempted to have) sexual intercourse with another person who did not want to by using or threatening the use of “physical force” if they did not cooperate, had oral sex under the same circumstances, or had sexual intercourse with someone “even though they did no[t] want to, because they were too intoxicated . . . to resist . . .” *Id.* at 77–78.

<sup>114</sup> *Id.* at 78.

Lisak study in its 2014 report, *Rape and Sexual Assault: A Renewed Call to Action*, to support its claim that “campus perpetrators are often serial offenders.”<sup>115</sup>

The risk management interpretation of this study is that, when an individual has committed an act of sexual violence, he should be separated from the community because he is likely one of those repeat offenders. Or, in criminal justice parlance, he must be incapacitated. NCHERM, for example, counsels that when a student has committed an “egregious” act of sexual violence, suspension of the offender until the victim has graduated is “misguided” because it “assumes a contextual conflict, and that no one else is at risk.”<sup>116</sup> Under such circumstances, the “typically educational and developmental sanctions of student conduct processes” should cede to the need to protect the “victim and the community” and the offender should be expelled.<sup>117</sup> It bases this advice on three key presumptions: first, that “very little research” supports the notion that sex offenders can be rehabilitated; second, that the university is not responsible for attempting any such rehabilitative interventions; and third, that the university should respond as if the offender may be one of the repeat offenders Lisak identified.<sup>118</sup> NCHERM asks,

So, unless you can distinguish whether an offender is one of the 63% of repeat perpetrators, or one of the 37% of one-time perpetrators (and you can't), can you really afford to take a chance with the safety of your community? We're fond of telling NCHERM clients, “if you're willing to let him back in, you also have to be willing to fix him up with your daughter on a date, because by reinstating him, you're vouching for his safety.” Are you that sure?<sup>119</sup>

Thus, drawing on the incapacitory logic that has fueled the criminal justice system's response to sexual assault, risk management consultants are urging schools to craft disciplinary regimes *based on presumptions about an offender's future risk, not his past individual behavior*. And as in the criminal justice system, there is a growing push to make sure that a finding that an individual has committed sexual misconduct becomes an indelible mark on his record so that other schools considering his candidacy will be on notice that he is a sexual predator. For example, a former assistant dean of the University of Virginia

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<sup>115</sup> WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, *RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION* 14 (2014), [https://www.whitehouse.gov/sites/default/files/docs/sexual\\_assault\\_report\\_1-21-14.pdf](https://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf).

<sup>116</sup> W. SCOTT LEWIS ET AL., NAT'L CTR. FOR HIGHER EDUC., *GAMECHANGERS: RESHAPING CAMPUS SEXUAL MISCONDUCT THROUGH LITIGATION* 20 (2010), <https://www.ncherp.org/documents/2010NCHERMWhitepaperFinal.pdf>.

<sup>117</sup> *Id.* at 21.

<sup>118</sup> *Id.* at 20–21.

<sup>119</sup> *Id.* at 21.

claimed, “[s]chools have a right to know” whether a student has a history of any sexual misconduct, because “if they are turned in one time for nonconsensual kissing, what have they done 10 times before? . . . That’s not something you take a chance on.”<sup>120</sup>

The importation into Title IX policy of the notion that sex offenders should be identified and banished is troubling not only because it has been criticized as both ineffective and possibly criminogenic in the context of criminal justice policy,<sup>121</sup> but also because the serial predator presumption it reflects may not be accurate. A recent study suggests that Lisak’s 2002 conclusions about the serial tendencies of campus rapists—and the risk management responses this study inspired—is, at best, oversimplified. This 2015 study, which followed 1,646 collegiate men from orientation through senior year, tested and challenged Lisak’s “campus serial rapist assumption.”<sup>122</sup> It paints a more complex picture of the behavior of men who commit rape. The study found that “[a]lthough a small group of men perpetrated rape across multiple college years, *they constituted a significant minority of those who committed college rape.*”<sup>123</sup> It therefore described as “misguided” policies that place an “exclusive emphasis on serial predation to guide risk identification, judicial response, and rape-prevention programs.”<sup>124</sup>

### C. Remedial Duty

The third duty Title IX imposes on universities is the duty to remedy the effects of sexual assault on the individual victim and the broader university community. The Dear Colleague Letter counsels that schools provide substantive assistance to the complainant by helping her change living situations, granting requests for academic accommodation, instituting a no contact order against the alleged perpetrator, and assisting her in accessing medical, mental health, and other

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<sup>120</sup> Baker, *supra* note 84.

<sup>121</sup> See, e.g., McLeod, *supra* note 26, at 1557 (explaining why, “rather than prevent repeat criminal conduct, post-conviction sex offense regulation may actually be criminogenic.”).

<sup>122</sup> Kevin M. Swartout et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 JAMA PEDIATRICS 1148 (2015). See also Liza Lucas, *Study Questions Focus on Serial Offenders in Preventing Campus Rape*, CNN (July 14, 2015), <http://www.cnn.com/2015/07/14/health/campus-serial-rapist-assumption/> (discussing the Swartout study).

<sup>123</sup> Swartout et al., *supra* note 122, at 1148 (emphasis added). This study used a more narrow definition of rape than the Lisak study: “penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” *Id.* at 1149. And unlike the Lisak study, it counted only acts of completed rape. *Id.*

<sup>124</sup> *Id.* at 1149. Of the respondents, 7.9% reported that they had committed a completed rape during college. *Id.* at 1151. Of those who reported having committed a rape 72.8% did so during only one academic year. *Id.* at 1149. The study identified three different trajectories the offenders followed. The vast majority of those who reported having committed a rape during or before college (92.6%) were classified as following a low or time-limited behavioral pattern. *Id.* Only 2.1% followed an increasing rape pattern, and 5.3% a decreasing pattern. *Id.*



supportive services.<sup>125</sup> The university must also take steps to remedy the impact of sexual violence on the “broader student population.”<sup>126</sup> Such steps might include offering mental health and counseling services to all students affected by sexual violence, properly training employees and notifying students about how to identify and respond to sexual violence, and periodically assessing the efficacy of the university’s response to sexual violence.<sup>127</sup>

Compared to the reaction and prevention duties, the remedial duty has been relatively uncontroversial and is least reminiscent of the duties of the criminal justice system. Nevertheless, the implementation of this duty, too, is recirculating tenets of the feminist and victims’ rights ideology that fueled criminal law reform, particularly the presumption that permanent, incapacitating harm flows from every act of sexual violence.<sup>128</sup> Significantly, a university’s duty to remedy the effects of sexual assault may arise before an investigation is completed. As a result, schools are encouraged to presume harm and implement procedures to protect the complainant based on this presumption. The issuances of no contact orders that often require the accused to leave campus are common, even for minor infractions of school disciplinary codes, pending the outcome of investigations.<sup>129</sup> The remedial duties can extend to control the movement even of those who are not believed to be involved in the sexual assault. For example, Halley recounts the story of a student who was subjected to a month-long investigation of his personal relationships for evidence of sexual misconduct and a “stay away” order that required him to vacate campus because he “reminded” another student of a man who had raped her—months before and thousands of miles away. Though he was found not responsible for sexual misconduct, “the stay-away order remained in place, and was so broadly drawn up that he was at constant risk of violating it and coming under discipline for *that*.”<sup>130</sup>

### III. DE-CRIMINALIZING TITLE IX

Critiques of the criminal justice system’s response to sexual assault have been emerging for decades and it is increasingly acknowledged that changes to criminal justice law and policy have had limited impact on behaviors and attitudes about

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<sup>125</sup> Dear Colleague Letter, *supra* note 42, at 16–17.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 17–19.

<sup>128</sup> *See, e.g.,* HALLEY, *supra* note 40, at 345.

<sup>129</sup> Halley, *supra* note 56, at 116 (noting that “OCR increasingly implies that the only adequate ‘interim measure’ that can protect a complainant in the Title IX process is the exclusion of the accused person from campus pending resolution of the complaint.”).

<sup>130</sup> *Id.* at 116 (emphasis in original).

sexual assault.<sup>131</sup> Nevertheless, as Part II demonstrates, instead of learning from the failures of the criminal justice model and taking advantage of the opportunity offered by Title IX to develop new and innovative responses to sexual assault, those empowered to set Title IX policies and procedures are instead drawing directly from the criminal law playbook. This section engages in a brief distributional analysis of sorts to identify who stands to benefit—and who to lose—from the criminalization of Title IX<sup>132</sup> and then concludes by drawing on feminist critiques of rape law reform measures to begin a conversation about how to use the opportunity of Title IX differently, and to different effect.

#### A. *Assessing the Costs of Title IX Criminalization*

Undoubtedly, universities stand to benefit the most from the criminalized approach to Title IX. The inordinate focus on the response duty simplifies and restricts what is expected of them; a university is popularly deemed to have responded sufficiently once it has punished those found responsible for sexual assault. Moreover, by focusing on the role and responsibility of the individual offender, potential victim, and/or bystander, this approach deflects attention away from the role and responsibility of the university in creating, supporting, or maintaining practices that condone sexual violence.

Certainly, some people who have experienced sexual violence may also benefit from this approach, in particular those who seek to see their assailant held accountable through a punitive disciplinary process. Many of the changes recounted above, along with the growing popular pressure to take campus sexual assault seriously, make it more likely an individual accused of sexual assault will be found responsible through school disciplinary proceedings and removed from the school as a result. Moreover, to the extent these policies signal that universities recognize that sexual violence occurs on their campuses and want to redress the harms that flow therefrom, this approach may validate the voices and experiences of those who have, until recently, felt silenced or ignored.

This criminalized approach is also at least a partial victory for some feminist legal scholars who see the Title IX system as a way to achieve accountability that is often denied in the criminal justice system. For example, Katharine Baker

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<sup>131</sup> See SCHULHOFER, *supra* note 2 at 17 (discussing limited impact of legislative changes to rape law); see generally Kahan, *supra* note 21 (discussing “sticky norms” about date rape that persist despite changes to the law of rape).

<sup>132</sup> Distributional analysis is a technique developed in critical legal studies, third-world approaches to international law, and governance feminist scholarship. See Gruber, *supra* note 56, at 3213. It involves a “meticulous and deliberate contemplation of the many interests affected by” an existing regime and “evidence-informed predictions about how law reform might redistribute harms and benefits, not just imminently but over time.” *Id.* A thorough distributional analysis of Title IX reform is beyond the scope of this essay, but this assessment is inspired by the attention in distributive analyses to the costs, benefits, and alternatives to current legal regimes.

celebrates the Title IX system for using a lower standard of proof and more expansive definitions of offenses, which captures more behavior and increases the likelihood an assailant will be found liable. She contends that as a result, there will be more enforcement, which will bring about greater behavioral changes.<sup>133</sup>

However, this approach also imposes many costs, both tangible and discursive. The most obvious cost, and the one that has received the most attention, is that the impetus to demonstrate that universities take sexual assault seriously has led to the adoption of procedures that impose harsh sanctions without sufficient process.<sup>134</sup> The growing sentiment that Title IX procedures are unfair has led to a counterintuitive result: many men are currently suing their universities *under Title IX*, claiming they were the victim of discrimination because they were punished without sufficient process.<sup>135</sup> This battle for victimhood detracts attention from where it belongs—the causes of sexual assault and how to redress it.

Furthermore, this criminalized framework is not a boon to many victims. It is now common knowledge that victims of sexual violence may willingly decline to engage with the criminal justice system, for many reasons. For example, it is commonly accepted that many individuals who have experienced sexual violence find interacting with the criminal justice system to be traumatizing in and of itself—because, for example, system actors meet their reports with skepticism and focus inordinately on their behavior instead of on that of the accused, while neglecting what the victims want from the process.<sup>136</sup> Indeed, some victims, despite their injury, do not want to see someone they know, love, or depend on to be punished harshly. While they seek justice and want the assailant to change his or her behavior, they do not believe either of these results will come from the imposition of punitive sanctions. Others, particularly those from communities that have historically been subjected to harsh policing practices, may be wary of inviting greater scrutiny upon their lives and communities. As long as universities strive to replicate criminal justice-like practices and sanctions, they will continue to alienate those complainants who want a different kind of justice than that available through the criminal justice system.

Moreover, the criminalized approach recirculates many of the problematic assumptions and stereotypes about sexual assault that have persisted despite—or

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<sup>133</sup> See Baker, *supra* note 9.

<sup>134</sup> See *Rethink Harvard's Policy*, *supra* note 67.

<sup>135</sup> A men's rights group maintains a database of lawsuits that allege due process and other violations in campus adjudications of sexual assault allegations against male students. As of March 15, 2016, 110 lawsuits had been filed. See *Database: Due Process Lawsuits against Colleges and Universities*, BOYS AND MEN IN EDUC., <http://www.avoiceformalestudents.com/list-of-lawsuits-against-colleges-and-universities-alleging-due-process-violations-in-adjudicating-sexual-assault/> (last visited March 15, 2016).

<sup>136</sup> See, e.g., Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1627 (2014) (discussing studies showing that many victims of sexual assault find the criminal justice process to be “re-traumatizing”).

because of—criminal law reform. Lurking in the background of these reforms (and the foreground of the political and popular attention to sexual assault on college campuses) are heteronormative assumptions of a presumptively male assailant who desires sex from a presumptively female victim. Tellingly, the archetype that drives campus sexual assault reform is a fraternity party at which an entitled frat brother assaults, through force, coercion, or because of intoxication, a vulnerable, intoxicated woman.<sup>137</sup> Certainly, this scenario may be prevalent, but it is hardly the only one. As critical scholars have reiterated for decades, sexual assault occurs within queer relationships and according to different scripts within heterosexual ones. To the extent Title IX policies, like the criminal justice law and policies, advance this narrative and obscure others, they continue to silence those whose experiences of sexual assault disrupt these presumptions.

Finally, current Title IX practices reinforce disempowering presumptions about male agency and female victimhood that emerged from dominance feminism and motivated changes in criminal law and policy.<sup>138</sup> This approach creates a self-perpetuating cycle: it equates student protection with punitive policies, which students then expect and demand as a demonstration that the university is dedicated to keeping them safe.<sup>139</sup>

### B. Identifying Opportunities

Title IX, a civil law that imposes responsibility on institutions for eradicating the impact of sexual violence, presents an opportunity to push for different kinds of reforms and responses than those available in the criminal justice system. This section seeks to initiate a conversation about what it could mean to take advantage of that opportunity, to use Title IX not as an end-run around ineffective criminal justice polices, but as a means of achieving a different kind of justice, one that holds institutions responsible for supporting and perpetuating sexual violence. This analysis is both historical and contemporary, reviving early second-wave feminist observations about the structural causes of sexual violence and incorporating insights from intersectional, queer, and neofeminist<sup>140</sup> critiques of rape law reform.

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<sup>137</sup> See Halley, *supra* note 56 (“The paradigm cases of the movement have been women drugged at fraternity parties and raped by groups of men, or women staggering home from these parties with the supposed help of men who proceed to rape them there.”).

<sup>138</sup> This conceptualization is most succinctly summed up in dominance feminist theorist Catharine A. MacKinnon’s famous line, “Man fucks woman; subject verb object.” CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 124 (1991).

<sup>139</sup> See Gruber, *supra* note 56, at 3234–35 (noting that “female students feel that punitive campus disciplinary reform is necessary to protect them and value women.”).

<sup>140</sup> See Gruber, *supra* note 13, at 1383 (“Rather than characterizing women as autonomous liberal agents or perpetual objects of oppression, neofeminism acknowledges that women must navigate the complex matrix of social, cultural, and institutional constraints. Rather than assuming

From this new perspective, a few key suggestions for the future of Title IX policies come into focus. First, Title IX policies should take seriously the mandate that institutions—not individuals—are ultimately responsible for eradicating sexual assault. This would require that the scope of the university's reaction duty be expanded beyond an investigation of the individuals involved in the reported incident to encompass a duty to investigate ways in which the institution, its agents, and its practices promote and perpetuate sexual violence. As the myopic focus on individual responsibility limits articulations of the causes and appropriate remedies for sexual assault,<sup>141</sup> widening the focus to institutional responsibility should reveal new avenues for inquiry and redress. It would ask, for example, whether the university has a stake in covering up incidents of sexual violence because the accused is a member of a profitable sports team or whether the university dissuades students from speaking out about sexual violence. The prevention duty would likewise expand to focus on ways the institution can change its behaviors so that potential victims need not change theirs. Instead of assuming sexual violence will occur—and teaching potential victims and bystanders how to react—universities should seek to interrupt and change sexist practices.

Moreover, the Title IX policies should be responsive to the needs of victims but, importantly, should recognize that victims are not a monolithic group. Rather, victims react to violence in different ways and seek different kinds of justice. In other words, Title IX policies should embrace insights of intersectional feminist and neofeminist analyses, which identify how factors such as race, gender, sexual orientation, and socioeconomic status influence an individual's experience of and desired response to an act of sexual violence. Toward that end, universities should offer a range of avenues for redress, which may include, but are not limited to, traditional disciplinary hearings as well as some of the programs detailed below. Finally, Title IX policies should be wary of the expansion of protectionist, punitive polices that may cause harm but realize little benefit for those who experience violence.

A few existing frameworks can lead the way to more effective alternatives: restorative justice and transformative justice models. Both models have been advanced by feminist and other critical scholars as more viable alternatives to the criminal justice system in redressing gendered violence.

The foundational premise of restorative justice is that “harm has been done and someone is responsible for repairing it,” and acknowledges the “ripple effects” of harm beyond the victim to the family, friends, and community members of the

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there is but one monolithic woman's voice, neofeminism recognizes that women's needs and identities are ever-shifting and racially, culturally, and economically contextual.”).

<sup>141</sup> See Matsuda, *supra* note 31, at 2203 n.33 (“The primarily punitive focus of the perpetrator perspective limits not only what we perceive as causes, but also what we construct as appropriate remedies.”).

victim and responsible party.<sup>142</sup> The restorative justice approach, unlike the traditional disciplinary process, puts the victim at the center of the process, taking cues from him or her in the first instance as to what kind of process best suits her needs or what kind of sanctions are desired.<sup>143</sup> In that way, the restorative justice approach is more desirable to those who decline to engage existing processes because they do not equate punishment with justice, and/or want their assailant to be held accountable but not necessarily removed from the community. It provides an opportunity for victims to confront their assailant, explain how the assault impacted their lives, and ask why the incident occurred, which can ease anxiety and anger and help them move forward.<sup>144</sup> In a recent peer-reviewed article, Mary P. Koss, a professor of psychology and well-known sexual assault researcher, identified ways that restorative justice practices could supplement or supplant various aspects of established Title IX proceedings.<sup>145</sup> For example, after a university is notified of a sexual assault allegation and conducts a preliminary internal review, the reporting student could opt to pursue restorative justice practices in lieu of the traditional hearing and investigation. If the reporting student opts for the former, the accused student would be invited to accept responsibility for his or her behavior and engage in a restorative justice resolution process, such as conferencing. Conferencing is an extended process that engages the victim, the responsible party, and members of their community, friend groups, and family who prepare for and attend a meeting at which the responsible person describes and takes responsibility for his or her acts.<sup>146</sup> The conference concludes with the formulation of a redress plan to identify the ways in which the accused will be held accountable, which may include reparations, counseling, accommodations in class scheduling to avoid contact between the parties, and a specification that if the accused fails to meet these requirements a traditional sanctioning mechanism will be used.<sup>147</sup>

If the reporting or accused student declines the restorative justice process, the university would follow its traditional investigation and hearing procedures. If the accused is found responsible through those procedures, the victim could elect

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<sup>142</sup> Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE, & ABUSE 242, 246 (2014). See also Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 969 (1998) (explaining that restorative justice focuses on “repairing relationships between offenders and victims and within the community” as an alternative to retribution).

<sup>143</sup> Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL’Y 13, 43 (2011) (noting that a “hallmark of restorative justice processes” is “its responsiveness to victims’ needs.”).

<sup>144</sup> *Id.* at 44.

<sup>145</sup> Koss et al., *supra* note 143.

<sup>146</sup> *Id.* at 248.

<sup>147</sup> *Id.* at 253.

restorative justice practices in lieu of sanctions imposed at the discretion of the university. Such practice may include a sentencing circle comprised of community members who create an individualized sanction plan.<sup>148</sup> Finally, when a student has been separated from the school for sexual misconduct and allowed to return after a specified period of time, restorative justice practices could be used to help reintegrate that student into the university community.<sup>149</sup>

A recent peer-reviewed analysis of a community-based restorative justice program, RESTORE, demonstrates that such practices can be implemented successfully.<sup>150</sup> RESTORE focuses on felony and misdemeanor crimes involving adults and uses restorative justice conferencing, which “involves a face-to-face meeting where victims express harm, the perpetrator accepts responsibility, and participants develop an accountability plan.”<sup>151</sup> RESTORE accepts cases upon the referral of the prosecutor, and both the victim and accused must consent to participate in the program instead of pursuing traditional criminal justice responses.<sup>152</sup>

The study found that 63% of victims and 90% of those accused of sexual violence opted for restorative justice over traditional justice, 63% of those accused of felony sexual assault accepted responsibility, and 80% of responsible persons completed all elements of their accountability plan within a year.<sup>153</sup> More than 90% of all participants felt that they were supported, treated fairly and with respect, and that the process was successful.<sup>154</sup> In fact, this process was more likely than the traditional court approach to result in an admission of responsibility and victims who opted for restorative justice viewed the process more favorably than a trial.<sup>155</sup>

The restorative justice process itself is not without its flaws or critics.<sup>156</sup> One primary critique, growing from critical feminist theorists, is that restorative justice practices do not address pre-existing power differentials and, in certain contexts, may enhance, rather than replace, traditional punishment.<sup>157</sup> In the wake of this critique, an alternative model of justice—called transformative justice—has

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Koss, *supra* note 137.

<sup>151</sup> *Id.* at 1625.

<sup>152</sup> *Id.* at 1627.

<sup>153</sup> Koss et al., *supra* note 143, at 248.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See Harris, *supra* note 143, at 53–54 (summarizing feminist critiques of restorative justice).

<sup>157</sup> See *id.* See also GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE 21 (2007) [http://www.generationfive.org/wp-content/uploads/2013/07/G5\\_Toward\\_Transformative\\_Justice-Documents.pdf](http://www.generationfive.org/wp-content/uploads/2013/07/G5_Toward_Transformative_Justice-Documents.pdf) (arguing that under a restorative justice approach, “collective values that perpetuate violence may go unchallenged.”).

emerged. Transformative justice seeks not only to repair harm but also to change behaviors going forward. It seeks to “recognize and grapple with the complicated ways in which race, gender, and other modes of domination are mutually entwined” and understand individual acts of violence within “a larger context of structural violence.”<sup>158</sup> Toward that end, transformative justice prioritizes “healing and transformation rather than retribution and punishment” and seeks to address incidents of abuse and “prevent future abuse by working on the social conditions that perpetuate and are perpetuated by” such abuse.<sup>159</sup>

The transformative justice model is relatively new, and as yet, there are no empirical studies evaluating its efficacy. Nevertheless, the key principles of this approach can help craft a more effective response to sexual assault on university campuses as they stress that simply reacting to individual instances is insufficient; transformation is required.

#### IV. CONCLUSION

Under pressure to demonstrate that they take sexual assault seriously, legislators and university administrators are increasingly incorporating into their Title IX duties policies and procedures that mimic the criminal justice mindset. This approach, like the current criminal justice approach to sexual assault itself, will inevitably be limited in its ability to bring about the behavioral and normative changes necessary to meaningfully reduce instances of sexual violence. This essay contends that the response to campus sexual assault should draw on criminal law in a different way—by learning from its limitations and crafting a more effective, transformative response to sexual violence. Doing so may provide new insights on how to redress sexual violence more effectively in the criminal justice system. In other words, instead of criminalizing the response to campus sexual assault, it may be that we should civil-ize our response to sexual violence beyond the university.

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<sup>158</sup> Harris, *supra* note 143, at 57–58. See also GENERATION FIVE, *supra* note 156, at 4 (explaining history of Transformative Justice).

<sup>159</sup> GENERATION FIVE, *supra* note 156, at 1.



