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Gabriella Kamran
UCLA School of Law

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A THIRD WAY: TITLE IX'S POTENTIAL BEYOND CRIMINAL AND CIVIL LAW PARADIGMS

*By Gabriella Kamran**

Table of Contents

I. DEPARTURES FROM THE CRIMINAL PARADIGM 13

A. Preventative Possibilities 13

B. Complicating Racial Narratives 14

II. DEPARTURES FROM THE CIVIL PARADIGM 15

A. Due Process 15

B. Intersectionality 16

* UCLA School of Law, J.D., 2022. Gabriella is currently an Associate at Liebert Cassidy Whitmore, where she advises public and private school clients on employment and education law matters.

A single occurrence of sexual violence on a college campus can lead to any of three major legal outcomes. The first is a traditional criminal prosecution of the alleged perpetrator. The second is a civil lawsuit against the school under Title IX, in which the victim alleges that the school's disciplinary procedures failed to deliver an adequate response according to the body of law developed by courts interpreting Title IX.[1] The third, which has become increasingly important and visible after a decade of student activism and initiatives by the Department of Education,[2] is an administrative enforcement action by the Department's Office for Civil Rights (OCR) in which the agency investigates the school for noncompliance with Title IX under threat of rescission of federal funding. The latter arena of administrative law is a highly dynamic one, as the OCR under Presidents Obama, Trump, and now Biden has engaged in the process of issuing the regulatory guidance that structures the agency's enforcement of Title IX as applied to the (mis)handling of sexual violence in educational settings.[3]

The surge of activity surrounding OCR's enforcement of Title IX has revealed the vast potential of administrative regulation to create a meaningful alternative to traditional criminal or civil litigation remedies—a third way toward justice for victims of sexual violence on college campuses. This essay explores several salient ways in which administrative enforcement of Title IX differs from criminal and civil responses to sexual violence in educational settings.[4] The objective of this essay in surveying existing applications of Title IX in the administrative arena is descriptive. Still, there is a normative element to demonstrating Title IX's capacity to transcend the limitations of criminal and civil law paradigms. Beyond the carceral logic embedded in the criminal justice system and the procedural prescriptions built into the courts' interpretation of Title IX lies "the expansive possibilities for administrative enforcement that are in Title IX's design."[5]

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1. The Supreme Court recognized an implied private right of action in Title IX in *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979).

2. *See* Alexandra Brodsky, A Rising Tide: Learning About Fair Disciplinary Process from Title IX, 66 J. LEGAL EDUC. 822, 822-23 (2017).

3The most notable products of this regulatory activity are the Obama-era OCR's Dear Colleague Letter in 2011, which comprehensively detailed a school's obligation in investigating and remedying sexual assault and harassment under Title IX and signaled a renewed intention to enforce these obligations. The formal rules and accompanying Q&A document issued by the Trump-era Department of Education scaled back the scope of enforcement pursued by the Obama-era OCR in many ways. These rules also purported to extend greater procedural rights to those accused of sexual assault in campus disciplinary proceedings. *See* Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONTANA L. REV. 71, 80-84 (2017); Sarah Brown, *6 Things to Know About the New Title IX Guidance*, CHRON. HIGHER EDUC. (July 20, 2021). President Biden's Department of Education proposed Title IX regulations and invited public comment on June 23, 2022. *See* Press Release, U.S. Dept. of Educ., The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment (June 23, 2022) https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment.

4. References to administrative enforcement of Title IX in this essay are meant to encompass both OCR regulations and enforcement of Title IX as well as schools' Title IX disciplinary procedures, as the former regulates and structures the latter.

5. Katharine Silbaugh, Reactive to Proactive: Title IX's Unrealized Capacity to Prevent Campus Sexual Assault, 95 B.U. L. REV. 1049, 1062 (2015).

I. DEPARTURES FROM THE CRIMINAL PARADIGM

Although sexual violence is one of many code of conduct violations for which a school might seek to discipline a student, some commentators insist on treating sexual violence as inherently and exceptionally criminal in nature.[6] One manifestation of this framework is the position that schools should refer all reports of sexual violence to law enforcement either instead of or in addition to campus disciplinary proceedings.[7] Such a requirement is not the norm, however, which constitutes the primary difference between Title IX's administrative handling of sexual violence and the criminal law paradigm—the former does not occur in the context of the criminal justice system at all. While a full exploration of what this distinction means for procedural and remedial possibilities under Title IX is beyond the scope of this essay,[8] two notable considerations of a more theoretical nature set Title IX administrative law apart from the logic and structure of the criminal justice system: the potential for a preventative rather than merely punitive approach to sexual violence, and the refusal of certain racialized narratives that attach to the criminalization of its alleged perpetrators.

A. Preventative Possibilities

A core feature of criminal law is its reactivity, meaning its focus is invariably on events that have already occurred. This structure is intertwined with the punitive nature of criminal law, which metes out punishment to individual perpetrators for acts they committed. Katharine Silbaugh refers to this paradigm as the "law enforcement approach" to sexual assault, contrasting it with a "public health approach" that is prevention-oriented and studies ecological factors that influence behavior at the population level.[9] Silbaugh argues that current civil and administrative enforcement of Title IX adopts the quasi-criminal law enforcement approach to sexual assault on college campuses, incentivizing schools to devote greater attention to their infrastructure for post-assault responses.[10] But, through a careful reading of Title IX civil and administrative law and their origins in Title VII doctrine,[11] Silbaugh

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6. Brodsky, *supra* note 2, at 842-43 ("[C]ritics and legislators treat sexual assault alone as *essentially and exclusively criminal*. The most frequently asked question of the recent national debate about campus gender violence is why schools have any role in addressing gender violence—which, to the public imagination, is a crime and a crime alone, not a civil rights violation, tort, or honor code infraction.").

7. Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J. L. & GENDER 1, 12 n.37 (2019). One significant advantage that school Title IX proceedings have over the criminal law enforcement models of responding to sexual violence is that victims do not need to interact with police, which can be a major deterrent to reporting, cause of discomfort, or even a source of danger to Black and Latinx victims. *Id.*

8. One such possibility that has received some attention in recent years is the use of restorative justice models to address sexual violence and repair harm to the victim. *See, e.g.*, David Karp et al., *The Use of Restorative Justice in Sexual Misconduct Cases*, NASPA (June 17, 2020), https://www.naspa.org/course/restorative-justice-sexual-misconduct.

9. Silbuagh, *supra* note 5, at 1049-51.

10. *Id.* at 1051, 1066.

11. Specifically, Silbaugh argues that OCR's current law enforcement focus is a result of adopting the civil Title IX regime that courts adapted in contrast to Title VII law. Title VII incentivizes preventative measures through the Ellerth-Faragher standard—an affirmative defense to an employer's vicarious liability for supervisory harassment that requires the employer to exercise "reasonable care to prevent and correct promptly

demonstrates that it does not need to be this way—nothing in the language or design of Title IX prevents the OCR from requiring schools to invest resources in preventative measures such as empirically supported bystander intervention training or campus alcohol policies.[12]

Thus, while Silbaugh is concerned primarily with contrasting administrative and civil enforcement of Title IX, her argument illuminates the path through which Title IX can break free from the criminal law enforcement approach to sexual violence on campus and embrace a preventative model. To be sure, there is a punitive element to Title IX disciplinary proceedings insofar as accused students face consequences up to expulsion, and a preventative approach does not necessarily reject the need for such material consequences (whether for their deterrent effect or simply to keep students safe on campus). Nonetheless, the OCR is in the position to develop regulations and guidelines requiring schools to adjust the campus environment to make sexual violence less likely.

B. Complicating Racial Narratives

Nancy Chi Cantalupo writes that one of the many ways that Title IX is "criminalized" is through its critics' invocation of the narrative that a disproportionate number of men of color are accused of and punished for alleged sexual violence against white women.[13] This narrative—which is an objectively accurate account of a phenomenon that has historically plagued the U.S. criminal justice system—essentially lifts a paradigm from the criminal law context and maps it onto Title IX's administrative regime. In doing so, Cantalupo argues that critics of university Title IX proceedings obscure the reality that women of color are disproportionately the victims of sexual violence and harassment on college campuses.[14] The strength of Title IX—a law applied in both the administrative and civil arenas largely due to the pioneering efforts of women of color[15]—is its capacity to center women of color and embrace an intersectional lens in its intervention in campus sexual violence.

This is not to suggest that Title IX inherently or automatically refutes this paradigm of the criminalization of men of color—to the contrary, it would be unsurprising if implicit biases produced disproportionate school disciplinary action against students of color.[16] The point is that the OCR, charged with the

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any sexually harassing behavior"—and a constructive knowledge standard for coworker harassment. Courts adopted neither standard in the Title IX context, instead requiring actual notice for school liability in both teacher and peer harassment cases. The courts have justified this heightened liability standard on the basis that Title VII explicitly contemplates a private right of action whereas Title IX merely implies it. Silbaugh argues that the very fact that Title IX contemplates administrative enforcement—through which OCR can provide schools with sufficient notice—frees OCR from the bounds of civil Title IX doctrine. *See id*. at 1057-60.

12. *Id*. at 1070-71. Silbaugh's recommendations are similar to the population-level interventions studied by Columbia University's SHIFT, a large-scale research project convened to "advance the science of sexual assault prevention."; *see also* JENNIFER S. HIRSCH & CLAUDE A. MELLINS, SEXUAL HEALTH INITIATIVE TO FOSTER TRANSFORMATION (SHIFT) FINAL REPORT 1 (Mar. 2019), https://sexualrespect.columbia.edu/sites/default/files/content/Images/shift_final_report_4-11-19_1.pdf.

13. Cantalupo, *supra* note 7, at 15.

14. *Id*.

15. *See Id.* at 64-69.

16. *See* Brodsky, *supra* note 2, at 826; Cantalupo, *supra* note 7, at 15.

task of ensuring equal and just access to education for all students, is uniquely positioned to develop a paradigm for sexual violence prevention and response that is attentive to both the racialized and gendered aspects of both victimization and perpetration. The agency's existence outside of the criminal justice system means that it is not locked into the victim vs. defendant structure; at the macro level, administrative enforcement of Title IX has the potential to refuse this adversarial template and consider the needs of all parties. As Alexandra Brodsky writes, advocates for the rights of accused students and students who experience sexual violence share the fundamental value of opposing unjust deprivations of the right to learn, and—as discussed further in Part II.C—the OCR can develop fair procedures that serve as "a rising tide for student disciplinary rights writ large."[17]

II. DEPARTURES FROM THE CIVIL PARADIGM

The fact that Title IX administrative enforcement is not a criminal matter, while difficult for some commentators to accept normatively, is relatively straightforward. The differences between civil and administrative enforcement of Title IX are more subtle, although they are, in certain ways, very significant. This Part introduces two major distinctions: Title IX's provision of a high watermark of due process rights for accused students, and its capacity to move beyond the single-axis framework of anti-discrimination law.

A. Due Process

The doctrine for due process in the public school student discipline context originates from the seminal case *Goss v. Lopez*, which held that before a ten-day suspension, a student is owed "some kind of notice and . . . some kind of hearing."[18] This means that a disciplined student who sues a school for inadequate due process protections in a Title IX investigation can rely only on the doctrine developed by *Goss*.[19] A private school student does not even get that much, as they are limited to contractual claims based on the school's written policies.[20] The OCR's 2011 Dear Colleague Letter (DCL), however, provides significantly more procedural protections to students accused of sexual violence than the collective body of civil law developed on the question by courts.[21] To begin, the DCL rests on the bold fundamental tenet that the rights of complainants and respondents in school Title IX investigations must be symmetrical; thus, any enhancement of procedural protections to support victims must extend the same privileges to the accused.[22] Specific due process rights protected by OCR that exceed those guaranteed by the courts include: (1) an

17. Brodsky, *supra* note 2, at 841.

18. *Id.* at 831-32 (citing Goss v. Lopez, 419 U.S. 565, 579 (1975)). The Court left open the question of whether more protections are owed to students facing more severe discipline, but lower courts have extended such protections inconsistently at best. *Id*. at 832 n.54.

19. Such a lawsuit would be brought on constitutional grounds, but disciplined students can bring claims under Title IX alleging sex-based discrimination against the accused. *See* Buzuvis, *supra* note 3.

20. Brodsky, *supra* note 2, at 831.

21. *Id*. at 832.

22. *Id*. at 836.

expectation that the accused receive notice of the charges over a week in advance of the hearing, whereas *Goss* allowed the hearing to immediately follow notice;[23] (2) a mandate of equal access by the parties to a complete record of information that will be used at the hearings, including the witnesses' identities and full testimony, whereas *Goss* makes no mention of such access;[24] and (3) encouragement of the provision of an appeals process that, if instituted, must be available to both parties, whereas *Goss* and lower courts are in agreement that the right to appeal an outcome is not constitutionally required.[25] Contrary to critics' accusations of a dearth of due process for accused students, administrative enforcement of Title IX represents a high watermark for procedural protections for the accused that exceeds those protected by the courts.

B. Intersectionality

In Kimberle Crenshaw's groundbreaking and much-cited critique of anti-discrimination law, she describes the single-axis framework embedded in such laws that regards discrimination based on sex, race, and other characteristics as discrete, non-overlapping phenomena.[26] This framework produces a doctrinal regime, including most notably the "but for" causation standard of discrimination, that defines and seeks to remedy discrimination in terms of the experiences of those who are privileged but for their racial or sexual characteristics.[27] Alfred Dennis Mathewson has applied Crenshaw's critique to the Title IX context, arguing that, on the whole, the single-axis framework has caused Title IX to be more beneficial to white female student-athletes at the expense of Black female student-athletes.[28] He proposes an administrative response in which the Department of Education's OCR, with its counterpart in the Department of Justice responsible for enforcing Title VI, can promulgate regulations or enforcement guidance that focus specifically on identifying and remedying inequities between Black female athletes and white female athletes. Mathewson cites Derek Black's observation that neither Title IX nor Title VI explicitly "defines the term 'discrimination,' but both explicitly authorize the agencies to enforce and interpret the term" with the blessing of judicial deference.[29] The Departments of Education and Justice are thus at liberty to develop a scheme of enforcement that is explicitly intersectional, directing educational institutions to attend to sex, race, and other protected characteristics in fulfilling their existing obligations under Title IX.[30]

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23. *Id*. at 832-33.

24. *Id*. at 834-35.

25. *Id*. at 835-36.

26. See Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139, 139-40 (1989).

27. *Id*.

28. Alfred Dennis Mathewson, Remediating Discrimination Against African American Female Athletes at the Intersection of Title IX and Title VI, 2 WAKE FOREST J. L. & POL'Y 295, 295-96 (2012).

29. *Id*. at 314-15 (citing Derek W. Black, The Mysteriously Reappearing Cause of Action: The Court's Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs, 67 MD. L. REV. 358, 413 (2008)).

30. *Id.* at 315-17.

While Mathewson is focused on the athletic aspect of Title IX, his policy suggestion applies just as well to the sexual violence context. As Cantalupo has demonstrated, women of color are disproportionately the victims of on-campus sexual violence and harassment. Yet, the single-axis, non-intersectional understanding of sex discrimination and sexual violence in the educational context leads to their erasure in the application of Title IX.[31] The flexibility of administrative enforcement of Title IX is aptly illustrated by the possibility of centering the margins and attending to the interaction of sex, race, disability[32] and other characteristics in the occurrence of sexual violence. Examples of possibilities include policy guidance for schools on ensuring the accessibility of Title IX reporting mechanisms and investigation procedures for disabled or undocumented students, or guidance addressing how a school should identify and handle a complaint that is not a sexual violence complaint nor a racial discrimination complaint, but rather both simultaneously.

Administrative enforcement of Title IX sheds the formalities of both criminal and civil law and the paradigms baked into their structure, presenting instead an incubator for creative theoretical and policy-based interventions to prevent and address sexual violence in educational settings. Administrative law holds the potential to redefine what justice means for both victims and perpetrators of sexual violence on campus and extend the boundaries of equal access to education.

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31. Cantalupo, *supra* note 7, at 11 ("This Part reviews the development of this anti-intersectional narrative by focusing on the interaction of three factors. First, the Obama administration's stepped-up enforcement of Title IX with regard to sexual harassment has been countered by a concerted effort to 'criminalize' Title IX in the eyes of schools and the general public, an effort that has been joined by the current administration. Second, this criminalization has relied on racialized sex stereotyping of both women of color and African American men to a significant extent. Third, the lack of public information about such harassment and how schools investigate it makes it difficult to counter stereotyping and the push to criminalize Title IX. Together, these three factors have led to the erasure of women students of color and their experiences from the dominant narrative."); *see also* Nancy Chi Cantalupo & William C. Kidder, *Mapping the Title IX Iceberg: Sexual Harassment (Mostly) in Graduate School by College Faculty*, 66 J. LEGAL EDUC. 850 (2017).

32. *See* Bianca Quilantan, *Students With Disabilities are Largely Ignored by Colleges' Assault Prevention, Study Finds*, CHRON. HIGHER EDUC., (Jan. 31, 2018), https://www.chronicle.com/article/students-with-disabilities-are-largely-ignored-by-colleges-assault-prevention-study-finds/.