

NOTES

Title IX Narratives, Intersectionality, and Male-Biased Conceptions of Racism

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INTRODUCTION

For decades, men have sexually harassed and sexually assaulted women on college campuses with impunity.¹ Although Title IX was passed in 1972 to provide sex equality in education,² that equality still does not exist. In recent years, campus sexual assault has been recognized as a national epidemic and a manifestation of sex inequality.³ The U.S. Department of Education Office for Civil Rights (OCR) has responded by finally holding universities accountable for violations of Title IX.⁴ Title IX is a federal law that prohibits discrimination in education based on sex and requires equal access to educational opportunities.⁵ Sexual harassment and sexual assault create a hostile environment that interferes with access to education; therefore, universities are legally required to prevent and address such issues.⁶

OCR has long issued guidance on campus sexual assault.⁷ Unfortunately, many colleges and universities ignored this direction until OCR finally decided to enforce

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1. Studies have consistently shown that around one in four women experience some form of sexual assault during college. See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1969 (2016) (noting studies from various time periods that show a substantial number of female college students experience actual or attempted sexual assault during their time in college). See, e.g., Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2040, 2050–51 (2016) (providing more statistics surrounding sexual assault on college campuses).

2. See *id.* at 1970–71.

3. See Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. F. 359 (2015); see also CATHARINE A. MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 240–48 (2005).

4. See Rosenfeld, *supra* note 3, at 365–66.

5. See 20 U.S.C. § 1681(a) (2012).

6. Rosenfeld, *supra* note 3, at 361.

7. See, e.g., Anderson, *supra* note 1, at 1972 (“In 1997, for instance, OCR issued guidance on disciplinary procedures, which required notice, ‘[a]dequate, reliable and impartial investigation of complaints, including the opportunity to present witnesses and other evidence,’ reasonably prompt time frames, notice of the outcome to the parties, and an ‘assurance that the school will take steps to prevent reoccurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.’”) (quoting Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997)).

the law.⁸ For instance, many schools ignored the call to use a preponderance of the evidence standard—a civil liability standard, meaning more likely than not—in adjudicating campus sexual assault.⁹ Since OCR began enforcement, many schools have changed their policies to reflect the appropriate evidence standard and meet their other obligations under Title IX.¹⁰ Now that there appears to be at least some accountability, schools are starting to understand that there are serious civil rights violations happening on their campuses.¹¹ If schools continue to inadequately investigate and resolve these issues, they risk losing billions in federal funding.¹²

As OCR begins to take the steps necessary to ensure compliance with federal law, a fervent opposition attempts to attack and undermine OCR's Title IX policies at every turn. Invoking everything from due process and free speech to racial and class bias, opponents of OCR's policies question their fairness now that OCR might hold institutions accountable.¹³ Backlash to progress in the context of sexual assault is not new.¹⁴ In many ways, this response mirrors the wave of criticism levied at progressive reform of rape law in the criminal justice system.¹⁵

In the context of campus sexual assault, critics claim that the pendulum has swung too far against the rights of the accused, and caution that the enforcement of OCR's policies will have dangerous consequences.¹⁶ Some of these critics believe that campus sexual assault was never a serious issue.¹⁷ Others agree that the old Title IX policy was unacceptable but maintain that the current policy goes too far.¹⁸ The dangerous consequences that might result from OCR's enforcement remain to be seen, but that has not prevented critics from trotting out a parade of horrors to suggest that OCR should scale back its policies before it is too late.¹⁹

8. *See id.* at 1976–77.

9. *See id.* at 1973–76.

10. *See id.* at 1987.

11. *See id.* at 1976–77 (“In recent years, OCR oversaw a tenfold increase in sexual assault complaints against colleges and universities. In 2009, there were nine complaints to OCR regarding sexual violence; in 2014, there were 102. But it was not just the number of complaints that increased. OCR also stepped up enforcement. It has opened Title IX sexual violence investigations against more than 120 colleges and universities across a wide range of types of institutions, such as Southern Methodist University, Virginia Military Institute, Harvard Law School, Michigan State University, Hobart and William Smith Colleges, and the University of Virginia.”).

12. *See id.* at 1987–88.

13. *See id.*

14. *See id.* at 1981–82.

15. *See id.*

16. *See, e.g.*, Janet Halley et al., Opinion, *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://perma.cc/7U5T-PE86>.

17. *See, e.g.*, Heather Mac Donald, *The Campus Rape Myth*, CITY J. (Winter 2008), <https://perma.cc/6Z3J-QFCQ>.

18. *See* Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 103–04 (2015). Still, one wonders where their support for survivors was when perpetrators of sexual assault received only a slap on the wrist.

19. *See, e.g.*, Jeannie Suk Gerson, *The Transgender Bathroom Debate and the Looming Title IX Crisis*, NEW YORKER (May. 24, 2016), <https://perma.cc/7Z3A-647U>. *But cf.* Chase Strangio, *There Is Only a Title IX Crisis if You Believe the Existence of Trans People Is Up for Debate*, SLATE (May. 27, 2016), <https://perma.cc/G42S-X999> (explaining that Professor Suk begins her argument with a false premise and fails to provide critical engagement of transgender issues, such as the myth of the bathroom predator).

Perhaps the most notable critique of OCR's policies is that they will lead to a disparate impact against men of color, particularly black men.²⁰ The critique begins by noting the long and enduring history of racial bias against black men in the criminal justice system, especially in regards to false accusations of rape, which were used as a means of terrorizing blacks in the Deep South.²¹ It then claims that OCR's policies will be used in support of white supremacy, as black men will be falsely accused by white women and suffer professional death.²² Might what happened decades ago in the South find itself being repeated on college campuses?

In this paper, I argue the answer to that question is no. While the critique appears plausible on the surface, a closer examination reveals a damning gender bias. There is a history of race being used as a political tool to shut down conversations about sexual assault, even when it directly affects black women.²³ For these critics, it is as if the question of race settles the question of gender. But race does not work alone; race can be used either to illuminate or to obscure the reality of sexual assault for women of color. Despite their apparent concern for racial minorities, many critics of the new Title IX enforcement fall prey to the latter.²⁴ Without considering the implications their arguments have for women of color, they contend that the prevalence of racial bias is a reason to halt progress on Title IX reform.

In their myopic approach to addressing racial bias, these critics create a narrative of campus sexual assault that fails to grapple with the concept of intersectionality,²⁵ excludes women of color, and therefore perpetuates racism. Professor Janet Halley of Harvard Law School has been a leading figure in this narrative's advancement. For example, in *Trading the Megaphone for the Gavel in Title IX Enforcement*, Halley raises a cultural differences argument, suggesting that there are different sex norms among poor people and people of color.²⁶ What she fails to mention is that the cultural differences argument has historically been used to reinforce racial and class

20. See Nancy Gertner, *Complicated Process*, 125 YALE L.J.F. 442, 442-43 (2016); Halley, *supra* note 18, at 106-08; see also Robby Soave, Opinion, *Is This the Most Unfair Campus Rape Investigation Ever?*, NEWSWEEK (Jan. 13, 2016), <https://perma.cc/V6V3-N2M6> ("Some due process advocates who follow these cases, including Harvard University Law Professor Jeannie Suk, believe black male students are more likely to be falsely accused of sexual assault.").

21. See sources cited *supra* note 20.

22. Racial bias is a well-studied phenomenon and affects racial minorities in a myriad of ways, so one wonders why these critics seem rarely to address the other, arguably more prevalent, ways in which racial bias negatively impacts black men and black women on college campuses.

23. See Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1473 (1992) ("One of the most troubling manifestations of this attitude is represented by those who claim that any Black woman who raises a gender related issue is simply acting on the white women's agenda and not on that of the Black community. Apparently a Black woman who has been harassed, or raped, or battered cannot conclude on her own that this behavior is damaging to her as a Black woman.").

24. These critics usually offer no concrete proposals to address racial bias for either black men or black women. This raises the question of whether the invocation of race comes from a place of genuine concern or a place of convenience.

25. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

26. See Halley, *supra* note 18, at 108-10.

stereotypes.²⁷ Furthermore, although Halley seems concerned about the disparate racial impact of accusations against black men, she completely ignores the racial bias that affects *women* of color in these situations. These critics often appeal to the myth of the black rapist and the current state of the criminal justice system as reasons to oppose OCR's policies.²⁸ However, they often mention these reasons in passing, never fully articulating their relevance to the actual present context of campus sexual assault. As this article will explain, the circumstances are not analogous. As a result, in pursuing the laudable goal of exposing racial bias, these critics often fall into the trap of prioritizing racial bias against men over racial bias against women.

In their battle to defeat progressive reform of campus sexual assault, some critics use a male-biased conception of racism to create a false Title IX narrative that undermines recent moves to effectuate gender equality on college campuses. Their account excludes women of color, especially black women, from questions of racial justice, and stereotypes racial minorities as possessing different sexual moralities. This narrative fails to grapple with the concept of intersectionality (e.g., its focus on men of color at the expense of women of color). In their account of racism, critics of OCR's policies base their commentary in assumptions of past racism, the myth of the black rapist, and mass incarceration, which are incongruent with the current social reality. This essay examines the gender- and race-biased narrative and argues for continued progress on the issue of campus sexual assault. Part I describes the legal background of this narrative. Part II explains how the narrative's reliance on the cultural differences argument reinforces harmful racial and class stereotypes. Part III considers the narrative's failure to grapple with the concept of intersectionality. Finally, Part IV exposes the problems with the narrative's use of the myth of the black rapist and the phenomenon of mass incarceration in the context of campus sexual assault.

I. LEGAL BACKGROUND

In 1972, Congress enacted Title IX of the Education Amendments.²⁹ Title IX provides that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”³⁰ Congress also authorized OCR to enforce Title IX and achieve compliance “by the termination of or refusal to grant or to continue assistance under such program or activity . . . or . . . by any other means authorized by law.”³¹

27. See Crenshaw, *supra* note 23, at 1471–72.

28. See, e.g., Jeannie Suk, *Shutting Down Conversations About Rape at Harvard Law*, NEW YORKER (Dec. 11, 2015), <https://perma.cc/W9F6-2GEG>.

29. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-07, 86 Stat. 235, 373-75 (codified at 20 U.S.C. §§ 1681-1686 (2012)).

30. 20 U.S.C. § 1681(a).

31. *Id.* at §1682.

In the early years after Title IX's passage, the legal obligations of universities were not clear.³² But at this point, neither was the concept of sexual harassment.³³ During this time, feminists confronted the social confines of a male dominated society by defining sexual harassment as a practice of sex discrimination and helping advocates challenge the legitimacy of sexual harassment in court.³⁴ Sexual harassment was first recognized as a claim of sex discrimination in education in *Alexander v. Yale University* (1977).³⁵ Early Title IX cases focused on the harassment of students by professors and administrators, but by the end of the century, courts held that peer-on-peer harassment could violate a student's right to education.³⁶

Despite this progress, court actions brought against universities were infrequently successful due to emerging jurisprudence that limited the scope of a school's liability where there was an absence of deliberate indifference.³⁷ To this day, the failure of colleges and universities to adequately protect students against sexual harassment often goes without redress by the courts.³⁸ OCR had long issued guidance on proper procedures for complaints, investigations, and discipline, but many schools failed to comply without incurring any consequence, resulting in inadequate enforcement of Title IX.³⁹ Essentially, this meant that schools exercised wide discretion and faced little oversight in adjudicating cases of campus sexual assault.⁴⁰ In recent years, however, OCR has increased enforcement, opening Title IX investigations against more than 120 colleges and universities, and threatening to withhold billions of dollars in federal funding on which schools depend.⁴¹

As one might imagine, many university administrators and professors are displeased with OCR's change in policy (i.e., its decision to enforce its Title IX regulations). Before there were consequences for failing to comply with Title IX, schools essentially had free reign to create policy even when it provided inadequate support for students who experienced campus sexual assault.⁴² For instance, some schools used a clear and convincing evidence standard (a high threshold) when adjudicating sexual assault claims, notwithstanding OCR's consistent use of a preponderance of the evidence standard in accordance with civil rights cases.⁴³ Schools often denied students prompt and equitable resolution of disputes, occasionally dragging out cases

32. See Anderson, *supra* note 1, at 1971-77.

33. See MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 150-51 (2007); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 174 (1989).

34. See CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, 4 (1979).

35. See *Alexander v. Yale*, 459 F. Supp. 1 (D. Conn. 1977).

36. See Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2040, 2049 (2016) (describing the first peer sexual harassment case).

37. See *id.*

38. See *id.* at 2067-85.

39. See Anderson, *supra* note 1, at 1970-78.

40. See *id.* at 1973-76.

41. See *id.* at 1976-77.

42. See *id.* at 1973-77.

43. See *id.* at 1973-74.

until the perpetrator had already graduated, or sometimes failing to resolve matters at all.⁴⁴

Now that there are potential consequences for failure to comply, schools have moved toward compliance with OCR. Nevertheless, a fervent opposition continues to resist compliance with a range of arguments, contending that OCR's policies violate, among other things, academic freedom, freedom of speech, and due process.⁴⁵

While this paper considers one such argument made regarding racial bias, there is a commonly raised point of contention that must be addressed here because it risks confusing the civil rights issue at hand. One camp contends that campus sexual assault is a criminal issue under rape law, and thus should be resolved only by the criminal justice system.⁴⁶ Unfortunately, this argument conflates criminal and civil law, under which Title IX falls, and fails to consider the numerous other school violations that also fall under the criminal code.⁴⁷ This conflation of criminal and civil law is sometimes made with an appeal to the racial bias black men experience, but it is unclear why these critics would launch an attack against OCR's policies on these grounds when the criminal justice system is not exactly known for obtaining justice on behalf of rape victims or racial minorities. Such inconsistencies aside, this racial bias narrative, with its particular fixation on racial bias against black men, is offered in a number of formulations as a reason to scale back enforcement of Title IX.

44. *See id.* at 1971-78.

45. For example, the American Association of University Professors' Committee on Academic Freedom and Tenure and Committee on Women in the Academic Profession wrote, "[w]e do argue that questions of free speech and academic freedom have been ignored in recent positions taken by the Office for Civil Rights (OCR) of the Department of Education, which is charged with implementing the law, and by college and university administrators who are expected to oversee compliance measures. We offer a critique of the failure to attend to free speech and academic freedom as well as an analysis of the resulting negative effects on teaching, research, shared governance, and extramural speech. Further, because actions by the OCR and responding institutions have compromised established practices of due process and faculty governance, we also present some reflections on how such abuses of Title IX have developed in the context of the corporate university, and we review relevant AAUP policies." AM. ASS'N U. PROFESSORS, HISTORY, USES, AND ABUSES OF TITLE IX 7033 (2016).

46. *See, e.g.*, Andrew M. Duehren, *In New York, Law School's Jeannie Suk Debates Title IX*, CRIMSON (CRIMSON Dept. 18, 2015), <https://perma.cc/HM73-C3SS> ("Harvard Law School professor, Jeannie C. Suk, argued at a forum in New York that the criminal court system, not campus resources, should investigate and adjudicate cases of alleged sexual harassment, sexual assault, and rape.").

47. As Anderson explains, "[s]tudents have been disciplined for many kinds of misconduct, from plagiarism to nonsexual assault or rioting, regardless of whether the misconduct is a crime. One should be wary of arguments that campuses cannot handle these cases, since they have been adjudicating other misconduct claims for hundreds of years. Moreover, campuses have occasionally had to adjudicate cases that are more serious than felonious rape. In 2013, for example, a college fraternity hazing ritual in Pennsylvania ended in the death of a pledge by blunt force trauma to the head. The coroner ruled the death a homicide, but the prosecutor did not file charges until two years later. The college, however, had an independent interest in the case, and pursued disciplinary charges against the fraternity members who killed the student. Fraternity hazing and homicide are both serious crimes, but no one in that case said that the campus is incompetent to adjudicate the case, the court should be the only one to handle it, and the college should get out of the way. People recognized the obvious: campuses have different interests in the case and different reasons to be involved. They have to work to protect their students from harm." Anderson, *supra* note 1, at 1997-98.

II. CULTURAL STEREOTYPES AND CONSENT

Some critics of Title IX create a false narrative about campus sexual assault by appealing to cultural differences.⁴⁸ In simple form, the argument holds that:

- (1) Members of different cultures have different sex norms in regards to consent;
- (2) Universities should not punish cultural differences;
- (3) Title IX enforcement should be rolled back so as not to unfairly punish cultural minorities.

The argument appears to show concern for cultural diversity, but it is actually mired in pernicious cultural stereotypes of women that support rape myths.⁴⁹ Such stereotypes have been used to characterize black and poor women as more promiscuous.⁵⁰ Although this argument is not novel, this section examines the argument in full, showing its foundation in class and racial stereotypes. First, this section examines the argument in the context of class and explains how poverty lacks sufficient connection to any consent standard. Second, this section shows the argument's connection to racist stereotypes about black women and men, and how the argument perpetuates old-fashioned racial prejudice against people of color.

A. Class

In *Trading the Megaphone for the Gavel*, Halley argues that different cultural groups have “clashing” and “inconsistent” sexual moralities that complicate the meaning of sexual assault.⁵¹ Halley argues that a cultural defense to accusations of sexual assault is valid, saying “[w]hen two cultures come into conflict over the meaning of a sexual encounter, which one wins?”⁵² She believes there are relevant cultural differences that make the expression of non-consent different among various cultural groups. However, she provides little insight into what these relevant differences are. To make her point, she relies on *State v. Rusk*,⁵³ which involved a middle-class white female victim and a poor white male defendant.⁵⁴

In *Rusk*, the jury found the defendant guilty of rape based on the victim's testimony that the defendant withheld her car keys, lightly choked her, and maintained a menacing facial expression.⁵⁵ Halley argues that the conviction depended largely on

48. See, e.g., Anderson, *supra* note 1.

49. See AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS 33 (2007) (“Numerous studies have shown a connection between stereotypical attitudes about women's sexuality and aggressive sexual behavior. For example, adversarial sexual beliefs, rape myth acceptance, and sexist beliefs about women are related to aggressive sexual behaviors.”).

50. See, e.g., PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 81–92 (2002) (explaining that the practice of using controlling images to control black women's sexuality has occurred since American slavery).

51. See Halley, *supra* note 18, at 108–10.

52. *Id.* at 108.

53. 424 A.2d 720 (Md. 1981).

54. Halley, *supra* note 18, at 108.

55. See *id.* at 108–09.

the victim's subjective belief that he was threatening her.⁵⁶ She worries that this may have been a mere disagreement between people of different socioeconomic backgrounds, as evidenced by the "significance of their gestures in a gendered script for communicating consent or non-consent."⁵⁷ Indeed, she cautions, noting the defendant's "poor" class status, that accepting the victim's word at face value "may mean committing the legal system to supporting [the victim's] white middle-class assumptions about how men and women communicate with each other when they go home together after a night out drinking."⁵⁸

Halley suggests that there are different cultural assumptions between poor white men and middle-class white women about the meaning of consent. However, she does not spell out the content of these cultural differences or account for how they could exist in the first place. There is nothing class specific about a man choking a woman or taking her car keys. Men from all economic backgrounds commit such abuse against women. Thus, it is not entirely clear what she means when she suggests the evidence presented in *Rusk* exemplifies a case of cultural difference about the expression of consent; nevertheless, her general implication is quite disturbing.

In the *Rusk* example, Halley implies men and women from lower-income backgrounds have different and, implicitly, lower standards for consent.⁵⁹ This analysis of Halley's argument is not a normative claim about the right or moral consent standard. This critique is descriptive insofar as it articulates the consequences of Halley's position. In this context, by supposing that poor women, as a class, are more likely to accept or even prefer rough, aggressive pursuit of sex, she commits herself to a standard that inherently implies lower and higher barriers to intercourse. In practice, this reproduces class stereotypes, e.g. "the unrapeable prostitute." It is the same stereotype used to dismiss allegations of rape by women in the sex industry.

In this view, the situation in which a poor man aggressively and coercively pressures a poor woman for sex amounts to a normal game of seduction. The thought screams, "Poor women like it rough!" This logic implies that poor people have different (lower) standards for what constitutes consent. Despite the fact that she cites no evidence to support this claim, Halley argues that this class difference is a relevant one.⁶⁰ The upshot of her argument is that cases like *Rusk* are about not a man being guilty of rape, but a woman guilty of misunderstanding.⁶¹

But sex norms are not created in the ether. In this country, sex education comes mostly from pornography and media, and people of all socio-economic backgrounds

56. See *id.* at 109-10.

57. *Id.* at 109.

58. *Id.*

59. To emphasize, this is a result of Halley's position and not a moral critique about what is the "most right" or the "most moral" sex standard. She creates a less demanding standard for consent and supposes that it applies to all cultural groups. To have a higher or lower consent standard does not automatically attach to a particular moral implication, although there very well may be moral implications. The reader can decide for themselves what, if any, moral consequences Halley's position holds. Halley believes in different "sexual moralities" among cultural groups. No such claim is made in this piece.

60. See Halley, *supra* note 18, at 110.

61. *Id.*, at 111.

access these means of communication.⁶² Sex education is not class specific. The fact that people commonly engage in sexual activity with people of different socio-economic classes buttresses this point. While it was once true that people were more likely to interact with people of the same social class, the Internet has made that presumption easily rebuttable.⁶³ Thus, there is no group isolation from which to claim that sex norms are distinctly constituted. Halley does no work to show who or what creates this culturally gendered script. Upon closer examination, the position relies on cultural stereotypes, not any real evidence. This becomes increasingly apparent when we consider the cultural differences argument in the context of race.

B. Race

By juxtaposing class and race, one recognizes the difference that race makes in Halley's argument. She suggests that different cultural groups (e.g. African Americans) have different "sexual moralities" that will "clash" with the sexual moralities of members of other groups (e.g. white Americans).⁶⁴ Although she does not explicitly refer to African Americans as one of these cultural groups, her logic naturally carries to the realm of race. Consider Halley's description of Rusk's poor class status. She states that he was a "white male defendant from a poor, inner-city background in Baltimore proper, a city notorious then and now for its toughness."⁶⁵ In this racially-tinged description, class *and* race appear as the cultural markers to consider in the "incommensurability of the parties' social codes and their inconsistent and even clashing sexual moralities."⁶⁶ For Halley, race and class are key cultural differences in "cases involving sexual messages that are culturally coded."⁶⁷ But as explained in the previous section, these supposed culturally coded sexual norms lack empirical support and logical consistency. Consequently, her use of the cultural differences argument implies that the sexual culture of African Americans is more likely to appear like rape than the sexual culture of white Americans. Taken to its logical conclusion, this suggests that these marginalized cultural groups have different, lower standards for what constitutes consent. Not surprisingly, this argument has been raised before.

62. See, e.g., Elizabeth M. Morgan, *Associations Between Young Adults' Use of Sexually Explicit Materials and Their Sexual Preferences*, 48 BOI. J. SEX. RES. 520 (2011) (finding widespread consumption of sexually explicit materials by young adults); Michelle J. Anderson, *Sex Education and Rape*, 17 MICH. J. GENDER & L. 83, 88 (2010) ("Sixty-five percent of American children have television in their bedrooms. Research indicates that this arrangement increases children's exposure to televised sexual content."). See also AM. PSYCHOLOGICAL ASS'N, *supra* note 49, at 30-31 ("Across several studies, women and men exposed to sexually objectifying images of women from mainstream media (e.g., R-rated films, magazine advertisements, music videos) were found to be significantly more accepting of rape myths (e.g., the belief that women invite rape by engaging in certain behaviors), sexual harassment, sex role stereotypes, interpersonal violence, and adversarial sexual beliefs about relationships than were those in controlled conditions.").

63. See, e.g., Robert Kurzban & Jason Weeden, *HurryDate: Mate Preferences in Action*, 26 EVOLUTION & HUM. BEHAV. 227 (2004) (finding mate values for both men and women derive almost exclusively from physically observable attributes like attractiveness, BMI, height and age and that these values are not substantially related to harder-to-observe attributes such as education, religion, and sociosexuality).

64. See Halley, *supra* note 18, at 108-10.

65. Halley, *supra* note 18, at 107.

66. See *id.*

67. See *id.* at 108-09.

As Angela Davis notes, the cultural differences argument is neither new nor original.⁶⁸ This argument has consistently been used to deflect questions surrounding sexual assault and to stereotype both black men and women as promiscuous.⁶⁹ In a historical context, the argument was used to paint black men as sexual beasts that harbored irresistible and animal-like sexual desires, especially for white women.⁷⁰ By extension, the argument painted black women as their promiscuous sisters who also had lower, animal-like standards for sex.⁷¹ These stereotypes carry over to modern times, in that there is a cultural norm that suggests that black people “like it rough.” For example, like the poor man who sexually coerces a poor woman by force, a man’s sexual coercion of a black woman does not amount to rape because the black woman “likes it rough.” One can see how Halley’s argument depends upon stereotyping black men and women as having lower standards for what constitutes consent, and thus reinforces racist stereotypes of African Americans as being more promiscuous.

Kimberlé Crenshaw explains that the cultural differences argument is strategically used to obscure the narrative of sexual assault and effectively end the conversation.⁷² She considers the role that the cultural differences argument played during the congressional hearing on Justice Clarence Thomas’s alleged sexual harassment of Anita Hill. During the hearing, Thomas maintained that the entire proceeding was nothing more than a “high-tech lynching for uppity blacks.”⁷³ At the time, many black leaders declined to speak out against Thomas, fearing that it would enflame and encourage racial stereotypes against black men.⁷⁴ Others, however, embraced these racial stereotypes as cultural differences between white and black Americans.⁷⁵

Orlando Patterson, an African-American professor at Harvard University, argued that even if the testimony about Thomas’s harassment of Hill were true, Thomas would be justified in lying about his behavior towards her because it was the style of “down home courting” of black women.⁷⁶ Patterson suggested that the sexual harassment of black women is a part of the normal game of seduction in black communities.⁷⁷ Therefore, a black man like Thomas would be justified in lying about his behavior to a white audience because they would probably not understand this cultural difference. As Crenshaw explains, this “cultural defense effectively deflects criticisms of sexist attitudes and practices that subordinate black women and other women of color in our communities.”⁷⁸ Crenshaw further explains that it becomes much easier for white society to accept these stereotypes when a member of the

68. See ANGELA Y. DAVIS, *WOMEN, RACE, AND CLASS* 172–201 (1981).

69. See *id.* at 159.

70. See *id.*

71. See *id.*

72. See Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1471–73 (1992).

73. See *id.*

74. See *id.* at 1471–72.

75. See *id.* at 1472.

76. See *id.* at 1471.

77. Professor Patterson’s statement also shows how blacks as well as whites can believe in racial stereotypes. See *id.* at 1471.

78. *Id.* at 1472.

stereotyped group voices them.⁷⁹ Of course, generally, white society already bought into these stereotypes about black men and women. The support from a voice of color serves to provide legitimacy to stereotypes already prevalent in white society.⁸⁰ Nonetheless, history disproves the notion that sensitivity to sexual assault is a white woman thing since black women brought the earliest cases of sexual harassment before there was legal recognition of such a claim.⁸¹

III. WOMEN OF COLOR AND CAMPUS SEXUAL ASSAULT

A. Gendered Racial Bias and Exclusion

Critics of OCR's enforcement of Title IX have used the phenomenon of racial bias to create a false narrative of campus sexual assault that excludes women of color. Their narrative tells the story of men of color who are routinely falsely accused and then severely punished because of racial bias. This narrative renders women of color invisible. Women of color exist at the intersection of race and gender, so they confront a dual vulnerability to racism and sexism.⁸² They are more likely to be sexually harassed and assaulted and less likely to be believed.⁸³ Given these realities, one would imagine that those invoking racial bias would not only worry about the men of color being accused but would also center their critiques on the unique vulnerability of women of color. However, critics of OCR's enforcement of Title IX have largely erased these women from the picture. The racial bias to which black men are subjected is tangible. Indeed, racial bias affects black men and women in a variety of social and academic activities at the university level. Thus, it is strange that critics seem to show concern only for the racial bias that affects black men within the context of campus sexual assault.

Ignoring the fact that black women suffer a greater risk of marginalization within that context, Halley claims that Title IX policy seems to reflect the "priorities" and

79. *See id.*

80. *See id.*

81. In the context of employment, see cases brought by Sandra Bundy, Paulette Barnes and Michele Vinson. *See Bundy v. Jackson*, 641 F.2d 934 (C.A. D.C. 1981); *Barnes v. Costle*, 561 F.2d 983 (DC Circuit, 1977); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). In education, see case brought by Pamela Price. *See Alexander v. Yale*, 459 F. Supp. 1 (D. Conn. 1977).

82. *See Crenshaw*, *supra* note 23, at 1467–68.

83. *See id.* at 1470 ("Historically Black women's words were not taken as true . . . Lest we believe that these attitudes are a thing of the past, a very recent study of jurors in rape trials revealed that Black women's integrity is still very deeply questioned by many people in society."); *see also id.* at 1472 ("[M]any Black women are understandably silent out of a belief that our interests are best served by a singular focus on race . . ."); *see also* MICHELE C. BLACK ET AL., CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (2011), <https://perma.cc/XE8D-SLZ3> ("Approximately 1 in 5 Black (22.0%) and White (18.8%) non-Hispanic women, and 1 in 7 Hispanic women (14.6%) in the United States have experienced rape at some point in their lives. More than one-quarter of women (26.9%) who identified as American Indian or as Alaska Native and 1 in 3 women (33.5%) who identified as multiracial non-Hispanic reported rape victimization in their lifetime.").

“visions” of middle-class white women.⁸⁴ Yet, that claim does not comport well with the lived realities of black women. Black women are stereotyped as being more promiscuous than white women, and, therefore, more likely to want to engage in sexual activity.⁸⁵ This stereotype casts doubt on their credibility when they bring forth allegations of sexual assault. With this in mind, the benefits of swinging the pendulum back are unclear. Indeed, given the racial bias against these women, the pendulum may not have swung far enough. Halley’s analysis appears to be inconsistent with her concern for racial justice. Her consideration of black men comes at the expense of black women. Any vision for racial justice that excludes half of the respective population is deeply flawed. These shortcomings highlight the importance of intersectionality in the discussion of campus sexual assault.

B. Racial Justice and Intersectionality

In the context of campus sexual assault, black women usually have to choose between race and gender. If they choose race, then the unique harms they face on the basis of gender are ignored. If they choose gender, then they are seen as race traitors. The problem here is that neither choice allows the whole experience of black women to be fully understood. The choices should not be mutually exclusive. Black women’s experience of sexual assault is simultaneously racialized *and* gendered. Thus, Halley’s focus on racial bias alone is, in fact, gender biased. If one truly cares about racial bias, they must consider the racial bias that affects black women as well as black men.

An intersectional approach to campus sexual assault does not prioritize men of color over women of color. In this approach, any claim of racial bias that is used to effectively shut down the conversation on campus sexual assault should be properly understood as a claim asserting only male racial bias. When Halley prioritizes black men over black women, she prioritizes male racial bias over female racial bias, rather than exposing racial bias generally. As a result, it would be a mistake to call her project one aimed at true racial justice. Though male racial bias may be a perfectly valid issue to be concerned about in isolation, male racial bias cannot be commandeered to undermine gender equality for women of color. Any project for racial justice must take into account the full context of racial subordination across genders.

The proposals Halley makes for addressing racial bias in the adjudication of Title IX claims also betray her own misguided approach. She argues, for instance, that sexual assault and harassment “[c]ases should go to a body charged with fairness to all members of our community, and with particular charges . . . to be on the lookout for racial bias and racially disproportionate impact.”⁸⁶ However, to achieve the justice aspirations of black men *and* women, these “particular charges” need to address the kinds of racial bias experienced by both the accused *and* the victim. A commitment to racial equality and justice requires attention to women and men of color equally; it

84. Note that Professor Halley provides no evidence, data, or citation to support the claim that Title IX reflects the priorities or visions of a particular economic and racial class of women. See Halley, *supra* note 18, at 109.

85. See COLLINS, *supra* note 50.

86. Halley, *supra* note 18, at 108.

requires an intersectional approach. A racially just approach to campus sexual assault embraces these intersectional differences to build a stronger policy for survivors of campus sexual assault.

IV. RACIAL BIAS IN THE CONTEXT OF CAMPUS SEXUAL ASSAULT

Although past and present instances of racial injustice against men are indeed issues that need to be considered in the context of campus sexual assault, the narrative pushed by critics of OCR overstate this need.⁸⁷ This section examines the myth of the black rapist and the phenomenon of mass incarceration—often invoked by critics like Halley—in order to illustrate why they may not be the most suitable tools of comparison for understanding racial bias within the Title IX context. This section then suggests a more plausible explanation for the role that racial bias plays in Title IX proceedings.

A. *Myth of the Black Rapist*

In defense of their argument against OCR's Title IX policy, some critics consider the myth of the black rapist as a reason to believe that black men will be unfairly punished in Title IX adjudications. For instance, Halley writes:

From Emmett Till to the Central Park Five, American racial history is laced with vendetta-like scandals in which black men are accused of sexually assaulting white women that become reverse scandals when it is revealed that the accused men were not wrongdoers at all.⁸⁸

Concerned by this particular history of racial injustice, Halley cautions against the dangerous effects that OCR's policies will have on “sexually stigmatized minorities.”⁸⁹ She writes, “Title IX, after all, is dedicated *solely* to sex discrimination.”⁹⁰ Of course, as explained above in Parts I and II respectively, Halley's analysis stereotypes so-called sexually stigmatized minorities and renders women of color invisible in the process. However, such appeal to the myth of the black rapist is misguided because it lacks sufficient bearing with present-day realities on college campuses.

Historically, the myth of the black rapist was used as a justification for the lynching of blacks.⁹¹ The lynching came first, and the myth was invented to not only justify the act but also control black bodies in a time when white supremacy was all-encompassing.⁹² As Davis points out, “the myth of the Black rapist was a distinctly political invention.”⁹³ In fact, before the Civil War, white abolitionists were

87. See, e.g., Suk, *supra* note 28 (“[I]f we have learned from the public reckoning with the racial impact of over-criminalization, mass incarceration, and law enforcement bias, we should heed our legacy of bias against black men in rape accusations.”).

88. Halley, *supra* note 18, at 106.

89. See *id.*

90. *Id.* at 107 (emphasis added).

91. See DAVIS, *supra* note 68, at 172–201.

92. See *id.*

93. *Id.* at 184.

the primary targets of lynching.⁹⁴ After the Civil War, however, black people's potential for political and economic equality threatened the power of white supremacy. "These were the circumstances which spawned the myth of the Black rapist—for the rape charge turned out to be the most powerful of several attempts to justify the lynching of Black people."⁹⁵ As a result, the myth of the black rape of white women was used to undermine the political and economic progress of black people through racialized terror, even though the majority of lynchings did not involve accusations of sexual assault.⁹⁶ Although racism is still a major force in society, the circumstances that brought about the myth of the black rapist are not the same in today's context of campus sexual assault. In this section, several important differences between the past and present are explained, illustrating the imprudence of the myth's application in this context.

1. Colleges and Universities Aggressively Recruit Racial Minorities

In contrast to a world where schools consistently denied black students access to higher education, today, universities adopt affirmative action policies to ensure a critical mass of black students. Schools value racial diversity at an unprecedented level as compared to the history in which the myth of the black rapist developed. Even as the Supreme Court threatens to roll back progress from the Civil Rights era, colleges and universities from around the country continue to stress the importance of racial diversity on their campuses.

2. Schools Value Quantitative Diversity⁹⁷

Although the myth is invoked to warn against the unfair punishment that awaits black men, history suggests that schools have an incentive to do otherwise. "During slavery, the lynching of Black people did not occur extensively—for the simple reason that slave owners were reluctant to destroy their valuable property."⁹⁸ Schools use the recruitment of racial minorities to leverage their respective appeal. Simply put, diversity sells.⁹⁹

Black male students are often chosen, in part, because of their school's commitment to quantitative diversity. Serving as physical markers of racial, and ethnic variety, students of color generally help schools market themselves as inclusive learning environments. It is not uncommon to see these students paraded on the school's

94. *See id.*

95. *Id.* at 185.

96. *See id.* at 187.

97. Quantitative and qualitative diversity should be distinguished. While quantitative diversity tends to focus on the numerical representation of racial minorities, qualitative diversity places greater emphasis on recruitment and retention of these students. As Harvard Law School Professor Tomiko Brown-Nagin explains, in recent years, the lack of qualitative racial diversity on college campuses has led to student protests. *See* Tomiko Brown-Nagin, *Students Want Qualitative Diversity on Campus*, SLATE (Nov. 30, 2015), <https://perma.cc/PK7V-5XLU>.

98. *See* DAVIS, *supra* note 68, at 183.

99. *See, e.g.*, Bianca Tylek, Opinion, *Harvard Law School Alumni, Stop Donating*, BOS. GLOBE (Nov. 25, 2015), <https://perma.cc/ZCV5-MJCZ>.

website or represented as percentage points in admission catalogs. Necessarily, institutions develop an interest in maintaining a certain appearance: the image of a racially inclusive and diverse educational environment. Consequently, the incentive to unfairly punish black men, while not obsolete, is far less prevalent in this context and pales in comparison to the need of universities to preserve their image of inclusivity. Although one might expect that an inclusive image would include survivors, it can have the opposite effect. Since the branding of inclusion is simply an image, the university's superficial commitment to racial diversity is consistent with excluding survivors of sexual assault, particularly when those narratives do not fit the branding image.

3. Sexual Assault Investigations Against Male Student Athletes in Competitive Sports are More Likely to be Biased in Their Favor, Regardless of Race

Each year college sports bring in billions of dollars in revenue. Some universities depend on this revenue for their educational programs. Thus, in an allegation of sexual assault, college administrators often have a financial incentive to take the side of male athletes, regardless of their race.¹⁰⁰ Unfortunately, as Rosenfeld observes, these incentives perpetuate sexual assault by members of male athletic teams:

Such assaults often appear to reflect alliances among many players—generally implicit (but sometimes explicit) agreements to commit the assault, to cover it up, or to keep it from hurting the season. Coaches, college administrators, and even prosecutors sometimes participate in these alliances.¹⁰¹

In the context of campus sexual assault, given the various financial incentives that discourage punishing athletic perpetrators at all, let alone unfairly, it seems particularly unlikely that racial bias would work against those accused of campus sexual assault. In this context, it is far more reasonable to infer that women of color who accuse athletes, white or black, are more at risk of receiving unfair treatment. By contrast, inadequate campus sexual assault investigations have provided no such incentive. Universities are rarely held liable under the deliberate indifference standard,¹⁰² and OCR has yet to terminate federal funding for any school found in violation of Title IX.¹⁰³

4. School's Reputation and Desire Not To Mar It

Similar to their omission of gender, critics also fail to consider the power of wealth-related interests in their analysis. Many wealthy schools, both private and public, depend on reputation to attract donors, attract quality students, and increase their ranking among schools. The desire to protect an institution's reputation may outweigh racial bias against black men that might otherwise occur at the micro level,

100. See, e.g., Gary Fineout, *FSU Official Says Football Players Get Special Treatment in Sexual Assault Cases*, ORLANDO SENTINEL (Nov. 26, 2015), <https://perma.cc/4MRQ-CFVL>.

101. Rosenfeld, *supra* note 3, at 373.

102. See MacKinnon, *supra* note 1, at 2093-96.

103. See Anderson, *supra* note 1, at 1988.

especially when the current legal apparatus leaves few options for victims to hold universities accountable. Consequently, schools can often get away with the mere appearance of compliance in order to avoid liability. As MacKinnon writes:

As things stand, schools have an incentive not to know about sexual harassment in their institutions, and when they do, to do little to nothing about it. They can only be liable for what they know, even when their own employees and superior agents engage in it, and any change they make or action they take can imply that something needed doing or correcting. This legal posture converges with schools' concern to control cases internally so as to not look bad externally.¹⁰⁴

Oftentimes, universities would rather sweep an allegation of campus sexual assault under the rug than risk damaging the institution's reputation. The interest that schools have to present a certain message to the public acts as a perverse incentive to minimize reporting and punishment of sexual assault.

Taken together, these differences illustrate the inept comparison between the historical context in which the myth was created and today's reality. In historical context, the lynching of black men for alleged rape did not even involve an accusation of sexual assault by a victim.¹⁰⁵ Racial bias persists and is relevant, but it is not always determinative, and it is certainly not only against men. Furthermore, although there is certainly much improvement to be made in terms of qualitative racial diversity on college campuses, these circumstances differ from the environment in which the myth of the black rapist originated. By contrast, universities continue to support symbolic diversity initiatives and strive for seemingly more inclusive schools.¹⁰⁶ Thus, emphasizing the myth of the black male rapist in the context of campus sexual assault serves to distort the issue in a way that focuses on race at the expense of gender.

B. Appeal to Mass Incarceration

When references to lynching and the myth of the black rapist are not made, those against Title IX enforcement often appeal to the phenomenon of racialized mass incarceration to cast doubt on the policy.¹⁰⁷ Mass incarceration predominantly affects men of color, evidenced by realities that they are disparately racially profiled and condemned to longer prison sentences than their white counterparts.¹⁰⁸ In the context of campus sexual assault, critics caution against the use of certain adjudicative processes because they fear these methods may resemble the demonstrably biased criminal justice system. However, this concern depends on several flawed assumptions. First, it assumes that the circumstances that led to mass incarceration of poor

104. MacKinnon, *supra* note 1, at 2085.

105. See DAVIS, *supra* note 68, at 187.

106. See, e.g., Anemona Hartocollis, *Harvard Law to Abandon Crest Linked to Slavery*, N.Y. TIMES (March 4, 2016), <https://perma.cc/2PHT-EJS8>.

107. For more on the phenomenon of racialized mass incarceration, see Lawrence D. Bobo & Victor Thompson, *Racialized Mass Incarceration: Poverty, Prejudice, and Punishment*, in *DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY* 322, 322–55 (Hazel R. Markus & Paula Moya eds., 2010).

108. See *id.*

people of color are analogous to the context of privileged people of color in the university setting. Since many students of color who attend college are not from the same disadvantaged background as those from the urban ghetto, the stereotypes and racial bias involved in internal adjudications may be less salient than they are in the inner-city courtrooms that dispense rubber-stamp justice to parades of poor black people.¹⁰⁹ As Anderson explains, “[t]he notion that these were *potential* or *actual* college kids, good upstanding citizens, is a description coded for class and racial privilege and dignity, so as to relieve the accused of responsibility, or at least lessen it.”¹¹⁰ Within the backdrop of increasingly corporatized universities, gender bias may prove to be more salient in such adjudications given the financial incentives against seeking justice on behalf of primarily female victims. It would be a mistake to assume that racial bias plays a similar role in the context of university sexual assault adjudications as it does in the criminal justice system more broadly. For instance, as institutions of privilege, college campuses are much more lenient than the criminal justice system.¹¹¹ Second, much of the racial imbalance in mass incarceration has been the result of disproportionate punishment of people of color for drug use, even though drug use among whites is statistically the same or greater.¹¹² Thus, part of the problem with mass incarceration has more to do with unequal application of the law and less with the absence of culpability.

C. Social Power and Underreporting

The narrative pushed by critics of Title IX enforcement clings to the absence of culpability without question. These critics may not be giving due consideration to the fact that men of color sometimes commit sexual assault.¹¹³ If black men are accused of rape at a higher rate than white men, it might not say anything about the rate of false accusations. To the contrary, it might be the case that victims of sexual assault feel more comfortable bringing complaints against black men because they believe that something will actually be done about it. As Davis explains, a racial justice or feminist analysis needs to consider not only accused rapists, but also actual

109. For example, places like the Bronx have been accused of administering a “managerial” brand of justice, in which courts essentially exist to “sort and regulate” a dehumanized underclass. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014). A university, just by virtue of its size, will not operate with the same racist impulse toward mass social control. This is just one example of how the realities of mass incarceration do not neatly align with the challenges of sexual assault adjudication in universities. Though the school campus environment certainly doesn’t insulate them from the effects of racial bias. See, e.g., Dana Ford, *Uproar after black UVA student injured during arrest*, CNN (Mar. 19, 2015), <https://perma.cc/W98A-F67K>.

110. See Anderson, *supra* note 1, at 1993 (emphasis added).

111. See *id.* at 1981–84.

112. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS*, 7 (2010) (“Studies show that people of all colors use and sell illegal drugs at remarkably similar rates. If there are significant differences in the surveys to be found, they frequently suggest that whites, particularly white youth, are more likely to engage in drug crime than people of color.”).

113. See, e.g., Elahe Izadi, *Spelman, Morehouse Investigate Gang-Rape Allegations Posted by Anonymous Twitter Account*, WASH. POST (May 5, 2016), <https://perma.cc/PV53-QVWB>.

rapists who go unreported.¹¹⁴ Here, one should ask, just as Davis does in the criminal justice context, “What is the racial identity of the enormous number of anonymous rapists who remain unreported?”¹¹⁵ Likely, these perpetrators have social power;¹¹⁶ certainly, they are men; probably, they are white. Indeed, it is probable that they are the ones who account for the significant portion of the unreported sexual assaults.¹¹⁷ As a result, there may be a large number of women who are being sexually assaulted by white men but do not feel comfortable enough to bring a claim, because they do not think they will be taken seriously.¹¹⁸

This threat to the social power of white men may well explain much of the strong backlash against OCR. With the change in OCR’s enforcement policy, white male perpetrators of sexual assault and harassment are more at risk than ever of being exposed. The tide is turning, and survivors of sexual assault can no longer be silenced. For the perpetrators, the question becomes how one can most effectively defend against OCR’s enforcement. And here, we see the cynical manipulation of discussions about race to legitimize campus sexual assault—a phenomenon not unlike the invention of the myth of the black rapist to legitimize the lynching of African Americans. Because white men are challenged in this situation—not only because they are the ones who have gotten away with this for so long, but also because they continue to do so—they strategically use America’s history of racial injustice to bring the hammer down on gender equality.¹¹⁹ They recognize, in the flawed racial justice-inflected arguments of Halley and others, a way to deflect the threat posed by greater gender equality.¹²⁰ Consequently, we see a misappropriation of racial inequality, or rather a deceptive appeal to the wounds of the past that result in the debasement of the unique intersectional concerns of women of color.

CONCLUSION

Reckoning with racial bias in the context of campus sexual assault means reckoning with gender bias. It means considering the ways in which racial bias impacts perpetrators as well as victims, including racial bias that produces widespread underre-

114. See DAVIS, *supra* note 68, at 199.

115. *Id.*

116. *Id.*

117. *See id.*

118. This may explain the results of the recent campus sexual assault climate survey at Harvard University. See DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT (Sept. 21, 2015), <https://perma.cc/3UZX-P8M7>.

119. *Cf.* Anderson, *supra* note 1, at 1995 (“The notion that there is a simple choice between campuses adjudicating responsibility for sexual assault or courts prosecuting sexual assault as a crime misses a key point. Opponents of Title IX sexual assault adjudications are not working hard to help the criminal justice system address acquaintance rape without extrinsic violence. They do not simply conclude that, on balance, it is better for sexual assault victims to pursue their claims in courts rather than in campus disciplinary tribunals. Rather, many are attempting to close the courthouse doors to victims of acquaintance rape without extrinsic force, and then close the doors to campus tribunals to those same victims as well.”).

120. In this light, Professor Derrick Bell’s interest convergence principle takes an unfortunate and yet expected twist. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

porting. Given all the data we have on campus sexual assault and the large numbers of women who experience sexual assault but do not report, we must implement Title IX policy more expansively. This suggests a plausible reason why many critics ignore the role that intersectionality plays in their narrative: it does not accord with rolling back the recent campus sexual assault reform.

Consequently, this narrative serves more as a red herring than a genuine concern for the racial bias men and women of color endure. Going forward, the appeal to a male-biased view of racism should be resisted in substantive discourse on campus sexual assault. In this context, substantive discourse on racism requires intersectionality, which means careful attention to race and gender. Of course, America's history of racial bias may or may not bear some relevance to its present predicament, but that is a question to answer, not an assumption to presume. As this article shows, if one truly understands the difference that race makes, one understands that the issue is that the pendulum still has not swung far enough.