The Little Known Story Behind Title IX and Women's Ongoing Struggle for Equal Treatment Under Educational Civil Rights Laws

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Much of the public narrative related to Title IX and campus sexual assault has been mysteriously misleading. Splashy news stories in major publications have declared that advocacy campaigns during the time period 2011-2014 grew out of an organic groundswell of student activism, and that Congress was enacting laws in response to those students to make things better. The truth is almost entirely the opposite. Student activism was more of a prop and a dangerous distraction because while students at schools like the University of North Carolina, Amherst, and Yale were being heralded as heroes for bringing the issue to light, Congress was busily enacting laws to weaken Title IX, and citing those students as supporters of their efforts.

In reality, the groundswell of activism in 2011 began with landmark cases against Princeton University and Harvard Law School in 2010, and before that, with an even more important case against Harvard College in 2002. Those cases demonstrated the connection between civil rights laws and sexual assault, and showcased the lack of effective enforcement of Title IX on campus *as* a civil rights law.

Beginning in 2011, when Congress and students at other schools were making headlines for proposing new laws to help stop campus sexual assault, cases against Harvard and Princeton that were getting no attention at all argued that Title IX did not need changing, it needed *enforcement*. It was (and is) perfect the way it was written in 1972, as a civil rights law that granted women educational equality and protection against sex discrimination in public and private schools that receive federal funds. That's it. Title IV of the Civil Rights Act of 1964 provides the same legal protections in public schools. What could be better than equality and nondiscrimination?

Yet students in 2011 were described in news stories as demanding new laws to better protect women, as if the equality they already had was somehow inadequate. What they should have been fighting for was equal ***enforcement,*** equal ***respect,*** and equal ***protection***. By demanding new laws, naïve advocates were urging Congress and many states to weaken Title IX, and allowing themselves to be used them as pawns in subversive lawmaking.

Subversive lawmaking is not new, and college students can hardly be blamed for not being sophisticated enough to know they were being used. But someone should have told them that Title IX, like many state law analogs, already provided excellent protections for women, by requiring that sex and race discrimination be treated exactly the same because "different" or "separate" treatment of sex-based harms

was forbidden. Put simply, students were rightly concerned in 2011 that sexual assault was a major problem, however, they were wrong to assume that a new law was the answer.

The real problem was that between 1972 and 2002, schools were not being held accountable for failing to enforce Title IX correctly, but that began to change when I filed a strategically planned test case against Harvard in 2002, with the Office for Civil Rights (OCR) at the Department of Education (DOE), for the dual purposes of forcing Harvard to change its policies, and raising public awareness about the legal relationship between Title IX and sexual assault.

As a former sex crimes prosecutor, I was not surprised about the way women were being treated on college campuses because they suffered similar injustices in the criminal justice system. Rape victims were routinely subjected to intrusive court orders and other burdens that were never imposed on other types of crime victims. I regularly complained to judges, who usually rolled their eyes. One told me, "Ms. Murphy, you are the government, your job is to state the law, not complain about it. If you want to change the law, you have to get a different job."

So I did. And I started doing pro bono impact litigation work on behalf of abused women and children in 1992. My early work involved teaching victims a kind of "Miranda Rights" protocol, so they could refuse to answer irrelevant personal questions from police, about things like past sexual activity and whether they ever had mental health treatment. I taught them to respond with statements like, "How is that relevant to this case?"

I also started advising rape crisis center and battered women's shelter directors to refuse to comply with court orders for victims' privileged counseling files, and I invited judges to hold them in contempt so that I could file appeals and ask the appellate courts to change the law and better protect victims' constitutionally protected privacy rights.

Invariably I would write my pleadings from scratch because there were no forms in the back of the law books (as there are for most things) that lawyers for rape victims could fill in and file with the judge when victims' rights were violated in criminal cases. I generally had to rely on old due process cases to support my arguments about why rape victims had a constitutionally protected right to privacy in their counseling files and sexual history. Judges would insist that I had no right to be heard because my client was not a party to the case. And they would ask why I was the "only one" filing motions on behalf of rape victims. I would explain that most victims did not have the money to hire lawyers, but that my clients could "afford" me because they had no money, and I worked for free for people with limited means. I would also point out that my client had as much standing to object to a criminal defendant's request for confidential therapy records as a New York Times reporter who objects to a similar request for information about a confidential

source, and that there was no justification for treating a rape victim's confidentiality rights with less respect.

On one occasion, a judge threatened to release a very dangerous criminal from jail if I did not agree to turn over my client's privileged therapy file, even though it contained no statements about the crime, and was filled with personal irrelevancies about her family. I challenged the judge to explain why the victim's privileged treatment file should be released, but not my own attorney/client file, which was filled with statements the victim made to me about the crime. I demanded to know whether the court wanted my file to be turned over, too. "If this is all about protecting the rights of the accused, Your Honor, then surely you want my attorney/client file because it could have lots of information the accused might want to use at trial." The judge whacked his desk with his gavel and told me to stop talking or he would dismiss the charges. Pointing out his hypocrisy I insisted that the judge explain why he was ordering disclosure of the victim's therapy records but not her grocery receipts – considering that neither contained any information about the crime, and unlike therapy records, grocery receipts were not even protected by a privilege of confidentiality. Again the judge told me to stop talking or he would release the perpetrator from jail. My client begged me to give the judge whatever he wanted because she knew that if the guy were released, he would kill her. I was horrified that the court was essentially extorting my client, and forcing her to choose between justice and death, but this is just one of many examples of the legal system's maltreatment of women that I saw every day in my practice (and still see) as a young lawyer.

Gender-based injustices on college campuses were similarly rampant when I began my career, but they were harder to see because schools have extraordinary independence, and are not subject to effective rules of oversight and accountability. I learned this ugly fact in 1993 while working on a case involving a high school student who was being sexually harassed by her teacher. The student's mother complained to the superintendent, but nothing was done, and the student continued to suffer.

I did a little research and went to the basics to see what the law said about sexual mistreatment of high school girls by their teachers. There wasn't much there, but what I saw was plenty good enough to help the girl. Title IX, in all its simple glory, stated that there can be no discrimination "on the basis of sex" in education. Period. I was both elated and upset because I had been taught that Title IX was only about girls in sports. I never played sports, so I figured Title IX was irrelevant in my life, but I had been duped. We were all duped. Title IX was enacted to ensure equal access to education, and protection against sex-discrimination, the most severe expression of which is violence. That's it. Equity in sports is relevant, but it's not the core purpose of Title IX.

What I wanted to know was why nobody seemed to understand this simple truth, and no advocacy groups were even talking about Title IX. I asked my colleagues

whether they realized that Title IX was a civil rights law that applied to sexual assaults, but not a single attorney I spoke with had a clue.

Using the powerful and plain language of Title IX as a guide, I helped the family of the high school girl file a civil rights complaint with the Office for Civil Rights, which quickly ended the teacher's discrimination. Then I started looking for a good test case that I could use to get out the truth about Title IX, especially its applicability to sexual assault.

That opportunity landed in my lap in 2002 when I was serving as a Visiting Scholar at Harvard Law School following my appointment as the Mary Joe Frug Visiting Assistant Professor of Law at New England Law|Boston, where I had taught Constitutional Criminal Procedure, and Sexual Violence Law. As a Visiting Scholar, my work focused on the status of women in their capacities as victims of sex-based violence in the criminal justice system. I was hoping to develop new theoretical and practical ideas that advocates could use to reform law's structured inequality and unequal protection of women.

While studying at Harvard Law School, students from Harvard College asked for my help when the faculty of arts and sciences adopted a new rule requiring sexual assault victims to produce "sufficient, independent corroboration" as a prerequisite to Title IX redress on campus. Students suffering other types of civil rights harms, based on race and national origin for example, would continue to receive redress without corroborative proof, but the word of a credible woman would be per se inadequate under the new policy without corroboration. The students were outraged, and I jumped at the chance to represent them because it was exactly the test case I'd been waiting for.

I offered to file a complaint with the Office for Civil Rights (OCR), but I had no victim because the corroboration policy had not yet been applied in a real case. This was a problem because to my knowledge OCR had never accepted a complaint for investigation without a real victim having suffered an actual violation of civil rights on campus. But I had litigated enough cases in the real world to know that equitable remedies in civil rights cases are permitted on behalf of whole classes of people, and since OCR was similarly mandated to enforce equitable principles as a regulatory agency, I decided to file a complaint without a victim, and argue by analogy to real world courts that OCR had the authority to issue a decision on behalf of women as a class. It helped that I was a female member of the Harvard Law School community, and that I had permission from a female student to use her name, anonymously, as my class representative. Most of the students did not want their names used because they feared retaliation.

Two months later, in the summer of 2002, I received notice from OCR that they had accepted the case for investigation. This meant that OCR saw a problem with the corroboration policy. The students were very excited.

Then president of Harvard University, Lawrence Summers, was asked by the media how he felt about Harvard being under federal investigation, for the first time ever, for violating women's rights under Title IX because of its corroboration policy. He responded that Title IX had nothing to do with sexual assault. I was both annoyed and surprised that Summers would make such a comment, not only because the connection between the two was so obvious, but also because he was already under investigation. It was a little late to be declaring that OCR had no jurisdiction or authority.

OCR completed its investigation at the end of its 180-day rule, and issued a findings letter essentially thanking Harvard for not being in violation of Title IX. The confusing phraseology in the letter was typical of OCR at the time in that it did not spell out how and why Harvard's corroboration policy DID violate Title IX, and how and why they were forced to retract it during the investigative period. Nor did the letter point out that Harvard tried very hard not to rescind the policy.

Indeed, there were many debates and disagreements during OCR's investigation when Harvard tried to offer a compromise. For example, Harvard was willing to revoke the requirement that corroboration be "sufficient" and "independent," while maintaining the word "corroboration." I rejected every compromise offer and insisted that removal of the word corroboration was nonnegotiable. Harvard was forced to revoke the rule in its entirety.

The case made headlines for many reasons, not only because it involved Harvard, but also because it was an investigation without an actual victim. This revolutionary decision by OCR to investigate a complaint without a victim led to a significant increase in "policy complaints" across the nation, because students everywhere could now file complaints with OCR without waiting for an unlawful policy, such as a corroboration requirement, to be imposed on an actual student. This development allowed me to help students all over the country because I could file complaints for them, on-line and for free, without a particular student having to bear the risk of retaliation by taking on her own school. It was very dramatic advancement in Title IX advocacy, and it was the first time that Title IX became widely known as a civil rights law that applies not only to sports, but also to violence against women, such as sexual assault.

Knowing the importance of the case, I published articles about the case at the websites of Security on Campus, and the National Sexual Violence Resource Center in 2003. I then turned those pieces into a first of its kind law review article in 2006. Lots of student and community-based advocacy groups were paying attention, and many began helping victims file complaints. Things were moving in the right direction and people no longer talked about Title IX ***only*** as a sports equity rule.

In 2010, Harvard Law School hired me to work on a Title IX matter, in connection

with which, I pointed out that the law school's policies were not compliant with Title IX, including that they used a standard of proof more onerous than preponderance of the evidence for Title IX grievance hearings. The Board Chair told me he was aware of an OCR ruling against Georgetown on the preponderance issue. He then said, "perhaps you haven't noticed Ms. Murphy, but this is not Georgetown." He was both condescending and correct. Schools generally did not perceive themselves to be bound by OCR rulings against other schools.

I made notes of the various problems with Harvard Law School's policy, anticipating that it might become necessary to file an OCR complaint if their noncompliant policies were applied against my client.

The victim told me her case had been pending for eighteen months, and that she had been relying on guidance from two teachers at the law school, (Rosenfeld and MacKinnon) whom she trusted as strong advocates for women. Neither woman actually stands up for the equal treatment of women under Title IX, and MacKinnon's work in particular, as the academic of the two advisers, has hurt the cause of women's equality. In her work on sexual harassment (MacKinnon did not come up with the idea, it was conceived by a group of women academics), MacKinnon published the first book on sexual harassment that disseminated the concept into popular culture. Her book was soon followed by a United States Supreme Court ruling that recognized the concept of sexual harassment for the first time in history. Seemingly a progressive move for women, the doctrine was actually a linguistic propaganda tool, which caused the severe abuse of women in the workplace and on campus to fall outside the discursive scope of civil rights laws, and discrimination generally. When racist abuse happened, it continued to be described as race discrimination, and understood as a civil rights issue. When the same abuse happened to women, it was now called "sexual harassment," even though the term "racial harassment" was not used to describe the same types of harms when they occurred based on race. Racial harassment cases continued to be called what they were, race discrimination. Simply put, the phrase "sexual harassment" became a linguistic red herring that segregated out violence against women, and legitimized its separate and different treatment compared to violence based on race, national origin, etc. Worse than that, the term "sexual harassment" was then firmly established by the courts as requiring extra proof, far beyond that which had been necessary to prove sex discrimination. Women suing for sexually abusive harm in the workplace now had to prove that they suffered "sexual harassment," which required proof of "severe and pervasive" harm that caused a hostile environment in the workplace, or involved the trading of sexual favors for a workplace benefit. Before the development of sexual harassment as a legal doctrine, it was much easier to enforce women's civil rights simply by alleging "unwelcome and offensive" words of actions "based on sex." These easier to prove standards continued to be part of women's civil rights after the establishment of sexual harassment law, but the standards were no longer enforceable in lawsuits for money damages, and would only be used by administrative oversight agencies, such as EEOC, and OCR at the DOE. To win money, women now had to meet the more

onerous standards of sexual harassment law, thanks to MacKinnon.

When she was working on my case at Harvard Law in 2010, MacKinnon did nothing to help the victim achieve a "prompt and equitable" grievance hearing during the entire time she was involved, prior to me coming on board almost eighteen months later. Neither she nor Rosenfeld even advised the victim that an eighteen-month delay was a serious violation of both promptness and equity. Instead, the victim was advised to wait, and do nothing, because the District Attorney was supposedly conducting an investigation to determine whether to file criminal rape charges. The records I subsequently obtained from the District Attorney showed that he had done nothing during the eighteen-month delay, and that the Cambridge Police investigation had been completed soon after the incident. In other words, the District Attorney's purported "delay" served no purpose except to run out the clock so that the victim's hearing would not occur until the eve of graduation.

I was asked to represent the victim only weeks before the Title IX hearing began. The offender had an attorney on board from the beginning. The documents and reports I received from Harvard essentially said that the victim described being deeply asleep and barely conscious when the rape happened. I suspected that she had been drugged, but forensic tests were not conducted quickly enough after the attack to know for sure. Indeed, although the victim went to the hospital immediately, she was made to wait many hours before forensic tests were done. Any drugs that may have been present would have dissipated from blood or urine by the time the samples were taken. Hair testing after a drugging rape would have been possible even months later, but I was not retained until more than a year later, and the victim's advisors from Harvard Law School never informed her that hair testing was an option.

The offender's defense was that the victim consented, but an eyewitness disputed the attacker's claims. The most helpful evidence was that the offender made damning inconsistent and irrational statements about important evidence, including that he could not recall whether his own pants were on or off during the incident.

The hearing was treated like an actual trial, in one of Harvard Law School's oldest buildings. The victim's and offender's family members were allowed to be present, and Harvard Officials acted more like criminal court judges than enforcers of civil rights laws. The Board Chair overtly favored the offender, at one point even forbidding me to offer up a dictionary definition of the word "erythema" to explain the significance of the victim's vaginal injuries. After the evidence was presented, a jury of seven administrators, professors and students found sufficient evidence to rule against the offender. He was punished by a period of academic suspension and forbidden to graduate.

After the hearing, the victim and her family wanted to take me out for dinner, but one of the victim's "women's rights" advisors from Harvard insisted that I not spend

time with the family. A few days later, the victim graduated, and left the state to study for two bar exams. Though the case was seemingly over, I told her to expect shenanigans because the offender would likely file an appeal, even though Harvard's rules nowhere allowed for appeals after suspensions.

As expected, the offender filed an appeal a couple of months later, and the victim's response was due smack in the middle of her bar exam schedule. Harvard was paying me, and they agreed to continue paying me to write the victim's response to the appeal, but we had very little time. I told the victim I would need her help, and the help of her "women's rights" advisors at the law school, who were both lawyers. I had no idea at the time how hard they had worked to undermine her case.

The advisors refused to help, which surprised the victim because they told her that they had been "co-counseling" the case with me all along. In fact, they had done nothing. Indeed, one of them sent me a screeching email demanding that I force the victim to sign a HIPAA release so that Harvard could obtain some of the victim's privileged medical records. I said no, and I asked incredulously why she was wasting her time demanding release of the victim's medical records, but was doing nothing to help with the appeal. She did not respond.

I later learned that it was the offender who wanted the victim's medical file. He wanted to make a ridiculous claim on appeal about the victim being incapacitated at the time of the rape, even though she had repeatedly made clear that she was not intoxicated, and even though neither side had claimed during or before the hearing that she was intoxicated when the attack happened.

But the offender got desperate after losing the case, so he changed his strategy on appeal. He retained a hired gun expert to submit a nonsensical opinion about dissipation rates of alcohol in urine. The victim's blood alcohol level was zero, but her urine was positive, which is meaningless because alcohol can remain in urine for days. Nonetheless, the expert submitted a ridiculous report based on the urine test, opining by nonscientific extrapolation that the victim was very intoxicated at the time of the rape. Again, all the witnesses agreed that she was not intoxicated, though I suspected that she had been drugged, which is why she fell into what she described as "a deep sleep."

To support his theory, the offender's expert had to guess about the exact time when the victim's urine sample was taken, because it was not included in the forensic reports to which he was entitled. It was only included in the victim's privileged medical file, to which he was not entitled. As it tuned out, his guess was correct, which was strange because the urine sample was not taken until many hours after the victim arrived at the hospital, so the expert would have had no way of knowing that there was such an unusual delay in the taking of the urine sample. Nor would he have had a ***legal*** way of knowing the time when the sample was taken, because the document that contained that information was not legally available to him.

The expert now had a problem because he could not possibly explain in the offender's appeal how he came to know the time when the urine sample was taken, because the victim did not sign a HIPAA release. However, if the victim signed a HIPAA release while the appeal was pending, he could claim to have obtained the information legally. His report was bogus irrespective of when the sample was taken, but without the information it was a complete joke.

I refused to instruct the victim to waive her HIPAA rights, and I filed the victim's response to the perpetrator's appeal without help from either of the victim's "women's rights" advisors at the law school.

While the appeal was pending, I told the victim we should file a complaint with the OCR at the Department of Education in Boston, because it seemed obvious that Harvard was planning to overturn its decision. The mere filing of an OCR complaint would help protect her rights, because Harvard would be less likely to overturn its decision and violate the victim's Title IX rights if they thought OCR was watching.

Before deciding whether to file with OCR, the victim wanted to have a conference call with me, and her two "women's rights" advisors. For reasons I still find perplexing, she continued to trust them even after they lied to her and were actively working to undermine her case.

One of the advisors insisted that we conduct the call from her law professor husband's office on Harvard's campus, and heed his advice. I saw no need to meet at Harvard, or obtain advice from her husband. All three had done nothing to help with the case up to that point. So I participated in the call from my office while the victim called in from another state.

During the call, I explained why filing with OCR was critically important. I pointed out that the victim had already been treated unfairly, her case had been delayed more than 18 months, and the writing was on the wall in terms of Harvard planning to overturn its decision. Filing with OCR was her only hope, and her only leverage. The advisors from Harvard angrily urged the victim not to file with OCR, told her it would be disastrous and "explosive," and would "piss off" Harvard. The victim said she would discuss it with her parents, and let us know her decision the following day.

The next morning, the victim sent an email stating that she had discussed it with her parents and they all agreed Harvard had treated her poorly, and that it was necessary and appropriate to file an OCR complaint before Harvard decided the appeal.

I immediately started writing the OCR complaint because it had to be filed before the appeal, which was scheduled to take place about a week later. When I finished a

draft, I sent it to the victim by email for her approval, but she did not respond. I told her I could not file without her consent, but she still did not respond. Then I said I would file the complaint if she did not tell me not to file, because the last communication I had from her said she wanted me to file. She immediately responded that she did not want to file and that she had changed her mind because she was worried about retaliation in her career.

I respected how she felt, but I was ethically conflicted because she had been persuaded to change her mind by people from Harvard. I consulted with an ethicist and was advised to file the OCR complaint, and let OCR know the circumstances under which the victim changed her mind.

Harvard owed me a lot of money when the day came to file the complaint, and I figured I would never be paid if I filed, but I filed anyway, and they eventually paid me. I sent copies of the complaint to Harvard officials, my client, and others involved in the case, so that everyone knew OCR was watching. A few days later, my client won the appeal. Better yet, OCR accepted my complaint and opened a first-of its kind investigation of Harvard Law School, even though my client did not consent to the filing of the complaint. I eventually won that case, four and-a-half years later, in a ruling that slammed Harvard Law School for multiple violations of Title IX.

Around the same time that I filed the OCR complaint against Harvard Law School, in late Summer 2010, I filed a similar OCR complaint against Princeton University. I sent both cases to OCR headquarters and asked them to issue some form of "global guidance" that would apply to all schools because problems at Harvard and Princeton were systemic in higher education. I solicited and received amicus letters of support from two major advocacy groups: the National Center for Higher Education Risk Management (NCHERM) and Security on Campus (SOC, The "Clery Act" people). We urged the OCR to issue interpretive guidance that would apply to all schools because enforcing Title IX one school at a time was not effective, and women sere suffering very high rates of sex-based harm on college campuses.

OCR agreed and based on my communications with OCR officials I expected them to issue new guidance in the Spring of 2011, which would be around the end of the six-month investigative period in the Harvard Law School and Princeton cases.

In late fall 2010, soon after I learned that OCR would be issuing new guidance in the spring of 2011, I was informed that students at Yale were planning to file their own OCR complaint. This seemed to come out of nowhere, and I was later told by a Yale student that the idea came from two Harvard Law School "women's rights" lawyers, who contacted Yale students right after they learned that Harvard Law School was under federal investigation, and volunteered to help the Yale students file an OCR complaint against Yale.

The Yale students were told to stay quiet about their plans to file an OCR complaint,

and they were instructed not to reveal the fact that my client's Harvard Law School advisors were involved in helping them. The Yale students were unaware that Harvard Law School was already under investigation by OCR at the time, so they had no way of knowing that an investigation of Yale would provide cover for Harvard when the OCR's new guidance was announced in early 2011.

A few months later, on April 4, 2011, the much-anticipated "global guidance" was released by OCR in the form of a Dear Colleague Letter (DCL). Vice President Joe Biden announced the DCL at the University of New Hampshire (UNH) amid much fanfare and media attention. The event occurred only days after OCR announced that it had opened a Title IX investigation against Yale. The opening of an OCR investigation against Yale received a lot of publicity. The opening of OCR investigations against Harvard Law School and Princeton did not. Thus, the public assumed that the DCL and Biden's visit to UNH were in response to problems at Yale, even though that was obviously not the case since Yale had come under investigation only days earlier, and a Dear Colleague Letter could not have been written about Yale in such a short period of time. Indeed, it would be many months before OCR would complete its investigation and issue a decision against Yale.

The DCL agreed with all the arguments I had made in my complaints against Harvard Law School and Princeton about why they were violating Title IX. The DCL made clear to all schools that sex-based assaults are civil rights matters that must be redressed "equitably," under civil rights laws. It was a good victory and a remarkably noncontroversial document in that it simply stated the obvious about the obligation of all schools to enforce civil rights laws on behalf of women and girls, and ensure their equal access to education, and fully equal protection against sex discrimination, including sexual assault.

Higher education was furious about the DCL, and days later, had a bill filed with Congress to overturn it. Known as the Campus SaVE Act (SaVE) (later also known as the 2013 amendments to the Clery Act, and amendments to the Violence Against Women Reauthorization Act), the law was designed to weaken Title IX by permitting schools to subject sex-based civil rights harms to second-class, non-civil rights treatment.

An early iteration of SaVE contained good language on a few key provisions. For example, it mandated use of the "preponderance of evidence" standard during grievance hearings, and explicitly required that victims receive "equitable" redress. Advocacy groups around the country rallied in support of the bill because they were told it would "codify" the DCL, but I was suspicious because I knew that higher education was upset about the DCL, and I knew that no victim or women's groups had asked Congress to codify the DCL. Why on earth would Congress take steps to codify the DCL if women's groups did not ask for it, and if higher education as an industry (one of the most influential lobbying groups in D.C.) hated it?

Some of the advocates spoke to me privately about their concerns, and said they had been advised not to tell me about the bill, which made them nervous.

A memorandum was distributed soon after the SaVE Act was filed, which purported to summarize key provisions of SaVE. It stated that the preponderance standard of proof and "equitable" redress for victims would be mandatory, which were good things. But there were problems, too. For example, the bill would require "promptness" only for initial decision-making, not for "final determinations." And the victim would have no right to know that a decision had been changed during the "final determination" phase, which could occur long after graduation. I was also deeply troubled by the redefining of sex-based civil rights offenses such that rather than the longstanding definition of "unwelcome and offensive," SaVE would allow schools to use more onerous criminal law definitions, such as "rape" and "sexual assault" to determine whether a sex-based civil rights offense had been proved. Unwelcome is much easier to prove, and uses a subjective test, which is much more protective of women's autonomy and bodily integrity than the criminal law terms such as "non-consent" or even "affirmative consent," which permit an offender's claimed mistake about a victim's consent to override a credible victim's claim of actual non-consent.

I wrote a lot about the dangers of SaVE before it became law, and I urged advocates not to support it because I feared the few good parts would be removed prior to enactment in a classic legislative bait and switch, which is exactly what happened thanks to the bipartisan and offensive efforts of Rep. Charles Grassley (R) and Sen. Patrick Leahy (D).

As predicted, the provisions requiring "equitable" treatment of women, and use of the preponderance of evidence standard were removed and the SaVE Act became an exceedingly bad bill. When advocates objected, the bill was tacked onto the Violence Against Women Reauthorization Act, which was a big funding bill for women's and victims' groups. Advocates went silent.

While I was fighting against SaVE, President Obama was holding press events and boasting about a new task force and other initiatives he said would help stop sexual assault on college campuses. He was also supporting SaVE, though no doubt aware it would allow schools to subject women to second-class treatment on campus.

Advocates and students who supported SaVE were celebrated in the media. Those who opposed it were ignored. SaVE sailed through Congress, supported by advocates such as Laura Dunn, Alexandra Brodsky, and Andrea Pino, all of whom were given positions of prominence and opportunities to create "training" programs and websites where they touted SaVE as a good thing. None of these women, or the groups they founded, such as "Know your IX," "End Rape on Campus," and "SurvJustice" provides information about the numerous ways in which SaVE subjects women to second-class treatment on campus, and weakens Title IX.

While many "advocates" shamelessly cheered for SaVE, a few worked hard to stop it. The media never reported the truth about SaVE, with the exception of myself and Joan Vennochi of the Boston Globe, who wrote a few columns explaining some of the problems. But it just wasn't enough, and SaVE became law in March 2013, scheduled to take effect one year later.

Right before SaVE took effect, in March 2014, I filed a federal lawsuit to enjoin SaVE's enforcement. With help from the "Godmother of Title IX," Dr. Bernice Sandler, I drafted a long and detailed complaint against the DOE and the Department of Health and Human Services (DHHS). I asked a local attorney to file it for me in the Federal District Court for the District of Columbia. The guy knew little about Title IX at the time, but he was willing to help and I needed an attorney who was admitted to practice in D.C. federal court.

We asked the court to issue an order forbidding the enforcement of SaVE on the grounds that its disparate legal standards violated women's constitutional and civil rights. We argued that SaVE was unconstitutional because Congress has no general authority to regulate violence against women under the Commerce Clause, or the Spending Clause. While the lawsuit was pending, federal authorities were in the process of drafting regulations pursuant to SaVE.

The lawsuit against SaVE was filed on behalf of a victim from the University of Virginia, (UVA) but it also implicated Harvard Law School and Princeton University. We urged the federal court to approve the suit prior to March 7, 2014 because the UVA victim had a case pending at the OCR, and if her case were analyzed under pre-SaVE standards, she would prevail. But if her case were analyzed under SaVE's worse standards, she would lose. We included Harvard Law School in the lawsuit because that investigation had been opened on behalf of women as a class and we were trying to stop SaVE on behalf of all women. We also included the Princeton investigation because the OCR in that case refused to say whether it would apply SaVE's worse standards if that investigation were resolved after March 7.

After refusing even to accept our complaint for docketing for more than a week, the federal court finally approved the suit to proceed at the end of the day on March 6, 2014. Attorney General Eric Holder filed a response on behalf of the DOE and the DHHS on May 20, 2014, in which he avoided the constitutional questions and urged the federal court to dismiss the lawsuit on procedural grounds. The administration's silence on SaVE's constitutional defects was, to me, a concession of Mr. Holder's awareness that SaVE is unfair to women. Tellingly, President Obama made public comments right after my lawsuit was filed indicating a need for reparative legislation and an executive order to better protect women's Title IX rights. Soon thereafter, Senator Claire McCaskill convened new hearings on the issue of campus sexual assault. She, along with Senator Kirsten Gillibrand and others, ultimately proposed new legislation in a bill known as the Campus Accountability and Safety

Act (CASA), which, if enacted, will allow for even more secrecy by schools, and more directly weaken Title IX. For example, CASA will allow reports to law enforcement to be treated as confidential, and require schools to partner with confidential "advisors" and "counselors" who are not obligated to file formal reports with responsible school officials.

A few weeks after we filed suit to stop SaVE, Dr. Sandler and I were invited to address an alumni group at Harvard. I explained the problems with SaVE in general, and Harvard's sexual assault policy in particular because of its incorporation of SaVE's second-class legal standards. I emphasized the need for Harvard to adopt a singular civil rights umbrella policy that would address violence against women under exactly the same standards as violence against other protected class categories, such as race and national origin. About a month later, Harvard announced a revised policy in which it removed several of SaVE's most dangerous provisions. The policy guaranteed "equitable" redress, mandated application of a "preponderance of the evidence" standard, and removed all criminal law definitions of offenses in favor of civil rights definitions. This rejection of criminal law terms such as "force" and "non-consent," in favor of "unwelcome" and "offensive" was particularly important and was an unprecedented expression of support for the fully equal treatment of women's civil rights on campus. This bold move set Harvard apart as the best of the elite schools on this issue, and I celebrated the move in an op-ed for the Boston Globe. But my joy was short-lived as Harvard later changed its policy, and adopted a separate and worse gender-misconduct policy that incorporated some of SaVE's most offensive provisions, including the use of criminal law definitions of offenses, rather than using only the civil rights definition of unwelcome and offensive.

In early 2015, the federal lawsuit to stop SaVE was dismissed on procedural grounds, which meant the court declined to reach the constitutional questions; an all too common result of impact litigation aimed at developing strong doctrinal support for women's civil and constitutional rights. But the lawsuit was successful in many ways nonetheless because it had been held up as a Damocles Sword for an entire year to force all schools to adopt the preponderance of evidence standard. Princeton was the last school to comply in late 2014. The ruling was also helpful in that the judge ruled SaVE could have "no effect" on Title IX because Congress had attempted to weaken Title IX indirectly by amending the Clery Act, rather than amending Title IX itself. This "no effect" language allows attorneys for victims to argue that schools cannot rely on SaVE to justify or uphold a school's use of different and worse definitions and standards for sex-based civil rights harms.

Despite the federal court's ruling that SaVE could have no effect on Title IX because Congress did not amend Title IX directly, and even though OCR agreed (after the lawsuit was filed) in a "Q and A" guidance document in the summer of 2014 that SaVE would have no effect on Title IX, Education Secretary Betsy DeVos issued new guidance in September 2017 withdrawing not only the 2011 DCL, but also the 2014 guidance stating that the SaVE Act has "no effect" on Title IX, and expressly

permitting schools to subject sex-based harms to second-class treatment, including use of a burden of proof more onerous than preponderance at Title IX grievance hearings. The 2017 guidance incorporated the SaVE Act by reference in a footnote and nowhere acknowledged the federal court's ruling precluding SaVE from having any effect on Title IX, or Title IX's regulatory mandate forbidding "different" treatment based on sex.

The lawsuit also had an important effect on federal regulations that were drafted pursuant to SaVE during the time that the lawsuit was pending. When the regulations were released at the end of 2014, right before the lawsuit was dismissed, many of SaVE's constitutional defects that had been identified in the lawsuit were repaired, including SaVE's use of *mandatory* language requiring schools to adopt disparate policies for women. The regulations clarified that SaVE was a discretionary bill, and that despite SaVE's use of terms such as "shall," schools could opt out altogether, reject SaVE in its entirety, and choose to apply Title IX standards instead. It remains to be seen how courts will interpret a regulatory attempt to turn a mandatory statutory term into a permissive one, because a substantive provision within a regulation has no power to redefine a federal statute when the statutory language is clear. Simply put, if the language in the SaVE Act conflicts with its own regulations, the Act prevails because regulations can only interpret statutes; they cannot overturn them. That said, the existing Title IX regulations explicitly forbid different treatment based on sex specifically with regard to rules of conduct and behavior. This means that even if SaVE permits different treatment of harms based on sex, schools cannot rely on SaVE to avoid liability and responsibilities under Title IX.

The lawsuit's effect on UVA remains unclear because a landmark investigation of UVA by the OCR at the DHHS is still pending after almost six years, and involves especially shocking allegations of egregious misconduct. UVA's forensic nurse, Kathryn Laughon, not only changed a medical report to state falsely that there were no vaginal injuries consistent with sexual assault (there were many), she also "lost" or destroyed photographs *that she took* of the victim's vaginal injuries after applying a special dye and inserting a catheter. The nurse's original medical report noted, and of course the victim recalled, that many photographs were taken, but none were mentioned at the hearing where, instead, the board was told that there were no injuries consistent with sexual assault. The board found in favor of the offender and noted the absence of genital injuries as one of the reasons for its determination.

When the victim's family read the board's decision and saw the conclusion that there were "no injures," they were very angry, and they asked the UVA nurse and the UVA hospital where the rape exam was conducted for copies of the photographs depicting the injuries. The hospital balked at the family's request and the family complained to university officials demanding that the photographs be produced. A frustrating series of emails went back and forth before a dean (who later resigned) replied that the photographs do not exist. The victim's family was incredulous. How could the photographs not exist? They appealed the school's ruling without the

benefit of the photographs, and the university rendered its final decision in favor of the offender in June 2012. I then filed various complaints with several oversight entitles including the nursing licensing board in Virginia and the association that certifies Sexual Assault Nurse Examiners (SANE) because Laughon claimed to be "certified" by the SANE Association. I also filed complaints with several federal agencies including the DOJ and the OCR at the DOE, under Title IV and Title IX. I even filed an unprecedented complaint with the little-known OCR at the DHHS because that agency handles Title IX complaints when violations occur in connection with health care on campus.

Shockingly, the nursing licensing board in Virginia concluded that the nurse who changed the victim's medical record to state that there were no injuries, and couldn't account for the lost photographs, did nothing wrong. The SANE Association also did nothing because it claimed it had no authority to discipline a SANE-trained nurse who violated its protocols by failing to preserve photographs, or even create a log to identify the number and type of photographs taken.

I pointed out to the various agencies the many conflicts of interest in the case because Laughon was supposed to be an objective medical professional but she was employed by UVA, and was married to a senior prosecutor in the County Attorney's office that had declined to file criminal charges. It goes without saying that a powerful university should not have close ties with law enforcement and other civilian authorities responsible for making discretionary decisions about whether campus sexual assault cases are investigated and prosecuted. Yet such close ties are exceedingly common and often provide exactly the sort of insulation from accountability that enables schools to violate women's civil rights with impunity.

I eventually won my OCR/DOE cases against Harvard Law, Princeton, and UVA. The OCR determined that all three schools had policies that did not comply with Title IX. The media coverage of these unprecedented victories was strange. When I won the Princeton case in November 2014, no reporter who wrote about the case contacted me or mentioned me in their story. They did, however, quote "advocates" who had nothing to do with my case, and who supported the SaVE Act. The same thing happened when I won my case against UVA. My case against Harvard Law School was handled ever more strangely in the press. The Boston Globe interviewed advocates about my victory who had nothing to do with the case, and the reporters not only barely mentioned me in a throw-away line on the second page of the article, they literally wrote that Murphy "claims" she filed the complaint. The reporters who used this derogatory term *knew* it was my case because the Globe had written about it and had talked to me at length, back in 2010, when the case was first filed and accepted for investigation.

The OCR ruled that both Harvard and Princeton would remain under scrutiny by OCR while further modifications were made to their policies because even after a four-year investigation, their revised policies still had problematic provisions. Some of those problems will need to be addressed in future federal lawsuits and OCR

complaints, in which advocates will hopefully challenge the constitutional legitimacy of all provisions that subject victimized women to disparate treatment in the redress of sex/gender-based violence on campus.

Lacking the same legacy and political "value" and influence as male offenders, victimized women are often at the mercy of school officials who are highly motivated to rule against them. It is no wonder then that one in three to one in five women is likely to be sexually assaulted in college. J. Freyd et. al., 2014, (one in three); J.A. Humphrey & J.W. White 2000, (one in four); C.P. Krebs et al., 2009, (one in five). Even using the more conservative one in five number, and considering that about six million women currently are enrolled as undergraduates in four-year schools, this means that *more than a million of these women will experience sexual assault during college over the next four years*; a number substantially greater than the number of students who will suffer any other type of civil rights violence on campus. Indeed, although no formal comparative data exists, violence against women is clearly more prevalent than all other forms of civil rights harassment and violence against students from other protected class categories combined. Consider for example that in 2001, the U.S. Department of Justice 2001 found an average of only 3.8 hate crimes on campus for all of 1998, excluding sex/gender offenses, for a total of 334 incidents in 411 schools. During the same time period, the FBI ascertained that 241 incidents of hate crimes were reported from 222 of 450 schools. In 2016, the DOJ reported 153 racist incidents on college campuses nationwide. These numbers are significantly lower than the numbers of sex/gender-based harms, but the comparative data is never reported by mainstream media even though Congresswoman Shirley Chisholm remarked during congressional hearings in the early 1970s, in support of the passage of Title IX, that she had endured far more discrimination on the basis of sex in her political career than she ever endured on the basis of her status as an African-American.

Whether the correct number of campus-based sexual assaults is one in four or one in five, (a study of one school in 2018 found that 40% of women undergraduates experienced sexual assault), it bears noting that the number is greater than the number of sexually assaulted women who do not attend college. Women are even more likely to be sexually assaulted in college compared to the hyper-masculine environment of the military (Defense Manpower Data Center 2013, 2) where one in six women experiences "unwanted sexual contact." One explanation for this seemingly odd disparity is that military women are more valuable to the institution than are college women valuable to their universities. In addition, rather than paying tuition to participate in the armed forces, women are paid to become trained in the military, and the military has a strong financial incentive not to lose the value of their investment. All these things make it much more expensive for the military to tolerate sexual assault. Still, the military's much lower offense rate is all the more remarkable given the smaller ratio of men to women in the military compared to universities, and in light of the fact that military researchers used a much broader definition of sexual assault to measure incidence rates compared to the narrower definition of "sexual assault" used to measure incidents on campus.

It should come as no surprise then that women are more likely to report sexual assault in the military and in larger society: 36% of rapes, 34% of attempted rapes, and 26% of sexual assaults are reported to police (C. Rennison 2002); and in the military: 46% reporting rate (U.S. Commission on Civil Rights 2013), compared to college: 12% reporting rate (G. Kilpatrick et al., 2007). These data suggest that the military and real world systems, though woefully inadequate at addressing violence against women, are more likely to hold offenders accountable compared to colleges and universities.

It might seem easier (and cheaper) in the short term for schools to sweep sexual assaults under the rug by claiming that cases are difficult to resolve "he said–she said" situations, but this is rarely true. In fact, most cases are more fairly described as "she said–he took the Fifth," or "she said–he hired a lawyer," or "she said–he lied." A disturbing number of cases involve not only careful planning but also the intentional use of rape drugs—which is a convenient strategy for an offender hoping to avoid responsibility. A victim who can't remember what happened certainly can't file a report. Drugs that cause amnesia are cheap and easy to get on the Internet, or can be made in a dorm room sink with materials available at Home Depot. By the time a victim recovers a reliable, if fuzzy, memory about what happened, any hope of finding drugs in her blood or urine is long gone because rape drugs dissipate quickly. Schools are well aware that rape drugs are a serious problem, yet most rely on the absence of forensic proof as an excuse to do nothing on the grounds that the absence of memory makes the case unprovable.

Schools that sincerely care about preventing drug-facilitated attacks should adopt clear policies informing all students that an inference of drugging will be drawn from behavioral symptoms, alone, irrespective of negative forensic tests, and that victims will be given access to hair testing technology at no cost because rape drugs remain detectable in hair for months and studies show that hair testing is an extremely effective method of detection. (P. Kintz 1996). When compared to urinalysis, the rate of detection using hair samples far supersedes that of urine samples for a wide variety of drugs (F. Tagliaro et al., 1997). Simply changing school policy to alert students that there is a drug-testing policy is an effective deterrent to drugging (A. Martinez 1998), and the very existence of hair testing procedures, along with inferences from behavioral symptoms alone, will reduce incidence rates on campus by deterring some offenders. Indeed, studies suggest the more robust the testing policy, the greater the deterrent effect (A. Martinez 1998).

Schools should also be focused on important new research showing that perpetrators of sexual assault on campus are not heterogeneous, and that one in four male college students commits an act of sexual coercion by the end of his fourth year. (K. Swartout et. al, 2015). Studies also show that many perpetrators are repeat offenders. (D. Lisak, 2002). These data compel schools to understand the benefits of taking swift and harsh steps in response to first-time offenders as an obvious of keeping incidence rates low. It may seem preferable to avoid scandals and

controversies by imposing some of the blame on victims, especially those who become incapacitated, but this approach ignores the findings of numerous studies which show that alcohol isn't a cause of rape, so much as a weapon used by offenders to facilitate the offense by targeting victims who become vulnerable from drinking. Schools that decline to act by imposing a degree of blame on victims only motivate predatory offenders to target intoxicated victims, or even cause their incapacitation by drugging, as a way of avoiding punishment.

Schools should work harder to change the harmful narrative that most sexual assaults on campus are nothing more than "bad sex" or "sex with a buzz." If individual autonomy is to be valued, harm-doers must always bears the burden of restraint and the risk of getting in trouble if they choose to act against a student whose capacity to make decisions is, or may be, diminished. Policies should make very clear that *diminished capacity is a vulnerability, not a liability,* and that unclear situations should evoke feelings of reluctance, not titillation.

In addition to adopting a more civilized approach to intoxication-involved incidents, schools that properly apply the "preponderance of the evidence" will better deter violence against women simply by messaging offenders that their denials will not be presumed more credible than accusations. A burden of proof more onerous than mere preponderance (51% proof) necessarily declares all women less credible than all men because the word of a woman whose credibility is greater than that of her assailant will never be credible enough to establish that an incident actually happened. Under a burden of proof more onerous than preponderance, such as "clear and convincing," (about 75% proof) which is permitted by the Campus SaVE Act and the new Title IX rules issued by the Trump administration in September 2017, a woman whose credibility rises to 74% proof is not credible enough, even if her offender's denial is only 2% credible, or overtly false for that matter.
Even if all schools had policies stating that they use the preponderance standard, it is very difficult to hold them accountable for correctly *applying* the right burden of proof. Indeed, many schools claim that they apply the preponderance standard, but in fact they impose a much more onerous burden of proof. Schools like the higher burden of proof because it allows them to *claim* that they believe the victim, thus continue to receive tuition payments from her parents, while also claiming they didn't believe her *enough* to justify punishing her attacker, thus continue to receive tuition payments from his parents, too. This is not possible under a preponderance standard where crediting a victim's report requires schools to do something (not necessarily expulsion) "effective" to stop the harm on behalf of the victim, and women as a class.

Blaming a victim's inadequate credibility shifts responsibility away from school officials, as do "bystander" programs. There's nothing wrong with asking students to help protect each other from harm, but the problem of rampant sexual assault on campus will not get better by telling women not to drink, and telling bystanders to watch out for them if they do. Sexual assault rates will diminish when women are respected as fully equal citizens, and when sex-based harms are *framed* openly and

always as civil rights matters, on par with racism, and when such harms are treated exactly the same as harms based on race and national origin, etc. Fully equal treatment, not education and training programs, will stop the violence because the underclass always endures disproportionate abuse.

Schools have been getting away with treating women as second-class campus citizens for a very long time, in part by not teaching students to understand Title IX as a civil rights law on par with racism, and by using tactics that deter victims from filing reports and seeking redress. For decades after Title IX was enacted, and to this day, if a victim asks for help, barely able to talk because her body is sore from her mouth to her knees, and she cannot relate what happened because she was drugged or she simply cannot not bring herself to face the horrifying reality of having been violated by a trusted fellow student, it is common for school officials to advise her to "move on," maintain confidentiality, seek counseling, and focus on her studies. Most victims heed this advice because they desperately want to believe that moving on and keeping the incident a secret will make everything alright, but the reality is much more grim. Secrecy and "moving on" fixes nothing, and usually makes things worse. In fact, research shows that unresolved trauma has long-term consequences that recur over the lifespan (L. McCloskey 1997; Chadwick's Child Maltreatment 2014). Moving on and maintaining confidentiality helps the school, not the victim.

Unjustly refusing to hold offenders accountable, and relying on long and confusing "sexual misconduct" policies to legitimize inaction, will cost schools more in the long run, because not treating women as fully equal campus citizens when they endure the most severe expression of sex discrimination will lead to more violence and more dissatisfaction, especially among female students.

Victims are more aware of their rights today than ever before, and they are more willing to seek restraining orders in court, and file civil lawsuits, especially under state law analogs to Title IX, and state constitutional provisions, which are almost always more protective than federal law.

When victims file lawsuits in court, they can point out the myriad ways that schools subject sex-based harms to different and worse treatment than race and national origin-based harms, even though Title IX expressly forbids different treatment. They can also point out that the lawyers who represent offenders in race and national origin cases on campus never complain that the standards applied in those cases, such as use of the civil rights definition of "unwelcome" rather than "non-consent," and application of the preponderance standard, are onerous and unfair. They only complain about these things as unfair when they are applied in sex-based cases, even if the cases involve exactly the same conduct, by exactly the same offender, against exactly the same victim. Obviously, this raises disturbing questions about how cases are handled when a single offense occurs against a woman based on her race and her sex. Are there two hearings with two different sets of standards, for a single incident?

Schools that use substandard rules the set forth in SaVE Act, or the September 2017 Title IX rules, are systematically discriminating against an entire class of people. This will necessarily lead to a loss of civility on campus as the university itself becomes weak at its core. Policies that authorize the second-class treatment of women under civil rights laws effectively teach students to that women are not as important as other people. After graduation, like leaves that emerge shriveled from a rotted tree, women and men enter the real world scarred with harmful ideas about the value of women in society.

Some university officials simply do not understand why sexual assaults are so destructive to the fabric of an academic community, and so ruinous to the human condition. How can a single act be at once devastating to one person and profoundly pleasurable to another? This question often is at the center of campus disputes and is pondered by decision-makers who assess conflicting information through the biased lenses of their own sexual life experiences. Such biases produce unfair results in both directions, with males (usually) identifying with the offender and females (usually) identifying more with the victim. These biases need to be confronted, and openly discussed on all campuses, so that people can become critically aware of their own sexism.

That two people could feel exceedingly different emotions about the same event makes simple solutions seem elusive. But if the frame through which the problem is evaluated is oriented around ideas such as personal autonomy and bodily integrity, rather than sex, then resolving disputes is simple. Put simply, the old adage "my right to swing my fist ends before it hits you in the nose" applies to penises and vaginas, too. Higher-education officials should be focused on guiding the millions of young people in their care toward a deep understanding of why respect for individual autonomy and women's full equality —not regulation of students' sexual activities—are the driving forces behind a school's anti-sexual violence policies.

Although effective solutions won't come from universities alone, leadership that begins in academia has the potential to change behavior far beyond the campus environs—starting with attention to autonomy theory in all disciplines, alongside consistent application of disciplinary rules that promote the class-based nature of civil rights laws, and the importance of valuing each individual's exclusive right to decide the circumstances under which another person gains intimate access to his or her body.

Students know a lot, but they don't know nearly enough to be able to protect their rights effectively. Public information is often not clear or even correct about the fact that sexual assault is ***only*** a civil rights issue on campus, and ***only*** a crime for law enforcement purposes, and the laws, proceedings, and remedies are ***very*** different because they serve ***very*** different purposes.

Even seeming experts don't seem to understand the fact that civil rights laws, not criminal laws, apply on campuses, and are different from criminal laws for a reason. I recently debated conservative writer Stuart Taylor, who wrote a book on Title IX, at George Washington University, during which I pointed out that Title IX is coextensive with Title IV, which similarly prohibits sex discrimination in public schools. His reply was an embarrassing, "who ever heard of Title IV?"

Obviously training and education programs are important because people have no hope of enforcing their fights if they don't know they have them. But people cannot be taught not to rape any more than they can be taught not to be racist. Meaningful prevention requires changing the way students think and feel about women, and giving them a compelling reason to think differently. For example, sexual assault can be compare to slavery, not because they are the same social harms, but because *freedom and authority over the self are lost in both contexts*. And just as we enlighten young people to reject the argument that some African-American slaves "liked" working in the fields despite the fact that they were not free to choose otherwise, we need to teach young people to reject claims that there is freedom to be had in a woman's "choice" to be raped while barely conscious. There isn't.

A school's integrity does not exist in Latin words on a shiny crest. It exists in its policies, and it is manifested in the words and actions of the people who act under those policies. To be sure, sexual violence emanates not only from a failure of university leadership, but also from a long history of gender inequality in society. Women in America are not yet entitled to equal protection of the law under the U.S. constitution because the Equal Rights Amendment (ERA) has not been ratified. It passed Congress in 1972 and was sent to the states for ratification, but as of 2017, only 36 states have ratified. 38 are necessary for the ERA to become law. Title IX was enacted as a kind of mini-ERA that would provide equal protection for women in the narrow venue of education, but more than 40 years after the enactment of Title IX, it has yet to be enforced as intended.

For centuries, universities have enjoyed a place of privilege in society, though some believe it is an undeserved privilege and that higher education is like any other industry except for the seeming benevolence of ivy covered towers, and tax-exempt status. Higher education remains nonetheless a source of hope for those of us who feel confident that even as most industries strive only to produce better profits, most colleges and universities sincerely endeavor to produce better people.

Better people do not graduate from universities where sexual assault occurs with impunity. Better people come from schools where equality for women is as important as equality for gays, Irish, Muslims, African-Americans, and students with disabilities. *The very idea that the redress of violence against women would be subjected to worse legal standards compared to violence against other protected class students on campus is offensive to the most basic understanding of what it means to be American.* Women do not need solicitous protection. They

want, need, and deserve only meaningful equality, especially in the critically important environment of higher education—where our next generation of leaders, parents, lovers, spouses, friends, and neighbors is living, growing, and learning together about how the world works, and where women fit in. Nobody should leave college having *learned* that violence against women is more acceptable, and less serious, than targeted violence against any other class of people, yet under SaVE and the September 2017 Title IX rules issued by Secretary DeVos, that is exactly what schools are authorized to teach their students.

As I did when the SaVE Act was passed, I filed a federal lawsuit when Secretary DeVos announced new Title IX rules in 2017. I filed suit against Secretary DeVos and the DOE in Massachusetts Federal District Court in Boston a few weeks after the September 2017 guidance was released. I included claims that the new rules were illegally promulgated in violation of the Administrative Procedures Act, violated the Title IX regulatory mandates prohibiting "separate" and "different" treatment based on sex, and were unconstitutional under the Massachusetts Constitution, which, unlike the federal constitution, guarantees women full equality and fully equal protection of the law, subject to strict scrutiny review. My plaintiffs included three women who were sexually assaulted and who took legal actions thereafter, with OCR and in the courts. Their cases stood to be negatively affected by the new DeVos rules. I also included a national organization, Equal Means Equal, as a representational plaintiff. Equal Means Equal advocates for women's equality in all spheres, including ratification of the Equal Rights Amendment.

Months later, a different lawsuit was filed against Secretary DeVos and the DOE in a California federal court. The claims in that case alleged, as did my lawsuit, that Secretary DeVos did not comply with the APA or have authority to issue the new rules. But unlike my suit, the case did not allege that the new DeVos rules violated Title IX's prohibition against "separate" and "different" treatment of women. To the contrary, the lengthy complaint nowhere cited or made reference to either regulatory provision. Stranger still, the complaint nowhere asked the court to enforce Title IX such that sex-based harms are treated exactly the same on campus as race and national origin-based harms. Instead, the complaint asked only that the court enforce the Fifth Amendment's equal protection doctrine, which notoriously provides only second-class protection for sex-based discriminatory harms.

The Plaintiffs in the California suit are all organizations that do not advocate for equal treatment of sex-based harms on campus, exactly on par with harms based on race and national origin. One of the organizational plaintiffs, Survjustice, was started by Laura Dunn, who openly endorsed the SaVE Act. Her organization also teamed up for a fundraising event with author Jonathan Krakauer, whose book *Missoula* was widely panned as offensive and disrespectful of Title IX as a civil rights law. Another group involved in the case, the National Women's Law Center, does not advocate for equal treatment of sex under Title IX, on par with race and national origin. Indeed, as late as 2009, the group was not even teaching or advocating about the fact that Title IX covered peer-on-peer sexual assaults, though the Supreme Court of the

United States had made this clear more than a decade earlier. The National Women's Law Center is now responsible for managing the #TimesUp legal defense fund, which is a fund aimed at enforcing women's equality in the workplace. Obviously, money intended to promote women's equality in the workplace should go to groups that are actually asking courts for equality in all spheres of society.

It is befuddling, to put it mildly, that "women's rights" groups would file a lawsuit regarding Title IX and ***nowhere*** in dozens of pages ask the court to treat Title IX with the equal respect it deserves, so that sex-based harms are treated exactly the same as harms based on race and national origin. If Title IX did not expressly forbid "different" treatment based on sex, it might not be so glaringly outrageous for advocates not to ask for equal treatment in a lawsuit, but the prohibition against different treatment has been in place as a regulation (not merely a guidance document) for more than forty years. There is no excuse to ask a court for maximum legal protections when the law specifically provides for them. It's like suing a doctor who wrongfully amputates an entire leg, but only complaining about the inability to wear shoes. Too bad women as a class cannot sue for legal malpractice when groups purporting to speak for them undertake to make bad law.

Some victim lawyers are making bad law, too, when they file suit against schools for violating Title IX, but don't point out that the school violated Title IX by not enforcing it exactly the same way they enforce Title VI, which covers race and national origin. Several high profile cases filed by the Zalkin law firm in California, for example, failed to ask for equal treatment of sex and race. And even well known women's right advocates like Gloria Allred are failing to hold schools accountable when they subject women to second-class treatment. See *An Open Letter to Attorneys Allred and Zalkin*, www.campusaccountability.org

It is difficult for victims to know whom to trust, and they often turn to lawyers in the news, which is not usually a good idea. How can a traumatized victim know that a lawyer who claims to be working hard for victims is actually undermining the equal protection of women's rights by filing lawsuits that do not even ask for equal treatment of sex-based harms. If universities themselves worked harder to promote the importance of equality for women, and equal treatment of sex-based harms, it would be easier for victims and families to make sure that their lawyers, and the courts, are doing the right thing.

Universities should not be places where victimized women are openly subjugated by the explicit adoption of polices that separate out only sex-based harms, and subject them to different and worse treatment compared to other civil rights harms. Nor should universities be known as places where women are routinely subjected to any form of discrimination, much less exceedingly high rates of the most violent expression of discrimination, such as sexual assault. But that is the reality in 2018 and it has been the reality for many years.

College presidents hoping to change this shameful reputation should proudly speak out against sexual assault every time it happens, the way the University of Oklahoma president spoke out against racism in 2015, by immediately and publicly condemning and punishing fraternity brothers who chanted racist words on a bus.

Presidents should also consistently frame sex-based harms, including sexual assaults, as civil rights issues *on par with racism* as this will inspire more openness, and will engage the entire campus community to become more involved in meaningful solutions. This is the magic of civil rights laws. They create legal injury not only in individual victims, but also in whole classes of people, and entire campus communities. When whole communities feel injured by a single sexual assault, whole communities will feel personally invested in truth, justice, and prevention. Treating sexual assault as a secret, and a non-civil rights form of generic misconduct that harms only the individual victim prevents collective solutions from taking root, and sends the incorrect and dangerous message that violence against women is a private problem, unworthy of community concern, or public accountability.

I am not a black woman, but I feel injured by racist violence because I inherently understand racist violence as harmful to me as a member of a community where racism is not welcome. This same philosophy must be brought to bear on the problem of violence against women, proudly and without compromise.

Parents can play an important role in making this happen, too, because they hold the purse strings and they decide where to spend their money when sending their children off to college. With luck, parents will find it repulsive to learn that a school subjects sex-based harms to different and worse treatment compared to race-based harms, and they will enthusiastically send their children and their money only to schools that proudly and clearly treat women as fully equal campus citizens.
It is incomprehensible that girls and women are safer ***not*** becoming educated in America, and that even half a century after women were granted educational equality under Title IX and Title IV of the Civil Rights Act of 1964, an awful lot of powerful people in this country think that's just fine. Women were granted civil rights protections in education more than forty years ago. They have suffered long enough, and they have waited long enough for their rightful ***equal*** seat at the civil rights table of justice.

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