

AND EVEN MORE OF US ARE BRAVE: INTERSECTIONALITY & SEXUAL HARASSMENT OF WOMEN STUDENTS OF COLOR

NANCY CHI CANTALUPO*

ABSTRACT

Events in 2017 highlighted both celebrations of and contests over intersectionality and civil rights. In September 2017, the U.S. Department of Education rescinded Obama-era guidance on sexual harassment and replaced it with interim guidance that allows schools to set different evidentiary standards for investigations of sexual and racial harassment, creating an intersectional legal conflict, particularly for women students of color. This occurred nine months after the 2017 Women’s March, a protest organized and led primarily by women of color, became the largest single-day protest in world history and kicked off a year of increased women’s political participation unprecedented in the U.S.—and less than two months before #MeToo changed the global conversation about sexual harassment.

This article responds to the conflicting narratives preceding and resulting from such events by delving into evidence suggesting that women students of color reported sexual harassment at disproportionately high rates. Further research to confirm this suggestion found much indirect evidence of women of color’s greater vulnerability, particularly in the workplace and criminal contexts, and confirmed that very few published articles commenting on campus sexual harassment used intersectional analyses. Instead, commentary on how race factors into this epidemic renders women victims of color virtually invisible, despite the aforementioned evidence that women students of color are disproportionately targeted. This article therefore discusses several interventions drawn from Social Justice Feminism that seek to

* Associate Professor of Law, Barry University Dwayne O. Andreas School of Law; B.S.F.S., Georgetown University; J.D., Georgetown University Law Center. I thank the following people and groups for commenting on or workshopping earlier drafts of this piece: attendees of the University of Baltimore School of Law Center on Applied Feminism 2017 Conference, the joint 2017 Conference of Asian Pacific American Law Faculty & Northeast People of Color Conference, John Marshall Law School faculty workshop, and University of Chicago Law School 2017–18 Legal Scholarship Workshop; Lisa Bernstein; Karen Bradshaw; Deborah Brake; Naomi Cahn; I. Bennett Capers; Mary Anne Case; Sheryll Cashin; Robert Chang; Gabriel “Jack” Chin; Sumi K. Cho; Frank Rudy Cooper; Martha Chamallas; Richard Delgado; Darby Dickerson; Phyllis Goldfarb; Ardath Hamann; Tanya Hernández; Vicki Jackson; Randall Johnson; William Kidder; Rebecca Lee; Nancy Leong; Ann McGinley; Rachel Moran; Naomi Mezey; Maria Ontiveros; Dorothy Roberts; Jeffrey Stempel; Robert Stumberg; David Super; Amelia Uelman; Robin West; and Lua Yuille. I am grateful to Tiffany Buffkin for excellent research assistance and to D Dangaran for extremely helpful editing and I offer extra special thanks to Dr. Tara Richards for her analysis of the NISVS data.

prevent this erasure of women of color and place women of color's experiences of sexual harassment and violence at the center of our analysis and solutions to the problem.

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I. INTRODUCTION

In 1983, Drs. Akasha (Gloria T.) Hull, Patricia Bell Scott, and Barbara Smith titled the first Black Women’s Studies reader *All the Women Are White, All the Blacks Are Men, but Some of Us Are Brave*.¹ When it comes to sexual harassment (including sexual violence),² regardless of field or industry, this title is often—unfortunately, or fortunately as the case may be—just as true today as it was over 35 years ago. Social media and other campaigns such as #MeToo,³ #WeKnowWhatYouDid,⁴ and Times Up⁵ have certainly startled and inspired the nation and the globe with the bravery of survivors⁶

¹ GLORIA T. HULL, PATRICIA BELL SCOTT & BARBARA SMITH, *ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN’S STUDIES* (1982).

² Note that subsequent uses of “sexual harassment” in this Article will not specify sexual violence because I use “sexual harassment” to refer to sexual conduct that is unwelcome to the target of the conduct, including sexual violence as a severe form of harassment. In this usage, sexual harassment also significantly overlaps with “gender-based violence,” which refers to violence directed at cisgender women or gender minorities, including cisgender men and boys who are targeted because they are perceived as insufficiently masculine, as well as transgender and gender non-conforming persons. Although harassment and violence affect, as indicated, victims of all gender identities, and much of the analysis in this Article is relevant to all survivors, my focus in this Article is on cisgender women of color.

³ Stephanie Zacharek et al., *Time Person of the Year 2017: The Silence Breakers*, *TIME*, Dec. 18, 2017, <http://time.com/time-person-of-the-year-2017-silence-breakers/> [<https://perma.cc/Y6MP-7S9G>].

⁴ Angela Helm, *#WeKnowWhatYouDid: Signs Naming Accused Rapists Papered All Over Morehouse and Spelman Campuses*, *THE ROOT* (Nov. 11, 2017), <https://www.theroot.com/weknowwhatyoudid-signs-naming-accused-rapists-papered-1820358936> [<https://perma.cc/NHE8-52ZT>].

⁵ Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, *N.Y. TIMES*, Jan. 1, 2018, <https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html> [<https://perma.cc/5CM5-GWKJ>].

⁶ When discussing other authors’ research, I try to use the same terms they use for the subjects of their research. In other cases, I generally use “victim” and “survivor” interchangeably to refer to those who have reported or disclosed in some way that they have experienced harassment; I use “accuser,” “complainant,” or “plaintiff” to refer to victims or survivors in the context of claims, complaints, lawsuits, etc., when they have accused a specific person of harassing or victimizing them. I mainly use “accused,” either as an adjective or a noun, to designate someone who has been accused of harassing or victimizing someone else. I also use “alleged” or “reported” as synonyms for “accused.” Only when the context I am discussing is the criminal justice system will I use “defendant.” I have selected all of these terms self-consciously with a goal of capturing and respecting, admittedly imperfectly, the self-identification of the people to whom these terms refer. I use “accused” and “victims” / “survivors” / “accusers” / etc. regardless of whether a neutral factfinder has found an accused individual responsible for harassing or victimizing someone. I do so because, based on my 20+ years of working on sexual harassment in education as a student activist, university administrator, attorney, researcher, and scholar, I have observed that those who report or disclose in some way that they have experienced sexual harassment self-identify as victims, survivors, accusers, complainants, and plaintiffs at different points in time and in different contexts, but these self-identities almost never have anything to do with the judgment of a neutral factfinder. Likewise, those who have been accused of harassing or victimizing someone else generally refer to themselves as “accused” even when they have been found responsible for such conduct by a neutral factfinder.

who are speaking out against sexual harassment. On college campuses, the visibility of such courage is at least five years older than #MeToo, as student survivors and allies began breaking their silence on a national scale in large numbers in the spring of 2013.⁷ Organizing primarily under the banner of Title IX of the Educational Amendments of 1972 (“Title IX”), the groundbreaking civil rights statute that prohibits sexual harassment as a form of sex discrimination, these student survivors and their allies focused on sexual assaults by peers and quickly turned previous, primarily local protest efforts⁸ into a national movement, using social media and more traditional techniques to connect activists and show patterns that transcend single campuses.⁹

Beginning in 2014, this Title IX civil rights movement has generated an enormous amount of policy activity and protest, with the federal government’s position on these issues changing with the new presidency in early 2017. The most direct change occurred when the U.S. Department of Education’s Office for Civil Rights (“OCR”) issued a “Q&A on Campus Sexual Misconduct” (“Interim Guidance”)¹⁰ authorizing schools to adopt several policies that are facially unequal and/or run contrary to at least twenty-two years of consistent Title IX enforcement by OCR.¹¹ For instance, the Interim

⁷ See Richard Pérez-Peña, *College Groups Connect to Fight Sexual Assault*, N.Y. TIMES, Mar. 19, 2013, <https://www.nytimes.com/2013/03/20/education/activists-at-colleges-network-to-fight-sexual-assault.html> [https://perma.cc/AS47-58B4].

⁸ For a discussion of the local efforts to protest gender-based violence at Columbia University, see Jia Tolentino, *Is There a Smarter Way to Think About Sexual Assault on Campus?*, NEW YORKER, Feb. 12 & 19, 2018, <https://www.newyorker.com/magazine/2018/02/12/is-there-a-smarter-way-to-think-about-sexual-assault-on-campus> [https://perma.cc/JHD4-ZJVV].

⁹ See THE HUNTING GROUND (RADiUS-TWC 2015) (highlighting college student activists who used social media to organize across campuses); see also Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847, 1870 (2017) (discussing how campus activists connected local incidents of sexual assault to garner national attention).

¹⁰ OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [https://perma.cc/D2PE-XFWZ] [hereinafter INTERIM GUIDANCE]. The issuance of the Interim Guidance was preceded by Secretary of Education Betsy DeVos’s announcement that she was rescinding Title IX guidance regarding how schools should respond to sexual harassment, issued in 2011 and 2014 under President Obama’s administration. See Press Release, U.S. Dep’t of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct> [https://perma.cc/3GQJ-68YC].

¹¹ DeVos made clear that her primary reason for rescinding the guidance was to expand the rights of accused students. See Susan Svrluga, *Transcript: Betsy DeVos’s Remarks on Campus Sexual Assault*, WASH. POST (Sept. 7, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/?utm_term=.31f416ad257c [https://perma.cc/AH4K-GB4V]; see also Diane Rosenfeld, *Why DeVos’s Position on Campus Sexual Assault is Flawed*, WASH. POST (Sept. 13, 2017), https://www.washingtonpost.com/opinions/why-devoss-position-on-campus-sexual-assault-is-flawed/2017/09/13/3e2b34a0-97d2-11e7-82e4-f1076f6d6152_story.html [https://perma.cc/77QA-HQCL]. This expansion of rights amounts to providing preferential treatment to accused students, whose rights had previously been treated

Guidance allows schools to give accused students, but not student victims, the right to appeal the result of a disciplinary proceeding¹²—a change that at least one major university has adopted.¹³

In addition, since at least the mid-1990s and through both Democratic and Republican administrations, OCR directed schools to use a preponderance of the evidence standard across all statutes that OCR enforces. Thus, before September 2017, schools had to use a preponderance of the evidence standard in *both* sexual¹⁴ and racial harassment¹⁵ cases. The Interim Guidance departs drastically from previous OCR enforcement by authorizing schools to adopt a “clear and convincing evidence” standard of proof in “campus sexual misconduct” cases.¹⁶ The Interim Guidance says nothing about OCR changing its requirements for racial harassment, however, so the preponderance standard remains in place in racial harassment cases.¹⁷ As

as equal to the rights of student complainants. See KATHARINE K. BAKER ET AL., TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER (2016), <http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17.pdf> [<https://perma.cc/FPB5-K6AY>]; see also Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations & Cautions*, 125 YALE L.J. F. 281, 286–87 (2016); Lynn Rosenthal, *#MeToo Stories Won't End Until We Focus on Prevention*, THE HILL, Nov. 28, 2017, <http://thehill.com/opinion/education/362009-campus-safety-is-next-for-the-metoo-movement> [<https://perma.cc/RC32-EHHU>].

¹² See INTERIM GUIDANCE, *supra* note 10, at 9.

¹³ Morgan Watkins, *Experts: University of Kentucky's Sexual Assault Policy May Be Illegal*, COURIER J., July 11, 2018, <https://www.courier-journal.com/story/news/2018/07/11/university-kentuckys-sexual-assault-policy-may-break-law/712333002/> [<https://perma.cc/J82L-48DD>].

¹⁴ Letter from Russlynn Ali, Ass't Sec'y for Civil Rights, U.S. Dep't of Educ. 11 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/KMH8-5DK5>] [hereinafter Dear Colleague Letter].

¹⁵ Voluntary Resolution Agreement, Wallingford Bd. of Educ., Compl. No. 01-13-1207 (Office for Civil Rights, U.S. Dep't of Educ.), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01131207-b.pdf> [<https://perma.cc/UU4H-3UXG>] [hereinafter Wallingford Bd. of Educ.].

¹⁶ See INTERIM GUIDANCE, *supra* note 10, at 5.

¹⁷ Note that footnote 19 of the Interim Guidance says: “The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases,” thereby implying that schools should not adopt different standards for racial harassment and sexual harassment. *Id.* at 5 n.19. Because the Interim Guidance does not state explicitly that schools may adopt “clear and convincing evidence” for racial harassment investigations—as it does with sexual harassment—footnote 19 may operate to discourage schools from exercising the option that the Interim Guidance otherwise suggests they have: to adopt “clear and convincing evidence” in sexual harassment cases. The facial approval of a “clear and convincing evidence” option combined with footnote 19’s potential practical undermining of that option may also simply sow confusion into schools’ expectations of how OCR will enforce the civil rights laws under its jurisdiction, should OCR investigate a particular school for potential violations of those laws. Such confusion is likely to undercut meaningful enforcement by OCR because schools can credibly argue that OCR’s own guidance is contradictory. As former Assistant Secretary for Civil Rights Catherine Lhamon explained to Senator Lankford, OCR’s guidance should not be categorized as “law” or “regulation,” but is designed to inform schools of what to expect when OCR investigates their compliance with the applicable civil rights statute. See Letter from Catherine E. Lhamon, Ass't Sec'y of Civil Rights, to the Hon. James Lankford, Chairman, Subcomm. on Reg. Aff. &

such, the Interim Guidance singles out sexual harassment victims for differentially less protection than victims of racial or other kinds of discriminatory harassment.

The guidance thus leads immediately to this Article's central questions: if a school has adopted different evidentiary standards for sexual and racial harassment, what happens when a woman of color¹⁸ is sexually and racially harassed? What standard will be used if she experiences racialized sexual harassment or sexualized racial harassment? Will she be a woman first or a person of color first? Which of her identities will the school declare to be the important one? These questions are fundamentally "intersectional" and "multidimensional" ones,¹⁹ in that they recognize the multiple communities

Fed. Mgmt., Comm. on Homeland Sec. & Gov't Aff., U.S. Senate (Feb. 17, 2016). The effect of footnote 19 is to obfuscate what OCR will do should it undertake an investigation of a school that has adopted "clear and convincing evidence" only for sexual harassment cases or for both sexual and racial harassment cases. Thus, a school could reasonably decide that there would be little risk of OCR finding a civil rights violation if the school exercised its "clear and convincing evidence" option, even though there would be zero risk of such a violation if the school opted to keep the preponderance standard for investigations involving racial, sexual, and all other forms of discriminatory harassment.

¹⁸ "Woma(e)n of color" refers to individuals who identify as women and as non-white and thus includes both cisgender and transgender women, as well as individuals whose racial identity is in whole or in part African, Asian, Latinx, and/or Native American. For specific racial groups and identities, I use multiple terms interchangeably, such as "African American" and "black," or "Latino/a" and "Latinx." I do so because, in my experience, different individuals who identify as a particular race may prefer different terms for their racial identity, with multiple terms often being simultaneously recognized as legitimate, including "of color" to refer to numerous groups that share a racial identity associated with racial or ethnic minorities. The times I depart from the usages described here are limited to when my discussion of another author's work requires adopting that author's terminology. Note that I also recognize that "women of color" is used as both a biological as well as a political term adopted to build solidarity between non-white women of different races and ethnicities. See Jessica C. Harris, *Centering Women of Color in the Discourse on Sexual Violence on College Campuses*, in INTERSECTIONS OF IDENTITY AND SEXUAL VIOLENCE ON CAMPUS: CENTERING MINORITIZED STUDENTS' EXPERIENCES 42, 46 (Jessica C. Harris & Chris Linder eds., 2017) [hereinafter INTERSECTIONS OF IDENTITY]. Similarly, I recognize that race itself is a socially constructed concept that is not stable and can be redefined at will by those in power. See RICHARD DELGADO, CRITICAL RACE THEORY: AN INTRODUCTION 8 (2012).

¹⁹ Both "intersectional" and "multidimensional" are terms used first by academics but increasingly found—at least in the case of "intersectional" and "intersectionality"—in mainstream conversation. Intersectionality was first articulated by Professor Kimberlé Crenshaw as a way to describe women of color's (particularly black women's) experience of multiple, intersecting forms of discrimination based on gender and race. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991). It has since become a "feminist buzzword." See, e.g., Christine Emba, *Intersectionality*, WASH. POST (Sept. 21, 2015), <https://www.washingtonpost.com/news/in-theory/wp/2015/09/21/intersectionality-a-primer/> [<https://perma.cc/G3QZ-2YBH>]. Indeed, the Women's March included the term in the organization's mission and shared the concept with the millions of people who marched in 2017 and 2018. *Our Mission*, WOMEN'S MARCH, <https://www.womensmarch.com/mission/> [<https://perma.cc/K4MQ-RN54>] (last visited September 21, 2018). While "multidimensionality" has a long history in legal theory, intersectionality has informed and altered this term's use. Since the mid-1990s, it has been used by legal scholars struggling to understand the position of individuals whose experiences involve intersecting

with which women of color identify or may be identified, as well as the discrimination we likely face as a result of that identification.²⁰

It borders on baffling that the Interim Guidance's drafters could create such an immediately obvious intersectional legal conflict while appearing just as obviously unaware of having done so. Is it simply that women students of color are so invisible to these officials that the effects of this conflict on these students never occurred to them? Or perhaps it is possible that these officials simply do not care about treating sexual harassment and violence victims in a different and unequal way from racial harassment victims. A final possibility is that this intersectionality problem signals an intention to remove the requirement to use the preponderance standard from OCR's enforcement of racial and other discriminatory harassment prohibitions—to use the evidentiary standard for sexual harassment as a “right-wing ‘beach-head,’” as referenced by Professor Anne McClintock,²¹ for a wide-ranging attack on civil rights more generally.²²

discrimination and privilege, such as men of color who experience discrimination due to racial identity but benefit from the power associated with masculinity. Multidimensionality is grounded in two principles, “(1) identities are co-constituted and (2) identities are context dependent. A multidimensional approach argues that since identities are co-constituted, race, gender, class, sexual orientation, and other discrete identities are actually imbricated within one another and cannot be understood in isolation.” Ann C. McGinley & Frank Rudy Cooper, *Masculinity, Multidimensionality, and Law: Why They Need One Another*, Introduction to MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 1, 6–7 (Frank Rudy Cooper & Ann C. McGinley eds., 2012); see also Athena D. Mutua, *Multidimensionality is to Masculinities What Intersectionality is to Feminism*, 13 NEV. L.J. 341, 351–54 (2013); Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 309–10 (2001).

²⁰ As will be discussed in greater detail in Part IV, both intersectionality and multidimensionality recognize that all individuals have multiple identities and are simultaneously part of different groups or communities, and that most of these communities/identities carry markers of privilege or subordination. While each individual will identify with or be a part of groups or communities such as those related to one's work or profession (e.g., janitor, nurse, small business owner) or one's position in one's family (e.g., parent, spouse, middle child), intersectionality and multidimensionality—particularly in legal discourse—are concerned with investigating and connecting these to broader systems of domination and inequality, such as those based on gender, race, sexuality, socioeconomic class, (having a) disability, etc. Law and legal theory are focused primarily on these identities/communities because they too often translate into discrimination against subordinated groups and preferential treatment for privileged groups, both of which offend national and international commitments to equal protection of the law.

²¹ Anne McClintock, *Who's Afraid of Title IX?*, JACOBIN, Oct. 24, 2017, <http://www.jacobinmag.com/2017/10/title-ix-betsy-devos-doe-colleges-assault-dear-colleague> [<https://perma.cc/V88Q-X5FK>].

²² Other have commented on this possibility. Professor and Interim Dean of the University of Cincinnati's law school, Verna Williams, drew this connection in a presentation at the 2018 Association of American Law Schools conference. Cf. Tyler Kingkade, *Meet the Republican Lawmaker Who's Taken Up the Cause of Defending College Men Accused of Rape*, BUZZFEED NEWS (Dec. 21, 2017), <https://www.buzzfeed.com/tylerkingkade/meet-the-republican-lawmaker-whos-taken-up-the-cause-of> [<https://perma.cc/Y998-BW2A>] (discussing legislative pressure to discourage state universities from investigating sexual assault allegations and systems for adjudicating sexual misconduct).

This erasure is particularly ironic because many years of research have confirmed that women of color are disproportionately targeted for sexual harassment. Moreover, race and gender discrimination are so intertwined in sexual harassment that finding redress and remedies for women of color under traditional civil rights legal doctrine, which tends to address only one form of discrimination at a time, is extremely challenging.²³ But as already noted, and as documented more extensively in a White Paper signed by 115 law professors (and counting),²⁴ traditional civil rights legal doctrine at least follows the same standards of proof. Thus, as hard as it is to address women of color's intersectional experiences under traditional, consistent, and parallel civil rights standards, how much more difficult will it become when those standards are no longer consistent and schools are confronted with the intersectional questions posed above?

This Article seeks to address these difficult questions, and to reverse the erasure of women students of color that they represent, by proceeding in four parts. In Part II, I briefly review how a particular narrative regarding race and sexual harassment in education became dominant.

Next, Parts III and IV together detail how using an intersectional analysis surfaces the narrative currently rendered invisible by the dominant *anti*-intersectional one. Part III collects research and analysis by scholars working in the workplace and criminal contexts, utilizing logical reasoning to assert a common hypothesis explaining *why* women of color are more likely to be targeted for sexual harassment. In doing so, it discusses the causes and contributing factors that are rooted in women of color's greater general vulnerability deriving from circumstances such as a greater likelihood of living in poverty, being seen as a target by a larger number of potential harassers, and/or being subjected to racial, sexual, and intersectional racial-sexual stereotyping. Part IV then analyzes the evidence amassed over decades of research conducted on race and sexual harassment to see if Part III's hypothesis is borne out in empirical data and observation. It first draws from the quite limited research and scholarship addressing sexual harassment against women of color in higher education, and expands to research on harassment in the workplace and to sexual violence that is or should be addressed by the criminal justice system.

The Logic Story and the Evidence Story in Parts III and IV show that, contrary to the dominant narrative's erasure of women students of color as victims of sexual harassment, or indeed as being *capable* of such victimiza-

²³ See Lilia M. Cortina et al., *Contextualizing Latina Experiences of Sexual Harassment: Preliminary Tests of a Structural Model*, 24 BASIC & APPLIED SOC. PSYCHOL. 295, 307 (2002) ("Although Title VII employment law typically treats different forms of discrimination as discrete phenomena, women of color often experience sexual harassment as a manifestation of *both* gender and race discrimination [T]he reality for many [women of color] . . . is that they can no more dissect their experiences into such neat categories than they can dissect themselves.").

²⁴ See BAKER ET AL., *supra* note 11, at 1 ("[T]he preponderance standard is fully consistent with the requirements and spirit of civil rights laws.").

tion *at all*, these students are likely *more* vulnerable to such harassment than white students are.

Parts III and IV also expose another intersectional story embedded in the larger phenomenon of disproportionate harassment of women of color: of all women of color, multiracial women (women who self-identify as having ancestors from two or more “traditional” racial groups) appear to be the most vulnerable to sexual harassment. Data from the National Intimate Partner and Sexual Violence Survey (NISVS) indicate that U.S. multiracial women experience sexual harassment 4.8% to 32.2% more than any other racial group of cisgender women or men (data for transgender individuals was not collected), but the NISVS itself indicates that almost no research and analysis has further explored that data point.²⁵ The Interim Guidance provides a disturbing example of what can result from gaps in needed intersectional research and analysis, but a full discussion of the implications of the NISVS data on multiracial women is beyond the scope of this Article. Therefore, I begin filling the multiracial gap in the scholarly literature in a separate article that is in progress.²⁶

Finally, Part V considers the Logic and Evidence Stories in conjunction with recent events, including but not limited to #MeToo, the Women’s Marches, and the Interim Guidance, clearly demonstrating the need for new, specifically *intersectional* interventions to address sexual harassment. Part V explains how the methodology of Social Justice Feminism provides such an intervention, returning to the intersectional legal conflict created by the Interim Guidance and suggesting next steps for combatting intersectional racialized sexual/sexualized racial harassment. As a baseline for improvement, OCR needs to return to consistent enforcement of Title IX with other civil rights statutes. However, more is required than simply returning to the pre-Interim Guidance status quo. Thus, Part V also recommends steps that put women students of color’s experiences at the *center* of our legal responses to sexual harassment—exactly the opposite of the Interim Guidance’s erasure. Doing so will require us to learn about those experiences,

²⁵ See Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011*, at 5, in MORBIDITY & MORTALITY WKLY. REP., at 5 (Ctrs. for Disease Ctrl. & Prev., Vol. 63, No. 8, 2014), <https://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf> [https://perma.cc/7UDS-M2NC].

²⁶ Nancy Chi Cantalupo, *Multiracial Women, Sexual Harassment & Gender-Based Violence* (May 17, 2018) (unpublished manuscript) (on file with author). Such research gaps are dangerous when they mis- and dis-inform public policy. As a multiracial woman and a twenty-plus year professional and legal scholar studying civil rights, sexual harassment, and gender-based violence, I was shocked to discover how little time and attention has been devoted to researching and analyzing this extreme vulnerability (including by myself). However, my preliminary research on this disproportionate targeting demonstrates that discussion of this multiracial gap requires a much deeper and more complex dive into the research and analysis on such topics as the formation of multiracial identities, the theoretical and political contestation of “multiracial” as a demographic and legal category, and the scope and dynamics of the discrimination and/or privilege directed at individuals because they either identify as or are perceived as multiracial.

which will require creating legal supports by: (1) appropriating government funds for research on the sexual harassment experiences of women students of color and other intersectional student populations; and (2) creating new and additional transparency requirements for schools both to collect and to disclose demographic data about student victims and accused students.

II. MAPPING THE ANTI-INTERSECTIONAL DOMINANT NARRATIVE REGARDING RACE & SEXUAL HARASSMENT IN EDUCATION

The policy position and actions of the new administration, as expressed and implied by the Interim Guidance, have their origins in tactics used by opponents of the Title IX civil rights movement well before the 2016 presidential election. Indeed, student survivors have needed their bravery for a longer period of time than most post-October 2017 #MeToo movement activists. #MeToo is just now beginning to experience a “blowback,”²⁷ but for several years, student survivors have had to defend themselves, and their rights to live free of harassment, from a variety of attacks. A non-exclusive list of attacks includes: (1) private investigators (hired by the accused harassers) following and intimidating survivors, as well as tricking and interrogating their friends and family;²⁸ (2) aggressive defamation lawsuits brought by the accused;²⁹ (3) proposed or successful state legislation designed to force schools to give accused students inequitably greater rights in school investigations of sexual harassment complaints;³⁰ (4) proposed or successful state legislation mandating that schools pass reports received from student victims to law enforcement, regardless of the victim’s consent;³¹ (5) claims that enforcement of Title IX violates the “due process” rights of accused students;³²

²⁷ Caroline Reilly, *Losing Your Job for Sexual Harassment Is Not a Violation of Due Process*, REWIRE.NEWS (Jan. 18, 2018), <https://rewire.news/article/2018/01/18/losing-job-sexual-harassment-not-violation-due-process> [https://perma.cc/K6TS-BDEH].

²⁸ See Harry Shukman, *Male Students Charged with Rape Are Hiring Private Investigators to Follow Their Accusers*, BABE (Dec. 8, 2017), <https://babe.net/2017/12/08/the-untold-story-of-how-private-investigators-are-set-on-the-women-who-speak-out-about-rape-24157> [https://perma.cc/B2YB-N85U].

²⁹ See Tyler Kingkade, *As More College Students Say “Me Too,” Accused Men Are Suing for Defamation*, BUZZFEED NEWS (Dec. 5, 2017), <https://www.buzzfeed.com/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing> [https://perma.cc/PA5Q-BWGD].

³⁰ See ANDREW MORSE ET AL., STATE LEGISLATIVE DEVELOPMENTS ON CAMPUS SEXUAL VIOLENCE: ISSUES IN THE CONTEXT OF SAFETY 15–16 (2015), https://www.naspa.org/images/uploads/main/ECS_NASPA_BRIEF_DOWNLOAD3.pdf [https://perma.cc/739J-QBXC] (discussing North Carolina’s legislation requiring that schools allow accused students to be represented by legal counsel in student conduct proceedings, but creating no similar guarantee for complainants).

³¹ See Dana Bolger, *Quote of the Day: “If You Feel Triggered, Trigger Somewhere Else,”* FEMINISTING (Mar. 2, 2017), <http://feministing.com/2017/03/02/quote-of-the-day-if-you-feel-triggered-trigger-somewhere-else> [https://perma.cc/558H-XTBN].

³² See Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 823–24 (2017); Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims’ Attorneys*, 65

(6) accusations that those who report sexual harassment are simultaneously too weak to handle opinions and ideas different from their own and are aggressively attacking the free speech and academic freedom of others;³³ and (7) narratives that the recent wave of student sexual harassment complaints are just a modern iteration of the white supremacist excuse for lynching, wherein false accusations by white women of sexual harassment by Black boys and men provided a pretext for murdering those boys and men.³⁴

Because much of the Interim Guidance originates from the dominant narrative regarding race and sexual harassment in education, a narrative crafted through pre-2016 election attacks on the policies inspired by Title IX civil rights activists, it is important to understand how that dominant narrative was created. This Part reviews the development of this anti-intersectional narrative by focusing on the interaction of three factors. First, the Obama administration's stepped-up enforcement of Title IX with regard to sexual harassment has been countered by a concerted effort to "criminalize" Title IX in the eyes of schools and the general public, an effort that has been joined by the current administration. Second, this criminalization has relied on racialized sex stereotyping of both women of color and African American men to a significant extent. Third, the lack of public information about such harassment and how schools investigate it makes it difficult to counter stereotyping and the push to criminalize Title IX. Together, these three factors have led to the erasure of women students of color and their experiences from the dominant narrative.

A. "Criminalizing" Title IX

Efforts to criminalize Title IX require or encourage schools to imitate criminal laws and procedures with regard to sexual harassment. Unlike the criminal law, Title IX aims to ensure equal treatment.³⁵ As a result, criminalizing Title IX undermines its effectiveness in reaching its equality goals. With regard to intersectional discrimination, such criminalization has facili-

DRAKE L. REV. 293, 311–12 (2017); Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 71–72 (2017); Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 634 (2018).

³³ See Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671, 676–78; McClintock, *supra* note 21; see also David Schaper, *University of Chicago Tells Freshmen It Does Not Support "Trigger Warnings,"* NPR (Aug. 26, 2016), <https://www.npr.org/2016/08/26/491531869/university-of-chicago-tells-freshmen-it-does-not-support-trigger-warnings> [<https://perma.cc/T2B9-ZUL3>] (describing pushback against trigger warnings at the University of Chicago).

³⁴ See Antuan M. Johnson, *Title IX Narratives, Intersectionality, and Male-Biased Conceptions of Racism*, 9 GEO. J. L. & MOD. CRITICAL RACE PERSP. 57, 72–74 (2017); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 106 (2015).

³⁵ See INTERIM GUIDANCE, *supra* note 10, at 3–4.

tated the import of narratives related to race and the criminal justice system to Title IX discussions. These narratives have traditionally downplayed the criminal justice system's discriminatory treatment of women victims of color, even when those narratives have focused on discrimination against male defendants of color, and even when data has shown that discrimination against defendants is linked to unequal treatment of victims based on race.

The tendency to criminalize Title IX has taken many forms over the last few years. Three criminalization efforts are noteworthy³⁶: calls for "mandatory referral" of all campus sexual assault reports universities receive to law enforcement;³⁷ the passage of statutes requiring criminal "affirmative consent" standards rather than civil rights "welcomeness" standards to determine whether sexual harassment has occurred;³⁸ and com-

³⁶ I have previously addressed these three categories of criminalization more fully. See Cantalupo, *supra* note 11. There, I argue that the three categories are: importing criminal due process into internal administrative Title IX proceedings, *id.* at 286–91, instituting mandatory referral, *id.* at 291–96, and adopting affirmative consent policies, *id.* at 296–302.

³⁷ See *id.* at 291–96. Universities criminalize Title IX by turning student victims' reports into involuntary indirect reports of criminal violations to law enforcement by invoking their Title IX rights. Mandatory reporting has traditionally provided protection from abuse for children and others who have significant legal dependencies, neither of which describes the majority of college student victims. Therefore, mandatory reporting would treat student victims as legal children without any legitimate justification for doing so, thus engaging in direct gender discrimination by stereotyping and infantilizing victims, the majority of whom are women or gender minorities. Differential treatment without legitimate justification is the definition of discrimination. Thus, mandatory referral encourages the very treatment that Title IX prohibits. In addition, mandatory referral has the practical effect of chilling victim reporting, obstructing student victims' access to their Title IX rights. Many victims do not wish to report to law enforcement (for a range of legitimate reasons), and victims from certain communities of color have more reasons than other victims to avoid the police. By turning a report to school Title IX officials into a report to police, mandatory referral deters victims who do not wish to report to police from reporting or disclosing at all. Because victims cannot access services, accommodations, investigations, and many other remedies guaranteed by Title IX rights and other applicable laws if they do not report, chilling reporting undermines and even negates Title IX's guarantees of equal educational opportunity. See also Alexandra Brodsky, *Against Taking Rape "Seriously": The Case Against Mandatory Referral Laws for Campus Gender Violence*, 53 HARV. C.R.-C.L. L. REV. 131, 143–44 (2017).

³⁸ See Cantalupo, *supra* note 11, at 296–302. Educational "affirmative consent" statutes and policies, while less problematic in practice than mandatory referral statutes, still inappropriately adopt criminal standards for civil rights proceedings. "Consent," as used by affirmative consent statutes and policies, is a criminal law concept. The correct standard for a civil rights statute, such as Title IX, is "welcomeness." "Hostile environment sexual harassment" is defined as sexual conduct and/or attention that is unwelcome to the recipient and is sufficiently severe or pervasive to constitute a hostile environment for the victim. See Dear Colleague Letter, *supra* note 14, at 3. As a totality of the circumstances standard, welcomeness allows for relevant contextual factors to be considered in determining whether conduct was welcome or not, including the determination of whether affirmative consent was present only as one of several factors. See Cantalupo, *supra* note 11, at 298–99. In this sense, criminalizing Title IX's standards causes a subtly limiting focus on consent, rather than looking at all of the relevant factors that the welcomeness standard recognizes.

plaints that stepped-up enforcement of Title IX is violating the due process rights of students who are accused of sexual harassment.³⁹

The most vocal protests accusing Title IX of violating accused students' rights focus on the standard of proof: the "preponderance of the evidence" standard that OCR has consistently used in enforcement of the civil rights laws under its jurisdiction. These protests seek to criminalize Title IX by insisting that only the criminal standards of proof of "clear and convincing evidence" or "beyond a reasonable doubt" are fair to accused students.⁴⁰ Such arguments invoke the high stakes of defendants in the criminal justice system, where a "false positive" or "wrongful conviction" of a sex offense could lead to unjust incarceration and/or lifetime registry as a sex offender, but a "false negative" or "wrongful acquittal" is not perceived as having an important effect on the victim's or complaining witness's future life. In light of these different stakes, and despite an acknowledgement that no standard of proof is necessarily more accurate than any other, the criminal law selects standards of proof with higher chances of false negatives and lower chances of false positives.⁴¹

Because schools do not have the powers of the criminal justice system and campuses are usually small communities where all students live and/or attend class in a small geographic area, the stakes of students in a campus sexual harassment investigation differ significantly from the stakes of victim and accused in a criminal proceeding. In campus cases, each student has an equal stake in the ability to remain at the college of the student's choice and to complete their education there. Although no research has confirmed that this actually occurs in significant numbers, and several bits of anecdotal evidence indicate that the opposite is true, the accused student could be expelled for committing sexual harassment and may have difficulty completing

³⁹ See Cantalupo, *supra* note 11, at 286–91. The final push to criminalize Title IX consists of vocal complaints that Title IX's requirement of procedural equality violates accused students' due process rights. Procedural equality means that all parties to a proceeding get equal rights within the rules that govern the proceeding. *Id.* at 286–87. This requirement starkly contrasts with the criminal justice system, mainly because survivors are not parties to criminal proceedings. In criminal court, survivors are merely witnesses, and the prosecutor represents the state; the survivor often has no independent legal representation, whereas defendants have their own lawyer. In Title IX sexual harassment proceedings, survivors are parties with equal rights to be present in the entire proceeding, to present evidence, and to appeal. *Id.*

⁴⁰ See Nancy Chi Cantalupo & John Villasenor, *Is a Higher Standard Needed for Campus Sexual Assault Cases?*, N.Y. TIMES, Jan. 4, 2017, <https://www.nytimes.com/roomfordebate/2017/01/04/is-a-higher-standard-needed-for-campus-sexual-assault-cases> [<https://perma.cc/RNM8-EGNH>].

⁴¹ For discussion of how procedural choices lead to different balances between wrongful convictions and wrongful acquittals, see Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 702–04 (2014) (for the proposition that the adversarial system produces wrongful conviction); David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1688 (2009) (for the proposition that the American criminal justice system may benefit from the use of more inquisitorial procedures).

their education elsewhere.⁴² However, the consequences of a wrongful failure to sanction are equally serious for the student victim, as research has confirmed that a high number of student victims transfer schools or drop out entirely⁴³ to avoid an accused student who remains on campus. One student survivor reported submitting fourteen transfer applications to other colleges before finally being accepted to one.⁴⁴

Efforts to criminalize Title IX rely on the perceived unbalanced stakes of victim and accused in criminal proceedings. When the students' stakes in campus sexual harassment proceedings are properly understood as equal, it becomes clear that the preponderance of the evidence standard is the only appropriate evidentiary standard, compared to requiring harassment victims to show "clear and convincing evidence" that their reports are true and accurate. This latter standard signals to victims that we are so skeptical of the truth of their accounts that we have to be *clearly convinced* of that truth before we will believe it. In contrast, the preponderance standard gives equal presumptions of truth telling to both parties and does not signal skepticism about either party's account.⁴⁵

Just as efforts to criminalize the standard of proof incorrectly import assumptions about the stakes of victims and defendants in the criminal sys-

⁴² The press has covered several instances of students who were suspended or expelled due to being found responsible for severe sexual harassment and who then transferred to other schools to continue their college educations. *See, e.g.*, Tyler Kingkade, *Brandon Austin, Twice Accused of Sexual Assault, Is Recruited by a New College*, HUFFINGTON POST (July 28, 2014), http://www.huffingtonpost.com/2014/07/28/brandon-austin-northwest-florida_n_5627238.html [https://perma.cc/HF39-ZZCP] (discussing a college basketball player who was suspended, along with a teammate, for sexual assault at Providence College, then transferred to the University of Oregon, where he was suspended again with two other teammates for another joint sexual assault, and finally went on to attend and play basketball at a third school, Northwest Florida State College); Todd South, *Jury Finds Sewanee and Student at Fault; Awards Student \$26,500*, CHATTANOOGA TIMES FREE PRESS, Sept. 3, 2011, <http://www.timesfreepress.com/news/news/story/2011/sep/03/jury-finds-sewanee-and-student-fault-awards-50000-/58021/> [https://perma.cc/67SB-NVS3] (noting that a student expelled from University of the South for sexually assaulting a classmate has "continued his education at another college"); James Taranto, *An Education in College Justice*, WALL ST. J., Dec 7, 2013, <http://www.wsj.com/articles/SB10001424052702303615304579157900127017212> [https://perma.cc/GDB8-S5T7] (noting that a student expelled from Auburn University after being found responsible for sexual harassment had transferred to University of South Carolina Upstate and was expected to graduate in May). In addition, the few efforts to gather less anecdotal evidence have found that schools expel students only in a minority, sometimes an extreme minority, of cases. *See* Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFINGTON POST (Sept. 29, 2014), https://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html [https://perma.cc/QF5H-DZEU]; THE HUNTING GROUND, *supra* note 9 (detailing numerous cases in which students accused of sexual assault, including students found responsible, were not expelled).

⁴³ *See* Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. 2106, 2109–10 (2016).

⁴⁴ *See* IT HAPPENED HERE, at 1:13:16 (Neponsit Pictures 2014).

⁴⁵ For further argumentation on why the preponderance standard is the correct standard for Title IX cases, see BAKER ET AL., *supra* note 11, at 4–12.

tem into Title IX investigations, the narrative regarding race and campus sexual harassment imports circumstances from the criminal justice system, seemingly without much attention to the accuracy of such analogies. Of particular relevance to this Article is an analogy between the wave of accusations of sexual harassment on college campuses and a deeply familiar and stomach-turning episode in the history of the American criminal justice system: white women falsely accusing black men of rape or sexual assault, resulting in the lynching of those men.

For instance, in an article about campus sexual assault, Professor Janet Halley stated:

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. . . . Case after Harvard case that has come to my attention, including several in which I have played some advocacy or adjudication role, has involved black male respondents⁴⁶

If Professor Halley's analogy were supported by evidence that recent campus sexual harassment cases are new white-supremacy-motivated vendettas, there would indeed be cause for grave concern. However, the evidence actually points in a different direction: that a disproportionate number of campus sexual harassment victims are likely women and girls of color.⁴⁷

To be clear, both of these phenomena could be present simultaneously: women and girls of color could be disproportionately targeted for sexual harassment, and men and boys of color could be disproportionately disciplined for sexual harassment. If so, they are both equally distressing and equally deserving of attention and intervention.⁴⁸ However, if we ignore the fact that these problems do not get equal attention and intervention, we could find ourselves adopting interventions that are damaging rather than helpful. Indeed, in an actual Harvard case at the backdrop of the aforementioned article by Professor Halley, and in which Professor Halley and a group of other Harvard Law professors issued a press release expressing support for the African American male accused student,⁴⁹ the student victim and accuser was not a white woman—she was an African American woman classmate of

⁴⁶ Halley, *supra* note 34, at 106–08 (citations omitted).

⁴⁷ See *infra* Parts III and IV.

⁴⁸ It is for this precise reason that this Article discusses solutions that would address both of these potential problems. See *infra* Part V.

⁴⁹ See Cara Buckley, *Professors Dispute Depiction of Harvard Case in Rape Documentary*, N.Y. TIMES, Nov. 13, 2015, <https://www.nytimes.com/2015/11/14/movies/professors-dispute-depiction-of-harvard-case-in-rape-documentary.html> [https://perma.cc/6W25-S3YQ].

the accused student.⁵⁰ Nevertheless, women of color are never mentioned in Professor Halley's article.

Professor Halley's failure to mention women of color is just one example of the erasure of women students of color in the narrative regarding campus sexual harassment and race, but it helpfully demonstrates how the criminalization of Title IX sexual harassment links women of color's invisibility in the campus context with their invisibility in the criminal justice system. That is, to the extent that black men are disproportionately criminally charged, convicted, and/or harshly sentenced, studies have shown that the race of the victim is as relevant as the race of the accused. For instance, a 2003 study involving a weighted sample of 41,151 cases from the seventy-five most populous U.S. counties adjudicated between 1990-1996 found that "African-Americans and Hispanics arrested for sexual assault are significantly less likely to be found guilty and receive significantly fewer months of incarceration compared to Whites arrested for sexual assault."⁵¹ Thus, this study shows that defendants of color who were accused of what the research establishes as the primarily *intra*-racial crime of sexual assault were treated more *leniently* than white defendants, but defendants of color who were accused of primarily *inter*-racial crimes were treated more *harshly*.⁵² As such, this study echoes the conclusions of much research on the death penalty, which has likewise found that the race of the victim is a key factor in whether defendants are sentenced to death.⁵³

B. Racialized Sex Stereotyping/Sexualized Racial Stereotyping

One likely cause of more lenient treatment of defendants of color in intra-racial criminal sexual assault cases, but harsher treatment in inter-racial criminal cases, is the second anti-intersectional factor creating the dominant narrative: racialized sex stereotyping, directed at women students of color and African American men students. Racialized sex stereotyping of these two groups in the dominant narrative has arguably operated not only to render women students of color invisible but also to use harmful stereotypes of African American men in a way that primarily benefits white or otherwise privileged men students.

⁵⁰ Kamilah Willingham, *To the Harvard Law 19: Do Better*, MEDIUM (Mar. 24, 2016), <https://medium.com/@kamily/to-the-harvard-law-19-do-better-1353794288f2> [<https://perma.cc/55PD-QMB4>].

⁵¹ See Christopher D. Maxwell et al., *The Impact of Race on the Adjudication of Sexual Assault and Other Violent Crimes*, 31 J. CRIM. JUST. 523, 533 (2003).

⁵² *Id.* at 526–27, 533–34; see also I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1370 (2010) (“[T]he vast majority of rapes involving white victims are intraracial.”).

⁵³ See generally *Race and the Death Penalty*, DEATH PENALTY INFORMATION CENTER (2018), <https://deathpenaltyinfo.org/race-and-death-penalty> [<https://perma.cc/L5J8-GWKW>].

Regarding women of color generally, each subgroup of women of color can point to intersectional stereotyping of their group as prostitutes or promiscuous.⁵⁴ Such stereotypes mean that women of color are the least likely to be seen as true sexual harassment victims. Indeed, the stereotype that women of color are “unchaste” may negate the very possibility that women of color could be victims of sexual harassment at all.

Women *students* of color are hardly free of such stereotypes. For instance, in a powerful article, Professor Sumi K. Cho quoted from a letter sent to a Japanese woman student by a faculty member who was alleged to have sexually harassed multiple Japanese women students:

I’ll get right to the point, since the objective is to give you, in writing, a clear description of what I desire. . . . Shave between your legs, with an electric razor, and then a hand razor to ensure it is very smooth. . . .

I want to take you out to an underground nightclub . . . like this, to enjoy your presence, envious eyes, to touch you in public. . . . You will obey me and refuse me nothing. . . . I was dreaming of your possible Tokyo persona since I met you. I hope I can experience it now, the beauty and eroticism.⁵⁵

A different Japanese student reported that this professor told her that he “hangs around campus looking for Japanese girls . . . [and] that he liked [them] because they were easy to have sex with and because they were submissive.”⁵⁶

Another author, Aiko Fukuchi, shares a distressingly similar story of intersectional harassment where the connection between the harassers’ stereotyping and their inability to see Ms. Fukuchi as a victim is clear.⁵⁷ Ms. Fukuchi recounts that members “in one specific fraternity” committed two sexual assaults and one rape against her before her first two months of college were complete.⁵⁸ During these months, she remembers fraternity members pushing her to dress for Halloween as a “Geisha,” and substituting “Geisha Doll” for her name while victimizing her.⁵⁹ She also states that one harasser told her, as a defense for rape, that “it was ‘just too hard to pass up

⁵⁴ For further discussion, see *infra* Parts III and IV.

⁵⁵ Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, in *CRITICAL RACE FEMINISM: A READER* 349, 349 (Adrienne Katherine Wing ed., 2d ed. 2003).

⁵⁶ *Id.* at 350.

⁵⁷ Aiko Fukuchi, *Not Your ‘Geisha Doll:’ We Need to Talk About & Not Around Racist Sexual Violence*, *THE BODY IS NOT AN APOLOGY* (Sept. 8, 2018), <https://thebodyisnotanapology.com/magazine/i-am-not-your-geisha-doll-we-need-to-talk-about-not-around-racist-sexual-violence/> [https://perma.cc/MK9J-KWNR].

⁵⁸ *Id.*

⁵⁹ *Id.* Geishas are often popularly (if mistakenly) believed to be Japanese prostitutes. See Charlea Jeffs, *Are Geisha Prostitutes? Geisha History and the Prostitution Myth*, *INSIDEJAPAN TOURS* (Jan. 5, 2018), <https://www.insidejapantours.com/blog/2018/01/05/are-geisha-prostitutes/> [https://perma.cc/GUD4-3K6N].

the *opportunity* to have his own little Asian girl, even if it was only for a night.”⁶⁰

These anecdotes are unlikely to be anomalous. Indeed, Dr. Jessica Harris notes in her volume, *Intersections of Identity and Sexual Violence on Campus: Centering Minoritized Students' Experiences*, co-edited with Dr. Chris Linder, that “[t]he racially charged stereotypical understandings of sexual violence for women on college campuses have seeped into the very fabric of education.”⁶¹ Other researchers who studied African American women students’ experiences of sexual harassment found significant rates of “sexual imposition (19%), particularly sexual touching,” as well as “sexual attention based solely on racial stereotypes.”⁶² The presence of such racialized sex stereotyping of women students of color makes it hardly surprising that women students of color are invisible in the anti-intersectional dominant narrative. If women students of color are stereotyped in a manner such that they are not seen as victims at all, the dominant narrative simply will not include them.

For the other group of racially stereotyped students, African American men, the connection between stereotyping and the anti-intersectional narrative is harder to see but nevertheless present. As Professor Deborah Brake points out, aspects of the conversation about race and campus peer sexual harassment have assumed, with no actual evidence, that most students accused of sexual violence against classmates are men of color.⁶³ These assumptions are aided by the media attention, with accompanying photos, that often results when college athletes in high-profile sports, such as football and basketball, are accused.⁶⁴ Such media coverage is rarely given to other, non-athlete accused students’ cases,⁶⁵ and journalistic ethics affirmatively prevent the press from reporting most victims’ identities or using their photos.⁶⁶ Indeed, in the majority of campus cases, which are not public, the racial identities of both the accused students and the student victims are not provided, so they are assumed to be white by default.⁶⁷ Thus, discussions of campus sexual violence tend to omit race in the discussions of accusers and “pit[] a racially diverse group of accused students, with black men featured

⁶⁰ Fukuchi, *supra* note 57.

⁶¹ Harris, *supra* note 18, at 50.

⁶² Darlene C. DeFour et al., *The Interface of Race, Sex, Sexual Orientation, and Ethnicity in Understanding Sexual Harassment*, in *ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A HANDBOOK OF CULTURAL, SOCIAL SCIENCE, MANAGEMENT, AND LEGAL PERSPECTIVES* 31, 34 (Michele Paludi & Carmen A. Paludi, Jr. eds., 2003).

⁶³ See Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109, 144–45 (2017).

⁶⁴ See *id.* at 146.

⁶⁵ See *id.*

⁶⁶ See Nigel Duara, *Is it Ever Okay to Name Victims?*, COLUM. JOURNALISM REV., Oct. 24, 2014, http://archives.cjr.org/minority_reports/domestic_violence_reporting.php [<https://perma.cc/CDE8-6HZF>].

⁶⁷ See *Racialization*, CARED: CALGARY ANTI-RACISM EDUCATION (2018), <http://www.ucalgary.ca/cared/racialization> [<https://perma.cc/4F2Y-YRTM>].

prominently among them, against a race-less (and implicitly white) group of accusers.”⁶⁸

Moreover, prior to the Obama administration’s increased enforcement of Title IX, when most legal action related to campus peer sexual harassment focused on accused black male athletes, there was little protest over the enforcement of Title IX.⁶⁹ It was not until the Obama administration started requiring schools to take action even in cases where the accused student was “the average college boy” at “Ivy League schools and/or elite colleges, such as Columbia, Yale, Harvard, Princeton, Duke, the University of Virginia, Stanford, and Dartmouth” (all of which have been recently investigated or are still under investigation by OCR), that a concerted backlash to OCR’s Title IX enforcement began.⁷⁰ In other words, once the public image of college men accused of sexual violence did not fit with racialized sexual stereotypes of black men as rapists,⁷¹ “public sympathy for the college men accused of sexual assault [grew, along with] . . . concerns about unfounded accusations.”⁷² Thus, much of the dominant narrative about race and campus peer harassment/violence is propelled by the “politics of white privilege”⁷³ but does nothing to address a variety of intersectional race and masculinity problems faced by male student athletes of color⁷⁴ and leaves women students of color ever “invisible in the analysis even when they are complainants.”⁷⁵

Antuan M. Johnson notes similar dynamics in his Note, *Title IX Narratives, Intersectionality, and Male-Biased Conceptions of Racism*. Mr. Johnson articulates a certain opportunistic link between the anti-intersectional dominant narrative and the push to scale back OCR’s enforcement of Title IX, citing Professor Kimberlé Crenshaw when he says that “[t]here is a history of race being used as a political tool to shut down conversations

⁶⁸ Brake, *supra* note 63, at 138; *see also* Jessica C. Harris & Chris Linder, *Preface to INTERSECTIONS OF IDENTITY*, *supra* note 18, at xiii–xiv (noting media focus on “stereotypically pretty, apparently white, cisgender, heterosexual women” victims and “Black male athletes as perpetrators,” which “allows the dominant perpetrator—an economically privileged, straight, cisgender white man—to continue to commit sexual violence.”).

⁶⁹ *See* Brake, *supra* note 63, at 146–47.

⁷⁰ *Id.* at 147–48.

⁷¹ *See generally* Angela Davis, *Rape, Racism and the Myth of the Black Rapist*, in *WOMEN, RACE & CLASS* 172, 199–201 (1983).

⁷² Brake, *supra* note 63, at 148.

⁷³ *Id.* at 146; *see also* Johnson, *supra* note 34, at 74 (“[O]ne should ask, just as [Angela] Davis does in the criminal justice context, ‘What is the racial identity of the enormous number of anonymous rapists who remain unreported?’ Likely, these perpetrators have social power 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. This threat to the social power of white men may well explain much of the strong backlash against OCR.”).

⁷⁴ *See* Brake, *supra* note 63, 145–46.

⁷⁵ *Id.* at 137.

about sexual assault, even when it directly affects black women.”⁷⁶ Thus, taken together, these analyses show that the racialized sex stereotypes involved in the dominant narrative use African American men’s experiences of racism to primarily benefit white men who show no significant interest in combatting such racism. This narrative is at best distasteful, and at worst, it adds to the erasure of women students of color and the harm to both women of color and African American men as a whole.

C. Lack of Public Information on Campus Sexual Harassment Generally & on Race & Sexual Harassment Specifically

The third factor erasing women students of color from the dominant narrative of sexual harassment is the lack of actual data about campus sexual harassment generally and about individual cases, including the racial demographics of the students involved in these cases. Campus sexual harassment is massively underreported, and even when it is reported, it is often investigated and resolved confidentially, leaving little to no public record of the report. As a result, there is very little public information about campus investigations of sexual harassment complaints, including demographic information about the accused students and the student victims in these cases, which makes it harder for social scientists to conduct empirical research about harassment.

Accordingly, there is relatively little published research addressing the topic of race and sexual harassment in education, despite the attention paid to peer sexual harassment, in particular, since President Obama’s White House Task Force to Protect Students from Sexual Assault (“Task Force”) was launched in 2014.⁷⁷ The Task Force’s recommendation that colleges and universities conduct what it characterized as “campus climate surveys” and what I had previously described as “victimization surveys”⁷⁸ resulted in three major, multiple-institution, empirical studies of peer sexual harassment. However, none of these studies shed much light on whether there are racial disparities of victims in reports of campus sexual harassment. The studies collect even less self- or victim-reported information about college harassers, including no racial demographic information.

⁷⁶ Johnson, *supra* note 34, at 59; *see also id.* at 74 (“[In the narratives about race and campus harassment/violence,] 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.”).

⁷⁷ WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE 2 (2014), http://www.changingourcampus.org/resources/not-alone/WH_Task_Force_First_Report.pdf [<https://perma.cc/B2WM-GFY6>].

⁷⁸ *See* Nancy Chi Cantalupo, *Institution-Specific Victimization Surveys: Addressing Legal and Practical Disincentives to Gender-Based Violence Reporting on College Campuses*, 15 TRAUMA, VIOLENCE & ABUSE 227, 234 (2014).

The first such study was structured as a telephone poll that contacted a national, random sample of 1,053 college undergraduates and appears not to have collected racial demographic information.⁷⁹ The second study collected information from the students of nine schools and primarily measured three categories of violence—sexual assault, rape, and sexual battery⁸⁰—but only reports racial demographic information for “sexual assault.”⁸¹ At the majority of schools, the prevalence rates of sexual assault were not statistically distinguishable between non-Hispanic white women and “other” women, and at two schools the prevalence rates were higher for non-Hispanic white women than for “other” women.⁸² The final study was conducted by the Association of American Universities (AAU) at twenty-seven institutions, and measured incidents involving two types of sexual contact achieved using four tactics, as well as “sexual harassment, stalking, and intimate partner violence.”⁸³ However, the AAU does not report data regarding race and ethnicity either granularly (despite the granular survey design) or consistently,⁸⁴ limiting its discussion to the statement that “[w]ith respect to race, for most forms of victimization, Asians are less likely to report being a victim.”⁸⁵ This statement downplays the data showing that for each of the categories presented in the report, there is at least one non-white racial group in all three gender categories experiencing higher rates of victimization than white students do.⁸⁶

⁷⁹ See Nick Anderson & Scott Clement, *1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015), https://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/?utm_term=.fee7bd1b7921 [https://perma.cc/ZH9M-57EG].

⁸⁰ See CHRISTOPHER KREBS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, *CAMPUS CLIMATE SURVEY VALIDATION STUDY FINAL TECHNICAL REPORT 62* (2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf> [https://perma.cc/XHE8-QFY4]. The study also measured sexual harassment, intimate partner violence, and coerced sexual contact. See *id.* at 43.

⁸¹ *Id.* at 77–78.

⁸² See *id.*

⁸³ See DAVID CANTOR ET AL., WESTAT, *REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 1–2* (2017), <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf> [https://perma.cc/MUW2-3AUD].

⁸⁴ For instance, the survey reports racial (and other) demographic information in its results for “nonconsensual sexual contact,” which merges two types of sexual contact. However, the four tactics are not clearly delineated. Physical force and incapacitation (presumably corresponding to “drugs and alcohol” in the design description) are merged into one category. Absence of affirmative consent is in its own category. The results by demographic breakdown vary by category. The demographics of nonconsensual sexual contact by coercion are not reported. For nonconsensual sexual contact, undergraduates and graduates are combined into one reported number for each of the Female, Male, and TGQN (transgender woman, transgender man, genderqueer, gender non-conforming, questioning, and not listed) students. For sexual harassment, stalking, and intimate partner violence, undergraduates and graduate students are reported separately for each of the genders. See *id.* at 102–09.

⁸⁵ See *id.* at 35.

⁸⁶ See *id.* at 102–09.

For these reasons, in a recently published study in the *Utah Law Review*, William C. Kidder and I use the metaphor of the tip of an iceberg to show how much we don't know about campus sexual harassment.⁸⁷ In that study, we made a first attempt to begin filling this gap, collecting and analyzing just over 300 sexual harassment cases where faculty were accused by students of sexual harassment, including 220 media cases, 57 victim lawsuits or resolutions of investigations by the U.S. Departments of Education and Justice under Title IX, and 25 tenured faculty termination lawsuits. However, when I returned to that data to determine additional characteristics, including parties' demographic information, the area above the waterline on the iceberg shrank even further. For example, of the aforementioned datasets, the media dataset drops out of view because journalistic ethics generally frown upon revealing too much identifying information about a victim⁸⁸ or simply because the race or ethnicity of the parties is not seen as relevant.

Similarly, in the faculty termination dataset, information about the race and ethnicity of the parties is almost entirely suppressed. Because the faculty termination cases are brought by a faculty member terminated for sexual harassment, that faculty member likely will de-emphasize any facts related to the underlying harassment complaint, including as little information about the victim(s) as possible. Moreover, because most of the court opinions in these cases decide motions to dismiss or summary judgment motions, the court will adopt the plaintiff faculty member's facts and the court opinion will likewise de-emphasize facts regarding the underlying harassment accusations.

Finally, of the original datasets, even the OCR investigations of Title IX complaints do not provide enough information to consistently determine most of the parties' race and ethnicity, because OCR redacts complainant names from the resolution letters released to the public and will generally only mention race and ethnicity if the complaint alleges both violations under Title IX and under Title VI of the 1964 Civil Rights Act, which prohibits race discrimination in education. In the end, only one source of data from my *Utah Law Review* study provided any insight at all into the demographics of sexual harassment in education.⁸⁹

Although the data gathered for my *Utah Law Review* study was not that helpful in shedding light on the intersectional questions explored here, the process of conducting that research taught me a lesson that is quite relevant to the dominant narrative about race and sexual harassment. That study ultimately demonstrated that research gaps regarding the scope and dynamics of sexual harassment allow assumptions about sexual harassment to settle regardless of the accuracy of those assumptions. Specifically, the research led

⁸⁷ Cantalupo & Kidder, *supra* note 33, at 683–89.

⁸⁸ See Duara, *supra* note 66.

⁸⁹ See *infra* Part III.

to a number of conclusions that contradict another dominant narrative about the nature of sexual harassment in education: that students accuse faculty of sexual harassment because the students are offended by verbal statements made by faculty that are protected by academic freedom.⁹⁰ In contrast to this settled assumption about faculty sexual harassment, the 300+ cases demonstrated (1) that the majority of students who report sexual harassment describe harassment involving *physical* contact, not purely verbal behavior, and (2) that physical contact is not primarily the kind that is affectionate or accidental and merely mistaken for sexual, but involves clearly sexual touching ranging from groping to acts fitting the standard statutory definitions of criminal rape and relationship violence.⁹¹

Thus, my co-authored study shows that crafting narratives about the nature of sexual harassment in education without actual information or data on which to base that narrative can lead to highly inaccurate narratives. Therefore, gathering the research and information that already exists—as partial as it may be—is a critical first step to interrogating the dominant narrative with which this Article is concerned. The following sections undertake precisely that task, paying particular attention to intersectional research and analyses focusing on the experiences of women of color with sexual harassment.

The anti-civil rights bent of the efforts to criminalize Title IX, the racialized sex stereotyping of both women students of color and African American men students, and the lack of information and data about the real demographics of sexual harassment in education have each contributed to the dominant narrative’s anti-intersectional character. A critical look at that narrative requires an intersectional and multidimensional lens, which is necessary to avoid what Mr. Johnson characterizes in the peer sexual harassment context as 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.”⁹² By including an intersectional analysis in the scholarly conversation about campus sexual harassment, we can better craft a “racially just approach” that “embraces . . . intersectional differences to build a stronger policy for survivors.”⁹³ Therefore, the next Parts will discuss both the scholarship that uses logical reasoning to set out a hypothesis that women of color are likely to face more sexual harassment, followed by the empirical evidence confirming that hy-

⁹⁰ Cantalupo & Kidder, *supra* note 33 at 676–79; *see also* Frederick Schauer, *The Speech-ing of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 347, 354 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Mary Anne Franks, *Beyond ‘Free Speech for the White Man’: Feminism and the First Amendment*, in *RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE* (Cynthia Bowman & Robin West eds., forthcoming Jan. 2019) (manuscript at 23–24), <https://ssrn.com/abstract=3206392> [<https://perma.cc/ECV9-U5P3>].

⁹¹ Cantalupo & Kidder, *supra* note 33, at 720–22.

⁹² *See* Johnson, *supra* note 34, at 74.

⁹³ *Id.* at 69.

pothesis's accuracy. The empirical evidence is split between direct empirical data that I draw from my co-authored *Utah Law Review* study and indirect evidence that I have collected demonstrating the disproportionate targeting of women of color for sexual harassment on campus, in the workplace, and in the criminal justice system.

III. ARE WOMEN STUDENTS OF COLOR AT PARTICULAR RISK OF SEXUAL HARASSMENT?: THE LOGIC STORY

Collectively, the research discussed in this Part sets out a hypothesis that a variety of causes and complicating factors lead to women of color's heightened vulnerability to sexual harassment. In other words, this research focuses on the *structural* reasons why women of color are *more likely* to face this harassment.

Many of the studies that have addressed the reasons for disproportionate targeting of women of color have analyzed this question with regard to workplace sexual harassment, an analysis applicable to sexual harassment of students. In addition, studies of women of color's status vis-à-vis the criminal justice system play a significant role in explaining women of color's heightened vulnerability to sexual harassment in general. Moreover, the power of the criminal-justice-system-related factors for women students of color is increased by the push to criminalize Title IX discussed in Part II. Finally, as detailed here, being a student in the institutional context of higher education may intensify the structural dynamics observed in the workplace and criminal justice settings.

This Part will accordingly collect the reasons advanced for disproportionate targeting of women of color by those studying the workplace and the criminal justice system and connect those analyses to the education context. Professor Maria Ontiveros' *Three Perspectives on Workplace Sexual Harassment of Women of Color* provides a useful way to organize the structural legal analyses of the factors explaining why women of color are more vulnerable to sexual harassment in the workplace and elsewhere.⁹⁴ The first perspective of "The Harasser" focuses on the factors that lead harassers and potential harassers to see women of color as more vulnerable and therefore "better" targets of harassment. The perspectives of "Women of Color as Members of the Minority Community" deal with the pressures on women of color not to disclose, report, or seek redress for harassment, which increases their vulnerability. The third perspective of "The Legal System" is concerned with how women of color's overall status in society, structured intersectionally by racism and sexism, comes to be reflected in the legal system, particularly in court processes, which increases women of color's vulnerability further. While separating these three perspectives in this manner is use-

⁹⁴ See Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 818 (1993).

ful, the remainder of this Part will also show how these perspectives interact and influence each other in important ways, although often not with equal strength.

A. *The Harasser's Perspective*

Professor Ontiveros begins with the structural factors that are likely to influence some individuals to harass and to select certain other individuals for that harassment. For instance, she explains that harassers who target women of color are likely to be a larger and more diverse group than harassers who target white women, because racial power dynamics are likely to deter most harassers of color from targeting white women.⁹⁵ The analyses that focus on the Harasser's Perspective show that women of color in general and women students of color specifically are more likely to face harmful stereotypes and to be perceived by potential harassers as more vulnerable targets, and that these factors increase the likelihood they will be sexually harassed.

Sexual harassment and sex discrimination scholars have documented a long list of racialized sexual stereotypes/sexualized racial stereotypes for women of color. African American women are stereotyped as “Jezebels,”⁹⁶ Latinas as “hot-blooded,”⁹⁷ Asian Pacific Islander and Asian Pacific American (API/APA) women as “submissive, and naturally erotic,”⁹⁸ multiracial women as “tragic and vulnerable” and historically “product[s] of sexual and racial domination,”⁹⁹ and American Indian/Native American women as “sexual punching bag(s)”¹⁰⁰ who are “sexually violable” as a “tool of war” and colonization.¹⁰¹

Despite differing in their details, each stereotype boils down to the same message: women of color are sexually available, promiscuous, or actually prostitutes, and therefore will welcome any sexual attention and conduct directed at them. Professor Tanya Katerí Hernández has suggested that such stereotypes have been promoted by the global sex tourism industry; she methodically shows the similarities between the racialized sex stereotyping that occurs in workplace sexual harassment directed at women of color *domesti-*

⁹⁵ See *id.* at 818–19.

⁹⁶ Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates Over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185, 214 (2014); see also Harris, *supra* note 18, at 49.

⁹⁷ Ontiveros, *supra* note 94, at 820; see also Darlene C. DeFour, *The Interface of Racism and Sexism on College Campuses*, in SEXUAL HARASSMENT ON COLLEGE CAMPUSES: ABUSING THE IVORY POWER 49, 52 (Michele A. Paludi ed., 1996).

⁹⁸ Ontiveros, *supra* note 94, at 819. See also Harris, *supra* note 18, at 49; Ciera V. Scott et al., *The Intersections of Lived Oppression and Resilience: Sexual Violence Prevention for Women of Color on College Campuses*, in INTERSECTIONS OF IDENTITY, *supra* note 18, at 119, 125–26.

⁹⁹ Harris, *supra* note 18, at 49–50.

¹⁰⁰ See Debra Merskin, *The S-Word: Discourse, Stereotypes, and the American Indian Woman*, 21 HOW. J. COMM. 345, 353 (2010).

¹⁰¹ Harris, *supra* note 18, at 49; Scott et al., *supra* note 98, at 126.

cally and the “product” marketed and consumed *internationally* by sex tourists.¹⁰² The presence and popularity of sex tourism and the demographics of the sex workers, who come overwhelmingly from the Global South and countries whose populations are non-white, strengthen stereotypes of women of color generally as “wanton and thus the quintessential prostitute.”¹⁰³ Sources such as industry marketing materials¹⁰⁴ and quotes from sex tourists¹⁰⁵ provide empirical evidence of such stereotyping.

Professor Cho’s analysis demonstrates quite viscerally how stereotyping and the promotion of it through mechanisms like sex tourism can lead quickly to sexual harassment of women students of color. Professor Cho quotes a 1990 essay in *Gentleman’s Quarterly* entitled “Oriental Girls” that extols the “great western male fantasy”:

When you come home from another hard day on the planet, she comes into existence, removes your clothes, bathes you and walks naked on your back to relax you. . . . She’s fun, you see, and so uncomplicated. She doesn’t . . . insist on being treated like a person She’s a handy victim of love or a symbol of the rape of third world nations, a real trouper.¹⁰⁶

This nauseating quote also shows how racial and gendered stereotypes are often so intertwined that they are impossible to separate. This is one of the characteristics that identify these stereotypes as not only racist or sexist but *intersectionally* racist and sexist.¹⁰⁷

From the harasser’s perspective, stereotyping is a group construct, with the harasser directing certain conduct at an individual person because of that person’s perceived inclusion in a particular group. However, the harasser’s perspective will likely also include an individualized analysis, where the harasser selects a particular victim based on that victim’s specific vulnerabilities. The research on workplace sexual harassment has identified particular vulnerabilities more likely to affect women of color, including poverty and economic vulnerability, which make fear of retaliation for resisting advances and/or reporting unwelcome sexual conduct more acute. Other isolating factors include immigration status, especially if undocumented, and language access issues.

For instance, Latinas who are undocumented immigrants and whose undocumented status pushes them into underground domestic work in private homes experience particular economic disadvantages. Such positions often pay very low wages and involve work conditions rife with sexual harassment

¹⁰² See Tanya Katerí Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER, RACE & JUST. 183, 209–16 (2001).

¹⁰³ *Id.* at 195.

¹⁰⁴ See *id.* at 204–06.

¹⁰⁵ See *id.* at 207.

¹⁰⁶ Cho, *supra* note 55, at 351.

¹⁰⁷ See Cortina et al., *supra* note 23, at 307.

from the domestic worker's employer.¹⁰⁸ These undocumented domestic workers' extreme isolation, both from legal regulation and other workers or potential witnesses, make them even more vulnerable to abuse.¹⁰⁹

Even when Latinas' work is not underground, and subject to some regulation (if still extremely inadequate), as in the case of women farmworkers, Latinas' level of vulnerability remains extremely high. Studies note that Latina farmworkers are extremely isolated and vulnerable to sexual harassment for similar reasons as domestic workers, including extreme economic vulnerability and undocumented immigration status. Farmworkers are "among the poorest of the working poor,"¹¹⁰ and although undocumented immigrants are not necessarily a majority of women farmworkers,¹¹¹ immigration status is still potentially a major issue for a large portion of farmworkers.¹¹² Their poverty makes the fear of retaliation from employers for complaining about sexual harassment even more acute, as women farmworkers rarely make enough money to save for the future.¹¹³ Similar language access issues as experienced by domestic workers can likewise make it difficult for farmworkers to understand their legal rights and seek help in accessing them.¹¹⁴ In addition, farmworkers' ability to access assistance is impeded by the transience of their work.¹¹⁵ The requirement to move from farm to farm also interferes with farmworkers' educations¹¹⁶—a critical problem, as many women farmworkers are illiterate, creating yet another barrier to accessing services.¹¹⁷

Even though college students may seem very different from domestic or farm workers, women students of color can face similar stereotypes, as well as other comparable problems due to economic instability, transience and, if undocumented or foreign, immigration status. Higher education scholars such as Dr. Harris believe that stereotypes about sexual harassment and women on college campuses are a part of campus culture.¹¹⁸ This claim is corroborated by the professor who demands that the Japanese woman student recipient of his letter "obey" him and explicitly fantasizes about her "eroticism" and "Tokyo persona,"¹¹⁹ as well as by the fraternity students

¹⁰⁸ See Diana Vellos, *Immigrant Latina Domestic Workers and Sexual Harassment*, 5 AM. U. J. GENDER & L. 407, 420–21 (1997).

¹⁰⁹ *Id.* at 423.

¹¹⁰ Richard Kamm, *Extending the Progress of the Feminist Movement to Encompass the Rights of Migrant Farmworker Women*, 75 CHI.-KENT L. REV. 765, 768 (2000).

¹¹¹ *Id.* at 767 (noting statistics for 1994–95).

¹¹² See Maria M. Dominguez, *Sex Discrimination & Sexual Harassment in Agricultural Labor*, 6 AM. U. J. GENDER & L. 231, 257 (1997).

¹¹³ *Id.*

¹¹⁴ See Kamm, *supra* note 110, at 769; Dominguez, *supra* note 112, at 255–56.

¹¹⁵ See Kamm, *supra* note 110, at 768.

¹¹⁶ See *id.*

¹¹⁷ See Dominguez, *supra* note 112, at 256–57.

¹¹⁸ Harris, *supra* note 18, at 50; see also DeFour, *supra* note 97, at 52 (discussing factors making women students of color more vulnerable to sexual harassment, including stereotyping).

¹¹⁹ See Cho, *supra* note 55, at 349.

who Ms. Fukuchi recounts assaulted her while calling her a “Geisha Doll.”¹²⁰ Moreover, women students of color face these stereotypes off campus, as evidenced by Harvard student Nian Hu’s 2016 editorial, “Yellow Fever: The Problem with Fetishizing Asian Women,” in which she discusses the racially specific sexual street harassment she experiences and a “Tumblr blog that compiles messages from ‘creepy white guys with Asian fetishes.’”¹²¹ Although the harassers discussed in this editorial are not necessarily affiliated with the educational environment of the author, the harassers in Ms. Fukuchi’s account were student fraternity members whose conduct, though involving more severe harassment, was consistent with that described by the Harvard student.

Students not only share many of the same vulnerabilities as working women, but they also have the additional disadvantages of youth and student status, both of which involve multiple vulnerabilities. First, students are subordinate to faculty, regardless of whether the student victim is enrolled in the faculty harasser’s class or under that faculty member’s direct supervision in some way. If the student is enrolled in a harassing professor’s class or under the professor’s supervision, the professor may retaliate in a manner that could be extremely damaging to the student’s education and future employment, adding to the damage already done by the harassment itself. For graduate students, such retaliation may make it impossible for students to enter the career for which the student’s graduate program is preparing them. For undergraduate students, a second vulnerability comes from the fact that many are away from their existing networks of family and friends for the first time in their lives, and are thus isolated from people they trust and who are likely motivated to assist them.¹²² Minor students in particular may be especially vulnerable in this regard, as they are also legally dependent on parents or guardians. Third, immigrant students, documented or undocumented, can have similar immigration-status-related vulnerabilities as domestic workers and farmworkers, and non-native English speakers can find it particularly challenging to navigate the school’s bureaucracy and other

¹²⁰ Fukuchi, *supra* note 57.

¹²¹ Nian Hu, *Yellow Fever: The Problem with Fetishizing Asian Women*, HARV. CRIMSON (Feb. 4, 2016), <http://www.thecrimson.com/column/femme-fatale/article/2016/2/4/yellow-fever-fetishization> [<https://perma.cc/JJ7P-GVL2>]. Note that while the harassment to which Hu refers is not necessarily generated by students, faculty, or staff at a college or university, Hu’s article does make clear that APA women students are among the victims.

¹²² A recent example of this phenomenon can be found in the case of Dr. George Tyndall, a university health center gynecologist who is accused of abusing young, primarily Chinese women students, exploiting their isolation from their families and countries. Jennifer Medina, *‘Just the grossest thing’: Women Recall Interactions With U.S.C. Doctor*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/us/USC-gynecologist-young-women.html> [<https://perma.cc/8XTD-CS2K>].

necessary systems.¹²³ Fourth but not necessarily finally, students are economically vulnerable even when they can depend on family support (and many cannot). Many students are without full-time paid employment while in school, are taking on large debts to attend school,¹²⁴ and/or are first-generation college students from low-income families.¹²⁵ Significant gender and racial disparities exist in the larger amounts of debt most women students and students of color must pay off in comparison to men students and white students, respectively.¹²⁶ Similarly, compared to men students and white students, more women students and students of color are first-generation college students, who are significantly more likely to be low-income than students whose parents had at least some experience with college.¹²⁷

B. *Women of Color as Members of the Minority Community*

Returning to Professor Ontiveros' structure, the second perspective is that of the victims, who bring perspectives to the workplace about sexual behavior, as well as what to do about that behavior when it is unwelcome—lessons learned from their families, communities, and other cultural forces. Cultural factors deterring women victims of color from reporting include: submissiveness in response to machismo and male authority;¹²⁸ taboos on discussing sexual matters;¹²⁹ concerns about a community attitude toward blaming victims for the abuse;¹³⁰ and impulses to deny harassment when the harasser is a member of the same community of color, so as not to undermine the cohesion and reputation of that community.¹³¹ Moreover, cultural

¹²³ See, e.g., Liu v. Striuli, 36 F. Supp. 2d 452, 458–61 (D.R.I. 1999) (denying summary judgment to a faculty defendant who allegedly told a Taiwanese student plaintiff he would get her deported if she did not have sex with him).

¹²⁴ See, e.g., Bill Fay, *Students & Debt*, DEBT.ORG, <https://www.debt.org/students> [<https://perma.cc/KH86-AU4E>]; see also DeFour, *supra* note 97, at 52 (discussing factors making women students of color more vulnerable to sexual harassment, including economic factors such as dependence on financial aid and scholarships).

¹²⁵ See, e.g., VICTOR B. SAENZ, ET AL., HIGHER EDUC. RESEARCH INST., UCLA, *FIRST IN MY FAMILY: A PROFILE OF FIRST-GENERATION COLLEGE STUDENTS AT FOUR-YEAR INSTITUTIONS SINCE 1971* at 3, 22 (2007), <https://www.heri.ucla.edu/PDFs/pubs/TFS/Special/Monographs/FirstInMyFamily.pdf> [<https://perma.cc/9G6Y-F85C>].

¹²⁶ See KEVIN MILLER, AMERICAN ASS'N OF UNIV. WOMEN, *DEEPER IN DEBT: WOMEN AND STUDENT LOANS* 16, 18 (2017), https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=deeper-in-debt [<https://perma.cc/8XEM-LRDY>]; JUDITH SCOTT-CLAYTON & JING LI, *BROOKINGS BLACK-WHITE DISPARITY IN STUDENT LOAN DEBT MORE THAN TRIPLES AFTER GRADUATION* 2–3 (2016), https://www.brookings.edu/wp-content/uploads/2016/10/es_20161020_scott-clayton_evidence_speaks.pdf [<https://perma.cc/X2QL-PQWU>].

¹²⁷ See Saenz et al., *supra* note 125, at 8, 12, 22.

¹²⁸ See Ontiveros, *supra* note 94, at 821; Kamm, *supra* note 110, at 770; Dominguez, *supra* note 112, at 235.

¹²⁹ See Ontiveros, *supra* note 94, at 823.

¹³⁰ *Id.* at 821–22.

¹³¹ *Id.* at 823.

norms may cause victims not to identify sexual harassment¹³² or recognize it as a violation of their legal rights.¹³³

These problems are particularly noted among Latina and APA/API women workers.¹³⁴ For instance, Professor Ontiveros discusses a case in which a Japanese American woman's mother advised her to remain in a sexually harassing workplace because of her cultural background and lack of understanding about sexual harassment law.¹³⁵ Another author suggests that the internalization of racialized sexual stereotyping makes many Latinas more vulnerable to sexual harassment in the workplace.¹³⁶ Stereotypes of hypersexualized Latinas have been exacerbated by the imagery used to promote the movies and music of Latina celebrities (e.g., Jennifer Lopez and Shakira).¹³⁷ To the extent that Latinas internalize those stereotypes, they may fail to recognize sexual harassment in the workplace and thus will not take action to protect their rights under workplace anti-discrimination laws.¹³⁸

Research on domestic workers and farmworkers note similar factors discouraging Latinas from seeking help when sexually harassed. These factors include "learned cultural values, including self-blame and passivity," as well as "different views of sexuality, which may not include the concept of sexual harassment."¹³⁹ Similarly, many women farmworkers are taught from childhood not to speak out,¹⁴⁰ especially to men who are strangers,¹⁴¹ and are socialized into a certain gender-based submissiveness.¹⁴² Even when women farmworkers recognize sexual harassment as a general problem, few women farmworkers reported *themselves* as sexual harassment victims, especially if they suffered less severe forms of harassment.¹⁴³

The situation of women students of color shares many similarities with that of women workers of color, but students, especially when they are also young, likely face even greater cultural challenges, especially if they are harassed by a faculty member or other trusted older adult. For instance, students who are minors, as well as students who are still very close in age to minors, are likely to be even more obedient to authority than older women, because they are still under, or have just aged out of being under, their parents' or guardians' direct authority. In addition, because teachers and school officials were the main other adult authorities in students' pre-college lives,

¹³² See Waleska Suero, "We Don't Think of it as Sexual Harassment": *The Intersection of Gender & Ethnicity on Latinas' Workplace Sexual Harassment Claims*, 33 *CHICANA/O-LATINA/O L. REV.* 129, 145–47 (2015).

¹³³ See Ontiveros, *supra* note 94, at 822–23.

¹³⁴ See *id.* at 821–23.

¹³⁵ *Id.* at 822.

¹³⁶ Suero, *supra* note 132, at 145–47.

¹³⁷ See *id.* at 143, 146.

¹³⁸ See *id.* at 147.

¹³⁹ Vellos, *supra* note 108, at 425–26.

¹⁴⁰ See Kamm, *supra* note 110, at 766.

¹⁴¹ See Dominguez, *supra* note 112, at 235.

¹⁴² *Id.*

¹⁴³ *Id.* at 255.

students are likely to be extra obedient to faculty, even if a faculty member is harassing them. When a woman student of color's community also values and teaches students to be highly deferential to authority, the additive effect may make it nearly impossible for a woman student of color to protest a faculty member's harassment. This dynamic may also exist for other campus employees in similar positions of authority, such as doctors.¹⁴⁴

The pressures on women workers of color to deny harassment when the harasser is a member of the same community, so as not to undermine the cohesion and reputation of that community, may also influence women students of color not to report harassment by either faculty or peers. In the case of faculty harassment, students of color may feel protective of faculty of color, especially when there are few professors of color at the school. Under such circumstances, if a professor of color harasses a woman student of color, the student may be more likely to opt not to file a complaint, for fear that doing so will get the professor fired. The victim may affirmatively not want this result or may anticipate retaliation from the community for complaining. This protectiveness is particularly problematic because there is a greater likelihood that harassers of color will harass women of color rather than white women because of the greater risks entailed in harassing white women.¹⁴⁵

Specific cultural beliefs may make some women students of color even more vulnerable. For instance, in Chinese culture, teachers are admired to the point of reverence,¹⁴⁶ and such veneration could act as a significant barrier to many student victims recognizing unwelcome sexual conduct as a violation of their legal rights, especially if such conduct came from such a highly respected person. For example, Dr. Seo-Young Chu wrote a powerful piece, part essay and part poem, in which she discloses that her faculty advisor, now deceased, sexually harassed and raped her when she was a twenty-two-year-old Ph.D. student who had been recently diagnosed as bipolar after a suicide attempt.¹⁴⁷ Dr. Chu refers to the advisor, Jay Fliegelman, and accuses him of taking advantage of both her "Confucian worship of profes-

¹⁴⁴ See, e.g., Medina, *supra* note 122.

¹⁴⁵ See Ontiveros, *supra* note 94, at 818–19; see also Anna-Maria Marshall, *Closing the Gaps: Plaintiffs in Pivotal Sexual Harassment Cases*, 23 L. & SOC. INQUIRY 761, 782 (1998).

¹⁴⁶ See Peter Dolton, *Why Do Some Countries Respect Their Teachers More Than Others?*, GUARDIAN (Oct. 3, 2013), <https://www.theguardian.com/teacher-network/teacher-blog/2013/oct/03/teacher-respect-status-global-survey> [<https://perma.cc/HN56-KQKK>] ("In European countries, between 10 and 25% of people tended to think that pupils respected teachers—compared to 75% in China. Fewer than 20% of Germans would encourage their child to become a teacher compared to nearly 50% of Chinese people. Out of all the countries surveyed, only Chinese people tended to compare teachers with doctors. Here, cultural issues seem to be at work. Teaching is treated with reverence in Asian societies—especially in China.").

¹⁴⁷ Seo-Young Chu, *A Refuge for Jae-In Doe: Fugues in the Key of English Major*, ENTROPY (Nov. 3, 2017), <https://entropymag.org/a-refuge-for-jae-in-doe-fugues-in-the-key-of-english-major/> [<https://perma.cc/FE74-FRRS>].

sors” and her “deference” to male authority to sexually harass her.¹⁴⁸ Similarly, it is conceivable that cultural reverence for teachers played a role in *Liu v. Striuli*,¹⁴⁹ in which a Taiwanese graduate student was coerced into a sexual relationship with a faculty member who was the university point person for visas after he threatened deportation if she did not have sex with him.¹⁵⁰ Liu endured nearly a year of sexual, physical, and verbal abuse before obtaining a civil protection order against the professor.¹⁵¹ Liu may have avoided the relationship altogether or identified Striuli’s abusive behavior earlier had he not been a professor.

Cultural dynamics can influence peer harassment cases in similar ways. For instance, for many years there have been problems and protests relating to sexual harassment in the Atlanta consortium of three Historically Black College/Universities (HBCUs): all-women Spelman College, all-men Morehouse College, and co-ed Clark Atlanta University. In January 2016, Anita Badejo of *Buzzfeed News* did an extensive report of the history of the problem, which had already landed both Spelman and Morehouse on the list of schools being investigated by the Office for Civil Rights.¹⁵² In the report, Ms. Badejo discusses the experiences of “some Spelman survivors who have reported their assaults [and who] have been left to wrestle not only with a campus adjudication process that they feel didn’t serve them justice, but also with deep guilt for having turned in one of their Morehouse ‘brothers.’”¹⁵³ The pressures on the Spelman student survivors and their allies catalogued in the report are enormous, ranging from dealing with blowback for merely tweeting that unnamed friends reported being sexually assaulted by unnamed Morehouse students, to “the burden to protect the reputations [not only] of their colleges,” “but also of their entire race.”¹⁵⁴ Indeed, one Spelman student’s keen articulation of the difficulties she and her classmates face when speaking out about sexual harassment by Morehouse men captures the original protest of intersectionality evocatively: “[They’re] trying to protect Morehouse at the expense of Spelman, which doesn’t make any sense to me,” she said. “It’s just a really deep-rooted sense of protecting the black man. . . . But everyone is victimizing the black woman, and where is that narrative?”¹⁵⁵

¹⁴⁸ *Id.*

¹⁴⁹ *Liu v. Striuli*, 36 F. Supp. 2d 452 (D.R.I. 1999).

¹⁵⁰ *Id.* at 459–61.

¹⁵¹ *See id.* at 460, 471.

¹⁵² Anita Badejo, *What Happens When Women At Historically Black Colleges Report Their Assaults*, BUZZFEED NEWS (Jan. 21, 2016), <https://www.buzzfeed.com/anitabadejo/where-is-that-narrative> [<https://perma.cc/YJ4R-EFEL>].

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*; *see also* Candace King, *We Need to Include Black Women’s Experience in the Movement Against Campus Sexual Assault*, NATION (June 15, 2018), <https://www.thenation.com/article/need-include-black-womens-experience-movement-campus-sexual-assault> [<https://perma.cc/7HU2-URVZ>].

As these examples demonstrate, cultural pressures may make some women students of color more reluctant to complain about sexual harassment than white women. The distrust women of color have toward their schools' response can be accompanied and influenced by the criminal justice system's options for reporting and redress outside the educational institution, a system which is infamously hostile to sexual offense victims generally,¹⁵⁶ but especially to women victims of color.¹⁵⁷

C. *The Legal System*

Professor Ontiveros' final perspective on workplace sexual harassment of women of color comes from society as a whole, represented by judges and juries who are influenced by the "dominant culture."¹⁵⁸ Here, racist and sexist stereotyping rears its ugly head once more, as judges, juries, and society in general often disbelieve testimony by people of color, by women when they report sexual harassment, and especially by women of color who experience it.

Most of the evidence on this point comes from the criminal context, in which both racial and gender bias on the part of criminal justice system actors are well documented.¹⁵⁹ Indeed, gender-biased policing is such a problem that the U.S. Department of Justice issued guidance designed to prevent it in 2015.¹⁶⁰ This guidance grew out of a number of individual U.S. Department of Justice investigations into specific police departments.¹⁶¹ Much of this documented bias can be traced back to stereotypes about women rape victims that have been around for hundreds of years. Professor Michelle Anderson organizes these stereotypes into five special requirements for the common law crime of rape. First, the victim had to make a prompt complaint to police or other authorities.¹⁶² Second, she had to provide corroborating

¹⁵⁶ See Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 210 (2016) ("[P]olice often conclude that rape complaints are false without investigating or, in some cases, even interviewing the victim."); Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 645 (2010) ("The marital rape exemption and the historical requirements in rape law of resistance, corroboration, and chastity continue to infect both statutory law and the way that actors with[in] the criminal justice system—police, prosecutors, judges, and juries—see the crime of rape."); Lisa Avalos, *Policing Rape Complainants: When Reporting Rape Becomes a Crime*, 20 J. GENDER, RACE & JUST. 459, 462 (2017) ("[R]ape complainants regularly find themselves charged with false reporting.").

¹⁵⁷ See Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1293–94 (2016).

¹⁵⁸ See Ontiveros, *supra* note 94, at 824.

¹⁵⁹ See Tuerkheimer, *supra* note 157, at 1294–95; Yung, *supra* note 156, at 209–10; Avalos, *supra* note 156, at 462–63.

¹⁶⁰ See U.S. DEP'T OF JUSTICE, IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE (2015), <https://www.justice.gov/opa/file/799366/download> [<https://perma.cc/TN8W-U6PD>].

¹⁶¹ See Tuerkheimer, *supra* note 157, at 1310–22.

¹⁶² Anderson, *supra* note 156, at 648.

physical evidence (blood, torn clothes, other signs of struggle) that, third, she was chaste (meaning as close to a virgin as possible),¹⁶³ and that, fourth, she “resisted her assailant to the utmost of her physical capacity.”¹⁶⁴ Finally, jurors were given “a cautionary instruction warning judicial decision makers to treat a rape complainant’s testimony with suspicion,” designed to guard against the supposed tendency of rape victims to level false accusations.¹⁶⁵ Even though these special requirements have been removed from formal legal doctrine for the most part, they live on in various stereotypes about rape victims. These include stereotypes that victims lie, with their credibility diminishing the less chaste the victim is, the less she resisted the assault, the less prompt her complaint, and the less corroborating evidence she could produce of the attack.¹⁶⁶ The myth of widespread false accusations in particular is so strong that scholars have begun documenting the distressing numbers of women later proven to be victims who have been prosecuted for false accusations, and even served jail time.¹⁶⁷

As if such centuries-old gender biases were not damaging enough, studies show that African American women rape victims face particular unequal protection problems. Since at least the early 1990s, scholars such as Professor Crenshaw have focused on the particularly intense suspicion that the criminal justice system directed at Black women rape victims—hostility that she and others saw echoed in the public discussions of workplace sexual harassment at the time.¹⁶⁸ This work was mainly prompted by Professor Anita Hill’s groundbreaking testimony during Clarence Thomas’s hearings before the Senate judiciary committee.¹⁶⁹ Among the many examples Professor Crenshaw cites is “a very recent study of jurors in rape trials reveal[ing] that Black women’s integrity is still very deeply questioned by many people in society.”¹⁷⁰ Nearly fifteen years later, Professor Jeffrey J. Pokorak reviewed numerous studies conducted over that time confirming that prosecutors charge defendants with rape when the rape victim is white much more frequently than when the victim is black.¹⁷¹ In one study, prosecutors rejected or dismissed nearly double the number of rape cases involving African American women as white women,¹⁷² and in another, “prosecutors were

¹⁶³ *Id.* at 648.

¹⁶⁴ *Id.* at 653.

¹⁶⁵ *Id.* at 647. A sixth requirement made an exception for marital rape, essentially refusing to recognize that marital rape existed. *Id.* at 662–64.

¹⁶⁶ *See id.* at 652.

¹⁶⁷ *See* Yung, *supra* note 156, at 219; Avalos, *supra* note 156, at 460–61.

¹⁶⁸ *See* Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1469–70 (1992).

¹⁶⁹ *Id.* at 1467–68.

¹⁷⁰ *Id.* at 1470.

¹⁷¹ *See* Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L. J. 1, 38–43 (2006).

¹⁷² *See id.* at 41.

4½ times more likely to file charges if the victim was white.”¹⁷³ In both cases, researchers attributed these disparities at least in part to prosecutors’ incorporation of “jurors’ class, culture, and race biases.”¹⁷⁴

Indeed, as recently as 2007, prosecutors’ assumptions about juror attitudes have been borne out in “[r]esearch on how third-party observers view victims in sexual assault scenarios, [which] found that when women of color are depicted as the subjects of sexual assault by white perpetrators, they are viewed more skeptically and in a more stigmatizing manner than white women in the same scenarios.”¹⁷⁵ Other studies demonstrate that jurors are not the only ones who act on such biases: police do, too.¹⁷⁶ These studies are further corroborated by a 2003 study that examined over 40,000 cases and concluded that defendants of color were treated more leniently by the criminal justice system when they were charged with sexual assault,¹⁷⁷ which the authors link to findings that sexual assault is primarily intra-racial.¹⁷⁸ In addition, five other studies found that African American defendants who sexually assaulted victims of color were treated more leniently,¹⁷⁹ African American defendants who sexually assaulted white victims were treated more harshly,¹⁸⁰ or both.¹⁸¹

In explaining the source of these biases, scholars point to the same stereotype already discussed: the myth that “Black women were sexually voracious and indiscriminate”¹⁸² was developed to help justify the legal status of enslaved Black women who were “rendered legally unrapeable”¹⁸³ during slavery.¹⁸⁴ This stereotype, which portrays African American women to be unchaste in the extreme, severely damages the credibility of Black women rape victims. In addition, the similarities between the stereotypes held by the accused and by criminal justice system actors show that the

¹⁷³ *Id.* at 42.

¹⁷⁴ *Id.* at 43.

¹⁷⁵ Brake, *supra* note 63, at 138 (citing Roxanne A. Donovan, *To Blame or Not to Blame: Influences of Target Race and Observer Sex on Rape Blame Attribution*, 22 J. INTERPERSONAL VIOLENCE 722, 723 (2007)).

¹⁷⁶ See Yung, *supra* note 156, at 229–30.

¹⁷⁷ See Maxwell et al., *supra* note 51, at 533–34.

¹⁷⁸ See *id.* at 526, 534.

¹⁷⁹ *Id.* at 526 (discussing Darnell F. Hawkins, *Race, Crime Type and Imprisonment*, 3 JUST. Q. 251–69 (1986)).

¹⁸⁰ *Id.* at 527 (discussing Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. 842–54 (1980)).

¹⁸¹ See, e.g., *id.* at 526 (discussing Anthony Walsh, *The Sexual Stratification Hypothesis and Sexual Assault in Light of the Changing Conceptions of Race*, 25 CRIMINOLOGY 153–73 (1987); Cassia Spohn, *Crime and the Social Control of Blacks*, in INEQUALITY, CRIME, AND SOCIAL CONTROL (G. Bridges & M. Myers eds., 1994); Cassia Spohn & Jeffrey Spears, *The Effect of Offender and Victim Characteristics on Sexual Assault Case Processing Decisions*, 13 JUST. Q. 649–79 (1996); Rodney F. Kingsnorth et al., *Adult Sexual Assault: The Role of Racial/Ethnic Composition in Prosecution and Sentencing*, 16 JUST. Q. 275–302 (1998)).

¹⁸² Crenshaw, *supra* note 168, at 1469.

¹⁸³ Brake, *supra* note 63, at 138.

¹⁸⁴ See Crenshaw, *supra* note 168, at 1469; Pokorak, *supra* note 171, at 9.

accused appreciate the power of such stereotypes in the criminal justice system. Indeed, Professor Corey Rayburn Yung notes that the patterns of a number of accused serial rapists indicate that the likelihood of a victim not being believed by police, prosecutors, and juries may factor into the accused's selection of that victim.¹⁸⁵ The American Prosecutors Research Institute agrees:

The reality of rape cases is that the better a target a victim is for an offender, the worse the victim generally will be viewed as a witness for the prosecution. The flaws that make the victim a target for the offender also often make the victim less credible in a jury's eyes.¹⁸⁶

Less research has been conducted to determine whether stereotypes about Latinas, American Indian women, and APA/API women affect their believability as victims and as witnesses (keeping in mind that in criminal court, the victim is not a party to the proceeding, but is merely a "complaining witness").¹⁸⁷ Nevertheless, some historical and case-specific observations indicate that Latinas and APA/API women may also experience problems with police underenforcement of criminal rape laws and with stereotyping in court proceedings. With regard to discriminatory underenforcement, for instance, the U.S. Department of Justice's investigation of the Maricopa County, Arizona Sheriff's Office found that, among other violations, the county had significantly reduced police services to the Latinx community, including failing to investigate over 400 "sexual assault and child molestation cases."¹⁸⁸

With regard to API/APA women and the criminal justice system, Professor Gabriel J. Chin examined how, during the time of the Chinese Exclusion Acts, racist stereotypes of Chinese immigrants and Chinese Americans were used to question their credibility as witnesses,¹⁸⁹ including stereotypes that the Chinese were intellectually inferior, unreliable, "very peculiar and mysterious," "crafty and designing," and were likely to act on their "prejudices" and to give false testimony because they did not recognize the obligations of their oath.¹⁹⁰ Although some of these stereotypes may have waned today, others relate to the persistent idea that Asians are "ineradically foreign," which continues to be "a key characteristic of the Asian Pacific American experience," and thus could be used to discredit an APA/API

¹⁸⁵ See Yung, *supra* note 156, at 221–30.

¹⁸⁶ TERESA P. SCALZO, NAT'L DIST. ATTORNEYS ASS'N, PROSECUTING ALCOHOL-FACILITATED SEXUAL ASSAULT 21 (2007).

¹⁸⁷ See Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 676–77 (2009).

¹⁸⁸ Tuerkheimer, *supra* note 157, at 1314.

¹⁸⁹ See Gabriel J. Chin, "A Chinaman's Chance" in *Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 U.C. IRVINE L. REV. 965, 967–68 (2013).

¹⁹⁰ *Id.* at 969–72.

victim or witness.¹⁹¹ Still other stereotypes pop up unexpectedly, such as in the sex discrimination and sexual harassment lawsuit filed by Ellen Pao, who would later become the first API/APA woman CEO of Reddit, against a Silicon Valley venture capital firm.¹⁹² Ms. Pao's subsequent book about the case and its context recounts her "experiences on the witness stand, where her race and gender contributed to her being stereotyped by defense attorneys, juries, and the media as 'distant' and 'robotic,'" ¹⁹³ stereotypes not all that different from being "peculiar and mysterious."

In addition, a number of APA/API women and some Latinas are likely actual foreigners, in that they are relatively recent immigrants or temporary residents. They could thus experience credibility problems that come from being non-native English speakers whose cultural background differs significantly from those born and raised in the U.S., as Professor Ontiveros observes in the swirl of media and commentary around Rosa Lopez, a defense witness in O.J. Simpson's criminal trial whose testimony was mocked by the U.S. media and public at large as not credible.¹⁹⁴ Among the gendered, classed, and cultural misunderstandings present in commentaries about Ms. Lopez's testimony were those related to language; a translator from Mexico had to be replaced after mistranslating for Ms. Lopez, who is Salvadoran.¹⁹⁵ Misinterpretations of her testimony also occurred due to missed cultural meanings in several of Ms. Lopez's responses. For instance, Latin American cultural conventions of indirect speech meant that phrases literally translated as "I don't remember" actually meant "No."¹⁹⁶ Further, different attitudes regarding time between the Latinx "polychronic" culture with which Ms. Lopez was familiar and the "monochronic" culture of the U.S. led her answers about the exact time that she saw Simpson's white Bronco in front of his house to sound inconsistent.¹⁹⁷ Finally, the prosecution's efforts to impeach Ms. Lopez's collateral testimony ignored realities of her life such as poverty and fear of the government (including fear of the prosecutors of the Simpson trial) caused by spending most of her life in a war-torn country with a government that "disappeared" thousands of citizens, including one of Ms. Lopez's children.¹⁹⁸

¹⁹¹ *Id.* at 966.

¹⁹² Pao v. Kleiner Perkins Caufield & Byers LLC, No. CGC-12-520719, 2013 WL 3224589, at *1 (S.F. City & Cty. Super. Ct. June 26, 2013).

¹⁹³ *Asian American Women at the Forefront in the Fight to End Silicon Valley's Culture of Sexual Harassment*, REAPPROPRIATE (Aug. 24, 2017), <http://reappropriate.co/2017/08/asian-american-women-at-the-forefront-in-the-fight-to-end-silicon-valleys-culture-of-sexual-harassment> [https://perma.cc/PDY9-3SBP].

¹⁹⁴ See Maria L. Ontiveros, *Rosa Lopez, David Letterman, Christopher Darden, and Me: Issue of Gender, Ethnicity, and Class in Evaluating Witness Credibility*, 6 HASTINGS WOMEN'S L.J. 135, 141–43 (1995) [hereinafter, Ontiveros 1995].

¹⁹⁵ *Id.* at 144.

¹⁹⁶ *Id.* at 146.

¹⁹⁷ *Id.* at 148–49.

¹⁹⁸ *Id.* at 149–51.

Several of Ms. Lopez's responses that were damaging, at least in the eyes of some, harken back to cultural factors that increase the vulnerability of Latina domestic workers and farmworkers to sexual harassment. For instance, Ms. Lopez's frequent deference to the attorney aggressively cross-examining her, while damaging to her credibility when viewed from a purely U.S. cultural perspective, is attributable to the traditional deference that Latinas are socialized to show to men.¹⁹⁹ In addition, one newspaper referred to Ms. Lopez with the sexualized stereotype of "damaged goods,"²⁰⁰ a slang phrase for a woman who is not chaste or a virgin, which was a particularly offensive and strange choice of language when describing a mother of seven children whose testimony had nothing to do with anything sexual. If the time-worn chastity stereotype could be used to undermine the credibility of Rosa Lopez, imagine how effectively that stereotype could be used to undermine the credibility of women of color in sexual harassment cases, where the sexual nature of the case more naturally evokes stereotypes of unchaste "hot-blooded Latinas" or "naturally erotic" Asian women.

While extrapolating from Rosa Lopez's testimony may seem speculative, such extrapolation is nothing compared to the level of conjecture required to determine whether stereotypes of women victims of color influence school investigations of student sexual harassment complaints. Because of the "tip of the iceberg" phenomenon,²⁰¹ case-based or empirical evidence supporting the relevance of such racialized sexual stereotyping is downright impossible to find. Furthermore, while few faculty sexual harassment cases appear above the waterline, even fewer peer cases are likely to break that surface in general. In the very few cases existing above the waterline, the race of the victim is almost never mentioned. For example, the Supreme Court case that established the current liability standard for peer sexual harassment cases, *Davis v. Monroe County Board of Education*,²⁰² discusses the sexual harassment experienced by the plaintiff, an African American fifth-grade girl, at the hands of a boy classmate, but does not mention the plaintiff's claim that the school in *Davis* disciplined the same boy classmate for striking a white female classmate, yet did nothing for months to address the sexual harassment the boy directed at the plaintiff.²⁰³ Similarly, Professor Brake notes that in the prominent University of Colorado

¹⁹⁹ See Dominguez, *supra* note 112, at 235; Kamm, *supra* note 110, at 766; Vellos, *supra* note 108, at 425–26.

²⁰⁰ Ontiveros 1995, *supra* note 194, at 142. Professor Ontiveros notes that this newspaper article appeared to take the statement of a law professor that Lopez was "irreparably damaged" as a witness and turn it into "damaged goods," transforming it from a descriptive legal term into a stereotype. *Id.* This is particularly true in light of the fact that the newspaper was not a legal publication addressed to a legally trained audience who might have understood "damaged goods" to be used in a legal sense and not in the colloquial sense of a non-chaste women. *Id.*

²⁰¹ See *supra* Part II.

²⁰² *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 630 (1999).

²⁰³ See *Aurelia D. v. Monroe Cty. Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994).

gang rape case, while the race of the accused African American student assailants was discussed, “it went unnoticed that one of the women who was raped was also African-American.”²⁰⁴

Indeed, much of the recent attention and public debate regarding peer sexual harassment on college campuses have replayed what the research demonstrates in case after case in the criminal justice system: the race of the woman victim of color is invisible in the case and commentary, even when it influences the outcome.²⁰⁵ The media treatment of Kamilah Willingham’s case provides another example of this phenomenon. In the documentary *The Hunting Ground*, Ms. Willingham shared her experience of being sexually assaulted while at Harvard Law, along with a friend, while both were unconscious, by another Harvard Law student.²⁰⁶ She did not name the accused assailant in the film,²⁰⁷ but because he had been charged in criminal court for assaulting Ms. Willingham’s friend, the record was public. *Dear Prudence* columnist Emily Yoffe published his name, Brandon Winston, and characterized the night in question as “an ambiguous sexual encounter among young adults that almost destroyed the life of the accused, a young black man with no previous record of criminal behavior.”²⁰⁸ Although Ms. Yoffe later noted that Willingham and Winston are black and Willingham’s friend is white, not acknowledging the race of all three after making a point of stating Winston’s race would have raised questions. Despite this acknowledgment, moreover, her discussion of Winston’s criminal conviction (for “simple or ‘non-sexual’ assault” on Willingham’s unnamed friend)²⁰⁹ fails to recognize how the decision in that case to charge an accused assailant for violence to a white woman but not to a black woman exemplifies the documented racist sexism and sexist racism that faces women victims of color, particularly black women, in most courts.

Ms. Yoffe’s article was later cited in a press release by nineteen Harvard Law professors criticizing *The Hunting Ground* producers for the film’s “impression” of Winston.²¹⁰ Based on campus and other press coverage of the

²⁰⁴ See Brake, *supra* note 63, at 138.

²⁰⁵ See *id.*

²⁰⁶ See THE HUNTING GROUND, *supra* note 9, at 11:40.

²⁰⁷ See Tyler Kingkade, *Harvard Law Grad Kamilah Willingham Fights Back Against Sexual Assault Doubters*, HUFFINGTON POST (Apr. 4, 2016), http://www.huffingtonpost.com/entry/kamilah-willingham-harvard_us_57029258e4b0a06d580631c5 [https://perma.cc/8LLU-TF7W].

²⁰⁸ Emily Yoffe, *How The Hunting Ground Blurs the Truth*, SLATE (June 1, 2015), http://www.slate.com/articles/news_and_politics/doublex/2015/06/the_hunting_ground_a_closer_look_at_the_influential_documentary_reveals.html [https://perma.cc/EU28-PJPH].

²⁰⁹ See Willingham, *supra* note 50 (arguing indictment for “simple or ‘non-sexual’ assault” shows the grand jury was “not convinced of the seriousness of this action”).

²¹⁰ See Michael Shammass, *19 Harvard Law Professors Defend Law Student Brandon Winston, Denouncing his Portrayal in “The Hunting Ground”*, HARV. L. REC. (Nov. 13, 2015), <http://hlrecord.org/2015/11/19-harvard-law-professors-defend-law-student-brandon-winston-denouncing-his-portrayal-in-the-hunting-ground> [https://perma.cc/K646-DVCB].

press release, Professor Halley appears to have been the primary spokesperson for the group.²¹¹ Some months before, Professor Halley had written the essay in *Harvard Law Review Forum* quoted in Part II.²¹² At no point did the essay mention African American women, women of color in general, or, as Ms. Willingham herself put it, the “well-established research on the disproportionate rate at which women of color are sexually assaulted.”²¹³

In addition to enacting the phenomenon of treating women of color as less credible witnesses, Emily Yoffe’s and the Harvard Law professors’ activities regarding Brandon Winston exemplified a campus version of another pattern identified in the workplace and criminal justice contexts: the “so-called cultural defense.”²¹⁴ Responding to writings by several of the nineteen Harvard Law professors (including Professors Nancy Gertner and Jeannie Suk-Gersen) on the subject of campus sexual harassment, Mr. Johnson, a Harvard Law School alumnus, remarked on Professor Halley’s essay in particular, stating that it “raises a cultural differences argument, suggesting that there are different sex norms among poor people and people of color. . . . [The argument thus] stereotypes racial minorities as possessing different sexual moralities.”²¹⁵ Specifically, Mr. Johnson objects to the argument that the “cultural differences” of poor people and African Americans mean they “have different and, implicitly, lower standards for consent”²¹⁶ and “that the sexual culture of African Americans is more likely to appear like rape than the sexual culture of white Americans.”²¹⁷ Even more problematically, this argument is linked, in the case of African Americans, back to the old stereotypes of black promiscuity, in which both genders have “lower, animal-like standards for sex.”²¹⁸

While the controversy at Harvard dealt with sexual harassment between students, both in terms of the specific case of Brandon Winston and in terms of the scholarly writings produced by some of the nineteen Harvard Law professors during essentially the same time period, there is little reason to believe that, had Brandon Winston been a faculty member, the controversy would have played out differently. Indeed, it was remarkable for a group of

²¹¹ See King, *supra* note 155; Andrew M. Duehren, *Law School Professors Challenge Critical Documentary*, HARV. CRIMSON (Nov. 13, 2015), <https://www.thecrimson.com/article/2015/11/13/hls-profs-challenge-doc> [<https://perma.cc/Y4D6-BLSL>].

²¹² See Halley, *supra* note 34, at 106–07 (referring to an “American racial history . . . laced with vendetta-like scandals in which black men are accused of sexually assaulting white women” and “some of these accusations will be based on racially exploitative evasions of responsibility by white women who willingly had sex with black men and then disavowed it as rape”).

²¹³ Willingham, *supra* note 50; see also Kamilah Willingham, *Dear Emily Yoffe, in WE BELIEVE YOU: SURVIVORS OF CAMPUS SEXUAL ASSAULT SPEAK OUT* 310, 311 (Annie E. Clark & Andrea L. Pino eds., 2016) [hereinafter *WE BELIEVE YOU*].

²¹⁴ See Ontiveros, *supra* note 94, at 826.

²¹⁵ Johnson, *supra* note 34, at 59–60.

²¹⁶ *Id.* at 64.

²¹⁷ *Id.* at 65.

²¹⁸ *Id.* at 66.

professors to publicly and vociferously speak out against one of their students in the manner that played out. My *Utah Law Review* study indicates that supporting a faculty colleague against a student accuser would not only be unremarkable, but is also much more common than the opposite scenario.²¹⁹ Thus, when viewed through the lenses of the legal system and society as a whole, targeting women students of color for sexual harassment appears to be animated by similar causes as sexual harassment outside of our educational institutions.

IV. ARE WOMEN STUDENTS OF COLOR AT PARTICULAR RISK OF SEXUAL HARASSMENT?: THE EVIDENCE STORY

The research reviewed in Part III's Logic Story presents a hypothesis that structural factors make disproportionate targeting of women of color for sexual harassment more likely. This Part collects evidence supporting that hypothesis, including a limited amount of new, direct evidence demonstrating that women students of color face more of this harassment, as well as ample indirect evidence supporting the same conclusion. In both cases, this Part focuses on empirical data showing that disproportionate targeting is actually occurring. Together, the "Logic Story" and the "Evidence Story" show that women students of color are highly likely to be more vulnerable to sexual harassment.²²⁰ Therefore, our narratives about sexual harassment should not only stop erasing women student survivors of color, but should do the exact opposite of erasure and *focus* on the intersectional experiences of these survivors to truly understand the scope and dynamics of sexual harassment in education and to craft appropriate policies to address this problem.²²¹

This Part begins with direct empirical evidence that women students of color are indeed at greater risk of being sexually harassed, including my Title IX court case dataset from the *Utah Law Review* study. It then showcases indirect evidence of this disproportionate targeting, citing studies addressing greater rates of harassment of women employees of color in the workplace. Lastly, it discusses data from the National Intimate Partner & Sexual Violence Survey (NISVS), which tracked and compared rates of sexual harassment among various demographic groups in a sample of U.S. residents. This discussion presents both analyses of the NISVS data that have been previously published and a new analysis of the data, conducted by Pro-

²¹⁹ See Cantalupo & Kidder, *supra* note 33, at 711 (discussing how "certain institutions may have a faculty harassment-supportive culture").

²²⁰ It is worth noting that even if the evidence of disproportionate targeting of women students of color was more equivocal, rates of sexual harassment are high enough across the board that they are cause for concern, and there is certainly no evidence that women students of color experience so little sexual harassment that they should be erased as victims from our discussions of the problem.

²²¹ See *infra* Part V.

fessor Tara Richards, a social scientist at the University of Nebraska, for inclusion in this Article.

A. *Direct Evidence of Sexual Harassment of Students*

Empirical studies of the experiences of women students of color with sexual harassment are somewhat dated, with limited findings. For instance, Drs. Lilia Cortina, Suzanne Swan, Louise F. Fitzgerald, and Craig Waldo's 1998 study surveyed women students at one "large university" and reported that 62% of African American women and 60% of Latina women reported higher incidences of sexual harassment by faculty (defined to include both gender harassment, such as sexist remarks, and unwanted sexual attention, including touching, with sexual assault measured separately) than European American and Asian/East Indian American women (56% and 46%, respectively).²²² Empirical studies on campus peer harassment are more recent but still quite limited.

Most other discussion of greater targeting of women of color for sexual harassment in academia is anecdotal—a trend that began even before #MeToo. In the peer harassment context, Dr. Susan Marine echoed Aiko Fukuchi's personal experiences²²³ when she shared that, during her time doing anti-gender-based violence work at two Ivy League universities, there was a three-year period when "nearly one-third of the reports [of peer sexual violence she] received . . . were made by Asian and Asian-American women, primarily of East Asian descent."²²⁴ Regarding faculty sexual harassment, women of color authors and plaintiffs have accused faculty members, such as the unnamed faculty member in Professor Cho's article,²²⁵ as well as professors John Searle²²⁶ and Jay Fliegelman,²²⁷ of sexual harassment.

²²² Lilia M. Cortina, Suzanne Swan, Louise F. Fitzgerald & Craig Waldo, *Sexual Harassment and Assault: Chilling the Climate for Women in Academia*, 22 PSYCHOL. WOMEN Q. 419, 423, 428 (1998); see also MICHELE A. PALUDI & RICHARD A. BARICKMAN, *SEXUAL HARASSMENT, WORK, AND EDUCATION: A RESOURCE MANUAL FOR PREVENTION* 70 (1998) (citing 1992 and 1996 studies finding that "women of color, especially those with 'token' status" and "ethnic minority women," respectively, experience higher rates of academic sexual harassment); Jessica C. Harris & Chris Linder, *Introduction*, in INTERSECTIONS OF IDENTITY, *supra* note 18, at 1, 6–7; Luoluo Hong, *Digging Up the Roots, Rustling the Leaves: A Critical Consideration of the Root Causes of Sexual Violence and Why Higher Education Needs More Courage*, in INTERSECTIONS OF IDENTITY, *supra* note 18, at 23, 36; Harris, *supra* note 18, at 42 (showing that few studies exist examining higher women of color harassment).

²²³ See Fukuchi, *supra* note 57.

²²⁴ Susan Marine, *Combating Sexual Violence in the Ivy League: Reflections on Politics, Pain, and Progress*, in THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE 55, 62 (Sara Carrigan Wooten & Roland W. Mitchell eds., 2016).

²²⁵ See Cho, *supra* note 55, at 349–50 (anecdotal evidence in the form of a letter and testimony in a Japanese student's complaint shared with the researcher).

²²⁶ A twenty-four-year-old former student and employee of eighty-four-year-old philosophy professor, Dr. John Searle, brought a case against U.C. Berkeley for allowing Dr. Searle to create a hostile environment through multiple instances of alleged unwelcome

In addition, the authors of one of the oldest comprehensive studies of professors harassing students, Professors Billie Dziech and Linda Weiner, gathered anecdotal information from “approximately four hundred students, faculty, administrators, and alumni from across the country.”²²⁸ They note two particularly vulnerable groups of students: “minority women” and women “enrolled in traditionally male fields.”²²⁹ Regarding women students of color, they note the “racist stereotype” held by “some harassers”: that minority women are “‘easier’ and more responsive to sexual advances”²³⁰ and that “the lecherous professor” may find many women students of color more vulnerable as newer entrants to the college environment.²³¹

Although *The Lecherous Professor* was published over thirty years before my *Utah Law Review* study, one of my datasets suggests that disturbingly little appears to have changed. The dataset consists of court cases brought by student plaintiffs alleging violations of Title IX, and supports the thesis that women students of color are disproportionately targeted by faculty accused of sexual harassment.²³²

This dataset is comprised of forty-two cases, decided between the years of 1998–2015,²³³ three of which involved male plaintiffs.²³⁴ To collect this group of cases, I first used last names to determine if the plaintiffs alleging that they were sexually harassed in the case were likely women of color.²³⁵ Second, I added to this number any case where the court specified that the plaintiff’s race or ethnicity was APA/API, Latina, African American, or Native American (the racial groups included by the U.S. Census as non-White). Third, I identified several cases that were brought against schools that are likely to have student bodies predominantly “of color” because they are HBCUs or located in U.S. territories where there is a very large majority of

sexual conduct, including groping her, “telling her they were ‘going to be lovers,’” watching pornography in front of her, asking her “to log into a ‘Sugar Baby, Sugar Daddy’ website,” and—when she brought up American imperialism—stating, “American imperialism? Oh boy, that sounds great, honey! Let’s go to bed and do that right now!” Katie J.M. Baker, *A Former Student Says UC Berkeley’s Star Philosophy Professor Groped Her and Watched Porn at Work*, BUZZFEED NEWS (Mar. 23, 2017), <https://www.buzzfeednews.com/article/katiejmbaker/famous-philosophy-professor-accused-sexual-harassment> [https://perma.cc/G422-KPT3].

²²⁷ See Chu, *supra* note 147.

²²⁸ BILLIE WRIGHT DZIECH & LINDA WEINER, *THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS 3* (2d ed. 1990).

²²⁹ *Id.* at 80.

²³⁰ *Id.*

²³¹ *Id.* at 80–81.

²³² Cantalupo & Kidder, *supra* note 33, at 717.

²³³ The first year for this data set was 1998 because *Gebser v. Lago Vista Independent School District* was decided in this year. 524 U.S. 174 (1998) (establishing the legal standard for private lawsuits under Title IX when a teacher sexually harasses a student).

²³⁴ It is worth noting that of these three cases, one male plaintiff appears to be API/APA, one white, and the third involved two male plaintiffs, one of whose name suggests he is API/APA.

²³⁵ Note that because I was using last names of people whom I do not know and have never met, the plaintiffs’ actual race identification may not match the statistical prevalence of the race or ethnicity of their last name.

people of color. Fourth and finally, I noted that the plaintiffs in some cases had names indicating Middle Eastern or Jewish descent, which the U.S. Census does not include in a separate demographic group from Whites, but who may nevertheless identify or be identified as “of color.” The first and second categories make up eleven out of forty-two cases.²³⁶ Based on these categories alone, 26.2% of the plaintiffs are likely women students of color. If the three cases involving an HBCU²³⁷ and the case occurring in the Northern Marianas Islands, where only 2.5% of the population are not API/APA,²³⁸ or the four cases where the plaintiff’s name indicates she is of Middle Eastern origin and could identify or be identified as “of color,”²³⁹ the percentage jumps to 35.7%. If the plaintiffs in all four categories are included, the percentage of likely women of color plaintiffs balloons to 45.2% of these forty-two cases.

Depending on which percentage is considered, these percentages range from somewhat larger to much larger than the average 19.6% of women students of color enrolled in degree programs at colleges and universities

²³⁶ According to Forebears, a genealogy search engine, the plaintiffs’ surnames in the following eight cases are typically Indian; Mexican; Mexican and Cape Verdean; Spanish and Colombian; Brazilian, Argentinian, Venezuelan, and Guatemalan; Mexican and Peruvian; Vietnamese; and Mexican and Nicaraguan, respectively. *Adusumilli v. Ill. Inst. of Tech.*, 191 F.3d 455 (7th Cir. 1999); *Aguilar v. Corral*, No. CIV. S-07-1601 LKK/KJM, 2007 WL 2947557 (E.D. Cal. Oct. 7, 2007); *Delgado v. Stegall*, 367 F.3d 668 (7th Cir. 2004); *Escue v. N. Okla. Coll.*, 450 F.3d 1146 (10th Cir. 2006); *Esposito v. Hofstra Univ.*, No. CV 11-2364, 2012 WL 607671 (E.D.N.Y. Feb. 24, 2012); *Gonzales v. N.C. State Univ.*, 659 S.E.2d 9 (N.C. Ct. App. 2008); *Ha v. Nw. Univ.*, No. 14 C 895, 2014 WL 5893292 (N.D. Ill. Nov. 13, 2014); *Hernandez-Loring v. Universidad Metropolitana*, 233 F.3d 49 (1st Cir. 2000). See FOREBEARS, <http://forebears.io> (last visited Nov. 13, 2018). The courts identified the following three plaintiffs as Taiwanese, African American, and African American, respectively. *Liu v. Striuli*, 36 F. Supp. 2d 452 (D.R.I. 1999); *Wilborn v. S. Union State Cmty. Coll.*, 720 F. Supp. 2d 1274 (M.D. Ala. 2010); *Wills v. Brown Univ.*, 184 F.3d 20 (1st Cir. 1999).

²³⁷ The schools that the students in *Does v. Rust Coll.*, No. 3:13-cv-220-NBB-SAA, 2015 U.S. Dist. LEXIS 72312 (N.D. Miss. June 4, 2015), *Hurd v. Del. State Univ.*, No. 07-117-MPT, 2008 WL 4369983 (D. Del. Sep. 25, 2008), and *Owens v. Dillard Univ.*, No. 01-3432, 2002 WL 1822932 (E.D. La. Aug. 8, 2002) attended at the time of their complaints are HBCUs according to the National Center for Education Statistics. See *College Navigator*, NATIONAL CENTER FOR EDUCATION STATISTICS, <http://nces.ed.gov/COLLEGENAVIGATOR> (last visited Nov. 13, 2018).

²³⁸ The school that the students in *Oden v. N. Marianas Coll.*, 440 F.3d 1085 (9th Cir. 2006) attended is likely primarily API/APA. See *Northern Mariana Islands*, CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/print_cq.html [<https://perma.cc/B8SE-V62E>].

²³⁹ According to Forebears, a genealogy search engine, the plaintiffs’ surnames in the following four cases are typically Egyptian, Israeli, Israeli, and Egyptian or Lebanese, respectively. *Elgamil v. Syracuse Univ.*, 99-CV-611(NPM/GLS), 2000 WL 1264122 (N.D.N.Y. Aug. 21, 2000); *Hayut v. State Univ. of N.Y.*, 352 F.3d 733 (2d Cir. 2003); *Shalom v. Hunter Coll. of the City Univ. of N.Y.*, No. 13-cv-4667 (SAS), 2014 WL 3955167 (S.D.N.Y. Aug. 13, 2014); *Takla v. Regents of the Univ. of Cal.*, No. 2:15-cv-04418-CAS(SHX), 2015 WL 6755190 (C.D. Cal. Nov. 2, 2015). See FOREBEARS, <http://forebears.io> (last visited Nov. 13, 2018).

from 1998 to 2015.²⁴⁰ Moreover, because the majority of these percentages are based on last names, they are dominated by Latinas and API/APA women, and almost certainly undercount the numbers of plaintiffs who are women students of color but would not be signaled by a last name. This disproportionately high percentage of women students of color filing sexual harassment claims strongly suggests that women students of color are in fact more vulnerable to being sexually harassed.²⁴¹

Nevertheless, because forty-two cases over nearly twenty years is a very small sample, the conclusions that one can draw are limited. Therefore, the next Subsection considers a number of studies that examine sexual harassment against women of color in the workplace to see if they are corroborative.

B. Indirect Evidence from Studies on Sexual Harassment of Women of Color in the Workplace

Viewed as a whole, researchers studying whether sexual harassment directed at women of color in the workplace is more common than harassment directed at white women agree that women of color are more likely targeted for such harassment. When looked at in conjunction with the discussion in Part III, it is clear that studies of workplace sexual harassment come to this common conclusion regardless of whether they primarily draw from anecdotal evidence or empirical (quantitative or qualitative) data, and whether they use social science methodologies, legal analysis, or some combination of the two.

For instance, a study of plaintiffs in seventeen pivotal sexual harassment cases spanning 1974 to 1991 conducted by Dr. Anna-Maria Marshall includes seven cases (41%) brought by black women.²⁴² These cases oc-

²⁴⁰ See Young M. Kim, *Minorities in Higher Education: Twenty-Fourth Status Report, 2011 Supplement*, AM. COUNCIL ON EDUC. 8–9 (Oct. 2011), https://diversity.ucsc.edu/resources/images/ace_report.pdf [<https://perma.cc/AD7Z-UCL8>]; *Digest of Education Statistics: 2016*, INST. OF EDUC. SCI. (Oct. 2016), https://nces.ed.gov/programs/digest/d16/tables/dt16_306.10.asp [<https://perma.cc/C4NV-PD5A>]; *Digest of Education Statistics: 2005*, INST. OF EDUC. SCI. (Sept. 2005), https://nces.ed.gov/programs/digest/d05/tables/dt05_205.asp [<https://perma.cc/8MS2-U255>]; *Digest of Education Statistics: 2008*, INST. OF EDUC. SCI. (Oct. 2008), https://nces.ed.gov/programs/digest/d08/tables/dt08_226.asp [<https://perma.cc/6BAC-K63G>]; Thomas D. Snyder & Sally A. Dillow, *Digest of Education Statistics 2009*, INST. OF EDUC. SCI. (Apr. 2010), <https://nces.ed.gov/pubs2010/2010013.pdf> [<https://perma.cc/Q3XS-DHN2>]; *Digest of Education Statistics: 2010*, INST. OF EDUC. SCI. (Oct. 2010), https://nces.ed.gov/programs/digest/d10/tables/dt10_235.asp [<https://perma.cc/H5KV-GMJ7>].

²⁴¹ See Karen Kelsky, *A Crowdsourced Survey of Sexual Harassment in the Academy*, THE PROFESSOR IS IN (Dec. 1, 2017), <http://theprofessorisin.com/2017/12/01/a-crowdsourced-survey-of-sexual-harassment-in-the-academy/> [<https://perma.cc/B47A-VGXZ>] (noting that a recent crowdsourced survey regarding faculty sexual harassment ballooned to over 1,900 entries in just a few months, but did not explicitly prompt respondents to give demographic information other than the gender of the reported harasser).

²⁴² See Marshall, *supra* note 145, at 792–93. Note that Marshall’s study began with twenty-nine cases, selected on criteria not related to race or other demographic character-

curred during years when the entire African American population of the country, including men, children, and retired or unemployed African Americans, was only between ten and twelve percent, showing the disproportionate representation of women of color plaintiffs in sexual harassment cases.²⁴³

More recently, Professor Joan Williams interviewed sixty women scientists of color, a majority of whom are professors in Science, Technology, Engineering, and Mathematics (STEM) fields, about their experiences of gender bias, concluding that “gender bias is a common experience for women of color . . . [that] often differs from that of white women.”²⁴⁴ Professor Williams noted the racialized sexual stereotypes that face women of color in the workplace, devoting extra discussion to the difficulties that several of the APA/API women scientists in her study had with various stereotypes, including the sexualized “Lotus Blossom Baby” stereotype, which portrays APA/API women as passive and deferential and thus “too feminine” to be judged as competent or self-confident professionals.²⁴⁵ Because the study only included harassing comments and behaviors as one form of gender biased conduct, the bulk of the analysis was not directly about sexual harassment. Nevertheless, it did note the connections between gender bias and sexual harassment.²⁴⁶ In addition, a related report that Professor Williams co-authored said that 34.5% of the women scientists of color surveyed reported sexual harassment.²⁴⁷

Other research using quantitative methodologies draws similar conclusions. One study finds that “minority women were significantly more harassed than minority men, majority women, and majority men when both ethnic and sexual harassment were combined into an overall measure of harassment.”²⁴⁸ This study defined sexual harassment as including both the

istics, that were culled to the seventeen for which Marshall was able to interview counsel for the plaintiff or the plaintiff herself.

²⁴³ Gary D. Sandefur et al., *An Overview of Racial and Ethnic Demographic Trends, in AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES, VOLUME I* 40, 43 (Neil J. Smelser et al. eds., 2001) (showing that the African American population has stayed around ten to twelve percent since 1900). Had Marshall’s study included racial demographic information for all twenty-nine plaintiffs that the study originally included, and if the twelve plaintiffs not included in the seventeen were all white women, the seven black women plaintiffs would still have constituted twenty-four percent of the twenty-nine plaintiffs, a much larger percentage of African American sexual harassment plaintiffs than African Americans in the U.S. population at the time.

²⁴⁴ Williams, *supra* note 96, at 189.

²⁴⁵ *See id.* at 212–19.

²⁴⁶ *Id.* at 214.

²⁴⁷ *See* JOAN C. WILLIAMS ET AL., DOUBLE JEOPARDY? GENDER BIAS AGAINST WOMEN IN SCIENCE 5 (Jan. 2015), https://worklifelaw.org/publications/Double-Jeopardy-Report_v6_full_web-sm.pdf [<https://perma.cc/E59S-CKJB>]; *see also* Jana L. Raver & Lisa H. Nishii, *Once, Twice, or Three Times as Harmful? Ethnic Harassment, Gender Harassment, and Generalized Workplace Harassment*, 95 J. APPLIED PSYCHOL. 236, 237 (2010) (explaining that when sexual harassment occurs, it is “nearly always coupled” with gender harassment).

²⁴⁸ Jennifer L. Berdahl & Celia Moore, *Workplace Harassment: Double Jeopardy for Minority Women*, 91 J. APPLIED PSYCHOL. 426, 432 (2006).

“traditional” unwelcome sexual conduct form of sexual harassment and a particular type of gender harassment referred to by the researchers as “not-man-enough harassment.”²⁴⁹ Although the study did not find that women of color were sexually harassed more than white women or that they were ethnically harassed more than men of color, women of color were still harassed more overall because they faced both sexual harassment and ethnic harassment in the workplace.²⁵⁰ The study also found that women who were “in an ethnic minority in their work group” experienced both more sexual harassment and more ethnic harassment “than those . . . in the ethnic majority,” and that male-dominated organizations had more traditional sexual harassment than female-dominated organizations.²⁵¹

Similarly, empirical studies on the workplace that have looked not at rates of sexual harassment itself but at sexual harassment victims’ reactions to that harassment, in terms of what institutional or legal remedies they seek, reach consistent findings with the studies on sexual harassment rates. For instance, Professor Hernández collected dozens of sexual harassment studies conducted from 1981–2004 and conducted her own empirical research.²⁵² First, she performed a “statistical analysis of sexual harassment complaints” from 1964–2000, in which “[w]omen of [c]olor were consistently over-represented as complaining parties in comparison to their presence in the female labor force year after year,” whereas “[w]hite women were under-represented despite their larger presence in the female labor force.”²⁵³ Then, in her second study, she asked a group of “women who believed they were sexually harassed”²⁵⁴ whether they had filed sexual harassment complaints with their employer or an outside entity.²⁵⁵ This study found greater rates of filing among women of color compared to white women, both of whom believed they had been sexually harassed: 91.8% of women of color filed complaints, compared to 77% of white women.²⁵⁶

Because these studies analyze data regarding complaints, Professor Hernández also discusses studies that measure harassment regardless of whether the victim filed a complaint, and what factors pushed victims to

²⁴⁹ *Id.* at 429.

²⁵⁰ *Id.* at 433.

²⁵¹ *Id.* at 432; see also Raver & Nishii, *supra* note 247, at 236 (presenting more equivocal findings that corroborated the greater rates of ethnic harassment, which is defined as “threatening verbal or exclusionary behavior that has an ethnic component and is directed at a target individual because of the individual’s ethnicity,” experienced by people of color, but not significantly greater rates of gender harassment, which is defined as “crude verbal and physical behaviors that convey hostile, offensive, and sexist attitudes,” experienced by women); Berdahl & Moore, *supra* note 248, at 243.

²⁵² Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1239 (2005).

²⁵³ *Id.*

²⁵⁴ *Id.* at 1246.

²⁵⁵ *Id.* at 1248–53.

²⁵⁶ *Id.* at 1254.

complain. These studies show that women of color are more likely to be targeted for sexual harassment²⁵⁷ due to racial stereotyping²⁵⁸ and possibly economic vulnerability.²⁵⁹ In attempting to understand how incidence rates and rates of complaint filing are connected, studies have found, on the one hand, that white women regard a wider range of conduct as sexually harassing and view sexual harassment as more serious than women of color do,²⁶⁰ that women of color may be less inclined to report sexual harassment because they are used to discriminatory behavior in the workplace,²⁶¹ and that women of color are less likely to complain or take any official action against white men,²⁶² who are the majority of the men who harass women of color.²⁶³ On the other hand, at least one study indicates that sexual harassment victims tend to take formal action based on the severity of the sexual harassment.²⁶⁴ Although this last study does not analyze data that factors in or focuses on race, it leaves open the possibility that women of color may com-

²⁵⁷ See Hernández, *supra* note 252, at 1241 (citing Azy Barak, *Cross-Cultural Perspective on Sexual Harassment*, in *SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT* 263, 277–78 (William O'Donohue ed., 1997) [hereinafter *SEXUAL HARASSMENT*]); DeFour, *supra* note 97, at 51–53; Audrey J. Murrell, *Sexual Harassment and Women of Color: Issues, Challenges, and Future Directions*, in *SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES* 51, 54–56 (Margaret S. Stockdale ed., 1996); Hernández, *supra* note 252, at 1244 (citing JUDITH BERMAN BRANDENBURG, *CONFRONTING SEXUAL HARASSMENT: WHAT SCHOOLS AND COLLEGES CAN DO* 45–46 (1997)).

²⁵⁸ See Hernández, *supra* note 252, at 1244 n.39.

²⁵⁹ See *id.* at 1243–44 (citing BARBARA A. GUTER, *SEX AND THE WORKPLACE* 73–74 (1985); Irene Browne, *Introduction: Latinas and African American Women in the U.S. Labor Market*, in *LATINAS AND AFRICAN AMERICAN WOMEN AT WORK: RACE, GENDER AND ECONOMIC INEQUALITY* 1, 24 (Irene Browne ed., 1999) in support; and citing James E. Gruber, *An Epidemiology of Sexual Harassment: Evidence From North America and Europe*, in *SEXUAL HARASSMENT*, *supra* note 257, at 84, 88; Barak, *supra* note 257, at 277–78; Constance Thomasina Bails, *Females' Reactions to Sexual Harassment in the Workplace and the Impact of Race* iv (1994) (unpublished Ph.D. dissertation, Temple University) (on file with author) against).

²⁶⁰ See Hernández, *supra* note 252, at 1241 (citing Mary Giselle Mangione-Lambie, *Sexual Harassment: The Effects of Perceived Gender, Race and Rank on Attitudes and Actions* 104 (1994) (unpublished Ph.D. Dissertation, California School of Professional Psychology at San Diego); William Lawrence Neuman, *Gender, Race, and Age Differences in Student Definitions of Sexual Harassment*, 29 *WIS. SOCIOLOGIST* 63 (1992)).

²⁶¹ See Hernández, *supra* note 252, at 1241–42 (citing Jann H. Adams, *Sexual Harassment and Black Women: A Historical Perspective*, in *SEXUAL HARASSMENT*, *supra* note 257, at 213, 220–23; Murrell, *supra* note 257, at 54–56; Angela M. Hargrow, *Speaking to Our Realities: From Speculation to Truth Concerning African American Women's Experiences of Sexual Harassment* 56 (1996) (unpublished Ph.D. dissertation, Ohio State University) (on file with author)).

²⁶² See Hernández, *supra* note 252, at 1242 (citing Kathleen M. Rospenda et al., *Doing Power: The Confluence of Gender, Race, and Class in Contrapower Sexual Harassment*, 12 *GENDER & SOC.* 40, 54 (1998); S. Arzu Wasti & Lilia M. Cortina, *Coping in Context: Sociocultural Determinants of Responses to Sexual Harassment*, 83 *J. PERSONALITY & SOC. PSYCHOL.* 394, 402 (2002)).

²⁶³ See Hernández, *supra* note 252, at 1242–43.

²⁶⁴ See *id.* at 1243–44 (citing James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 *BASIC & APPLIED SOC. PSYCHOL.* 543, 556 (1995)).

plain at greater rates because they experience harassment that is more severe than that experienced by white women—severe enough that it can overcome the other factors that may make women of color less likely to complain formally.

With regard to sexual harassment of Latinas, the damaging dynamics just reviewed are on par with or worse than those experienced by women of color generally. For instance, in the case of farmworkers, the majority of whom are Latinx,²⁶⁵ empirical studies have confirmed what the logical reasoning discussed in Part III suggests: a long-standing and severe sexual harassment problem exists. Indeed, in 2000, an Equal Employment Opportunity Commission employee spoke of conversations with farmworkers who shared “that hundreds, if not thousands, of women had to have sex with supervisors to get or keep jobs and/or put up with a constant barrage of grabbing and touching and propositions for sex by supervisors,” including a worker who “eventually told [the EEOC] that farm workers referred to one company’s field as the *field de calzon*, or ‘field of panties,’ because so many supervisors raped women there.”²⁶⁶ Ninety percent of women farmworkers in another study stated that sexual harassment was a “major problem . . . in the workplace.”²⁶⁷ In 2008, a coalition of non-profit organizations working on sexual violence, civil rights, and/or farmworkers’ assistance produced a guide for attorneys that noted the continued relevance of these statistics.²⁶⁸

Like the women of color in the studies collected and discussed by Professor Hernández, women farmworkers are reluctant to take formal action for “less severe forms of sexual harassment.”²⁶⁹ Scholars advance several reasons for this, including poverty-, language-, immigration- and transience-related isolation, factors that may be more common than one might think to working women outside of agriculture.²⁷⁰ Many women college students share such vulnerabilities, since too many college students live in poverty and have transient housing.²⁷¹ In addition, foreign and immigrant students,

²⁶⁵ See Eduardo González, Jr., *Migrant Farm Workers: Our Nation’s Invisible Population*, EXTENSION (Oct. 5, 2015), <https://articles.extension.org/pages/9960/migrant-farm-workers-our-nations-invisible-population> [<https://perma.cc/TP7A-EZML>]. In earlier decades, many farmworkers also included Filipinos and other APA/API groups. See Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795, 804 (2000).

²⁶⁶ William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. DAVIS L. REV. 1075, 1080 (2000).

²⁶⁷ Dominguez, *supra* note 112, at 255.

²⁶⁸ See CAL. RURAL LEGAL ASSISTANCE ET AL., FARMWORKER SEXUAL VIOLENCE TECHNICAL ASSISTANCE PROJECT, SEXUAL VIOLENCE AGAINST FARMWORKERS: A GUIDEBOOK FOR CRIMINAL JUSTICE PROFESSIONALS 6 (2010), <https://www.victimrights.org/sites/default/files/Farmworkers%20Criminal%20Justice%20Professionals.pdf> [<https://perma.cc/V6FW-G2EK>].

²⁶⁹ Dominguez, *supra* note 112, at 255 (quoting a 10% reporting rate).

²⁷⁰ For further discussion, see *supra* Part III.

²⁷¹ Vanessa Romo, *Hunger and Homelessness are Widespread Among College Students, Study Finds*, NPR: THE TWO-WAY (Apr. 3, 2018), <https://www.npr.org/sections/>

such as “DREAMers,”²⁷² will potentially face language- and immigration status-based vulnerabilities, as did the plaintiff in *Liu v. Striuli*, who was coerced into a year-long abusive relationship with a faculty member who she believed could revoke her visa and get her deported.²⁷³

Apropos of these commonalities, an organization representing women farmworkers, the Alianza Nacional de Campesinas, recently sent a letter of solidarity to the “actors, models and other individuals” who began speaking out against sexual harassment in Hollywood in October 2017, explaining:

We wish that we could say we’re shocked to learn that this is such a pervasive problem in your industry. Sadly, we’re not surprised because it’s a reality we know far too well. Countless farmworker women across our country suffer in silence because of the widespread sexual harassment and assault that they face at work.²⁷⁴

C. Indirect Evidence from The National Intimate Partner & Sexual Violence Survey

Like my study of faculty sexual harassment, the workplace studies must contend with the general low reporting rates of sexual harassment; thus, the conclusions drawn based on reporting rates alone are unlikely to capture the full scope of the harassment that is occurring.²⁷⁵ However, the NISVS, conducted by the Centers for Disease Control and Prevention, does not depend on the filing of official complaints or other formal reporting to gather information about sexual harassment and other forms of gender-based violence. Instead, it asks whether the survey respondent has experienced certain kinds of conduct over the course of the respondent’s lifetime, and then sorts the respondent’s answers into categories such as rape and sexual violence other than rape, which includes sexual coercion, unwanted sexual contact, and noncontact unwanted sexual experiences.²⁷⁶ These experiences may never have been formally reported to any officials. Further, by asking questions about conduct, the survey does not rely on respondents to identify any conduct as a *legal* violation. Therefore, the NISVS reduces the risk of un-

thetwo-way/2018/04/03/599197919/hunger-and-homelessness-are-widespread-among-college-students-study-finds [https://perma.cc/Ry6M-NZ4C].

²⁷² See AM. IMMIGRATION COUNCIL, THE DREAM ACT, DACA, AND OTHER POLICIES DESIGNED TO PROTECT DREAMERS 1 (Sept. 6, 2017), <https://www.americanimmigrationcouncil.org/research/dream-act> [https://perma.cc/9HQJ-N94B]; Jill Barshay, *Counting DACA Students*, HECHINGER REP. (Sep. 11, 2017), <https://hechingerreport.org/counting-daca-students/> [https://perma.cc/RQC7-BGJB].

²⁷³ See *Liu v. Striuli*, 36 F. Supp. 2d 452, 458–61 (D.R.I. 1999).

²⁷⁴ Time Staff, *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), <http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/> [https://perma.cc/9X6X-TG7H].

²⁷⁵ See *supra* Part IV.B.

²⁷⁶ See Breiding et al., *supra* note 25, at 3.

dercounting incidents of harassment because survivors do not recognize, or resist characterizing, the conduct as harassment.

In addition, the NISVS is a large-scale study with a national sample. “[A] nationally representative random-digit-dial telephone survey of the noninstitutionalized English- and Spanish-speaking U.S. population aged =18 years,” it is conducted via landline (40%) and cellular (60%) telephones.²⁷⁷ In 2011, it collected data from 12,727 completed interviews, 6,879 with women and 5,848 with men. While its title suggests that the conduct it measures is narrower than the full range of conduct included in the definition of sexual harassment, the NISVS in fact measures a number of sexually harassing behaviors and uses “sexual violence” as an umbrella term for all, including those for which I use “sexual harassment” as an umbrella term.²⁷⁸ For instance, in the sexual violence other than rape category, the survey asks survey-respondents questions regarding whether they have experienced visual sexual harassment such as indecent exposure, showing of pornography, or taking photos or filming when they did not want to be filmed.²⁷⁹ In the same category, it also asks about verbal harassment in public places that made the victim “feel unsafe.”²⁸⁰ Finally, with regard to sexual harassing conduct that involves physical contact but without sexual penetration, the NISVS measures sexual kissing, fondling, groping, grabbing or other touching that made the victim feel unsafe.²⁸¹

Most importantly for this Article’s purposes, the NISVS reports prevalence rates of sexual violence based on race and ethnicity of women and men in the following groups: American Indian/Alaska Native, Asian or Pacific Islander (API), Hispanic, multiracial (meaning the survey respondent checked more than one racial group), non-Hispanic black, and non-Hispanic white.²⁸² The survey reports these rates for two categories of conduct: rape and sexual violence other than rape, with the second category including the range of both physical and non-physical sexually harassing conduct listed above.²⁸³ According to the NISVS, 27.5% of American Indian/Alaska Native women have been raped in their lifetime, and 55% have experienced sexual violence other than rape.²⁸⁴ Case counts of API women who were raped were too small to provide statistically reliable percentages, but 31.9% of API women experienced sexual violence other than rape in their lifetime.²⁸⁵ For His-

²⁷⁷ *Id.*

²⁷⁸ I define sexual harassment as an umbrella term similar to the NISVS definition of “sexual violence.” *See supra* note 2.

²⁷⁹ *See National Intimate Partner and Sexual Violence Survey (NISVS) 2011 Victimization Questions*, CDC STACKS, 3 (2014), <https://stacks.cdc.gov/view/cdc/24726> [<https://perma.cc/V8R6-W7BY>].

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Breiding et al., *supra* note 25, at 5.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

panic women, these percentages were 13.6% (lifetime prevalence of rape) and 35.6% (lifetime prevalence of sexual violence other than rape).²⁸⁶ Although slightly more non-Hispanic black women (21.2%) than non-Hispanic white women (20.5%) experienced rape in their lifetimes, the prevalence rates were reversed for sexual violence other than rape, with more non-Hispanic white women experiencing this type of sexual violence (46.9%) than non-Hispanic black women (38.2%).²⁸⁷ Finally, the NISVS data indicate that multiracial women responded with the highest rates of both forms of sexual violence, reporting that 32.3% of multiracial women have been raped in their lifetimes and 64.1% of multiracial women have been subjected to sexual violence other than rape.²⁸⁸ Several characteristics of the U.S. multiracial population suggest that the number of multiracial identifying women in the survey is larger than one might expect, and that some significant portion of the multiracial identifying women in the NISVS are multiracial Hispanics and/or multiracial Asians or Pacific Islanders.²⁸⁹

As reported, these statistics could suggest somewhat different conclusions from my study of faculty sexual harassment of students, and many of the workplace studies, in that these studies do not always show a disproportionately high number of women of color being subjected to sexual violence compared to non-Hispanic white women. American Indian/Alaska Native women and multiracial women consistently experience much higher—indeed, the two highest—rates of all forms of sexual violence measured by the survey. However, non-Hispanic white women experience higher or comparable rates of sexual violence as non-Hispanic black women, Hispanic women, and API women. In the case of Hispanic women and API women, rates of sexual violence as measured by the NISVS are consistently the lowest, but the group of women student of color plaintiffs in my forty-two-case dataset was dominated by plaintiffs with Hispanic or API names,²⁹⁰ suggesting that Hispanic women and API women are harassed more, not less, than other groups of women, at least in universities.

In light of how published reports on the NISVS have separated women of color into individual racial/ethnic categories, yet most of the workplace studies and evidence gathered in education aggregate women of color into one category, it was not possible, based on those reports, to know whether the NISVS data indicates that women of color *as a whole* are more, less, or equally targeted for sexual harassment in comparison to white women. For this reason, Professor Richards, in response to my request, agreed to run an analysis of the raw NISVS data and aggregate the responses of American Indian/Alaska Native, Asian or Pacific Islander, Hispanic, multiracial, and

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ See Cantalupo, *supra* note 26 (exploring potential explanations for why multiracial women experience such high rates of gender-based violence).

²⁹⁰ See *supra* note 236.

non-Hispanic black survey-respondents into a single “women of color” category. Professor Richards’s analysis found that 1,999 women (22%) of the 9,086 women who completed the NISVS survey²⁹¹ identified as American Indian/Alaskan Native, Asian, Native Hawaiian or other Pacific Islander, Black, or “Other” on at least one of the four race variables or identified as “Hispanic” on a separate variable asking about Hispanic/Latinx origin (because this count includes those who checked at least one of the four non-white race variables or the Hispanic/Latinx variable, it includes multiracial-identified women). Of the women of color who completed the survey, 42.4% reported at least one instance of sexual violence other than rape in their lifetimes, compared to 44.4% of the 7,069 white women who completed the survey, a non-statistically significant difference.²⁹² Of the women of color who completed the survey, 29% reported at least one instance of rape or attempted rape in their lifetimes, compared to 25.3% of white women, a difference that is statistically significant.²⁹³ Women of color also experienced more repeated rapes or attempted rapes than white women.²⁹⁴

It is also worth noting that the NISVS shows that women and girls who are at ages when they are typically students are most vulnerable for sexual violence, with 78.7% of women who were raped being victimized prior to

²⁹¹ See Email from Professor Tara Richards to author on November 12, 2018, on file with author (noting the following regarding her analysis of the raw data: “The National Intimate Partner and Sexual Violence Survey (NISVS): General Population Survey Raw Data, 2010. The United States Department of Health and Human Services. Centers for Disease Control and Prevention. National Center for Injury Prevention and Control. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 2016-06-09. Available at <https://doi.org/10.3886/ICPSR34305.v1>. Correspondence on these analyses should be directed to tararichards@unomaha.edu.”). Note that Professor Richards’s analysis of the raw data produced more women listed in the database than the NISVS analysis conducted by Breiding et al., *supra* note 25 at 3 (reporting a total of 7,758 women surveyed and 6,879 women who completed the survey). The total number of women in that analysis also does not match later studies that were published by CDC researcher Dr. Matthew J. Breiding and various co-authors in subsequent years, which *do* match Dr. Richards’s total of 9,086 women surveyed. See, e.g., Kathleen C. Basile et al., *Disability and Risk of Recent Sexual Violence in the United States*, 106 AM. J. PUB. HEALTH 928, 929 (2016). Professor Richards’s best explanation for this discrepancy is that some change in the data stored in the database occurred after the Breiding et al. analysis at note 25. My tremendous thanks to Professor Richards for taking the considerable time and effort required to run this data analysis, which is very illuminating.

²⁹² See Email from Professor Tara Richards to author on November 12, 2018, on file with author (“Regarding unwanted sexual contact, 44.4% of white women and 42.4% of women of color reported experiencing at least one instance of unwanted sexual conduct other than rape or attempted rape. These differences were not statistically different, $\chi^2(1) = 2.55, p = .11$.”).

²⁹³ See *id* (“25.3% of white women and 29.0% women of color reported at least one experience with rape or attempted rape and these differences were statistically significant such that women of color reported an increased risk of rape or attempted rape, $\chi^2(1) = 10.631, p = .001$.”)

²⁹⁴ See *id* (“women of color experienced more repeated rapes or attempted rapes than white women, $M = 0.65 (SD=1.46)$ versus $M = 0.52 (SD=1.31)$ and this difference was statistically significant, $t(2846.72) = 3.48, p = .001$.”).

age 25 and 40.4% at under 18 years.²⁹⁵ Therefore, women students of color are already in a particularly high-risk group, even without their minority race or ethnicity.

In sum, empirical research conducted in a variety of areas on the question of whether women of color are more vulnerable to sexual harassment consistently indicate that women of color are indeed disproportionately targeted for such harassment. This appears to be true regardless of whether studies rely on formal reporting and complaints, as many of the workplace studies do, or not, as with the NISVS. Therefore, these data may provide corroboration for the particular pattern seen in my *Utah Law Review* study of disproportionate targeting of women students of color.

V. IMPROVING THE EQUAL EDUCATIONAL OPPORTUNITY OF ALL
INTERSECTIONAL STUDENTS BY PLACING WOMEN OF COLOR AT
THE CENTER USING SOCIAL JUSTICE FEMINIST
THEORY AND PRACTICE

Intersectionality is somewhat in vogue these days—it has arguably even “gone mainstream.” Perhaps the clearest example of its new popularity came on January 21, 2017, when millions of people across the country and the globe joined a Women’s March led by organizers who explicitly recognized “that women have intersecting identities and are therefore impacted by a multitude of social justice and human rights issues.”²⁹⁶ Proving that the popularity of such an intersectional approach is sustainable, moreover, Women’s Marches were organized again on January 20 & 21, 2018, drawing crowds of marchers that even surpassed the 2017 numbers in certain cities.²⁹⁷

The appreciation and use of intersectionality by a wide swath of the general public versus opposing efforts regarding race and gender by the current administration and its supporters demonstrate both how far we have come and how much further we have to go before intersectionality will meaningfully influence public policy. Proceeding down this hopeful path requires a translation of intersectional theory into practice in the form of, among other things, specific legal and policy proposals. In this spirit, this Part looks to the theory and practice of Social Justice Feminism, a Critical Race Feminist approach drawing from a history of grassroots activism by women of color, African American and Chicana women especially, dating back to the mid-twentieth century at least. Accordingly, this Part begins with

²⁹⁵ Breiding et al., *supra* note 25, at 11.

²⁹⁶ *Guiding Vision and Definition of Principles*, WOMEN’S MARCH ON WASH., <https://static1.squarespace.com/static/584086c7be6594762f5ec56e/t/5877e24a29687f9613e546ff/1484251725855/WMW+Guiding+Vision+%26+Definition+of+Principles.pdf> [<https://perma.cc/4WHM-8YFL>].

²⁹⁷ Hannah Golden, *Women’s March Numbers: Here’s the Attendance by City in 2018*, HEAVY (Jan. 22, 2018), <https://heavy.com/news/2018/01/womens-march-numbers-2018-attendance-turnout-by-city/> [<https://perma.cc/R79G-5MJ2>].

a brief summary of some of the theory and activism that influenced and coalesced in Social Justice Feminism and then discusses Social Justice Feminism's unique approach to public policymaking. After this explanation, it briefly discusses three Social Justice Feminist-informed proposals for improving our legal and policy responses to women students of color's higher vulnerability to sexual harassment. These strategies will not just benefit women students of color, but many other groups of sexual harassment survivors.

A. *Social Justice Feminism: Theory & Practice*

Social Justice Feminism has a history rooted in theory and practice, both of which are fairly described as activist in nature. These influences combine to create a unique approach to legal design and policymaking that focuses on structural solutions that put a central focus on addressing the multiple oppressive forces facing women of color and other intersectional populations.

i. *Intersectionality & Social Justice Feminism*

Intersectional theories and analyses have a history going back many decades, several preceding Professor Crenshaw's naming of them as such at the end of the 1980s. The great civil rights lawyer, activist, poet, and reverend, Dr. Pauli Murray, who encountered intersectional oppression and discrimination throughout her remarkable life and career, coined the term "Jane Crow" while a law student at Howard University in the early 1940s.²⁹⁸ In 1984, just two years after Drs. Hull, Bell-Scott, and Smith published *But Some of Us Are Brave*, African American lesbian author and poet, Audre Lorde, published *Sister Outsider*, offering fundamentally intersectional and multidimensional analyses throughout.²⁹⁹ Black feminist theorist, bell hooks, published her volume, *Feminist Theory: From Margin to Center*, theorizing the contours of and intersectional feminist interventions into the "imperialist,"³⁰⁰ "white supremacist, capitalist patriarchy"³⁰¹ in the same year. Three years prior, Cherríe Moraga and Gloria Anzaldúa edited a volume of essays,

²⁹⁸ PATRICIA BELL-SCOTT, *THE FIREBRAND AND THE FIRST LADY: PORTRAIT OF A FRIENDSHIP: PAULI MURRAY, ELEANOR ROOSEVELT, AND THE STRUGGLE FOR SOCIAL JUSTICE* 111 (2017). Dr. Murray would later write "Jane Crow & the Law" in the *George Washington Law Review* when the ink of the 1964 Civil Rights Act was barely dry, and would co-found the National Organization for Women in 1966, but leave the leadership soon after due in part to NOW's inadequate attention to the concerns of poor and minority women. *Id.* at 330.

²⁹⁹ AUDRE LORDE, *SISTER OUTSIDER* (2d ed. 2007) (1984).

³⁰⁰ BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 92 (1984).

³⁰¹ *Id.* at 118.

all of which were intersectional in nature, entitled *This Bridge Called My Back: Writing by Radical Women of Color*.³⁰²

Such intellectual intersectional works were preceded and informed by the activism and leadership of African American and Chicana women in particular. African American women were leaders in the civil rights movements of the 1950s and 1960s, and created formal black feminist organizations that were active mainly during the 1970s, including such organizations as the Third World Women's Alliance, National Black Feminist Organization, National Alliance of Black Feminists, the Combahee River Collective, and the Black Women Organized for Action.³⁰³ Chicana feminists organized and formed their own organizations during the same period,³⁰⁴ and their work fed academic essays such as those in *This Bridge Called My Back*.

The 1970s also included the remarkable, intentionally intersectional 1977 National Women's Conference, an event that seems largely lost to history. Documented by the film *Sisters of '77*,³⁰⁵ this convention took two years and five million dollars³⁰⁶ (the equivalent of over 23 million in 2017 dollars³⁰⁷) to plan and convene. Approximately 20,000 people attended, including 2,005 delegates elected at the fifty-six state and territory conventions³⁰⁸ held in the months leading up to the national conference. The 130,000 participants at the state and territory conventions³⁰⁹ generated over 4,500 resolutions,³¹⁰ which were merged and shaped into a twenty-six plank Plan of Action on which the delegates at the national convention voted and submitted to President Carter and Congress.³¹¹

According to the review of the conference documents and records by Professors Kristin Kalsem and Verna L. Williams, the conference was intentionally inclusive and intersectional in many ways, although imperfectly so, as reflected in the conference's goals and the methods used to meet them.³¹² The conference was chaired by Congresswoman Bella Abzug and civil rights

³⁰² See Cherríe Moraga & Gloria Anzaldúa, *Introduction, 1981*, in *THIS BRIDGE CALLED MY BACK* xliii–xliv (Cherríe Moraga & Gloria Anzaldúa eds., SUNY Press 2015) (1981).

³⁰³ KIMBERLY SPRINGER, *LIVING FOR THE REVOLUTION: BLACK FEMINIST ORGANIZATIONS, 1968–1980* 1–2 (2005).

³⁰⁴ BENITA ROTH, *SEPARATE ROADS TO FEMINISM: BLACK, CHICANA, AND WHITE FEMINIST MOVEMENTS IN AMERICA'S SECOND WAVE* 8 (2004).

³⁰⁵ *SISTERS OF '77* (PBS television broadcast Mar. 1, 2005).

³⁰⁶ *International Women's Year, National Conference*, Pub. L. No. 94-167, 89 Stat. 1003, 1006 (1975).

³⁰⁷ Calculated using *Inflation Calculator*, SAVING.ORG, <https://www.saving.org/inflation/inflation.php?amount=1&year=1975> [<https://perma.cc/LBV9-C7LH>].

³⁰⁸ Kristin Kalsem & Verna L. Williams, *Social Justice Feminism*, 18 *UCLA WOMEN'S L.J.* 131, 162–63 (2010).

³⁰⁹ See *Sisters of '77: The Conference*, PBS: INDEPENDENT LENS, <http://www.pbs.org/independentlens/sistersof77/conference.html> [<https://perma.cc/UUJ7-24KT>].

³¹⁰ See Kalsem & Williams, *supra* note 308, at 162–63.

³¹¹ See *Sisters of '77*, *supra* note 309.

³¹² See Kalsem & Williams, *supra* note 308, at 164–65.

leader Carmen Delgado Votaw,³¹³ and the law appropriating money for the conference “said the Conference had to attract[] representatives of organizations working to advance the rights of women; members of diverse racial, ethnic, and religious groups; unions; publications; women of all incomes and women of all ages.”³¹⁴ The conference organizers used the bulk of the appropriated money for a wide range of methods to fulfill this inclusive mission, including appointing local coordinating committees that provided funding for participants who could not otherwise afford to travel to the state/territory conventions; providing notices of the meetings in multiple languages; lowering the age of voting in the meetings to sixteen; and visiting or doing other outreach to women field workers, women living on American Indian reservations, women receiving welfare assistance, women farmers and ranchers, women with disabilities, wives and widows of coal miners, women business owners, women living in homes for the elderly, PTA members, and beauty salon staff and customers.³¹⁵

The twenty-six planks³¹⁶ of the plan adopted by the delegates and the level of disagreement among the delegates about some of those planks reflected not only the inclusiveness of the conference but also the limits of that inclusiveness.³¹⁷ Each plank was debated intensely. Although the delegates approved sixteen planks in their original form, they amended ten, and the process of those amendments demonstrated the commitment of the delegates to creating a plan that truly gave voice to the diversity of American women.³¹⁸ For example, the disabled women’s caucus stayed up all night in the middle of an already intense four days to rewrite the entire Disabled Women plank.³¹⁹ All in all, the delegates appeared to fully agree with civil rights leader, Congresswoman Barbara Jordan, when she confirmed in her keynote

³¹³ See *Sisters of '77*, *supra* note 309; Maryland State Archives, *Carmen Delgado Votaw*, MD. WOMEN’S HALL OF FAME (2001), <http://msa.maryland.gov/msa/educ/exhibits/womenshall/html/votaw.html> [<https://perma.cc/GND2-A4L2>].

³¹⁴ Kalsem & Williams, *supra* note 308, at 167.

³¹⁵ *Id.* at 167–169.

³¹⁶ The twenty-six planks included: Arts & Humanities; Battered Women; Business; Child Abuse; Child Care; Credit; Disabled Women; Education; Elective & Appointive Office; Employment; Equal Rights Amendment; Health; Homemakers; Insurance; International Affairs; Media; Minority Women; Offenders; Older Women; Rape; Reproductive Freedom; Rural Women; Sexual Preference; Statistics; Women, Welfare & Poverty; and a Continuing Committee on the Conference. See *Sisters of '77*, *supra* note 309. The inclusiveness of these planks particularly stood out to me based on a specific class exercise that I have done with multiple groups of law students. I ask the students to write their own international women’s human rights treaty, then give them the text of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and ask them to compare the treaty they wrote with CEDAW. Consistently, this exercise has exposed important omissions from both the U.S. law students’ treaty and CEDAW, but the 1977 National Women’s Conference covers both the areas that CEDAW neglected (especially gender-based violence) and the areas that my law students consistently forgot (e.g., protections for rural women).

³¹⁷ Kalsem & Williams, *supra* note 308, at 179–80.

³¹⁸ See *id.* at 163 n.94.

³¹⁹ *Id.*

address that the delegates' "economic, cultural, social, political, ideological" differences made them "not of a single mind," and reminded them that "no one person and no one sub-group at this Conference has the right answers."³²⁰

The conference was perhaps the most intersectional with regard to race and gender. Conference organizers chose to devote separate planks to the intersectional circumstances of Disabled Women, Minority Women, Rural Women, Older Women, and Lesbian and Bisexual Women, a choice that certainly made the conference more inclusive. However, dedicating planks to intersectional populations and rarely mentioning those intersectional groups in the other planks exposed an underlying assumption that "women" unmodified meant white, urban, middle to upper class, able-bodied, heterosexual, and cisgender women.³²¹ Nevertheless, race was acknowledged in several planks other than the Minority Women plank.³²² For instance, the 1977 Declaration of American Women accompanying the National Plan stated: "We are poorer than men. And those of us who are minority women—blacks, Hispanic Americans, Native Americans, and Asian Americans—must overcome the double burden of discrimination based on race and sex."³²³

The Minority Women plank also stated that "minority women share with all women the experience of sexism as a barrier to their full rights of citizenship. Every recommendation of this National Plan of Action shall be understood as applying equally and fully to minority women."³²⁴ The Minority Women plank was significantly amended to explicitly include the "specific concerns of 'American Indian and Alaskan Native women,' 'Asian/Pacific American women,' 'Black women,' and 'Hispanic women.'"³²⁵ In addition, it "explained, with many specific examples, the ways in which 'the combined effect of race, sex, and economic class can produce extreme hardship in the lives of these American women.'"³²⁶ This intersectional approach enabled now-Congresswoman Maxine Waters to say "there is a black perspective in all the feminist issues in the National Plan."³²⁷

If intersectional activism and theories were born before the 1980s, they were quickly integrated into legal analysis and linked to sexual harassment in the 1990s. The decade kicked off with Professor Hill's testimony before the Senate about now-Associate Justice Clarence Thomas's sexual harass-

³²⁰ *Id.* at 164–65. Congresswoman Jordan was also the first Southern African American woman elected to the U.S. House of Representatives. JORDAN, Barbara Charline, HISTORY, ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/People/Detail/16031> [https://perma.cc/2MND-LRQK].

³²¹ Kalsem & Williams, *supra* note 308, at 179–80.

³²² *Id.* at 169–70.

³²³ *Id.* at 169.

³²⁴ *Id.* at 173.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.* at 172.

ment, giving the country a real world example of not only intersectionality but also bravery worthy of the book title of Drs. Hull, Bell-Scott, and Smith.³²⁸ Professor Cho's aforementioned account of the Japanese American student who dared to file a complaint regarding a predatory professor³²⁹ was another notable example of the intersectional bravery of sexual harassment survivors in the 1990s. The 1990s also saw the robust development of Critical Race Feminist Legal Theory, including not only work by Professors Crenshaw and Cho, but also Professors Regina Austin,³³⁰ Angela Harris,³³¹ and Mari Matsuda,³³² to name only a few such pioneers. Legal scholarship engaging in and inspired by intersectional analyses continued throughout that decade and until present day.

In this century, intersectional analysis has been linked to the movement for "Social Justice Feminism."³³³ Although Professors Kalsem and Williams trace the history of Social Justice Feminism back as far as the early twentieth century, they identify the 1977 conference as the first broad-based example of Social Justice Feminism, particularly in its critical race feminist aspects.³³⁴ They also discuss Social Justice Feminism's new articulation as an organizing point for the New Women's Movement Initiative, a multiyear series of activist gatherings in the mid-2000s with the purpose of "address[ing] longstanding divisions within the women's movement and [building] . . . relationships, trust and analysis"³³⁵ between participants and the communities they represented.

However, some of the most significant Social Justice Feminist events of this century so far have been the Title IX survivor activist-led civil rights movement, the 2017 and 2018 Women's Marches, and the grassroots organizing and political engagement that the 2017 march inspired during 2017 and into 2018.³³⁶ #MeToo and Time's Up may eventually join this list, al-

³²⁸ See HULL ET AL., *supra* note 1.

³²⁹ Cho, *supra* note 55, at 349.

³³⁰ See Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 539–40 (observing that "Black bitch hunts are alive and well in the territory where minority female law faculty labor," and proposing "a legal jurisprudence grounded in the material conditions of the lives of the black women and their critiques of a society dominated by whites, males and the middle class").

³³¹ See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (arguing that gender essentialism silences "some voices . . . in order to privilege others," and that "the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice of 'We the People'—among them, the voices of black women").

³³² See Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1184 (1991) (exploring "the relationship between the process and the substance of coalition, suggesting that the instrumental use of coalition building to achieve certain political goals is merely the beginning of the worth of this method").

³³³ See Kalsem & Williams, *supra* note 308, at 132–33.

³³⁴ *Id.* at 161.

³³⁵ *Id.* at 133.

³³⁶ See Shannon Carlin, *Viola Davis Gave the Women's March a Speech on Intersectional Feminism that is a Must-See*, REFINERY29 (Jan. 21, 2018), <http://www.refinery29>

though it is a bit too early to tell. Although media portrayals of Title IX movement activists make the movement seem entirely white, women students of color have in fact been leaders in the Title IX movement from the beginning, not only by speaking out about their own experiences in a variety of direct-action protests,³³⁷ but also in forming organizations addressing sexual harassment in education³³⁸ and joining the multiethnic leadership teams of other organizations.³³⁹

In addition, several organizations built during the movement explicitly include recognition of intersectional and multidimensional experiences of sexual harassment. For instance, Know Your IX's "Our Values" statement includes recognition "that sexual and dating violence are manifestations of systemic gender oppression, which cannot be separated from all other forms of oppression, including but not limited to imperialism, racism, classism, homophobia, transphobia, and ableism."³⁴⁰ Another organization formed by Title IX activists, End Rape on Campus, was co-founded by a Latina student survivor³⁴¹ and has started a specific project designed to focus on survivors of color, LGBTQ survivors, transgender & non-binary survivors, and survivors enrolled at HBCUs.³⁴² Finally, Survivors Eradicating Rape Culture, founded and led by two women of color, states that its mission is "to center the experiences and needs of the most marginalized survivors to change cultural norms and stop gender-based violence before it happens."³⁴³

The Women's Marches are arguably even more important examples of recent Social Justice Feminist events due in part to their sheer size but most significantly because they were explicitly intersectional from almost the inception of the *idea* to march. The 2017 Women's March was likely the largest single protest march in world history and definitely in U.S. history,³⁴⁴

.com/2018/01/188455/viola-davis-womens-march-speech-intersectional-feminism [https://perma.cc/MBS4-CU8N].

³³⁷ See Tyler Kingkade, *The Woman Behind #SurvivorPrivilege was Kicked Out of School After Being Raped*, HUFFINGTON POST (June 12, 2014), https://www.huffingtonpost.com/2014/06/12/survivor-privilege-wagatwe-wanjuki_n_5489170.html [https://perma.cc/4FSC-ZM5M]; Kingkade, *supra* note 207; Helm, *supra* note 4; THE HUNTING GROUND, *supra* note 9;

³³⁸ See, e.g., *Our Team*, SURVIVORS ERADICATING RAPE CULTURE, <http://eradicaterape.org/our-team/> [https://perma.cc/3E5C-27W5].

³³⁹ See *id.*; *Who We Are: Our Staff*, END RAPE ON CAMPUS, <http://endrapeoncampus.org/our-team-1/#whoweare> [https://perma.cc/3PQL-8JEH]; *Our Board*, SURVJUSTICE, www.survjustice.org/board.html [https://perma.cc/2GZ9-GUYE].

³⁴⁰ *Our Values*, KNOW YOUR IX, <https://www.knowyourix.org/our-values/> [https://perma.cc/AH7B-LMVA].

³⁴¹ Andrea Pino, *Dear Abuelita*, in WE BELIEVE YOU, *supra* note 213, at 61, 61–63.

³⁴² *Centering the Margins*, END RAPE ON CAMPUS, <http://endrapeoncampus.org/centering-the-margins/> [https://perma.cc/N9AB-FB6P].

³⁴³ *About Us*, SURVIVORS ERADICATING RAPE CULTURE, <http://eradicaterape.org/about-us/> [https://perma.cc/CWW6-A4WZ].

³⁴⁴ See Erica Chenoweth & Jeremy Pressman, *This is What We Learned by Counting the Women's Marches*, WASH. POST (Feb. 7, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/07/this-is-what-we-learned-by-counting-the-womens-marches/> [https://perma.cc/R94C-UTTY]; WOMEN'S MARCH ORGANIZERS AND CONDÉ

drawing over four million in the U.S. into the streets, an equivalent of 1.3% of the U.S. population at the time.³⁴⁵ Moreover, although the Women's March has experienced its share of criticism for not being inclusive enough,³⁴⁶ the leadership and choices that the March's organizers made and continue to make explicitly embraced inclusiveness and intersectionality.

The intersectionality of the March is the most dominant theme of the story of the March's genesis, planning, and impact, as told in the March history, *Together We Rise*. First, the mission of the March uses "intersectionality" in its second sentence, and its first states that "[t]he mission of the Women's March is to harness the political power of diverse women and their communities to create transformative social change."³⁴⁷ Second, the March organizers created "Unity Principles" to accompany the mission, explaining that "[t]he Women's March on Washington convened a broad and diverse group of leaders to produce an intersectional platform . . . [r]epresenting a new understanding of the connected nature of our struggles and vision of our collective liberation."³⁴⁸ Third, from virtually the genesis of the March, the organizers placed "women—and specifically women of color—at the center of their leadership structure."³⁴⁹ The initial idea of the March was spontaneously, separately, and accidentally generated—and then virally spread—by two white women with no organizing experience who had similar reactions to the 2016 Presidential Election results: "we should march."³⁵⁰ Within three days of suggesting marching via Facebook, these two women passed the bulk of the organizing to experienced civil rights and grassroots organizers, nearly all women of color, and only one remained heavily involved in the leadership of the March.³⁵¹

These factors are among those that identify the Women's March as a Social Justice Feminist movement, even if the organizers do not identify it as such. Although the Women's March mission and unity principles refer to intersectionality, the March is practice-based, not theory-based—like the Title IX movement, the New Women's Movement Initiative, and the 1977 National Women's Conference before it. As such, these movements are closer to the practice-based Social Justice Feminism than the theory-focused Black Women's Studies, Intersectionality, and other Critical Race Feminist analyses. Like Social Justice Feminism, these events and movements are "committed to making material changes to people's lives."³⁵²

NAST, *TOGETHER WE RISE: BEHIND THE SCENES AT THE PROTEST HEARD AROUND THE WORLD* 11 (2018).

³⁴⁵ Chenoweth & Pressman, *supra* note 344.

³⁴⁶ *TOGETHER WE RISE*, *supra* note 344, at 35–44.

³⁴⁷ *Our Mission*, *supra* note 19.

³⁴⁸ *Id.*

³⁴⁹ *TOGETHER WE RISE*, *supra* note 344, at 14.

³⁵⁰ *Id.* at 28–29 (quoting Teresa Shook, Women's March founder).

³⁵¹ *See id.* at 29–34.

³⁵² Kalsem & Williams, *supra* note 308, at 183.

Nevertheless, the most recent examples of Social Justice Feminism demonstrate how its methodology is inextricably intertwined with Critical Race Feminist theoretical analyses. As explained by Professors Kalsem and Williams, Social Justice Feminism uses three methods:

“[1] looking to history to understand subordinating structures . . . and then dismantl[ing] the bases of societal institutions that perpetuate hierarchies and inequities . . . [2] examining the interrelationships between interlocking oppressions [and] how issues of gender, race, class, and other categories of identity and experiences work together to create social injustice . . . [and 3] focus[ing] on bottom-up strategies in fashioning remedies [These methods should be applied from] the perspectives of the most oppressed . . . in an effort to identify strategies that combat the multiple oppressions.”³⁵³

As this Article has already explained, Critical Race Feminists in particular have extensively theorized the first two methodologies. They have done the same with the third methodology. For example, Professor Matsuda articulated both a theoretical position and a concrete way to translate that theory into legal doctrines and remedies with her famous article, *Looking to the Bottom: Critical Legal Studies and Reparations*,³⁵⁴ in which she urged Critical Legal Studies theoreticians to look to the “grass roots philosophers who are uniquely able to relate theory to the concrete experience of oppression. . . . [This means seeking out and listening to] the actual experience, history, culture, and intellectual tradition of people of color in America.”³⁵⁵ Professors Joan Callahan and Dorothy E. Roberts stated that consideration of “harms arising from unjust social relationships” should be a central factor in government law and policy that affects subordinated groups.³⁵⁶ Such government action should be “predominant[ly] concern[ed with] dismantling unjust arrangements of race, class, and gender power and . . . ensuring substantive liberty for all in our society.”³⁵⁷ Finally, Professor Crenshaw explained that fully effective anti-discrimination efforts will focus on those who face the most multiple disadvantages, because “then others who are singularly disadvantaged [will] also benefit,” concluding that “[w]hen they enter, we all enter.”³⁵⁸

³⁵³ *Id.* at 175, 190.

³⁵⁴ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

³⁵⁵ *Id.* at 325.

³⁵⁶ Joan C. Callahan & Dorothy E. Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, 84 KY. L.J. 1197, 1221 (1995–96).

³⁵⁷ *Id.* at 1234.

³⁵⁸ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 167 (1989).

With regard to how the four modern Social Justice Feminist movements utilized the first methodology, each was clearly aware of the history of subordinating structures. For instance, the Women’s March organizers drew self-consciously from the civil rights movements of the past and present, from the 1950s/60s Civil Rights and 1970s Feminist movements to today’s Black Lives Matter, disability rights and DREAMer movements.³⁵⁹ They also intentionally took control of telling their own story with the writing of *Together We Rise*, stating:

[O]ften women are erased from our history books. Not this time. . . . [U]nless women tell our own story, men of privilege will always rewrite history in their favor. We created this book so that no historian, pundit, or politician could claim what was ours. And what was yours.³⁶⁰

Likewise, the Title IX activists include in their values recognition of “the (continuing) histories of the state’s co-optation of progressive movements’ practices and goals,” making clear that they “aim to resist and reject the violence of the state,” and to affirm that “no one is disposable [while] also affirm[ing] the importance of holding individuals accountable for the harm they cause.”³⁶¹

In keeping with the second Social Justice Feminist method, these four movements also examine and consider interlocking oppressions such as gender, race, class, and other categories of identity or experience. Professors Kalsem and Williams point to the Health Plank adopted by the 1977 National Women’s Conference delegates³⁶² as an example of how Social Justice Feminism, in Professor Patricia Hill Collins’s words, “does not ‘elevate one group’s suffering over that of another.’”³⁶³ Similarly, the Women’s March Unity Principles specifically list goals from “Ending Violence” to “Environmental Justice” as benefitting more communities and populations than only women.³⁶⁴

Finally, all of these movements focused on bottom-up strategies in fashioning remedies from “the perspectives of the most oppressed.”³⁶⁵ The Title IX movement organizations follow a grassroots model,³⁶⁶ with the majority of their activities led by activist volunteers. The 2018 Women’s March

³⁵⁹ See Jamia Wilson, *Introduction*, in *TOGETHER WE RISE*, *supra* note 344, at 13–14.

³⁶⁰ See The Women’s March Organizers, *Preface*, in *TOGETHER WE RISE*, *supra* note 344, at 11.

³⁶¹ *Our Values*, *supra* note 340.

³⁶² Kalsem & Williams, *supra* note 308, at 182–83.

³⁶³ *Id.* at 182 (quoting PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM* 3 (2004)).

³⁶⁴ See *Our Mission*, *supra* note 19.

³⁶⁵ Kalsem & Williams, *supra* note 308, at 190.

³⁶⁶ See *Our Values*, *supra* note 340 (“[W]e believe that a bottom-up approach to building power is the only way to achieve justice and hold our schools accountable.”).

organizing theme was “Power to the Polls,”³⁶⁷ an initiative focusing on a grassroots strategy of getting more people to vote—particularly the most marginalized, who face barriers trying to register to vote and then to exercise that right.³⁶⁸ In keeping with this Article’s critique of “criminalization” efforts, the three most recent of these movements explicitly reject collaboration with the criminal justice system. The Women’s March’s specific references to Black Lives Matter echo the resolution of the New Women’s Movement Initiative to address violence against women by focusing on the injustices of the criminal justice system,³⁶⁹ and the Title IX movement activists make clear their antipathy to “the criminal legal system, which does not work to support or protect many communities [and to] efforts to make reporting to law enforcement the only option for student survivors of sexual and dating violence.”³⁷⁰

ii. *Sexual Harassment, Civil Rights Laws, and Social Justice Feminist Activism*

The Title IX movement and the developing #MeToo and Time’s Up movements are just the latest examples in a history of anti-sexual harassment activism that can be characterized as Social Justice Feminist from the development of sexual harassment as a legal claim in the first place. Indeed, Professor Roberts’s explanation for how and why “[b]lack women played a critical role in courts’ recognition of sexual harassment as a form of sex discrimination”³⁷¹ makes clear the roots of the movement in Social Justice Feminist methodologies.³⁷² In particular, black women were pioneering plaintiffs “at the forefront of early sexual harassment litigation”³⁷³ under Title VII of the 1964 Civil Rights Act’s prohibition of sex discrimination in the workplace. For example, Mechelle Vinson’s case led the Supreme Court to recognize sexual harassment as a violation of Title VII.³⁷⁴ Black women’s “historical experience of workplace abuse as an instrument of both race and

³⁶⁷ See *Power to the Polls*, WOMEN’S MARCH (2018), <http://www.powertothepolls.com/> [<https://perma.cc/4DJR-SMN6>].

³⁶⁸ See Leila Fadel, *Women’s Marches Across the Country Will Focus on the Vote*, NPR (Jan. 19, 2018), <https://www.npr.org/2018/01/19/579051150/womens-marches-across-the-country-will-focus-on-the-vote> [<https://perma.cc/U5XA-3S3A>]; see also Beth Greenfield, “*We’re Sex Workers and We Vote*”: *Women’s March Event Shines Light on a Marginalized Group*, YAHOO LIFESTYLE (Jan. 23, 2018), <https://www.yahoo.com/lifestyle/sex-workers-vote-womens-march-event-shines-light-marginalized-group-213646567.html> [<https://perma.cc/ENE9-6PAT>].

³⁶⁹ Kalsem & Williams, *supra* note 308, at 183.

³⁷⁰ *Our Values*, *supra* note 340.

³⁷¹ Dorothy Roberts, *The Collective Injury of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra* note 90, at 365, 368.

³⁷² See Kalsem & Williams, *supra* note 308, at 175.

³⁷³ Roberts, *supra* note 371, at 370.

³⁷⁴ See DeNeeen L. Brown, *She Said Her Boss Raped Her in a Bank Vault. Her Sexual Harassment Case Would Make Legal History*, WASH. POST (Oct. 13, 2017), <https://www.washingtonpost.com/news/retropolis/wp/2017/10/13/she-said-her-boss-raped-her-in-a->

gender subordination”³⁷⁵ fits the first methodology, in that this experience of “compound harm helped to clarify the seriousness of sexualized conduct by male coworkers, conduct seen previously as misguided romantic gestures.”³⁷⁶ Moreover, because “the workplace has largely been a site of degradation and danger for black women,” dating back to slave laws that “granted white masters unrestricted sexual access to their female slaves,”³⁷⁷ the black community as a whole “viewed the workplace abuse of black women as a *group* grievance that was part of the struggle for liberation.”³⁷⁸

Though women have led these movements historically, the aforementioned idea of group grievance may also play a part in the apparent greater numbers of men of color who recognize and acknowledge the “pressures women of color faced.”³⁷⁹ For example, prominent Critical Race Theorist, Professor Derrick Bell, resigned as Dean of University of Oregon’s law school as well as from the Harvard Law School faculty in protest of failures by both schools’ faculties to hire women faculty of color.³⁸⁰ In light of #MeToo, a recent poll found that women of color were most likely to see sexual harassment as a “serious problem in the workplace” (86%) and that “marginally” more men of color (74%) shared this view than white women (72%).³⁸¹ 63% of white men rated the sexual harassment problem as serious.³⁸² Thus this greater recognition by men of color regarding the existence and importance of the sexual harassment problem may derive, at least in part, from its commonalities and connections with race discrimination.

This history feeds into the second and third Social Justice Feminist methodologies because much of the harassment those early black women plaintiffs experienced could not “be disaggregated into its component parts.”³⁸³ Due to the perception that this harassment was “racist as well as

bank-vault-her-sexual-harassment-case-would-make-legal-history/ [https://perma.cc/2FZU-BEDM].

³⁷⁵ Roberts, *supra* note 371, at 366.

³⁷⁶ *Id.* at 368.

³⁷⁷ *Id.* at 371.

³⁷⁸ *Id.* at 372.

³⁷⁹ RICHARD DELGADO & JEAN STEFANCIC, *Introduction*, in THE DERRICK BELL READER 1, 12 (Richard Delgado & Jean Stefancic eds., 2005).

³⁸⁰ *See id.* at 10–13.

³⁸¹ Anne Branigin, *Survey Finds Men of Color are More Likely to Say Sexual Assault is a ‘Serious Problem’ Than White Women . . . For Real*, ROOT (Jan. 26, 2018), <https://www.theroot.com/men-of-color-are-more-likely-to-say-sexual-assault-is-a-1822462505> [https://perma.cc/79FR-VMBC].

³⁸² *Id.* Note that the poll question asking about the seriousness of the sexual harassment problem was only asked of those who responded affirmatively to a previous question about whether sexual harassment was a problem; 83% of Americans polled thought sexual harassment was a problem, including 87% of non-white Americans, 81% of white Americans, 86% of American women, and 81% of American men. *Q: Do You Think Sexual Harassment of Women in the Workplace is a Problem in this Country or Not? IF PROBLEM: Is it a Serious Problem, or Not Serious?*, WASH. POST-ABC NEWS POLLING (Jan. 29, 2018), https://www.washingtonpost.com/page/2010-2019/WashingtonPost/2018/01/24/National-Politics/Polling/question_19723.xml?uuid=IZYjBgD8EeiGuYkIdDx53Q [https://perma.cc/H6ZX-4FTC].

³⁸³ Roberts, *supra* note 371, at 370–71.

sexist,” it was “easier to recognize . . . as discrimination.”³⁸⁴ Such perceptions undoubtedly helped convince courts of the legitimacy of sexual harassment as a form of discrimination, but Professor Roberts’s analysis demonstrates that the critical ingredient black women contributed to the development of sexual harassment law was their recognition of the intersectional nature of the harassment they suffered. After all, without the early black women plaintiffs’ intersectional understandings of their experiences and histories, as well as their courage to use an untried legal method to seek redress, courts may never have adjudicated any claims that recognize sexual harassment as discrimination. Moreover, simply by using the legal claim to combat the racialized sexual harassment / sexualized racial harassment they experienced, these path-setting black women plaintiffs arguably used a “bottom-up” strategy, from “the perspectives of the most oppressed,” in an attempt to “combat . . . multiple oppressions.”³⁸⁵ Thus, like the Women’s March—which owes its success primarily to the skilled, experienced, and brave women of color organizers who made up the majority of its leaders—the fearlessness and leadership of the early black women sexual harassment plaintiffs helped translate a “social practice” into a legal violation.³⁸⁶

In numerous albeit quite imperfect ways, the history of sexual harassment law has arguably corroborated Professors Matsuda, Crenshaw, and others who advocated that “bottom-up” strategies would benefit not only the most intersectionally disadvantaged, but also those who are “singularly disadvantaged.”³⁸⁷ As some Title IX, #MeToo, and Time’s Up activists are currently showing, white women who are otherwise some of the most privileged women in the nation (e.g., students at elite universities, famous actresses) have been able to use anti-sexual harassment law and activism quite effectively. Since *Oncale v. Sundowner Offshore Services*,³⁸⁸ white, heterosexual men and boys who are nevertheless disadvantaged by their socioeconomic status, as Joseph Oncale was,³⁸⁹ or who have been “feminized” by bullies,³⁹⁰ can bring sexual harassment cases. Finally, although it doesn’t appear that this analysis has yet made it into any litigated cases, in

³⁸⁴ *Id.* at 371.

³⁸⁵ Kalsem & Williams, *supra* note 308, at 190.

³⁸⁶ Reva B. Siegel, *A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 90, at 1.

³⁸⁷ See Crenshaw, *supra* note 358, at 167.

³⁸⁸ 523 U.S. 75 (1998).

³⁸⁹ See Toni P. Lester, *Race, Sexuality, and the Question of Multiple, Marginalized Identities in U.S. and European Discrimination Law*, in GENDER NONCONFORMITY, RACE, AND SEXUALITY: CHARTING THE CONNECTIONS 84, 91–95 (Toni P. Lester ed., 2002).

³⁹⁰ See Nancy Chi Cantalupo, *Masculinity & Title IX: Bullying & Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887, 947 (2014) (“In some cases, plaintiffs are put at the bottom of the [male] hierarchy with epithets calling them gay or a girl, and this degraded status makes them vulnerable to sexual violence. In others, the plaintiffs are ‘made gay’ through being the victim of a sexual assault, which opens them up to further harassment as boys who are supposedly feminized and degraded under traditionally masculine norms.”).

Chokehold, an intersectional study of the policing of black men, Professor Paul Butler identifies the aspects of police stop and frisks that are arguably actionable using sexual harassment laws.³⁹¹

Women of color remain leaders in the development of public awareness of sexual harassment as a civil rights violation. Professor Hill's courageous testimony about Justice Thomas, while unsuccessful in blocking his confirmation to the Court, made sexual harassment a household term and educated employees and employers of all genders about its illegality.³⁹² More recently, and prior to #MeToo, women of color were not only combatting sexual harassment on campuses, but they were also challenging accused harassers and the institutions that harbor them, both individually³⁹³ and collectively,³⁹⁴ in extremely hostile environments like Silicon Valley.

Discussions of intersectionality and women of color's leadership in speaking out against sexual harassment have also been prominent with regard to #MeToo, in both positive and negative senses. When #MeToo took off, its insufficiently intersectional character was quickly identified and critiqued, with particular criticism directed at the initial lack of acknowledgment that Tarana Burke had used the phrase "Me Too" to raise awareness and to support survivors of sexual harassment who were women and girls of color.³⁹⁵ In addition, the failure of those on social media to vocally support black female film and television personalities who had been attacked on Twitter was contrasted with the outpouring of outrage and protective tweeting for white women who had been harassed.³⁹⁶

#MeToo has been fairly responsive to such critiques. As a grassroots movement, #MeToo is not officially represented by any one person or organization, but women of color have taken on leadership roles in the #MeToo movement. Prominent women of color actresses such as Salma Hayek and Lupita Nyong'o were among the women who spoke out about being harassed

³⁹¹ PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 98–103 (2017).

³⁹² See Crenshaw, *supra* note 168, at 1467–48.

³⁹³ An example of such an individual case is Ellen Pao's lawsuit, which "paved the way for many other women" to speak out "against a culture of sexual harassment in Silicon Valley." REAPPROPRIATE, *supra* note 193.

³⁹⁴ For instance, Tammy Cho, Grace Choi, and Anne Shin created their website, BetterBrave.org [<https://perma.cc/GA3G-7J62>], to provide "a comprehensive guide for anyone who's experienced sexual harassment at work and doesn't know what to do next." Emily Peck, *These 3 Women Are Fed Up With Sexual Harassment. And They're Taking Action.*, HUFFINGTON POST (July 15, 2017), https://www.huffingtonpost.com.au/entry/sexual-harassment-silicon-valley-tech-women-website_us_5967cfabe4b0d6341fe79f23 [<https://perma.cc/RW9U-UESC>].

³⁹⁵ See Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, YALE L.J. F. 105, 106–07 (Jun. 18, 2018); see also Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/F9BS-TLHP>].

³⁹⁶ Onwuachi-Willig, *supra* note 395, at 111; see also Garcia, *supra* note 395.

by Harvey Weinstein,³⁹⁷ and the first woman to report Bill Cosby for assault in 2000 is an African American actress and model.³⁹⁸ At the 2018 Women's March in Los Angeles, triple-crown (of acting) winner, Viola Davis, disclosed that she is a survivor of sexual harassment and drew attention to the Time's Up initiative designed to combat sexual harassment across industries, including those not well represented thus far in #MeToo activism.³⁹⁹ Likewise, in her celebrated Golden Globes speech, Oprah Winfrey highlighted sexual harassment, specifically mentioning the high levels of harassment in industries dominated by women workers of color, working class women, and others less able to participate in the #MeToo movement.⁴⁰⁰ In an echo of Professor Roberts's analysis about how African American women's intersectional understandings of sexual harassment led them to take a leadership role in protesting and working to end harassment, Oprah also specifically mentioned Recy Taylor and Rosa Parks's organizing on Taylor's behalf.⁴⁰¹

Perhaps most significantly, prominent and influential Hollywood women and women lawyers of color have been leaders in forming the Time's Up Legal Defense Fund. They include Tina Tchen, America Ferrera, Rashida Jones, Eva Longoria, Shonda Rhimes, Nina L. Shaw, and Kerry Washington.⁴⁰² The Time's Up Legal Defense Fund aims to assist women workers who are likely unable to afford legal action against sexual harassment, including those in industries with large numbers of women of color, such as farmworkers, hotel and restaurant staff, etc.⁴⁰³ The reasonably quick and ongoing correction from a non-self-conscious, white-woman-dominated movement to a more Social Justice Feminist approach suggests that Time's Up activists are learning from the Title IX movement activists and the Women's March organizers. Moreover, although #MeToo and Time's Up are getting more public attention right now, the Title IX activists have become ever more explicitly Social Justice Feminist in their efforts, forming organi-

³⁹⁷ See Isha Aran, *Harvey Weinstein is Saving His Nastiest Smear Attempts for Women of Color*, SPLINTER (Dec. 14, 2017), <https://splinternews.com/harvey-weinstein-is-saving-his-nastiest-smear-attempts-1821293136> [<https://perma.cc/S9JR-5HBX>].

³⁹⁸ See *Timeline: Bill Cosby's Career and Accusations Against Him*, REUTERS (Dec. 30, 2015), <https://www.reuters.com/article/us-people-cosby-career-timeline/timeline-bill-cosbys-career-and-accusations-against-him-idUSKBN0UD1UF20151230> [<https://perma.cc/52Q2-PE5N>].

³⁹⁹ See Carlin, *supra* note 336.

⁴⁰⁰ See Eliza Berman, "A New Day Is on the Horizon." *Oprah's Powerful Golden Globes Speech Honors Women of #MeToo Movement*, TIME (Jan. 8, 2018), <http://time.com/5088311/oprah-golden-globes-speech-cecil-demille-award/> [<https://perma.cc/PTZ7-LPEL>].

⁴⁰¹ *Id.* Six white men in Alabama raped Ms. Taylor, a young African American woman, in 1944, and Rosa Parks organized a protest movement around Ms. Taylor's case over 10 years before her famous refusal to give up her seat to a white man on a Montgomery, Alabama bus. Lindsay Deutsch and Josh Moon, *5 facts about Rosa Parks and the movement she helped spark*, USA TODAY (Dec. 1, 2015), <https://www.usatoday.com/story/news/nation-now/2015/12/01/rosa-parks-bus-facts/76603386/> [<https://perma.cc/LB57-9RKH>].

⁴⁰² Buckley, *supra* note 5.

⁴⁰³ *Id.*

zations such as Survivors Eradicating Rape Culture, which was founded and led by two women of color to combat rape culture in an intersectional way.⁴⁰⁴

B. Social Justice Feminist Solutions to Disproportionate Targeting of Women Students of Color

Survivors Eradicating Rape Culture’s Social Justice Feminist mission is a hopeful first step in halting the erasure of women students of color from the dominant narrative—as well as from our collective images of what sexual harassment in education is, and who experiences its harms. Scholars such as Drs. Harris and Linder have called for several other much needed interventions, including: “[l]istening to women of color’s experiences and asking them directly about their needs regarding approaches to sexual violence on campus;”⁴⁰⁵ student services and educational programs that integrate women of color as staff, speakers, and “institutional allies;”⁴⁰⁶ required courses and events that deal intersectionally with “sexism, racism, genderism, and classism” as well as women of color’s experiences of sexual violence;⁴⁰⁷ starting up “collectives”⁴⁰⁸ and support groups for women survivors of color;⁴⁰⁹ training victim advocates in intersectionality and culturally competent practices;⁴¹⁰ and incorporating information about intersectionality and sexual violence in student bystander training.⁴¹¹

Even more steps beyond this list will likely be needed to truly accomplish this task, and some steps will require specifically legal interventions. Therefore, this Part concludes with three Social Justice Feminist interventions that can assist with reaching this goal, each of which needs new law to facilitate it. First, the Department of Education (ED) must re-establish “preponderance of the evidence” as the only acceptable evidentiary standard for school investigations of all discriminatory harassment. Second, federal law needs to prioritize research on women students of color’s experiences of dis-

⁴⁰⁴ See *Our Team*, *supra* note 338; Kamilah Willingham, *Why Harvard Should #JustSaySorry for How it Handled My Sexual Assault*, MEDIUM: THE ESTABLISHMENT (Aug. 9, 2016), <https://medium.com/the-establishment/why-harvard-should-justsaysorry-for-how-it-handled-my-sexual-assault-c4ba18f72b5b> [<https://perma.cc/MG6V-KNWU>].

⁴⁰⁵ Harris, *supra* note 18, at 55.

⁴⁰⁶ Scott et al., *supra* note 98, at 130.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ See Chris Linder and Jessica C. Harris, *Conclusion: History, Identity, and Power-Conscious Strategies for Addressing Sexual Violence on College Campuses*, in INTERSECTIONS OF IDENTITY, *supra* note 18, at 243.

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 247 (“When college students subscribe to the myths that white women are most likely to be targeted as victims of sexual violence and that most sexual violence is perpetrated by strangers or men of color, they are not intervening in the right moments . . . [because] they have not been socialized to believe that this is what sexual . . . violence looks like. They have been socialized to protect wealthy white men because they are the ones with power in our culture.”).

criminy harassment when allocating research funding. Third, federal law should be amended to increase schools' disclosures about their responses to sexual harassment complaints, including demographic information about the parties in investigations and the parties disciplined by the school for sexual harassment. These interventions are Social Justice Feminist because they fashion remedies from "the perspectives of the most oppressed . . . in an effort to identify strategies that combat . . . multiple oppressions."⁴¹² Because women students of color are among those most oppressed by sexual harassment in education,⁴¹³ each of these interventions puts women students of color at the center of its concerns and adopts methods focused on meeting their needs.

i. *Re-establishing the Preponderance Standard as the Uniform Evidentiary Standard in All Internal School Investigations of Discriminatory Harassment*

The first of these interventions, re-establishing "preponderance of the evidence" as the only acceptable evidentiary standard in school investigations across all forms of discriminatory harassment, is a baseline change. A legal standard that creates a clear intersectional legal conflict, such as the Interim Guidance does, should not be allowed to stand—at least not by any intervention claiming to use Social Justice Feminist methods. Women students of color simply cannot be put in the position where they must chop up their identities in order to get just and equitable redress and remedies for harassment that they have suffered—a task that is impossible anyway, given what we know about the inextricably intertwined racist and sexist ways in which harassment targets women of color.

Of course, adopting the same evidentiary standard for racial and sexual harassment does not necessitate adopting the preponderance standard. According to the enforcement record of OCR, which has required that schools use the preponderance standard in both racial and sexual harassment investigations, any school that decided to adopt a clear and convincing evidence standard for both racial and sexual harassment would risk being found in

⁴¹² Kalsem & Williams, *supra* note 308, at 190. Note that these remedies are not obviously grassroots strategies; they ultimately depend on those at or near the top of public or private institutions (university presidents, boards, etc.) adopting and implementing the measures, and on government regulators who create and/or enforce state laws and federal statutes like Title IX. Nevertheless, the climate surveys discussed in Part V.B.iii are actively being advanced by groups of student survivor activists such as those affiliated with Know Your IX and therefore can be considered grassroots. See *Student Rally Against Sexual Violence*, NO MORE, <https://nomore.org/events/student-rally-sexual-violence/> [<https://perma.cc/79ZC-PE9S>]. In addition, these remedies constitute a Social Justice Feminist "bottom-up" strategy because they establish mechanisms by which those in charge of making law and policy can hear and listen to the experiences and demands of those with the greatest need.

⁴¹³ See *supra* Parts III and IV.

violation of Title VI by OCR.⁴¹⁴ However, if a school—for whatever mysterious reason—decided to take such a risk and use clear and convincing evidence for both racial and sexual harassment, it would still need to justify why clear and convincing evidence is an appropriate evidentiary standard for any form of discriminatory harassment. As the analysis in Part I and in other writings on the use of the preponderance standard in sexual harassment cases shows,⁴¹⁵ such a justification simply cannot be made. All of the reasons that the preponderance standard is the only appropriate standard for the purpose and principles of anti-sex discrimination laws apply equally to those of anti-race discrimination laws because both are concerned with ensuring equality.

Furthermore, it would be dangerous to assume that racial harassment is different from sexual harassment as a practical matter. In particular, it would be a mistake to assume that racial harassment can more easily reach a higher evidentiary standard because it tends to occur in the public as opposed to in private spheres and is therefore less likely to be a “word-on-word” case. For instance, one might imagine a situation where a student sees another student surreptitiously hanging a noose in a place where it is likely to harass African American students but where there are no video cameras or other witnesses besides the single student observer. When the student observer confronts the noose-hanging student, a fist-fight develops, and both students end up in the emergency room with injuries. Imagine, furthermore, that neither student is African American (because if either student were African American, their identity would likely influence the credibility of a charge of racial harassment). If the student observer files a complaint against the accused noose-hanger and the accused student denies the charge, the case is a word-on-word racial harassment case.

While such a case is presented hypothetically here, it is hardly outlandish: surreptitious hanging of nooses and other similar visual or verbal symbols happens distressingly frequently on college campuses.⁴¹⁶ However, non-hypothetical cases of private racial harassment exist as well. For instance, a white University of Hartford student privately harassed her African American roommate for months, such that the African American woman decided

⁴¹⁴ Wallingford Board of Education, *supra* note 15.

⁴¹⁵ See Baker et al., *supra* note 11, at 6; Cantalupo, *supra* note 11, at 289.

⁴¹⁶ Mariah Bohanon, *Three Incidents Involving Nooses on College Campuses are Being Investigated as Hate Crimes*, INSIGHT INTO DIVERSITY (May 9, 2017), <http://www.insightintodiversity.com/three-incidents-involving-nooses-on-college-campuses-are-being-investigated-as-hate-crimes/> [https://perma.cc/A9TL-RY6V]; Rachel Chason, *Student Admits to Hanging Noose on Duke Campus*, USA TODAY (Apr. 3, 2015), <http://college.usatoday.com/2015/04/03/duke-investigation-underway-after-noose-found-on-campus/> [https://perma.cc/TE5C-AFKL]; Jingwen Zhang, *Noose Discovery Sparks Campuswide Response*, AMHERST STUDENT (Sept. 12, 2017), <https://amherststudent.amherst.edu/?q=article/2017/09/12/noose-discovery-sparks-campus-wide-response> [https://perma.cc/B2Q3-TDQ6]; Veronica Hilbring, *It Never Stopped: Here Are 5 Recent Cases of Attempted Lynchings and Noose Intimidation*, ESSENCE (Sept. 15, 2017), <https://www.essence.com/news/recent-cases-lynching-noose-intimidation> [https://perma.cc/3ZGQ-QAHT].

to move out, prompting the white roommate to brag online about the “shockingly gross” ways she had harassed her roommate.⁴¹⁷ Had the African American roommate experienced that harassment without the white roommate bragging online about it, it would again have been a word-on-word case.

In word-on-word cases, it is fundamentally inequitable to *systematically* and *structurally* privilege the truth-telling presumption given to one party over the other. This is just as true for racial harassment cases—and any other kind of discriminatory harassment case—as it is for sexual harassment cases.

For these reasons, as well as those discussed in Part I, the preponderance standard is the appropriate standard for racial harassment cases as well as for sexual harassment cases, even independent of the need to have consistent standards across the board. Accordingly, schools should feel compelled to adopt the preponderance of the evidence standard for both racial and sexual harassment investigations even aside from the indication in OCR’s past enforcement actions that OCR will find a school in violation of Title VI if it uses another evidentiary standard for racial harassment cases.

ii. *Supporting Research on Women of Color’s Experiences of Sexual Harassment*

Re-establishing the pre-Interim Guidance status quo regarding the standard of evidence is necessary, but insufficient on its own. Other Social Justice Feminist interventions are needed, and one of the most critical is a method for encouraging research on women students of color’s experiences of sexual harassment.

Encouraging such research is important for several reasons. First, racialized sexual/sexualized racial stereotyping is a clear cause of much sexual harassment directed at women students of color, but it is difficult to debunk such stereotypes without actual data. Second, the almost total lack of research on women students of color’s experiences contributes to their erasure from the conversation about sexual harassment. Third, as Social Justice Feminist methodologies teach us, we will not be able to address the harm of intersecting oppressions without centering the perspectives of those experiencing such intersecting oppressions in our research.

Research on women students of color’s experiences of sexual harassment should therefore be encouraged by the federal government. Congress should appropriate money for such research as it has done under the Vio-

⁴¹⁷ Beatrice Dupuy, *White College Student Arrested for Bullying ‘Jamaican Barbie’ Roommate in Shockingly Gross Ways*, RAWSTORY (Nov. 1, 2017), <https://www.rawstory.com/2017/11/white-college-student-arrested-for-bullying-jamaican-barbie-roommate-in-shockingly-gross-ways/> [<https://perma.cc/H3UW-Q4U5>].

lence Against Women Act (VAWA).⁴¹⁸ Such funding is especially important because many universities have a poor record and poor incentives for funding or otherwise supporting research on sexual harassment and violence in education. Specific legislation is required to change universities' incentives: as we wait for such legislation to pass, the federal government must support sexual harassment research, including by specifically funding research relevant to women students of color's experiences of sexual harassment.

This also means researching the race of alleged harassers, either by asking survivors about the race or perceived race of the harasser, by asking accused harassers directly for demographic information, or, ideally, doing both. As shown in the context of criminal justice system research, it is possible to conduct such research; and as VAWA makes clear, the federal government supports such research.⁴¹⁹ Therefore, the federal government can and should support such research around Titles IX and VI.

The federal government is not the only entity, however, that should support this research. Indeed, such research should be supported by many, including the Title IX critics who allege that black men in particular are being disproportionately and falsely accused of sexual violence, are disproportionately disciplined for sexual harassment by their schools, or both. For instance, Professor Halley complains that Harvard Law School's Title IX office "cannot 'know' [the number of black male respondents in its investigations of reported sexual harassment] because it has not been thought important enough to monitor for racial bias."⁴²⁰ Professor Halley's concerns and the primary concerns of this Article could be addressed together by collecting demographic information about complainants and respondents in each case. Only with this information can any of us know whether complainants are primarily white women, and whether white women or women of color complainants are accusing black men of sexual harassment in disproportionately large numbers. Therefore, it can be anticipated that Professor Halley and others who share her concern would support such research. These demands for more information on race and sexual harassment cannot be fulfilled without more data collection and greater transparency about that data on the part of schools.

⁴¹⁸ See, e.g., U.S. DEPT OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, FISCAL YEAR 2017 RESEARCH AND EVALUATION SOLICITATION 1 (2017), <https://www.justice.gov/ovw/file/923436/download> [https://perma.cc/RQV7-NFJB].

⁴¹⁹ See *The National Institute of Justice Commemorates the 15th Anniversary of the Violence Against Women Act*, 266 NAT'L INST. JUST. J. 9 (May 26, 2010), <https://www.ncjrs.gov/pdffiles1/nij/230409.pdf> [https://perma.cc/XQ94-KSIX].

⁴²⁰ See Halley, *supra* note 34, at 107–08.

iii. *Requiring Demographic Data Collection and Transparency by Colleges and Universities*

The second Social Justice Feminist intervention to halt the erasure of women students of color from our images and narratives of sexual harassment in education thus feeds into a third: requiring data collection and transparency by schools about this problem. These requirements should compel schools to collect demographic information about survivors and the accused via climate surveys, about complainants and respondents in the school's investigation processes, and about parties disciplined (or not) as a result of those processes.

Data collection and transparency are both long-articulated goals of those seeking to prevent and end sexual harassment, and especially sexual violence. For example, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) was passed in 1990 as a consumer protection statute designed to compel colleges and universities to collect crime reporting data and to disclose those statistics to the public.⁴²¹ This nearly thirty-year-old statute has been amended several times, most recently by the 2013 Violence Against Women Reauthorization Act (VAWA 2013). VAWA 2013 added dating violence, domestic violence, and stalking to the list of offenses about which colleges had to disclose (sex offenses that were included in the Clery Act from its inception), as well as adding to the protections for survivors of those crimes.⁴²²

The Clery Act's effectiveness in disseminating information about gender-based violence has been hampered by various factors. First, Professor Yung's research suggests that many colleges and universities inadequately comply with the legislation's requirements.⁴²³ Even more fundamentally, such non-compliance is encouraged by the perverse incentives that schools face regarding reporting of campus sexual harassment. In the case of peer sexual violence, high rates of violence and low rates of victim reporting combine such that the schools that ignore sexual violence have fewer reports and look safer, whereas the schools that encourage victim reporting have more reports and look less safe.⁴²⁴ Because victims must first report in order

⁴²¹ See *Summary of the Jeanne Clery Act: A Compliance and Reporting Overview*, CLERY CENTER, <https://clerycenter.org/policy-resources/the-clery-act/> [https://perma.cc/YW66-EB5R].

⁴²² See CLERY CENTER, CHECKLIST: VAWA AMENDMENTS TO CLERY (2017), https://clerycenter.org/wp-content/uploads/2017/04/VAWA_Checklist.pdf [https://perma.cc/5PLT-LYAG].

⁴²³ See Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL., PUB. POL'Y & L. 1, 7 (2015).

⁴²⁴ See Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 219 (2011); Press Release, Office of the Press Sec'y, FACT SHEET: Not Alone – Protecting Students from Sexual Assault (Apr. 29, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/04/29/fact-sheet-not-alone-protecting-students-sexual-assault> [https://perma.cc/928B-KAW7]; Tyler Kingkade, *College*

to access services that can halt the harm and possibly identify an accused assailant, campuses with higher reports are actually safer for victims and students who might be victimized later. However, this correct conclusion is counterintuitive⁴²⁵: the reporting portions of the Clery Act do not have the consumer protection effect intended by the law, and in fact *discourage* certain information disclosures that could give prospective students and their parents a false impression of safety.

Largely because of these perverse incentives, scholars and lawmakers have proposed mandating “climate” surveys to show the rates of violence on a campus even if victims are not officially reporting.⁴²⁶ These surveys change the incentives that schools have and focus prospective students on the correct data: incidence rates, reporting rates, and the gap between the two. A campus with high incidence rates but low reporting rates will cause consumers to wonder why there is such a large gap, creating incentives for campuses to shrink that gap by utilizing primary prevention methods to lower sexual harassment incidence rates and secondary prevention methods to raise victim reporting rates.⁴²⁷

As a result of encouragement by the Task Force⁴²⁸ as well as general public discussion of high rates of sexual harassment and low rates of victim reporting, many institutions initiated climate surveys from 2014–2016, either

Sexual Assaults Often Go Unreported, This Idea Could Change That, HUFFINGTON POST (April 28, 2014), https://www.huffingtonpost.com/2013/09/23/campus-sexual-assault-surveys_n_3968725.html [<https://perma.cc/7F8N-UD58>]; Danielle Dirks, *Surveys Will Reveal the True Numbers of Sexual Assault Survivors on Campus*, N.Y. TIMES (Oct. 10, 2016), <https://www.nytimes.com/roomfordebate/2014/08/12/doing-enough-to-prevent-rape-on-campus/surveys-will-reveal-the-true-numbers-of-sexual-assault-survivors-on-campus> [<https://perma.cc/6CTF-SLPD>].

⁴²⁵ See Cantalupo, *supra* note 424, at 219–20; Cantalupo, *supra* note 78, at 228; Nancy Chi Cantalupo, “Decriminalizing” *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 483, 522 (2012); Nancy Chi Cantalupo, *Accurate Reporting of Sexual Assault on Campus Without Shame*, N.Y. TIMES (Jan. 3, 2017), <https://www.nytimes.com/roomfordebate/2014/08/12/doing-enough-to-prevent-rape-on-campus/accurate-reporting-of-sexual-assault-on-campus-without-shame> [<https://perma.cc/2QX9-N7HQ>].

⁴²⁶ See Catherine Rampell, *Stop the Campus Rape Numbers Game*, WASH. POST (Aug. 4, 2014), https://www.washingtonpost.com/opinions/catherine-rampell-stop-the-campus-rape-numbers-game/2014/08/04/da82dcfc-1c0d-11e4-ae54-0cfe1f974f8a_story.html [<https://perma.cc/FN6J-VW2X>]; Tyler Kingkade, *Proposal To Require Campus Climate Surveys On Sexual Assault Faces Quick Opposition*, HUFFINGTON POST (Apr. 29, 2014), https://www.huffingtonpost.com/2014/04/29/campus-climate-surveys-sexual-assault_n_5235457.html [<https://perma.cc/C9MY-UD8H>].

⁴²⁷ The public health model of comprehensive sexual violence prevention consists of primary, secondary, and tertiary prevention methods. Such comprehensive prevention methods are widely acknowledged as a best practice. See, e.g., CENTERS FOR DISEASE CONTROL AND PREVENTION, *SEXUAL VIOLENCE PREVENTION: BEGINNING THE DIALOGUE* 3 (2004), <https://www.cdc.gov/violenceprevention/pdf/svprevention-a.pdf> [<https://perma.cc/88EL-XX9L>].

⁴²⁸ See WHITE HOUSE TASK FORCE, *supra* note 77, at 7–8 (Apr. 2014), http://www.changingourcampus.org/resources/not-alone/WH_Task_Force_First_Report.pdf [<https://perma.cc/B2WM-GFY6>].

independently⁴²⁹ or in cooperation with other schools.⁴³⁰ The Task Force⁴³¹ and the Kaiser Family Foundation, in partnership with *The Washington Post*,⁴³² also conducted surveys using national samples.

Because these surveys were voluntary, they made different methodological choices, some of which were controversial.⁴³³ Climate surveys were initially opposed by some colleges and universities⁴³⁴ after the Task Force recommended them and Vice President Biden called on colleges to fulfill their “moral responsibility to know what’s happening on their campus.”⁴³⁵ These developments may have encouraged inclusion of a provision mandating a common survey to be conducted by all schools in proposed legislation introduced in 2014.⁴³⁶ With the 2016 election of a Republican-majority Congress, proposed legislation⁴³⁷ has taken the exact opposite tack and would codify a *prohibition* on the Secretary of Education *ever* regulating the con-

⁴²⁹ See Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Surveys: 2014, 2015, and 2015-2016*, FREYD DYNAMICS LAB, <http://dynamic.uoregon.edu/jjf/campus/> [https://perma.cc/UC6X-MU26]; OFFICE OF THE CHANCELLOR, MASSACHUSETTS INSTITUTE OF TECHNOLOGY, SURVEY RESULTS: 2014 COMMUNITY ATTITUDES ON SEXUAL ASSAULT 4–5 (Oct. 27, 2014), <http://web.mit.edu/surveys/health/MIT-CASA-Survey-Summary.pdf> [https://perma.cc/2BB3-LWFD]; Scott Malone, *University of New Hampshire Sets National Model for Rape Prevention*, HUFFINGTON POST (May 2, 2014), https://www.huffingtonpost.com/2014/05/03/university-of-new-hampshire-rape_n_5253157.html [https://perma.cc/4PY3-MFL2].

⁴³⁰ See *ARC3 Campus Climate Survey*, ADMIN. RESEARCHER CAMPUS CLIMATE COLLABORATIVE (Sept. 1, 2015), <https://campusclimate.gsu.edu/arc3-campus-climate-survey/> [https://perma.cc/6END-9LVV]; Cantor et al., *supra* note 83, at 1.

⁴³¹ See Krebs et al., *supra* note 80, at 1–3.

⁴³² See Bianca DiJulio et al., *Survey of Current and Recent College Students on Sexual Assault*, KAISER FAMILY FOUND. (June 12, 2015), <https://www.kff.org/other/poll-finding/survey-of-current-and-recent-college-students-on-sexual-assault/> [https://perma.cc/K7XJ-PBVH].

⁴³³ See Michael Stratford, *AAU Pushes Climate Surveys*, INSIDE HIGHER ED (Nov. 19, 2014), <https://www.insidehighered.com/news/2014/11/19/research-universities-say-theyll-conduct-sexual-assault-surveys-amid-federal> [https://perma.cc/9DM4-K498].

⁴³⁴ See Jake New, *Creating the Right Climate Survey*, INSIDE HIGHER ED (July 29, 2016), <https://www.insidehighered.com/news/2016/07/29/campus-climate-surveys-abound-does-disagreement-over-what-works-best> [https://perma.cc/2QUX-UY9Z].

⁴³⁵ See Amer Madhani & Rachel Axon, *Biden: Colleges Must Step Up to Prevent Sexual Assault*, USA TODAY (Apr. 29, 2014), <https://www.usatoday.com/story/news/nation/2014/04/29/biden-colleges-sexual-assaults/8460745/> [https://perma.cc/E2SV-YXGX].

⁴³⁶ See Press Release, Congresswoman Speier Introduces Bipartisan Legislation to Protect College Students from Sexual Assault (July 30, 2014), <https://speier.house.gov/media-center/press-releases/congresswomanspeierintroduces-bipartisan-legislation-protect-college> [https://perma.cc/A3FG-5KZA]; HALT Campus Sexual Violence Act, H.R. 2680, 114th Cong. (2015).

⁴³⁷ See Kara Voght, *GOP Bill Could Make it Harder for Colleges to Crack Down on Sexual Assault*, MOTHER JONES (Dec. 21, 2017), <https://www.motherjones.com/politics/2017/12/gop-bill-could-make-it-harder-for-colleges-to-crack-down-on-sexual-assault> [https://perma.cc/LYJ2-YA5G].

tent of the surveys or using “the results of the [campus climate] surveys to make comparisons between institutions of higher education.”⁴³⁸

As this history demonstrates, getting schools to collect and disclose the data necessary to conduct research on sexual harassment has been controversial, somewhat surprisingly in light of colleges’ and universities’ reputation for being at the forefront of research and intellectual innovation. For this reason, it will likely be necessary to compel schools to expose more of the iceberg—increasing data collection and transparency in general, and for racial and sexual harassment in particular—most likely through new legal requirements.

Had the bills that included mandatory climate surveys passed during the 2014–2016 Congress, they would have tasked the ED with writing the mandatory surveys, with relatively few guidelines on what should be included. In light of the developments in the race and sexual harassment conversation discussed in this Article, the mandatory survey provisions in those bills should be re-introduced, but they should be modified to direct the ED to collect and publish demographic information about survey respondents, anyone who survey respondents indicate harassed them, and anyone they harassed. Given what we know about faculty sexual harassment, as reviewed here and in my co-authored *Utah Law Review* study, the provisions should also direct the ED to survey graduate students and to ask all students about faculty harassment. Such a mandate could be put in place through an amendment to the Clery Act, in order to assist it in achieving its consumer protection goals.

The Clery Act should also be amended to require schools to disclose more information about individual cases brought by or against students and faculty that go through the school’s disciplinary systems—including demographic information for the complainant and respondent, and information about the result of the investigation and any sanctions imposed. In cases for which personally identifying information might be necessarily disclosed, an amendment could limit disclosures about investigations so that they are not provided to the general public, but are released for research purposes that meet certain criteria established by the ED.

Such an amendment to the Clery Act could use the Civil Rights Data Collection mandate as a model, or separate legislation could extend the Civil Rights Data Collection beyond the K–12 context in which it is currently used. The Civil Rights Data Collection has collected data about civil rights issues in K–12 schools since 1968,⁴³⁹ including student discipline.⁴⁴⁰ As

⁴³⁸ PROSPER Act, H.R. 4508, 115th Cong. § 162(d)(2)(B) (2017), https://edworkforce.house.gov/uploadedfiles/amd_1_guthrie_amendment_in_the_nature_of_a_substitute.pdf [<https://perma.cc/6GLR-NG3R>].

⁴³⁹ See *Civil Rights Data Collection*, U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS (Nov. 30, 2017), <https://www2.ed.gov/about/offices/list/ocr/data.html> [<https://perma.cc/EHW7-KCSV>].

others have pointed out,⁴⁴¹ by either imitating or extending the Civil Rights Data Collection regarding discipline at colleges and universities, we would be able to collect data indicating whether accused students of color are disproportionately disciplined on a range of misconduct allegations, including sexual harassment.

It is important to remember that collecting data from students directly and collecting data from schools about their disciplinary proceedings are two fundamentally different inquiries that will gather information about different aspects of the race and sexual harassment issue. Collecting data via the climate surveys addresses the narrative that any racial disparity in accusations of sexual harassment is a result of the accusers' racist attitudes, which lead accusers to file false reports. According to the dominant narrative, the accusers are white college women and the accused are African American college men.⁴⁴² But this narrative may be untrue on multiple counts. First, most accusers may not be white. Second, most accused students may not be black men or other men of color. Finally, most accusers of any racial group may not be accusing harassers following any particular racial pattern. That is, even if most accusers are white and most accused students are African American, this does not necessarily mean that most white accusers are accusing black accused students, or that most black accused students are being accused by white women.

Whether schools or school disciplinary procedures are racially biased is a different question. Again, it is possible that schools are disproportionately disciplining students of color for misconduct generally or sexual harassment specifically—it may even be likely, depending on what analogies one draws. But that does not *necessarily* mean that such disproportionate discipline is linked to the *accusers'* racial biases. This is not to suggest that accusers have no racial biases; indeed, the research on implicit bias suggests that the vast majority, if not all, of us carry around racial, gender-based, and other biases, which could be described as a negative side effect of normal cognitive processes.⁴⁴³ Nevertheless, biases come in varying strengths and contexts. To

⁴⁴⁰ See U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (March 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf> [<https://perma.cc/88QW-2JNN>].

⁴⁴¹ Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*, 18 NEV. L. J. 107, 156–59 (2017).

⁴⁴² See, e.g., Crenshaw, *supra* note 19, at 1266 (“Historically, the dominant conceptualization of rape as quintessentially Black offender/white victim has left Black men subject to legal and extralegal violence. . . . [T]he casting of all Black men as potential threats to the sanctity of white womanhood was a familiar construct that antiracists confronted and attempted to dispel over a century ago.”).

⁴⁴³ See Cynthia Lee, *Awareness as a First Step Toward Overcoming Implicit Bias*, in ENHANCING JUSTICE: REDUCING BIAS 289, 290–91 (Sarah E. Redfield ed., 2017); Keith Payne et al., *How to Think About “Implicit Bias”*, SCI. AM. (Mar. 27, 2018), <https://www.scientificamerican.com/article/how-to-think-about-implicit-bias/> [<https://perma.cc/JD33-KV8P>]; Carolyn Y. Johnson, *Everyone is Biased: Harvard Professor’s Work Reveals We Barely Know Our Own Minds*, BOSTON GLOBE (Feb. 5, 2013), <https://www.boston.com/>

support a narrative that accusers' racism is primarily or even equally responsible for disparate discipline against male students of color as any discrimination practiced by an educational institution and/or its officials, the link between accusers' biases and the school's discriminatory actions would have to be strong, as was often the case during the American lynching period.⁴⁴⁴ Therefore, research—and the data collection and disclosure on which research depends—must include information about the demographics of *both* the harassment (i.e., who is harassing whom) *and* the operation of the disciplinary system (i.e., who is filing sexual harassment complaints against whom and which accused students are being investigated, found responsible, and disciplined by the school). To truly understand how race, national origin, disability, sexuality, gender identity, etc. interact with sexual harassment, either an amended Clery Act and/or an extended Civil Rights Data Collection must require schools to collect and disclose both types of data.

Requiring schools to collect and disclose such demographic information is Social Justice Feminist because it will surface more completely the experiences of a range of intersectional and multidimensional students, including those who are most marginalized and oppressed by sexual harassment. It will also stop the erasure of women students of color from the dominant narrative about sexual harassment in education, the intersectional problem with which this project is most concerned. Whether the evidence presented by this Article is correct and women students of color are disproportionately targeted for sexual harassment, or the dominant narrative is correct and men of color are disproportionately disciplined for sexual harassment, or *both*, our discussions and interventions into the sexual harassment problem will at least no longer render the experiences of women students of color invisible.

VI. CONCLUSION

In so many ways, we are living in a remarkable moment, with the recent law and politics of women's lives marked by both incredible lows and incredible highs, and women of color's experiences and courageous activism at the center of it all—even when the general public does not appear to know it. The struggle to end sexual harassment has been no different, characterized

news/science/2013/02/05/everyone-is-biased-harvard-professors-work-reveals-we-barely-know-our-own-minds [https://perma.cc/6WEW-G54B].

⁴⁴⁴ See Emma Coleman Jordan, *Crossing the River of Blood Between Us: Lynching, Violence, Beauty, and the Paradox of Feminist History*, 3 J. GENDER RACE & JUST. 545, 571 (2000) (discussing role of white women in lynching, including false accusations of rape against black men). Compare Johnson, *supra* note 34, at 74 (arguing the comparison of false allegations of rape by white women during the lynching period with increased reporting of sexual violence to campus authorities is inaccurate and harmful); with Halley, *supra* note 34, at 106 (arguing the comparison of false allegations of rape by white women during the lynching period with increased reporting of sexual violence to campus authorities is accurate and helpful).

not only by survivors and their allies' brave activism, but also by intense backlash against that activism.

Sexual harassment in education presents some differences from the other lows and highs, due in part to the fact that both anti-harassment activism and backlash to it on college campuses predated the 2017 Women's March, #MeToo, and many other "capital-R Resistance" efforts getting most of our attention at this moment. In addition, unlike the way that both the Women's March and #MeToo arguably incorporated relatively early women of color's voices, leadership, intersectional analyses, and Social Justice Feminist strategies, the public conversation about campus sexual harassment became quickly dominated by voices that were downright *anti*-intersectional, leading to a narrative that nearly completely erased women of color from the public's images of this harassment and violence.

This Article has sought to add to others' work in exposing such narratives as anti-intersectional and to suggest Social Justice Feminist interventions that can move such narratives in a more intersectional and more accurate direction. Contrary to the dominant narrative that implies women students of color are never harassed, the data and analysis I have drawn from my co-authored *Utah Law Review* study provides one piece of direct evidence that women students of color are targeted *more* often for sexual harassment. In addition, both the Logic Story and the Evidence Story detailed in Parts III and IV provide ample indirect evidence supporting the direct evidence from my *Utah Law Review* data. Moreover, even if all of this evidence were insufficient to establish that women students of color are *more* vulnerable, no evidence exists that shows women students of color experience such infinitesimal rates of sexual harassment that it is in any way legitimate to erase them from the conversation.

As this suggests, establishing heightened vulnerability of an entire group is not necessary to recognize the importance of intersectional racialized sexual harassment, or indeed any discriminatory harassment or violence.⁴⁴⁵ Nevertheless, from an intersectional perspective, because such harassment translates into distressing inequalities of educational opportunity and many women students of color already face educational inequalities linked to gender, race, and other marginalizing experiences, this harassment has the potential not only to *add* the disadvantages of two forms of discrimination together but to *multiply* those disadvantages.

Indeed, social science is increasingly documenting the enormous costs to student victims, confirming that sexual harassment subjects its victims to trauma and to the negative health, educational, and economic consequences

⁴⁴⁵ See Tana Somanader, "Even One Case Is Too Many": Vice President Biden Marks the 20th Anniversary of the Violence Against Women Act, WHITE HOUSE ARCHIVES (Sept. 9, 2014), <https://obamawhitehouse.archives.gov/blog/2014/09/09/even-one-case-too-many-vice-president-biden-marks-20th-anniversary-violence-against-> [https://perma.cc/EW3T-2TSP].

of that trauma,⁴⁴⁶ which are likely to disproportionately impact women students of color because they are already disproportionately vulnerable. For instance, students of color are more likely to be first-generation college students and/or immigrants, including “DREAMers”⁴⁴⁷ and other undocumented students. In addition, women students are more likely to have greater family responsibilities, including to their own children. These lesser resources and greater responsibilities mean that these students have less time and space to recover from trauma, creating uniquely higher barriers for these particular women survivors of color to receive and achieve an equal education. As if these short-term, supposedly temporary inequities were not bad enough, they very likely translate into long-term diminished employment opportunities and lifetime lower earnings and socioeconomic status, especially when trauma goes unaddressed—as is more likely to happen for women students of color.⁴⁴⁸ These kinds of negative effects on equal educational opportunity are at the center of concern for all of the laws protecting civil rights in education. Thus, the intersectional heightened vulnerability of women students of color requires us as a society and as a nation to re-establish the consistent and equal enforcement of our civil rights laws generally, beginning with OCR eliminating the recently created intersectional legal conflict regarding the preponderance of the evidence standard.

Moreover, we need to intervene more directly in the dominant, anti-intersectional narrative, because failing to use an intersectional lens is dangerous to achieving both gender and racial justice. Interventions must prioritize the Social Justice Feminist strategies of not just including but actually focusing our research on the sexual harassment women students of color experience, including by appropriating money for such research and passing laws that require schools to collect and disclose demographic information about sexual harassment in the campus community.

As Professor Crenshaw herself has pointed out, “if women and girls of color continue to be left in the shadows, something vital to the understanding of intersectionality has been lost.”⁴⁴⁹ The Interim Guidance demonstrates that women and girls of color *are* continuing “to be left in the shadows,” and that “something vital to the understanding of intersectionality” has indeed been lost. Ultimately, by using the methodology of Social Justice Feminism, we can address this intersectional problem with an intersectional solution.

⁴⁴⁶ See Baker et al., *supra* note 11, at 1; Cantalupo, *supra* note 11, at 295.

⁴⁴⁷ See AMERICAN IMMIGRATION COUNCIL, *supra* note 272.

⁴⁴⁸ See Baker et al., *supra* note 11, at 3; Cantalupo, *supra* note 11, at 295–296.

⁴⁴⁹ Kimberlé Crenshaw, *Why Intersectionality Can't Wait*, WASH. POST (Sept. 24, 2015), <https://www.washingtonpost.com/news/in-theory/wp/2015/09/24/why-intersectionality-cant-wait/> [https://perma.cc/M3U2-UGJQ].