The Personal Is Still Political: A Feminist Critical Policy Analysis of the Rollback of Title IX

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Cover Page Footnote
Thank you, Dad, for a wealth that can never be stolen.
In November 2016, Republican candidate Donald Trump won the presidential election with 304 electoral votes over Democrat Hillary Clinton’s 227, despite the difference of 2.9 million in the popular vote in favor of Clinton. The discriminatory and hate-filled rhetoric of the Trump campaign raised concerns that the advancements of rights for “sexual and gender minorities made under President Barack Obama’s administration would be limited or rescinded” (Veldhuis, Drabble, Riggie, Wootton & Hughes, 2018, p. 27). The fate of Title IX of the Education Amendments was of concern due to the calamitous appointment of Trump’s nominee, Betsy DeVos as Secretary of Education. DeVos signaled no commitment to upholding the previous guidance during her confirmation hearing. Advocates contended that the Department of Education Office of Civil Rights’ (OCR) release of the 2011 Dear Colleague Letter (DCL), charging institutions of higher education (IHE) with the responsibility of direct involvement in complaints of sexual misconduct, advanced the advancements of rights for “sexual and gender minorities” (Shaw, 2004, p. 57). The purpose of this article is to employ a feminist critical policy analysis using a critical lens to analyze Title IX guidance. For this analysis, I will focus specifically on the effects of policies (Shaw, 2004). Feminist critical analysis problematizes policies to reveal sexism and discrimination, including racial, sexual, and social class biases, inherent in commonly accepted theories, constructs, and concepts (Bensimon & Marshall, 2003; Marshall, 1999). According to Marshall (1997 as cited in Shaw, 2004), White, well-educated males dominate approaches to policy analysis; therefore, the worldview of this group is valued and widely accepted. Feminist critical analysis reveals androcentrism (centered on male or masculine interests) in the ways policies exclude women or proclaim neutrality, essentially disenfranchising or denying women opportunity, agency, or power (Biklen, Marshall & Pollard, 2008). Simply adding sex, or women, as a protected class is not in itself transformative (Bensimon & Marshall, 2003; Shaw, 2004). The key tenets of feminist critical theory were the key to its success toward the goal of challenging dominant structures that deny access to power and further oppress marginalized groups. First, gender must be the center of analysis, whereby assessment of structures and policies is gender conscious, not gender blind or neutral (Bensimon & Marshall, 2003; Shaw, 2004). As in critical theory, lived experiences are essential in data collection. Feminist critical policy analysts rely on the “lived experiences of women, as told by women, and they also utilize discourse analysis to uncover the ideologies and assumptions embedded in policy documents” (Shaw, 2004, p. 59). Analysis must be viewed from the counter narratives and voices of those disenfranchised or discriminated (Bensimon & Marshall, 2003). Feminist critical feminism recognizes the intersections (Crenshaw, 1989) of gender, race, sexuality and social class; thus, the purpose of this approach is not to develop a generic universal understanding of the human experience, rather it is to underscore the ways in which these identities vary the effects of policies (Shaw, 2004). Finally, feminist critical policy analysis must be transformative, a form of action research (Bensimon & Marshall, 1997 as cited in Shaw, 2004).

Using Feminist Critical Analysis with Title IX

One could assume that a feminist critical policy analysis framework was applied at all levels of amending Title IX because sex is a variable in the policy. Or perhaps because Title IX because sex is a variable in the policy. Or perhaps it was the product of the 2011 DCL, criticizing the guidance as illegally implemented having not been vetted through a rulemaking process of notice and comment (Rider-Milkovich, 2017). She characterized it as a failed system that had not brought fairness to either party involved in alleged campus sexual violence (Yoffe, 2017). Later that month, a new Dear Colleague Letter rescinding the 2011 and 2014 guidance (United States Department of Education (DOE), 2017) was released, signed by Acting Assistant Secretary for Civil Rights, Candice Jackson. In place of the repealed Obama-era guidance, the new DCL outlined significant changes that provided a glimpse of this administration’s direction. The future of Title IX reform seems dim and uncertain given an administration overlaid with “grab her by the pussy” recordings (Fahrenthold, 2016), inexperienced female “inheritors” (Bensimon & Marshall, 2003) inducted into the old boys’ club under the auspices of the Department of Education and the default to fake news to evade responsibility.

The purpose of this article is to employ a feminist critical policy analysis (Marshall, 1998) of Title IX guidance from the Department of Education. The Obama-era guidance was heralded as successful in bringing national attention to campus sexual violence, and mobilized universities to update practices to address the issue (Collins, 2016). The current administration, however, has left many worried about the legitimacy of messages of exclusion, hate and violence (Veldhuis et al., 2018). The discourse of campus sexual violence from the current administration reflects dominant narratives of rape that “blame the victim, question the victim’s credibility, imply that the victim deserved being raped, denigrate the victim, and trivialize the rape experience” (Ward, 1988 as cited in Nagal, McIntyre, & Morrison, 2005, p. 726). Negative attitudes toward rape victims are exacerbated by perceptions of race, culture, and gender (Collins, 2018; Crenshaw, 1989; Nagal et al., 2005). Feminist analysis using a critical lens recognizes intersections of identities and the impact these have on marginalized groups (Biklen, Marshall & Pollard, 2008; Shaw, 2004). Utilizing feminist critical analysis, I aim to expose the prevailing power relations in Title IX policy for a more complete understanding of its implementation from the perspectives of both the policymakers and those affected by the policy (Shaw, 2004, p. 57).

Feminist critical analysis can be applied to the spectrum of sex-based discrimination defined by Title IX. However, for this analysis, I will focus specifically on regulations regarding sexual violence and rape. According to the Office of Civil Rights, sexual violence refers to “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent,” including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion (United States Department of Education, 2011, p. 1). In this article, I begin with an overview feminist critical policy analysis and explain its use to analyze Title IX guidance. Next, with the intent to expose the intersections of sexism with other forms of oppression and further marginalization, I will use critical feminist thought to (a) examine rape; (b) review the implementation and responses to the 2011 DCL; and (c) examine the five significant changes in the Obama-era Title IX guide. Finally, I will provide discussion points to facilitate future considerations for Title IX implementation.

Feminist Critical Policy Analysis

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Resilience, Resistance, & Reclamation

Cablingabang: A Feminist Critical Policy Analysis of the Title IX Rollback

Halley (2015) called out feminists within the government for feminism in government. In her article “Trading complexities of sexual violence fortify how the personal becomes political” (Crenshaw, 2016; Crenshaw, 1991; Marshall, 1999; Shaw, 2004) feminist critical analysis has the potential to fully realize the potential of Title IX by revealing the group that are now being excluded by the policy (Collins, 2016; Crenshaw, 1991; Marshall, 1999; Shaw, 2004). Feminist critical scholarship is limited in regards to Title IX analysis on how “they can and do result in perverse obstinate interpretations of ‘true victims’ to White females, eliminating the experiences of sexual violence in communities of color (Crenshaw, 1989: Crenshaw, 1991; Harris, 2017; Harris & Linder, 2017). These patriarchal and racist attitudes toward sexual violence and implies Title IX reform, and provide critical discourse for professionals in higher education.

Title IX Analysis

Rape

Interestingly, much of the literature used to examine Title IX in this article does not include a definition of rape. Instead, it begins with a definition of sexual violence focusing on the act of completion of intercourse and include dynamics of power and control, the burden to prove victimization continues to fall on the survivor. Anything that diverges from the narrative of sexual violence to look beyond the act of intercourse and include dynamics of power and control, the burden to prove victimization continues to fall on the survivor. Rape laws have been adjusted over the years (RAINN, 2018). Due to this bigoted system, sexual violence remains a highly underreported crime. Federal statistics show that only 3% of rapes are reported to law enforcement, 11 of those are referred for prosecution, and seven lead to felony convictions (RAINN, 2018). RAINN (2018) indicates women and girls experience sexual violence at high rates; one in six American women being victims of attempted or completed rape.

At the forefront, the combination of sexual penetration and the absence of consent criminalize rape, yet the vast majority of rape that occur are not reported for fear of being judged or punished (RAINN, 2018). Due to this biased system, sexual violence remains a highly underreported crime. Federal statistics show that only 3% of rapes are reported to law enforcement, 11 of those are referred for prosecution, and seven lead to felony convictions (RAINN, 2018). RAINN (2018) indicates women and girls experience sexual violence at high rates; one in six American women being victims of attempted or completed rape.

Through a critical feminist lens, the disproportionally high number of offenders convicted of rape versus the number of women actually impacted by sexual violence reveals a prejudiced system governed and privileged by men. Despite updates in rape laws to expand the discourse of sexual violence to look beyond the act of intercourse and include dynamics of power and control, the burden to prove victimization continues to fall on the survivor. Changes from the dominant narrative of rape questions everything about the survivor’s behavior (prior and current) and
identities that contributed to the act of sexual viola-
tion. Ultimately, the policies and statutes associated 
with determining whether a crime of rape occurred, 
not to mention guilt in rape, perpetuate a systematic 
oppression of females: Part of the intellectual and political effort to 
mobilize around this issue (rape) has involved the 
development of a historical critique of the rule 
that law has played in establishing bounds 
of normatism and in regulating female 
sexual behavior. Early carnal knowledge statutes 
and rape laws understood within this discourse 
to illustrate that the objective of rape statutes 
traditionally has not been to protect women from 
cocercive intimacy but to protect and maintain 
a property-like interest in female chastity (Cren-

Campus Sexual Violence and the 2011 Dear Colleague Letter

Despite heightened attention to campus sexual 
violence recently, rape on college campuses is not 
a new concept. Sexual violence in postsecondary 
institutions has remained consistent, with 20-25% of 
college women experiencing rape or attempted rape 
(Jessup-Anger & Edwards, 2015). In addition, male col-
lege students are approximately five times more likely 
than their non-student counterparts to be victims of 
rape or sexual assault (Spar, 2018). In the light of 
what is now known as Title IX reform, I ask you to 
think back to the landscape of sexual violence education 
and adjudication on college campuses before 2011. 
Sexual violence was adjudicated on a case-by-case 
basis and school policies described what behaviors 
did not amount to consent versus what it is and how it 
is attained (Childs, 2017; Jozkowski, 2015). Additional 
factors contributed to how IHE responded to reports 
of rape: the clout of the accused rapist, the victim's 
perception of “true” victims to White females, 
eliminating the experiences of sexual violence in communities of color.”

4. Grievance procedures for students to file com-
plaints of sexual violence must be provided. Pro-
cedures must include equal opportunity for both 
parties to a) present witnesses and evidence, and 
b) the same appeal rights; 
5. The preponderance of evidence standard must be 
used to resolve complaints of sex discrimination; and 
6. Both parties must be notified of the final outcome 
of the complaint (United States Department of 
Education, 2011). The Department of Justice (DOJ) reinforced the 
responsibility of universities to address sexual violence 
and intimate partner violence in the 2013 Reauthoriza-
tion of the Violence Against Women Act (VAWA) under 
its Campus Sexual Violence Elimination Act (SaVe Act) 
production, Section 304” (American Council on Educa-
tion, 2014). Under VAWA, institutions are required to: “1) Report domestic violence, dating violence, 
and stalking, beyond crime categories the Clery 
Act already mandates; 2) Adopt certain student 
discipline procedures such as for notifying pro-
vided of their rights; and 3) Adopt certain 
institutional policies to address and prevent cam-
pus sexual violence, such as to train in partic-
going to due process. In their National Review publi-
cation “The New Standard for Campus Sexual Assault: 
Guilty until proven innocent” Taylor and Johnson 
(2015) disputed the federal findings identifying three 
myths about campus rape: that an epidemic exists, 
that it is becoming more problematic, and that nearly 
all males accused of rape are guilty.” The authors 
claimed that one in thirty women as opposed to the 
one in five Obama claim are assaulted while in college, 
and note an increase in accusations against innocent 
students. A contributor to the Chronicle of Higher 
Education boldly described the procedures meant 
to protect students at “a declaration of martial law 
against men, justified by an imaginary emergency, 
and a betrayal of the Title IX equity law” (Sommers, 
2011, para. 17). A renewed wave of legal 
procedures that standardized how to address campus 
sexual violence. Institutions examined their sexual 
misconduct policies to find outdated, ineffective and 
irrelevant procedures. IHE designated individual Title 
IX coordinators to receive all reports of sexual violence 
and coordinate services and investigations according 
ly. State agencies dedicated more resources to imple-
ment the new policies and, with increasing national 
attention on campus rape, institutions could no longer 
sweep the issues under the rug. Female students were 
provided options to report rape and figure out what 
they could do to take back control in their lives. Going 
forth the legal requirements, a handful of institu-
tions allocated resources establishing support services 
for accused students. The discourse on campus rape 
shifted to begin the focus from females making false 
reports of rape, to Title IX policy and institutional 
responses to sexual violence.

As anticipated, the potential to hold men and colleges 
accountable roused opposition of this united federal 
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them expelled for “regret sex” (Joyce, 2017). Now that schools have the obligation to increase the standard of proof, there is worry that students held responsible under the previous policy will return to their institutions to have their cases rehashed or to file lawsuits (Miltonberg in Joyce, 2017). The Student Affairs Administrators in Higher Education (NSAPGA) president released a statement soon after the repeal to declare the association’s support of the preponderance of evidence, stating, “slinging out sex assault to have higher standard perpetuates rape culture” (Krug, 2017, para. 5).

Appeal of outcome of campus investigations. Appeals in the current guidance are governed under two conditions: by the accused, or (b) by both parties if voluntarily agreed upon. The previous guidance allowed for either party to file an appeal, where institutions indicated two conditions in which one could be filed: (a) introduction of new evidence, or (b) a due process violation. The current guidance limits an appeal to the responding party, citing the accused individual is the one who risks penalty and therefore should not be tried twice for the same allegation (United States Department of Education, 2017). Contrary to the guidance’s commitment to equitable procedures for all parties, the option for a complainant to file an appeal was removed by the new policy. Cincinnati Determination Letter (2006) that indicates no requirement to provide a victim’s right of appeal (United States Department of Education, 2017).

Set time frame for investigation and resolution. The OCR no longer requires a set time frame for campus investigations and leaves it up to institutions to determine how long an investigation runs. Institutions would be evaluated instead on their good faith effort to provide fair and impartial investigations (United States Department of Education, 2017). Campus administrators acknowledge the 60-day timeframe was too short, however supported this guideline because it placed responsibility on the institution to prevent violence and further harassment. The rationale for removing the timeline would allow for parties, particularly the accused, time to respond to the allegations, gather evidence, and round up witnesses (Joyce, 2017). “Absence of a timeline risks leaving both students in perpetual states of limbo awaiting jurisdiction” (Krug, 2017, para. 2).

Informal resolutions. Inconsistent with the 2001 Guidance, the OCR adds mediation as an option for resolution, previously unheard of in campus sexual violence adjudication. The irony is that the same administration granting institutions permission to mediate sexual violence also condemned university investigations as “kangaroo courts” (Kreighbaum, 2017). In the master narrative, mediation protects accused male students by eliminating a conduct violation on their education record while the female accuser remains responsible for determining if and how her rapist will be held accountable.

Support persons. “Any process made available to one party in the adjudication procedure should be made equally available to the other party (for example, the right to have an attorney or other advisor present and/or participate in an interview or hearing; the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses)” (United States Department of Education, 2017). Though ambitiously positioned in the Q & A document, the OCR now permits a support advisor or advocate to previous guidance. The debate regarding support advisors and their role in the adjudication process brings up multiple concerns. Though schools can provide this option to both parties, it does not include stipulations for a party that is unable to have an advisor that can participate at the same degree as the other party. Based on my own experiences, it is typical for the accused to hire an attorney, while the reporting party has no such avenue. The behavior (2017) stop and avoid legal-like proceedings – often why they prefer university investigations over the courts (Wies, 2015). Most campus policies allow either party to have a support person present during interviews, however their role is limited to their physical presence and consultation, separate from the proceedings.

Opposing interests motivate the difference between current practices and the OCR’s optional suggestions for revision. Campus administrators acknowledge this has edged the lived experiences of students experiencing sexual violence by placing the burden on the institutions” “to determine whether sexual misconduct occurred, and if so, whether a hostile environment has been created that must be redressed” (United States Department of Education, 2017, pg. 4). The Trump administration echoes the interests of Title IX critics and enacted their opposition through this repeal. In New York Times Magazine article entitled “The Takedown of Title IX,” conservative Republican state representative, Earl Ehrhart, is quoted after meeting with DeVos about Title IX: “She’s placing this back where it belongs, in the purview of the states” (Joyce, 2017, para. 24). Though the future of Title IX is somewhat of a mystery, one thing is clear: in regard to campus rape, the presumed innocent White male falsely accused of sexual violence, has priority above all else.

Discussion

The Personal is Still Political

My personal and professional identities are directly impacted by the complexities of Title IX. The fact that policies that mainly impact women (i.e. reproductive rights, Title IX) continue to be governed by lawmakers maintains my personal identities and experiences as political. I am a woman of color with ethnic origins in a country that was colonized for centuries. Documentation of the use of rape as a tool of power in colonization shapes the way women of color perceive our roles in society and how we experience sexual violence, in particular. As a Title IX confidential advocate on a college campus, navigating the evolving institutional policies to address sexual violence is just as much of a learning experience for me as it is for the students I work with. My professional role on my campus allows me to navigate university procedures that are not as accessible to students. I do not mean to point blame at any institution for implementing difficult policies and procedures. Instead I want to shine light on the gap that remains between institutional compliance and the lived experiences of students. Recent Title IX guidance appeared to provide an alternative to the criminal justice system, which was often a barrier for reporting sexual violence. The guidance however continues to mirror the criminal justice system, which has been proven to perpetuate patriarchal and racist structures oppressing minoritized groups. The burden remains on reporting parties to prove victimization, ensuring due process rights for accused individuals. Consequently, critiques of Title IX procedures reflect the expectations of the dominant patriarchal and racist criminal justice system. This paternalistic approach further silences the interests of all the subjects of the law: our students. Political decisions regarding campus sexual violence are extremely personal for the students they are directly impacting. Therefore, it is imperative that lawmakers and administrators recognize power, privilege and domination in implementing gender-based policies.

Missing Voices

The discourse of Title IX of the Education Amendments of 1972 within the last decade has brought our attention to campus sexual violence in specific ways in which IHE’s handled or mishandled reports of these crimes. Absent from many recent discussions are
the victims of rape, sexual assault and discrimination. Even the voices of the student survivor activists that brought these issues to Washington, D.C. have fallen to the back of the room and are silenced by cries for due process – in hopes of unfolding the master narratives and directives of those who wish to keep power intact. Also missing from the current conversation are the voices of people of color, homosexual, non-binary, and communities marginalized by socioeconomic and education status. The anti-discrimination law meant to protect marginalized groups, will never be fully realized until the society that renders these communities invisible is dismantled. Moreover, until we can counter the narratives of our sexuality and experiences of rape and sexual violence, we will not know equity. Feminist critical thought has evolved over the years, recognizing the intersections of identities and layers of oppression that are not validated nor protected by society. Crenshaw (1989) points out how simplifying our understanding of rape further targets our marginalized identities: “The singular focus on rape as a manifestation of male power over (female) sexuality tends to eclipse the use of rape as a weapon of [racial] terror” (p. 158). Critical feminism challenges us to be uncomfortable and confront the status quo. This examination of Title IX reveals that the personal is still very political and to be accountable to critical feminism (Bensimon & Marshall, 2003) it is our voices that must tell our story.

Trump and the Trumpeteers

So far, descriptions of the gatekeepers of power are as elite White men, or something to that effect. This allegorical group of White men refers to those who have clout, privilege and influence resulting from patriarchy, not necessarily always White, and not always male. Due to Trump’s election, we have names and faces of those who have hold this power. Feminist critical policy analysis calls upon the disruption of dominant narratives (Biklen et al., 2008) by revealing the assumptions and ideals of said group, specifically President Donald Trump, Secretary of Education Betsy DeVos and Acting Assistant Secretary of Civil Rights Candice Jackson. I believe the bigotries of the 45th President of the United States are common knowledge internationally. For examples of his prejudices, please refer to the 2005 recording (Fahrenthold, 2016) of our current president bragging about “grabbing them [women] by the pussy” and follow his Twitter account @realDonaldTrump.

The same day the Office of Civil Rights released the interim guidance, Democratic National Jess O’Connell tweeted “banner day when Republicans can find women to do their dirty work against other women” (Rothman, 2017). Bensimon and Marshall (2003) refer to the 2005 recording (Fahrenthold, 2016) of our current president bragging about “grabbing them [women] by the pussy” and follow his Twitter account @realDonaldTrump.

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Conclusion

This feminist critical policy analysis of Title IX only hits the tip of the iceberg, revealing the further subordination of women and other oppressed groups through policies and structures governed by ideals and assumptions that view women as less-than. For true transformation, there is a need to reframe all steps of policy development, implementation, and analysis. Of utmost importance, is a reminder that the personal is still political, especially when addressing sexual violence.