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

Leslie Duadua Cabingabang
University of Hawai‘i at Mānoa

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Cover Page Footnote
Thank you, Dad, for a wealth that can never be stolen.

This conceptual framework is available in Journal of Critical Scholarship on Higher Education and Student Affairs: https://ecommons.luc.edu/jcshesa/vol3/iss3/5
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 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of rights for “sexual and gender minorities” made under President Barack Obama’s administration would be limited or rescinded (Veldhuis, Drabble, Riggie, Wootton & Hughes, 2018, p. 27).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 contend that the Department of Education Office of Civil Rights (OCR) with the responsibility of direct involvement 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 In place of the repealed Obama-era guidance, the new DCL outlined significant changes that provided a glimpse of this administration’s direction.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 overload 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 exacerbate 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 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 current Title IX guidance. Finally, I will provide discussion points to facilitate future consideration of Title IX implementation.

Feminist Critical Policy Analysis

Feminist critical policy 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 are the intersectional analysis 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). 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 per-
haps because sex is embedded in the policy, gender biases are not a concern. Conventional policy analysts would argue that because sex is the basis of this anti-discrimination policy, it is not necessary to analyze its potential for gender bias toward males. A close examination of perceptions of rape is paramount in the analysis of the current status and direction of Title IX. The current administration’s approach in repealing previous Title IX guidance mirrors patriarchal and racist relations toward sexual violence and exposes the prevalence of an un-written threat to power (Crenshaw, 1991; Harris & Linder, 2017; Nagal et al., 2005). DeVos and critics of the Obama-era guidance have focused much of their attention on the negative impact these changes have had on students accused of sexual violence. Many of the examples used to support this claim follow the dominant narrative of sexual violence. Implementing Title IX provides a venue for false reporting against innocent White male students (Joyce, 2017; Taylor & Johnson, 2015; Yoffe, 2017). Employing feminist critical analysis has the potential to fully realize the spirit of Title IX by revealing the group that are again being excluded by the policy (Collins, 2016; Crenshaw, 1991; Marshall, 1999; Shaw, 2004). Feminist critical scholarship is limited in regards to Title IX provides a venue for false reporting against innocent White male students. (Joyce, 2017; Taylor & Johnson, 2015; Yoffe, 2017). Employing feminist critical analysis has the potential to fully realize the spirit of Title IX by revealing the group that are again being excluded by the policy (Collins, 2016; Crenshaw, 1991; Marshall, 1999; Shaw, 2004). Feminist critical scholarship is limited in regards to Title IX as a model for policy’s prevailing ambiguous status. However, the basis of gender in Title IX and the complexities of sexual violence fortify how the personal remains political; hence, a feminist critical approach is exceptionally appropriate.

An area of contention in using feminist critical analysis on Title IX is the policy is inherently gender-charged, whereas the literature on this method is typically applied to seemingly neutral structures. Instead of focusing on gender in this policy, feminist critical analysis problematizes the policymakers and the political processes that govern gender. Activism to implement firm Title IX guidelines was led by policymakers who may identify as feminist and advocate for gender equity. In her article “Trading the Megaphone for the Gavel in Title IX Enforcement,” Halley (2015) called out feminists within the government that pushed for the Obama-era Title IX regulations (p. 103). These “strategic feminists” (Bensimon & Marshall, 2003, p. 347) or “feminocrats” (Frazzanoz, Court, & Connell, 1989 and Watson, 1990 as cited in Marshall, 1999, p. 66) perhaps neutralized the discourse of campus sexual violence as all-inclusive to remain at the table for governmental power over Title IX regulation (Collins, 2016; Halley, 2015). Although this tactic conflicts with critical feminism, the use of heteronormativity (assumptions that all people are heterosexual), gender binarism (system that limits gender identity to opposite categories i.e. boy and man or girl and woman), and neutralization to develop, implement and govern Title IX, was perhaps necessary to win the approval of the dominant center. Neutralizing Title IX in this way, however, eradicates the experiences of the disproportionate number of women that are sexually assaulted. Even more troublesome is the absence of the impact that race, class, and ability have in the discourse on prevention and intervention of campus sexual violence. Furthermore, the assertion of the dominant narrative where women are victims and men are rapists excludes the experiences of male survivors, transgender survivors or sexual violence in same-sex relationships (Davies & Hudson, 2011; Harris & Linder, 2017; Marine, 2017) which critics can use to counter any attempt toward gender equity. Yet, the same heteronormative and gender binary assumptions are being used to charge Obama-era guidance with inequitable practice. Exposing and navigating the nuances of patriarchal politics requires the use of a lens that unsets the power dynamics and facilitates transformation.

Traditional policy analysis believes in a single truth and assumes objectivity is achievable and desirable (Shaw, 2004), contrary to critical analysis. Critical feminism threatens power structures by revealing the potential flaws in practices and decisions that would otherwise be normalized and accepted. Bensimon and Marshall (2003) explain that traditional analytic positions gender as an environmental variable referring “only to those areas both structural and ideological involved in the perception between the sexes and therefore, gender is not seen as relevant to issues where gender is not explicit” (p. 344). As an environmental variable the implication is that gender is a concept associated with the study of things related to women” (Bensimon and Marshall, 2003, p. 344). Consequently, reframing questions using this approach changes the focus of the solution. I hope to disrupt the discourse of campus sexual violence by reframing the analysis of 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, legal and civil definitions of rape are used to contextualize the complexities as an essential component in analyzing Title IX policy. The common denominators in the various definitions of rape in the United States are the presence of consent and the absence of consent (Estrich, 1986; Hickman & Muehlenhard, 1999 as cited in Jodkowski, 2015; Rape Abuse & Incest National Network (RAINN), 2018). Rape laws have been adjusted over the years to include forms of sexual violence other than penile penetration of the vagina (Corigan, 2013). For example, some statutes vary in recognizing anal penetration, stipulations around statutory rape, oral penetration by a sex organ, digital penetration, penetration with foreign objects, rape between married individuals, and so forth.

Conceptualization of rape follows the dominant narrative in which White cisgender women are victims of rape by straight, cisgender men of color (Crenshaw, 1991; Harris & Linder, 2017). This patriarchal and racist perception constructs stereotypical attitudes toward victims (Crenshaw, 1991; Davies & Hudson, 2011; Nagal et al., 2005) and disregards the experiences of survivors of color; transgender and male survivors; lesbian, gay, bisexual and queer survivors; and survivors with disabilities (Crenshaw, 1991; Harris & Linder, 2017). In rape law, “the male standard defines a crime committed against women, and male standards are used not only to judge the conduct of women victims” (Estrich, 1986, p. 1091). The widely accepted patriarchal view of women’s sexuality places property-like aspects on women’s bodies. Black women’s sexuality and even sexual aggression is celebrated (Crenshaw, 1991). Additionally, traditional gender roles shape attributions of rape victimization. Consequently, victims that deviate from socially accepted gender roles (i.e. transgender, lesbian, gay, bisexual, queer) experience higher rates of sexual violence, but the stigmatization of their identities pushes them further to the margins, limiting access to services and justice (Davies & Hudson, 2011; Grubb & Turner; 2017; Veldhuis, et al., 2018). Racism asserts who is capable of committing rape and who can be raped. The stereotype that perpetrators of rape are usually men of color is upheld by the sensationalized focus on savage or animalistic representations of Black men (Crenshaw, 1991). The hypersexualization of Black women, and commodification of Asian women, narrows the perception of “true victims” to White females, eliminating the experiences of sexual violence of communities of color (Crenshaw, 1989; Crenshaw, 1991; Harris, 2017; Harris & Linder, 2017). These patriarchal and racist views reinforce misconceptions of what constitutes “real” (Estrich, 1986, p. 1088) rape versus, for lack of a better term, non-traditional rape.

At the forefront, the combination of sexual penetration and the absence of consent criminalize rape, yet the vast majority of rape goes unreported or never reported (RAINN, 2018). Due to this bigoted system, sexual violence remains a highly underreported crime. Federal statistics show that only 10 of 310 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 disproportionately low numbers of offenders convicted of rape versus the number of women annually 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 survivors who must navigate 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 false reports of rape, to Title IX policy and insti-
tutional responses to sexual violence.

As anticipated, the potential to hold men and colleges
accountable roused opposition of this united federal
front. Critics neglected any focus on campus sexual vi-
nalence, immediately investigating and 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
coercive 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 like-
ly than their non-student counterparts to be victims of
rape or sexual assault (JHANNA, 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
alcohol consumption, the victim’s reputation, and so
forth. Motivation to establish a standardized approach
for campuses to investigate and eliminate sexual vio-
lence derived from an increasing number of student
narratives that claimed their universities refused to
investigate reports of sexual violence, “weeping issues
under the rug” (Childs, 2017). Additionally, there were
a growing number of federal bodies being investigated
by the Office of Civil Rights for egregious mishandling
of sexual misconduct cases which university admin-
istrators were aware of, but failed to do anything, i.e., Penn
State, Michigan State University and University
of Missouri.

To clarify and expand its Revised Sexual Harassment
Guidance (2001), the OCR released the infamous
2011 Dear Colleague Letter, compelling schools to
standardize definitions of behaviors constituting sex
discrimination and developing procedures to handle
campus sexual violence. The OCR clearly stated that
“sexual violence refers to physical acts perpetrated
against a person’s will or where a person is incapable
of giving consent due to the victim’s use of substances
intellectual or other disability and provides examples
of sexually violence acts” (United States Department
of Education, 2011). Institutional obligations under this
guidance were:

1. The school must take immediate and appropriate
   action whenever they are put on notice; and
2. Regardless of an existing criminal investigation,
   the school must take prompt and effective steps
to end the violence, prevent its recurrence and
   address its effects.
3. Schools must implement interim measures to pro-
tect the complainant, even prior to a final decision
of investigation;
4. Grievance procedures for students to file com-
   plaints of sexual violence must be provided. Pro-
cedures must include equal opportunity for both
decisions 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
responsibilities 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)
provision, 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 pur-
   ishing victims of their rights; and 3) Adopt certain
   institutional policies to address and prevent cam-
   pus sexual violence, such as to train in particu-
   lar the responsible parties; and 4) Increase transparency
   and improve enforcement of Title IX at the federal
   and institutional levels (Task Force, 2014).

For the first time, universities were provided tangible
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 accordingly.
State agencies dedicated more resources to implement
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
beyond the legal requirements, a handful of institu-
tions allocated resources establishing support services
for accused students. The discourse on campus rape
began to shift the focus from females making false
reports of rape, to Title IX policy and institutional
responses to sexual violence.

Analysis of Current Guidance

In anticipation of Title IX reform under the Trump
administration, states and institutions initiated proce-
dures to codify campus sex assault policies established
under the previous administration. Since her confrir-
mation hearings in early 2017, Secretary DeVos hinted at changes to the previous
Title IX guidance. In July 2017, concerns arose when she held meetings with
questionable stakeholders regarding policy change (Reisgbaugh, 2017). In her
announcement of repeal two months later, she said, “One rape is one
too many, one assault is one too many, one sexual harassment is one
too many. One person denied due pro-
cess is one too many” emphasizing the last point (Rothman, 2017). Citing ap-
typical Title IX cases mishandling reports of rape, DeVos announced her intent
to review the Obama-era guidance and criticized IHE with running “kangaroo
courts” (Rothman, 2017).

Though it does not require campuses to
alter current policies, the new OCR Ques-
them expelled for "regret sex" (Joyce, 2017). Now that schools have the options to increase or reduce the standard of proof, there is worry that students held responsible under the previous policy will return to their institutions to have their cases reviewed or file lawsuits (Miltenberg in Joyce, 2017). The Student Affairs Administrators in Higher Education (NAASA) 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" (Kruger, 2017, para. 5).

Appeal of outcome of campus investigations. Appeals in the current guidance are handled under two conditions: by the accused, or (b) by both parties if voluntarily agreed upon. The previous guideline 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 compliant to file an appeal was removed in the retracted version, separate from the proceedings. The OCR now permits “participation” of either party’s attorney or support advisor, contrary to previous guidance. The debate regarding support advisors and their role is limited to their physical presence and consultation, 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 affected. Therefore, it is imperative that lawmakers and administrators recognize power, privilege and domination in implementing gender-based policies.

Opposing interests motivate the difference between current practices and the OCR’s optional suggestions for revisions to campus sexual misconduct regulations. Title IX continues to acknowledge the documented lives of experiences 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 primarily impact women (i.e. reproductive rights, Title IX) continue to be governed by lawmakers who 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 colonizing societies 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 support students 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 affected. 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. Specifically the ways in which IHE’s handled or mishandled reports of these crimes. Absent from many recent discussions are
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] by the pussy” and follow his Twitter account @realDonaldTrump.

Conclusion

This feminist critical policy analysis of Title IX only hit the tip of the iceberg, revealing the further subordination of women and other oppressed groups. The present power structures challenge student affairs practitioners and educators to reignite our activism towards social justice. At the center of our efforts are our students’ rights to safety and protection of their access to education.

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.

Suggested Citation: