



Commentary

Title IX: The Big Mess on Campus



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In 1982, a student at the University of Oklahoma was sexually assaulted in her home by a man who also robbed her before he fled. Later, she could not identify the perpetrator from a photo montage—but once she saw a new version of the montage, in which two men from the first montage made a repeat appearance, she identified Thomas Webb. The jury, which never learned about the problems of memory nor of eyewitness identification, convicted Webb. DNA testing exonerated him 13 years later.

For those of us who write articles applying the science of memory and cognition to the law, this kind of paragraph is probably the most common way to open. It's our Pawn to King 4—an opening gambit that sets a predictable course. We all know what comes next, don't we? *How do wrongful convictions, like this one, happen?* followed by *memory is not like a tape recorder; accused people are being treated so unfairly*, add a bit of *photo-bias, cross-race identification and confirmation bias*, and end with *we must help fix this broken system*.

But when it comes to the problems of Title IX on campus, our little corner of science remains puzzlingly quiet. That's why the pieces such as the blistering critique of Title IX investigative interviews by Meissner and Lyles (2019) are so important. Meissner and Lyles show us the degree to which campuses—our crucibles of knowledge—fail miserably at scientifically-grounded training and practice. As we absorb their evidence about what's wrong with Title IX investigative interviews, let's also consider this (perhaps unpopular) idea: when it comes to campus sexual assault claims, there's something wrong with Title IX itself. The fact is, Title IX is a mess.

Let's start with the law. When an allegation of sexual assault occurs on a campus, are we then dealing with a possible crime? Or a breach of civil rights? Or an injury to be addressed in civil

court? The answer is yes, it has elements of all three (Swan, 2015). In the kingdom of transgressions, then, we have turned campus sexual assault into a platypus: it lays eggs but is not a bird; it has a beaver's tail, but is not a beaver; it has a bill but is not a duck. But the law, like biology, demands a coherent taxonomy, or it cannot know what to protect nor how to protect it. Sexual assault is a crime, whether it happens in an alley, or an apartment, or a frat house. It should be investigated by police officers.

In a scathing *New Yorker* piece, Harvard Law Professor Jeanine Suk Gersen (2019) reports that at many universities, the investigation goes off the rails at the beginning. Why? Because investigators are trained not to presume innocence, nor even to presume nothing in particular. If only. Instead, investigators are trained that the first step in investigating a complaint is to believe the complainant. Then, at the end of the investigation, the accused faces a threshold of “preponderance of the evidence,” rather than the higher “reasonable doubt” standard in criminal law. An investigation that starts with “believe the complainant,” and ends with “preponderance of the evidence” is not an investigation so much as an episode of Confirmation Bias Theater. As Tavis (2019) says, in the pursuit of justice, we must start by disbelieving.

And yet another problem: Title IX probably disproportionately discriminates against minority students. Trachtenberg (2017) writes:

it would be a miracle if university disciplinary procedures did not produce outcomes that excessively punish black students, along with members of other disadvantaged minority groups. One would expect more university charges per capita to be filed against black students than whites, and one would expect to find more per capita suspensions of black students. (p. 109)

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Why would we expect these outcomes? Because non-white men are overrepresented in various corners of the criminal justice system. As the journalist Emily Yoffe (2017) reports, although black men constitute about 6% of undergraduates, they are “vastly overrepresented” in the cases her Google Alerts ping her about every day. It is worrying, then, that universities don’t collect the data that would tell us more about the accusations, investigations, and outcomes for all the men caught up in Title IX investigations. But it seems plausible that in the process of making things better for women, Title IX has also made things worse for these men.

I vividly remember the day that Title IX landed in my junior high. Suddenly, girls were no longer confined to classes in home economics—we could, if we wanted to, wield the bandsaw and produce laminated plexiglass *objets*. We could play the same sports the boys did, and use their equipment too. As one of the few rainbow coalition members who has never, ever learned to dance, I rejoiced at the chance to play lacrosse instead. And yes, we can draw a straight line from these Title IX reforms to this year’s victory by the US women’s soccer team—but Title IX has expanded far beyond its original goals of equality for women in sports and academics. Today it saddles universities with impossible obligations. It requires them, for instance, to reliably adjudicate the intricacies and complications of student love affairs with all their misunderstandings and regrets, distinguish them from unwanted and unpleasant sexual experiences, and in turn distinguish *those* from physical assault and rape. These obligations create risks that are in turn impossible to mitigate, as Zimmerman (2016) warns. And because we live in an era of rankings and ratings, universities understandably seek to defend themselves—and look like responsible institutions—by creating layers of bureaucracy. Who bears the cost of this bureaucracy? We all do. When students come to expect the university will protect them from negative experiences, we rob them of the need to develop the basics of “adulting.” We break their future.

As a field, we have never done well at consistently applying our fundamental discoveries about memory to cases involving sexual assault. A wrongful accusation for burglary? Murder? A bar fight? Hang on, we say: *memory is not like a tape recorder. Accused people are being treated so unfairly.* We wring our hands about Thomas Webb: *photo-bias, cross-race identification, confirmation bias.* But do we wring our hands about the frat men falsely accused at the University of Virginia? Or the lacrosse players at Duke? Not so much. Fast-forward to Christine Blasey Ford’s accusations against Brett Kavanaugh. Not much hand-wringing to be seen there either, if the media interviews with many psychologists asked to comment on her testimony reflect what we’re willing to put on the record. But decades of our own good science show that memory is not necessarily reality, because people can and do come to remember horrific—yet wholly false—events. When those events involve some mix of memory, alcohol, embarrassment, and time, we should be the first to raise our hands in the back of the room and ask,

respectfully and pointedly, the one question Loftus (1998) says good scientists have learned to ask: “What, exactly, is the evidence?” Are we afraid that in questioning the veracity of some reports of sexual assault we will be seen as questioning all of them?

Look: we can shudder at Kavanaugh’s jurisprudence, and still be concerned about Christine Blasey Ford’s memories. We can pursue our goal of finding justice for the countless women who are sexually assaulted every day, yet still pursue our goal of justice for the wrongly accused. We can cheer the success of the US women’s soccer team, yet still be society’s critic and conscience. If we shirk these responsibilities we will not look good in the rear-view mirror of history.

Conflict of Interest

The author declares no conflict of interest.

Author Contributions

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