

From the Editors

At the time of this symposium “Sexual Misconduct, Title IX and Academic Policies” held at Georgetown, we were in the midst of a presidential campaign with a candidate whose comments on an Access Hollywood tape called into question his suitability for the office. Clearly, sexual misconduct is not dead, and may even be on the rise. How should schools handle sexual misconduct on campus? How should we reconcile policy and procedure aimed at reducing sexual misconduct and guaranteeing victims’ security with core values of academic freedom, and protection of an accused’s individual rights? Like other social issues, politics of sexual misconduct are polarized with survivors and their allies lobbying universities to take action against sexual violence and civil rights advocates challenging disciplinary practices as violative of civil liberties. The Obama Office of Civil Rights’ (OCR) key 2011 guidance, commonly known as the “Dear Colleague Letter,” provoked vocal debates questioning its fairness to students accused of gender violence. While the new Trump administration has yet to reveal its Title IX agenda, it is clear that another round of conversation is in order as change is on the horizon.

This symposium issue begins with a thoughtful essay based on an opening address delivered by Hiram E. Chodosh, President of Claremont McKenna College. “Let’s Get It Together” highlights the delicate balance and interdependence of safety and freedom and what it takes to shape the balance into a virtuous relationship. It is a triad of *Let’s get real*—a candid acknowledgement of the existing ineffectiveness, gaps or infirmities; *Let’s get facts*—a deeper understanding of the nature of the problem; and *Let’s get better*—a targeted and strategic response at a collaborative, national level.

In the spirit of *Let’s Get It Together*, Joan W. Howarth draws from her prior experience as a former dean and Title IX adjudicator to focus on three interrelated concerns with Title IX compliance efforts: 1) overly broad definition of sexual assault; 2) failure to deal appropriately with vast variation in how campus women feel about and experience sexuality and 3) resolution processes that ignore the complex web of relationships involved in many allegations of Title IX violations. Specifically, Howarth argues persuasively how gendered “shame” shaped Title IX complaints process and how better understanding of this “shame” can assist in prevention of sexual misconduct. Howarth also urges a new category of sexual misconduct—“sexual infraction”—one that captures infringing conduct that is not assault and should not be sanctioned as such and suggests that restorative justice responses could be more effectively used to take account of the range of injuries currently being adjudicated and to change campus culture more profoundly.

Moving us away from the complaint process, in “Assaultive Words and Constitutional Norms,” Catherine J. Ross reminds us of the historic tension between the competing demands of the First Amendment’s express guarantee of free speech and the Fourteenth Amendment’s implicit promise of dignity and equality. She expressly addresses gendered verbal assaults and the conundrum that a college is more than a public space or workplace—it may also be a student’s home. Finally, she proposes some solutions by analyzing what college (and law school) administrators, faculty, and students can do within the confines of constitutional doctrine to temper the incidence of and harms caused by verbal assaults.

More theoretically, Katharine K. Baker looks at physical sexual assaults and compares these complaints with other types of claims (race discrimination, academic integrity, drunk driving) that have been taken more seriously with far less process and asks why. Is it rape exceptionalism? Baker argues persuasively that the problem may be a lack of consensus on what constitutes “harm” in sex based incidents and a lack of understanding that the post procedure harm can be equally devastating as the assault itself. Robin West, meanwhile, moves us away from the issue of “consent” and asks us to turn our attention to harm that could exist even with sex that is fully consensual and entirely nonassaultive, but unwanted. Focusing on consent “transactionalized” and devalued sex, leading to a view that transgressions on sex may be “wrong and criminal, but hardly a crime of great moral turpitude.” To address violations of Title IX then may mean changing the culture of how we view the “moral goodness of sex” as not only consensual but wanted, desired, desirable or pleasurable.

Alexandra Brodsky defends the Title IX complaints process by resisting “false equivalencies between political factions” to focus on the unifying principle that motivates those who labor to end sexual abuses and those who work to ensure adequate protections for the accused in disciplinary hearings. Certainly, the long-term realization of accused and victimized students’ interests depends on the legitimacy of disciplinary procedures. Brodsky systematically analyzes how the Title IX guidance and Campus SaVE Act are not merely compatible with due procedure but in fact, provide more robust procedural protections for both victims and accused than does the Constitution or any other federal law or regulation. They are a “rising tide” for student disciplinary rights writ large.

In “Mapping the Title IX Iceberg: Sexual Harassment (Mostly) in Graduate School by College Faculty” Nancy Chi Cantalupo and William C. Kidder give us a chilling picture of the Title IX iceberg of faculty harassment of graduate students in their mapping of the issue by using social science literature, court cases, and OCR investigations. Cantalupo and Kidder conclude that contrary to assumptions, a sizable majority of the cases resolved by OCR investigations or decided in court involve physical contact rather than purely verbal conduct and that many of these cases involve serial harassers. The article “Trigger Warnings: From Panic to Data” by Francesca Laguardia, Venezia Michalsen and Holly Rider-Milkovich looks at the state of research

on the impact of trigger warnings on student learning and mental health, and concludes with recommendations about how to construct and use trigger warnings to enhance rather than constrict classroom conversation.

Two articles are featured in our *At the Lectern*. Carol Goforth focuses on how to integrate “Transactional Skills Training Across the Curriculum.” James Grimmelmann challenges the property course’s historic focus on real property. Grimmelmann details how to give greater attention to personal property, intellectual property, and intangible property, and offers a suggestion of doctrinal concepts around which these topics can be organized.

Three book reviews round out this volume. Jennifer W. Reynolds reviews Laura Underkuffler, *Captured by Evil: The Idea of Corruption in Law* (New Haven: Yale University Press, 2013); Richard Abel reviews Wendy Nelson Espeland and Michael Sauder, *Engines of Anxiety: Academic Rankings, Reputation, and Accountability* (New York, NY: Russell Sage Foundation, 2016); and Paula A. Monopoli reviews Tracy A. Thomas, *Elizabeth Cady Stanton and the Feminist Foundations of Family Law* (New York, NY: New York University Press, 2016). Enjoy!

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