

TITLE IX AND THE FAILURE OF DUE PROCESS

Kenneth Lasson[†]

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There has long been a problem with Title IX.¹

The Title IX legislation was intended to fill a gap in the landmark Civil Rights Act of 1964, which had outlawed discrimination based on race, color, religion, sex, or national origin, but left women teachers unprotected.² The difficulty of negotiating Title IX’s byzantine

[†] Professor of Law, University of Baltimore School of Law.

¹ “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” Educational Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688 (1972). See, e.g., “Punished for Reporting Sexual Harassment: How One Law School Almost Got a Student Survivor Banned from the Bar,” ACLU NEWS & COMMENTARY (September 29, 2020), available at <https://www.aclu.org/news/womens-rights/punished-for-reporting-sexual-harassment-how-one-law-school-almost-got-a-student-survivor-banned-from-the-bar>. See also “Title IX Changes A Bad Turn, BOSTON HERALD, May 10, 2020, available at www.bostonherald.com/2020/05/10/title-ix-changes; Kelley Taylor, “Evaluating the Varied Impacts of Title IX,” INSIGHT INTO DIVERSITY, July 5, 2016, available at <https://www.insightintodiversity.com/evaluating-the-varied-impacts-of-title-ix/>; Valerie Wilson, “The Problem With Title IX And Why It Matters,” THE PRINCETON TORY, February 19, 2015, available at <http://theprincetonatory.com/the-problem-with-title-ix-and-why-it-matters/>; and Andrew Kreighbaum, “Title IX Failures,” INSIDE HIGHER ED, January 19, 2018, available file://localhost/at <https://www.insidehighered.com/news:2018:01:19:feds-find-buffalo-state-failed-investigate-alleged-sexual-assault-created-hostile>.

² Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h (1964). The act specifically prohibited unequal application of voter registration requirements and racial segregation in schools, employment, and public accommodations. A parallel law, Title VI, 42 U.S.C. § 2000, had also been enacted in 1964 to prohibit discrimination in federally funded private and public entities. It covered race, color, and national origin, but excluded sex.

investigative and approval process has been the subject of various recent discussions.³

This Article discusses various Title IX cases that have been decided in the interim, describes the current Administration's policies toward education, and offers recommendations about how best to handle future cases.

I. UNRESOLVED TITLE IX CASES

Perhaps the most notable Title IX case still to be resolved is that of Harvard Law School Professor Bruce Hay, who in October 2020 sued the university for refusing to pay his legal defense costs after he had been allegedly defamed by a New York Magazine article reporting that a student had filed a paternity charge against him.⁴

Around the same time in Canada, transgender activist Jessica Yaniv was pressing the British Columbia Human Rights Tribunal to hear a somewhat bizarre complaint about whether the country's gender-equality law requires a Brazilian "bikini-waxing" business that accepts only female customers to perform the service on a transgender woman.⁵

³ See Laura Marini Davis & Victoria Geyman, *The Glass Door Remains Closed: Another Look at Gender Inequality in Undergraduate Business Schools*, 90 J. EDUC. FOR BUSINESS 81-88 (2015); See, e.g., Laura Marini Davis & Victoria Geyman, *The Business of Title IX Revisited*, 48 J.L. & EDUC. 335, 340 (2019).

⁴ The complaints were brought by two female students who said they had met with Hay for dinner, after which they had a sexual encounter with him. Months later one of the women claimed she was pregnant with his child. Prof. Hay's suit against Harvard, in which he accused the university of "turning its back on a dedicated faculty member," sought to recover over \$300,000 in legal fees he'd spent to fight his case. See Alanna Durkin Richer, *Professor Charged in China Case Sues Harvard Over Legal Fees*, U.S. NEWS & WORLD REPORT, Oct. 9, 2020, available at <https://www.usnews.com/news/us/articles/2020-10-09/professor-charged-in-china-case-sues-harvard-over-legal-fees>; See also Robby Soave, *How 2 Women Used Sex, Activism, and Title IX To Scam a Harvard Professor Out of His House, Job, and Money*, REASON, July 24, 2019, available at <https://reason.com/2019/07/24/bruce-hay-harvard-scam-title-ix-paternity/>; and Kyle Smith, 'Bonfire of the Trannies' at Harvard, NAT'L REVIEW, July 24, 2019, available at <https://www.nationalreview.com/corner/bonfire-of-the-trannies-at-harvard/>.

⁵ The business owners offered a variety of reasons why they would or could not accommodate Yaniv, including that a Sikh woman cannot touch a man in an intimate manner. See Graeme Gordon, *Groin-Waxing Human Rights complainant Has History of Anti-Immigrant Comments*, TORONTO SUN, July 30, 2019, available at <https://torontosun.com/news/national/groin-waxing-human-rights-complainant-has-history-of-anti-immigrant-comments>; and REASON; and Robby Soave, *No Woman Should Be Forced to Give a Troll a Brazilian Bikini Wax*, REASON, July 23, 2019, available at <https://reason.com/2019/07/23/jessica-yaniv-da-silva-brazilian-wax-balls/>. In August of 2020, Yaniv filed another suit seeking similar redress. See Dorothy Cummings McLean, *Trans Activist Launches New Lawsuit Against Women Who Refused to Wax His Genitals*, LIFESITE, Aug. 28, 2020, available at <https://www.lifesitenews.com/news/trans-activist-launches-new-lawsuit-against-women-who-refused-to-wax-his-genitals>.

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Yaniv's actions may be atypical of those by trans people or of social-justice activists in general. However, there exist some parallels to the high-profile controversy surrounding the *Masterpiece Cake Shop* case, a suit by gay couples alleging violation of anti-discrimination laws by a Christian bakery owner for his refusal to service same-sex weddings.⁶

In *Masterpiece*, the question was whether public accommodations can refuse certain services based on the First Amendment claims of free speech and free exercise of religion, and therefore be granted an exemption from laws ensuring non-discrimination in public accommodations—in particular, by refusing to provide creative services, such as making a custom wedding cake for the marriage of a gay couple, on the basis of the owner's religious beliefs.⁷

In a 7–2 decision, the Supreme Court reversed, ruling that the Commission had not applied religious neutrality and thereby violated *Masterpiece* owner Jack Phillips' rights to free exercise. But the Court did not rule on the broader intersection of anti-discrimination laws, free exercise of religion, and freedom of speech.⁸

In October of 2013, another case involving unresolved sexual-misconduct complaints arose at Harvard University.⁹ Damilare Sonoiki, a native of Nigeria who had immigrated to the United States when he was six years old, had received numerous academic accolades. He served as president of Harvard's Black Men's Forum and was chosen as male orator for his graduating class.¹⁰

But Sonoiki would never officially receive his Harvard degree. Unbeknownst to him, two female students had filed sexual misconduct complaints against him just hours before his graduation. According to a lawsuit he filed against Harvard in October of 2019, these allegations were

⁶ See Davis and Geyfman, *supra*, note 3; See also Jack Crowe, *Masterpiece Cakeshop Owner Sued Again after Refusing to Bake 'Gender Transition' Cake*, NAT'L REV. (June 11, 2019 4:01 PM), <https://www.nationalreview.com/news/masterpiece-cakeshop-owner-sued-again-after-refusing-to-bake-gender-transition-cake/>.

⁷ The Colorado Civil Rights Commission found that the bakery had discriminated against the couple. That decision was affirmed on appeal to lower courts. *Craig v. Masterpiece Cakeshop Inc.*, 370 P.3d 272 (Colo. App., 2015).

⁸ *Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018).

⁹ Juliet E. Isselbacher & Amanda Y. Su, *Former Harvard Student Sues University for Denying His Degree Following Sexual Misconduct Findings*, HARV. CRIMSON (Nov. 7, 2019), <https://www.thecrimson.com/article/2019/11/7/student-sues-harvard/>.

¹⁰ Juliet E. Isselbacher & Amanda Y. Su, *Former Harvard Student Sues University for Denying His Degree Following Sexual Misconduct Findings*, HARV. CRIMSON (Nov. 7, 2019), <https://www.thecrimson.com/article/2019/11/7/student-sues-harvard/>. See also Robby Soave, *Two Women File Sexual Misconduct Complaints Against a Nigerian Immigrant a Day Before He Graduated From Harvard. He Never Got His Diploma*, REASON (Jan. 23, 2020, 9:00AM), <https://reason.com/2020/01/23/damilare-sonoiki-harvard-title-ix-sexual-misconduct/>.

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made at the urging of Sarah Rankin, who directed Harvard's Office of Sexual Assault Prevention and Response. Months later, following an adjudicatory procedure that Sonoiki claims violated basic principles of fairness and due process, the school's Administrative Board formally expelled him.¹¹

Sonoiki's suit alleged that Harvard's sexual-misconduct policy was "vague, overbroad, and inherently unfair, and lacked basic definitions necessary for students to understand the elements of a policy violation." He argued that he had neither been able to appear at the hearing nor confront witnesses against him. He also challenged the university's then-standard of evidence – "sufficiently persuaded" – as vague and not clearly defined in the school's student handbook. Harvard's process specifically prohibited lawyers from being involved in these meetings: Sonoiki was permitted to consult a faculty adviser, but this adviser couldn't be a lawyer.¹²

To what extent does race play a part in Title IX prosecutions? A 2015 campus sexual-assault documentary, which described "privileged" white men and challenged "dominant white male power," suggested that it does. The documentary reinforced this theory by pointing to the case of Brock Turner, a swimmer at Stanford University who was convicted of sexually assaulting an unconscious woman after meeting her at a party, but sentenced to only six months in jail.¹³

Melissa Kagle, an assistant professor of educational studies at Colgate University who left in 2016 after being denied tenure, became a prominent critic of the school's handling of sexual misconduct, as well as an informal advisor to minority students who'd been accused of sexual assault or harassment. She felt that men of color, especially students from overseas, were particularly vulnerable when faced with accusations of sexual misconduct, because they were often less privileged, had more limited understanding of their rights, and had less access to available resources and social support.¹⁴

In December of 2019, Nick Flor, a professor at the University of New Mexico, was suspended without pay after being found responsible for

¹¹ *Id.*

¹² Sonoiki's suit was hampered by a somewhat complicated variety of differing allegations by students and administrators, as well as by his recent conviction for insider trading. *See Soave, supra* note 4, and accompanying text.

¹³ "The brilliant smile of a Stanford swimmer with Olympic dreams, the happy privileged face of a white college kid named Brock Turner. . . . This is what a campus sexual predator looks like." *See Emily Yoffe, The Question of Race in Campus Sexual-Assault Cases: Is the system biased against men of color?*, ATLANTIC (Sept. 11, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assaultcases/539361>.

¹⁴ These concerns are shared by some members of Harvard's own law faculty. *Id.*

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sexual harassment. The university claimed that Flor had struck up a “flirtatious” and ultimately “explicit” email relationship with a 35-year-old graduate student at UNM (identified in the complaint by the pseudonym Jane Doe), after the two had met briefly in person in May 2018. When Flor, who is married, tried to end the email exchange after several weeks, Doe began threatening to expose their emails to Flor’s department chair and others at the university.¹⁵

Flor sued the university claiming he’d been denied due process, and alleging that he had no other option but to disclose the threats and harassment to which he’d been subjected to his department chair, in addition to his correspondence with Doe. After the chair reported the incident, the university began an investigation.¹⁶

When confronted with the complaint, however, Doe alleged that it was actually *she* who was the victim of harassment. Over the course of their correspondence, Flor and Doe had discussed the possibility that she might work for him as a summer research assistant. He continued to offer her that job after he ceased their romantic communications, but she angrily turned it down. Now, however, she claimed that it was *quid pro quo* harassment — that he had somehow made the job offer contingent on her submission to the sexual emails.¹⁷

Because the whole affair occurred electronically, it could be easily investigated. Flor continued to extend the job offer even after discontinuing the online flirtation. Jane Doe appeared to decline the job offer because she was unhappy that Flor had shifted their relationship from romantic to platonic, nor did she like the required work hours. The university’s investigator ultimately found Flor responsible not only for *quid pro quo* harassment but also for retaliation against Flor.¹⁸

Flor’s suit claimed that Doe had thus committed extortion, because he is his family’s sole wage earner and the University’s sanction would require him either to quit his job. The University’s Board of Regents declined to hear an appeal from Flor, and made its findings final. “The University’s sanction ... requires Plaintiff, who is the sole wage earner for his family, to either not work for an entire year and earn no income, or to quit.” UNM’s Board of Regents had the option to hear an appeal from Flor, but it declined

¹⁵ See Tom Ciccotta, *University of New Mexico Professor Suspended by Kangaroo Court*, BREITBART (Dec. 11, 2019), <https://www.breitbart.com/tech/2019/12/11/university-of-new-mexico-professor-suspended-by-kangaroo-court/>. See also Samantha Harris, *Lawsuit: University of New Mexico Violated Professor’s Due Process Rights*, FIRE (Jan. 6, 2020), <https://www.thefire.org/lawsuit-unm-violated-professors-due-process-rights/>.

¹⁶ Ciccotta, *supra* note 15.

¹⁷ See Harris, *supra* note 15.

¹⁸ *Id.*

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to do so, at which point the finding of responsibility became final. All of this, claims Flor, served to violate his right to due process under the Constitutions of both New Mexico and the United States.¹⁹

In February of 2020, an anonymous plaintiff under the pseudonym John Doe filed a lawsuit against Williams College, alleging that the school had violated Title IX of the Education Amendments Act of 1972 by suspending him for sexual misconduct. The suit challenged the College's findings – that Doe had “engaged in kissing and touching with another student without her affirmative consent” – which he claimed were based on false allegations. The female student who had made the charges add a comment that the accused was “culturally insensitive” to her conservative religious values.²⁰

The complaint included text messages Smith sent Doe after their first encounter, including that “the other night was amazing and [I felt] so different and liberated after it” – a comment which the hearing panel failed to note in its decision. Doe further alleged that he had been expressly forbidden from investigating the claims against him, that he was not provided the identity or testimony of any witnesses identified by the complainant, and that he had not been given an opportunity to appear before the panel – which had determined its verdict based primarily if not solely on a written report detailing the results of interviews and documents gathered by the College's investigator. As a result, Doe claimed, he had suffered serious damages in the form of lost opportunities during his suspension, harm to his reputation, and emotional distress.²¹

A similar complaint came to light in March of 2020, when the *New York Times* published a story about a male faculty candidate at Arizona State University, J., who had filed a series of anonymous sexual-misconduct allegations that two current female faculty members, who were married to one another, had solicited sex from unwilling students.²² The complaint alleged that the relationship was between Doe and Sally Smith, a pseudonym.²³ The claims, said the *Times*, were false.²⁴

¹⁹ *Id.*

²⁰ The complaint was similar to those filed by other former male students in 2016 and 2018. See Annie Lu, *Anonymous Student Sues College Over Alleged Title IX Violation in Sexual Misconduct Case*, WILLIAMS RECORD (Mar. 4, 2020), <https://williamsrecord.com/2020/03/anonymous-student-sues-college-over-alleged-title-ix-violation-in-sexual-misconduct-case/>.

²¹ The demand requested in the complaint involves over \$75,000 and injunctive relief. *Id.*

²² Sarah Viren, *The Accusations Were Lies, But Could We Prove It*, N.Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/magazine/title-ix-sexual-harassment-accusations.html>.

²³ Annie Lu, “Anonymous Student Sues College over Alleged Title IX Violation in Sexual Misconduct Case,” THE WILLIAMS RECORD, September 30, 2020, available at <https://williamsrecord.com>.

²⁴ See Viren, *supra* note 22.

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Hoping that Title IX's investigative process and attendant rumors would sabotage their careers and make him the next aspirant in line for a teaching position, J. sent emails to ASU's sexual-misconduct investigator. Though the ASU faculty members (Viren and Tecedor) denied any misconduct, they found it difficult to prove their innocence because the emails been sent under fake names. More troubling, however, was that the Title IX investigator insisted on proceeding as if the accusations were valid. "We just want to figure this out as quickly as possible," she said to Ms. Viren. "You're fine."²⁵

II. TRUMP ON EDUCATION

There are numerous other stories about students, administrators, and professors using the Title IX process to exact vengeance on their enemies, which were part of the reason that U.S. Secretary of Education Betsy DeVos sought to revise the federal government's Title IX guidelines.²⁶

Some critics assert that the Trump Administration has purposefully taken a reduced role in education, pointing specifically to the Department of Education's withdrawal of a 2014 question-and-answer document that spelled out school obligations under Title IX.²⁷

Could the notion that the Trump administration has little serious interest in educational policy be influenced by the apparently predominant mindset among liberal academics that characterizes the current occupant of the White House as more divisive, short-sighted, and self-serving than any other president in American history? Do they buy into the accepted orthodoxy that due process, free speech, and civility – rather than being Constitutionally-required components of a free society – are merely ways by which the powerful to oppress the weak?

To be sure, as is his wont, the president sometimes sends mixed signals about his goals, and seems often to relish criticism from the left, especially concerning his positions on things like health care and immigration. But honest scholarship demands fairness and balance in assessing his views.²⁸

²⁵ By then, however, it was too late for Tecedor to receive a partner hire, and the pair lost out on their dream move to Michigan. They also accrued \$10,000 in legal fees while dealing with J. And as part of a settlement, they are prohibited from publicly naming him. Robby Soave, *A Crazy Academic Weaponized Title IX Against a Rival Professor Whose Job He Wanted*, REASON (Mar. 18, 2020, 4:49 PM), <https://reason.com/2020/03/18/title-ix-arizona-state-university-viren-tecedor/>.

²⁶ See Emily Yoffe, *Reining In the Excesses of Title IX*, ATLANTIC (Sept. 4, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/title-ix-reforms-are-overdue/569215/>.

²⁷ See Yoffe, *supra* note 26 and accompanying text; See *supra* note 4 and accompanying text.

²⁸ See Gregory Eady, et al. *Comparing Trump to the Greatest – and the Most Polarizing – Presidents in U.S. History*, BROOKINGS, March 20, 2018, available at <https://www.brookings.edu/blog/fixgov/2018/03/20/comparing-trump-to-the-greatest-and-the-most->

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Indeed the facts suggest that Mr. Trump has a long record of strong and consistent views about improving both public and private schools in America. Here is a chronological catalogue of the President's comments on education:

As far back as 2000, he urged that schools teach citizenship and stop "dumbing down" the curriculum.

"Our schools aren't safe. On top of that, our kids aren't learning. Too many are dropping out [into] street life – and too many of those who do graduate are getting diplomas that have been devalued into 'certificates of attendance' by a dumbed-down curriculum that asks little of teachers and less of students. Schools are crime-ridden and they don't teach. How long do we think the U.S. can survive schools that pretend to teach while our kids pretend to learn? How can a kid hope to build an American Dream when he hasn't been taught how to spell the word "dream"?"²⁹

The president said he wanted to put an end to things like "creative spelling," "estimating," and "empowerment" – terms which have entered the modern educational vernacular. "The people running our public schools don't want to damage a student's self-esteem. They're concerned about 'empowerment.' They're worried kids will feel bad if they get a problem wrong or flunk a spelling test. It's better to pat a kid on the head and praise his 'creative spelling' than point out that there is a traditional name for people with poor spelling skills. We call them illiterates."³⁰

Back then, Mr. Trump said, some educators thought that being "judgmental" was the worst of all sins, and that life tends toward harsh judgments. But there's no room for error in launching a space shuttle. And if you give try giving a number "in the neighborhood of" on your tax returns "you may end up in a place where there's a very definite number stamped on

the back of your shirt."³¹

He went on to assert that comprehensive education dissolves the lines between knowing too much and knowing too little on a variety of subjects that are necessary for broader success. Later, in 2015, he said that

polarizing-presidents-in-u-s-history/; Sarah Jones, *State of the Union Address: Live State of the Union Polling: Mixed News for a Divisive President*, Feb. 5, 2020, INTELLIGENCER, available at <https://nymag.com/intelligencer/2020/02/trump-is-a-uniquely-divisive-president-live-poll-reveals.html>; and David Smith, *How Is the Most Unpopular and Divisive President on His Way to a Second Term?*, GUARDIAN, Jan. 26, 2020, available at <https://www.theguardian.com/us-news/2020/jan/26/donald-trump-2020-election-impeachment-democrats>.

²⁹ See DONALD TRUMP, *THE AMERICA WE DESERVE* 67 (2000).

³⁰ See *Donald Trump on Education, End "Creative Spelling," "Estimating," & "Empowerment,"* ONTHEISSUES (July 2, 2000), https://www.ontheissues.org/2020/Donald_Trump_Education.htm.

³¹ See DONALD TRUMP, *THINK LIKE A CHAMPION* 37 (2009).

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“Common Core means Washington tells you what to study. . . . I think that education should be local. . . . [F]or people in Washington to be setting . . . all sorts of [curricular] standards for people living in Iowa and other places is ridiculous.”³²

A four-year degree today can often generate six-figure debt. “There is no reason [the federal government] should profit from student loans. This only makes an already difficult problem worse.” The federal student loan program turns huge multi-billion dollar profits. The government should not make money off of student loans, said the president. The fact that it does may have something to do with why schools continue to raise their tuitions. “Those loans should be viewed as an investment in America’s future,” he said. “A lot of people believe the Department of Education should just be eliminated. Get rid of it. If we don’t eliminate it completely, we certainly need to cut its power and reach. Education has to be run locally.”³³

He went on to say that Common Core, No Child Left Behind, and Race to the Top are all programs that serve to take decisions away from parents and local school boards, by allowing progressives in the Department of Education to indoctrinate more than help educate. “[They] allow the progressives in the Department of Education to indoctrinate, not educate, our kids. What they are doing does not fit the American model of governance. I am totally against [them] and the Department of Education. It’s a disaster. We cannot continue to fail our children – the very future of this nation.”³⁴

His Administration, said the President, plans to be cutting “tremendous amounts of money and waste and fraud and abuse. . . . I’m not cutting services, but I am cutting spending.”³⁵

In 2016, Mr. Trump declared that “We want every American to know the dignity of a hard day’s work.”³⁶ In November of that year, Senator

³² *Radio Interview on 2016 Presidential Hopefuls* (Hugh Hewitt radio broadcast, Feb. 25, 2015).

³³ See *Donald Trump on Education*, ONTHEISSUES (last visited Aug. 21, 2020), https://www.ontheissues.org/celeb/donald_trump_education.htm; See also DONALD TRUMP, *CRIPPLED AMERICA* 58-59 (2015). See also Jennifer Wadia, *Donald Trump on the Student Loan Crisis*, NPR (Sept. 12, 2018), <https://www.npr.org/2012/06/08/154576917/disastrous-s-d-flood-caused-national-wake-up-call>. See also Katie Lobosco, *Is the Government Making Money off Your Student Loans?*, CNN (Aug. 4, 2016), <https://money.cnn.com/2016/08/04/pf/college/federal-student-loan-profit/index.html>, and Zach Friedman, *Is There Really a Student Loan Crisis?*, FORBES (Dec. 10, 2019), <https://www.forbes.com/sites/zackfriedman/2019/12/19/is-there-really-a-student-loan-crisis/#493f371d4025>; See “Does the Government Profit from Student Loans?,” THE BEST SCHOOLS, March 2, 2020, available at <https://thebestschools.org/magazine/government-profit-student-loans/>.

³⁴ See *Donald Trump on Education*, ONTHEISSUES (last visited Aug. 21, 2020), https://www.ontheissues.org/celeb/donald_trump_education.htm.

³⁵ Sunday 2015 Coverage of 2016 Presidential Hopefuls (Fox News television broadcast, Oct. 18, 2015).

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Hillary Clinton responded to the question about how to fix the U.S. educational system by praising Common Core.³⁷ She then said that families today are too “negative” about the current system, which she described as “the most important non-family enterprise” in the country.³⁸ After noting what she described as “unfortunate” opposition to Common Core, she also dismissed the concerns of Common Core opponents by saying they just “do not understand the value” of the controversial top-down curriculum.³⁹ That same month, the president noted that we spend more per student than any other nation. But, he added, some twenty-five nations “are better than us at education. And some of them are like third world countries.”⁴⁰

In April of 2017, Mr. Trump proposed that funding for NASA’s Office of Education be eliminated. One of the Office’s goals included attracting and retaining students in Science, Technology, Engineering, and Mathematics (STEM), particularly women. NASA analyzed the STEM programs funded by their agency and saw that the numbers of women were low, and that female participation dropped off at every educational level – from middle school to doctoral completion and faculty tenure.⁴¹

These findings, contrasted with other professional fields that achieved gender parity (such as law and medicine) led NASA to examine the reasons why, in order to ensure that it was not due to unlawful discrimination. NASA published a self-evaluation guide on gender equity, instructing users how to evaluate every aspect of their academic programs from the admission process to allocation of lab space. Although Congress rejected closing the Office, the Executive Branch’s pivot from using Title IX to expand education was apparent.⁴²

In February 2017, the Administration rescinded a Title IX guidance protocol from the Department of Education which allowed transgender

³⁶ See *Donald Trump on Education*, ONTHEISSUES (last visited Aug. 21, 2020), https://www.ontheissues.org/celeb/donald_trump_education.htm.

³⁷ See *Common Core Is Most Important Non-Family Enterprise in U.S.*, ONTHEISSUES (last visited Aug. 21, 2016), https://www.ontheissues.org/celeb/Hillary_Clinton_Education.htm.

³⁸ *Id.*

³⁹ See *2016 AFA Action iVoterGuides: On Government Reform* ONTHEISSUES, (Nov 8, 2016), https://www.ontheissues.org/Archive/2016-AFA_Government_Reform.htm.

⁴⁰ *Donald Trump on Education*, ONTHEISSUES (last visited Aug. 21, 2020), https://www.ontheissues.org/celeb/donald_trump_education.htm.

⁴¹ See Ethan Siegel, “Trump’s Plan To Destroy NASA Science Laid Bare In FY2020 Budget,” *FORBES*, March 12, 2019, available at www.forbes.com/sites/startswithabang/2019/03/12/; See Sara Reardon, Alexandra Witze, Jeff Tolleson, & Erin Ross, *Trump Budget Would Slash Science Programs Across Government*, *NATURE* (May 23, 2017), <https://www.scientificamerican.com/article/trump-budget-would-slash-science-programs-across-government/>.

⁴² *Id.* See Joan Kuhl, “NASA Decision Ignites Dialogue around Gender Barriers in STEM,” *FORBES*, March 27, 2019, available at www.forbes.com/sites/joankuhl/2019/03/27/nasa.

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students to use restrooms of their choosing. Thus, schools that received federal funding would no longer be barred from discriminating against transgender students in K-12 schools and college campuses.⁴³

In May of that year, Mr. Trump issued an Executive Order that further limited the federal role in education. “For too long,” he said, “the federal government has imposed its will on state and local governments. The result has been education that spends more, and achieves far, far, far less.” While he made no statements about enforcement of Title IX in academic programs, implement of the statute began to change rapidly.⁴⁴

In his 2018 State of the Union Address, the president went on to say that the United States “can lift our citizens from welfare to work . . . from dependence to independence, and from poverty to prosperity. . . . And let us support working families by supporting paid family leave.”⁴⁵

He also rejected the Department of Education’s Common Core initiatives. “I believe Common Core is a very bad thing. . . . [W]e should be . . . educating our children from Iowa, from New Hampshire, from South Carolina, from California, from New York. I think that it should be local education.”⁴⁶

III. RENEWED ENFORCEMENT OF TITLE IX REGULATIONS

Title IX prohibits discrimination on the basis of sex in any federally-funded educational program or activity from kindergarten through post-secondary school. No institution may exclude, separate, deny benefits to, or otherwise treat differently any person on the basis of sex unless expressly authorized to do so under the law or the Department of Education’s implementing regulations.⁴⁷

In September 2018, Department of Education Secretary Betsy DeVos withdrew a 2011 letter from the Obama administration declaring that schools should use a “preponderance of the evidence” standard when judging sexual violence in Title IX enforcement cases. The Department also withdrew a 2014 question-and-answer document that spelled out school obligations under Title IX. Responding to the schools’ complaints

⁴³ See Rebecca Hersher & Carrie Johnson, *Trump Administration Rescinds Obama Rule on Transgender Students’ Bathroom Use*, NPR (Feb. 22, 2017), <https://www.npr.org/sections/thetwo-way/2017/02/22/516664633/trump-administration-rescinds-obama-rule-on-transgender-students-bathroom-use>.

⁴⁴ See Darlene Superville, *Trump Order Seeks to Limit Federal Role in K-12*, ASSOCIATED PRESS (Feb. 22, 2017), <https://apnews.com/453f30f6d9a64071b3b4515c67354743/Trump-order-seeks-to-limit-federal-role-in-K-12-education>.

⁴⁵ President Donald Trump, *State of the Union Address* (Jan. 30, 2018).

⁴⁶ See Matthew Lynch, *Donald Trump Says He Would Cut Department of Education*, THE EDVOCATE (Feb. 26, 2018), <https://www.theedadvocate.org/donald-trump-says-he-would-cut-department-of-education/>.

⁴⁷ 20 U.S.C. §§ 1681-1688 (2012).

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that the inquiries were excessive or unfair, the Department also opted to end an Obama-administration practice of expanding investigations of individual students' complaints concerning sexual assault and harassment.⁴⁸

Consequently, Title IX gender discrimination complaints are now closed significantly faster than they had been under previous administrations – from eighty-eight days to an average of thirty-nine. Civil-rights advocates who had initially objected to the toned-down approach, arguing that it would risk overlooking systemic problems, have now come to recognize its value.⁴⁹

Meanwhile, the similar assertion that there are fewer women applying to business schools nowadays has been addressed has been countered with the argument that the country's robust economy has generated greater employment opportunities for both genders. In addition, there has been a declining interest in graduate school among international students.⁵⁰

Historically, some women have found business school less than welcoming. According to a 2013 article in the *New York Times*, before Harvard undertook a massive effort to reform its male-dominated culture about a decade ago, the environment was “worse than any trading floor. . . . [M]ale students commandeered classroom discussions and hazed female students and younger faculty members,” and made crude comments about whom they would “kill, sleep with, or marry.”⁵¹

In 2017 students at Stanford University created a video with a strong motif about the objectification of women, which contained both images of men suggestively swinging golf clubs and scantily-clothed women. “It is quite literally a film of a hostile educational environment,” observed Stanford Law School professor and sociologist Michele Dauber.⁵²

Less flagrant but nonetheless pernicious, in some leading MBA programs women's grades often lag behind those of men – perhaps a reflection of curricular and grading systems that perpetuate gender

⁴⁸ Note that in the U.S. the federal role in education is limited by the Tenth Amendment; thus questions about policy should be checked with local school districts. See *Laws and Guidance*, U.S. DEP'T OF EDUCATION, available at <https://www2.ed.gov/policy/landing.jhtml>; See also Stephanie Saul & Kate Taylor, *Betsy DeVos Reverses Obama-Era Policy on Campus Sexual Assault Investigations*, N.Y. TIMES, Sept. 22, 2017, available at <https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html>.

⁴⁹ See Conor Friedersdorf, *The ACLU Moves to Embrace Due Process on Title IX*, ATLANTIC (Feb. 8, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/aclu-title-ix/582118/>.

⁵⁰ See Abigail Hess, *Application to Business School are Down—but Women are Making Modest Gains*, CNBC: MAKE IT (Nov. 11, 2019), <https://www.cnbc.com/2019/11/11/business-school-applications-are-down-but-women-are-making-gains.html>.

⁵¹ See Jodi Kantor, *Harvard Case Study: Gender Equity*, N.Y. TIMES (Sept. 8, 2013), <https://www.nytimes.com/2013/09/08/education/harvard-case-study-gender-equity.html>.

⁵² See Sara Todd, *Three M.B.A. Admissions Heads Explain Why Record Numbers of Women are Going to Business School*, QUARTZ AT WORK (Nov. 21, 2019), <https://qz.com/work/1751127/why-more-women-are-getting-mbas-according-to-admissions-heads/>.

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inequalities. In 2011, women made up just 32% of students at top business schools, according to data from the Forté Foundation.⁵³

On the other hand, there is statistical evidence that directly refutes the claim of a decline in women seeking admission to business schools – that indeed *more* women are applying nowadays. In 2019, 39% of students who enrolled in the top MBA programs were women.⁵⁴

Have the tides in fact turned, or could these competing narratives be merely a manifestation of Mark Twain’s famous aphorism – “Lies, Damned Lies, and Statistics” – referring to the persuasive power of numbers, particularly the use of statistics to bolster weak arguments?⁵⁵

In the end perhaps it doesn’t really matter much at all – since so few people actually pay attention to newspaper reports analyzing technical legal issues – much less read law-review articles about them.⁵⁶

⁵³ *Id.*

⁵⁴ See Kathryn Dill, *More Women Pursue M.B.A. as Elite Schools Step Up Recruiting*, WALL STREET J. ONLINE (Nov. 6, 2019), <https://advance.lexis.com/api/permalink/685bbc03-88c1-43cd-9ff5-bba758c2232c/?context=1530671>.

⁵⁵ Although the saying is often cited as Twain’s (as it is here), he himself attributed it to the British prime minister Benjamin Disraeli. But the phrase cannot be found in any of Disraeli’s works – so its origin remains in doubt. See Peter Lee, *Lies, Damned Lies and Statistics*, U. York, (July 19, 2012), <https://www.york.ac.uk/depts/math/histstat/lies.htm>, and Paul F. Velleman, *Truth, Damn Truth, and Statistics*, J. STAT. EDUC., (2008), <http://jse.amstat.org/v16n2/velleman.html>. See also Mark Twain, CHAPTERS FROM MY AUTOBIOGRAPHY at p. 196 (Benediction Classics 2011).

⁵⁶ See Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARVARD LAW REVIEW 926 (1990); *Feminism Awry: Excesses in the Pursuit of Rights and Trifles*, 42 J. OF L. & EDUCATION 1 (1992); and *Political Correctness Askew: Excesses in the Pursuit of Minds and Manners*, 63 TENNESSEE LAW REVIEW 689 (1996). These articles were later consolidated in a book entitled TREMBLING IN THE IVORY TOWER: EXCESSES IN THE PURSUIT OF TRUTH AND TENURE (Bancroft Press, 2003).