

Yale FOX INTERNATIONAL FELLOWSHIP

PROTECTING TITLE IX

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Title IX is the landmark 1972 federal legislation that prohibits discrimination in education on the basis of sex. Sexual violence is a form of sex discrimination because it creates a hostile environment that can [jeopardise](#) women's access to education. Through Title IX, students from [elementary school through university](#) may bring complaints of sexual violence to school authorities instead of or in addition to bringing their case to the police.

For these reasons, in 2011, President Barack Obama issued a '[Dear Colleague](#)' letter which outlined universities' obligations to deal with allegations of sexual violence. This action came in response to student protests about rape on school campuses. These [protests](#) have since reached new heights, epitomised by such high-profile demonstrations as the '[Carry that Weight](#)' protest in 2014-2015. A government [report](#) issued in 2011 concluded that nearly twenty percent of all college women and six percent of undergraduate men had been victims of attempted or actual sexual assault. These [figures](#) are much higher for women of colour than for white women.

Debates about Title IX [highlight](#) longstanding issues of racial and sexual violence in American universities. What is important to understand from my research and that of others is that sexual violence has historically functioned as a tool of white supremacy in the United States, as the examples provided below make clear. As such, campus sexual violence cannot be properly understood without taking both race and gender into consideration.

THE OBAMA ADMINISTRATION GUIDELINES

The Obama guidelines defined sexual assault broadly as 'any unwanted contact of a sexual nature.' The administration instructed schools to:

- Investigate all charges of sexual violence that come to the university's attention
- Take prompt action to end the violence, prevent its recurrence, and address its effects
- Use the *preponderance of evidence* standard instead of the higher standard of *clear and convincing evidence*

The Obama administration guidelines were praised by victims' rights advocates for taking steps to reduce the incidence of sexual violence on school campuses and for holding schools accountable for failures to address cultures of impunity. However, the guidelines were non-binding.

THE TRUMP ADMINISTRATION GUIDELINES

In September 2017, Education Secretary Betsy DeVos [announced](#) that she was rescinding Obama's 2011 letter. On November 16, 2018, she unveiled the

administration's [new rules](#), which can be made into law by an act of Congress after a 60-day waiting period.

The new guidelines diverged from the Obama administration guidelines in key respects:

- Sexual assault is defined according to the Supreme Court standard as 'unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it denies a person access to the school's education program or activity.'
- Universities will not be required to take action if the incident occurs off campus
- The standard of proof will be higher, reverting to the *clear and convincing* standard
- Defendants will have the right to personally cross-examine witnesses, including the complainant (this provision was discouraged by the Obama guidelines) or through a third party

Unlike the Obama administration guidelines, the Trump administration rules will have the force of law. The new guidelines have been [criticised](#) by [victim's rights advocacy groups](#) including End Rape on Campus and Know Your IX.

ISSUES AND QUESTIONS

Why did the Trump administration reduce the regulatory requirements of universities to address claims of sexual violence? Critics of the Obama administration procedures have argued that his rules violated the [due process rights](#) of the accused who, if found responsible, might be expelled without having been formally found guilty of any crime in a court of law. They argued that since the Title IX coordinator was usually responsible for investigating the charges and coordinating the disciplinary process, there could be the potential for individual bias. Journalists and other critics of the Obama era guidelines have further argued that men of colour are the [disproportionate](#) target of such campus rape allegations.

The question of racial bias is an important one. False allegations concerning the rape of white women by black men have long been used to dehumanise and disenfranchise black men. In the nineteenth century, false rape claims by white women, who themselves were often subject to the violence of their husbands, were invoked as justification for [lynching](#). Stereotypes about black men as sexually aggressive have endured, and throughout the twentieth and twenty-first centuries men of colour have faced discrimination and violence on this basis. The U.S. military, for example, scapegoated African-American soldiers for the rapes of civilian women during World War II. The most well-known case is that of [Louis Till](#), a GI who was executed on trumped-up charges of rape in Italy. Several years later, his teenaged son, Emmett Till, was lynched by a white mob on similar false charges in the United States, sparking the Montgomery Bus Boycott - a major event in the American civil rights movement. In October 2018, [a white woman](#) called the police on a 9-year-old African-American boy whom she accused of sexually assaulting her.

The legacy of racialised rape myths and the sexism of the criminal justice system have both shaped the landscape of sexual violence allegations that we confront today: *rape is significantly underreported, and a disproportionate number of rape allegations concern men of colour*. In societies in which black men are stereotyped as sexually aggressive and women's rape claims are treated with suspicion, the sexual violence cases that have typically resulted in conviction are those in which white women accuse black men. Cases in which black women accuse white men, or those in which transgender or disabled women are victims, have long been [under-reported](#).

Since 2011, however, and notably since the #MeToo movement which began in 2017, several high-profile cases implicating powerful men have garnered international attention. This level of scrutiny is unprecedented, and represents the kind of progress that is possible when victims' rights are bolstered. These cases have helped to shatter gender and race stereotypes by emphasising the credibility of victims and highlighting the [impunity](#) that many powerful, white men have so far enjoyed. For the first time, rape cases in American schools -- the [Brock Turner](#) case and the [Steubenville](#) case, to name but two -- have become part of a national conversation, facilitated in part by the Obama guidelines, with the potential to transform the cultural and legal system in which allegations of sexual violence are currently addressed.

While the Trump guidelines do nothing to mitigate racism, they do exacerbate sexism and entrench cultures of impunity in American schools by undermining victims' abilities to bring forward '[tougher](#)' cases that implicate powerful men, such as the university professors at the centre of an ongoing controversy at [Dartmouth](#). The Obama guidelines can be strengthened to bolster issues of due process without dismantling the protections they currently afford victims of sexual violence.

POLICY RECOMMENDATIONS

1. RETURN TO, AND EXPAND, THE 2011 GUIDELINES

The 2011 guidelines provide the most protection for victims of sexual violence. Under the provisions, universities receiving federal funds must meaningfully address all complaints, and they must provide support services to victims, such as counselling, a no-contact order between the complainant and accused, and the rescheduling of classes.

The guidelines and their counterpart, the [2014 Questions and Answers](#) document, also provide accused students with considerable [protection](#), including the right to:

- timely access to any information that will be used at the hearing
- equal opportunity to present witnesses and evidence
- equal right to an appeal of the findings, or remedy, or both, if the school chooses to provide for one
- equal right to be present for the duration of the hearing

These guidelines have [bipartisan support](#) and provide the best framework for protecting the rights of victims and accused students. The guidelines might be further strengthened, by, for example, mandating the use of hearings rather than the single-investigator model, which has been the subject of some controversy. However, many of the failures of due process currently cited by opponents have resulted from [incomplete or inconsistent](#) adherence to the Obama guidelines rather than from the guidelines themselves. The 2011 rules should therefore be made legally binding, and thus uniform across American schools, by an act of Congress.

2. IMPROVE STAFF AND STUDENT TRAINING

Many universities have already begun to make gender and race awareness [training](#) a compulsory part of their induction programmes; where possible, these should be offered together to highlight the interconnectedness of race and gender. Actions that promote racial equality have a direct impact on sexual violence cases because a [racist campus culture](#) is more likely to lead to racist reporting and outcomes in rape cases.

Massachusetts also recently passed [legislation](#) mandating better sexual assault training for campus staff, and this should be repeated in other states.

3. BOLSTER ACCESS TO LEGAL AID

In order to bolster the due process provisions outlined in the 2011 guidelines, universities can help to defray the costs of legal aid for students of colour, poor students, and other students from marginalised groups who face charges of sexual violence.

Universities may also decide to provide similar aid for complainants. By ensuring equal access to legal advice, universities can help to mitigate structural inequalities that prevent less privileged students from accessing legal support.

4. DECOLONISE THE UNIVERSITY

The above measures can only do so much. Universities must ultimately make radical efforts to decolonise spaces of learning, which still function as sites of racist and sexist institutional violence. Yale's endowment profits from investment in [private prisons](#) and [Puerto Rican debt](#), which contributes directly to the criminalisation of people of colour and, by extension, the perpetuation of racialised rape myths. The Yale police is armed and has been credibly implicated in racist violence, including, most recently, the [shooting](#) of Stephanie Washington and Paul Witherspoon. Since black women are the most likely to be victims of sexual violence, and the least likely to be taken seriously when they [report](#) it, including in [Title IX hearings](#), it is not possible to advance gender equality without changing the underlying racist structures which sustain violence against women of colour. Yale does not acknowledge that it occupies the ancestral homelands of indigenous peoples including the Quinnipiac, who still live and thrive in the region today,

and does not redress the economic violence it perpetuates against the residents of New Haven. In this way, the university creates, and profits from, racial segregation and economic inequality, both of which contribute to the vulnerability of women of colour to sexual violence and the impunity enjoyed by powerful men. There is capacity to make these changes: universities around the world have begun to [divest](#) from investments in arms, fossil fuels, and tobacco; students at Georgetown have [committed](#) to creating a reparations fund for the descendants of African people sold by the university; and Cambridge has [launched](#) an investigation into the ways in which the university has profited from slavery, potentially with a view to restorative justice, although this remains to be seen. Since sexual violence has been the [bedrock](#) of white supremacy in the United States for centuries, it cannot be properly tackled without some broader reckoning with the structures that prop it up.