

Title IX, Due Process, and the Struggle over Campus Sexual Assault

SANDRA LEVITSKY AND ELIZABETH A. ARMSTRONG
DEPARTMENT OF SOCIOLOGY



Motivation

2016 / CELEBRATING AT THE OSCARS

ENTERTAIN THIS

Lady Gaga, Joe Biden calling for end of rape culture wins the Oscars

Cara Kelly USA TODAY

Published 11:45 p.m. ET Feb. 28, 2016 | Updated 8:19 a.m. ET Feb. 29, 2016

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A powerful scene from the stage. Chris Pizzello, Chris Pizzello/Invision/AP

2020 / BEMOANING AN “ABOMINATION” (MS. MAGAZINE)

EDUCATION, NATIONAL, VIOLENCE & HARASSMENT

DeVos’s Campus Sexual Assault Regulations Are an “Abomination”

5/8/2020 by CARRIE N. BAKER



Betsy DeVos's new Title IX regulations make it much harder to discipline students accused of sexual misconduct than those accused of other much lesser serious infractions and have been described as "the antithesis of what Title IX was intended to do." Pictured: A January 2017 protest in opposition of Betsy DeVos in D.C. (Ted Eytan / Flickr)

Motivation

1972 TITLE IX = 37 WORDS

“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.”

2020 ED REGULATIONS 2,300 PAGES /

U-M POLICIES COMPLEX


Policy & Procedures
(Effective Oct. 1, 2021)

- [University of Michigan Policy on Sexual and Gender-Based Misconduct](#)
- [Standard Practice Guide](#)
- [Employee and third party procedures](#) (for Ann Arbor, Dearborn and Flint campuses)
- [Student procedures for Ann Arbor](#)
- [Student procedures for Dearborn](#)
- [Student procedures for Flint](#)

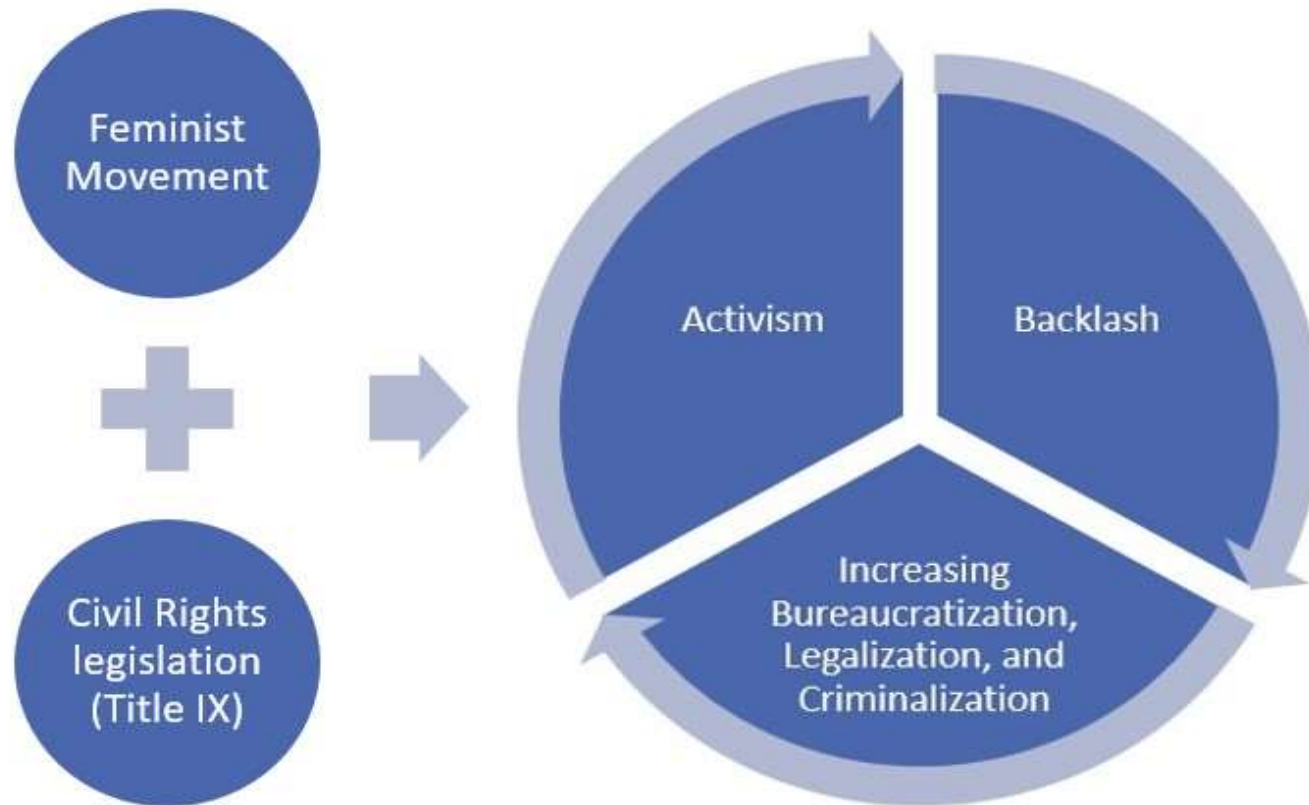
Motivation and Questions

- How to explain the rapid reversal in campus sexual assault politics from 2016 to 2020?
- How did a civil rights law with enormous potential for gender equity become a contentious, legalized, compliance industry?

Data

- Content analysis of 381 university sexual misconduct policies as of 2016 (end of the Obama era)
 - Interviews with national experts
 - Collection and analysis of litigation, media coverage, law review articles, and secondary sources
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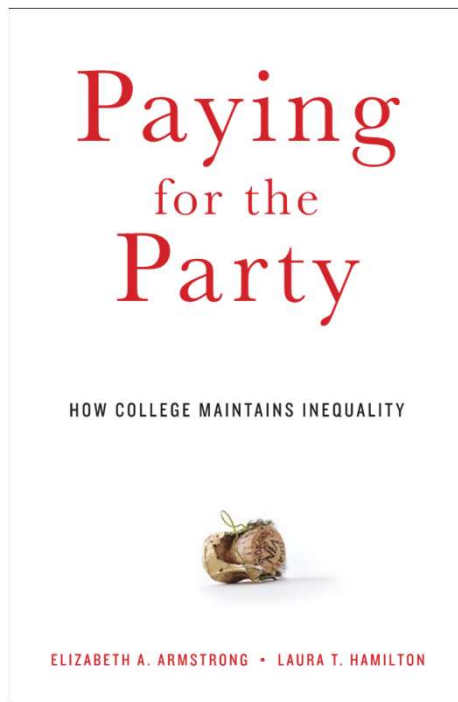
Tentative Argument



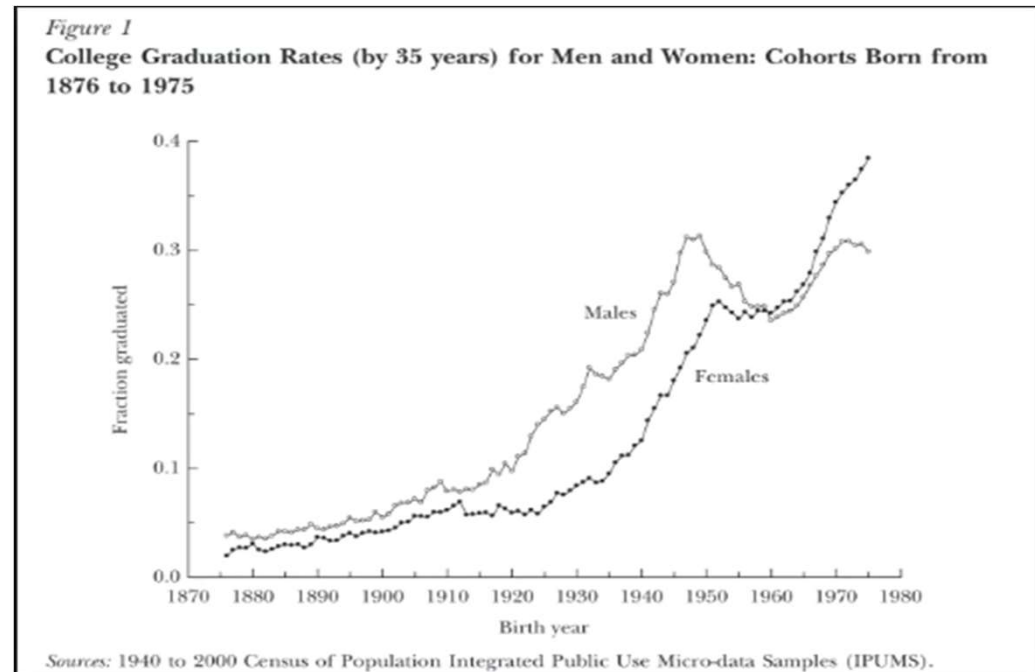
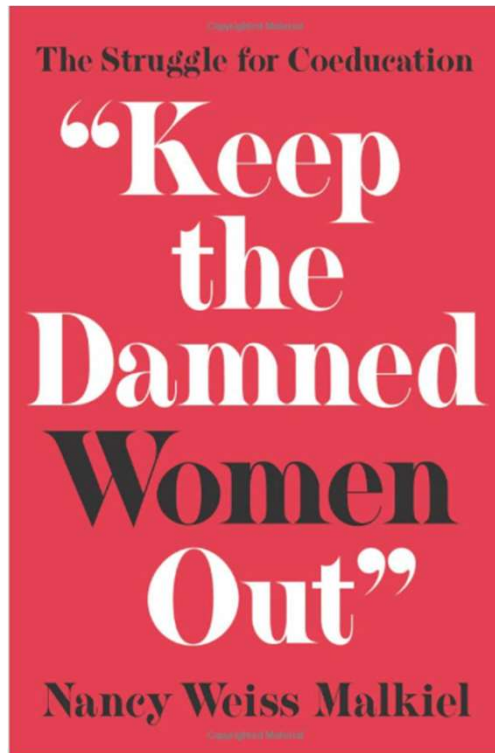
1 -- University Production of Sexual Assault

- Sexual assault is predictably produced by the operations of the university.

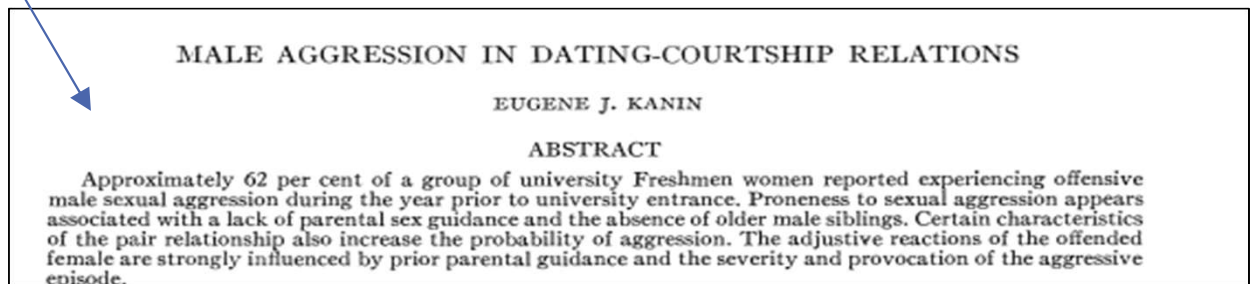
University Production of Sexual Assault



Coeducation



1957 sociology article first to document high prevalence



University Production of Sexual Assault

“This subject is the briar patch of university life; if I’m public with you about date rape as the school’s cost of doing business, you can bet that some lawyer for an OSU date-rape victim will use it in a trial someday about the school’s callousness.”

An administrator at Ohio State University, off the record, 1998, quoted in the footnotes of Murray Sperber’s 2000 book, *Beer and Circus*, p. 299

2 -- Early Feminist Activism

The first waves of anti-sexual violence activism on campus in the 1970s and 1980s generated largely ineffective prevention programming and some victim support services (e.g., SAPAC at U-M), but remained marginal to university operations and did not measurably decrease sexual violence on campus.

3 -- Inventing “Sexual Harassment”

The development in the late 1970s/early 1980s of a legal definition of “sexual harassment” and the establishment of sexual harassment as a Title IX violation created a new mechanism to attempt to hold universities accountable for sexual violence on campus.

(Catharine MacKinnon, *Alexander v. Yale* 1980)



4 -- Development of Sexual Harassment Law

The legal architecture for the deployment of Title IX to address sexual harassment developed gradually, and largely under the radar throughout the 1980s and 1990s.

It started to surface as consequential in Department of Education Office for Civil Rights guidance in 1997 and 2001.

5 -- New Campus Anti-Rape Movement

The “new campus anti-rape movement” started acquiring momentum around 2006 and peaked around 2013-2014. This wave of activism was distinct from prior activism in:

A) deploying TIX

B) using social media as a vehicle for mobilization

New Campus Anti-Rape Movement



Andrea Pino and Annie Clark (UNC),
New York Times, March 19, 2013



May 2014

6 -- The DCL

This activism contributed to and was accelerated by the 2011 "Dear Colleague Letter."

The DCL, combined with newly aggressive OCR enforcement, and the active sponsorship by the Obama White House, drew unprecedented attention to campus sexual assault.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 4, 2011

Dear Colleague:

Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. In order to assist recipients, which include school districts, colleges, and universities (hereinafter "schools" or "recipients") in meeting these obligations, this letter¹ explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence.² Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other

7 -- Universities Respond

From 2011, university administrators sought to “get it right” on campus sexual assault, with a fear of OCR investigation looming. This work escalated in difficulty as universities revised policies, adjudicated more cases, and the legal environment grew ever more complex.

NEWS STUDENTS AND VIOLENCE TITLE IX

Compassionate But Impartial

Paperwork aside, Title IX coordinators say their jobs take an unusual emotional toll and encourage peers to exercise self-care.

By Colleen Flaherty • Published December 19, 2014

And although Title IX investigators are increasingly coming to their roles with legal backgrounds – especially as Congressional inquiries and unprecedented media attention shine a harsh light on campus sexual assault – they typically lack the training on resilience and coping that counselors and advocates receive. Those emotional pressures come on top of negotiating what is still a relatively new position, the isolation that comes with being the sole Title IX investigator on lots of campuses, mounting caseloads and demand for a quick turnaround on investigations.

Confidentiality also is key, limiting the ways in which administrators can vent to family and friends and – if they're lucky enough to have them – colleagues in the same line of work.

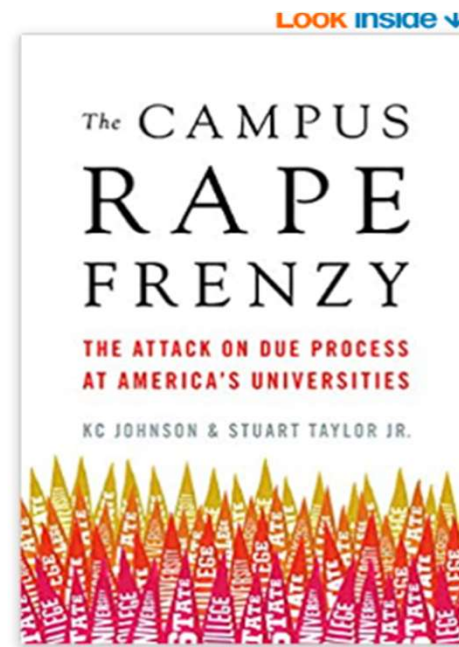
"It's emotionally and psychologically draining, especially for Title IX coordinators who don't have a background in student affairs – who aren't used to the emotional toll of these kinds of cases," said Daniel Swinton, associate executive director of the Association of Title IX Administrators, or ATIXA, a national professional group formed three years ago in part to provide a sense of community among coordinators.

8 – A Backlash Defending the Rights of the Accused Rapidly Mobilized

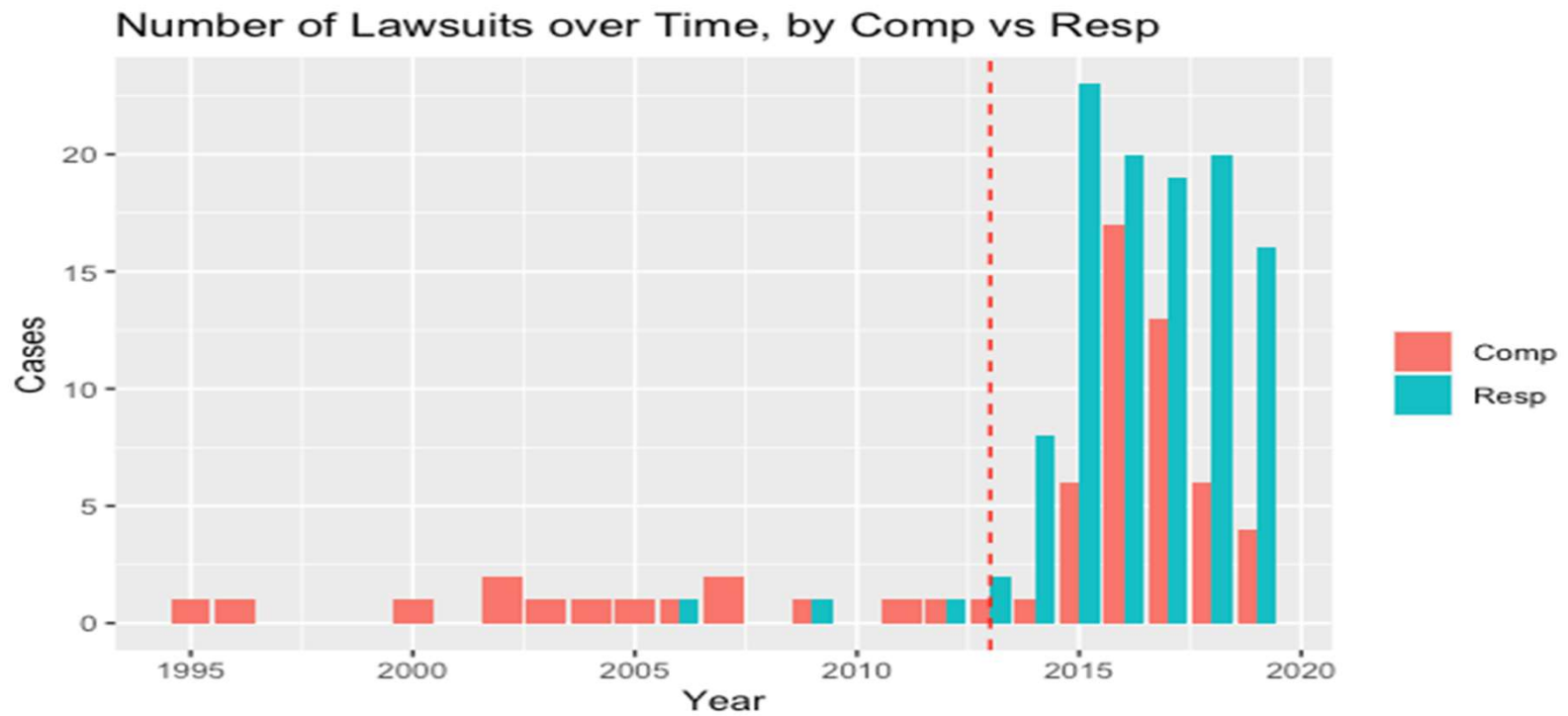
Families Advocating for Campus Equality (FACE):

The mission of FACE is to support and advocate for equal treatment and due process for those affected by inequitable Title IX campus disciplinary processes, and influence campus culture through outreach and education.

<https://www.facecampusequality.org/about-us>




Number of Lawsuits over Time



9 – Trump is Elected



10 – The 2020 Regulations

- Lawyers and organizations representing the rights of the accused had close access to Betsy DeVos and the OCR
 - Over 100,000 comments submitted in the Notice & Comment Period
 - The final rule was more than 2,300 pages – very complex
 - Required universities to implement very adversarial adjudication procedures, with near criminal level due process protections
- 

The New York Times Just Revealed Betsy DeVos' Plan to Let Colleges off the Hook for Sexual Assault

The proposal reportedly redefines "sexual harassment" and lets colleges ignore off-campus assaults.

By Jake New // November 6, 2014

Court Finds Due Process Denied in Sex Assault Case |


Betsy DeVos just rolled back protections for sexual assault survivors. Here's what that means.

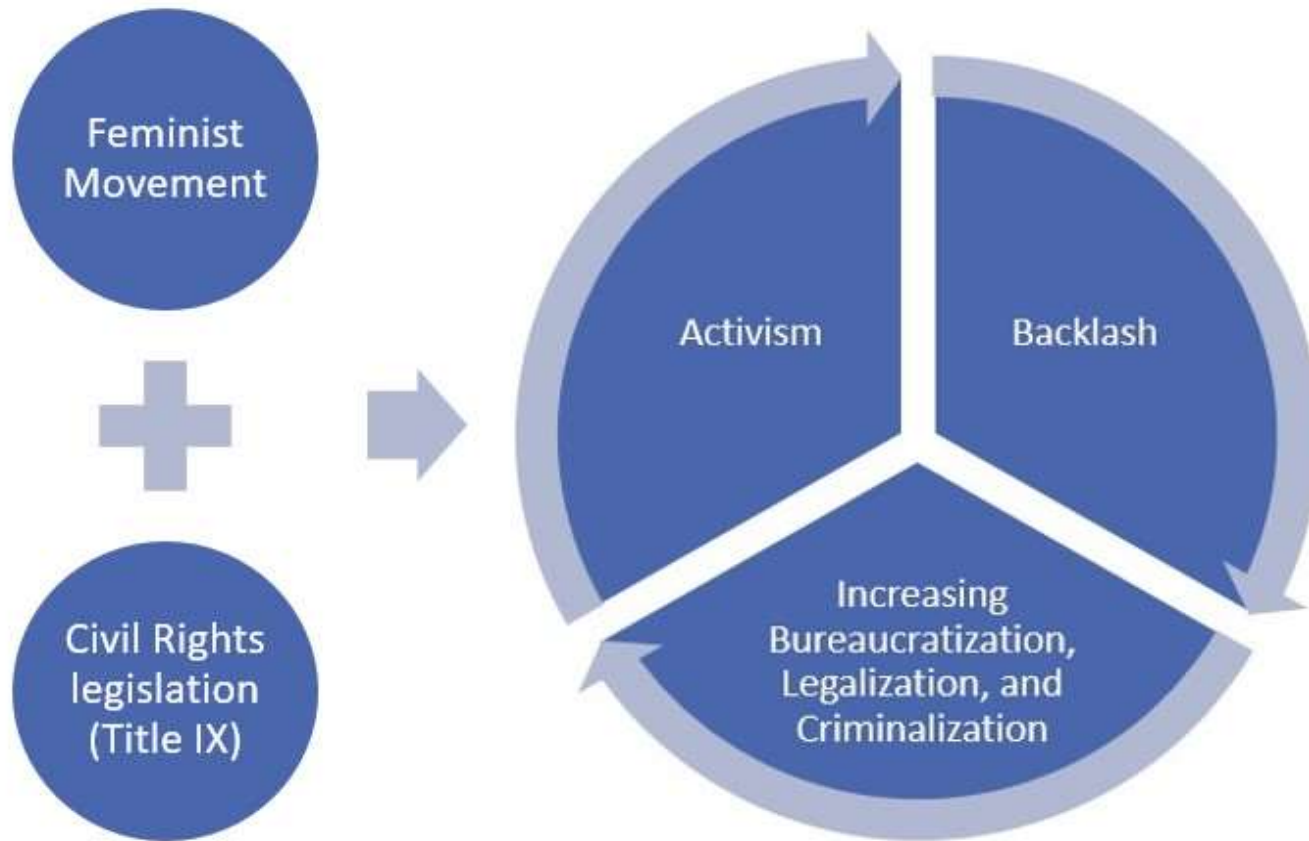
The education department is rescinding Obama-era guidelines, a move survivors and advocates have long feared.

By Anna North | Updated Sep 22, 2017, 1:22pm EDT


Survivors of Campus Rape Plead with DeVos to Protect Their Rights

Tentative Conclusions

- The political back-and-forth between feminists and those protecting the status quo set in motion processes that have pushed university responses to become more legalized, more bureaucratically complex, and more criminalized – with no evidence to date of a reduction in sexual harm on campus.
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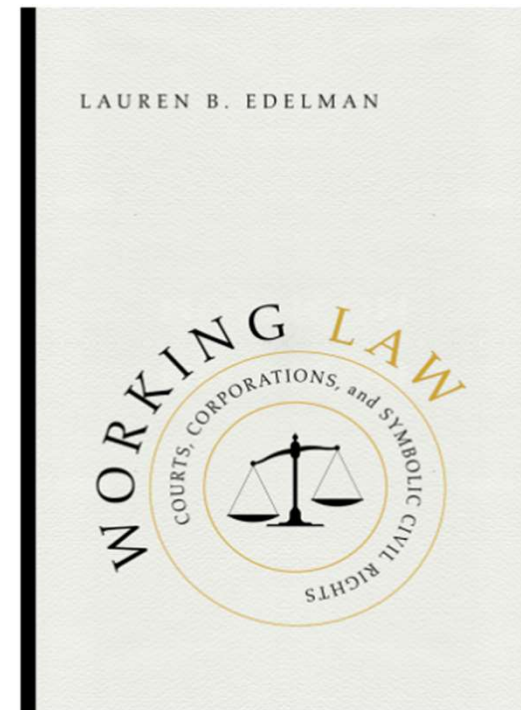


Tentative Conclusions


- Attention has been channeled toward the adversarial adjudication of complaints, with education and structural change taking the back seat.
 - This has not only contributed to the legalization of the university but has unfortunately served as an avenue for the importation of criminal logics into the university.
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The Legalization of Organizations

“The legalization of organizations is the process through which elements of law and legal principles become relevant to organizations and motivate the infusion of law-like ideas and the creation of law-like structures into organization governance.”



Tentative Conclusions


- In a society in which more organization is viewed as the solution to just about every problem, the intractability of this problem—and the lack of meaningful ways to measure improvement—intensifies the impulse toward organizational expansion.
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Acknowledgement of Financial Support

- Andrew Carnegie Foundation fellowship (2019-21), Elizabeth A. Armstrong.
- Center for Advanced Study in the Behavioral Sciences (CASBS) Fellowship (2018-19), Stanford University, Elizabeth A. Armstrong
- National Science Foundation, Law & Social Science Program (2017), Sandra Levitsky and Elizabeth A. Armstrong
- MCubed Rackham Summer Awards (2017), Miriam Gleckman-Krut, Jared Eno
- MCubed Award (2016), Elizabeth A. Armstrong, Sandra Levitsky, Gerald Davis
- Institute for Research on Women and Gender (IRWG) (2015)
- SURO, MROP, UROP, and SROP

Information on the Project

University Responses to Sexual Assault website
<https://sites.lsa.umich.edu/ursa/>



THANK YOU!

