

HOW FALSE ACCUSATIONS OF RAPE AND DOMESTIC
VIOLENCE AFFECT THE LIVES OF BLACK MALE ATHLETES:
ANALYSIS OF A FLAWED TITLE IX

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INTRODUCTION27

I. BACKGROUND31

A. *Racial Discrepancies Between Black Men and White Men in Relation to False Accusations*.....33

B. *The Depiction of Black Bodies as Sexual and Violent*35

II. LEGAL DISCUSSION37

A. *What is Title IX?*.....37

B. *What Is the Problem?*39

C. *Disparate Impact at Work Yet Again*42

III. THE JUSTICE SYSTEM SOLUTION AND ARE THE NEW CHANGES TO TITLE IX ENOUGH?43

A. *Recent Changes*43

B. *Are the Changes Enough?*.....44

CONCLUSION.....46

INTRODUCTION

Have you ever been falsely accused of something you did not do? Perhaps by a friend or a sibling? Have you ever been accused of something that prevented you from applying to school or completing a degree? Have false accusations followed you persistently? Or did they just dissipate? For some, the answers are all yes; false accusations have followed them, ruined their lives, and put them in unimaginable predicaments.

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Have you ever heard of five Black men named Kevin Richardson, Raymond Santana, Antron McCray, Yusef Saleem, and Korey Wise?¹ You may recognize those names from the popular Netflix documentary: *When They See Us* by Ava DuVernay.² Whether you know them by name because you're familiar with the case or because you watched the documentary, the group of young teenagers were dubbed the Central Park Five ("the Five").³

When the Five were arrested in 1989, they were teenagers ranging in age from 14 to 16, and all had so much life left to live.⁴ One accusation changed all of that in the blink of an eye.⁵ On April 19, 1989, a White woman named Trisha Meili was found by police in Central Park. The victim was raped multiple times and was so badly beaten that she lay in a coma for two weeks. The comatose was so severe, the victim could not remember what happened to her the night of the attack.⁶ In Meili's book, released in 2003, she describes the injuries she suffered in detail:

The woman is bleeding from five deep cuts across her forehead and scalp; patients who lose this much blood are generally dead, her skull has been fractured, and her eye will later have to be put back in its place The victim's arms and legs are flailing violently, the aftereffects of the massive brain damage, and that night had to be tied to the gurney since there were not enough night nurses to watch her constantly. . . .⁷

Of course, it is the upmost priority to catch the people who caused these unspeakable injuries; but placing blame on a group solely for the sake of judicial expediency was inappropriate and immoral. Those actions ultimately led to the accusation and conviction of the wrong individuals. Antron McCray was tried as a juvenile and convicted of rape and assault. McCray was handed a sentence of five to ten years and would end up spending six years behind bars. Kevin Richardson was just fourteen years old when he was sentenced five to ten years in prison and would end up spending five and a half years behind bars. Fifteen-year-old Yusef Salaam was convicted of Meili's rape and assault and handed

1. History.com editors, *The Central Park Five*, HISTORY, <https://www.history.com/topics/1980s/central-park-five> [<https://perma.cc/FX2J-TD2L>] (last updated Sept. 23, 2019).

2. WHEN THEY SEE US (Netflix Series 2019) (a documentary series by Ava DuVernay detailing the life and case of the Central Park Five).

3. History.com editors, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. Trisha Meili, I AM THE CENTRAL PARK JOGGER: A STORY OF HOPE AND POSSIBILITY, 15 (Scribner 2003).

a five to ten-year sentence.⁸ Salaam would go on to spend six years and eight months in jail. Raymond Santana was tried as a juvenile and spent five years in prison. Korey Wise, who has hearing issues and learning disabilities, was questioned without his parents. Wise, then sixteen years old, spent twelve years behind bars.⁹ In 2002, the Five's charges were vacated when a confession was received from the actual perpetrator.¹⁰ In 2013, after fighting a lawsuit against the city for a decade, the Five received a settlement of \$41 million.¹¹

While most have probably heard of the Central Park Five, some may not have heard of National Football League (NFL) player, Reuben Foster. Foster was falsely accused of domestic violence by his ex-girlfriend, Elissa Ennis.¹² Ennis admitted under oath that she's a liar who tried to extort Foster after he dared to break up with her; she said, she wanted to "[screw] up his career."¹³ Ennis claimed that Foster struck her ten times with a closed fist and even claimed he threw her bulldog across the room in a heated rage.¹⁴ She had a history of accusing boyfriends of domestic violence who tried to break up with her and she attempted the same in 2011 with another man.¹⁵ Foster struggled to reestablish his reputation and career after those accusations. Foster was suspended and placed on the commissioner's exempt list,¹⁶ causing him to lose money and possible future employment with other teams.¹⁷ Controversy arose after the prosecutor opted not to charge Ennis for filing a false police report nor

8. Alfred Joyner, *How Long Were The Central Park Five Incarcerated? 'When They See Us' Victims Spent A Number Of Years Behind Bars*, NEWSWEEK (June 19, 2019), <https://www.newsweek.com/how-long-central-park-five-incarcerated-when-they-see-us-1443119> [<https://perma.cc/6XLJ-U3QL>] (explaining the time each person received).

9. Joyner, *supra* note 8.

10. *See id.* (explaining the vacated conviction for each of the five after an appeal).

11. *See id.* (explaining that this is a civil lawsuit against New York City for malicious prosecution, racial discrimination and emotional distress).

12. Lisa Olson, *Olson: After damaging false accusations, how does Reuben Foster regain his reputation?*, THE ATHLETIC (May 20, 2018), <https://theathletic.com/361074/2018/05/20/olson-after-damaging-false-accusations-how-does-reuben-foster-regain-his-reputation/> [<https://perma.cc/SUD8-44EC>].

13. Olson, *supra* note 12.

14. *Id.*

15. *Id.*

16. Phil Perry, NBC SPORTS (Sept. 11, 2019), <https://www.nbcsports.com/boston/patriots/just-what-nfl-commissioners-exempt-list> [<https://perma.cc/M9NL-4EC4>] ("The Exempt List is a special player status available to clubs only in unusual circumstances," NFL.com points out, citing the league's manual. "The List includes those players who have been declared by the Commissioner to be temporarily exempt from counting within the Active List limit. Only the Commissioner has the authority to place a player on the Exempt List; clubs have no such authority, and no exemption, regardless of circumstances, is automatic").

17. *See generally* Olson, *supra* note 12.

forced her to pay damages to Foster in an effort not to deter real victims from coming forward.¹⁸

Perhaps you have heard of Brian Banks. Banks was falsely accused of rape in 2002 by a classmate at Long Beach Poly High School, Wanetta Gibson.¹⁹ At the time Banks was accused of rape, he was a top football prospect and was being scouted by schools like UCLA, USC, and other big football powerhouses.²⁰ Banks and Gibson had consensual intercourse however, Gibson presented a false story. Banks was faced with a choice: either go to trial and serve a possible forty-one years or take a plea deal for forcible rape and serve five years.²¹ “Banks pleaded no contest to one count of forcible rape, spent five years in prison and, upon his release, was forced to register as a sex offender and wear an electronic monitoring bracelet.”²² After Banks’ release, he could not find a job anywhere because no one wants to hire a convicted rapist.²³ Eventually, Gibson admitted she lied and Banks, now thirty-six years old, had his conviction overturned. While the overturned conviction meant a new chance at life, the damage was already done: he had lost his promising future.²⁴ In 2013, Gibson was ordered to pay \$2.6 million for restitution and fees.²⁵

How do you put a price on the aftermath of false criminal accusations? False accusations of domestic violence and sexual assault or misconduct, including false rape accusations, continue to affect the lives of Black athletes. When someone is falsely accused, there is a chance of loss of time to live life, scholarships, loss of employment, and so much more. However, the only recourse falsely accused individuals have are civil suits for libel or slander or Title IX lawsuits. Yet, these options are not enough as it does not rectify the damage caused. For these reasons, this Essay will be split into two parts. Part I will discuss the background of false accusations, racial discrepancies between Blacks and Whites with respect to false sexual assault accusations, and the history of Title IX and specific cases. Part II will suggest how the courts could reevaluate due process under Title IX and create more civil and criminal recourse for

18. *Id.*

19. Ashley Powers, *A 10-year nightmare over rape conviction is over*, LA TIMES (May 25, 2012), <https://www.latimes.com/local/la-xpm-2012-may-25-la-me-rape-dismiss-20120525-story.html> [https://perma.cc/W3CN-UMTD].

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Jason Kandel, *Woman Who Falsely Accused Brian Banks of Rape Ordered to Pay \$2.6M*, NBC LOS ANGELES (June 15, 2013), <https://www.nbclosangeles.com/news/local/woman-falsely-accused-brian-banks-rape-ordered-to-pay-26m/1971672/> [https://perma.cc/ZC2K-PSQ7].

those who have been falsely accused while responding to the recent Title IX changes.

I. BACKGROUND

The history of rape in this country has been fixated on rapes against White women perpetrated by Black males.²⁶ Even though rape can happen to any race and any gender, rape cases centered around White women by Black males are treated more seriously than rapes committed by men of other races.²⁷ False accusations of Black males is not a new phenomenon. Back in 1955, Emmett Till was falsely accused of whistling at and harassing a White woman at a grocery store. He was lynched in what appeared to the nation as a heinous racial attack on Blacks.²⁸

During the “lynching era,” the most common justification to lynch a Black man was to protect White women from Black rapists and attempted rapists.²⁹ Black men were constantly painted as “sexually deviant monsters” to society and it was important that White men’s women were always protected from those monsters.³⁰ Rebecca Latimer Felton, who was both a writer and politician once said, “[i]f it needs lynching to protect woman’s dearest possession from the ravaging human beasts, then I say lynch a thousand times a week if necessary.”³¹ The “Jim Crow Era” was infamous for White men using rape and false accusations of rape to send a message to Black people.³² To the Black men, White men wanted to send the message that violence against them was always going to be justified. To Black women, they wanted them to know that their bodies did not belong to them; White men owned them.³³

White America moved into “legalized lynching” by enforcing capital punishment against any Black male accused of rape whether true or not.³⁴ When the victim of the alleged rape was a White woman, the courts would allow a jury, “not of their peers,” to convict based upon race alone if the accused was a Black male:³⁵ beginning the presumption of “guilty until proven innocent” instead of “innocent until proven guilty.”³⁶ If you

26. Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN’S L.J. 103 (1983).

27. *Id.* at 104–05.

28. See Chelsey Hale & Meghan Matt, *The Intersection of Race and Rape Viewed through the Prism of a Modern-Day Emmett Till*, AM. BAR (July 16, 2019), <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2019/summer2019-intersection-of-race-and-rape/> [https://perma.cc/2QHQ-N4RD].

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. See Hale & Matt, *supra* note 28.

35. *Id.*

36. *Id.*

were Black, you were automatically guilty of rape no matter the amount of evidence, if there was any at all.³⁷

According to the U.S. Department of Justice, between 1930 and 1972, 455 people were executed for rape, and 405 of those people were Black. Moreover, according to the Wolfgang and Riedel study, Black defendants whose victims were White were sentenced to death about eighteen times more frequently than defendants in any other racial combination of defendant and victim.³⁸ Notably, no White man has ever been executed in the U.S. for the non-homicide rape of a Black woman or child.³⁹

Angela Davis in her 1983 essay “Rape, Racism, and the Myth of the Black Rapist” in *Women, Race, and Class* says:

The myth of the Black rapist continues to carry out the insidious work of racist ideology. It must bear a good portion of the responsibility for the failure of most anti-rape theorists to seek the identity of the enormous numbers of anonymous rapists who remain unreported, untried, and unconvicted. As long as their analyses focus on accused rapists who are reported and arrested, thus on only a fraction of the rapes actually committed, Black men—and other men of color—will inevitably be viewed as the villains responsible for the current epidemic of sexual violence. The anonymity surrounding the vast majority of rapes is consequently treated as a statistical detail—or else as a mystery whose meaning is inaccessible. Might not this anonymity be a privilege enjoyed by men whose status protects them from prosecution? Although white men who are employers, executives, politicians, doctors, professors, etc., have been known to “take advantage” of women they consider their social inferiors, their sexual misdeeds seldom come to light in court.⁴⁰

From slavery until now, the legal system constantly treats rape of White women by Black men with much more severity than other rapes.⁴¹ No race has ever received a harsher punishment than Black men for the accusation of rape: Black men have been castrated, legally lynched, and sent to prison for life.⁴² No matter how far society progresses, there are still racial discrepancies between how White men and Black men are treated for a crime.

37. *See generally id.*

38. *Id.*

39. *Id.*

40. Angela Davis, *Rape, Racism, and the Myth of the Black Rapist*, WOMEN, RACE, AND CLASS 115 (1983).

41. Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 116 (1983).

42. *Id.*

A. *Racial Discrepancies Between Black Men and White Men in Relation to False Accusations*

The racial disparities between Blacks and Whites are a social reality that has remained stagnant over time.⁴³ The tension fluctuates between the dominant race wanting to remain privileged and for the inferior race trying to overcome the status quo. Throughout history, when Blacks create movements of change, Whites retaliate.⁴⁴ One thing that perpetuates racial disparities and threatens a White man's ego and masculinity is "interracial sexuality",⁴⁵ which represents the White man's loss of his natural rights to White women.⁴⁶ Presumably because of the way rape has constantly been viewed in this country, another myth is that rape is primarily a crime Black men commit against White women.⁴⁷ These myths date back to the time of slavery, where White women allegedly needed protection from Black men.⁴⁸

In 2016, the wife of Buffalo Bills kicker Dan Carpenter, Kaela Carpenter, went on Twitter and claimed she felt threatened by then Seattle Seahawks cornerback, Richard Sherman, and that she would "castrate him" after he delivered a late hit on her husband.⁴⁹ She, a White woman, passed her tweet off as a joke with no repercussions. If a Black man had threatened her like that, he would not have received the same leniency as someone just laughing it off.⁵⁰ From the moment they are born, Black men are perceived as more of a threat to society than their White counterparts.⁵¹ Even though there is equality in the likelihood of committing a crime, inequality persists given a Black man is more likely to be incarcerated over a White man.⁵² White men are largely not perceived as a threat and tend to get leaner sentences, even for crimes such as rape.⁵³

43. Nichelle Womble, *The Birth of a Monster*, 33(1) ST. THOMAS. L. REV. 55, 57 (2020).

44. *Id.* at 58.

45. Abby L. Ferber, *The Construction of Black Masculinity : White Supremacy Now and Then*, 31(1) J. OF SPORT & SOCIAL ISSUES 11, 18 (2007).

46. *Id.*

47. Tracey Owens Patton & Julie Snyder-Yuly, *Any Four Black Men Will Do: Rape, Race, and the Ultimate Scapegoat*, 37(6) J. OF BLACK STUDIES, 859, 862 (2007).

48. *Id.* at 862.

49. Martenzie Johnson, *Being Black in a World Where White Lies Matter*, THE UNDEFEATED (Jan. 30, 2017), <https://theundefeated.com/features/being-black-in-a-world-where-white-lies-matter/> [https://perma.cc/ERE4-KBZ2].

50. *Id.*

51. *Id.*

52. *Id.*

53. *See generally id.* (explaining the example of convicted rapist Brock Turner only spending 3 months in jail for assaulting a co-ed University of Sanford student and how the judge said the punishment would be too severe on him).

A new report on exonerations concluded that Blacks were wrongfully convicted at an alarming rate. The National Registry of Exonerations, a joint project among the University of California at Irvine, the University of Michigan Law School and the Michigan State University College of Law showed that forty-seven percent of the people who were exonerated were Black. Remember, just fourteen percent of the U.S. population is Black.⁵⁴

Racial practices that in turn create inequalities in America today are increasingly secretive and are embedded in normal operations of society. This is better known as “institutionalized racism,” which avoids direct racial terminology to get around laws and is imperceptible to most Whites.⁵⁵ Donald Trump once said, “When you are ‘guilty until proven innocent,’ it’s just not supposed to be that way. That’s a very dangerous standard for the country.”⁵⁶ However, he also said the Central Park Five deserved the death penalty during the original case in 1989 without knowing whether they were guilty.⁵⁷ Even after they were exonerated, he explained that the Five admitted they were guilty so they deserved to be punished while on his campaign trail in 2016. He added that the city should have never settled even though the Five were coerced into a confession by the police.⁵⁸ His conflicting statements showcase how institutionalized racism is a norm that has manifested as discrimination in the criminal justice system.

Those stereotypes and discrepancies are amplified by the media’s portrayal of Black men.⁵⁹ Sometimes those stereotypes are created because of representations presented by others.⁶⁰ According to *The Opportunity Agenda*, many scholars who focus on the connection of

54. Petula Dvorak, *Black men—Not white guys—Face False Allegations and A Presumption of Guilt*, WASH. POST (Oct. 8, 2018), https://www.washingtonpost.com/local/black-men--not-white-guys--face-false-allegations-and-a-presumption-of-guilt/2018/10/08/a397fb44-cb06-11e8-a3e6-44daa3d35ede_story.html [https://perma.cc/K3HV-AT33].

55. See Eduardo Bonilla-Silva & Amanda Lewis, *The “New Racism”: Toward an Analysis of the U.S. Racial Structure, 1960s-1990s*, 536 CTR. FOR RES. ON SOC. ORG. 1, 2 (1996).

56. Dvorak, *supra* note 54.

57. See Rebecca Mornin, *‘They admitted their guilt’: 30 years of Trump’s comments about the Central Park Five*, USA TODAY (June 19, 2019), <https://www.usatoday.com/story/news/politics/2019/06/19/what-trump-has-said-central-park-five/1501321001/> [https://perma.cc/D2DU-FC8Z].

58. Dareh Gregorian, *Trump digs in on Central Park 5: ‘They admitted their guilt,’* NBC NEWS (June 18, 2019), <https://www.nbcnews.com/politics/donald-trump/trump-digs-central-park-5-they-admitted-their-guilt-n1019156> [https://perma.cc/7HYR-QRZQ].

59. The Opportunity Agenda, *Social Science Literature Review: Media Representations and Impact on the Lives of Black Men and Boys*, RACIAL EQUALITY TOOLS (Oct. 2011), <https://www.opportunityagenda.org/sites/default/files/2018-04/2011.11.30%20-%20Report%20-%20Media%20Representation%20and%20Impact%20on%20the%20Lives%20of%20Black%20Men%20and%20Boys%20-%20FINAL.pdf> [https://perma.cc/E679-K392].

60. The Opportunity Agenda, *supra* note 59, at 14.

media portrayal and Black male reputations and life chances will say there is a clear link.⁶¹ Most scholars describe the connection as: “For various reasons, media of all types collectively offer a distorted representation of the lives and reality of [B]lack males.” In turn, media consumption negatively affects the public’s understandings and attitudes around Black males.⁶² Finally, these distorted understandings and attitudes towards Black males lead to negative real-world consequences for them.”⁶³ According to Professor Robert Entman and Dr. Andrew Rojecki “. . . in the 1993–94 sample that stories about Blacks were four times more likely to include mug shots (though the actual numbers were small: eight for Blacks, two for Whites).”⁶⁴

Other research and studies show that the laws and procedural mechanisms applied in cases where Black men are accused of raping White women in fact void the presumption of innocence or tend to apply a different standard of law than in cases where White men are accused of raping women.⁶⁵ When looking at cases of rape, Blacks may receive the same protection under the law but they do not receive equality in the applications of those laws to their cases.⁶⁶

A legal scholar once commented, “While White women have been spared at all costs, [Black] women’s bodies have always been like a buffet for White men to have, and take, and come back as often as they wanted. Both history and our present legal system prove this to be true.”⁶⁷ While the crime of rape is a traumatic incident, false accusations should hold just as much weight when they are destroying the lives of Black men and Black athletes on college campuses.⁶⁸

B. *The Depiction of Black Bodies as Sexual and Violent*

When looking at college athletic rosters, it is no surprise that a majority of the athletes are Black athletes, depending on the sport.⁶⁹ Athletes are endorsed by everyday household products such as cereal, cleaning products, clothes, shoes, etc., and according to Dr. Erica Childs, “It can be argued, though, that White America’s fixation on the Black male athlete is simply an extension of White America’s history of

61. *Id* at 22.

62. *Id*.

63. *Id*.

64. ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND MEDIA AND RACE IN AMERICA* 82 (2000).

65. *Id*.

66. *Id*.

67. *Id*.

68. *Id*.

69. Erica Childs, *Images of the Black Athlete: Intersection of Race, Sexuality, and Sports*, 4(2) *J. OF AFRICAN AM. MEN* 19, 19–38 (1999).

obsession with the Black body and Black sexuality.⁷⁰ White Americans developed an ideology of Black male sexuality as ‘hypersexual,’ ‘animalistic,’ and having no self-control of their sex drive.’⁷¹ The notion that a Black man is not able to control his sexual drive, especially around White women, and the fixation with ideologies created around the Black male body are attributable for why a Black male athlete can be pinned as guilty of a sexual assault accusation before the investigation is even completed.

Many scholars have discussed the “hypersexual Black male” over the years and one, in particular, Angela Davis, shed light on the conclusion that “Black men were a threat to White women and hypersexualized Black men, who were well-endowed, would have a desire for White women they would take through ‘rape’ that they could not control.”⁷² It is believed Black men have a goal of having as many women as possible.⁷³ Black men have been fetishized and are thought to have sex like animals.⁷⁴ With the perpetuation of continued stereotypes, Black men have become the sexual attraction of White women; angering White men. Even though Black male bodies are a commodity, and they are still used to invoke fear simultaneously.⁷⁵ According to Dr. Earle V. Bryant, “the sexual attraction that the White female reputedly feels for the Black male is essentially a corollary of the projected sexual image of the Black male is, in effect, one of the by-products of sexualized racism.” The images of hypersexuality breed fear and thus, White men felt the need to control these Black men.⁷⁶

The continued stereotypes and projected narratives surrounding Black men and their bodies, demonstrates how a White man’s fear of sexuality could cause brazen and appalling violence to ensue against those same Black men.⁷⁷ The violence against Black men throughout history was attached to the accusations of rape.⁷⁸ Violence, such as lynching, castration, and beating, were the tools used to make an example of Black men and feed the egos of the White men who were threatened by the narrative of Black sexuality.⁷⁹

70. *Id.*

71. Earl Smith & Angela J. Hattery, *Hey Stud: Race, Sex, And Sports*, 10 (2) *SEXUALITY & CULTURE* 3, 30–32 (2006).

72. Ferber, *supra* note 45.

73. *Id.*

74. *Id.*

75. Ferber, *supra* note 45.

76. Earle V. Bryant, *The Sexualization of Racism in Richard Wright’s ‘The Man Who Killed a Shadow,’* 16(3) *BLACK AMERICAN LITERATURE FORUM* 119, 119–21 (1982).

77. Seth Young, *The Myth of Promiscuity: Examining Black Male Sexual Narratives and Sexual Identity* (2018) (Ph.D. dissertation, Duquesne University).

78. *Id.*

79. *Id.*

II. LEGAL DISCUSSION

A. *What is Title IX?*

The Department of Education Office of Civil Rights enforces, among many other statutes that relate to educational institutions, Title IX. Title IX is a statute protecting people from discrimination based on sex in educational programs or activities that receive federal financial assistance.⁸⁰ Title IX says, “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.”⁸¹ Title IX outlines that many different areas that educational programs receiving funds may not discriminate within; “recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment; treatment of pregnant and parenting students; discipline; single-sex education; and employment.”⁸²

The history and the purpose of Title IX has been a controversial area that no one group of people can seem to agree on. The origins of Title IX date all the way back to the Civil Rights Movement and is a follow up to the Public Law 88-352 (78 Stat. 241), popularly known as the Civil Rights Act of 1964.⁸³ The Civil Rights Act began the fight against discrimination based on race and sex, in hiring, promoting, and firing.⁸⁴ According to the National Archives, Section 703(a) made it unlawful for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment, because of such individual’s race, color, religion, sex, or national origin.”⁸⁵ However, women’s rights groups still felt excluded from Civil Rights Act protections and that there must be some legislation enacted strictly for the betterment of women.

Before Title IX was enacted, there was a disproportionate amount of woman in education compared to men. Then, men made up fifty-seven percent of college students compared to the forty-three percent of women college students.⁸⁶ The Women’s Rights Movement fought to have educational provisions added to the Civil Rights Act that would advance

80. 20 U.S.C.A. § 1681 (West 1986).

81. *Id.*

82. *Id.*

83. National Archives, *The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission* (last accessed Jan. 31, 2021), <https://www.archives.gov/education/lessons/civil-rights-act> [<https://perma.cc/DBA6-99T9>].

84. *Id.*

85. *Id.*

86. R. Shep Melnick, *The Strange Evolution of Title IX* (last accessed Jan. 31, 2021), <https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix> [<https://perma.cc/QN8V-KN33>].

women's opportunities in education and athletics.⁸⁷ Then in 1972, Congress passed Title IX as an amendment to the Civil Rights Act under education.⁸⁸ With this new provision in place, women would be entitled to have some footing in the education system and have recourse if they faced harassment in the workplace or at school.⁸⁹

When Title IX was passed, it was in response to intense campaigning by a feminist who wanted to call attention to discrimination in educational employment which was an area that was purposely left out of other areas of legislation.⁹⁰ To give rise to a Title IX complaint, sexual harassment must be so severe, persistent, or pervasive that it affects a student's education in an adverse manner or creates a hostile or abusive educational environment.⁹¹

In 2011, the conversation shifted from the inequalities and the growth of college athletics to sexual harassment.⁹² While Title IX seemed to increase the number of women in education and athletics over the years, the one problem that consistently emerged was how sexual harassment interacted with Title IX provisions.⁹³ When President Obama took office, his administration worked with the Office of Civil Rights within the Department of Education to create detailed explanations of sexual-harassment and launched publicized investigations into colleges and universities over sexual-assault allegations.⁹⁴ Then in 2016 when President Trump took office, his administration made some controversial changes and then Secretary of Education, Betsy DeVos, withdrew the Obama Administration's guidelines on sexual harassment.⁹⁵

The current concerns over the changes to Title IX have moved away from whether women will be set back in the education system and moved towards who is protected from sex discrimination. Professor R. Shep Melnick said:

The key to understanding current disputes over Title IX is to appreciate just how far federal regulations have departed from the law's original purpose. Title IX initially focused on what happens in the classroom. That focus soon shifted to the playing field, then shifted again to bedrooms and

87. Iram Valentin, Title IX: A Brief History, 2 HOLY CROSS J.L.L. & PUB. POL'Y 123, 130 (1997).

88. *Id.*

89. *See generally* Valentin, *supra* note 87.

90. Am. Ass'n of Univ. Professors, *The History, Uses, and Abuses of Title IX*, 102 BULLETIN OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 69, 70 (2010) [hereinafter *Bulletin*].

91. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,041 (Mar. 13, 1997).

92. *Id.*

93. *See* Melnick, *supra* note 86.

94. *Id.*

95. *Id.*

bathrooms. Over the past five decades, the understanding of nondiscrimination underlying Title IX has steadily drifted away from eliminating institutional barriers to educational opportunity for women and girls, and toward the much more ambitious project of changing the way we think about sex differences, gender roles, and sexuality in general.⁹⁶

Another concern with Title IX moving away from its original purpose is that there are no clear guidelines and no clear path for rectification. With neither of those and the perception that Title IX is moving toward what happens in the bedroom, the lives of those who may be involved in a Title IX claim could be altered forever.

B. *What Is the Problem?*

In a Law Review Article titled, *Trading the Megaphone for the Gavel in Title IX Enforcement*, Janet Halley wrote:

American racial history is laced with vendetta-like scandals in which black men are accused of sexually assaulting white women that become reverse scandals when it is revealed that the accused men were not wrongdoers at all. [...] But nothing so malign need be at work when black men show up in the dock: morning-after remorse can make sex that seemed like a good idea at the time look really alarming in retrospect; and the general social disadvantage that black men continue to carry in our culture can make it easier for everyone in the adjudicative process to put the blame on them.⁹⁷

To this day, the legal process is not as fair for Black men accused of rape versus their White counterparts.⁹⁸ Where are the protections for Black athletes falsely accused on campus of rape or domestic violence? Should those protections fall under Title IX? The rollbacks from the Trump Administration on the definition of “sexual harassment” did nothing but further amplify the problem of the justice system turning its back on the underserved community.⁹⁹

96. *Id.*

97. Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. 103, 106–07 (2015).

98. See generally Elizabeth Hinton, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/7TJN-AUBU>].

99. Erika Sanzi, *Black Men, Title IX, and the Disparate Impact of Discipline Policies*, REALCLEAR EDUC. (Jan. 21, 2021), https://www.realcleareducation.com/articles/2019/01/21/black_men_title_nine_and_the_disparate_impact_of_discipline_policies_110308.html [<https://perma.cc/5GQ4-X4UU>].

The problem students had was that Title IX does not explicitly mention “rape” or “assault” and it also does not require or force colleges and universities to adjudicate such allegations.¹⁰⁰ Because of those omissions, a Yale student went before a district judge and argued if women were forced to face their rapist on campus it would be a form of discrimination because she would be deprived of education benefits in that situation.¹⁰¹ The judge agreed.¹⁰² At that point, the Campus Consent law got folded into the federal mandate of Title IX and colleges and universities were able to act as quasi-criminal courts that adjudicate sexual assault complaints.¹⁰³ “In these tribunals, there appears to be no consideration of reasonable doubt, just that a preponderance of evidence be pointing to assault. That evidence is largely, of course, the girl’s say-so.”¹⁰⁴

Higher education institutions have become extremely aggressive in pursuing sexual misconduct investigations since the United States Department of Education’s Office for Civil Rights issued a letter in 2011 discussing how schools are to address sexual assault and misconduct to comply with the Department’s view of Title IX.¹⁰⁵ Once more, policies developed by former Secretary DeVos meant to clarify federal objectives seem to have exacerbated reactions by higher education institutions, who are drawing a battle line: “The administration is trying to roll back protections for women, and we’re not going to let them do that.”¹⁰⁶ In cracking down harder on sexual misconduct, even if accusations are not true, colleges and universities seemingly continue to violate due process for the accused, who most of the time end up being Black athletes.¹⁰⁷

The different interpretations of Title IX definitions and provisions continue to undermine academic freedom, while the enforcement of Title IX does not adequately protect due-process rights and academic governance.¹⁰⁸ Once again, some parallels still exist between how Black

100. Brad Koffel, *The Changing Narrative of Sexual Assault*, KOFFEL LAW (2020), <https://www.koffellaw.com/sex-crimes/rape/title-ix-and-false-accusations/> [https://perma.cc/L8T5-N9UA].

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. The Assistant Secretary, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> [https://perma.cc/XYX3-FECY].

106. Nesenoff & Miltenberg LLC., *University Misconduct Due Process & Title IX – Students & Faculty*, NMLLP LAW (Aug. 8, 2020), https://nmlplaw.com/practices-expertise/campus-assault-due-process-civil-rights/?utm_campaign=Title+9+-+Broad++NY+Office+%5BTtitle+9%5D&utm_source=bing&utm_medium=ppc&utm_term=title%20ix&utm_content=1860357xf63a7b4450dd1ff143102501f8376648 [https://perma.cc/U9JE-UEYJ].

107. *See generally id.*

108. Bulletin, *supra* note 90.

men accused of rape and domestic violence back in the “Jim Crow Era” and how those same cases are adjudicated in present day.

According to Harvard Law Professor, Janet Halley, who has represented both the accused and alleged victims, male students of color are punished and accused at an unreasonably high rate.¹⁰⁹ Former federal judge and a colleague of Halley’s, Nancy Gertner, said in written testimony to Congress, “the racial implications of rape accusations, the complex intersection of bias, stereotyping, and sex in the prosecution of this crime are [disproportionate].”¹¹⁰ Black athletes continue to suffer from false allegations investigated by poorly administered college tribunals; they are often expelled, suspended, and lose their scholarship money. Statistics show from 2012–2015 alone, Black male students were twenty-five percent more likely to be the subject of sexual misconduct reported to universities.¹¹¹

In 2014, there were five Black freshmen at William Paterson University who were arrested for allegedly holding a woman hostage in their room while they forced themselves on her.¹¹² Two of the students involved, Garrett Collick and Noah Williams, said not only was the sex consensual but the young lady had also initiated the encounter. Right after the arrests were made and before any sort of investigation was completed, the University President released a statement saying, “I am angry and dismayed that this crime was committed on our campus and allegedly by students. My deepest concern is for the victim of this criminal act who has courageously stepped forward to take legal action and seek justice.”¹¹³ The grand jury in this case decided not to indict the young Black men based on a lack of evidence, all charges were later dropped, and the students were cleared.¹¹⁴ Although the students were cleared of all charges the University still decided to expel them and not allow the students to continue their education.¹¹⁵ These young men lost their funding to attend school and because they received financial aid, they were not allowed to enroll anywhere else.¹¹⁶

109. Michael Jones, *Believe the survivor? Here’s 11 times young black men were railroaded by campus sexual assault claims*, THE COLLEGE FIX (Nov. 7, 2018), <https://www.thecollegefix.com/believe-the-survivor-heres-11-times-young-black-men-were-railroaded-by-campus-sexual-assault-claims/> [https://perma.cc/U3NM-EWW9].

110. *Id.*

111. Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases: Is the system biased against men of color?*, THE ATLANTIC (last accessed Jan. 31, 2021), <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/> [https://perma.cc/E4KN-3RC6].

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

Nikki Yovino was a student at Sacred Heart University who accused two Black male students of rape in October 2016.¹¹⁷ She was only in her third month of college when she went to an off-campus party and later told police that she was pulled into a bathroom by two Black guys she did not know and was raped.¹¹⁸ The accused Black men were football players on scholarship and they lost their scholarships because she fabricated the story of rape.¹¹⁹ There was no due process for these students and they were presumed guilty because the alleged victim said so, even though her story did not add up.¹²⁰ In 2017, Yovino was arrested for making false accusations and was sentenced to a year in prison in 2018.¹²¹

In 2016, a University of Pennsylvania student was falsely accused of rape.¹²² He was expelled after the school conducted their own investigation though the university never notified him of the specific allegations until the report from their investigation was issued.¹²³ Then, there is the highly publicized story of the UNC football player who was falsely accused of rape when a fellow female student said she was too drunk to consent.¹²⁴ Police and the university found she was not too drunk to consent. However, she and her lawyer took the allegations to the media and court and the Black student-athlete was deemed guilty before the case could be tried.¹²⁵ While charges were eventually dropped, like in many other cases, the damage was done because he had lost a year of eligibility.¹²⁶

Even though the Office of Civil Rights has embarked on a plan to create system that would prevent sexual assault, students who are being unfairly accused and targeted still have no safety net to fall back on.

C. *Disparate Impact at Work Yet Again*

Disparate impact occurs when policies, practices, rules, or other systems that appear to be neutral result have a disproportionate impact on

117. Tyler Kingkade, *Men's Rights Activists Say This College Student Is Why They Need A #MeToo Moment*, BUZZFEED (July 7, 2018), <https://www.buzzfeednews.com/article/tylerkingkade/yovino-jail-charged-false-rape-sentence-sacred-heart> [<https://perma.cc/S773-ZXHA>].

118. *Id.*

119. Jones, *supra* note 109.

120. Kingkade, *supra* note 117.

121. *Id.*

122. See generally Jeremy Roebuck, *Penn student accused of rape sues university, citing gender, racial discrimination*, INQUIRER (Sept. 27, 2016), https://www.inquirer.com/philly/education/20160928_Penn_student_accused_of_rape_sues_Penn_citing_gender_racial_discrimination.html [<https://perma.cc/J7W8-FYKZ>].

123. *Id.*

124. Jones, *supra* note 109.

125. *Id.*

126. *Id.*

a protected group.¹²⁷ Title IX's 2011 guidelines that changed how sexual assault cases were adjudicated have caused a disproportionate number of Black students to lose scholarships and be expelled from school.¹²⁸ The changes made by the Obama Administration in 2014 fought against disparate impact¹²⁹ and served as a warning to all colleges and universities that if their numbers of expulsions and suspensions were disproportionate based on race, then they would be subject to a federal investigation.¹³⁰

Unfortunately, later rollbacks by the Trump Administration reversed this warning and allowed schools to get back to one-sided tribunals and reporting. The Trump Administration made it easy for schools once again to abide by the 2011 guidelines which made it "customary for schools to withhold crucial information about the charges from the accused student. All opportunities for cross-examination either by the accused student or an attorney or advisor ceased to exist. So did the right for the accused to examine the evidence against him."¹³¹

Black students once again found themselves being disproportionately affected by the guidelines of Title IX because the rollbacks made it easier for schools to conduct their investigations into the sexual assault how they saw fit.¹³² When Black students were accused of sexual assault, they were not entitled to the same due process as the accuser.

III. THE JUSTICE SYSTEM SOLUTION AND ARE THE NEW CHANGES TO TITLE IX ENOUGH?

A. *Recent Changes*

Former Secretary DeVos decided to implement some historic changes to strengthen Title IX: to ensure there are greater protections for survivors of sexual misconduct and to ensure that all students are afforded an education free of sexual discrimination.¹³³ The most meaningful change was that "sexual harassment" is now defined to include sexual assault as unlawful sex discrimination. It provides:

127. SHRM, *What are disparate impact and disparate treatment?* (2021), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disparateimpactdisparatetreatment.aspx> [<https://perma.cc/X8FK-6H7A>].

128. Sanzi, *supra* note 99.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Press Release, U.S. Department of Education, Department Statement on Title IX (May 6, 2020), <https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students> [<https://perma.cc/KVB2-UGG9>].

a consistent legally sound framework on which survivors, the accused, and schools can rely; Requires schools to offer clear, accessible options for any person to report sexual harassment; Empowers survivors to make decisions about how a school responds to incidents of sexual harassment; Requires the school to offer survivors supportive measures, such as class or dorm reassignments or no-contact orders; Restores fairness on college and university campuses by upholding all students' right to written notice of allegations; the right to an advisor; and the right to submit, cross-examine, and challenge evidence at a live hearing; Requires schools to select one of two standards of evidence; the preponderance of the evidence standard or the clear and convincing evidence standard –and to apply the selected standard evenly to proceedings for all students and employees, including faculty; and Requires schools to offer an equal right of appeal for both parties to a Title IX proceeding.¹³⁴

One of the problems many of these students faced was not being given enough time to prepare for the investigation because lack of notice about the accusations. One of the new changes to Title IX is that accused students must now receive accusations in a timely matter, although there is still no clear timeline. Requiring schools to present the accused with the accusations needed to prepare a defense is a step in the right direction. To create a more transparent process, schools should be required to disclose all charges and information against the student before an investigation is completed, during a very specific time period so said student has enough time to gather information and representation, if needed.

B. *Are the Changes Enough?*

There are so many stories of Black men in general and Black athletes suffering immense damage from false accusations of domestic violence and rape as seen throughout this Essay. Throughout history, Black men have ended up in prison for numerous years until a new investigation clears them because DNA and witness statements were not thoroughly evaluated, like the Central Park Five. Many athletes were expelled or suspended without due process from school and even lost scholarships like Brian Banks and the athletes from Ohio did, because colleges and universities have been allowed to run their own tribunals and investigations under Title IX. In the perfect world, the accusers who are found to have lied would get the same amount of time in jail the accused would have if they were convicted. Those same accusers would be made

134. *Id.*

to pay damages for whatever time those Black men lost and reputations of those men would be immediately restored. The legislators and courts have the power to implement these changes.

Courts should change the way they apply the “innocent until proven guilty” concept because innocent men are losing significant time in their lives and families are being torn apart. The courts are responsible for upholding the law and upholding the standard of justice. What does it say about the judicial system when its pursuit of justice often disregards the lives of Blacks? Courts should institute legal safeguards that allow for continued transparency and adequate due process to best protect the accused’s civil liberties and the constitutional rights. Protecting those rights may lead to individuals cooperating with sexual assault investigations and highlighting their participation in their duties and obligations under the law are essential portions of due process. It is imperative to make sure innocent Black men remain free, in school, and on their scholarships. Due process is a constitutional right and if courts violate that, even on a collegiate level, someone needs to be held responsible.¹³⁵

Title IX is supposed to protect against race and sex discrimination for those attending colleges and universities that receive federal funds; that needs to include Black students that have been falsely accused as well.¹³⁶ While there is now a definitive mention of “sexual assault” and “abuse,” it needs to be added to the guidelines that collegiate tribunals must comply with. Outside investigations need to be conducted where there is no bias and each side has a fair chance at due process. Discrimination based on sex and race needs to include those who have been accused as well to stop schools from holding one-sided trials and protect both the accused and accusers. While things have changed due to the new regulations, one thing remains the same: the consequences of false accusations. The changes to Title IX provide an uneven number of protections for survivors and recourse for those who have committed assault, yet still no change to the recourse available for those who are falsely accused. The justice system would be best served to evaluate the remedies available for the falsely accused who are subject to school-sanctions the same level as they would for sexual assault victims. There needs to be an evaluation of expulsions executed through schools and criminal charges outside of school, to include incarceration time.

135. Linda Monk, *Due Process Clause, Equal Protection Clause, and Disenfranchising Felons*, PBS (Mar. 25, 2013), <https://www.pbs.org/tpt/constitution-usa-peter-sagal/equality/due-process-equal-protection-and-disenfranchisement/> [<https://perma.cc/2WDP-PB6H>].

136. *See generally* 20 U.S.C.A. § 1681 (West 1986).

CONCLUSION

Title IX has become another form of policing in America. It has become a way for Black men to once again be accused and convicted by societal standards without receiving fair due process. Times have changed but the disparate impact in the Black community remains.

The narrative that Black men only rape White women needs to change. Black men need the same chance their White counterparts receive to prove their innocence. The Courts, and the rest of the United States government needs to set that precedent and those standards for all to follow. This situation is not just going to disappear over-night and it is not just going to go away with the basic changes made to Title IX; there needs to be a complete overhaul and reevaluation.