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## Bystander Intervention Policies for Campus Sexual Assault Should Be Framed as Civil Rights Programs, and Made Broadly Applicable to All Protected Class Offenses

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BYSTANDER INTERVENTION POLICIES FOR CAMPUS SEXUAL  
ASSAULT SHOULD BE FRAMED AS CIVIL RIGHTS PROGRAMS,  
AND MADE BROADLY APPLICABLE TO ALL PROTECTED  
CLASS OFFENSES

Wendy J. Murphy, J.D.\*

[W]hen God wished to stop the Babylonians for their presumptuous effort to build a tower to reach the heavens, he simply caused them to speak in different languages. Without a common language, they could no longer cooperate.<sup>1</sup>

Bystander Intervention Programs (BIPs) have gained widespread popularity on college campuses as sexual assault prevention programs, and have been the subject of numerous articles<sup>2</sup> and studies.<sup>3</sup> Many people support BIPs because they train students to recognize warning signs, and then intervene to stop sexual assaults

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<sup>1</sup> Charles Fried, *The Fiduciary Rule Is a Friend of Capitalism*, BOS. GLOBE (Feb. 10, 2017), <https://www.bostonglobe.com/opinion/2017/02/10/the-fiduciary-rule-friend-capitalism/xDq6BeWKtnn53HxmQV8NoJ/story.html>. [<https://perma.cc/K6TA-NUU7>].

<sup>2</sup> See Victoria L. Banyard et al., *Bystander Education: Bringing a Broader Community Perspective to Sexual Violence Prevention*, 32 J. COMMUNITY PSYCHOL. 61 (2004); Lori E. Koelsch et al., *Bystander Perceptions: Implications for University Sexual Assault Prevention Programs*, 27 VIOLENCE & VICTIMS 563 (2012). See also Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975 (2015) (discusses bystander intervention strategies used to address issues such as sexual misconduct).

<sup>3</sup> See generally Sarah McMahan et al., *A Statewide Exploration of Bystander and Gender-Role Attitudes in New Jersey*, 28 AFFILIA: J. WOMEN & SOC. WORK 296 (2013) (the state of New Jersey conducted a study about residents attitudes toward bystander and sexual violence); Stacy Colino, *By Stander Intervention Programs: Do They Curb Campus Sexual Assault*, U.S. NEWS (Sept. 7, 2016, 11:27 AM) <http://health.usnews.com/wellness/articles/2016-09-07/bystander-intervention-programs-do-they-curb-campus-sexual-assault> [<https://perma.cc/5N46-YAZ9>] (A 2016 study conducted at Oklahoma State University and the University of Arkansas found that men who frequently watched violent or degrading pornography were less likely to intervene as bystanders to help someone experiencing sexual violence).

from occurring. BIPs also teach students to feel empowered to act when others are in danger.<sup>4</sup>

Despite the obvious advantages of having students become more involved in sexual assault prevention, some argue that BIPs are harmful because they idealize the sexist idea that women need to be rescued in order to be safe.<sup>5</sup> BIPs also fail to address the underlying causes and culturally constructed reasons behind violence against women.<sup>6</sup> Critics additionally complain that BIPs shift responsibility for prevention onto non-offending students and away from offending students and schools.<sup>7</sup>

This article examines both sides of the debate through a framing lens, and proposes that BIPs be framed and taught as civil rights programs. Civil rights framing will teach students to conceive sexual assaults the same way they conceive racist assaults—as offenses against whole classes of people and campus communities generally, hence deserving of, rather than in need of, intervention by others.

This article also argues that to be fully understood as civil rights programs, BIPs must be made applicable to all forms of protected class injuries, such as race and ethnicity-based assaults and harassment. This will protect against hierarchical thinking about civil rights laws and perpetuation of the idea that assaults on women are somehow different from assaults of other protected class students. Broad applicability will also comport with Title IX’s mandatory requirement that there be no “different” or “separate” treatment of students “based on sex.”<sup>8</sup>

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<sup>4</sup> Swan, *supra* note 2, at 985–994.

<sup>5</sup> See Emily Yoffee, *College Women: Don’t Depend on “Bystanders” to Rescue You from Assault. Rescue Yourselves.*, SLATE (Feb. 10, 2014, 2:15 P.M.) [http://www.slate.com/blogs/xx\\_factor/2014/02/10/bystander\\_intervention\\_the\\_answer\\_to\\_college\\_sexual\\_assault.html](http://www.slate.com/blogs/xx_factor/2014/02/10/bystander_intervention_the_answer_to_college_sexual_assault.html) [<https://perma.cc/8QXL-2UKL>] (explaining that the bystander program promotes a false sense of security because women feel like someone is always looking out for their safety).

<sup>6</sup> Lauren Chief Elk & Shaadi Devereaux, *The Failure of Bystander Intervention*, NEW INQUIRY (Dec. 23, 2014), <http://thenewinquiry.com/essays/failure-of-bystander-intervention/> [<https://perma.cc/2UH2-MHSM>].

<sup>7</sup> Swan, *supra* note 2, at 976–79; 981–85.

<sup>8</sup> Under Title IX, a school “shall not, on the basis of sex,” *inter alia*,

(1) *Treat one person differently* from another in determining whether such person satisfies any requirement of condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits or services in a different manner;

(3) Deny any person such aid, benefit, or service;

(4) *Subject any person to separate or different rules of behavior, sanctions, or other treatment;*

...

(7) Otherwise limit any person in the enjoyment or any right, privilege, advantage or opportunity.

Part I will discuss Bystander Intervention Programs, as applied to the problem of campus sexual assault. Part II will discuss educational civil rights laws, as applied to the problem of campus sexual assault. Part III will address the ways that sexual assaults are mishandled on college campuses when schools apply sexual misconduct policies, rather than civil rights laws. Part IV will discuss why framing BIPs as civil rights programs will improve prevention efforts and enhance student understanding of the nature of sexual assault as an injury to all women and girls, and the campus community as a whole.

### I. BYSTANDER INTERVENTION PROGRAMS

A leading educational risk management company, the NCHERM Group, LLC, describes BIPs as “a key to safer campus communities,”<sup>9</sup> that empowers students to intervene in high-risk situations in order to prevent harm from occurring.<sup>10</sup> All but one category of intended audiences (fraternities, sororities, male athletes, student athletes, hazing, sexual assault, problem drinking, and leadership)<sup>11</sup> describe circumstances related to sexual assault.<sup>12</sup> Aware that females endure disproportionately high levels of sexual assault on campus, the NCHERM Group, LLC mentions “sexual assault” repeatedly in its promotional material, while other types of assaults are not mentioned at all.<sup>13</sup> And although sexual

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34 C.F.R. 106.31(b)(1)–(4); (7) (emphases added).

<sup>9</sup> *Student Programs: Bystander Intervention*, THE NCHERM GROUP LLC (last visited Apr. 15, 2017), <https://www.ncherm.org/services/student-programs/bystander-intervention/> [<https://perma.cc/J7Q2-JVEN>].

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See John D. Foubert & Bradford C. Perry, *Creating Lasting Attitude and Behavior Changes in Fraternity Members and Male Student Athletes: The Qualitative Impact of an Empathy-Based Rape Prevention Program*, 13 VIOLENCE AGAINST WOMEN 70 (2007) (discussing empathy-based programs for rape prevention for fraternities and student athletes); Jacqueline C. Minow & Christopher J. Einolf, *Sorority Participation and Sexual Assault Risk*, 15 *Empathy-Based Rape Prevention Program*, 13 VIOLENCE AGAINST WOMEN 835 (2009) (discussing increased risk of sexual assault for women who join sororities); Meichun Mohler-Kuo et al., *Correlates of Rape While Intoxicated in a National Sample of College Women*, 65 J. STUDIES ON ALCOHOL 37, 37 (2004) (providing “prevalence data for rape under the condition of intoxication when the victim is unable to consent”); Belinda-Rose Young et al., *Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes*, 23 VIOLENCE AGAINST WOMEN 795 (2016) (discussing student athletes’ risk of perpetrating sexual violence); Elizabeth J. Allan & Mary Madden, *Hazing in View: College Students at Risk, National Study of Student Hazing*, STOP HAZING (Mar. 11, 2008), [http://www.stophazing.org/wp-content/uploads/2014/06/hazing\\_in\\_view\\_web1.pdf](http://www.stophazing.org/wp-content/uploads/2014/06/hazing_in_view_web1.pdf) [<https://perma.cc/6PGF-BYNE>] (discussing how “sex acts” are part of the hazing rituals among college campuses).

<sup>13</sup> *Student Programs: Bystander Intervention*, *supra* note 9.

assault is well established as a civil rights harm,<sup>14</sup> the phrases “civil rights,” “Title IX,” “Title IV,” and “sex discrimination,” appear nowhere. That BIPs are perceived as sexual assault prevention programs, but not civil rights programs, is also apparent when one searches for information about BIPs on the Internet. This author recently used *Bing* to search for “bystander intervention campus sexual assault,” which produced 301,000 responses, while “bystander intervention campus civil rights” produced only 181,000 responses, and “bystander intervention campus racist assault” produced only 89,500 responses. These data, while hardly scientific, suggests that BIPs are not well understood as having applicability to civil rights problems generally, or on behalf of women as a class, even though sexual assault is among the most prolific forms of civil rights assault on college campuses.<sup>15</sup> Indeed, sexual assault occurs at such high rates women are more likely to be victimized in college than in the hyper-masculine military.<sup>16</sup>

The framing of BIPs as sexual assault programs, but not civil rights programs, is problematic because students who participate in BIP trainings learn to think about and respond to sexual assault as an offense against an individual but not against women as a class and the community as a whole. In turn, students may see their intervention as a rescue effort meant to save individual victims from individual harm, rather than a responsibility of campus citizenship and a commitment to community values.

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<sup>14</sup> See *Title IX and Sexual Assault Violence in Schools*, ACLU (Apr. 15, 2017), <https://www.aclu.org/title-ix-and-sexual-violence-schools> [<https://perma.cc/M47J-8T8J>].

<sup>15</sup> See Anlan Zhang et al., *INDICATORS OF SCHOOL CRIME AND SAFETY: 2015*, INST. OF EDUC. SCIENCE (2016), <https://nces.ed.gov/pubs2016/2016079.pdf> [<https://perma.cc/8MY5-PY3M>] (finding 486,400 “violent victimizations” during the study period, which included simple assault, rape, sexual assault, robbery, and aggravated assault, and 791 total hate crimes/bias offenses). The data used in this article were collected from the National Center for Education Statistics, U.S. Department of Education and Bureau of Justice Statistics, Office of Justice Programs, and the U.S. Department of Justice. *Id.*

<sup>16</sup> Compare David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, WESTAT (Sept. 21, 2015) (finding more than between 22.8% and 25.3% of female undergraduate students reported being sexually assaulted), [https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU\\_Campus\\_Climate\\_Survey\\_12\\_14\\_15.pdf](https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf) [<https://perma.cc/4G4X-TSE9>] with U.S. COMMISSION ON CIVIL RIGHTS, *SEXUAL ASSAULT IN THE MILITARY* at 6 (2013), [http://www.usccr.gov/pubs/09242013\\_Statutory\\_Enforcement\\_Report\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf) [<https://perma.cc/8TTC-8F59>] (finding that “6.1% of female Service members . . . reported being the victim of unwanted sexual contact”).

## II. EDUCATIONAL CIVIL RIGHTS LAWS

Educational civil rights laws have been around since 1964, and protect students from discrimination, including discriminatory violence.<sup>17</sup> Such laws are well understood in society as applicable to race discrimination, including racist assaults,<sup>18</sup> but are less well known for their applicability to sex discrimination, including sexual assaults.<sup>19</sup> Indeed, in news stories about campus sexual assault, the phrases “civil rights” and “sex discrimination” do not generally appear,<sup>20</sup> while stories about racist offenses typically include references to “discrimination,” “hate crimes,” and/or civil rights laws.<sup>21</sup> This disparity is curious considering that race and sex have been equally protected under civil rights laws for decades.<sup>22</sup>

Sexual assault on campus should be understood by students and treated by college officials as a civil rights matter rather than a generic sexual misconduct matter because, *inter alia*, civil rights laws require a certain quality of response and redress for victims that is not required when schools respond under generic sexual misconduct policies. Specifically, civil rights laws mandate that victims receive “prompt and equitable” redress on par with that affords victims of race and national origin-based offenses.<sup>23</sup> There is no similar legal requirement of

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<sup>17</sup> See 42 U.S.C.A. §§ 2000c–2000c-9 (Westlaw 2017); Paulette Brown, *The Civil Rights Act of 1964*, 92 WASH. U. L. REV. 527 (2014) (discussing the Civil Rights Act of 1964 protections against race and sex discrimination).

<sup>18</sup> Brown, *supra* note 17, at 532–34 (the Civil Rights Act of 1964 is most well known for prohibiting race discrimination).

<sup>19</sup> See *id.* at 537–40 (the Civil Rights Act of 1964 is rarely associated with gender or sexual assault.).

<sup>20</sup> See Walt Bogdanich, *Reporting Rape and Wishing She Hadn’t: How One College Handled a Sexual Assault Complaint*, N.Y. TIMES (July 12, 2014) [https://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html?\\_r+](https://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html?_r+) [<https://perma.cc/RDZ9-2F2W>]. In this very lengthy piece describing criminal and college proceedings related to allegations of an extreme gang rape on Hobart and William Smith College campus, the writer nowhere uses the phrases “civil rights” or even “sex discrimination” when describing the process used on campus to redress the victim’s report. *Id.*

<sup>21</sup> See Scott Greer, *Public University Suspends Frat over “Racial Slur” Allegations*, DAILY CALLER (May 18, 2016) (characterizing verbal incident as involving race discrimination, and citing civil rights laws in detail to describe why offending students were suspended); Scott Jaschik, *The Incidents Since Election Day*, INSIDE HIGHER ED (Nov. 11, 2016), <https://www.insidehighered.com/news/2016/11/11/students-many-colleges-reporting-ethnic-or-racial-harassment-election-day> [<https://perma.cc/2J63-4L86>] (discussing racial discrimination offenses and characterizing them as hate crimes).

<sup>22</sup> Wendy Murphy, *From Explicit Equity to Sports to Sexual Assault to Explicit Subjugation: The True Story Behind Title IX and Women’s Ongoing Struggle for Equality in Education*, in SEXUAL HARASSMENT IN EDUCATION AND WORK SETTINGS: CURRENT RESEARCH AND BEST PRACTICES FOR PREVENTION, 47–48 (Michele A. Paludi et al., eds. 2015) [hereinafter Murphy, *From Explicit Equity to Sports*].

<sup>23</sup> JUSTICE DEPARTMENT RELEASES INVESTIGATIVE FINDINGS ON UNIVERSITY OF NEW MEXICO’S RESPONSE TO SEXUAL ASSAULT ALLEGATIONS, U.S. DEP’T OF JUSTICE (Apr. 22,

“equitable” treatment when schools apply less protective sexual misconduct policies. Furthermore, if schools do not comply with civil rights laws they can be sued and subjected to investigation by civil rights oversight agencies.<sup>24</sup> There is no similar accountability and oversight when schools fail to enforce generic sexual misconduct policies. Civil rights laws also utilize an equitable and subjective definitional standard of “unwelcome” to determine whether a sexual assault occurred.<sup>25</sup> By contrast, sexual misconduct policies apply more burdensome criminal law standards of “non-consent” or “affirmative consent,”<sup>26</sup> which require more proof than mere “unwelcomeness.”<sup>27</sup> This means a victim is more likely to prevail on campus if civil rights laws are applied, than if sexual misconduct policies are applied.

Civil rights laws are also preferable to sexual misconduct policies simply because they were designed to create cognizable legal injury in individual victims as well as whole classes of people and entire communities.<sup>28</sup> In this way, civil rights laws protect and promote the collective values of equality, nondiscrimination, and civility. Hence, treating sexual assault as a civil rights matter ensures not only that victims receive the fully equal treatment to which they are entitled but also that other students feel personally injured, thus personally invested in prevention. Studies suggest that this atmosphere of inclusion may change student attitudes toward women in general and sexual assault in particular.<sup>29</sup> Indeed, negative attitudes toward women and a sense of entitlement

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2016), <https://www.justice.gov/opa/pr/justice-department-releases-investigative-findings-university-new-mexico-s-response-sexual> [<https://perma.cc/77XV-7MTN>].

<sup>24</sup> Wendy Murphy, *Sexual Harassment and Title IX, What's Bullying Got to Do with It?*, 37 NEW ENG. J. ON CRIM & CIV. CONFINEMENT 305, 317–18 (2011) [hereinafter Murphy, *Sexual Harassment and Title IX*].

<sup>25</sup> *Sexual Harassment: It's Not Academic*, U.S. DEP'T OF EDUC. (Sept. 2008), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf>. [<https://perma.cc/SUY9-XMNR>]. “Unwelcome” is defined as conduct “the student did not request or invite . . . and [the student] considered the conduct to be undesirable or offensive.” *Id.*

<sup>26</sup> Wendy Murphy, *Krakauer's Missoula: Where Subversive Meets Versimilitude*, 42 J.C. & U.L. 479, 496–97 (2016) [hereinafter Murphy, *Krakauer's Missoula*].

<sup>27</sup> *Id.* (explaining that “unwelcomeness” is “‘equitable’ because it is a subjective test that honors women’s autonomy an exclusive authority of their bodies by asking only whether they *wanted* sexual contact.” As opposed to the “inequitable” “non-consent” where “they ask no only whether a victim ‘consented’ but also whether an offender mistakenly *believed* the victim consented.”).

<sup>28</sup> The Supreme Court has repeatedly noted “Title IX’s ‘unmistakable focus on the benefited class.’” *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 639 (1999) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 691(1977)). “Title IX’s beneficiaries plainly include all those who are subjected to ‘discrimination’ ‘on the basis of sex.’” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 n.3 (quoting 20 U.S.C. § 1681(a)).

<sup>29</sup> See Young et al., *supra* note 12, at 797–99 (finding significant association between attitudes toward women, rape myth acceptance, and prevalence of sexual coercion); *Sexual Assault Victimization Disproportionately Affects Certain Minority College Students:*

are correlated with high rates of sexual assault,<sup>30</sup> which may explain why lower tiered schools have lower incidence rates.<sup>31</sup> Lower tiered schools may have fewer numbers of males who feel a sense of entitlement in their lives based on factors such as wealth and status as a star athlete.

### III. SEXUAL ASSAULT IS ALWAYS A CIVIL RIGHTS ISSUE, YET IS ROUTINELY ADDRESSED ON CAMPUS UNDER NON-CIVIL RIGHTS SEXUAL MISCONDUCT POLICIES

Sexual assault on college campuses is prolific,<sup>32</sup> and is well established as a sex-based civil rights offense under Title IV of the Civil Rights Act of 1964,<sup>33</sup> as well as Title IX of the Education Amendments of 1972.<sup>34</sup> Sexual assault is a sex-based offense because of the sexual aspects of the harm, and because it occurs disproportionately to females.<sup>35</sup> In addition, sexual assault contributes to women's

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*Inclusive Campus Climates May Lower Risk*, U. PITT. HEALTH SCIENCES MEDIA RELATIONS (Mar. 17, 2017), <http://www.upmc.com/media/NewsReleases/2017/Pages/coulter-sex-assault.aspx> [<https://perma.cc/ES5X-DVS6>] (referencing Robert W. S. Coulter & Susan R. Rankin, *Inclusive Campus Climates May Lower Sexual Assault Risk*, J. INTERPERSONAL VIOLENCE, Mar. 2017, at 1 (2017) (finding that students who perceive their campus as inclusive have a 27 percent lower chance of being sexually assaulted compared to their peers who perceived their campuses as less inclusive)).

<sup>30</sup> See Melanie S. Hill & Ann R. Fischer, *Does Entitlement Mediate the Link Between Masculinity and Rape-Related Variables?*, 48 J. COUNSELING PSYCHOL. 1 (2001); Leana A. Bouffard, *Exploring the Utility of Entitlement in Understanding Sexual Aggression*, 38 J. CRIM. JUSTICE 870, 876 (2010) (explaining that offenders' sense of entitlement fosters rape-supportive attitudes and behaviors, which is correlated with sexual aggression).

<sup>31</sup> See 2017 SAFEST COLLEGE CAMPUSES IN AMERICA, NICHE (last visited Apr. 15, 2017), <https://www.niche.com/colleges/rankings/safest-colleges> [<https://perma.cc/HX2F-NT66>] (providing a ranked list of the safest college campuses across the United States).

<sup>32</sup> See Heidi M. Zinzow & Martie Thompson, *Barriers to Reporting Sexual Victimization: Prevalence and Correlates Among Undergraduate Women*, 20 J. AGGRESSION, MALTREATMENT & TRAUMA 711, 712 (2011) (finding that a "national survey of college women estimated that approximately one fifth to one quarter of women will experience a completed or attempted rape during their college careers" with the highest risk of assault occurring in their first year of college).

<sup>33</sup> 42 U.S.C.A. § 2000e-2 (West 2014).

<sup>34</sup> 20 U.S.C.A. §§ 1681-1688 (West 2014).

<sup>35</sup> Shannon Cleary, *Using Title IX and the Model of Public Housing to Prevent Housing Discrimination Against Survivors of Sexual Assaults on College Campuses*, 30 COLUM. J. GENDER & L. 364, 366 (2015) (citing MATTHEW BREIDING ET AL., U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING, AND INTIMATE PARTNER VIOLENCE VICTIMIZATION—NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, UNITED STATES (2011) (estimating that "19.3% of women in the United States have been raped during their lifetime, compared to 1.7% of men.")).

subjugation in society.<sup>36</sup> While not every sexist remark is an act of sex discrimination, every sexual assault is.<sup>37</sup> Yet, widespread understanding of the relationship between sexual assault and civil rights laws remains elusive.

Colleges and universities contribute significantly to this problem by obfuscating the legal relationship between sexual assault and civil rights laws. They do this in many ways, including: (1) separating sexual misconduct policies from sex-based civil rights policies;<sup>38</sup> (2) subjecting sexual assaults and other forms of severe sex-based harms such as dating abuse and stalking, to different and worse prevention programs compared to harms based on other civil rights categories such as race and national origin;<sup>39</sup> (3) subjecting sexual assaults and other forms of severe sex-based harms to different and worse procedural and substantive rules in investigative and disciplinary proceedings compared to other types of civil rights harms.<sup>40</sup> This separating out of sex-based harms for different and worse treatment conveys the erroneous idea that these are not civil rights problems. This violates not only Title IX's regulatory prohibition against "separate" and "different" treatment "based on sex," but also the regulatory mandate that schools treat civil rights offenses as civil rights matters, using civil rights legal standards.<sup>41</sup>

In addition to separating out sexual assaults for different treatment, many schools also state or imply through their use of language that sexual assaults are not civil rights issues. As noted above, for example, schools use criminal law standards, such as non-consent, rather than the civil rights standard of unwelcome, to determine whether a sexual assault occurred. This misuse of criminal law definitions conveys to students that campus officials must follow criminal laws and procedures when responding on campus, which is untrue as a matter of law, and harmful to the rights of women students who are entitled to redress under the much more protective civil rights laws. Universities are not government prosecutors, and school officials have no jurisdiction or authority to enforce criminal laws on

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<sup>36</sup> Walter S. DeKeseredy, *Male Violence Against Women in North America as Hate Crime*, in 3 HATE CRIMES: THE VICTIMS OF HATE CRIME 151–72 (Barbara Perry ed., 2009).

<sup>37</sup> *Sexual Harassment: It's Not Academic*, U.S. DEP'T OF EDUC. 7 (Sept. 2008), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf>. [<https://perma.cc/SUY9-XMNR>] (stating that "sufficiently severe, single or isolated incidents of sexual harassment can create a hostile environment [for purposes of Title IX]."); *Little v. Windermere*, 301 F.3d 958, 967 (9th Cir. 2001); *Soper by Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999); *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 650–51 (threats of sexual contact and minor sexual touching sufficiently severe to rise to level of actionable discrimination).

<sup>38</sup> Wendy Murphy, *Krakauer's Missoula: Where Subversive Meets Verisimilitude*, 42 J.C. & U.L. 479, 491 (2016).

<sup>39</sup> *Id.*

<sup>40</sup> See KEENE STATE COLLEGE, SEXUAL MISCONDUCT POLICY (Oct. 31, 2016) [http://www.keene.edu/administration/policy/detail/handbook/sexual-misconduct/#policy\\_definitions](http://www.keene.edu/administration/policy/detail/handbook/sexual-misconduct/#policy_definitions) [<https://perma.cc/3EA9-SENM>]; Smith College, *Smith College Gender-Based and Sexual Misconduct Policy*, (last visited Feb. 9, 2017) <https://www.smith.edu/sao/handbook/policies/sexmisconduct3.php> [<https://perma.cc/K5P8-B7SK>].

<sup>41</sup> 34 C.F.R. 106.31(b)(4).

campus. This blending of criminal laws and civil rights laws inhibits student understanding of the critical differences between criminal and civil rights legal concepts. Consequently, students are not being properly informed that they even have civil rights at stake when sexual assault happens, much less that sexual misconduct policies afford victims no meaningful rights at all, while civil rights laws afford them maximum legal protection, on campus, with regulatory oversight agencies, and in the courts.

Against this backdrop of misinformation and non-information rests still more confusing information about the overlapping applicability of sexual misconduct policies, civil rights/sexual harassment laws,<sup>42</sup> and bullying<sup>43</sup> policies.<sup>44</sup> Indeed, standard definitions for each would lead an ordinary student to conclude that these provisions apply to different types of harms because they require different types of proof. Sexual misconduct policies typically require proof of “sexual contact or behavior that occurs without the explicit consent of the recipient.”<sup>45</sup> Bullying generally requires proof that a person was “treated abusively” or “by means of force or coercion.”<sup>46</sup> Civil rights/sexual harassment requires proof of “unwelcome conduct based on sex.”<sup>47</sup> Clearly, a sexual assault could satisfy any of these three categories, but with very different consequences in terms of how the matter is handled on and off campus. For example, violations of civil rights laws can be redressed by civil rights oversight agencies, such as the Office for Civil Rights at

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<sup>42</sup> See CATHERINE HILL & ELENA SILVA, DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 17 (2005) (finding in a study of college and university students that 62 percent of female college students and 61 percent of male college students experienced sexual harassment on campus); PERMANENT COMMISSION ON THE STATUS OF WOMEN, IN OUR OWN BACKYARD: SEXUAL HARASSMENT IN CONNECTICUT’S PUBLIC HIGH SCHOOLS 10 (1995) (finding in a study of Connecticut high school students that 92 percent of females and 57 percent of males reported experiencing sexual harassment at school); see also PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUSTICE CTR. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF JUSTICE, PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NAT’L VIOLENCE AGAINST WOMEN SURVEY (1998) (discussing results of a national “survey of 8,000 women and 8,000 men about their experiences with rape, physical assault, and stalking. . .”).

<sup>43</sup> Although college offenders are rarely accused of bullying, and are more commonly accused of generic sexual misconduct rather than civil rights offenses when they commit sexual assaults, the problem of schools mislabeling sexual assaults as bullying is addressed here because bullying is a common misnomer for sexual assault when it occurs in grades K-12, even though civil rights laws including Title IX apply with equal force to all levels of education, from grade school through graduate school.

<sup>44</sup> See AM. ASS’N OF UNIV. WOMEN EDUC. FUND, HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 20–21 (American Assoc. of Univ. Women Fund 2001).

<sup>45</sup> SEXUAL ASSAULT, U.S. DEP’T OF JUSTICE (last visited Feb. 9, 2017), <https://www.justice.gov/ovw/sexual-assault> [<https://perma.cc/Q4QE-YJUN>].

<sup>46</sup> *Bully*, MERRIAM-WEBSTER DICTIONARY (last visited May 21, 2017), <https://www.merriam-webster.com/dictionary/bully> [<https://perma.cc/92CU-E547>].

<sup>47</sup> Murphy, *Sexual Harassment and Title IX*, *supra* note 24, at 308 n.10.

the Department of Education.<sup>48</sup> Violations of bullying laws cannot. When a victim makes it known that she is aware of her civil rights, and is motivated to ensure their proper enforcement, her rights are more likely to be respected on campus because school officials understand that there may be serious consequences for them with oversight agencies and the courts if they fail to correctly apply and enforce civil rights laws. There is no similar external oversight with regard to how a school handles bullying or hazing. Hence, an offender is more likely to be held accountable if he or she is characterized as a civil rights offender than as a bully or a hazer.

Framing a sex-based civil rights offense as a non-civil rights sexual misconduct matter, or as bullying, or hazing is not uncommon, but these multiple “charging” options creates a tyranny of choices that enables schools to avoid having to comply with civil rights laws simply by labeling a sexual assault as something other than a civil rights offense. Such mislabeling may be the result of schools attempting to avoid regulatory oversight and liability exposure by managing rather than aggressively addressing the problem for what it is. But these labels also render invisible the critical fact that an offense occurred “based on sex.” As a practical matter, this mislabeling also causes victims seeking information about what to do after sexual assault happens to look for answers in a policy manual labeled “sexual misconduct” rather than “civil right.” Without legal expertise or clear information, a victim can hardly be expected to understand that she suffered a civil rights offense, much less that civil rights laws afford her better legal protections while also ensuring that she can seek recourse in the courts and with the state and federal oversight agencies if her rights are not properly enforced on campus.<sup>49</sup>

This mistreatment of victims who suffer sexual assault and other forms of sex-based civil rights offenses is troubling given that females suffer more civil rights offenses than other protected class students. Even when their victimization is more vaguely framed as bullying, females suffer more than other protected class students.<sup>50</sup> Yet most schools confuse rather than enlighten students such that victims of sexual assault neither expect nor request a civil rights response, even as victims from other protected class categories inherently understand their suffering as a civil rights issue. When victims do not expect a civil rights response from school officials, they are less likely to complain or take legal action when one is not provided.

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<sup>48</sup> See Murphy, *From Explicit Equity to Sports*, *supra* note 22, at 50–51; J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d. 1094, 1122 n.15 (C.D. Cal. 2010) (dismissing sexual harassment claims against a school where claim was framed as “cyber-bullying” rather than a Title IX issue sex discrimination issue, on the grounds that the conduct was protected speech under the First Amendment).

<sup>49</sup> See Murphy, *Krakauer’s Missoula*, *supra* note 26, at 482, n.10.

<sup>50</sup> AMANDA BURGESS-PROCTOR ET AL., CYBERBULLYING RESEARCH SUMMARY: VICTIMIZATION OF ADOLESCENT GIRLS 1–2 (2009) (finding that the majority of bullying is done to girls and involves gendered and/or sexual name-calling, threats, disrespect, unwanted sexual advances and sexual harassment).

IV. FRAMING BIPS AS CIVIL RIGHTS PROGRAMS CAN IMPROVE PREVENTION EFFORTS AND ENHANCE STUDENT UNDERSTANDING OF THE NATURE OF SEXUAL ASSAULT AS AN INJURY TO ALL WOMEN AND GIRLS, AND THE CAMPUS COMMUNITY AS A WHOLE

Framing theory holds that individuals interpret information and experiences through filters or “frames” that provide a context within which information is given meaning because of the way it “fits” among existing internalized emotional and intellectual constructs.<sup>51</sup> Information is both projected and received through frames, thus influencing individual and social understanding.<sup>52</sup> Simply put, framing is a way of packaging information to give it meaning in light of existing information.<sup>53</sup> In turn, framing determines not only our understanding of ideas, but also, how those ideas influence our decisions regarding laws, rules of behavior, and social policies.<sup>54</sup>

Confusion around campus sexual assault is, in a sense, a problem of conflicting frames. If students perceive sexual assault policies as complicated or confusing, they cannot develop a cogent and focused understanding of how the laws work, who should be held accountable, and in what forum. Nor can parents or the general public be apprised of truthful information about the risk of harm their children face in school if the nature of sexual assault is subject to different measurements based on how an incident is labeled. For example, at the K-12 level, sexual assault is often treated as bullying.<sup>55</sup> If 25 sexual assaults occur at a high school in a given year, and are labeled “bullying,” school officials can publicly claim to have no problems with sexual assault. Municipalities and schools alike benefit from this wrongful framing because the vague word “bullying” covers a range of conduct from minor to very serious, thus does not reveal whether an offense was sexual in nature. This insulates schools and communities from developing reputations as places where sexual assault happens, which could affect property values, quality of life, tax base, etc.<sup>56</sup> Similar concerns about stigma affecting tuition dollars and alumni donations exist in higher education.<sup>57</sup> This reluctance to acknowledge sexual assaults openly may also be rooted in a fear of

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<sup>51</sup> Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103, 105 (2007).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 105–06.

<sup>55</sup> Carlin DeGuerin Miller, *Phoebe Prince's Final Days: Bullied Girl Suffered "Intolerable" Abuse Before Suicide, Says Court Docs*, CBS NEWS (Apr. 9, 2010), [http://www.cbsnews.com/8301-504083\\_162-20002132-504083.html](http://www.cbsnews.com/8301-504083_162-20002132-504083.html) [<https://perma.cc/BW8Y-5NRM>].

<sup>56</sup> Thomas J. Kane et al., *School Accountability Ratings and Housing Values*, BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS, 2003, at 83, 94 (finding that the reputation of the school, even more than standardized test scores, affects property values).

<sup>57</sup> Murphy, *From Explicit Equity to Sports*, *supra* note 22, at 64.

lawsuits, though schools have long been aware that they are subject to suit under civil rights laws by victims of sexual assault<sup>58</sup> irrespective of the label used to describe them.<sup>59</sup> Nonetheless, mislabeling incidents to produce false data is a serious problem<sup>60</sup> that distorts the truth about how many sexual assaults are actually occurring on college campuses, while also preventing students from understanding and enforcing their rights.

Conflicting frames also inhibit the impact and value of scientific studies related to sexual assault. For example, one recent study of crimes and hate crimes on campus found nearly one million violent victimizations, which included rape and sexual assault, but only 791 hate crimes, which included 93 assaults (unclear whether they were sexual) and four forcible sex offenses.<sup>61</sup> Since all sexual assaults are sex-based bias offenses, but not all sex-based bias offenses occur in the form of sexual assault, it is unclear how researchers came to conclude that “rape and sexual assault” should be considered “violent victimizations” while “forcible sex offenses” should be considered “bias offenses.” Researchers nowhere explain this overlap, and the data suggests that the number of actual bias offenses based on sex were grossly undercounted because researchers mislabeled many sex offenses as something other than bias offenses.

Apparently concerned that conflicting labels inhibit student understanding of, and access to civil rights remedies, the Department of Education in an Advisory letter on Bullying issued October 26, 2010 wrote that the fact that behavior may be labeled “bullying” changes nothing about a school’s legal responsibilities to redress sexual harassment as a Title IX violation.<sup>62</sup> Yet, unless schools proactively teach students the ways that civil rights laws, criminal laws, sexual misconduct policies, bullying, and hazing laws interact and overlap, victims will never come to

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<sup>58</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285, 292–93 (1998); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 681–83 (1999).

<sup>59</sup> Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to the Staff of U.S. Dep’t of Educ. (October 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> [<https://perma.cc/X773-QC69>] (stating “The label used to describe an incident (e.g., bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications. So, for example, if the abusive behavior is on the basis of race, color, national origin, sex, or disability, and creates a hostile environment, a school is obligated to respond in accordance with the applicable federal civil rights statutes and regulations enforced by OCR.”).

<sup>60</sup> See, e.g., Madison Pauly, *Here’s What’s Missing from the Stats on Campus Rape*, MOTHER JONES, Oct. 8, 2015 (discussing AAU survey data showing that most schools publicly report under the Clery Act only a fraction of reported rapes by relying on technical rules that permit schools to exclude off-campus rapes and rapes reported to confidential counselors).

<sup>61</sup> See Simone Robers et al., INDICATORS OF SCHOOL CRIME AND SAFETY: 2014, INST. OF EDUC. SCIENCE (2015), <https://nces.ed.gov/pubs2015/2015072.pdf> [<https://perma.cc/89TY-L3RG>].

<sup>62</sup> Letter from Russlynn Ali, *supra* note 59.

appreciate that they *had* civil rights at stake, much less than schools are violating the law when they respond without complying strictly with civil rights laws.<sup>63</sup>

While BIPs can certainly be used for non-civil rights offenses, they offer a unique platform that schools can exploit to reduce sexual assault incidence rates. BIPs teach students to become more involved in preventing sexual assaults by proactively looking out for their fellow students, which conveys a philosophy of community-based caregiving. This alone may reduce incidence rates simply because a community that promotes caring for others is less likely to breed attitudes and ideas that tolerate sexual assault. In this sense, BIPs align philosophically with civil rights laws. The problem remains, however, that BIPs are taught through a lens of individuality because the act of intervening as a bystander is meant to occur only on behalf of specific students when certain risk factors are present. BIPs are not taught as programs that engage students on behalf of women as the class or the campus community generally. This lack of class-based framing can be contrasted with the way students learn about the prevention of racism, in which all “types” of students regularly become involved by engaging in protests, etc.,<sup>64</sup> not because they received BIP training, but because they learned from a variety of sources that a single racist incident injures whole classes of people and entire communities.

The widespread lack of appreciation for the civil rights sameness of racist and sexual assaults disservices the goal of ensuring safety and full equality for all. It also prevents students from noticing, much less complaining about the fact that sexual assaults are being subjected to separate and different treatment based on sex, not only in written policies and disciplinary proceedings, but also in training programs, such as BIPs.

Common sense dictates that all students who conceive of sexual assaults as civil rights matters on par with racist assaults will feel personally injured when sexual assault happens, thus are more likely to become involved in effective prevention. In turn, victims will enjoy improved opportunities for legal redress, on campus and in the courts, as they begin to see sexual assault not as private and shameful, but rather, as injuries to the entire campus community, for which they should feel strength and pride when reporting, irrespective of the outcome of any

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<sup>63</sup> For the victim who never comes to understand her suffering as a civil rights offense, she could lose her rights altogether because statutes of limitation begin to run when a victim appreciates that she has been injured, even if she has no understanding of the civil rights nature of her claim. *See Royster v. Beard*, No. 1:CV-06-0842, 2007 U.S. Dist. LEXIS 83833, at \*4 (M.D. Pa. Nov. 9, 2007) (finding a prisoner’s “lack of knowledge of the law” insufficient to toll running of statutory limitation period).

<sup>64</sup> *See* John Conley, *The Role of Teaching in Responding to Racism*, INSIDE HIGHER ED (Oct. 7, 2016) <https://www.insidehighered.com/views/2016/10/07/responding-classroom-racial-incident-campus-essay> [<https://perma.cc/8MUP-38RW>]; Ashley Jost & Celest Bott, *Racial Incident at Mizzou Sparks Student Discussion*, ST. LOUIS POST-DISPATCH (Sept. 29, 2016), [http://www.stltoday.com/news/local/education/racial-incident-at-mizzou-sparks-student-discussions/article\\_b70cefeb-af80-5f7f-a39b-86bafbaa0355.html](http://www.stltoday.com/news/local/education/racial-incident-at-mizzou-sparks-student-discussions/article_b70cefeb-af80-5f7f-a39b-86bafbaa0355.html) [<https://perma.cc/X77U-H8ZE>].

legal process. The point for the victim is not to win but to be heard and respected as a person who suffered harm not only as an individual but as a representative of an entire class of people. In this way, a sexual assault of one woman is seen and understood as a sexual assault against all women, which makes the often secretive problem of violence against women not only more visible but also highly relevant to everyone on campus.

To firmly establish in the minds of all students that sexual assault is a civil rights issue on par with other forms of class-based assaults, schools should make explicit in their BIP policies and trainings that the program is applicable to all types of civil rights offenses, and that all students have a community-based obligation to promote and protect a nondiscriminatory environment. In this way, BIPs are not perceived as rescue programs, but rather, as programs to promote equality for all. This paradigmatic shift then avoids problems associated with programs that teach students to “save” women from predatory males, and communicates the more empowering message that women are entitled to, rather than in need of, assistance from others. An ideal BIP policy could state in its introductory paragraph: “This program is intended to encourage students to intervene in all forms of discrimination, including racist, ethnic, and sexual assaults, and other forms of verbal or physical harassment based on race, sex, national origin, etc., and is part of a comprehensive effort to promote safety and equality for all.” With this inclusive language and framing of sexual assault as a fully equal civil rights injury, student attitudes will shift, incidence rates will go down, and liability exposure for schools will diminish.

#### CONCLUSION

The overarching goal of any campus sexual assault prevention program should be to reduce incidence rates. BIPs may accomplish this result more effectively than other programs because they engage students to become personally involved in actual incidents, thus directly influencing the way students think and feel about sexual assault. By framing BIPs as civil rights programs applicable to all protected class categories, schools ensure that students understand why intervening is appropriate, and underscores that everyone has a stake in promoting and protecting the safety and full equality of all women and girls on every campus.