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Making Gender Visible: Title IX and Discriminatory School Discipline

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TITLE IX AND DISCRIMINATORY SCHOOL DISCIPLINE

Verna L. Williams*

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INTRODUCTION

On October 26, 2015, Spring Valley High School resource officer Ben Fields gave the world a glimpse into the worst of school discipline.¹ That morning, a girl named Shakara refused to put away her cellphone in math class.² To make matters worse, Shakara then defied her teacher and the school vice principal when they ordered her out of the classroom.³ Anticipating a showdown when Fields (whom students also called “Officer Slam”⁴) arrived, Shakara’s classmates had their own smart phones at the ready.⁵ These amateur documentarians captured Fields when he hooked his arm around Shakara’s neck, flipped her over as she sat in her desk, and dragged her across the floor.⁶ Within hours, the video went viral and a new hashtag was born, #AssaultAtSpringValleyHigh.⁷

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¹ Nick Visser, ‘Officer Slam’ Threw Teen from her Desk over Cellphone, Lawyer Says, HUFFINGTON POST (Oct. 29, 2015, 9:53 PM), http://www.huffingtonpost.com/entry/assault-spring-valley-high-explanation_us_5632b058e4b0c66bae5be560.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Colleen Jenkins & Harriet McLeod, *Sheriff Seeks Probe After Video of Violent Arrest of S. Carolina Student*, THOMPSON REUTERS FOUNDATION (Oct. 27, 2015, 2:44 PM), <http://news.trust.org/item/20151027144638-6gk8u>. Because of Fields’ actions, Shakara suffered a broken arm, injuries to her back and neck, and an abrasion on her forehead. Fields was subsequently fired. Associated Press, *Deputy Ben Fields Fired for Tossing Girl from Desk in Spring Valley Classroom*, THE MERCURY NEWS (Oct. 28, 2015, 2:34 AM), <http://www.mercurynews.com/2015/10/28/deputy-ben-fields-fired-for-tossing-girl-from-desk-in-spring-valley-classroom/>. *Id.*

⁷ Jenkins & McLeod, *supra* note 3.

Shakara's encounter with a "resource officer," a euphemism for police in schools, sadly reflects the educational environment for too many Black⁸ children. With metal detectors, zero-tolerance discipline policies, and law enforcement as prevalent as white boards, dry-erase markers, and #2 pencils, schools are being transformed from incubators for college into prep schools for incarceration.

Students of color have been caught in the web of harsh disciplinary practices, to their detriment, in what has been called the School-to-Prison Pipeline.⁹ Disparities in punishment persist at every level of schooling. For example, the Department of Education ("ED") reports that even in *pre-school*, Black children are suspended more often than their white counterparts – almost four times as much.¹⁰ In addition to racial disparities, school discipline has a gender dimension, as well. Specifically, ED found that Black girls were 8% of students enrolled in K-12 schools but 13% of students suspended.¹¹

In a January 8, 2014, "Dear Colleague" letter,¹² ED and the Department of Justice ("DOJ") cited research indicating that the increased suspension rate did not result from greater misbehavior by Black children.¹³ Their investigations revealed that "racial discrimination in school discipline is a real problem."¹⁴ ED and DOJ (together, "the Agencies") put schools on notice that the Agencies would use their enforcement authority to target discrimination in school discipline.¹⁵ Specifically, the Agencies noted that discrimination in school discipline may violate Title IV of the Civil Rights Act of 1964 ("Title IV"), which prohibits discrimination based on race, color, or national origin in elementary and secondary education, and Title VI of the same Act ("Title VI"), which forbids such discrimination in any federally funded program.¹⁶ However, the Agencies failed to mention Title IX of the Education Amendments of 1972 ("Title IX") which bans sex discrimination in any federally funded program or activity.¹⁷

⁸ I capitalize "Black" to signal that the term signifies reflects a cultural group, such as "Asian" or "Latina." See Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n. 2 (1988).

⁹ Monique W. Morris, *Race, Gender, and the School-to-Prison Pipeline: Expanding Our Discussion to Include Black Girls*, AFRICAN AM. POLICY FOUND. 2 (2012), <https://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/5422efe3e4b040cd1f255c1a/1411575779338/Morris-Race-Gender-and-the-School-to-Prison-Pipeline+FINAL.pdf> (defining "school-to-prison pipeline" as "the collection of policies, practices, conditions, and prevailing consciousness that facilitate both the criminalization within educational environments and the process by which this criminalization results in the incarceration of youth and young adults").

¹⁰ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., 2013—2014 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK 3 (2016), <http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.

¹¹ *Id.*

¹² Civil Rights Div., U.S. Dep't of Educ. & Office for Civil Rights, U.S. Dep't of Justice, *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline*, (Jan. 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> [hereinafter "Dear Colleague Letter"].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 2.

¹⁶ Dear Colleague Letter, *supra* note 12, at 2, 6; *see also* 42 U.S.C. § 2000d (2000).

¹⁷ 20 U.S.C. § 1681 et seq.

In omitting Title IX, the Agencies framed the problem of disparate disciplinary measures in schools solely as an issue of race. To the extent gender is examined, it is to focus on the impact of zero tolerance policies on African-American males.¹⁸ Even when Black girls are considered, they are measured against Black males.¹⁹ As a result, discussions about discrimination in discipline erase the significance of gender, as well as the possibility of Title IX as a remedy.

The silence of the Agencies regarding gender is not surprising when considered in context. Discussions about addressing disparities in school discipline primarily have centered on African-American males.²⁰ As the phenomenon of mass incarceration has risen to public prominence,²¹ so too has the urgency with which researchers have approached discrimination in school discipline.²² Because data suggest that suspensions are a predictor for involvement in the juvenile justice system, and later prison,²³ focusing on males – the most incarcerated people in our society – likely makes sense.²⁴

However, such reasoning ignores crucial facts. African-American women's involvement in the criminal justice system is expanding beyond other groups of women.²⁵ Similarly, Black girls are increasingly at the receiving end of school disciplinary practices.²⁶ More importantly, just as is true for their male counterparts, being subject to punishments like suspension is equally detrimental to Black girls' future prospects.²⁷ Thus, the emphasis on Black boys not only silences Black girls and undervalues their experiences, it ensures that they largely will be absent when it comes to crafting and benefitting from any solutions developed. Simply put, we cannot afford to ignore Black girls any more.²⁸

This essay examines why gender and, by extension, Title IX have been invisible in the context of discrimination in school discipline. In this regard, I will apply methods of what some feminist legal advocates have called social justice

¹⁸ Ashley L. Smith, *#BlackWomenMatter: Neo-Capital Punishment Ideology in the Wake of State Violence*, 85 J. NEGRO EDUC. 261 (2016); Morris, *supra* note 9, at 4.

¹⁹ Smith, *supra* note 18, at 264.

²⁰ Jamilia J. Blake et al., *Unmasking the Inequitable Discipline Experiences of Urban Black Girls: Implications for Urban Educational Stakeholders*, 43 URBAN REV. 90, 91 (2011) (observing that “much of the school discipline literature has focused on Black males given Black males’ risk of underachievement and the potential that exclusionary discipline practices have . . . contribut[ed] to school drop-out and incarceration rates”).

²¹ The issue of mass incarceration has moved beyond academic circles and into popular culture, including documentary films, such as the Oscar-nominated film “13,” directed by Ava Duvernay.

²² See Dear Colleague Letter, *supra* note 12, at 2, 6; Morris, *supra* note 9, at 2.

²³ See, e.g., Blake et al., *supra* note 20, at 91.

²⁴ *Inmate Gender*, FED. BUREAU OF PRISONS (Jan. 28, 2017), https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp.

²⁵ Elizabeth Swavola, et al., *Overlooked: Women and Jails in an Era of Reform*, VERA INSTITUTE OF JUSTICE 11 (2016), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2016/08/overlooked-women-in-jails-report-web.pdf>.

²⁶ Blake, *supra* note 20, at 92.

²⁷ See, e.g., John R. Slate et al., *A Clear Lack of Equity in Disciplinary Consequences for Black Girls in Texas: A Statewide Examination*, 85 J. NEGRO EDUC. 250, 251 (2016).

²⁸ Cf. Lori D. Patton, et al., *Why We Can't Wait: (Re)Examining the Opportunities and Challenges for Black Women and Girls in Education*, 85 J. NEGRO EDUC. 194 (noting the paucity of research concerning Black females' educational experiences).

feminism (“SJF”), an intentionally intersectional, context- and community-informed approach to this issue.²⁹ Part I briefly explains SJF and its methodologies. Part II applies SJF briefly by examining the history and the interrelationship of subordination based on gender and race in the school disciplinary setting. Part III concludes by discussing the implications of this analysis for Title IX.

I. SOCIAL JUSTICE FEMINISM: WHAT IT IS AND HOW IT WORKS

Social justice feminism (SJF) is a recently articulated strand of feminist legal theory, rooted in the experiences of feminist legal advocates.³⁰ Responding to calls from women of color and other marginalized women seeking greater progress on issues affecting them,³¹ SJF reinforces feminism’s original mission and expands its reach by “striv[ing] to uncover and dismantle [social and political structures that support patriarchy],”³² while “recognizing and addressing multiple oppressions.”³³ SJF “shares with [critical race feminism] a concern about recognizing and addressing multiple oppressions . . . not just for purposes of identity politics, but to gain a fuller understanding of the multiple and intersecting forms subordination can take.”³⁴ Significantly, it is “structural in its orientation, identifying issues that contribute to systemic subordination and developing theories and strategies for change.”³⁵ Martha Chamallas has suggested that SJF is “a new take on intersectionality theory and intersectional feminism.”³⁶ Given its genesis among practitioners, SJF embodies three core methodologies that

²⁹ See Martha Chamallas, *Social Justice Feminism: A New Take on Intersectionality*, 2014 Freedom Center J. 11, 11-12 (2014).

³⁰ *Id.*

³¹ Kristin Kalsem & Verna L. Williams, *Social Justice Feminism*, 18 UCLA WOMEN’S L.J. 131, 133 (2010). At a series of donor-funded convenings about revitalizing the women’s movement, particularly for marginalized women, participant Linda Burnham observed that the “feminist project, while not completely stalled, does not have the kind of political traction it needs to effectively influence public policy and improve the lives of women.” *Id.* at 133-34. The catalyst for these meetings was research by the National Association for the Advancement of Women that found that women of color were more likely to consider themselves feminists than their white counterparts. *Id.* at 137-38. These women expressed a desire for a movement that addressed issues mainstream feminism had neglected. *Id.* Primary among those issues was violence. *Id.* at 183. Over the course of three years, Astrea Lesbian Foundation, the Ford Foundation, and the Ms. Foundation for Women financially supported gatherings of feminist activists from across the country and a variety of settings to consider where and how the feminist movement could be more inclusive and effective. *Id.* at 132-33. Social justice feminism is what the attendees determined was their calling, with one participant remarking, “I don’t want to do feminism any more unless it’s social justice feminism.” *Id.* at 132.

³² *Id.* at 157.

³³ *Id.* at 158.

³⁴ *Id.*

³⁵ *Id.* at 161.

³⁶ Chamallas, *supra* note 29, at 11-12; see also MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, 107-11 (3rd ed. 2013) (identifying social justice feminism as a “promising variation” on intersectional feminism).

“attempt to reveal features of a legal issue that more traditional methods tend to overlook or suppress.”³⁷

One method, looking to history to understand subordinating structures, seeks to acquire more knowledge with which to understand and then dismantle the bases of societal institutions that perpetuate hierarchies and inequities. Another method, examining the inter-relationships between interlocking oppressions, asks how issues of gender, race, class, and other categories of identity and experiences work together to create social injustice. A third method, ensuring that principles of dismantling interlocking oppressions inform solutions, keeps the focus on bottom-up strategies in fashioning remedies.³⁸

Accordingly, SJF focuses on historical context, structural inequities, intersecting oppressions, and listening to underserved populations.³⁹ In this connection, SJF methods reveal issues that liberal feminism might fail to recognize as having significant gender implications, which makes this approach especially apt for examining discrimination in disciplinary practices.⁴⁰ The sections that follow briefly look to history to understand the privileging of Black male school experiences and explore the myriad ways race and gender combine to subject Black girls to inequalities in punishment.

II. EXAMINING HISTORY: SILENCING BLACK FEMALE EXPERIENCE TO FURTHER THE RACE

The absence of Black girls in the discourse regarding discrimination in disciplinary practices is the latest policy discussion that elevates African-

³⁷ Kalsem & Williams, *supra* note 31, at 175 (quoting Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 836 (1990)).

³⁸ Kalsem & Williams, *supra* note 31, at 175.

³⁹ *Id.*

⁴⁰ *See id.* at 139. We used SJF to analyze the Supreme Court’s unanimous decision in *Long Island Care at Home v. Coke*, 551 U.S. 158 (2007), which upheld Department of Labor regulations exempting home health care workers from overtime and minimum wage requirements of the Fair Labor Standards Act (“FLSA”). *Id.* at 186-87. SJF methods revealed that this administrative law case “raised powerful issues of race, gender, and class hierarchies.” *Id.* at 139. Specifically, in drafting the FLSA, Congress purposefully excluded domestic and agricultural workers from protection because doing so would benefit African Americans and therefore erode support from Southern lawmakers for the Act. *Id.* at 187. This history suggested that, in practice, the FLSA reinforced interlocking oppressions because women of color are overrepresented in the field of home health care, which is physically and emotionally strenuous work that pays poorly. *Id.* at 188. Thus, while the Court’s reading of the FLSA implementing regulations may have been consistent with administrative law precedent, it unwittingly fortified Congress’s discriminatory intent by sanctioning “a pay structure that assure[d] that this job category [would] remain the preserve of poor women of color, and . . . be perpetually underpaid.” *Id.* at 190. Finally, in seeking solutions informed by a “bottom-up” approach, we argued that feminist legal advocates should add the *Coke* case to their agendas and organize home health care workers to identify goals and strategies to correct the Court’s ruling. *Id.* at 191-92.

American males in the guise of uplifting Black people in general. As suggested below, framing issues of subordination this way responds to the manner in which law and custom have constructed African Americans as gender deviant to justify their subjugation. Because space constraints make a full exploration of the historic and systemic subordination of African Americans impossible, what follows briefly highlights three moments in recent history that illustrate the foregrounding of Black men as a tool for resistance.

Starting with slavery, African Americans have been pushed into gender roles that in key respects departed from the norm. Black women and men frequently performed the same punishing duties on plantations, as Jacqueline Jones has explained:

Together with their fathers, husbands, brothers, and sons, [B]lack women spent up to fourteen hours a day toiling out of doors, often under a blazing sun. In the Cotton Belt they plowed fields; dropped seed; and hoed, picked, ginned, sorted, and moted cotton. On farms in Virginia, North Carolina, Kentucky, and Tennessee, women hoed tobacco; laid worm fences; and threshed, raked, and bound wheat . . . Stated simply, most women spent a good deal of their lives plowing, hoeing, and picking cotton. In the fields the notion of a distinctive “women’s work” vanished as slaveholders realized that “women can do plowing very well [and] full well with the hoes and [are] equal to men at picking.”⁴¹

Upon emancipation, Black men claimed masculinity by, for example, serving in militias, a duty denied them before the founding of the nation.⁴² However, in so doing, Black men confronted violent backlash from hate groups seeking to reinforce the message that masculinity was the preserve of white men alone.⁴³ Lisa Cardyn writes at length about how the end of the Civil War, the Ku Klux Klan (and hundreds of groups borne of it) “degender[ed]” their male victims by stripping and whipping them,⁴⁴ forcing husbands to watch while their wives were sexually assaulted,⁴⁵ and castrating lynched men.⁴⁶ Against a social and legal backdrop hostile to African-American attempts to secure true freedom, Black families frequently adopted forms that were at odds with traditional gender norms, compensating for discrimination in employment, for example, by having dual earner households. But rather than being celebrated as symbols of resilience

⁴¹ JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* 15 (2010).

⁴² See Verna L. Williams, *Guns, Sex, and Race: The Second Amendment through a Feminist Lens*, 83 TENN. L. REV. (forthcoming 2017) (examining how militia service helped construct and privilege white masculinity).

⁴³ Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 712-13 (2002).

⁴⁴ *Id.*

⁴⁵ *Id.* at 722.

⁴⁶ *Id.* at 752.

against the odds, such departures have been deemed symptomatic of dysfunction needing remediation.

For example, just over fifty years ago, the Department of Labor published “The Negro Family: The Case for National Action”⁴⁷ (“the Moynihan Report”), which recommended eradicating the purported matriarchal structure of Black families as a remedy for centuries of oppression. Intended to lay the foundation for comprehensive policies to support African Americans,⁴⁸ the Moynihan Report remarkably and briefly called for substantive equality: measures designed to produce equality of outcomes, not merely of process.⁴⁹ But ultimately, the Moynihan Report’s chief prescription was uplifting Black men, whom it deemed as the ones “most humiliated” by Jim Crow.⁵⁰ The Moynihan Report claimed that laws designed to keep Blacks subordinated were best understood as “keeping the Negro male in his place: the female was not a threat to anyone.”⁵¹ In essence, law and custom had denied African-American men their entitlement to traditional masculinity, which resulted in “disorganized” and “pathological” families led by Black women.⁵² Thus, rather than proposing structural remedies for legally entrenched discrimination, the Moynihan Report recommended male-focused strategies to address the alleged gender imbalance characterizing African American families.⁵³ For example, the Moynihan Report suggests that young Black males should join the military because the military “is an utterly masculine world . . . a world run by strong men of unquestioned authority.”⁵⁴ The Report became a subject of great controversy and somewhat of an embarrassment for the Johnson Administration.⁵⁵ More importantly, despite its ambitious goals, the Report did not lead to any major policies benefitting African American families. Still, its reasoning retains great purchase and has surfaced in the context of education reform efforts focusing on sex segregation and in the Obama administration’s My Brother’s Keeper initiative.

Enactment of the No Child Left Behind Act of 2001⁵⁶ gave school districts greater flexibility to experiment with single sex schools or classes, provided they did so consistent with Title IX.⁵⁷ Echoing the Moynihan Report, proponents

⁴⁷ DANIEL P. MOYNIHAN, OFFICE OF POLICY PLANNING AND RESEARCH, U.S. DEP’T. OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (MARCH 1965).

⁴⁸ Daniel P. Moynihan, *The President and the Negro: The Moment Lost*, 43 COMMENTARY 31 (Feb. 1967).

⁴⁹ The Moynihan Report, *supra* note 47, at 1. With the passage of the Civil Rights Act of 1964, the Report predicted that African Americans would — and should — cease being mollified by equal opportunities, observing that “[b]eing Americans, they will now expect that in the near future equal opportunities for them will produce roughly equal results, as compared to other groups. This is not going to happen for generations . . . unless a new and special effort is made.” *Id.*

⁵⁰ *Id.* at 16.

⁵¹ *Id.*

⁵² *Id.* at 18

⁵³ *Id.* at 47

⁵⁴ *Id.* at 75.

⁵⁵ See generally LEE RAINWATER & WILLIAM L. YANCEY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* (1967).

⁵⁶ Pub. L. No. 107-110, 115 Stat. 1425 (codifying and amending 20 U.S.C.A. §§ 6301-7941).

⁵⁷ 20 U.S.C.A. § 7215(a)(23).

argued that sex segregation in education was especially important for Black males because they are “an endangered species . . . target[ed] by this system for destruction and extermination.”⁵⁸ Supporters cast single sex schools and classes as the magic bullet that would reduce problems such as high rates of incarceration and homicide and, most importantly, provide young Black men role models to teach them how to be providers and husbands.⁵⁹ In contrast, sex segregated education would keep Black girls from becoming teen mothers.⁶⁰

Most recently, My Brother’s Keeper (“MBK”), a 2014 initiative of the Obama administration, focused federal and private dollars on young males of color.⁶¹ The Obama administration justified this emphasis by pointing to such problems as the great numbers of young men dropping out of school, being unemployed, or involved in criminal activities.⁶² The Task Force report on MBK noted that among the “persistent challenges” dogging youth of color was being raised in a female headed household.⁶³ The Obama administration enlisted support of at least \$200 million from such corporate giants as the National Basketball Association, AT&T, and JP Morgan Chase.⁶⁴ This public/private venture overshadowed the Obama administration’s Council on Women and Girls, which was established five years earlier and garnered neither the attention nor the funding of MBK until advocates highlighted the inequity.⁶⁵

In each of these examples, policymakers privileged the experiences of Black men under the guise of addressing racial subordination. To the extent that the experiences of Black women were considered, it was solely to claim that discrimination was not as much of a problem for them or to blame them for assuming roles deemed inappropriate for their gender. Placing the emphasis on Black men not only renders African-American women invisible, it also diverts much needed energy from developing structural remedies to address entrenched inequalities. Moreover, it supports the narrative that the inequities Blacks confront are solely a matter of individual responsibility, a short-sighted and inaccurate approach guaranteed to prevent the systemic changes that are so necessary to improve the material conditions of African Americans’ lives. Kimberlé Crenshaw has explained why failing to reckon with the intersectional aspects of subordination is a recipe for maintaining a subordinating status quo.

Problems that were once debated within political discourse as the product of illegitimate social power are now less controversially

⁵⁸ *Nightline: Detroit Black “Male Academies” Ruled Unfair* (ABC News television broadcast, Aug. 15, 1991).

⁵⁹ Verna L. Williams, *Reform or Retrenchment: Single Sex Education and the Construction of Race and Gender*, WIS. L. REV. 15, 21-22 (2004).

⁶⁰ *Id.* at 23.

⁶¹ MY BROTHER’S KEEPER TASK FORCE, MY BROTHER’S KEEPER TASK FORCE REPORT TO THE PRESIDENT 5 (May 2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/053014_mbk_report.pdf.

⁶² Verna L. Williams, *The Patriarchy Prescription: Cure or Containment Strategy?* 8 GEO. J. OF L. & MODERN CRITICAL RACE PERSPECTIVES 61, 74 (2016).

⁶³ MBK TASK FORCE, *supra* note 61, at 13.

⁶⁴ Williams, *supra* note 62, at 75.

⁶⁵ *Id.* at 75

seen as individual pathologies and cultural deficits. Consequentially, social problems that are disproportionately visited upon poor, racially marginalized communities have been framed in ways that prime relevant publics to accept surveillance and punishment as appropriate solutions. Social justice advocacy that posits the need for infrastructural development and social reform is increasingly superseded by market-based solutions predicated on punishment and reward.⁶⁶

Until very recently, the discourse surrounding disparities in school discipline has continued this thread, suggesting that racial disparities in school discipline and educational opportunities result from Black students' deficiencies and misconduct. A more fruitful inquiry would examine the interconnection between race, gender, and other subordinating factors that make certain students particularly vulnerable to arbitrary discipline and diminishes their life prospects, as discussed in the next section.

III. HOW THE INTERACTION OF OPPRESSIONS CONTRIBUTES TO DISPARITIES IN SCHOOL DISCIPLINE

When compared to their white and Latina counterparts, “[African-American] girls are more likely to be suspended from school.”⁶⁷ While researchers have yet to examine the full extent of the disparities, existing data suggest that institutions suspend Black girls for minor infractions such as “gum chewing, failure to comply with a prior . . . sanction, defiance, disruptive behavior, disrespect, profanity, and fighting.”⁶⁸ Recent studies indicate that teachers and administrators are more likely to see Black girls as being overly aggressive,⁶⁹ leading commentators to theorize that some of the punishment Black girls receive has its roots in implicit race- and gender-based bias.⁷⁰

Teachers perceive Black girls as “angry, hostile, . . . and hypersexualized,”⁷¹ as well as “assertive, independent, and emotionally resilient,

⁶⁶ Kimberlé Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV., 1418, 1451 (2012).

⁶⁷ Blake et al., note 20, at 92 (citing Raffaele Mendez et al., *School Demographic Variables and Out-of-School Suspension Rates: A Quantitative and Qualitative Analysis of a Large, Ethnically Diverse School District*, 39 PSYCHOLOGY IN THE SCHS. 259, 277 (2002)).

⁶⁸ Blake et al., *supra* note 20, at 92 (citing Raffaele Mendez & Knoff, *Who Gets Suspended from School and Why? A Demographic Analysis of Schools and Disciplinary Infractions in a Large School District*, 26 EDUC. & TREATMENT OF CHILDREN 30, 51 (2003)).

⁶⁹ Blake et al., *supra* note 20, at 92 (citing Putallaz et al., *Overt and Relational Aggression and Victimization: Multiple Perspectives Within a School Setting*, 45 J. SCH. PSYCHOL. 523, 547 (2007)).

⁷⁰ Blake et al., *supra* note 20, at 92–93.

⁷¹ *Id.* at 93 (citing PATRICIA COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (2d ed. 2002); West, *Mammy, Sapphire, and Jezebel: Historical Images of Black Women and Their Implications for Psychotherapy*, 32 PSYCHOTHERAPY 458, 466 (1995)).

expressing their emotions and thoughts freely”⁷² Such attitudes stand in sharp contrast to behaviors coded as traditionally female. The manner in which educators perceive African-American girls appears to affect the discipline they receive.⁷³ Thus, when Black girls misbehave, teachers punish them not only for the underlying misconduct, but also for transgressing feminine norms that require “girls . . . [to] be silent, passive . . . reserved, and submissive.”⁷⁴ A recent study illustrates how race and gender converge to affect educators’ responses to Black girls.

Edward W. Morris studied a middle school in Texas between 2000 and 2002 and found that the confluence of gender, race, and class translated into significant disparities in student discipline.⁷⁵ Teachers routinely admonished Black girls for being “unladylike.”⁷⁶ For example, Morris observed a teacher reproving a Black girl for the manner in which she arose to get a tissue, noting that “[b]efore [student] Brittany can get to the tissue box, Ms. Taylor[the teacher] makes her go back to her seat, sit down, and then get up ‘like a young lady.’”⁷⁷ Teachers explained that exerting their authority in this manner was necessary because “[B]lack girls here—they lack social skills. The way they talk, it’s loud and combative. They grow up in these rough neighborhoods, and that’s how they act to survive. We need to teach them more social skills because that’s one of the big problems now.”⁷⁸ Indeed, “act like a lady” was one of the prime directives at this school, reflecting not just the emphasis educators placed on traditional femininity, but also their belief that “ladyhood” would be essential for Black girls when they reached adulthood. As Patricia Hill Collins has observed, “Black lady” status is the means by which African American women gain access to the middle class.⁷⁹ This image contrasts sharply and intentionally with prevailing notions of Black womanhood.

[I]mages associated with poor and working-class Black women become texts of what not to be. To achieve middle-class status, African American women must reject this gender-specific version of authenticity in favor of a politics of respectability. They must somehow figure out a way to become Black “ladies” by avoiding these working-class traps. Doing so means negotiating the complicated politics that accompany this triad of bitchiness, promiscuity, and fertility.⁸⁰

⁷² Blake et al., *supra* note 20, at 94.

⁷³ Slate et al., *supra* note 27, at 252-56.

⁷⁴ Blake et al., *supra* note 20, at 93.

⁷⁵ *Id.* at 40.

⁷⁶ *Id.* at 34.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ PATRICIA HILL COLLINS, BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM, 139 (2004).

⁸⁰ *Id.* at 138-39.

As I have written elsewhere, the "Black lady" has attributes of "traditional femininity, informed by African-American cultural experiences."⁸¹ For example, the Black lady is strong, but not overly so, in order to enable the Black man to "lead families and communities."⁸² She is "attractive and sensual", but not excessively so, "constraining that part of herself to heterosexual marriage."⁸³ In some respects, efforts by African-American women to claim status as "Black ladies" signals their agency and rejection of the stereotypes with which the broader society saddles them.⁸⁴ As a consequence, the "Black lady" departs intentionally from "the deviance white patriarchy ascribes to African-American women" and "represents a deliberate claim on the femininity white patriarchy denies Black women."⁸⁵

However, it is one thing to assert status as a "Black lady," and quite another to have that trope foisted upon girls just as they are carving out their own identities. Moreover, as Morris' study suggests, school official directives to "act like a lady" impose upon their charges something more than culturally informed African-American ladyhood. Rather, such commands and related forms of discipline seek to eradicate behaviors that deviate from traditional—i.e., *white* femininity—from being too loud or failing to rise from one's seat "like a lady," to wearing an African-inspired head wrap⁸⁶ or a hair style declared "a distraction."⁸⁷ That school officials would focus on gender nonconformity even when Black girls perform well academically makes such discipline all the more suspect: in the school Morris studied, African American girls were:

overrepresented in pre-Advanced Placement classes, and teachers frequently described them in "regular" classes as among their best students. In fact, stereotypically masculine behavior, such as boldness many adults interpreted as "loud," often seemed to benefit [B]lack girls in the classroom. [One veteran teacher said], "the [B]lack girls up there I don't worry about, they can fend for themselves—they're loud, but they're a sharp bunch and do their work."⁸⁸

Non-conformity with traditional femininity helped Black girls excel in the classroom, even when it justified school officials' discipline of them.⁸⁹

⁸¹ Verna L. Williams, *The First (Black) Lady*, 86 DENVER U. L. REV. 833, 841 (2008).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See Blue Telusma, *North Carolina Students Threatened with Suspension for Wearing African Headwraps*, THE GRIOT (Feb. 9, 2016, 2:51 PM), <http://thegriot.com/2016/02/09/north-carolina-students-threatened-with-suspension-for-wearing-african-headwraps/>.

⁸⁷ Clare Kim, *Florida School Threatens to Expel Student over 'Natural Hair'*, MSNBC (Nov. 26, 2013, 7:30 PM), <http://www.msnbc.com/the-last-word-94>.

⁸⁸ Morris, *supra* note 9, at 35.

⁸⁹ See Smith, *supra* note 18, at 267.

In too many instances, what is at work is a covert curriculum that seeks to push African-American girls toward traditional femininity. According to Signithia Fordham Black female students may achieve academic success under this model by creating a new self through:

silence and obedience with good grades, as well as the assertive suppression and denial of physicality and sexuality; . . . the assiduous commingling and maintaining of an academically successful persona *and* a “nice girls” persona with very little external reward or remuneration from parents or guardians, especially mothers.⁹⁰

This framework suggests that the best Black female student is one who recedes into the background. But enforcement of these policies comes at a great cost.

Students experience such school policies as creating educational environments more akin to penal settings. For example, one student in Morris’ study observed that the incarcerated persons “wear uniforms, we wear uniforms, they have a certain time to eat, we have a certain time to eat . . . it’s like we did something wrong, but we didn’t. . . We’re just here to learn . . . but it’s like we’re being punished.”⁹¹ Morris concluded that “disciplinary practices . . . often based on stereotypical assumptions about their lack of conformity, seemed to produce students who internalized these very assumptions.”⁹² Students began to believe that they were “oppositional or inadequate,”⁹³ which alienated them from the school altogether. Other research shows that such measures make students feel less safe.⁹⁴

School emphasis on the social control of students based on the confluence of race, gender, and class has dire implications for Black female students. Educator expectations for Black girls make them more vulnerable to harsh discipline, even for minor transgressions, which, in turn only increases the likelihood of greater misconduct.⁹⁵ Additionally, such policies undermine the educational enterprise, making student alienation from school more likely. Suspensions of African American girls place them at risk of not only leaving school prematurely, but also of teenage pregnancy or involvement in the juvenile justice system.⁹⁶ The next section examines the implications the foregoing issues for Title IX.

⁹⁰ Signithia Fordham, “*Those Loud Black Girls*”: (Black) Women, Silence and Gender “Passing” in the Academy, 24 ANTHROPOLOGY & ED. Q., 3, 10-11 (1993) (emphasis in original).

⁹¹ Morris, *supra* note 9, at 43.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See, e.g., Kayla M. Gass & Judson C. Laughter, “Can I Make Any Difference?” Gang Affiliation, the School-to-Prison Pipeline, and Implications for Teachers, 84 J. NEGRO EDUC. 333, 336-37 (2015).

⁹⁵ See *infra* note 88 and accompanying text.

⁹⁶ Blake et al., *supra* note 17, at 101.

IV. SCHOOL DISCIPLINARY PRACTICES, SJF, AND TITLE IX

Recognizing the interconnections of race and gender in an educational context pursuant to SJF requires addressing discriminatory disciplinary practices in an intersectional manner and developing solutions informed by the affected communities. Critical race feminist advocates have begun taking such steps, spurred, in part, by such movements as Black Lives Matter.⁹⁷ In so doing, they give voice to the experiences of African American girls and evoke a more robust analysis of the multiple dimensions of oppressions implicated in school discipline. It is in this spirit that Title IX should be among the tools to which ED, DOJ, and legal advocates turn in seeking change.

National movements drawing attention to police shootings of African Americans have highlighted the need for broad structural remedies to address longstanding inequities confronting communities of color, including the need for comprehensive education reform. For example, among the organizing principles for Black Lives Matter is an intersectional commitment to “family-friendly spaces and communal supports for our children,” which necessarily implicates public education and the racial inequalities plaguing it.⁹⁸ In a similar, but more specific vein, the platform for the Movement for Black Lives calls for a constitutionally guaranteed right to “a fully-funded education,” which includes addressing “zero-tolerance policies” and practices contributing to Black children being pushed out of schools.⁹⁹ Out of these movements—indeed, resulting from their own silencing of Black women’s experiences—¹⁰⁰ legal advocacy organizations have turned their attention to the struggles confronting girls of color.¹⁰¹ The African American Policy Forum (AAPF) and the Center for Intersectionality and Social Policy Studies (CISPS) have built upon data and conducted focus groups of Black girls in Boston and New York, through which they identified particular social ills affecting African American girls confront that suggest a role for Title IX.

CISPS and AAPF looked beyond the statistics regarding punishment to identify the causes of student misconduct. One key finding was that in some instances the misbehavior of girls stemmed from unresolved trauma relating to sexual assault or other interpersonal violence. In some instances, girls acted out

⁹⁷ See *infra* note 85 and accompanying text.

⁹⁸ *We Affirm that All Black Lives Matter*, BLACK LIVES MATTER, <http://blacklivesmatter.com/guiding-principles/>.

⁹⁹ *Invest-Divest*, THE MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/invest-divest/>.

¹⁰⁰ See KIMBERLÉ W. CRENSHAW ET AL., SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN 1 (2015) (observing that the movement against police brutality “has developed a clear frame to understand the police killings of Black men and boys, theorizing the ways in which they are systematically criminalized and feared . . . [y]et Black women who are profiled, beaten, sexually assaulted, and killed by law enforcement . . . remain invisible”).

¹⁰¹ For example, the NAACP Legal Defense Fund, and the National Women’s Law Center joined forces, publishing a report with important data on the status of Black girls in education with recommendations on how to eradicate discrimination confronting them. LETICIA SMITH-EVANS & JANEL GEORGE, UNLOCKING OPPORTUNITY FOR AFRICAN AMERICAN GIRLS: A CALL TO ACTION FOR EDUCATIONAL EQUITY (2014), http://www.naacpldf.org/files/publications/Unlocking%20Opportunity%20for%20African%20American%20Girls_0.pdf.

because of the pain they had experienced at home or at school.¹⁰² In others, girls were defending themselves from peer harassment, only to be disciplined for doing so.¹⁰³ When it comes to sexual harassment in schools, it bears repeating that Title IX requires officials to address known instances of such misconduct and imposes on them an obligation to provide students with nondiscriminatory learning environments.¹⁰⁴

CISPS and AAPF also found that girls frequently had greater familial responsibilities than did their male counterparts, which put them at risk for violating school rules about attendance.¹⁰⁵ Pregnancy and parenting is one such obligation that falls more heavily upon females than males. The lack of reliable, affordable child care that plagues adult women in the workplace creates a real barrier to young women. In addition, despite the fact that Title IX prohibits schools from discriminating based on parental status,¹⁰⁶ institutions fail to accommodate girls by such methods as relegating them to an inferior setting or making attendance so difficult, they ultimately drop out.¹⁰⁷

Finally, gender and racial biases converge in this context. In this regard, they construct stereotypes which educators respond to instead of the underlying infraction. A growing body of research concerning the stereotype threat provides evidence to question zero tolerance policies, the use of resource officers in schools, and harsh punishments for defiance, gum chewing, or cell phone usage. Adding gender to the analysis may increase awareness about the distinct – but equally harmful – presumptions about African American boys and girls. Because Title VII informs the scope of protection available under Title IX,¹⁰⁸ the latter should be employed to address such bias

V. CONCLUSION

The elision of gender in efforts challenging discrimination in school discipline has long roots but, at long last, may be turning around. Community organizing emerging from Black Lives Matter, which was founded by three Black women, has helped highlight difficulties confronting African-American girls and women and catalyzed advocates and academics to address the gendered nature of this site of discrimination.

This essay follows in the footsteps of important work being done on the ground. A significant way to build upon the momentum of these organizations is for ED, DOJ, and feminist legal advocates to include Title IX as a tool for addressing discrimination in school disciplinary practices. Doing so will shed light on the intersectional impact on young people of certain punishments and

¹⁰² *Id.* at 37.

¹⁰³ *Id.* at 10.

¹⁰⁴ *See, e.g.,* Davis v. Monroe County Bd. Of Educ., 526 U.S. 629 (1999)

¹⁰⁵ KIMBERLY W. CRENSHAW ET AL., BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED, AND UNDERPROTECTED 38 (2015), https://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/54d2d37ce4b024b41443b0ba/1423102844010/BlackGirlsMatter_Report.pdf.

¹⁰⁶ 34 C.F.R. § 106.40.

¹⁰⁷ CRENSHAW, *supra* note 105, at 38.

¹⁰⁸ *See* Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 286-87 (1998).

expose the need for developing intersectional approaches to behaviors that typically land students of color in trouble. But even more importantly, inserting Title IX into this discussion will give voice to the girls and young women who have been ignored for far too long.

