

(UN)DOING THE PROCESS: TITLE IX, LEGAL RHETORIC,
& THE POSSIBILITIES FOR CRITICAL CONSENT

by

SAMANTHA GRAINGER WEST

B.A., Whitman College, 2016

A thesis submitted to the
Faculty of the Graduate School of the
University of Colorado in partial fulfillment
of the requirement for the degree of
Master of Arts
Department of Communication

2019

This thesis entitled:
(Un)Doing the Process: Title IX, Legal Rhetoric & the Possibilities for Critical Consent
written by Samantha Grainger West
has been approved for the Department of Communication

Lisa A. Flores

Karen Lee Ashcraft

Phaedra Carmen Pezzullo

Date _____

The final copy of this thesis has been examined by the signatories, and we find that both the content and the form meet acceptable presentation standards of scholarly work in the above-mentioned discipline.

West, Samantha Grainger (M.A., Communication)

(Un)Doing the Process: Title IX, Legal Rhetoric & the Possibilities for

Critical Consent

Thesis directed by Associate Professor Lisa A. Flores

Confronted with panicked discourse around the statistics that 1 in 4 women, 6% of men, and 1 in 2 trans* students will experience sexual assault during their time in college, the U.S. Department of Education revisited 1972 law Title IX, and qualified sexual assault as creating a hostile learning environment on the basis of gender. Since then, a backlash has emerged, in which male Title IX violators are suing the colleges that expelled them. Using narrative criticism, this thesis examines four of these lawsuits with a specific focus on their complaints of lack of due process and gender discrimination against men. Each chapter investigates a facet of their shared narratives: chapter two explores the legal/administrative oscillations of Title IX administrative procedures; chapter three interrogates how these men narrativize consent; and finally, chapter four brings these two themes together to discuss how the lawsuits make sense of fairness and justice.

*For all of those struggling with sexual violence,
May we find peace.*

*For all of those struggling with heterosexuality,
May we figure this shit out.*

ACKNOWLEDGEMENTS

So much went into this thesis process, but mostly I'm just glad it's out of me. Not that it was unpleasant, but more like a constant state of restlessness. These thoughts I have about Title IX bubble in my brain, along the edges of my stomach, and right above my knee caps—just seconds from busting out. Like my mom always says, “It in me and it got to come out.”

To my powerhouse committee: you inspired every sentence of this work. Phaedra, thank you for the highest unflinching standards I have ever come up against—you believed that I could do it, so I did it. Karen, your bold use of theory and writing style is a constant inspiration, I left every conversation in your office my head swimming with a million new ideas. Lisa, my advisor and life coach, I have accumulated so many nuggets of truth from you: that wine is the perfect grading buddy, the importance of a good topic sentence, that is okay to say no to commitments, and that sometimes you don't know what you're arguing until you've argued it. Thanks for following me down the rabbit hole of desperately trying to make sense of these narratives that played into every dominant discourse we seek to resist.

To my parents, thanks for understanding of the lack of middle ground between the long periods of silence and long rants about my feelings. Y'all are the real heroes. Mackenzie, you have saved me multiple times from stress-induced impulse buys and from quitting grad school to run off to Mexico; I'm ready to be your neighbor! To my cohort of CU grad students, there has been a lot of whining, tears, laughing, wine, and momos from Tibet Kitchen, and for those things I am forever grateful. You made me feel like I wasn't alone in this very individualized endeavor we call grad school. To Kellie & Marti, the surprise chais, snacks, and texts out of nowhere never failed to revive me—I love you introverts. To Rebs, Kara, Shira & Laura, you brought out my best moves and gave my overloaded brain a break—y'all slay all day. To Anna & Rachel, I am so happy that best friends could come into my life right when I had given up hope of feeling at home in Colorado. To Evan Peter West, my love, partner, and inspiration, whew, it's been a rough few years, but I did it with you as my sounding board, grammar advocate, cat co-parent, and sous chef, so now that we're both at the finish line I quote Elle Woods: WE DID IT!!

CONTENTS

CHAPTERS

I.	Mapping Claims of Due Process as Title IX Teeters.....	1
	The Cases: Four Tales of Accountability and Backlash	8
	A Taxonomy of Sexual Violence Literature, 1970-2018.....	15
	Rhetorical Law as Constitutive and Constructive.....	22
	Method: Narrative Criticism.....	26
	Chapter Preview.....	30
II.	The Legal/Administrative Oscillations of the 2011 Dear Colleague Letter	40
	Responses to the DCL in Context.....	42
	Law as Rhetoric	50
	Law as Narrative.....	54
	Narrative Analysis of the 2011 DCL	58
	Concluding Thoughts.....	68
III.	Between Yes and No: The Complexities of Consent.....	74
	Circumventing State Law: Title IX & Consent.....	80
	Performatives of Gender, Consent & Precarious Life	83
	He Said, She Said: Narrativizing Consent	93
	Implications for Heterosexuality & Possibility of Critical Consent...	100
IV.	Legalizing Sexuality: A Pro/Con List.....	109
	Guilty Until Proven Innocent?	112
	A Laundry List of Implications	120
	On Future Studies of Sexual Violence in Communication.....	129
	SELECTED BIBLIOGRAPHY.....	134

Chapter 1

Mapping Claims of Due Process as Title IX Teeters

The United States is plagued by the issue of sexual violence. Every 98 seconds another person experiences sexual assault—it affects hundreds of thousands of Americans each year. 8 in 10 rapes will be committed by someone the victim knows.¹ However, only 6 out of every 1,000 rapists will serve time in prison.² It is estimated that 1 in every 6 women will experience attempted or completed sexual assault in her lifetime, as will 3% of men, and 1 in 2 trans* people.³ Author and journalist Susan Brownmiller famously argued that the proliferation of the sexual violence was much higher than imagined in her 1975 book *Against Our Will: Men, Women, and Rape*, as sexual violence was assumed to only happen rarely and in certain (often racialized) circumstances.⁴ Her book as well as law professor Susan Estrich’s 1987 book *Real Rape*—which added the term “date rape” into our lexicon—made public conversations that had previously occurred behind closed doors and been swept under the rug.⁵ It is from the conversations documented in and surrounding these texts, and the 1991 testimony of law professor Anita Hill during the confirmation of Supreme Court Justice Clarence Thomas that we then see discourse around the epidemic of sexual harassment and assault included in the workplace and across public culture.⁶

The statistics I have cited are broad estimates based on sampling data, but most organizations conducting research on the perpetuation of sexual violence assert that the number of actual assaults is much higher, that reports are low due to the stigma attached to reporting or admitting to being sexually assaulted. This stigma comes from both the pervasive disbelief of rape victims and the victim-blaming that occurs in what Brownmiller called a “rape-supportive culture,” (shorthand: rape culture).⁷ In rape culture, rape is both normalized and made invisible

as victims are continuously mistrusted and/or blamed for their own assaults under the auspices of clothing choices, consumption of alcohol, or the age-old assumption that rape occurs because men cannot control their sexual urges (a.k.a. “boys will be boys”). Within rape culture, most forms of sexual or gender violence are easily socially erased.

However, change is on the rise. We reside in what pundits, politicians, and scholars alike are calling a #MeToo moment—a movement for sharing narratives of sexual violence started by activist Tarana Burke in 2006 on social media to create “empowerment through empathy” for communities of color who experience sexual violence at high rates.⁸ #MeToo went viral in 2017 after it was tweeted by white actress Alyssa Milano and sparked the sharing of sexual violence narratives by millions of people worldwide. As a result, we have started to see consequences for perpetrators of sexual violence: film producer Harvey Weinstein, actor/comedian Bill Cosby, television host Bill O’Reilly, and comedian Louis C.K., to name a few who have been fired and/or prosecuted for sexual misconduct made public by #MeToo. While many tout #MeToo as progress, others note that it often takes multiple victims sharing their trauma to take down just one perpetrator.⁹ In this way, the disbelief and victim-blaming inherent in rape culture hampers the progress of #MeToo and is still racialized. For example, it took almost 20 years for rapper R. Kelly to be charged with sexual abuse against a multitude of women of color occurring from 1998-2010, which was partially made possible by docuseries *Surviving R. Kelly* and video evidence procured by white lawyer Michael Avenatti.¹⁰ However, the real effect of rape culture is not just silence, disbelief, and blame—it is apathy. This apathy has become abundantly clear in the recent confirmation of Supreme Court Justice Brett Kavanaugh, where even with a slew of victims and witnesses ready to share their stories, and even with a plethora of evidence at their disposal, U.S. Senators did not care enough to change their vote.

Feminist scholars have been interested in rape culture for some time, continue to track the implications of the #MeToo movement, and have also studied microcosms of these issues as they exist and persist on college campuses.¹¹ Campus sexual assault (CSA)* came to the forefront of the news cycle via a 2007 National Institute of Justice (NIJ) study that concluded that throughout their time in college, 1 in 4 women, 1 in 6 men, and 1 in 2 trans* individuals would experience attempted or completed sexual assault.¹² News articles took up this statistic, marking college campuses as some of the most dangerous places in the United States.¹³ Newspapers and magazines have reported on some aspect of Title IX regularly—not to mention online blogs, op-eds, podcasts, and entertainment/news sources like BuzzFeed. The May 2014 cover of *Time* magazine featured a collegiate pennant with the word “RAPE” printed in large font, and subtitled: “The Crisis in Higher Education.”¹⁴ The documentary *The Hunting Ground* that features stories about Title IX and campus sexual assault was shown at over 700 colleges and universities only months after its release.¹⁵ In response to the NIJ study, the re-passing of the Violence Against Women Act, and the overwhelming public response, the federal government revisited Title IX, the 1970’s era law, to push colleges to try to address the problem *on the campus*. Consequently, colleges are now required to adjudicate incidents of sexual violence. Since 2011, many campus survivors have started using these Title IX campus disciplinary procedures as an accountability mechanism instead of or in tandem with police proceedings.

* I use the umbrella term “campus sexual assault” (CSA) when describing the group of people included under the purview of Title IX. By “campus,” I refer to those who experience sexual assault during their time in college, not necessarily to a specific location of the assault. In federal statute, there are three levels of illegal sexual behavior: sexual harassment includes any unwanted words spoken, and/or physical motions; sexual assault is unwanted sexual touching without penetration; rape specifically involves penetration of mouth, anus, and/or vagina. Federal Title IX recommendations follow these distinctions when matching disciplinary sanctions to the severity of complaint. By this caveat I do not wish to imply that severity can be measured in a three-sizes-fit-all approach, but rather to describe the ways in which understandings of sexual misconduct are circulated by practitioners. These distinctions do not exist in popular discourse in the same way. “Campus sexual assault” is circulated as if all incidents were the same, and many survivors—though they experience different events—take on the phrase to describe their own assault, if only to create a sense of community around shared experiences.

As a quick aside: overwhelmingly, discussions of CSA have been imbued with whiteness as many of the more famous CSA cases detail accusations of black athletes assaulting their white female counterparts.¹⁶ While this overwhelming whiteness may reflect a history of who has access to institutions of higher learning, the black male rapist is a common trope in U.S. society, most famously depicted in Ku Klux Klan recruitment film *The Birth of a Nation*. This is a comfortable narrative that has historically gone unnoticed in the second wave feminist analysis of sexual violence noted in the preceding paragraphs. While these germinal texts around sexual violence have played a role in (re)producing the essentialist trope of the black male rapist, much contemporary scholarship has responded to them critically, pushing for more intersectional approaches. I hope to follow their lead in efforts to intersectionalize the discourse around CSA through a critical discussion of whiteness because we already know that statistically people of color experience sexual violence at higher rates than white people, that LGBTQ people are twice as likely to experience sexual violence than straight people, and that sexual violence perpetuated against disabled people is common but wildly under-reported. The word “intersectionality” calls to mind intersecting marginalized identities, but as Nakayama & Krizek note, the invisibility of whiteness is what creates whiteness as the norm, and we must interrogate the norm just as much as we interrogate what is considered marginal.¹⁷ My study seeks to interrogate the whiteness, masculinity, and upper-middle-class-ness that imbue much of the national conversation around CSA. This is not a conversation solely for and about white women, as Emma Sulkowicz’s *Carry That Weight* protest/art installation showed in its inspiration of thousands of students worldwide to carry the mattresses upon which they were raped around campus.¹⁸ However, much like the #MeToo movement, the reframing of Title IX to provide a certain amount of accountability in cases of CSA and in order to protect students has taken a (re)turn.

Recently, Title IX disciplinary investigations have been called into question for failing to provide due process to those accused of sexual assault. Due process, we know colloquially, is adherence to criminal codes of conduct including your Miranda Rights, the right to a fair trial, to face your accuser, and your right to a lawyer.¹⁹ It is deemed critical to national commitments to innocence until proven guilty. It is the process designed to ensure and justice as fairness under the law. According to the Due Process Clauses of the United States Bill of Rights, “government is prohibited from unfairly or arbitrarily depriving a person of life, liberty, or property.”²⁰ Due to the mechanisms put in place by Title IX, many of which do not require due process, this constitutional right comes into question when conducting an administrative adjudication of campus-based harm, especially when that harm is (by any other legal definition) a felony. Since 2011, due process has raised critical concern. A backlash has formed in response to Title IX processes in a bout of at least 15 lawsuits against colleges nationwide, four currently at my home institution of University of Colorado Boulder (CU).²¹ These lawsuits and accompanying narratives are from the accused (predominantly male students and their parents) who have been expelled from their colleges attesting that Title IX proceedings do not follow due process as is dictated by procedural law.²² Many of these cases have been dismissed at the district court level with the judges citing Title IX as an administrative proceedings²³ (and thus not needing to follow the exact nature of due process), but several very recent cases have been found in favor of the accused and/or settled for amounts as much as \$15,000.²⁴ Narratives from these lawsuits center on gender discrimination against the accused. For example, one of these students alleges that the school discriminated against him for being male by believing female witnesses over his testimony.²⁵ Another used the past writing of a Dean to accuse her of privileging female opinions.²⁶ President Donald Trump, an accused rapist himself, has recently given credence to a

great number of these cases bemoaning that it is “a very difficult time for young men in America... now you’re guilty until proven innocent—that is a very difficult standard.”²⁷ Trump’s assertion flies in the face of a 2014 study of over 125 colleges nationwide that found that only 1 in 3 Title IX cases resulted in expulsion for the respondent, which to be clear, is a far lesser punishment than they would have gotten if convicted by jury.²⁸ But let’s not let facts get in the way of a popular narrative: that Title IX processes are actually discriminating against men.

Across these narratives of discrimination, I have noticed that three tensions have emerged. First, the tension between rhetoric and law. We can see examples of this clash in some of the cases that U.S. District Court judges have dismissed. Many of the judges have dismissed cases labeling Title IX as an administrative process, not unlike an employee code of conduct. Here, I note a split between law and rhetoric where law is being cited by the student, but Title IX processes are placed in a category of administrative rhetoric. I question how this bifurcation has enabled certain practices of adjudication of sexual violence and constrained others, and how the bifurcation can be troubled. The second tension I find exists around what qualifies as sexual consent. Much of this tension relies on gendered assumptions of heterosexuality—who gets to distinguish sex from rape? In the ever-gendered arena of heterosexuality, is it possible that “yes or no” narratives we tell about sexual assault are failing us when they fail to account for power in relationships? Finally, I discuss the tension between fairness and justice. Criminal processes have been coded as fair to all (meaning that all are treated the same). Title IX and the other educational amendments were engendered by the 1964 Civil Rights Act which seeks to amend the concrete processes of U.S. law in order to make reparations for otherwise legal discrimination (the 3/5 compromise, poll tax, segregation, and more). These amendments unearth the messiness and nuance of providing equity, instead of the rigid processes of legalized equality.

I ponder how the notoriously clear-cut legal system can address the nuance of issues like consent, which is often not nearly as clear as provided by law.

Scholars have analyzed rape culture from multiple angles but have yet to incorporate studies of due process beyond the narrowness of criminal proceedings in trying rape cases. Scholars have also examined the relationship between rhetoric and law, and some have examined the relationship between law and sexual assault, but not with a CSA framework. There have been at least 15 publicized lawsuits of the accused against their college in the past 4 years, meaning there are most likely countless more that have been kept private. This thesis will examine the intersection of law, rhetoric, and campus sexual violence because these cases signal a change in the winds—a backlash that is hitting colleges where they are vulnerable: their reputation and their wallets. I contend that feminist rhetoricians must attend to the narrative circulation of due process.

I analyze four narratives from alleged CSA perpetrators who are suing their schools for failing to provide them with due process in their Title IX investigations. I pull these narratives from lawsuits filed by the men, themselves. I will consider the question: what rhetorical mechanisms are at play in accounts made by alleged perpetrators of CSA? Subsequently, my chapters will unfold as follows: first, I ponder the rhetorical mechanisms that sustain or disrupt narratives of being denied due process of law under Title IX particularly as they turn around tensions between law and rhetoric; second, I assess the relationship between claims of failed due process and how alleged perpetrators claim consent through larger narratives of heterosexuality as dominance and subordination; and I conclude by considering the gendered assumptions at play in these accounts that enable labeling Title IX as biased and law as fair and thus just. But before jumping into the chapters, I set up my project in this introduction. My goals in this

introduction are to lay the foundation for my intervention in sexual violence scholarship and connect it to Critical Legal Studies. I move through the following four sections. First, I outline the cases I have chosen to examine throughout the course of this thesis. Second, I review existing sexual violence literature, noting gaps where my research may fit. Third, I intervene in the literature at the intersection of rhetoric and law in order to discuss how law is constitutively constructed. I close with a discussion of narrative criticism, my chosen method, and a quick chapter preview.

The Cases: Four Tales of Accountability and Backlash

Thanks to the solidarity provided by #metoo, many famous and powerful abusers resigned, were fired, and/or were imprisoned as hordes of survivors came forward to share their stories. On college campuses, many perpetrators of sexual violence are being held accountable for violating Title IX. Conversely, as I mentioned earlier, we are also seeing a backlash against survivors of CSA. In short, just as survivors spark national attention to rampant sexual violence through lawsuit and protest, so too have the accused reached for the microphone. I have collected the narratives of four undergraduate men who are suing their respective colleges (University of Cincinnati, University of Colorado at Boulder, University of Michigan, and Texas A&M University) for failing to provide them with due process. These narratives take the form of complaints submitted to their regional district court, obtained through public records requests. The narratives these John Does tell of their experiences with their school's Title IX proceedings share major themes to which rhetoricians should attend, as they are symbolic and persuasive in nature. A quick note: some of these men have released their name and some have not. For the sake of clarity, as too many names make for less agile prose, I have demarcated them all as their school nickname + "Doe" (e.g. Cincy Doe, Boulder Doe, Michigan Doe, and TAMU Doe).

Cincy Doe filed his complaint in response to being suspended for a year for raping a fellow classmate (pseudonym) Jane Roe in 2015. The two connected on the dating app Tinder and met up at Doe's apartment to work on homework together. After initiating some kissing and touching, Doe reached for a condom, which caused Roe to request him to "hold on."²⁹ This is the moment of contested consent by which Cincy Doe took to mean "talk for a bit and then engage in consensual [vaginal] sex."³⁰ Roe claims "hold on" meant for them to stop completely because she did not want to have sex on their first date. Afterward, Roe hung around his room until Doe asked her to leave and never contacted her again. Doe claims that his inability to cross-examine Roe exemplifies the assumption of his guilt by Title IX investigators, and that "hold on" is not "stop," and that she had consented to portions of the sexual activity, so the other activities represent a "gray" area.³¹ He contends that the University of Cincinnati denied him his due process rights by assuming his guilt and refusing him his right to legal representation.

Close to my Colorado home, Boulder Doe sued the University of Colorado Boulder (CUB) for violating his due process rights when he was expelled for twice sexually assaulting a female classmate, (pseudonym) Jane Roe.³² The first incident occurred in the spring of 2014 when Doe pinned her down and touched her genitals.³³ The 2015 rape occurred after a night of drinking. Doe claims to be under the impression that he and Roe engaged in a consensual sexual encounter which he stopped before completion because he felt guilty about cheating on his girlfriend.³⁴ The next day, Roe did not recall anything from the night before due to the amount of alcohol she had consumed and became increasingly traumatized to hear that Doe had violated her.³⁵ Six months later, Roe reported the rape to the school's Title IX office and to local police. After an eight-day trial, a jury found Doe not guilty of sexually assaulting Roe.³⁶ However, the Title IX investigation concluded that Doe had violated the CUB Title IX policy, and the school

suspended him in April of 2016, which prevented him from completing the final 6 credits of his bachelor's degree.³⁷ Doe argued that the Title IX investigation was skewed by the preponderance of evidence standard, and is currently suing CUB for violating his due process rights and depriving him of his educational future.³⁸

Michigan Doe was expelled during his final semester at University of Michigan for raping (pseudonym) Jane Roe during a house party at his residence. According to Doe, the two went to his room where they each drank a shot of vodka, and then later engaged in consensual sex.³⁹ Afterward, he and his roommate noticed that Roe was visibly distressed, quickly gathered her things, and left.⁴⁰ The Title IX investigation concluded that Roe was incapacitated at the time of the assault and thus was not able to consent even if she was interested in sex with Doe. Doe is suing his school for violating his due process rights by using an unconstitutional definition of "incapacitation."⁴¹

Texas A&M University (TAMU) expelled TAMU Doe for performing anal and oral sex without consent. He met (pseudonym) Jane Roe through the Tinder dating app and planned a meet-up at Doe's apartment. According to Doe, both parties knew they wanted to engage in sexual activity, but Roe indicated that some of the sexual activity was not agreed upon.⁴² The two had uncontested consensual vaginal intercourse, but then Doe initiated anal and oral penetration to completion that was deemed non-consensual in the Title IX investigation. Doe contends that TAMU's Title IX evidence standards and investigatory practices are partial toward accusers.⁴³ TAMU Doe argues that the university was biased against men accused of sexual assault, assured to find them responsible.⁴⁴

I find these four cases striking in that they signal a change in narrative that has come to the forefront. Whereas much of the discourse around CSA has been about protecting women

from sexual assault or better serving those who have been victimized, these four cases share a focus on (the lack of) due process. Schools have been dealing with perpetrators suing for due process since 2011, but most cases have been dismissed by judges. However, that precedent is shifting. In 2016, CUB settled with a former student who sued under the auspices that he was expelled for sexual assault without being granted due process for \$15,000.⁴⁵ These complaints are gathering steam; they are *doing something*.

Throughout this thesis, I plan to perform a narrative criticism of the four lawsuits that have received national attention for complaints of a lack of due process from the accused. In both cases, the accused consider their right to due process as that reflected in court proceedings where evidence is presented to a jury, and there is cross-examination of plaintiff, defendant, and witnesses by a team of lawyers. To them, and arguably to the United States Judicial System, fairness and justice is caught up in due process. However, as Title IX has been federally defined, all of the aforementioned aspects of due process are prohibited in college investigations as they are considered unfair for survivors of assault.⁴⁶ I hope to examine the role the intersections of rhetoric and law play in perpetuating campus sexual assault.

Setting the Title IX Scene

With its passage in 1972, Title IX marked a major shift in education. For the first time, women were *guaranteed* access to all federally funded educational programs, including post-secondary institutions and any sport of their choosing. For about 35 years, Title IX had a relatively silent tenure as a law. There were minor kerfuffles about representation in athletics and scholarships, as well as a congressional amendment that excluded “revenue sports” like football from being required to have a female counterpart, but it did not make national headlines for much of that time.⁴⁷ This section will demonstrate how Title IX has been re-signified over time,

though the original legal language of Title IX has never been altered. But since 2011, there have been many conversations about Title IX as both a progressive policy to help survivors feel safe on campus and a discriminatory policy that hinders male access to college.

On April 4, 2011, three years after the NIJ study release, the Department of Education's Office for Civil Rights (OCR) released a Dear Colleague Letter (DCL) placing campus sexual assault (CSA) under the umbrella of Title IX. Prior to 2011, Title IX did not cover CSA; it was typical practice on college campuses to direct victims to local law enforcement. Sexual harassment on a college campus was covered under Title IX, but it was used to protect athletes from harassment from coaches or serve to adjudicate gender-based hate crimes that occurred on campus. In the DCL, the OCR expanded Title IX's definition of sexual harassment to include sexual assault, and in that expansion explicitly included sexual assault in the definition of what constitutes a hostile environment based on gender.⁴⁸ This expansion of sexual harassment indicated a move away from understanding gender equity through access to and representation in the university to understanding access and representation as hinged around the threat and/or after effects of sexual harassment and assault. The exact legal status of the DCL is murky. Definitively, a Dear Colleague Letter is an official, public way for federal agencies to communicate with Congress and institutions under their purview.⁴⁹ There is no legal mandate to follow DCL recommendations, but as noncompliance threatens a school's access to the federal funding that is essential for both public and private schools, most schools have complied.⁵⁰

The 2011 revision of Title IX redefined sexual harassment to include complaints of sexual assault and rape which had in the past been directed to the local police, as both are felonies.⁵¹ Due to the DCL, colleges and universities are now required to act as judge and jury to accusations of sexual misconduct that occur on their campuses or by students, faculty, and

staff.⁵² The DCL outlined recommendations for how schools should adjudicate sexual assault, stating that college grievance processes should use a more lenient evidence standard than used in criminal rape cases. Rather than the “clear and convincing” standard of a criminal investigation, college processes should rely on a preponderance of evidence.⁵³ A preponderance of evidence standard means that “it is more likely than not that harassment or violence occurred.”[†] Even with the new standards, the DCL does not define “due process” in text or footnote, so schools are left to define it for themselves.⁵⁴

However, while there are legal aspects to Title IX, the DCL identifies university Title IX processes as definitively not legal proceedings. Title IX disciplinary proceedings are administrative by nature (as they are conducted by school administrators, not officers of the court), with a visible lack of legal power and restriction in their use of a preponderance of evidence standard (instead of “clear and convincing”), a 60-day time frame (far shorter than most court cases), and relatively low-stakes consequences of expulsion (as compared to jail time).⁵⁵ In a 2014 report titled “Not Alone,” The White House Task Force to Protect Students from Sexual Assault made the distinction between judicial proceedings and Title IX. They wrote, “These two systems serve different (though often overlapping) goals. The principal aim of the criminal system is to adjudicate a defendant’s guilt and serve justice. A school’s responsibility is broader: it is charged with providing a safe learning environment for all its students – and to give survivors the help they need to reclaim their educations.”⁵⁶ With more lenient evidence standards and the absence of police or lawyers, the Title IX processes are framed as a low stakes

[†] The DCL mentions that public or state schools should use due process because they are considered government entities based on their funding, but does not indicate how to do that while still meeting the DCL standards. Private schools are not required to comply with due process standards.

accountability structure for survivors of sexual assault, many of whom do not seek out a rape kit, often delete, throw away or wash off evidence, or repress their trauma for months or even years.

Due process is part and parcel of most arguments against collegiate adjudication of CSA. In many op-eds and interviews, college men, their parents, and a variety of law professors argue that no one should be denied their right to due process when accused of sexual assault.⁵⁷ Many respondents detail an unevenness in the treatment of parties in their case: that women cry rape and are believed without proper evidence—“proper” often defined as evidence that would be accepted by police departments to qualify for an arrest (rape kit, photo/video footage, physical bruising, etc.). Legal scholars tend to take issue with Title IX’s “bastardization” of due process as a matter of precedent: The Bill of Rights deems that the commitment of a crime cannot be judged outside of due process.

As I have shown, Title IX adjudication procedures have been a site of trauma and contention since 2011, but now under the Trump Administration, campus adjudications have reached a critical point. Each new president “cleans house” after being elected, replacing members of the previous cabinet with new ones, and with new cabinet members come new policies. After her 2017 cabinet appointment was finalized, Education Secretary Betsy DeVos officially rescinded the guidelines of the DCL, specifically the requirement that schools use a preponderance of evidence standard—what she called a “kangaroo court...system run amok.”⁵⁸ In its statement, the Department of Education wrote that the 2011 policy “lacked basic elements of fairness.”⁵⁹ Most recently (September, 2018), the Department of Education (DOE) has drafted new Title IX regulations: The definition of sexual harassment has been narrowed to only applying to a pattern of behavior, instead of an isolated incident; schools must use “clear and convincing” instead of preponderance of evidence; incidents have to be reported to school

officials/campus police and cannot be reported to a professor or RA; mediation is the preferred form conflict resolution; the accused can demand “evidence” from survivors and both can cross-examine each other during an investigation; most of the accountability measures for schools failing to comply with Title IX are gone; and the assault has to occur on school grounds for it to count under Title IX (which excludes assaults that occur in off-campus apartments, Greek housing, and study abroad spaces).⁶⁰ These regulations were leaked through the *New York Times*. DeVos has stated that these changes are meant to protect those falsely accused of sexual assault by adhering to criminal standards of investigation. Many of the issuances mentioned are being debated in a few U.S. district courts and may be subject to change as this project continues.

A Taxonomy of Sexual Violence Literature, 1970-2018

There is much scholarly attention paid to sexual violence. Feminist conversations about sexual violence are more or less isolated to discussing survivors of violence: interrogations of classifications of trauma, narratives of victimhood, and the gendering of harassment and assault. Legal scholars tend to document the way that sexual violence law shifts as social mores shift, usually through famous cases and public outcry. Communication scholars tend to focus on the ways that victims are demonized in the public eye. This section seeks to create a taxonomy of the ways sexual violence has been considered within scholarly research: rhetorical patterns that set up dis/belief and gendered assumptions of sexual violence.

Rhetorical Production of Dis/belief

As many scholars and non-scholars alike might note, one of the problems with gender violence is that victims who come forward to share their story are not believed. Scholars have already shown interest in those narrative patterns. Brownmiller was one of the first to document the ways in which the law suppresses reporting of violence, upholds virtually impossible

evidence standards, and uses victims' past against them in court.⁶¹ She identified and deconstructed many of the rape myths to which our society still clings (e.g. uncontrolled male lust leads to rape, that women vindictively cry rape, clothing invites rape, the rapist is always a stranger).⁶² Her work marked the start of many victim-centered support systems: crisis centers, hotlines, self-defense classes, trauma counseling, and more.

Susan Estrich is another founding sexual violence scholar, best known for her book *Real Rape*, in which she refutes the common rape myth of the stranger in the bushes, even while noting that she is a victim of stranger rape herself.⁶³ Estrich's major contribution as a legal scholar shows how 1970s U.S. law was only able to prosecute stranger (or "real") rape, and not "simple" rape committed by a date, friend/family member, or partner. Much of the scholarship seeking to reframe rape draws anguish from understanding rape laws to be written by and for the benefit of white men. This has been primarily theorized by Catherine MacKinnon, who in 1987 wrote that men have defined what rape is by determining what they viewed as a violation of women (based on what they consider to be sex).⁶⁴

In the process of identifying the construction of disbelief, scholars have sought to combat how the inherent disbelief of victims is sanctioned by law. Estrich compares rape to fraud, arguing that money procured in deceit is a crime no matter how it is committed, so the same should be applied to sex.⁶⁵ Susan Caringella was inspired by this comparison and focused on why rape is not punished like its reciprocal crimes: homicide and arson.⁶⁶ She combines Estrich's notion that courts ignore the issue of mens rea (commonly understood as criminal intent)⁶⁷ and Catherine MacKinnon's argument that rape law "often contains a mental element, mens rea."⁶⁸ Caringella argues to extend notions of criminal negligence liability and mens rea to create a presumptive involuntariness in consent.⁶⁹ These solutions show a focus on the trial

process from a victim-centric angle because, in a climate of gendered disbelief, prosecutors have more than a “clear and convincing” evidence standard stacked against them.

Communication scholars have noted how rape trials participate in meaning-making around sexual violence, as the conversation around the trial influences legislation and social mores. Rape trials present resistive potential for deconstructing public disbelief of victims. Mass media scholar Lisa Cuklanz argues that rape trials and the ensuing media coverage participate in cultural meaning-making—they trumpet the issues they involve but also provide a site for writers and observers to adjudicate not only the trial but ideas about rape in general.⁷⁰ However, she also argues that with the trial’s traditional emphasis on the credibility of the victim (a key witness), coverage of the proceedings disproportionately follows suit.⁷¹ The rhetorical construction of meaning around violence can be seen in Valerie Palmer-Mehta’s examination of the media coverage of testimony by survivors of Bill Cosby’s sexual assault, where she argued that these testimonies (re)shape dominant discourses about sexual violence by reclaiming their narratives.⁷² Similarly, Shannon Holland’s interrogation of the coverage of the 2004 Super Bowl Halftime Show where singer Justin Timberlake ripped singer Janet Jackson’s shirt off.⁷³ She argues that the coverage of the event centered the victim (Jackson) as culpable (and a slut), effectively deflecting attention away from the perpetrator (Timberlake).⁷⁴ Rachel Griffin also found this to be true in both the case of celebrity boxer Mike Tyson’s rape of actress and Miss Black America contestant Desiree Washington, and alleged rape of exotic dancer Crystal Mangum by three Duke lacrosse players.⁷⁵ Griffin concluded that in both cases the victims were simultaneously invisible as survivors of sexual violence and hypervisible with dominant caricatures of black womanhood.⁷⁶ The coverage of the assaults was relatively indifferent to the violence, and the victims were subject to the assumptions that all black women lie about sexual assault. Griffin

pointedly notes that NFL player Michael Vick served jail time for animal cruelty when celebrity men like OJ Simpson, Ray Rice, R. Kelly, Kobe Bryant, Chris Brown and countless others who have been violent to women (especially women of color) rarely serve time.⁷⁷

Within the conversation about the production of disbelief, a third tension emerges in how to think through stranger rape *and* intimate partner violence, as they both occur. I have noticed that some scholars collapse domestic violence or intimate partner violence and sexual assault not only because they often occur together, but also in order to dispel the mythology around stranger rape (a laudable endeavor).⁷⁸ Across this project, I hope to complicate that notion further by nuancing the middle ground between relationship violence and sexual violence. While 8 in 10 rape victims know their attacker, I believe CSA is a rich example of the variety of relationships (abusive or otherwise) that might be able to complicate the stranger/intimate partner binary.⁷⁹

Gendered Assumptions about Sexual Violence

Linguistically scholars have noted patterns in how we discuss sexual violence. Across this work, arguments emerge of the erasure of responsibility in passive voice, the importance of identification, and issues with the gendering of sexual violence so that its victims can only be female. Feminist linguist Julia Penelope illustrates how sentence structure circulates, becoming more passive from “John beat Mary” to “Mary is a battered woman.”⁸⁰ Penelope argues that this change in language holds victims accountable rather than perpetrators; this pattern holds true in court settings with the word “accuser” as opposed to “victim.”⁸¹ Documentary filmmaker and feminist activist Jackson Katz uses Penelope’s linguistic work to argue that the way we structure language conspires to keep our attention off of male perpetrators of domestic violence.⁸² Currently, communication scholars are engaged in this conversation of naming. Scholars such as Nina Reich and Kate Harris have theorized meanings around sexual assault language like

“victim” and “rape.” Harris notes that in interviews many people who have experienced what might legally be understood as rape do not name their experiences as such.⁸³ Reich problematizes the victim/survivor dichotomy arguing that it perpetuates a similar empowered/disempowered binary and instead contends that we move toward a more nuanced understanding of the self-identification process of those who have experienced violence.⁸⁴ Elsewhere, Harris argues that we should let go of the term “gendered violence” as it is laden with whiteness and perpetuates the invisibility of perpetrators.⁸⁵ Instead, she pushes for calling it “violent gender,” which she deems a more politically agile term that offers a perpetrator-centered view of this violence. Ashley Mack, Carli Bershon, Douglas D. Laiche, & Melissa Navarro respond that we should not understand violence as existing outside of gender in the first place.⁸⁶ They instead argue that “theorizing gender and violence as co-constitutive compels us to examine the systemic nature of gendered violence domestically and globally, but also on our campuses.”⁸⁷ For these authors, understanding gender and violence as inextricable allows us to hold institutions accountable so that they cannot excuse such violence with typical frames such as “boys will be boys.”

Scholars have also sought to show gender operates within assumptions about sexuality. These assumptions construct men as agents and women as objects—men as penetrators and women as empty vessels. Scholars have argued that these constructions romanticize violent sex. Early gender scholars center the public/private and mind/body distinctions that confine gendered and raced bodies to their historical spaces (kitchens, prisons, poverty, etc.).⁸⁸ Elizabeth Grosz wrote of the relations of gendered bodies to space, focusing on disrupting the gendered mind/body split, and that spaces are always-already gendered.⁸⁹ In *Justice and the Politics of Difference*, Young contends that inclusionary participatory frameworks like justice systems—

created by and for white, heterosexual, Christian, property-owning cis-men—assume a homogenous public that does not exist.⁹⁰ She is suspect of blanket equality and impartiality in both policy and procedure because she argues that difference should not be ignored, but affirmed, as those differences tend to exist on lines of gender, race, class, and sexuality.⁹¹ These arguments are relevant to thinking about violence as they position issues that would normally be sequestered to the individual have enormous political consequences for gendered bodies.

In this way, the personal is always political, as Julia T. Wood wrote. Wood is a foundational author in the communication field for injecting gender into discussions power dynamics in interpersonal relationships, focusing on how personal interactions scale up.⁹² Brownmiller was one of the first feminist scholars to theorize that rape was more about gender dynamics between men and women than an individual crime of passion. In later works, Wood used first-person narratives of sexual violence to interrogate the way that society silences victims when framing sexual assault.⁹³ Celeste Condit has theorized the way that violence has permeated discussions of feminism so that all hegemonic practices (such as rhetoric) are implicated as violent patriarchal acts.⁹⁴ She uses moments of gender violence and spousal abuse to interrogate how the gendered private sphere silences women, effectively stopping them from speaking out and making real change.⁹⁵ Condit argues that “dichotomy feminism,” which purports to sanction the private sphere for women, since they have been historically denied access to the all-male public sphere, is not useful because it perpetuates past violence.⁹⁶ Bryan McCann has offered some insights into (in)visibility of gender within violence with his discussion of Charlize Theron’s portrayal of Aileen Wuornos—a famous lesbian serial killer prostitute who killed men at truck stops.⁹⁷ He notes that systems of gendered oppression are missing from the film, that Theron (a beautiful Hollywood actress) won her Academy Award not for her depictions of PTSD

and sexual violence, but for delving into the “monster” that was Wuornos.⁹⁸ To be seen as woman is to be constantly under threat of violence, and the way that we communicate about violence often ignores its gendered roots. In this way, sexual violence is a system of power and domination, rather than an interpersonal problem.

Other scholars contend that sexuality (both in act and representation) is caught up in gendered power dynamics. Suzanne Enck and Blake McDaniel use musicians Rhianna and Eminem’s video “Love the Way You Lie” to illustrate how the U.S. is invested in romanticizing cycles of abuse to (re)secure hegemonic masculinity.⁹⁹ Enck has elsewhere argued that actor Kevin Spacey’s reframe of sexual assault accusations as a coming out narrative masks acts of sexual aggression against a child.¹⁰⁰ MacKinnon contends that misogyny stems from sexual sadism, writing, “If violation of the powerless is part of what is sexy about sex, as well as central in the meaning of male and female, the place of sexuality in gender and the place of gender in sexuality need to be looked at together.”¹⁰¹ In this way, MacKinnon theorizes that much of pushback victims receive when they come forward comes from a confluence of factors: domination inherent in heterosexual sex that translates onto rape, and the fact that laws are written from a male perspective (where they control sex, and do not understand rape fear) thus the burden of proof that rape is not sex is higher. When representations of violence in sex have become so normalized that it is difficult to know where sex ends and rape begins. These authors show how gender is an integral part of sexuality, but it is in the romanticizing of violent sex where rape becomes normal.

It is important to note that many of the scholars I have included above theorize about sexual violence as if other identities do not intersect with victim as woman. This creates a kind of “sisterhood” of sexual violence. The construction of such a sisterhood has been heavily critiqued,

as it renders power within storytelling invisible—especially as it is been historically demonstrated that white voices are heard much more than voices of color. Brownmiller has been heavily criticized for using examples in her book that promoted racist ideas.¹⁰² Feminists of color take issue with the perceived sisterhood of the anti-rape movement, many arguing that indeed sexual violence exists and persists differently across intersections of experience.¹⁰³ For black feminists like Angela Davis, bell hooks, and Patricia Hill Collins, modern experiences of violence and black womanhood stem from a long history of the framing of black women as being “unrapable” to prop up the systematic rape of black women in chattel slavery.¹⁰⁴ These experiences of rape are not only defined by gender, but gender and race as inextricable. Suzanne Enck has argued that coverage of domestic violence perpetrated by black male athletes relies on racist tropes to recognize violence, and thus perpetuates racism against black men, and re-inscribes norms of hegemonic white masculinity.¹⁰⁵ For many scholars, the resolution to this problem is a bit unclear, but most seem to agree that a critical eye toward identity is a necessity in the study of sexual violence.

Rhetorical Law as Constitutive and Constructive

Given my interest in the tensions between law and rhetoric that pervade conversations about CSA, I turn to scholarship at the intersections of law and rhetoric to help us comprehend the following: that the law is constructed, and thus is inherently rhetorical; through criticism of law, rhetorical scholars can unveil systems of power in order to deconstruct them; and that rhetoricians have by and large paid scant attention to due process of law, a study of which would provide interesting insight into the false sense of neutrality in which we classify laws.

Some might wonder what right a rhetorical scholar (such as myself) has to engage with legal texts? Within the lay understanding of rhetoric as manipulation or persuasion and law as

neutral and concrete, law and rhetoric seem mutually exclusive. However, many rhetoricians have argued that law is inherently rhetorical. John Louis Lucaites, Celeste Condit, and Marouf Hasian identify the professionalization of legal studies as making it difficult for those without a Juris Doctor degree to be heard.¹⁰⁶ Early 20th Century Legal Realists theorized that judicial proceedings are always-already colored by ideology, and that arbiters of law do not just apply the law to contingent situations, but instead are actively involved in the process of *inventing* law through enactment.¹⁰⁷ Lucaites had previously documented the disciplinary shift to understanding the law as bound up in its rhetorical articulations and the community around it—also known as Critical Legal Studies (CLS). Influenced by feminist, poststructuralist, postmodern, and neo-Marxist theories, CLS scholars saw rhetoric and the law as operating together recursively to (re)legitimize socio-political systems as (falsely) neutral.¹⁰⁸ CLS scholars collectively argue that a CLS approach views the boundary between rhetoric and legal studies as a political space with possibility for radical change.¹⁰⁹ Law professor Eileen Scallen argues that rhetorical critics are well-positioned to provide instructive, reconstructive, and evaluative criticism for legal professionals, especially if they have an eye toward practice, because rhetoric adds context to otherwise wholly specific case law.¹¹⁰ Anjali Vats provides an example of this reconstructive criticism when she intervenes in intellectual property law cases to counter the discourse around copyright law that classifies it a racially neutral.¹¹¹ She shows how intellectual property laws rely on narratives of theft to mark certain work as original and others as theft. In this way, she notes that often absent from law is the recognition of the global inequalities that facilitates private ownership in the first place.¹¹² This methodology is further demonstrated by Marouf Hasian and Trevor Parry-Gilles who argue that critical rhetoric can provide an understanding of law through lived experience and communal life.¹¹³ The complexities of

appearance and enactment of policy can be lost in the relatively dry and sparse nature of the language of laws themselves. As demonstrated in the above literature, legal texts do not stand alone—in creation, enactment, and enforcement they are caught up in discourse, which is all the more reason for rhetorical scholars to continue to engage with them.

Across this thesis, I begin with the assumption that the law is constitutively produced and re-produced. Established and re-established through discourse, law standardizes the social order, such as class, gender, and race.¹¹⁴ As Robert Hariman claims, “society reproduces itself through performance before spectators in public space...The performance of laws then becomes a singularly powerful locus of social control, for it is the very means by which the members of the community know who they are.”¹¹⁵ For Hariman, the law is both performative and constitutive. It acts as a “powerful locus of social control,” directing and disciplining populations; a person understands themselves as either inside or outside of the law.¹¹⁶

While a powerful locus of control, the law is still constructed by humans. Jame Boyd White and Hariman both make clear that the law is not an omnipotent apparatus of The State. Instead, it is fluidly upheld by those under its purview. Most CLS scholars pull from Jacques Derrida’s “Force of Law” where he argues that laws are constitutive in nature; laws reside in a cyclical motion in which they must have authority, and it is those who follow the law that make up its authority.¹¹⁷ In like manner, Robert Asen situates “public policy as a mediation of rhetorical and material forces” drawing on the “constitutive and consequential power of rhetoric as well as other factors like institutional authority and financial resources.”¹¹⁸ Put simply, the audience gives the Title IX its power; Title IX’s original wording as well as the DCL signal legal power, and we believe the performance.

When Asen situates public policy as a mediation of material and rhetorical forces, he argues that, while rhetorical in construction, public policies enable particular material inputs—money, goods, opportunities, services—to certain populations in order to achieve certain outcomes.¹¹⁹ In the case of Title IX and the DCL, this means providing college students with a service by which they can seek accountability after being sexually assaulted. While having embodied effects for real people, Asen also notes that, “since material outcomes require human participation, rhetoric plays an equally important role in public policy through the ineluctable operation of meaning.”¹²⁰ The policies around Title IX “create, negotiate and re-define the meaning” of the services provided by the government and the university to ensure what equality in representation means in American education.¹²¹

In the bigger picture, Asen argues that public policy can be a constitutive force for (re)creating/negotiating national identity.¹²² Sara McKinnon makes a similar argument, noting that law “naturalizes the nation as categories to construct a story of the United States as always, in advance, white, European, middle class, heterosexual, able bodied, sound in mind, and male.”¹²³ It is unsurprising that Audre Lorde’s *mythical norm* appears as America’s national imaginary, but this argument highlights the manner by which we as a nation try to address inequality. Isaac West argues that citizenship is not the regressive concept acting as a barrier to radical equality, but instead an everyday, lived communicative process, not just a label bequeathed by those in power.¹²⁴ By understanding citizenship as a daily performative practice, West opens up new possibilities for a rearticulation of citizenship that lets go of homogeneity, and embraces a sense of unity in difference. The 2011 DCL marked a national commitment to serve those deemed most likely to experience sexual assault on a college campus: women.¹²⁵ Title IX represented a recognition that women were not being treated equally in a country where

(as stated in the DCL) “education is the great equalizer.”¹²⁶ By Asen and McKinnon’s logic, the nation is negotiated here to acknowledge that women exist, but they are not “naturalized” by already existing laws of the nation, which is why we as a nation needed an Education Amendment to include them. To return to Asen’s earlier discussion of materiality, this is not to say that the material outcomes of Title IX have been negative. In fact, having multiple options for accountability has benefitted many survivors of CSA, but the point stands that policymaking builds the nation, and many equal protections policies are responding to a national mythical norm. It also stands that it is possible, according to West, to build citizenship around a unity of difference in everyday practice, such as due process.

Finally, while rhetorical scholars have attended to the critical questions of both sexual violence and law, due process has been overlooked by rhetoricians, and thus understudied. Only a few rhetorical scholars have intervened in due process, mostly discussing ways to resist its false neutrality. Peter Odell Campbell argues that using substantive due process under the 14th Amendment (instead of procedural due process) is a way to inject radical queer politics into legal doctrine.¹²⁷ Procedural due process treats everyone equally under the law, but Campbell notes that equal does not indicate equitable. Through substantive due process, the Supreme Court was able to alter Texas’ existing anti-sodomy laws, saving a gay couple from persecution for having consensual sex. Through due process we can understand the false neutrality of the law, and how practice can make equitable change. It is through a CLS lens that I can move forward to analyze how narratives of due process operate in public discourse around CSA.

Method: Narrative Criticism

For the purposes of this project, I seek out a narrative criticism. If we are to understand, as Walter Fisher would, people to be natural story-tellers,¹²⁸ then we can use their narratives to

better understand the building of social worlds, and in that construction, the manifestation of social power. With a narrative criticism lens, I believe I can procure a better understanding of characterizations of victimhood, law, and functionalities of consent.

Narrative criticism is foundationally a form of rhetorical criticism. As rhetorical critics Campbell and Burkholder note:

Just as language is never neutral or impersonal, so rhetoric, no matter how expository or informative it may seem, is always designed to gain acceptance for certain ways or evaluating and labeling things. Similarly, as the naming process includes feelings and attitudes toward what is named, so rhetoric, because it is concerned with problems, seeks to label and evaluate in ways that make present conditions unsatisfactory, even intolerable, for audiences.¹²⁹

I find Campbell and Burkholder to speak directly to the expository formations of law in their condemnation of language's masquerade. As a rhetorical critic, I take the phrase "language is never neutral or impersonal" very seriously as my lens of inquiry. Campbell and Burkholder go on to assert that language and behaviors go through an evaluative naming process where they are labeled "normal" or "deviant."¹³⁰ Flores also contends that "mediated representations, then, can be powerful rhetorical forces," which suggests that the way we tell stories contains a power that, in itself, speaks volumes.¹³¹

There has been great debate about the use of narrative in rhetorical studies, but most studies show an interest in the act of story-telling.¹³² Rhetoricians understand the act of building a narrative as a key rhetorical formation—particularly its allure.¹³³ Jasinski notes that narrative (whether whole or a collection of cultural fragments) acts as a lens in building a social world.¹³⁴ Lucaites and Condit note that narratives explain past events as a mode to create possible futures, which can be framed as desirable or harmful.¹³⁵ Flores contends that the notion of narrative futures manifests itself in the construction of the nation, by framing of certain identities as inherently un-American.¹³⁶ Enticed by these futures, Kirkwood argues, audiences make real the

vision of the nation contained in the narrative, possibly in the form of anti-immigration laws or Ku Klux Klan lynchings.¹³⁷

Scholars have shown that vocabularies form as a consequence of narratives, and thus narratives are a worthy point of study. Narratives collectively develop contextual vocabularies which spill into other narratives, and have political consequences. Studying narrative exposes the composition process of vocabularies, so that we can understand how narratives and vocabularies (re)construct cultural values and norms. Lucaites and Condit established that a public vocabulary forms in the repetition of cultural narratives and characterizations.¹³⁸ The language within the vocabulary contains meaning conducive to life within this social identity, circulating foundational ideas of a culture—its structure and values. Condit stipulates that public vocabularies gain social credibility offering explanations for how a society functions.¹³⁹ In this way, I pay close attention to vocabularies used by each John Doe in order to examine the relationships those vocabularies have with social power and credibility, with a specific eye toward the law. How do these men characterize their experiences—what do their similarities reveal and what can we learn from their deviations?

Their deviations from set vocabularies also matter because contradictions power characterization. Flores contends that “the public sphere generally maintains multiple and often competing cultural narratives. Central to their ideological functions are those characterizations at play within them.”¹⁴⁰ Characterizations appear in a public vocabulary to paint actors, scenes, and telos.¹⁴¹ Narratives gather power through the recognizability and allure of its characterizations of actors and forces.¹⁴² Carlson argues that character-types “may alter an audience’s perception of a series of events.”¹⁴³ Goldzwig and Sullivan further argue that amidst competing cultural narratives, character-types speaking from a position of privilege are more normalized than

marginalized bodies.¹⁴⁴ However, narrative scholars maintain that public narratives are rarely coherent and linear, but are instead often fragmented and contradictory, especially over complex social issues.¹⁴⁵ Yet, according to Carlson and illustrated by Flores, “narratives can gain force when elements of competing narratives are mixed together such that, for all the seeming disparities, underlying aspects of coherence appear.”¹⁴⁶ For Flores, un-American-ness underlies the clearly disparate characterizations of the peon and the illegal alien. There are several moments for characterization of the narratives from the John Does that rely on positions of privilege, that rely on/reaffirm vocabularies, and that are often fragmented and/or contradictory. These characterizations matter because these cases are being heard in courts of law and have the potential for significant impact on current and future victimized bodies. The discussed scholars have shown that analyzing these narratives is critical to identifying underlying communicative structures that make up our society. I argue that it is through criticizing narratives that we may begin to undo them and strive to resist harmful public vocabularies.

Given these arguments about the importance of narrative criticism, I will collect and examine narratives surrounding perpetrators who claim that their college denied them due process. My artifacts are a set of first-person narratives that appear in a collection of the lawsuits against colleges about sexual misconduct that has been adjudicated through Title IX. Following Jasinski, Lucaites & Condit, and Flores, I define narrative as the process of creating a linear past through a mix of cultural artifacts and series of events to create a possible future(s). Because narratives are created in non-linear form and are typically multiple, I have gathered narratives from primary legal source documents, specifically the original complaints made against the school as filed with their respective U.S. District Courts, but I also situate these narratives in the cultural context from which they emerge: public/mass media coverage of sexual violence as well

as federal guidance from the Department of Education. I look to these particular sources because the creation of persuasive texts often centers storytelling over time and through several outlets. In my analysis, I will be gathering and analyzing the vocabularies and self-characterizations of these four Title IX violators to discuss the ways in which whiteness and masculinity build law as fair and neutral, consent as both simple and complex, and Title IX as unfair to men and partial to women. I seek to probe patriarchy (a scholarly go-to for structural blame) in order to understand these narratives as interacting with abusive legal frameworks, victim silence, and a culture of presumed consent. I believe that through this lens I may be able to grant more understanding of the relationship between sexual violence and the law that goes beyond patriarchy and delves into the complexities of sexual violence that are often narrativized simple.

Chapter Preview

Throughout this chapter I have shown a wide range of discussions of law and sexual violence throughout the relatively short time it has been a prominent part of the lexicon of scholarship. I have created a taxonomy of scholarly work to put in conversation with my own situated scholarship, and I have delved into the details of my methodological commitments. For the remainder of this project I seek to use a narrative analysis to discuss these lawsuits against four schools, with a specific focus on their complaints of lack of due process and gender discrimination against men. In chapter two I illustrate the legal/administrative oscillations of Title IX administrative procedures through a lens of due process; chapter three investigates how the Does frame consent in their narratives, illuminating the inherent complexities of consent for which law can never account; and finally, I conclude in chapter four by bring these two themes together to discuss how they make sense of narratives of fairness and justice.

In chapter two, I put some of the assumptions of rhetoric and law to work to interrogate what kinds of authority (or lack thereof) Title IX procedures build when they oscillate between legal and administrative language. I perform a close reading of the original 2011 DCL and connect it to conversations of constitutive law and agency to intervene into feminist discussions of campus sexual violence. I question how the bifurcation of rhetoric and law has enabled and constrained certain practices of adjudication sexual violence. I hope that viewing CSA through the role of form in policy and procedural documentation will unearth how the DCL exploits cracks and fissures in the law to resist hegemonic norms of power that silence victims or cannot provide recourse. Instead of working within existing sexual assault and rape statute, it bypasses it completely, creating its own system of adjudication procedures that resembles the law but has none of the same consequences.

Title IX has unearthed the nuance of providing equity after the recognition of discrimination. Instead of the rigid processes of equality under the law, where everyone is ostensibly treated the same, I ponder in chapter three what qualifies as sexual consent? Building off the work of Kate Harris and Abigaël Candelas de la Ossa, I examine the Does' lawsuits as case studies to interrogate the gendered performatives of heterosexuality that enable masculine sexual domination and feminine passivity. Scholars must attend to the interpersonal negotiations of consent beyond "yes" and "no" because these are also negotiations of gender and power. This lens complicates both our understandings of consent and of consent under the law. What are the possibilities for legal (hetero)sexuality? I explore how Robin Bauer's notion of critical consent interacts with power. The context from which they write already assumes a certain power differential that exists in BDSM relationships, but I ponder what other complexities of my

chosen cases add to notions of consent since both relationships and trauma tend to be more complex than simple “yes/no.” I consider if the law equipped to account for these nuances.

Finally, in my concluding chapter, I delve into one final argument before concluding this thesis project. I mobilize a few moments from the case studies where the two themes I have identified in chapters two and three come together, manifesting themselves into a conversation about fairness and justice. Juxtaposing criminal processes (which have been coded as equal by treating all the same) with Title IX and other Civil Rights legislation (which seek equity by privileging marginalized populations), I consider the ways in which whiteness and masculinity (re)assert themselves through narratives of fairness. I ponder how the notoriously unambiguous legal system can address the nuance of issues like consent, which is often not nearly as clear as legally necessitated. I conclude chapter four by reflecting on moments of possibility for Title IX, consent education, and alternative accountability methods that might be available outside of the legal system.

¹ “The Scope of the Problem,” .org, *Rape, Abuse & Incest National Network (RAINN)*, (static page), n.d., <https://www.rainn.org/statistics/scope-problem>.

² Ibid.

³ Ibid., and “The Report of the 2015 U.S. Transgender Survey,” .org, *National Center for Transgender Equality*, 2015, <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>

⁴ Brownmiller, *Against Our Will* and Friedan, Betty. *The Feminine Mystique*. (New York: Norton, 1963).

⁵ Susan Estrich, *Real Rape* (Cambridge, Mass: Harvard University Press, 1987).

⁶ Patricia L. N. Donat and John D’Emilio, “A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change,” *Journal of Social Issues* 48, no. 1 (April 1992): 9–22, <https://doi.org/10.1111/j.1540-4560.1992.tb01154.x> and National Public Radio, *Before It Had a Name*, This American Life, October 2001, <https://www.thisamericanlife.org/197/before-it-had-a-name>.

⁷ Patricia L. N. Donat and John D’Emilio, “A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change,” *Journal of Social Issues* 48, no. 1 (April 1992): 9–22, <https://doi.org/10.1111/j.1540-4560.1992.tb01154.x>; it also appeared 1975 documentary *Rape Culture*.

⁸ Tarana Burke, “#MeToo Was Started for Black and Brown Women and Girls. They’re Still Being Ignored.,” *The Washington Post*, November 9, 2017, https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too/?utm_term=.59bf44f470cf

⁹ Jill Filipovic, “We Shouldn’t Need Multiple Accusers to Stop a Sexual Harasser,” *TIME*, September 12, 2018, <http://time.com/5394329/les-moonves-cbs-metoo/>.

¹⁰ “R Kelly: Singer Charged with Sexual Abuse in Chicago - BBC News,” *BBC*, February 23, 2019, <https://www.bbc.com/news/world-us-canada-47338368>; David K Li, Sarah Fitzpatrick, and Elisha Fieldstadt, “R.

Kelly, Charged with Sexually Abusing Underage Victims, Has Turned Himself In,” *NBC News*, February 22, 2019, <https://www.nbcnews.com/news/us-news/r-kelly-charged-multiple-counts-sexual-abuse-minor-n974621>.

¹¹ As indicated by the following sampling: Dawn H. Currie, “Women’s Safety on Campus: Challenge the University as Gendered Space,” *Humanity & Society* 18, no. 3 (August 1, 1994): 24–48; Suzanne Marie Enck, “Accountability Amidst the ‘Me Too’ Reckoning: Kevin Spacey’s Homopatriarchal Apologia,” *QED: A Journal in GLBTQ Worldmaking* 5, no. 2 (2018): 80, <https://doi.org/10.14321/qed.5.2.0080>; Suzanne Marie Enck-Wanzer, “All’s Fair in Love and Sport: Black Masculinity and Domestic Violence in the News,” *Communication and Critical/Cultural Studies* 6, no. 1 (March 2009): 1–18, <https://doi.org/10.1080/14791420802632087>; Rachel Alicia Griffin, “Gender Violence and the Black Female Body: The Enduring Significance of ‘Crazy’ Mike Tyson,” *Howard Journal of Communications* 24, no. 1 (January 2013): 71–94, <https://doi.org/10.1080/10646175.2013.748602>; Rachel Alicia Griffin, “The ‘Morning/Mourning’ After: When Becoming President Trumps Being a Sexual Predator,” *Women’s Studies in Communication* 40, no. 2 (April 3, 2017): 140–44, <https://doi.org/10.1080/07491409.2017.1302259>; Jessica C. Harris and Chris Linder, eds., *Intersections of Identity and Sexual Violence on Campus: Centering Minoritized Students’ Experiences*, First edition (Sterling, Virginia: Stylus, 2017); Kate Lockwood Harris, “The Next Problem With No Name: The Politics and Pragmatics of the Word Rape,” *Women’s Studies in Communication* 34, no. 1 (May 5, 2011): 42–63, <https://doi.org/10.1080/07491409.2011.566533>; Kate Lockwood Harris, “Show Them a Good Time: Organizing the Intersections of Sexual Violence,” *Management Communication Quarterly* 27, no. 4 (November 2013): 568–95, <https://doi.org/10.1177/0893318913506519>; Kate Lockwood Harris, “Feminist Dilemmatic Theorizing: New Materialism in Communication Studies: Feminist Dilemmas,” *Communication Theory* 26, no. 2 (May 2016): 150–70, <https://doi.org/10.1111/comt.12083>; Kate Lockwood Harris, “Re-Situating Organizational Knowledge: Violence, Intersectionality and the Privilege of Partial Perspective,” *Human Relations* 70, no. 3 (March 2017): 263–85, <https://doi.org/10.1177/0018726716654745>; Kate Lockwood Harris, “Yes Means Yes and No Means No, but Both These Mantras Need to Go: Communication Myths in Consent Education and Anti-Rape Activism,” *Journal of Applied Communication Research* 46, no. 2 (March 4, 2018): 155–78, <https://doi.org/10.1080/00909882.2018.1435900>; Michael Johnson, “Gendered Communication and Intimate Partner Violence,” in *The SAGE Handbook of Gender and Communication*, ed. Bonnie Dow J. and Julia T. Wood (2455 Teller Road, Thousand Oaks California 91320 United States: SAGE Publications, Inc., 2006), 71–88, <https://doi.org/10.4135/9781412976053.n5>; Amanda Konradi, “Can Justice Be Served on Campus?: An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland,” *Humanity & Society* 41, no. 3 (August 2017): 373–404, <https://doi.org/10.1177/0160597616651657>; Stephanie R. Larson, “‘Everything inside Me Was Silenced’: (Re)Defining Rape through Visceral Counterpublicity,” *Quarterly Journal of Speech* 104, no. 2 (April 3, 2018): 123–44, <https://doi.org/10.1080/00335630.2018.1447141>; David Lisak, “Predators: Uncomfortable Truths about Campus Rapists,” *Connection*, Summer 2004, 19–21; David Lisak and M. Claire Harwell, “Why Rapists Run Free,” *Sexual Assault Report* 14, no. 2 (November 2010): 17–32; David Lisak and Paul M. Miller, “Repeat Rape and Multiple Offending Among Undetected Rapists,” *Violence and Victims* 17, no. 1 (February 2002): 73–84, <https://doi.org/10.1891/vivi.17.1.73.33638>; Ashley Noel Mack and Bryan J. McCann, “Critiquing State and Gendered Violence in the Age of #MeToo,” *Quarterly Journal of Speech* 104, no. 3 (July 3, 2018): 329–44, <https://doi.org/10.1080/00335630.2018.1479144>; Joshua Daniel Phillips and Rachel Alicia Griffin, “Crystal Mangum as Hypervisible Object and Invisible Subject: Black Feminist Thought, Sexual Violence, and the Pedagogical Repercussions of the Duke Lacrosse Rape Case,” *Women’s Studies in Communication* 38, no. 1 (January 2, 2015): 36–56, <https://doi.org/10.1080/07491409.2014.964896>; Nina M. Reich, “Towards a Rearticulation of Women-as-Victims: A Thematic Analysis of the Construction of Women’s Identities Surrounding Gendered Violence,” *Communication Quarterly* 50, no. 3/4 (Summer 2002): 292–311.

¹² Krebs, Christopher, Christine Lindquist, Tara Warner, Bonnie Fisher, and Sandra Martin. “The Campus Sexual Assault (CSA) Study,” December 2007. <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>

¹³ Matthew Kimble et al., “Risk of Unwanted Sex for College Women: Evidence for a Red Zone,” *Journal of American College Health* 57, no. 3 (November 2008): 331–38, <https://doi.org/10.3200/JACH.57.3.331-338>; “Campus Sexual Violence,” .org, Rape, Abuse & Incest National Network (RAINN), n.d., <https://www.rainn.org/statistics/campus-sexual-violence>; Peter Jacobs, “The ‘Red Zone’ Is A Shockingly Dangerous Time For Female College Freshmen,” *Business Insider*, July 14, 2014, <https://www.businessinsider.com/red-zone-shockingly-dangerous-female-college-freshmen-2014-7>; Claire Potter, “Inside the Red Zone: The College Rape Season - Tenured Radical,” *The Chronicle of Higher Education* (blog), July 13, 2014, <https://www.chronicle.com/blognetwork/tenuredradical/2014/07/inside-the-red-zone-the-college-rape-season-begins-soon/>.

¹⁴ *TIME Magazine*, May 2014.

- ¹⁵ “See the Hunting Ground,” [thehuntinggroundfilm.com](http://www.thehuntinggroundfilm.com), Dec. 1, 2015, <http://www.thehuntinggroundfilm.com/see/>
- ¹⁶ Suzanne Marie Enck-Wanzer, “All’s Fair in Love and Sport: Black Masculinity and Domestic Violence in the News,” *Communication and Critical/Cultural Studies* 6, no. 1 (March 2009): 1–18, <https://doi.org/10.1080/14791420802632087>.
- ¹⁷ Thomas K. Nakayama and Robert L. Krizek, “Whiteness: A Strategic Rhetoric,” *Quarterly Journal of Speech* 81, no. 3 (August 1995): 291–309, <https://doi.org/10.1080/00335639509384117>.
- ¹⁸ Svokos, Alexandra. “Students Bring Out Mattresses in Huge ‘Carry That Weight’ Protest Against Sexual Assault.” *The Huffington Post*, October 29, 2014. https://www.huffingtonpost.com/2014/10/29/carry-that-weight-columbia-sexual-assault_n_6069344.html.
- ¹⁹ *Black’s Law Dictionary*, s.v. “Miranda Rights.”
- ²⁰ *Black’s Law Dictionary*, s.v. “Due Process Clause.”
- ²¹ Personal Knowledge.
- ²² Demonstrated in this collection of articles: Timothy M Phelps, “Guidelines to Curb Campus Sexual Assault Raise Concerns for Accused,” *Los Angeles Times*, Apr. 29, 2014.; Rees T Shapiro, “Key elements of Rolling Stone’s U-Va. Gang Rape Allegations in Doubt,” *Washington Post*, Dec. 5, 2014.; Judith Shulevitz, “Accused College Rapists Have Rights Too.” *New Republic*, Oct. 11, 2014, <https://newrepublic.com/article/119778/college-sexual-assault-rules-trample-rights-accused-campus-rapists>; Emily Shire, “Columbia Student Joins the Men Fighting Back in Campus Rape Cases.” *The Daily Beast*, Apr. 24, 2015, <http://www.thedailybeast.com/articles/2015/04/24/columbia-student-joins-the-men-fighting-back-in-campus-rape-cases.html>; and Emily Yoffe, “The College Rape Overcorrection,” *Slate.com*, Dec. 7, 2014, http://www.slate.com/articles/double_x/doublex/2014/12/college_rape-campus_sexual_assault_is_a_serious_problem_but_the_efforts.html. As well demonstrated in these legal articles: Stephen Henrick, “A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses,” *Northern Kentucky Law Review*. 40, no. 49 (2013): 1. and Mark W. Shaughnessy and Jeffrey E. Dolan, “Emerging Litigation Regarding Campus Sexual Assaults,” *Massachusetts Lawyers Weekly* (2015): 2. Gerson, Jeannie Suk. “Betsy DeVos, Title IX, and the “Both Sides” Approach to Sexual Assault.” *The New Yorker*, 8 Sept. 2017, www.newyorker.com/news/news-desk/betsy-devos-title-ix-and-the-both-sides-approach-to-sexual-assault; Hartocollis, Anemona, and Christina Capecchi. “‘Willing to Do Everything,’ Mothers Defend Sons Accused of Sexual Assault.” *The New York Times*, The New York Times, 22 Oct. 2017, www.nytimes.com/2017/10/22/us/campus-sex-assault-mothers.html; Kitchens, Caroline. “Mothers for Due Process.” *National Review*, National Review, 10 Oct. 2017, www.nationalreview.com/blog/corner/mothers-due-process-caroline-kitchens/; Grigoriadis, Vanessa. “Hear From Moms of Sons Accused of Campus Sexual Assault.” *Time*, 6 Sept. 2017, time.com/4926979/campus-sexual-assault-mothers/.
- ²³ Braley Dodson, “UVU Files Motion to Dismiss Former Title IX Coordinator’s Lawsuit,” *Daily Herald*, August 22, 2018, https://www.heraldextra.com/news/local/crime-and-courts/uvu-files-motion-to-dismiss-former-title-ix-coordinator-s/article_8c517dbb-9e37-52c2-acdc-36c8f345f88d.html; Sarah Larimer, “Judge Dismisses Lawsuit from George Washington Grad Who Alleged Botched Sexual-Assault Case,” *Washington Post – Blogs*; Washington, August 30, 2018, <http://search.proquest.com/docview/2097404375/citation/FECE9F8E26464156PQ/1>; Kenneth Nelson, “Judge Dismisses Claims in UNM Due Process Case,” *Campus Reform*, October 14, 2018, <https://www.campusreform.org/?ID=11407>.
- ²⁴ As indicated by: Jeremy Bauer-Wolf, “U.S. Appeals Court Finds Student Accused of Sexual Assault Was Denied Due Process,” *Inside Higher Ed*, September 26, 2017, <https://www.insidehighered.com/news/2017/09/26/us-appeals-court-finds-student-accused-sexual-assault-was-denied-due-process>; Jeremy Bauer-Wolf, “Yale Being Investigated for Discrimination against Men in Unusual Title IX Complaint,” *Inside Higher Ed*, May 21, 2018, <https://www.insidehighered.com/news/2018/05/21/yale-being-investigated-discrimination-against-men-unusual-title-ix-complaint>; Benjamin Fearnow, “Texas A&M Swimmer Accused of Rape Sues School for ‘Bias Against Male Students,’” *Newsweek*, June 19, 2018, <https://www.newsweek.com/texas-am-rape-title-ix-bias-austin-van-overdam-hannah-shaw-swimmer-sexual-984462>; Todd Feathers, “Dartmouth College Lawsuits Claim Male Students Got Unfair Treatment,” *The New Hampshire Union Leader*, October 6, 2018, www.unionleader.com/Dartmouth-College-lawsuits-claim-male-students-got-unfair-treatment; Michael Roberts, “CU Boulder John Doe Double Sexual Assault Lawsuit Update | Westword,” *Westword*, May 30, 2018, <https://www.westword.com/news/cu-boulder-john-doe-double-sexual-assault-lawsuit-update-10344495>; Debbie Truong, “Va. Student Accused of Sexual Misconduct Says School Discriminated against Him: The Boy and His Father Filed a Federal Lawsuit Alleging Unfair Punishment Based on Gender.,” *The Washington Post (Online)*; Washington, D.C., October 8, 2018, <http://search.proquest.com/docview/2117050606/citation/10342DBF6E574DE8PQ/1>.

-
- ²⁵ Robby Soave, “In Due Process Lawsuit, Appeals Court Sides with Michigan Student Expelled for Sexual Misconduct - Hit & Run,” *Reason.Com* (blog), September 9, 2018, <https://reason.com/blog/2018/09/09/michigan-due-process-title-ix-student>.
- ²⁶ Todd Feathers, “Dartmouth College Lawsuits Claim Male Students Got Unfair Treatment,” *The New Hampshire Union Leader*, October 6, 2018, <http://www.unionleader.com/Dartmouth-College-lawsuits-claim-male-students-got-unfair-treatment>
- ²⁷ Jeremy Bauer-Wolf, “Trump Bemoans That Men Are Now ‘Guilty until Proven Innocent,’” *Inside Higher Ed*, October 3, 2018, <https://www.insidehighered.com/news/2018/10/03/trump-bemoans-men-are-now-guilty-until-proven-innocent>.
- ²⁸ Tyler Kingkade, “Fewer Than One-Third Of Campus Sexual Assault Cases Result In Expulsion,” *Huffington Post*, September 29, 2014, sec. College, https://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html.
- ²⁹ *John Doe v. The University of Cincinnati*, No. 1:16-cv-987 (The United States District Court for the Southern District of Ohio Western Division 2016) 26.
- ³⁰ *John Doe v. The University of Cincinnati* 2016, 26.
- ³¹ *Ibid*, 30.
- ³² *William Norris v. University of Colorado, Boulder*, No. 1:18-cv-02243 (The United States District Court for the District of Colorado 2018).
- ³³ *William Norris v. University of Colorado, Boulder*
- ³⁴ *Ibid*.
- ³⁵ *Ibid*.
- ³⁶ Michael Roberts, “CU Boulder John Doe Double Sexual Assault Lawsuit Update,” *Westword*, May 30, 2018, <https://www.westword.com/news/cu-boulder-john-doe-double-sexual-assault-lawsuit-update-10344495>.
- ³⁷ *William Norris v. University of Colorado Boulder*
- ³⁸ *Ibid*.
- ³⁹ *John Doe v. David H Baum, Susan Pritzel, Tabitha Bentley, E. Royster Harper, and Nadia Bazy*, No. 2:16-cv-13174 (United States District Court Eastern District of Michigan Southern Division 2016). 9-10.
- ⁴⁰ *John Doe v. David H Baum, Susan Pritzel, Tabitha Bentley, E. Royster Harper, and Nadia Bazy*, 9.
- ⁴¹ *Ibid*, 15.
- ⁴² *Austin Van Overdam v. Texas A&M University*, No. 4:18-cv-02011 (United States District Court Southern District of Texas Houston Division 2018) 2.
- ⁴³ *Ibid*.
- ⁴⁴ *Ibid*.
- ⁴⁵ Roberts, “CU Boulder John Doe Double Sexual Assault Lawsuit Update”
- ⁴⁶ U.S. Department of Education: Office for Civil Rights. “2011 Dear Colleague Letter.” April 4, 2011.
- ⁴⁷ Donald E. Agthe and R. Bruce Billings, “The Role of Football Profits in Meeting Title IX Gender Equity Regulations and Policy,” *Journal of Sport Management* 14, no. 1 (January 2000): 28–40, <https://doi.org/10.1123/jsm.14.1.28>.
- ⁴⁸ *Ibid*.
- ⁴⁹ U.S. Library of Congress. Congressional Research Service. “Dear Colleague” Letters: A Brief Overview, by R. Eric Peterson. RS21667. 2005.
- ⁵⁰ “Campus Sexual Assault Under Investigation,” *The Chronicle of Higher Education*, accessed October 31, 2018, <http://projects.chronicle.com/titleix/>.
- ⁵¹ U.S. Department of Education: Office for Civil Rights, 1-4.
- ⁵² *Ibid*.
- ⁵³ *Ibid*, 11.
- ⁵⁴ *Ibid.*, 12.
- ⁵⁵ *Ibid*.
- ⁵⁶ White House Task Force to Protect Students from Sexual Assault. “Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault.” April, 2014.
- ⁵⁷ Demonstrated in this collection of articles: Timothy M Phelps, “Guidelines to Curb Campus Sexual Assault Raise Concerns for Accused,” *Los Angeles Times*, Apr. 29, 2014.; Rees T Shapiro, “Key elements of Rolling Stone’s U-Va. Gang Rape Allegations in Doubt,” *Washington Post*, Dec. 5, 2014.; Judith Shulevitz, “Accused College Rapists Have Rights Too.” *New Republic*, Oct. 11, 2014, <https://newrepublic.com/article/119778/college-sexual-assault-rules-trample-rights-accused-campus-rapists>; Emily Shire, “Columbia Student Joins the Men Fighting Back in Campus Rape Cases.” *The Daily Beast*, Apr. 24, 2015, <http://www.thedailybeast.com/articles/2015/04/24/columbia->

[student-joins-the-men-fighting-back-in-campus-rape-cases.html](#); and Emily Yoffe, "The College Rape Overcorrection," *Slate.com*, Dec. 7, 2014, http://www.slate.com/articles/double_x/doublex/2014/12/college_rape-campus_sexual_assault_is_a_serious_problem_but_the_efforts.html. As well demonstrated in these legal articles: Stephen Henrick, "A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses," *Northern Kentucky Law Review* 40, no. 49 (2013): 1. and Mark W. Shaughnessy and Jeffrey E. Dolan, "Emerging Litigation Regarding Campus Sexual Assaults," *Massachusetts Lawyers Weekly* (2015): 2. Gerson, Jeannie Suk. "Betsy DeVos, Title IX, and the "Both Sides" Approach to Sexual Assault." *The New Yorker*, 8 Sept. 2017, www.newyorker.com/news/news-desk/betsy-devos-title-ix-and-the-both-sides-approach-to-sexual-assault; Hartocollis, Anemona, and Christina Capecchi. "'Willing to Do Everything,' Mothers Defend Sons Accused of Sexual Assault." *The New York Times*, The New York Times, 22 Oct. 2017, www.nytimes.com/2017/10/22/us/campus-sex-assault-mothers.html; Kitchens, Caroline. "Mothers for Due Process." *National Review*, National Review, 10 Oct. 2017, www.nationalreview.com/blog/corner/mothers-due-process-caroline-kitchens/; Grigoriadis, Vanessa. "Hear From Moms of Sons Accused of Campus Sexual Assault." *Time*, 6 Sept. 2017, time.com/4926979/campus-sexual-assault-mothers/.

⁵⁸ Anya Kamenetz, "Betsy DeVos Signals A Pullback On Campus Sex Misconduct Enforcement," *NPR*, September 07, 2017, <http://www.npr.org/sections/ed/2017/09/07/549197971/betsy-devos-signals-a-pullback-on-campus-sex-misconduct-enforcement>; Stephanie Saul and Katie Taylor, "Betsy DeVos Reverses Obama-era Policy on Campus Sexual Assault Investigations," *The New York Times*, September 22, 2017, <https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html>

⁵⁹ *Ibid.*

⁶⁰ "New U.S. Sexual Misconduct Rules Bolster Rights of Accused and Protect Colleges - The New York Times," accessed March 20, 2019, https://www.nytimes.com/2018/08/29/us/politics/devos-campus-sexual-assault.html?smid=fb-nytimes&smtyp=cur&fbclid=IwAR0hD_ccETo-egLSCMXiWK_7YbgvkqHoxxbllpvW5lyPNVBvZ0vcyJgoJI.

⁶¹ Brownmiller 1975.

⁶² *Ibid.*

⁶³ Estrich 1987.

⁶⁴ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass: Harvard University Press, 1987) p. 105.

⁶⁵ *Ibid.*

⁶⁶ Susan Caringella, *Addressing Rape Reform in Law and Practice* (New York: Columbia University Press, 2009).

⁶⁷ *Black's Law Dictionary*, s.v. "Criminal Intent."

⁶⁸ Catharine A. MacKinnon, *Sex Equality*, 2nd ed, University Casebook Series (New York : [St. Paul, Minn.]: Foundation Press ; Thomson/West, 2007) p. 831.

⁶⁹ *Ibid.*

⁷⁰ Lisa M. Cuklanz, *Rape on Trial: How the Mass Media Construct Legal Reform and Social Change*, Feminist Cultural Studies, the Media, and Political Culture (Philadelphia, Pa: University of Pennsylvania Press, 1996).

⁷¹ *Ibid.*

⁷² Valerie Palmer-Mehta (2018) "The Subversive Power of Survivor Rhetoric: An Innovative Archive of Survivor Discourse in New York Magazine," *Women's Studies in Communication*, 41:2, 159-182, DOI: 10.1080/07491409.2018.1471764

⁷³ Shannon L. Holland, "The 'Offending' Breast of Janet Jackson: Public Discourse Surrounding the Jackson/Timberlake Performance at Super Bowl XXXVIII," *Women's Studies in Communication* 32, no. 2 (July 2009): 129–50, <https://doi.org/10.1080/07491409.2009.10162384>.

⁷⁴ *Ibid.*

⁷⁵ Rachel Alicia Griffin, "Gender Violence and the Black Female Body: The Enduring Significance of 'Crazy' Mike Tyson," *Howard Journal of Communications* 24, no. 1 (January 2013): 71–94, <https://doi.org/10.1080/10646175.2013.748602>.

⁷⁶ Griffin, 2013.

⁷⁷ *Ibid.*

⁷⁸ Suzanne Marie Enck and Blake A. McDaniel, "Playing With Fire: Cycles of Domestic Violence in Eminem and Rihanna's 'Love the Way You Lie': Playing With Fire," *Communication, Culture & Critique* 5, no. 4 (December 2012): 618–44, <https://doi.org/10.1111/j.1753-9137.2012.01147.x>; Susan Estrich, *Real Rape* (Cambridge, Mass: Harvard University Press, 1987); Michael Johnson, "Gendered Communication and Intimate Partner Violence," in *The SAGE Handbook of Gender and Communication*, ed. Bonnie Dow J. and Julia T. Wood (2455 Teller

-
- Road, Thousand Oaks California 91320 United States: SAGE Publications, Inc., 2006), 71–88, <https://doi.org/10.4135/9781412976053.n5>. Catharine A MacKinnon and Reva B Siegel, *Directions in Sexual Harassment Law*, 2008, <https://www.degruyter.com/doi/book/10.12987/9780300135305>.
- ⁷⁹ “Perpetrators of Sexual Violence,” .org, Rape, Abuse & Incest National Network (RAINN), n.d., <https://www.rainn.org/statistics/perpetrators-sexual-violence>
- ⁸⁰ Penelope, Julia, “Prescribed Passivity: The Language of Sexism,” Faculty Publications -- Department of English. (1988). 89. <http://digitalcommons.unl.edu/englishfacpubs/89>
- ⁸¹ Ibid.
- ⁸² Jackson Katz, *Violence against Women--It’s a Men’s Issue*, TedX Talk, 2012, https://www.ted.com/talks/jackson_katz_violence_against_women_it_s_a_men_s_issue?language=en.
- ⁸³ Kate Lockwood Harris, “The Next Problem With No Name: The Politics and Pragmatics of the Word *Rape*,” *Women’s Studies in Communication* 34, no. 1 (May 5, 2011): 42–63, <https://doi.org/10.1080/07491409.2011.566533>.
- ⁸⁴ Nina M. Reich, “Towards a Rearticulation of Women-as-Victims: A Thematic Analysis of the Construction of Women’s Identities Surrounding Gendered Violence,” *Communication Quarterly* 50, no. 3/4 (Summer 2002): 292–311.
- ⁸⁵ Kate Lockwood Harris, “Mapping Gender and Violence: Describing Reality, Resisting Abuse,” *Women’s Studies in Communication* 41, no. 2 (April 3, 2018): 113–16, <https://doi.org/10.1080/07491409.2018.1463770>.
- ⁸⁶ Ashley Noel Mack et al., “Between Bodies and Institutions: Gendered Violence as Co-Constitutive,” *Women’s Studies in Communication* 41, no. 2 (April 3, 2018): 95–99, <https://doi.org/10.1080/07491409.2018.1463765>.
- ⁸⁷ Ibid, p 6
- ⁸⁸ Sharp, Joanne P., and Linda McDowell. *Space, gender, knowledge: feminist readings*. London: Arnold, 1997.
- ⁸⁹ Grosz, Elizabeth A. *Space, Time, and Perversion: Essays on the Politics of Bodies*. New York: Routledge, 1995; Grosz, Elizabeth A. *Volatile bodies: toward a corporeal feminism*. Bloomington: Indiana Univ. Press, 2011.
- ⁹⁰ Young, Iris Marion, and Danielle S. Allen. *Justice and the politics of difference*. Princeton, NJ: Princeton University Press, 2011.
- ⁹¹ Ibid.
- ⁹² Julia T. Wood, *Gendered Lives: Communication, Gender, and Culture* (Belmont, Calif: Wadsworth Pub, 1994).
- ⁹³ Julia T. Wood, “Telling Our Stories: Narratives as a Basis for Theorizing Sexual Harassment,” *Journal of Applied Communication Research* 20, no. 4 (November 1, 1992): 349.
- ⁹⁴ Celeste Michelle Condit, “What Makes Our Scholarship Feminist? A Radical/Liberal View,” *Women’s Studies in Communication* 11, no. 1 (April 1988): 6–8, <https://doi.org/10.1080/07491409.1988.11089712>; Celeste Michelle Condit, “In Praise of Eloquent Diversity: Gender and Rhetoric as Public Persuasion,” *Women’s Studies in Communication* 20, no. 2 (October 1997): 91–116, <https://doi.org/10.1080/07491409.1997.10162405>.
- ⁹⁵ Ibid, 94.
- ⁹⁶ Condit, “In Praise of Eloquent Diversity: Gender and Rhetoric as Public Persuasion.”
- ⁹⁷ Bryan J. McCann, “Entering the Darkness: Rhetorics of Transformation and Gendered Violence in Patty Jenkins’s *Monster*,” *Women’s Studies in Communication* 37, no. 1 (January 2, 2014): 1–21, <https://doi.org/10.1080/07491409.2013.867914>.
- ⁹⁸ Ibid.
- ⁹⁹ Suzanne Marie Enck and Blake A. McDaniel, “Playing With Fire: Cycles of Domestic Violence in Eminem and Rihanna’s ‘Love the Way You Lie’: Playing With Fire,” *Communication, Culture & Critique* 5, no. 4 (December 2012): 618–44, <https://doi.org/10.1111/j.1753-9137.2012.01147.x>.
- ¹⁰⁰ Suzanne Marie Enck, “Accountability Amidst the ‘Me Too’ Reckoning: Kevin Spacey’s Homopatriarchal Apologia,” *QED: A Journal in GLBTQ Worldmaking* 5, no. 2 (2018): 80, <https://doi.org/10.14321/qed.5.2.0080>.
- ¹⁰¹ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass: Harvard University Press, 1987) p. 6.
- ¹⁰² Angela Y. Davis, *Women, Race & Class*, 1st Vintage Books ed (New York: Vintage Books, 1983); bell hooks, *Ain’t I a Woman: Black Women and Feminism*, Second edition (New York: Routledge, Taylor & Francis Group, 2015).
- ¹⁰³ Lisa A. Flores, “Gender with/out Borders: Discursive Dynamics of Gender, Race, and Nation,” in *The SAGE Handbook of Gender and Communication*, ed. Bonnie J Dow and Julia T Wood (Thousand Oaks, Calif.: Sage Publications, 2006), <http://public.eblib.com/choice/publicfullrecord.aspx?p=996614>.
- ¹⁰⁴ Patricia Hill Collins, *Black Sexual Politics: African Americans, Gender and the New Racism*. (London: Routledge, 2004), <http://public.eblib.com/choice/publicfullrecord.aspx?p=199609>.

- ¹⁰⁵ Suzanne Marie Enck-Wanzer, "All's Fair in Love and Sport: Black Masculinity and Domestic Violence in the News," *Communication and Critical/Cultural Studies* 6, no. 1 (March 2009): 1–18, <https://doi.org/10.1080/14791420802632087>.
- ¹⁰⁶ Hasian, Marouf Arif, Celeste Michelle Condit, and John Louis Lucaites. "The Rhetorical Boundaries of 'the Law': A Consideration of the Rhetorical Culture of Legal Practice and the Case of 'Separate But Equal' Doctrine." *Quarterly Journal of Speech* 82 (1996): 325.
- ¹⁰⁷ Lucaites, John Louis. "Between Rhetoric and 'the Law': Power, Legitimacy, and Social Change." *Quarterly Journal of Speech* 76, no. 4 (November 1990): 436.
- ¹⁰⁸ Lucaites, "Between Rhetoric and 'the Law,'" 437.
- ¹⁰⁹ Hasian, Marouf Arif, Celeste Michelle Condit, and John Louis Lucaites. "The Rhetorical Boundaries of 'the Law': A Consideration of the Rhetorical Culture of Legal Practice and the Case of 'Separate But Equal' Doctrine." *Quarterly Journal of Speech* 82 (1996): 325.
- ¹¹⁰ Scallen, Eileen A. "Judgment, Justification and Junctions in the Rhetorical Criticism of Legal Texts." *The Southern Communication Journal* 60, no. 1 (1994): 68–74.
- ¹¹¹ Anjali Vats, "Created Differences: Rhetorics of Race and Resistance in Intellectual Property Law" (Dissertation, University of Washington, 2013) 5.
- ¹¹² Ibid.
- ¹¹³ Hasian, Marouf Arif, and Trevor Parry-Giles. "'A Stranger to Its Laws': Freedom, Civil Rights, and the Legal Ambiguity of *Romer v. Evans* (1996)." *Argumentation and Advocacy* 34, no. 1 (1997): 27–42.
- ¹¹⁴ White, James Boyd. "Reading Law and Language: Law as Literature" in *Heracles' Bow: Essays on the Rhetoric and Poetics of Law* (Madison: University of Wisconsin Press, 1989) 95.
- ¹¹⁵ Hariman, Robert. "Performing the Laws: Popular Trials and Social Knowledge," in *Popular Trials: Rhetoric, Mass Media, and the Law*, ed. Robert Hariman (Tuscaloosa, AL: University of Alabama Press, 1990), 17.
- ¹¹⁶ Hariman p. 17
- ¹¹⁷ Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" in *Acts of Religion*, ed. Gil Anidjar, 2002.
- ¹¹⁸ Asen, Robert. "Reflections on the Role of Rhetoric in Public Policy." *Rhetoric & Public Affairs* 13, no. 1 (2010): 121–43.
- ¹¹⁹ Ibid, 126.
- ¹²⁰ Ibid, 126.
- ¹²¹ Ibid, 126.
- ¹²² Ibid, 127.
- ¹²³ McKinnon, Sara L. "Review Essay: The Law and Its Bedfellows: Nation Making through the Rhetoric of US Courtrooms." *Quarterly Journal of Speech* 96, no. 3 (August 2010): 324.
- ¹²⁴ West, Isaac. *Transforming Citizenships: Transgender Articulations of the Law*, 2016.
- ¹²⁵ The 2011 DCL is specifically addresses women. Later iterations of the DCL (2014, specifically) have addressed genders outside of the M/F binary and cases of LBGTQ assault, which actually occur at rates comparable to or higher than those of cis, straight women. As well, Title IX practitioners are currently working to be more conscious of racial disparities in survivorship (e.g. indigenous folks are more likely than not to be sexually assaulted).
- ¹²⁶ U.S. Department of Education: Office for Civil Rights, 1.
- ¹²⁷ Campbell, Peter Odell. "The Procedural Queer: Substantive Due Process, *Lawrence v. Texas*, and Queer Rhetorical Futures." *Quarterly Journal of Speech* 98, no. 2 (May 2012): 203–29.
- ¹²⁸ Walter R. Fisher, "Narration as a Human Communication Paradigm: The Case of Public Moral Argument," *Communication Monographs* 51, no. 1 (March 1984): 1–22, <https://doi.org/10.1080/03637758409390180>.
- ¹²⁹ Karlyn Kohrs Campbell and Thomas R. Burkholder, *Critiques of Contemporary Rhetoric*, 2nd ed, Wadsworth Series in Communication Studies (Belmont, CA: Wadsworth Pub, 1997) p. 12.
- ¹³⁰ Ibid.
- ¹³¹ Lisa A. Flores, "Constructing Rhetorical Borders: Peons, Illegal Aliens, and Competing Narratives of Immigration," *Critical Studies in Media Communication* 20, no. 4 (December 2003): 365, <https://doi.org/10.1080/0739318032000142025>.
- ¹³² Fisher, "Narration as a Human Communication Paradigm: The Case of Public Moral Argument"; John Louis Lucaites and Celeste Michelle Condit, "Re-Constructing Narrative Theory: A Functional Perspective," *Journal of Communication* 35, no. 4 (December 1, 1985): 90–108, <https://doi.org/10.1111/j.1460-2466.1985.tb02975.x>; Robert C. Rowland, "On Limiting the Narrative Paradigm: Three Case Studies," *Communication Monographs* 56, no. 1 (March 1989): 39–54, <https://doi.org/10.1080/03637758909390248>; Barbara Warnick, "The Narrative Paradigm:

Another Story,” *Quarterly Journal of Speech* 73, no. 2 (May 1987): 172–82,
<https://doi.org/10.1080/00335638709383801>.

¹³³ W. Lance Bennett and Murray Edelman, “Toward a New Political Narrative,” *Journal of Communication* 35, no. 4 (December 1, 1985): 156–71, <https://doi.org/10.1111/j.1460-2466.1985.tb02979.x>; Fisher, “Narration as a Human Communication Paradigm: The Case of Public Moral Argument”; Michael Calvin McGee and John S. Nelson, “Narrative Reason in Public Argument,” *Journal of Communication* 35, no. 4 (December 1, 1985): 139–55, <https://doi.org/10.1111/j.1460-2466.1985.tb02978.x>; Hayden V. White, *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore: Johns Hopkins University Press, 1990).

¹³⁴ James Jasinski, “(Re)Constituting Community through Narrative Argument: *Eros* and *Philia* in the *Big Chill*,” *Quarterly Journal of Speech* 79, no. 4 (November 1993): 467–86, <https://doi.org/10.1080/00335639309384047>.

¹³⁵ Lucaites and Condit, “Re-Constructing Narrative Theory: A Functional Perspective.”

¹³⁶ Flores, “Constructing Rhetorical Borders: Peons, Illegal Aliens, and Competing Narratives of Immigration.”

¹³⁷ William G. Kirkwood, “Narrative and the Rhetoric of Possibility,” *Communication Monographs* 59, no. 1 (March 1992): 30–47, <https://doi.org/10.1080/03637759209376247>.

¹³⁸ John Louis Lucaites and Celeste Michelle Condit, “Reconstructing : Culturetypal and Counter□cultural Rhetorics in the Martyred Black Vision,” *Communication Monographs* 57, no. 1 (March 1990): 5–24, <https://doi.org/10.1080/03637759009376182>.

¹³⁹ Celeste Michelle Condit, “Democracy and Civil Rights: The Universalizing Influence of Public Argumentation,” *Communication Monographs* 54, no. 1 (March 1987): 1–18, <https://doi.org/10.1080/03637758709390213>.

¹⁴⁰ Flores, “Constructing Rhetorical Borders,” p. 367

¹⁴¹ Lucaites and Condit (1990) explain that, “Characterizations are the labels attached to agents, acts, scenes, agencies, or purposes in the public vocabulary” (p. 7).

¹⁴² Condit, “Democracy and Civil Rights: The Universalizing Influence of Public Argumentation”; William F. Lewis, “Telling America’s Story: Narrative Form and the Reagan Presidency,” *Quarterly Journal of Speech* 73, no. 3 (August 1987): 280–302, <https://doi.org/10.1080/00335638709383809>.

¹⁴³ A. Cheree Carlson, “The Role of Character in Public Moral Argument: Henry Ward Beecher and the Brooklyn Scandal,” *Quarterly Journal of Speech* 77, no. 1 (February 1991): 39, <https://doi.org/10.1080/00335639109383941>.

¹⁴⁴ Steven R. Goldzwig and Patricia A. Sullivan, “Narrative and Counternarrative in Print□mediated Coverage of Milwaukee Alderman Michael McGee,” *Quarterly Journal of Speech* 86, no. 2 (May 2000): 215–31, <https://doi.org/10.1080/00335630009384290>.

¹⁴⁵ Ibid.

¹⁴⁶ Flores, “Constructing Rhetorical Borders.”

Chapter 2

The Legal/Administrative Oscillations of the 2011 Dear Colleague Letter

The 2011 Dear Colleague Letter (DCL) has been noted by scholars of Title IX and campus sexual violence to be a turning point in the available accountability measures for addressing sexual assault at school.¹ It has also, as noted in the previous chapter, been a point of national political contention as both Presidents Obama and Trump made addressing sexual violence (whether preventing and adjudicating it or condoning it) an integral part of their most recent presidential elections. The DCL is the crux at which both presidents disagreed. Obama's administration constructed the DCL, heralding Title IX as an administrative way for schools to address the hostile environment created by CSA without having to utilize the criminal justice system; Trump's administration has rescinded it, arguing that as a law Title IX denies alleged campus perpetrators' right to due process of law. So, which is it—a law or an administrative policy? Can it be both, and if so, what are our expectations of an administrative/law hybrid?

The DCL frequently utilizes contradictory language. It states, “public and state-supported schools must provide due process to the alleged perpetrator.” In the same paragraph, though, it also contends that “schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.”² Much like Shakespeare's *Hamlet*, there is something rotten in the state of Denmark, if only because these conflicts have reached a crisis moment in the form of numerous men suing their colleges or universities for allegedly violating their due process rights and discriminated against them as men by following the recommendations of the DCL. This crisis moment deserves scholarly attention due to the controversial nature of the claims as well as

perhaps the following question: what is it about university-based Title IX proceedings that makes students feel as if they are guaranteed the same rights and treatment as a criminal court?

In this chapter I argue that the DCL operates between two different narrative forms: it mobilizes both legal and administrative logics, setting competing formal expectations and paradoxically satisfying them both. Through a narrative criticism of the document, I argue that the DCL becomes unintelligible in form, which speaks to a larger understanding of the blurring of lines between administrative and legal discourses from which it pulls. It is through this blurring that the DCL is able to speak softly as a set of guidelines *and* carry a big stick of the threat of losing federal funding. In order to make this argument, I delve into the relationships between law and rhetoric, as well as form and narrative because through understanding the relationships between the narratives we tell and our expectations of those narratives we can better understand society's expectations law and what happens when those expectations are destabilized. The implications of DCL's blend of legal and administrative narrative logics are beginning to reach beyond the campus quads and lecture halls. The blurring of lines between legal and administrative logics has enabled students to sue their schools for failing to provide them with due process of law, but it has also enabled multiple district court judges to dismiss the lawsuits citing the DCL and Title IX proceedings as non-legal proceedings. While the dynamics of this stalemate are currently changing as more and more schools are settling the lawsuits, the blurring of narrative logics carries larger set of implications for both those invested in Title IX and CSA policy outcomes, but also for intersections of rhetoric and legal studies. If we are to understand the rhetorical significance of the ways in which the DCL vacillates between narrative logics of law and administrative policy, we must attend to the means through which the lines between law and rhetoric become blurred as well. It becomes clear that assumptions of law as

both concrete and objective are both constructed and productive of certain ideals of the American legal/judicial system as just and fair. The DCL's blurring of narrative logics allows the document, and in relation, Title IX to exist in the intermediary space between law and administrative rhetoric, which allows it to pull from both narrative logics, often simultaneously. This blurring is fertile ground for the DCL to operate tactically to better serve campus survivors.

This chapter will first give a brief overview of the context from which the DCL emerges and operates within to introduce the case studies of several undergraduate men who cite the DCL as the reason that they are suing their colleges for violating their due process rights and for discriminating against them as men. Second, it will disrupt the dichotomy between law as stable justice and rhetoric as manipulation in order to mobilize law as a rhetorical narrative. Third, it considers available scholarship on narrative and form to discuss how the DCL oscillates between the narrative expectations of legal and administrative language. Fourth, this chapter conducts a narrative analysis of the DCL to decipher how it both upholds and disrupts both sets of narrative expectations. The chapter concludes by discussing how the DCL's blend of legal/administrative language functions tactically to exploit fissures and weaknesses in both narrative logics to resist hegemonic norms of power that silence victims or cannot provide recourse.

Responses to the DCL in Context

The creation of the 2011 Dear Colleague Letter (DCL) is often credited as filling the need to provide equal access to higher education for women by adjudicating campus sexual assault (CSA). Put simply, the (repeated) threat of sexual violence was deemed a gendered barrier for women to matriculate and graduate from institutions of learning, and the DCL set out to provide accountability measures for that issue. Public policy relies on narratives to justify its existence and need for adherence. In other words, legislation and narrative co-construct one another. Often,

public policy relies on what Thomas A. Birkland called a “focusing event.”³ Birkland defined such an event as one that is “sudden; relatively uncommon; [that] can be reasonably defined as harmful or revealing the possibility of potentially greater future harms; [that] has harms that are concentrated in a particular geographical area or community of interest; and that is known to policy makers and the public simultaneously.”⁴ In the case of the DCL, the NIJ study mentioned in Chapter 1 was the focusing event, which was only amplified by the wave of media coverage of campus sexual assault. But as Birkland noted, focusing events are “not politically neutral” and can “serve as important opportunities for politically disadvantaged groups to champion messages that had been effectively suppressed by dominant groups and advocacy coalitions.”⁵ The DCL took the narrative of the study, that revealed the proliferation of sexual assault on college campuses, and relocated and repurposed the internal narrative as a policy document. The statistic that 1 in 4 women would be sexually assaulted during her time in college functioned to justify the shifting the focus Title IX from representation to assault. This call to action animated dialogue between the public and internal institutional activity systems, altering the purposes and relationships of each. Schools changed their policies and created new departments because of this document, starting investigations as soon as January of 2012. Amy Devitt noted that narrative shifts “is often but not always a gradual process of subtle adaptations,”⁶ which complements C. D. Rude’s point that most policy change is “slow and incremental.”⁷ Conversely, the DCL spotlights how a pathway to accelerated policy change can clear abruptly in the face of events that reveal how a narrative is what Michael Knievel deems “complicit in public policy failure and incapable of meeting rapidly evolving rhetorical demands.”⁸ As Jeffery Grabill noted, “understanding policy making as a function of institutionalized rhetorical

processes.”⁹ In times of rupture, how is public policy enacted through narratives negotiation and revision?

In response to a national study that cited that 1 in 4 women would experience sexual assault in college, the 24-hour news cycle was constantly covering CSA from 2008 to today (according to my Google Alert), as schools scrambled to meet the guidelines of the DCL and the needs to worried parents and students by following the guidelines of the DCL. Their biggest issues? As Senator James Lankford noted in a letter to the OCR, schools struggled because the DCL lacked clear guidance for how institutions should respond to the growing issues of CSA.¹⁰ To say nothing of the famously languid rate of change academia, were schools really equipped to adjudicate a felony? Lankford also questioned the legal authority of the DCL—were DCLs law or merely guidelines? The exact legal status of the DCL is murky. A Dear Colleague Letter (DCL) is an official, public way for federal agencies to communicate with Congress and other entities.¹¹ The OCR cited the 2015 Supreme Court confirmation of the Administrative Procedures Act, under which federal agencies may issue guidance without the need for congressional legislation or executive order.¹² However, in the same letter, the OCR clarified that the Dear Colleague letter acts only as guidance for colleges and does not carry “the force and effect of law.”¹³ There is no legal mandate to follow the recommendations stipulated in the letter, but compliance is all but guaranteed because noncompliance threatens access to federal funding essential for both public and private schools.¹⁴ And thus we find ourselves in a precarious rhetorical situation. Where does law end and guidance begin? And what does that bifurcation (or lack thereof) mean for Title IX, the DCL, the schools trying to provide services to students, alleged perpetrators, and, most importantly, victims of CSA?

Colleges comply with the DCL by using a preponderance of evidence standard, mandating expedient investigations, and deviating from common criminal procedure in several key ways. The DCL states that college grievance processes must use a preponderance of evidence standard, meaning that “it is more likely than not that harassment or violence occurred.” This is a far lower standard than “beyond a reasonable doubt” or “clear and convincing”—both of which are used in the criminal justice system.¹⁵ The DCL also requires public or state schools to use due process because they are considered government entities based on their funding, yet, the DCL does not define “due process” in text or footnote, and therefore public schools are left to define it for themselves.¹⁶ According to the Due Process Clauses of Fifth and Fourteenth Amendments, no person shall “be deprived life, liberty, or property without due process of law.”¹⁷ Thus, most state schools subscribe to the constitutional and legal definition of due process for their Title IX processes, even though those processes are decidedly not legal proceedings. Second, schools are instructed to conduct investigations into sex- and gender-based violence in an efficient manner—completing the process within 60 days or less. However, the OCR did stipulate that the time limit was not applicable in complex cases, specifically cases that address multiple incidents at once.¹⁸ Third, the OCR “strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing” because it could create a “hostile environment” in which the alleged victim is traumatized while having to confront his or her attacker.¹⁹ Schools often still do allow cross-examination but most do not (as encouraged by the DCL) allow students to have lawyers present during the investigation because the presence of lawyers associates the investigation with a legal proceeding.²⁰

The number of victims who have reported sexual assault to the campus officials has risen precipitously since 2011.²¹ While reporting structures for on-campus crimes have been available since much earlier than 2011, schools were not authorized to adjudicate crimes beyond plagiarism and petty theft until the release of the DCL. With the number of reports sexual violence on the rise, it stands to reason that the number of suspensions or expulsions would rise as well. That is not the case. A 2014 study of over 125 colleges nationwide that found that only 1 in 3 Title IX cases resulted in expulsion for the respondent.²² But the ones who have been expelled believe that they were treated unfairly. Since as early as 2014, new accusations have arisen from students expelled after being found responsible for violating Title IX arguing that colleges are depriving men accused of sexual assault of their rights to due process. Parties are now suing the schools that suspended or expelled them for denying them due process of law through gender discrimination against them as men. These suits emerge on uneven grounds. Their complaints argue that schools violated their Fifth and Fourteenth Amendment rights by not providing them with due process of law in their Title IX investigations, but also that the schools could never have provided them with due process because schools are ill-equipped to do so as non-legal entities. They focus on the stipulations of the DCL as integral to the university's ability to discriminate against them: the preponderance of evidence is discriminatory and too lenient of an evidence standard, the grievance procedure favors the accuser, and the DCL's focus on victim advocacy is a violation of the due process rights of the accused.

As mentioned in the previous chapter, I have collected the narratives of four undergraduate men who are suing their respective colleges (University of Cincinnati, University of Colorado at Boulder, University of Michigan, and Texas A&M University) for failing to provide them with due process. These narratives take the form of complaints submitted to their

regional district court, obtained through public records requests. The narratives these (majority) John Does tell of their experiences with their school's Title IX proceedings share major themes to which rhetoricians should attend, as they are symbolic and persuasive in nature. Each of the following themes is, by these men, considered a violation of their due process rights under the Fifth and Fourteenth Amendments.

First, each narrative argues that the preponderance of evidence standard imposed by the 2011 DCL places an "improper burden of proof" on the alleged perpetrator as opposed to the accuser, which discriminates against the alleged perpetrator on the basis of gender. University of Colorado at Boulder John Doe (Boulder Doe) asserted that "the DCL minimized due process protections for the accused by, among other things, eschewing any presumption of innocence."²³ Here, Boulder Doe cites a what is a commonly known standard of the American criminal justice system: innocent until proven guilty by accusing his federally funded school of not following it. Texas A&M University John Doe (TAMU Doe) added that the university "creates an environment in which male students accused of sexual misconduct are nearly assured of a finding of responsibility."²⁴ This environment denies the accused his fundamental due process rights and deprives these male students of educational opportunities solely on the basis of their sex."²⁵ Not only does TAMU presume guilt of the accused, but in their Title IX processes, they discriminate against men by always finding them responsible for violating sexual harassment policy. University of Cincinnati John Doe (Cincy Doe) went even further to say that "requiring students to prove, because of the improper shifting of the burden of proof, that they have not committed a sexual assault or engaged in sexual harassment makes any new hearing futile because it is often difficult to prove a negative."²⁶ Cincy Doe brings the issue back to a federal

level by indicting the nationwide shift of burden of proof, arguing that it is more difficult to prove that violence did not happen than proving that it did.

Second, the narratives argue that the preponderance of evidence standard is too low for a criminal proceeding. Cincy Doe reports that “instead of requiring accusers to prove they were assaulted, the accused students have to prove they had consent; and schools apply the very lowest standard of proof — preponderance of the evidence.”²⁷ He also charged the university with permitting the use of “hearsay evidence” and “impact statements,” which he deemed were not based in fact.²⁸ Couched in many of these assertions is the accusation that schools do not seek out evidence that is not readily offered to them (such as medical records), and even when presented with records, schools tend to weigh them the same as what these narratives consistently refer to as “hearsay” or witness testimony. States, the Does argue, use a criminal standard for sexual assault cases, and those cases must be proven beyond a reasonable doubt. Since public schools are state-funded institutions, they should be held to state standards.

Third, the narratives assert that several aspects of the process, including limited cross-examination, interim safety measures after the report is filed, and the appeals process unfairly favor the accuser. All of the Does complained that their university had severely limited their ability to cross-examine witnesses or their accuser, by only allowing them to submit written questions to the investigative board.²⁹ I noted their use of the term “cross-examine” which is a common practice used by lawyers in courtrooms across the nation. Usually, cross-examination is face-to-face and without prior approval from the judge or jury. Cincy Doe noted that the university “often imposes restrictions and punishments – sometimes referred to as ‘interim measures’ – based solely on an allegation without allowing for any hearing or even conducting any investigation.”³⁰ These interim measures could include moving the alleged perpetrator out of

the accuser's dorm or out of a shared class; measures could also include no-contact orders (similar to restraining orders but with very few consequences) and extensions on deadlines for the accuser, which Cincy Doe cited was a reason to report assault in the first place. University of Michigan John Doe (Michigan Doe) writes, "Due process protections exist to protect the accused and permit the accused to appeal an erroneous determination of guilt. However, the university permitted the accuser to appeal the [institution's] decision in which Plaintiff had been found not to violate the Policy."³¹ Here, Michigan Doe refers to what is legally known as double jeopardy. In the United States criminal justice system, you cannot be tried twice for the same crime, so in this case allowing the accuser to appeal the decision made by the university is effectively trying Michigan Doe twice for sexual assault.

Fourth, and finally, the Does argue that the federal guidance structure of the DCL does a poor job of addressing due process because it focuses much more on victim advocacy, thus allowing schools to flout the due process rights of the accused. As cited by Boulder Doe (and repeated piecemeal by the others), "the DCL minimized due process protections for the accused by, among other things, eschewing any presumption of innocence, mandating a preponderance of the evidence standard, limiting cross-examination, and forbidding certain forms of alternative dispute resolution."³² In each of their complaints, each John Doe pulls moments from their experience with Title IX where their accuser's needs and comfort were placed above theirs, and they believe that unfair in a set of federal guidelines.

I take the time to pull snippets from these narratives to lay the foundation for the rest of this chapter. Through these narratives, I see conflicted understandings of the role of the 2011 DCL—is it legal or is it administrative? All four Does refer to Title IX investigations as "improper" based on their expectations of how a legal proceeding *should* function. At the same

time, they also point out that the administrative language of the DCL is “unfair” and “discriminatory” along the lines of gender, thus violating Title IX. These signifiers of un/fair are assigned to certain types of language and action. The Does connect law with fairness, and administrative Title IX proceedings with lack of fairness. In this way, the DCL has both the form and content of legal *and* an administrative document, and thus invites these suits. If we are to understand rhetoric as the interaction between symbolic action and knowledge, belief, and opinion, we can then begin to notice how invocations of law collide with invocations of fairness in these narratives. Given how the blurring of legal/administrative language invites these lawsuits, we need to explore the DCL and think at the intersections of law and rhetoric. In the next section, I tackle the assumptions of law as value-neutral and argue, as many have before me that law is inherently rhetorical.

Law as Rhetoric

The four above accounts of Title IX proceedings as unfair and unlawful show the connections between law, rhetoric, and persuasion. All four of these narratives seek to persuade a judge that a harm worth trying has been committed, and the very existence of all four complaints signal the rhetoricity of law. They cite a document that “requires” schools (at the expense of federal funding) to execute a set of administrative tasks that ended in the plaintiff’s expulsion. However, as noted earlier, the DCL is not considered by its governing body (the OCR) to have “force of law.” Given this polemic situation, I consider what the age-old question: what is law anyway? How, if at all, is it rhetorical?

Law is widely considered to be “reason free from passion.”³³ Across public discourse, we hear that law circulates as free from passion – as neutral, fair, and just. But rhetoricians and critical legal scholars and critical rhetorical theorists say otherwise. They argue that we must

think about law as rhetorical. James Boyd White wrote, “legal scholars have picked up habits that allow them to talk about language not as a field of action, but as if it were transparent or neutral.”³⁴ Rhetoricians have contended that language is many things, but it is never neutral, and Critical Legal scholars have furthered argued that law is caught up in many of meaning-making trappings of other types of language. Law and rhetoric scholars have argued that rhetorical critics are well-positioned to provide instructive, reconstructive, and evaluative criticism for legal professionals because rhetoric adds context to otherwise wholly specific case law.³⁵ Critical Legal scholars have laid the groundwork to understand law as a function of rhetoric.³⁶ I lead with this assumption because if we understand law through a rhetorical lens, then we can better comprehend how law functions in order to exact the desired action and adherence.

Legal-rhetorical scholars have also argued that law is constitutively (re)produced. White understands the law as a shared language, “a set of resources for claiming, resisting, and declaring significance.”³⁷ (Re)established through discourse, law standardizes the social order, such as class, gender, and race.³⁸ This notion of law is in direct opposition to two popular views of law: first (as noted above), that laws are essentially value-free, and second, that the power of state operates with unflinching authority. Roberto Unger, author of the book *The Critical Legal Studies Movement*, rejects legal theories of objectivism which obscure “how power ridden and manipulable materials gain a semblance of authority, necessity, and determinacy” in society.³⁹ In their place, he argues legal theories should embrace subjectivism.⁴⁰ Robert Hariman furthers this idea of constitutive legal rhetoric by claiming, “society reproduces itself through performance before spectators in public space. . . . The performance of laws then becomes a singularly powerful locus of social control, for it is the very means by which the members of the community know who they are.”⁴¹ For Hariman, the law is both performative and constitutive. It acts as a

“powerful locus of social control,” directing and disciplining populations; a person understands themselves as either inside or outside of the law.⁴² The key to these arguments is as follows: while the power of law is produced constitutively, it is still disciplining bodies.

Scholars have also theorized the law as performative. White and Hariman deconstruct the notion of law as an omnipotent apparatus of the state. Instead, they understand law as fluidly upheld by those under its purview, but with formidable effects. We, residents of a given space, constitutively uphold the law of the land as is performatively compulsory, but as Robert Asen mentions, it is more than complex than that due to material factors such as the stickiness of institutional authority and the persuasive nature of financial control.⁴³ To apply this argument to the DCL, it would be short-sighted to only consider how laws like Title IX are created through constitutive forces. While a social constructionist view does allow for the pillar-like authority of law to be more easily disassembled and its parts analyzed, it does not take into consideration the potency of the institutions we have built and the material value we have assigned to them. If we consider the billions of dollars’ worth of federal funding that the writers of the DCL hold in their hands, then we can better understand the strife that a mere 20-page document could invite.

While I recognize law as both constitutive and performative, as a scholar with a special attention to gender, I would be remiss to exclude law as both material and partial. While law is constitutively produced and performative, it has real consequences for bodies and is embedded in the movement of power. As Asen says, “public policy as a mediation of rhetorical and material forces” drawing on the “constitutive and consequential power of rhetoric as well as other factors like institutional authority and financial resources.”⁴⁴ It is the job of the rhetorical scholar to ask the following questions: What voices does law allow to be heard? And what relations does law establish among those voices? Much legal feminist scholarship draws anguish from

understanding rape laws to be written by and for the benefit of white men. This scholarship has been primarily theorized by Catherine MacKinnon, who in 1987 wrote that men have defined what rape is by determining what they viewed as a violation of women (based on what they consider to be sex). She continued, “rape becomes an act of a stranger (they mean Black) committed upon a woman (white) whom he has never seen before.”⁴⁵ MacKinnon’s example is direct illustration of White’s main questions: the voices of white men were heard in the creation of rape laws, and those laws only address what they (white men) consider to be a violation. And thus, laws both reflect and structure relations between people.

I build on these arguments and turn to a relatively neglected part of the rhetorical piece—narrative structures. In ways simultaneously constitutive, performative, material, and partial, law is not immune from narrative. It is not neutral but instead builds, participates, and alters narrative structures. It relies on a certain form and content and build appetites in us, satisfying them by meeting our rhetorical expectations. I am one of few scholars to connect critical study of narrative and law.⁴⁶ That limited work, however, is critical. Critical rhetorical theorists have contextualized narratives in order to make a grander commentary on identity parables and inequities. For example, in his study of the infamous 1913 Leo Frank murder case, Marouf Hasian used the lens of race, gender, class, and antisemitism to reconstruct the narrative of the lynching of Leo Frank after he was found (mistakenly) guilty of a rape/murder, yielding a more interesting, contextualized set of findings. I hope to channel Hasian’s critical rhetorical methods combined with narrative theory to analyze the 2011 DCL. Scholars have also explored connections between narrative of popular literature and legislation; there is much disagreement about whether or not popular narratives and narrative structures can affect laws and lawmaking (and vice versa).⁴⁷ Laws circulate publicly, and as they do so they evoke narrative logics that

animate their force and satisfy our need for law. Those logics, while varied, often turn on the critical rhetorical points of form and content. Under Title IX, the DCL exists by pulling from both legal and administrative logics, sometimes at the same time. We can better understand how this oscillation occurs by using a narrative theory lens.

Law as Narrative

Narratives rely on recognizability to maintain relevance in daily life, and, in this way, laws rely on narratives to justify themselves. We (re)tell stories as part of sensemaking, and we come to expect certain stories to indicate certain things. Much like Pavlov's Dog, commonly (re)told narratives build appetites within us that we expect to be satisfied. Lucaites and Condit note that narratives explain past events as a mode to create possible futures, which can be framed as desirable or harmful.⁴⁸ Flores contends that the notion of narrative futures manifests itself in the construction of the nation, by framing of certain identities as inherently un-American.⁴⁹ Enticed by these futures, Kirkwood argues, audiences make real the vision of the nation contained in the narrative, through policy and practice.⁵⁰ Narrative pasts participate in the creation of narrative futures. In the same way, law partakes in the narrative past of the nation and wholly participates in its narrative future. Narrative form matters because form makes things possible. Over and over the form puts in place expectations and then satisfies them.

Narratives do not exist in a vacuum but instead build on and circulate alongside other narratives—the more familiar a narrative, the more it circulates, often times having a naturalizing effect. Form and content are not neutral but are heavy with ideology. Sara McKinnon has argued that law “naturalizes the nation as categories to construct a story of the United States as always, in advance, white, European, middle class, heterosexual, able-bodied, sound in mind, and male.”⁵¹ She contends that narratives of whiteness and law circulate together to justify action

against undocumented immigrants seeking refuge. In her book *Crimes of Womanhood*, Cheree Carlson examines how lawyers used gendered narratives to shape the outcome of trials. For Carlson, the law has long “served as the arbiter of cultural values,” often meaning that outcomes of trials can either uphold the status quo or change it—either way law-upholding and lawmaking participate in narrative sensemaking.⁵² Ideologies are (re)built through narratives, but in that way, narratives are built by ideology, which has material impacts on bodies in courtrooms. The weight of ideology enables and constrains (re)actions to narratives, which makes certain outcomes (im)possible.

Part of a narrative’s ideological force lies in its form. I find it useful to consider the power of form through the four most common types of drama: comedy, tragedy, farce, and melodrama.⁵³ When each of these present themselves in film or theatre, we recognize patterns, that we know that the particular form puts in place a particular ending. For instance, a comedy will set up a problem with every intention of solving it for a happy ending—we are given clues by the quaint circumstances and witty remarks that all will be well in the end so that we are satisfied when our expectations are met.⁵⁴ In tragedies, our mood is often directed of strife and sorrow by dark and stormy weather; these types are so recognizable our appetites match the form instinctually. In their 1978 work *Form and Genre*, Karlyn Kohrs Campbell and Kathleen Hall Jamieson understand form and narrative as intertwined—that it is the repetition of form enacts genre which, as habitual, becomes concretized in popular discourse as a recognizable narrative.⁵⁵ For example, we are all so familiar with the typical format of a romantic comedy film that when a film deviates from the “boy wins girl back” ending, we leave the film dissatisfied. This chapter views the reactions to the DCL through a narrative lens of communal acting together in the way the DCL activates expectations through its form and then both can(not) satisfy them.

The power of form comes from its recognizability and how it comes to make sense. In other words, the form of a narrative has to be comprehensible in order to be categorized. Campbell finds that formal dimensions are central to an audience's ability to comprehend and categorize symbolic action.⁵⁶ Similarly, John Lucaites argued, "every rhetorical performance enacts [and relies upon]...relationships between speaker and audience, self and other, action and structure."⁵⁷ Erin Rand takes up Campbell's notions of form arguing that "the textuality of agency refers not to the location or possession of agency, but to the fact that agency can be exercised only through available and socially recognizable forms of discourse."⁵⁸ Using Larry Kramer's infamous polemics, Rand suggests that the power of text comes from its formal features—its intelligibility. Instead of the force of content as rhetor-based, she understands agency to stem from the following:

...the capacity for words and/or actions to come to make sense and therefore to create effects through their particular formal and stylistic conventions. These conventions are, I contend, specific materializations of institutional power. Texts are intelligible to the extent that they can be identified formally (as polemics or academic essays, for example), and the regulation of the standards of form is one of the ways that power is exercised through social institutions (such as the academy). The textual conventions of institutions are therefore both productive (they enable the force of a text) and constraining (they determine the limits of intelligibility). Rhetorical forms, in other words, operate much like subject positions: they are sites within institutional matrices of power through which discourse becomes intelligible.⁵⁹

Others have taken up these same notions of formal (con)textual agency. Emily Winderman argues that certain in-print rhetoric can only be intelligible as angry through a certain textual form—meaning the text must have a certain typographical layout and declarative sentence structure.⁶⁰ More recently, Paul Elliot Johnson uses form to discuss the ways in which Donald Trump's demagogic rhetoric has constructed white masculinity as precarious.⁶¹ In both cases, texts depend upon form for intelligibility as part of a certain narrative type (demagoguery,

polemics, law, etc). Form creates meaning through aesthetics and by attaching itself to certain histories that “make discourse intelligible” to communities.⁶²

However, narrative scholars maintain that public narratives are rarely coherent and linear, but are instead often fragmented and contradictory, especially over complex social issues.⁶³ Fragmented narrative logics have been argued to work together to mark bodies—even for incarceration. In his book *The Mark of Criminality*, Bryan McCann argues that what he terms the “mark of criminality” emerged as a complex set of generic enactment of white supremacy from the ashes of chattel slavery. McCann shows how the form of the mark of criminality morphs over time and space; still it holds onto a vital narratives thread that continues that subjugation of black peoples through policing and incarceration. According to Carlson and illustrated by Flores, “narratives can gain force when elements of competing narratives are mixed together such that, for all the seeming disparities, underlying aspects of coherence appear.”⁶⁴ For Flores, un-American-ness underlies the clearly disparate characterizations of the peon and the illegal alien. Even though the peon and illegal alien characterizations are not similar and are often competing, the underlying assumption marks Latinx bodies as un-American. In this same vein, I argue that legal and administrative forms are seemingly disparate, but for all their disparities, they tend to have a coherent undertone. As shown by McCann and Flores, while exact matches of narratives across time and space are rare, it behooves the rhetorical scholar to seek out underlying threads of narratives that bely disparate (though conflated) forms. It is through criticizing narrative that we may begin to unravel narrative and resist harmful public vocabularies.

If we understand law as constitutive, but with partial and material consequences, then we can conceptualize how laws rely on familiar narrative logics to justify themselves and their adherence. When laws take on certain narrative forms and genres, they (re)create these logics.

These forms and genres build appetites in the audience, that when they are unsatisfied or (as I argue below) blended, they become unintelligible and infuriating. If anything, much of what follows is an argument for why narrative forms and genres are so vital to study (and not a pointless exercise in taxonomy)—they provide us an avenue through which to better understand how familiarity operates to allow people to take comfort in (un)just aspects of our society. The next section will pull apart how narrative logics operate in the DCL.

Narrative Analysis of the 2011 DCL

In its narrative form, the DCL signals to us that it wants to operate with all the power of a legal document, but with the far fewer responsibilities of an administrative document. In its form, the text pulls from both narrative logics in order to build our appetite for that form of document, and then satisfy it. In this way, while the DCL may perhaps technically have no legal jurisdiction, it functions as both a legal and administrative document for institutions receiving federal education funds. It garners the power of both forms both singularly and blended to be able to build an authoritative appetite in the reader and satisfy it.

Legal narratives

Laws, policy documents, and statutes take on a specific type of form: they identify problems, cite other existing laws, and utilize a specific kind of vocabulary. Legal rhetoric has been theorized since Aristotle's *topoi*, and thus the vocabulary of law is well-recognized by Western eyes.⁶⁵ The DCL takes the same form of a legal document—citing relevant statute, invoking narratives of authority pertaining to the Executive Branch, and using formal language often seen in federal statute. If we are to understand the DCL as pulling from and participating in narratives of law (specifically sexual violence law), then what is assumed in the circulation of the DCL? What is latent in the DCL, and how can we come to broader conclusions about the

negative reactions I have collected? What about the DCL is causing undergraduate men to pursue legal action against their school? I argue that the DCL's use of legal language builds the appetite for a legal proceeding that it cannot satisfy. Thus, partly through its failure to meet the expectations of law invites these men to sue their schools. The following section is a textual analysis of the DCL with special attention paid to its use for legal language, jargon, and general appetite-building.

Legal language is pervasive across the DCL. That language appears in its use of court cases as evidence for claims, its reliance on statute for reason for guidance, and its citation of specific sexual violence-based laws to mark its own importance. The DCL uses direct legal language that cannot be extricated from the court system where it originated. For example, the DCL notes, "The Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*"⁶⁶ It is in these moments where the non-litigator eye skips over the last part of the sentence, starting with the parentheses, marking the sentence as legal in form, and thus the document as neutral and authoritative. The DCL relies on citing statute and court cases as evidence for the changes in procedure that are prescribed. For example, it contends "For instance, a single instance of rape is sufficiently severe to create a hostile environment."¹⁰ The footnote "10" refers to a series of at least eight court cases with their descriptions and dates, taking up about a third of the page. This extensive reliance on footnotes is consistent with legal writing—as many law reviews are heavy in definitional and citational footnotes. This pattern continues with many of the claims made in the DCL backed up by footnotes citing statutes marked only by the § (a.k.a. the symbol for statute) and the statute number. These formal commitments build and satisfy our appetite for law by mimicking existing legal form.

The DCL relies on this communal conscious of legal authority in its legal citations (in text and footnote). The DCL cites the 1986 Jeanne Clery Act in a footnote:

Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person, forcibly and/or against that person's will, or not forcibly or against the person's will where the victim is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. 34 C.F.R. Part 668, Subpt. D, App. A.^{‡67}

“The forcible sex offenses” and the other acts sexual assault acts listed are criminal acts, and in most states, are on par with murder and arson as Class A felonies, worth up to life in prison.⁶⁸

Typically such language—the citing of the Clery Act, use of the words “forcible” and “sodomy,” and the citation of statute—is more common to law, not administrative policy. Administrative policy acts as guidance for actions within an institution or organization—it often assumes those within the organization are acting in good faith within accordance to existing laws. Existing laws are taken as the foundation for behavior, and the guidance further directs behavior to be in line with the organization's vision or mission. The bifurcation of law/administration often means that when a law is broken within an organization, the organization defers to law enforcement, instead of solving it internally. The OCR now assumes responsibility for crimes of sexual violence (as they now fall under the term “sexual harassment”), when they do not assume responsibility for other crimes of the same legal classification, which are also covered under the Clery Act, such as theft, murder, arson, and vandalism. The use of the Clery Act positions the changes outlined in the DCL as a legal necessity because the Clery Act is already signed into law and was put in place because a series of incredible tragedies happened to a (white) woman that the college could have been prevented.

[‡] Jeanne Clery Act was passed after the brutal rape and murder of college student Jeanne Clery in her own dorm room. The law mandates that colleges report incidents of crime on campus for future students to view when choosing a college. The Department of Education oversees compliance with the Clery Act, and thus is using the Act as *logos* to claim that it is responsible for adjudicating the array of offenses itemized above.

The tone and language choice of the DCL indicate a clear interest and attention to law. The document continuously cites statute and court cases, making use of legal jargon that marks it as legal and authoritative. It participates in and (co)creates narratives of protection that are legally enacted through existing statute. This section has demonstrated the pervasive legal tone and language choice in the DCL and makes clear the ways that tone/language signals fairness and authority. The manner in which the DCL draws on this legal form bolsters its authority as a text. The way that the text imitates form of law also enabled agile policy change, which is notable for a type of environment (academia) that tends to move at a notoriously sluggish pace. But is it whole-heartedly a legal document?

Administrative Narratives

I answer the rhetorical (pun intended) question posed above with a resounding “no.” The DCL simultaneously draws on legal language, bolstering its authority, *and* couches language in administrative jargon to separate Title IX proceedings from the law. While it draws on the power of law, this simultaneously administrative document does not hold any of the legal consequences. In the DCL’s original formation, the Obama Administration situated Title IX CSA adjudications to be a supplement or a low-stakes replacement for criminal investigations.⁶⁹ The DCL reflects that distinction. The DCL specifically instructs campuses *not* to use the same forms and narratives as criminal proceedings. By providing guidance, it creates in the audience, the desire for bulleted lists, ideas for change, and perhaps some resources for further reading.

The first pattern noted in the DCL is that it replaces certain legal terms with administrative alternatives. The DCL takes care to refer to the people involved in a campus rape as they would in a court room; instead of “plaintiff” the DCL mobilizes “complainant,” and couches the “defendant” as “alleged perpetrator.” By avoiding legal language, the DCL

effectively avoids the responsibility of the criminal justice system—lawyers, juries, judges, and punishments. Using legal language would indicate a legal proceeding, and school-based Title IX grievance processes do not use the same standards as the law. The letter dictates that schools follow OCR policies of using a “preponderance of evidence” standard (which, according to the corresponding footnote, means “reliable, probative and substantial evidence”), as opposed to “clear and convincing” used in criminal sexual assault cases—in lay terms, it is useful to think about preponderance of evidence as 50/50 plus a feather, whereas “clear and convincing” has a higher evidence threshold.⁷⁰ There is a clear rhetorical demarcation of law and Title IX via evidence form; criminal law uses “clear and convincing” for sexual assault cases and Title IX proceedings will now use “preponderance of evidence,” a lower standard of proof. The DCL notes, “. . . because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX.”⁷¹ Differentiating by “standards” creates autonomy for Title IX and agency for the policies to operate by themselves. By stating that neither process determines violation of the other creates distance necessary to allow Title IX to stand on its own.

As well, there is conflict in the use of a preponderance of evidence standard because, as these complainants argue, it violates due process. This conflict functions rhetorically to situate Title IX proceedings as illegal and discriminatory toward men. When adjudicating Title IX cases, schools are required to use “due process” because they are federally governed and funded.⁷² According to the Due Process Clauses of Fifth and Fourteenth Amendments, no person shall “be deprived life, liberty, or property without due process of law.”⁷³ Yet, the DCL does not define “due process” in text or footnote, and thus, as I detail in chapter one, schools are left to define it for themselves.⁷⁴ Without a definition, many schools seemingly rely on the Bill of

Rights to define due process for their Title IX grievance processes, even though the Bill of Rights was constitutively constructed, and Title IX procedures have little of the same punitive powers of law. It is perhaps worth noting that the Due Process Clause is not very clear either, and states often rely on their own statutes and criminal codes to dictate what kinds of standards of evidence, trial procedures, and punishment minimums for each accusation, which might influence much of the legal/administrative conflation seen in the reporting of the DCL. For example, the men from the chosen cases indict their schools for using preponderance of evidence standard because it is a standard that would never be used for the same case in a court of law.⁷⁵

However, as well, I found that the letter is careful to only cite statute and court rulings having to do with the Educational Amendments (Title IV, Title VII, Title IX, etc.), walking a narrow line with the limitations of the scope of their oversight and efforts to expand that oversight to include sexual violence in sexual harassment. In the same vein, citing past cases and the appearance of the statute symbol (§) connects the document to the law in a way that aggregates authority without having nearly the same power to punish. In a footnote, the DCL reads, “OCR’s legal authority is based on those laws and regulations. This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations.”⁷⁶ Here, the DCL draws on the authority of law, but with this hedging language, is somewhat beholden to the law that supersedes it. While the OCR is free to draw on support of already-existing judicial decisions and statute, it cannot alter or replace law. The OCR is an administrative office in nature, for the most part handing down decisions from a larger power. This letter, however, is an instance in which the Office aggregates power by re-defining its power within its own parameters. The letter closes, “OCR provides technical assistance to assist

recipients in achieving voluntary compliance with Title IX.”⁷⁷ Throughout the DCL, it seemed clear that schools were required to make changes to their Title IX policies and procedures (or risk penalty of loss of federal funding) to reflect the newfound authority of the OCR, but it is actually “voluntary?” Is compliance with Title IX (a federal law) voluntary? What are the consequences for disobeying? They are nowhere to be found in the DCL. It becomes clear at this point that the OCR has very little legal authority on its own, but it is an agency that distributes federal funding, so the letter seems to find power in its ability to dish out material consequences.

These administrative oscillations serve two formal functions: they effectively soften the legal (and thus authoritative) teeth of the DCL’s oscillations toward the legal form. The administrative oscillation, as Shep Melnick notes, “evades requirements [for comment periods, congressional approval, and presidential signature] by labeling these commands ‘interpretations,’ ‘clarifications,’ and ‘guidance’ rather ‘rules,’ and denying—quite unconvincingly—that they add anything new.”⁷⁸ I conclude this section by noting that the DCL has reached a disjuncture: if the DCL is a legal document, it has the rhetorical power of U.S. governmental authority and a tone of neutrality, but with that comes the responsibility to uphold the Bill of Rights and state and federal statute; if it is an administrative document, it is less authoritative, but holds a greater possibility for campus-based, equity-minded change outside of the law. But what if the DCL is simultaneously both and neither?

The Blending of Forms: Lego-Administrative

When the DCL pulls simultaneously from both legal and administrative language, it can often times blend the two forms to create what I term Lego-Administrative language (a combination of the words “legal” and “administrative”). This blend is marked by the authoritativeness of the text while also pushing for schools to use their administrative power to

unlock accountability structures outside of the criminal justice system. Lego-Administrative language builds the appetite of legal authority only to leave us unsatisfied by oscillating to administrative language. As such, this rhetorical narrative is not established on its own, it pulls from two engrained narrative forms to create itself, it blurs the lines of different appetites and creates confusion.

At some levels, I find the DCL mobilizing what Michel de Certeau would call a tactical stance. A tactic works from grassroots level, taking advantage of weaknesses in hegemonic power to create fissures of resistance.⁷⁹ De Certeau defines strategy as “the calculation (or manipulation) of power relationships that becomes possible as soon as a subject with will and power (a business, an army, a city, a scientific institution) can be isolated.”⁸⁰ Institutional strategies, for de Certeau, locate their agency in already-existing locus of power that (re)authorize the status quo.⁸¹ As Darrel Enck-Wanzer argues, tactical rhetorics *resist* hegemonic power while strategic rhetorics *exert* hegemonic power.⁸² In this instance, the move to tactical is important for the ways that it demonstrates how resistance may exist outside of full-scale revolution—that even by exploiting weaknesses and fissures, real change can be made, even if that change is small. While I realize that a federal agency mobilizing tactical stance is somewhat counterintuitive, I believe that a more nuanced reading of the historical context might shed some light on why I use tactical stance. The problem: the criminal justice system (centuries in the instituting) is not serving survivors of CSA because they (the survivors) cannot meet the evidence standard. The solution: circumvent the legal system by holding federal money for schools hostage until they create another way to adjudicate violence on their campuses. I realize that understanding the DCL as a strategic text fits the form taken on by the DCL; the letter emerges from an institution utilizing its authority with the form of law. However, it uses tactics

as Enck-Wanzer understands them: “to take advantage of weaknesses, fissures, inattention, and so on, to gain an advantage and transform a static place into a constituted space.”⁸³

For CSA survivors, the DCL instituted Title IX procedures that allowed them to take advantage of the “weaknesses” and “fissures” of the criminal justice system by literally bypassing it. The DCL looks and sounds like a legal document, but it did not need the majority of Congress to approve it, which is significant because if put in front a 60-member Republican House of Representatives in 2011, the DCL would have never been passed. The OCR circumvented congressional approval by couching the language of DCL in administrative form. My narrative criticism of the DCL reveals the power of form to incite political change. For better or worse, CSA survivors have another option for recourse outside of the criminal justice system. Through its tactical blend of legal and administrative forms, the DCL is able to do two things: redefine sexual harassment to include the felonies of assault and rape and use statute as exigency for the OCR to require schools to conduct their own administrative disciplinary proceedings.

One of the ways Lego-Administrative language formally manifests itself is through the DCL’s (re)definition of sexual harassment under Title IX. Its rapid oscillation between legal and administrative forms effectively harnesses the authority to change the definition without any of responsibility to punish violators through legal means. The DCL identifies “sexual harassment” as a key term in the Title IX, and then goes on to expand the definition to include “sexual violence” also under that same umbrella term. The DCL announces that, “Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX.”⁸⁴ More than once, the DCL reiterates this phrase, repeatedly noting that “sexual violence is a form of sexual harassment”⁸⁵ or a blanket definitional phrase like, “Use of the term ‘sexual harassment’ throughout this document includes sexual violence unless otherwise

noted.”⁸⁶ The DCL denotes a change in definition multiple times in repetition of definitional statements, but by the middle of the document, it is freely using “sexual harassment” and “sexual violence” interchangeably. In the course of 19 pages, it alters the fate of college rape victims who were usually told to seek a criminal investigation for campus rape, and instead places it under the jurisdiction of the College, and by extension, the Department of Education. As reasoning, the DCL cites the CSA study done by the National Institute for Justice stating that “1 in 4 women are victims of completed or attempted sexual assault while in college,” and the same for 6% of men, finding that “in 2009, college campuses reported nearly 3,300 forcible sex offenses.”⁸⁷ The DCL reasons, “the Department is deeply concerned about this problem and is committed to ensuring that all students feel safe in their school, so that they have the opportunity to benefit fully from the school’s programs and activities.”⁸⁸ The definition of “sexual harassment” has been expanded due to a statistical study finding that sexual violence has become a prevalent problem on college campuses around the country.

The Lego-Administrative expansion of “sexual harassment” to include sexual violence utilizes the authority of legal language with none of the baggage of the criminal justice system; schools *should* adjudicate sexual violence on their campuses, but they should do it administratively. It is an impossibly difficult tightrope to walk, but the Lego-Administrative oscillation makes it intelligible by building the appetite of authority and rhetorically giving power to schools. This form may require difficult maneuvering, but it holds the possibility for major payoff. Under the purview of OCR, more can be done “to eliminate harassment, prevent its recurrence, and address its effects.”⁸⁹ Versions of this quote litter the letter. In this way, the OCR distinguishes its work from law enforcement and court proceedings without losing the authority it has already accumulated by assuming oversight of college sexual violence

elimination and adjudication. The OCR declared students unsafe at their federally funded school is a violation of Title IX because threat of danger deters students from participating, and thus being able to “benefit fully from the school’s programs and activities.” The Lego-Administrative form enables authoritative and administrative meanings to circulate together. This circulation combined with the abundant evidence of student danger enables the Department of Education to intervene; the stakes are too high not take action to protect students.

Concluding Thoughts

To conclude, I return to the claims of lack of due process that I mentioned in my earlier paragraphs. The John Does of the chosen cases invoke the legal and administrative oscillations when they take legal action against their schools. They note that schools are required to perform these procedures to ensure federal funding, and they protest the requirements under the DCL as discriminatory to men. Throughout this chapter, I have argued that the 2011 DCL imitates the form of a legal discourse in order to be intelligible as a form of authority. I have also argued that it mobilizes administrative language which functions to alleviate the responsibility to adhere to criminal procedure. I have concluded that the oscillations between legal and administrative languages produces a Lego-Administrative form that functions tactically to exploit weaknesses and fissures of hegemonic practices of adjudicating sexual violence. I used narrative criticism to interrogate the kinds of legal support DCL mobilizes to reconstitute sexual assault as sexual harassment and to ensure university accordance with administrative recommendations. Moving forward, I ponder how the blend of legal and administrative power sanctions a paradox: how politically charged administrative changes with no legal mandate can lead to legal recourse in cases of university noncompliance. It is the blend that invites both, and through this example, we

can better understand how form constitutes meaning, and what is rhetorically possible when texts exist between two forms.

A narrative criticism was vital to this reading of the 2011 DCL because the authority of administrative policy is not always clear, especially when put into conversation with the law (e.g.: sexual harassment HR policies at a workplace can differ from statewide law around sexual harassment). Through a narrative criticism, the DCL becomes unintelligible in form, which speaks to a larger understanding of the blurring of lines between administrative and legal discourses from which it pulls. This chapter prods the barriers separating administrative policy and legal documentation. Seeing administrative policy through a legal lens lends itself to new understandings of how policy becomes intelligible to those under its purview.

This chapter also intervenes in discussions about CSA. I have posited new way of viewing CSA through the role of form in policy and procedural documentation. The DCL finds itself caught in the crosshairs of de Certeau's two forms of agency: strategic and tactical. It exists within both realms. While the majority of this essay has proven that the DCL is absolutely an institutional document imitating legal discursive forms to (re)constitute pre-existing norms of power relations, it is also tactical. The criminal justice system is notoriously slow to change (if at all) to better support survivors, so the DCL has the chance to exploit cracks and fissures in the law to resist hegemonic norms of power that silence victims or cannot provide recourse. Instead of working within existing sexual assault and rape statute, it bypasses law completely, creating its own system of adjudication procedures that resembles the law but has none of the same consequences.

I have also identified and interrogated the possible material consequences of the administrative/legal oscillations of the DCL for victims. As Education Secretary Betsy DeVos

has demonstrated, Title IX-related protections and adjudications for victims can be enacted and taken away at any point by whatever party controls the White House. This kind of precarity is disconcerting for CSA victims and potentially dangerous if changes to administrative rules happen mid-investigation. Academia is famous for its bureaucracy, specifically its inability to change. Colleges cannot adjust to how quickly presidential administrations change their policies around campus adjudications. However, returning to this notion of tactics (instead of strategy) could prove useful for schools to avoid being jerked around by a polarized political system.

¹ Jessica C. Harris and Chris Linder, eds., *Intersections of Identity and Sexual Violence on Campus: Centering Minoritized Students' Experiences*, First edition (Sterling, Virginia: Stylus, 2017); Kate Lockwood Harris, "The Next Problem With No Name: The Politics and Pragmatics of the Word Rape," *Women's Studies in Communication* 34, no. 1 (May 5, 2011): 42–63, <https://doi.org/10.1080/07491409.2011.566533>; Kate Lockwood Harris, "Show Them a Good Time: Organizing the Intersections of Sexual Violence," *Management Communication Quarterly* 27, no. 4 (November 2013): 568–95, <https://doi.org/10.1177/0893318913506519>; Kate Lockwood Harris, "Feminist Dilemmatic Theorizing: New Materialism in Communication Studies: Feminist Dilemmas," *Communication Theory* 26, no. 2 (May 2016): 150–70, <https://doi.org/10.1111/comt.12083>; Kate Lockwood Harris, "Re-Situating Organizational Knowledge: Violence, Intersectionality and the Privilege of Partial Perspective," *Human Relations* 70, no. 3 (March 2017): 263–85, <https://doi.org/10.1177/0018726716654745>; Kate Lockwood Harris, "Yes Means Yes and No Means No, but Both These Mantras Need to Go: Communication Myths in Consent Education and Anti-Rape Activism," *Journal of Applied Communication Research* 46, no. 2 (March 4, 2018): 155–78, <https://doi.org/10.1080/00909882.2018.1435900>; Kate Lockwood Harris, "Mapping Gender and Violence: Describing Reality, Resisting Abuse," *Women's Studies in Communication* 41, no. 2 (April 3, 2018): 113–16, <https://doi.org/10.1080/07491409.2018.1463770>; Kate Lockwood Harris and Karen Lee Ashcraft, "Organizing Sexual Violence: Communicative, Intersectional Dilemmas around Mandated Reporting." (2013), http://0-gateway.proquest.com/libraries.colorado.edu/openurl?url_ver=Z39.88-2004&rft_val_fmt=info:ofi/fmt:kev:mtx:dissertation&res_dat=xri:pqm&rft_dat=xri:pqdiss:3607312; Kate Lockwood Harris and Jenna N. Hanchey, "(De)Stabilizing Sexual Violence Discourse: Masculinization of Victimhood, Organizational Blame, and Labile Imperialism," *Communication and Critical/Cultural Studies* 11, no. 4 (October 2, 2014): 322–41, <https://doi.org/10.1080/14791420.2014.972421>; Kate Lockwood Harris, Kellie E Palazzolo, and Matthew W Savage, "'I'm Not Sexist, but . . .': How Ideological Dilemmas Reinforce Sexism in Talk about Intimate Partner Violence," *Discourse & Society* 23, no. 6 (November 2012): 643–56, <https://doi.org/10.1177/0957926512455382>. R. Shep Melnick, *The Transformation of Title IX: Regulating Gender Equality in Education* (Washington, D.C: Brookings Institution Press, 2018).

² Rushlynn Ali, "Dear Colleague Letter, Office for Civil Rights, April, 2011" (United States Department of Education, April 4, 2011) 12.

³ Birkland, Thomas A. "Focusing Events, Mobilization, and Agenda Setting." *Journal of Public Policy* 18, no. 1 (1998): 53-74.

⁴ Ibid. p. 54

⁵ Ibid.

⁶ Amy J. Devitt, *Writing Genres, Rhetorical Philosophy and Theory* (Carbondale: Southern Illinois University Press, 2004) 134.

⁷ C.D. Rude, "Toward an Expanded Concept of Rhetorical Delivery: The Uses of Reports in Public Policy Debates." *Technical Communication Quarterly* 13: 3(2004) 286.

⁸ Michael S. Knievel, "Rupturing Context, Resituating Genre: A Study of Use-of-Force Policy in the Wake of a Controversial Shooting," *Journal of Business and Technical Communication* 22, no. 3 (July 2008): 332, <https://doi.org/10.1177/1050651908315984>.

-
- ⁹ Jeffrey T. Grabill, “Shaping Local HIV/AIDS Services Policy through Activist Research: The Problem of Client Involvement,” *Technical Communication Quarterly* 9, no. 1 (January 2000): 35, <https://doi.org/10.1080/10572250009364684>.
- ¹⁰ “Senator Lankford Challenges Department of Education on Legal Justification for Public School Bathroom Directive | U.S. Senator James Lankford of Oklahoma,” May 17, 2016, <https://www.lankford.senate.gov/news/press-releases/senator-lankford-challenges-department-of-education-on-legal-justification-for-public-school-bathroom-directive>.
- ¹¹ U.S. Library of Congress. Congressional Research Service. “Dear Colleague” Letters: A Brief Overview, by R. Eric Peterson. RS21667. 2005.
- ¹² “Senator Lankford Challenges Department of Education on Legal Justification for Public School Bathroom Directive | U.S. Senator James Lankford of Oklahoma,” May 17, 2016, <https://www.lankford.senate.gov/news/press-releases/senator-lankford-challenges-department-of-education-on-legal-justification-for-public-school-bathroom-directive>. “Administrative Procedure Act,” 79–404 60 Stat. 237 § (1946). R. Shep Melnick, *The Transformation of Title IX: Regulating Gender Equality in Education* (Washington, D.C: Brookings Institution Press, 2018).
- ¹³ “Senator Lankford Challenges Department of Education on Legal Justification for Public School Bathroom Directive | U.S. Senator James Lankford of Oklahoma,” May 17, 2016, <https://www.lankford.senate.gov/news/press-releases/senator-lankford-challenges-department-of-education-on-legal-justification-for-public-school-bathroom-directive>.
- ¹⁴ R. Shep Melnick, *The Transformation of Title IX: Regulating Gender Equality in Education*.
- ¹⁵ Rushlynn Ali, “Dear Colleague Letter, Office for Civil Rights, April, 2011” 11.
- ¹⁶ *Ibid*, 12
- ¹⁷ Epstein Lee and Thomas G. Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*. (Washington D.C.: CQ Press, 2004), 614.
- ¹⁸ Rushlynn Ali, “Dear Colleague Letter, Office for Civil Rights, April, 2011” 12-13
- ¹⁹ *Ibid*, 12
- ²⁰ *Ibid*, 12
- ²¹ R. Shep Melnick, *The Transformation of Title IX: Regulating Gender Equality in Education*, “Statistics,” .org, Know Your IX, n.d., <https://www.knowyourix.org/issues/statistics/>., “Campus Sexual Violence,” .org, Rape, Abuse & Incest National Network (RAINN), n.d., <https://www.rainn.org/statistics/campus-sexual-violence>.
- ²² Tyler Kingkade, “Fewer Than One-Third Of Campus Sexual Assault Cases Result In Expulsion,” *Huffington Post*, September 29, 2014, sec. College, https://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html.
- ²³ *William Norris v. University of Colorado, Boulder*, No. 1:18-cv-02243 (The United States District Court for the District of Colorado 2018) 6.
- ²⁴ *Austin Van Overdam v. Texas A&M University*, No. 4:18-cv-02011 (United States District Court Southern District of Texas Houston Division 2018) 4.
- ²⁵ *Ibid*.
- ²⁶ *John Doe v. The University of Cincinnati*, No. 1:16-cv-987 (The United States District Court for the Southern District of Ohio Western Division 2016) 27.
- ²⁷ *Ibid*, 4.
- ²⁸ *Ibid*.
- ²⁹ *William Norris v. University of Colorado, Boulder*, No. 1:18-cv-02243 (The United States District Court for the District of Colorado 2018) 6. *Austin Van Overdam v. Texas A&M University*, No. 4:18-cv-02011 (United States District Court Southern District of Texas Houston Division 2018) 4. *John Doe v. The University of Cincinnati*, No. 1:16-cv-987 (The United States District Court for the Southern District of Ohio Western Division 2016) 27. *John Doe v. David H Baum, Susan Pritzel, Tabitha Bentley, E. Royster Harper, and Nadia Bazy*, No. 2:16-cv-13174 (United States District Court Eastern District of Michigan Southern Division 2016).
- ³⁰ *John Doe v. The University of Cincinnati*, 11.
- ³¹ *John Doe v. David H Baum, Susan Pritzel, Tabitha Bentley, E. Royster Harper, and Nadia Bazy*, 12.
- ³² *William Norris v. University of Colorado*, 6.
- ³³ Aristotle. *Aristotle's Politics*. Oxford:Clarendon Press, 1905. Book III, 1287a.32
- ³⁴ James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) ix.
- ³⁵ Scallen, Eileen A. “Judgment, Justification and Junctions in the Rhetorical Criticism of Legal Texts.” *The Southern Communication Journal* 60, no. 1 (1994): 68–74.

- ³⁶ Hasian, Marouf Arif, Celeste Michelle Condit, and John Louis Lucaites. "The Rhetorical Boundaries of 'the Law': A Consideration of the Rhetorical Culture of Legal Practice and the Case of 'Separate But Equal' Doctrine." *Quarterly Journal of Speech* 82 (1996): 325. Lucaites, John Louis. "Between Rhetoric and 'the Law': Power, Legitimacy, and Social Change." *Quarterly Journal of Speech* 76, no. 4 (November 1990): 436. Scallen, Eileen A. "Judgment, Justification and Junctions in the Rhetorical Criticism of Legal Texts." *The Southern Communication Journal* 60, no. 1 (1994): 68–74. Hasian, Marouf Arif, and Trevor Parry-Giles. "'A Stranger to Its Laws': Freedom, Civil Rights, and the Legal Ambiguity of *Romer v. Evans* (1996)." *Argumentation and Advocacy* 34, no. 1 (1997): 27–42. White, James Boyd. "Reading Law and Language: Law as Literature" in *Heracles' Bow: Essays on the Rhetoric and Poetics of Law* (Madison: University of Wisconsin Press, 1989) 95. Hariman, Robert. "Performing the Laws: Popular Trials and Social Knowledge," in *Popular Trials: Rhetoric, Mass Media, and the Law*, ed. Robert Hariman (Tuscaloosa, AL: University of Alabama Press, 1990), 17.
- ³⁷ White, James Boyd. "Reading Law and Language: Law as Literature" in *Heracles' Bow: Essays on the Rhetoric and Poetics of Law* (Madison: University of Wisconsin Press, 1989) 205.
- ³⁸ White, James Boyd. "Reading Law and Language: Law as Literature," 95.
- ³⁹ Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, Mass: Harvard University Press, 1986).
- ⁴⁰ Ibid.
- ⁴¹ Ibid, 17-18.
- ⁴² Hariman, Robert. "Performing the Laws: Popular Trials and Social Knowledge," in *Popular Trials: Rhetoric, Mass Media, and the Law*, ed. Robert Hariman (Tuscaloosa, AL: University of Alabama Press, 1990), 17.
- ⁴³ Asen, Robert. "Reflections on the Role of Rhetoric in Public Policy." *Rhetoric & Public Affairs* 13, no. 1 (2010): 121–43. <https://doi.org/10.1353/rap.0.0142>.
- ⁴⁴ Ibid.
- ⁴⁵ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass: Harvard University Press, 1987) p. 105.
- ⁴⁶ Dolin, Kieran, ed. *Law and Literature*. Cambridge: Cambridge University Press, 2018. doi:10.1017/9781108386005; Poser, Richard A. *Law and Literature: A Misunderstood Relation*. Cambridge: Harvard University Press, 1988.
- ⁴⁷ Catherine MacKinnon, *Feminism Unmodified*, 105.
- ⁴⁸ Lucaites and Condit, "Re-Constructing Narrative Theory: A Functional Perspective."
- ⁴⁹ Flores, "Constructing Rhetorical Borders: Peons, Illegal Aliens, and Competing Narratives of Immigration."
- ⁵⁰ William G. Kirkwood, "Narrative and the Rhetoric of Possibility," *Communication Monographs* 59, no. 1 (March 1992): 30–47, <https://doi.org/10.1080/03637759209376247>.
- ⁵¹ McKinnon, Sara L. "Review Essay: The Law and Its Bedfellows: Nation Making through the Rhetoric of US Courtrooms." *Quarterly Journal of Speech* 96, no. 3 (August 2010): 324.
- ⁵² A. Cheree Carlson, "The Role of Character in Public Moral Argument: Henry Ward Beecher and the Brooklyn Scandal," *Quarterly Journal of Speech* 77, no. 1 (February 1991): 38–52, <https://doi.org/10.1080/00335639109383941>; A. Cheree Carlson, *The Crimes of Womanhood Defining Femininity in a Court of Law* (Urbana: University of Illinois Press, 2009) 4.
- ⁵³ Sylvan Barnet, ed., *Types of Drama: Plays and Contexts*, 8th ed (New York: Longman, 2001).
- ⁵⁴ Ibid.
- ⁵⁵ Kohrs Campbell, Karlyn, and Kathleen Hall Jamieson. "Introduction" in *Form and genre: shaping rhetorical action*. (Falls Church, VA: Speech Communication Association, 1978), 14.
- ⁵⁶ Karlyn Kohrs Campbell, "Agency: Promiscuous and Protean," *Communication and Critical/Cultural Studies*, 2 (2005): 7.
- ⁵⁷ Cheryl Geisler, "How Ought We to Understand the Concept of Rhetorical Agency? Report from the ARS," *Rhetoric Society Quarterly* 34, no. 3 (June 2004): 13, <https://doi.org/10.1080/02773940409391286>.
- ⁵⁸ Rand, Erin J. "An Inflammatory Fag and a Queer Form: Larry Kramer, Polemics, and Rhetorical Agency," *Quarterly Journal of Speech*, 94, no. 3 (2008): 299.
- ⁵⁹ Rand, "An Inflammatory Fag and a Queer Form," 299-300.
- ⁶⁰ Winderman, Emily. "(S)anger Goes Postal in *The Woman Rebel*: Angry Rhetoric as a Collectivizing Moral Emotion," *Rhetoric & Public Affairs*, 17, No. 3, (Fall 2014): 386.
- ⁶¹ Johnson, Paul Elliott. "The Art of Masculine Victimhood: Donald Trump's Demagoguery," *Women's Studies in Communication*, 40, no. 3, (2017): 231.
- ⁶² Rand, "An Inflammatory Fag and a Queer Form," 300.

-
- ⁶³ Steven R. Goldzwig and Patricia A. Sullivan, "Narrative and Counternarrative in Print-mediated Coverage of Milwaukee Alderman Michael Mcgee," *Quarterly Journal of Speech* 86, no. 2 (May 2000): 215–31.
- ⁶⁴ Lisa A. Flores, "Constructing Rhetorical Borders: Peons, Illegal Aliens, and Competing Narratives of Immigration," *Critical Studies in Media Communication* 20, no. 4 (December 2003): 362–87, <https://doi.org/10.1080/0739318032000142025>.
- ⁶⁵ Aristotle, and George A. Kennedy. "Topoi." *On rhetoric: a theory of civic discourse*. New York: Oxford University Press. 1991.
- ⁶⁶ Rushlynn Ali, "Dear Colleague Letter, Office for Civil Rights, April, 2011," 10.
- ⁶⁷ *Ibid*, 2
- ⁶⁸ *Blacks Law Dictionary s.v. "Classes of Felonies"*
- ⁶⁹ White House Task Force to Protect Students from Sexual Assault. "Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault." April, 2014.
- ⁷⁰ Rushlynn Ali, "Dear Colleague Letter, Office for Civil Rights, April, 2011," 11
- ⁷¹ *Ibid*, 10
- ⁷² *Ibid* 12
- ⁷³ Epstein Lee and Thomas G. Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*. (Washington D.C.: CQ Press, 2004), 614.
- ⁷⁴ Rushlynn Ali, "Dear Colleague Letter, Office for Civil Rights, April, 2011," 12.
- ⁷⁵ *William Norris v. University of Colorado, Boulder*, No. 1:18-cv-02243 (The United States District Court for the District of Colorado 2018) 6. *Austin Van Overdam v. Texas A&M University*, No. 4:18-cv-02011 (United States District Court Southern District of Texas Houston Division 2018) 4. *John Doe v. The University of Cincinnati*, No. 1:16-cv-987 (The United States District Court for the Southern District of Ohio Western Division 2016) 27. *John Doe v. David H Baum, Susan Pritzel, Tabitha Bentley, E. Royster Harper, and Nadia Bazy*, No. 2:16-cv-13174 (United States District Court Eastern District of Michigan Southern Division 2016).
- ⁷⁶ Rushlynn Ali, "Dear Colleague Letter, Office for Civil Rights, April, 2011," 1.
- ⁷⁷ U.S. Department of Education: Office for Civil Rights. "2011 Dear Colleague Letter" by Rushlynn Ali. April 4, 2011, 19.
- ⁷⁸ R. Shep Melnick, *The Transformation of Title IX: Regulating Gender Equality in Education*, 43.
- ⁷⁹ Michel de Certeau. *Practices of Everyday Life*. Trans. Steven Randall. (Berkeley: University of California Press, 1984): 35-36.
- ⁸⁰ Michel de Certeau, *Practices of Everyday Life*, 35-36.
- ⁸¹ *Ibid*, 36
- ⁸² Darrel Enck-Wanzer. "Tropicalizing East Harlem: Rhetorical Agency, Cultural Citizenship, and Nuyorican Cultural Production." *Communication Theory* 21, (2011): 348-350.
- ⁸³ Darrel Enck-Wanzer, "Tropicalizing East Harlem," 351.
- ⁸⁴ Rushlynn Ali, "Dear Colleague Letter, Office for Civil Rights, April, 2011," 1.
- ⁸⁵ *Ibid*, 3.
- ⁸⁶ *Ibid*, 1.
- ⁸⁷ *Ibid*, 2.
- ⁸⁸ *Ibid*, 2.
- ⁸⁹ *Ibid*, 4 & 15.

Chapter 3

Between Yes and No: The Complexities of Consent

The #metoo movement has been quick to condemn sexual harassment and abuses of power in the workplace—incidents with a clear perpetrator and someone who clearly was uncomfortable while trying to do their job. But one incident circulated very widely in which the lines of power and consent were not so clear. On January 13, 2018, babe.net[§] broke the story that Aziz Ansari, an actor, comedian, show creator, and Hollywood feminist figure had sexually assaulted a woman (pseudonym Grace) with whom he went on a date.¹ After exchanging texts, the two went out for dinner and then returned to Ansari’s apartment where, after kissing and touching, Ansari kept making moves to have sex. Grace repeatedly asked him to “slow down,” “chill,” and to wait until “next time.”² She physically moved her body away from him—to the bathroom, to the sofa, to the kitchen—to ward off his advances, but it was a long while before she fled his apartment in emotional distress.

Grace and Ansari’s story reflects conversations that are currently being had within this #metoo moment about consent both on and off college campuses. Ansari has been both labeled a harasser and boldly defended along gender lines (for being a man and thus single-minded about sex) and ESP lines (for not being a “mind-reader”).³ The national debate around this one case indicates that something is missing in our understanding of the difference between consensual sexual activity and sexual assault. Public understandings of sexual violence that are shaped by the clear-cut nature of workplace harassment and stranger rape fail to account for the negotiation

[§] I would be remiss to ignore the slew of controversy surrounding the release of Grace's story; she was approached by babe.net, who then released her story less than a week after she gave the interview, giving Ansari barely any time to respond with comments. Babe.net has since updated the story to include Ansari's comments and resolve some errors from the rush to publish the story, but the revelations within this context call into question babe.net’s motives for publishing the story as well as their journalistic integrity.

of gendered power dynamics in existing relationships. The narratives I have chosen to study involve people who were not necessarily in the exclusive romantic relationships with which we often associate the word “relationship,” but rather who are friends, acquaintances, in the early throghs of dating, or engaging in the ever-vague “hook-up.” Reaffirming the statistic that 8 in 10 victims know their attacker, in some way,⁴ is it possible that “yes or no” consent narratives are failing to account for power in relationships? Others seem to think not. Twitter users as well as op-ed writers like the *Atlantic*’s Caitlin Flanagan and the *New York Times*’ Bari Weiss were quick to condemn Grace for assuming that Ansari was a “mind-reader” and for failing to “be strong”—to scream “fuck no” and run out the door of his apartment.⁵ Aside from the apparent victim-blaming, it is clear that the expectations of Grace in that situation do not jive with Grace’s own interpretation of her bodily autonomy in the situation. It is also clear from the story that Grace was sexually interested in Ansari but was not interested in sex at that exact moment (hence the excitement about the date and the kissing, combined with the use of “slow down,” and other physical deterrents). I note nuances in interpersonal negotiations of consent beyond “yes” and “no” because these are also negotiations of gender and power. In these “gray area” moments, it becomes clear that in the repetitive doing of sexuality, we are also doing gender. I argue that through an examination of the gray areas of sexual assault, scholars can better understand the dangerous implications of performatives of gender in heterosexuality, and how the law is complicit in these performatives.

How can a law be complicit? As explored more fully in chapter 2, we understand law as never neutral, is instead constitutively formed and enacted, and that constitutive formation is laden with power. In statute, every state has a different definition of sexual assault, yet most states do not account for or define consent outside of “mental incapacity”—which is often

nebulous, and has been, in many cases, argued to include anything from alcohol use and a state of “blacked out,” to disability and age.⁶ The only exception is California, the first state to pass an affirmative consent law—meaning that any defense must prove that the alleged victim said “yes” rather than the prosecution proving that they said “no.”⁷ On college campuses, Title IX policies circumvent state law by accounting for their own definitions of consent. The DCL is very clear that consent plays an integral part in what qualifies as sexual violence:

“Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.”⁸

The letter also encourages schools to only pursue an investigation if the victim “consents.”⁹ In their complaints against various colleges they attend, the John Does I have identified for the purposes of this study argue that the DCL enabled their college to discriminate against them by using a definition of consent that is *not* supported by the course of due process. But as I will make clear below, each of these arguments is deeply embedded in larger gendered scripts of consent. Those larger scripts reveal the ways that scholars must consider how questions of consent and due process are inherently intertwined.

“Date rape” is a commonly used phrase to describe a situation similar to the Grace/Ansari incident detailed above (though one where she was unable to escape), but that term is less common on college campuses due to historical changes in romantic culture. As pundits ranging from septuagenarians to millennials have bemoaned in books and op-eds, there seems to be a gray area formed since dating culture has morphed into hook-up culture.¹⁰ Hook-up culture is often defined as the space between acquaintances and relationships where sexual activity may occur, but exclusivity is ill-defined.¹¹ It is commonly referred to as “casual sex” by way of

lamenting the state of romantic relationships, akin to most comments that begin with “kids these days...”.¹² If I may belabor the point made in *Unwanted Advances: Sexual Paranoia Comes to Campus* by author Laura Kipnis, in this way, the “college rape problem” is a mischaracterized panic about casual sex between drunk college students still trying to discover themselves.¹³ Feminism is to blame, argue three authors on the subject, who assert that campus feminists are eager to paint parties with too broad a brush—women as innocent victims and men as rapists or potential perpetrators—to push their own anti-man agenda.¹⁴ I include this perspective not to place blame on hook-up culture for the perceived confusion about campus rape, but to illustrate the ways that the narratives of what count as sex frame what count as rape.

And indeed, many college students do experience sexual assault, though I cannot vouch for the philosophical or political leanings of the Jane Roes involved in the cases chosen for this study. However, some of the perceived gray area between sex and rape exist within hookup culture. Many of the pieces of the Ansari/Grace story reflect the events transpiring between the Does and respective Roes. Generally, they met on a dating app or were already friends (meaning they knew enough about each other to be comfortable being alone together), arranged a time to meet, and when things start to escalate beyond a level of comfortability, the Roes use language similar to Grace’s: “hold on,” “slow down,” “I don’t know,” etc. Much like Grace’s story, most of these narratives note some ingestion of alcohol but maintain that the Doe remained relatively sober (or at least more sober than Roe). Similar to Ansari, the perpetrators contend that they would never violate any woman’s trust or boundaries. They tend to express shock and confusion at the accusation, remembering the encounter as pleasurable, if not forgettable. While Ansari has apologized for his behavior—and has been praised for addressing the situation “like an adult”¹⁵—many of these college men cling to their innocence by claiming consent. These

increasingly common narratives illuminate the “gray areas” of sexual violence. These narratives direct scholars to consider the complexities of consent. Consent is more complex than “yes” and “no” due to the gendered scripts that comprise heterosexuality: the feminine fear of violence for articulating refusal and the mandatory masculine sexual control and dominance.

Dissection of the gendered and legal scripts of sexual violence have been happening piece-meal as many scholars have confronted the ways that rape laws are inherently gendered, but I hope to expand on this by incorporating notions of masculinity into mens rea (or intention to commit a crime). Legal scholar Catherine MacKinnon argued that men have defined rape in part by determining what they viewed as a violation of women (based on what they consider to be sex). She continued, “rape becomes an act of a stranger (they mean Black) committed upon a woman (white) whom he has never seen before.”¹⁶ Scholars have taken up this notion of male-dominated law creation to theorize ways to change that gendered perspective in the courtroom. Susan Caringella questioned why rape is not punished like its reciprocal crimes: homicide and arson.¹⁷ She combines Susan Estrich’s notion that courts ignore the issue of mens rea (commonly understood as criminal intent)¹⁸ and MacKinnon’s argument that rape law “often contains a mental element, mens rea”¹⁹ to extend notions of criminal negligence liability and mens rea to create a presumptive involuntariness in consent.²⁰ But MacKinnon goes further than presumptive involuntariness to argue that since domination is inherent in our sexual scripts, the lines between what is sex and what is rape are blurred—implicating all heterosexual sexual activity as violent. In the pages that follow, I ponder the role of masculine dominance in the intermediary space between intent-to-rape and no-intent-to-rape, as providing the space from which the John Does are quick to argue that they did nothing wrong.

In this chapter, I argue that the performance of heterosexual relationships is complicated by gendered narratives of dominance and subordination. This nuance makes adjudicating sexual assault (whether criminally or on a college campus) so difficult. The law is notoriously cut and dry, and, as the previous chapter argued, considered value-neutral, even though it is value-laden. The critical question around consent is not whether “yes” or “no” is said to sex. It is instead: can heterosexuality as a performance connected to gendered/patriarchal ideologies ever be free of narratives of gendered dominance and subordination? I examine the narratives of those accused for consent, sexuality, and violence as they circulate within masculinity, which as narratives of masculinity are valued in powerful ways, permeates narratives of the Roes’ femininity. I ponder, how do the Doe narratives co-create and sustain rape culture by cataloguing these narratives as “normal” sexual behavior? What are the rhetorical conditions that produce a climate in which narratives of consent circulate and are widely adopted? If we consider the complexities of consent, then we can better interrogate the ways in which Title IX is tactical. This may facilitate using federal oversight to provide campus survivors with some semblance of accountability.

The first section of this chapter provides context for how Title IX addresses consent in ways that differ from the considerations of consent in state laws. The second section explores literature about consent, connecting it to literature on the rhetoric of (sexual) violence. This section will interrogate heterosexuality for the purpose of understanding its (not so) latent assumptions of dominance and subordination. The third section will examine how the accused male perpetrators narrativize consent based on their own experiences with the female accusers, testimony (or lack thereof) from these accusers, and the rules of engagement during the Title IX process. I conclude by arguing that Robin Bauer’s idea of critical consent is a potential mode of resistance to the narratives of masculine dominance that pervade heterosexuality.

Circumventing State Law: Title IX & Consent

From a legal-historic point of view, consent is tricky, if only because sexual violence is a crime at both the federal and state levels. Except when prosecuted federally, sexual violence cases are dependent on state statutes, which vary across the country, most of which do not include a comprehensive definition or discussion of consent.²¹ In 2011, the federal definition of rape changed from the remarkably narrow 1927 definition: “the carnal knowledge of a female, forcibly and against her will” to “The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”²² Federally, consent is defined through a series of problematics: age and incapacity due to drug or alcohol ingestion automatically qualify the crime as rape and physical resistance is not required to indicate a lack of consent.²³ Although uncommon, federal and state law conflict from time to time. For instance, gay marriage was legal in some states but was illegal federally until 2015; women’s right to vote was legalized in many states over the 19th century until it was passed federally in 1920; and recreational marijuana is currently legal in ten states, but still remains a federally controlled substance. This section will detail the ways in which the DCL circumvents state statute in order to enforce consent at the campus level.

The DCL refers to consent in two major ways: to define sexual violence and to guide campus personnel when pursuing investigations of reports of sexual violence. On the first page, the DCL refers to consent as both “will” and “capability:”

Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability.²⁴

Consent in this definition refers to the “will” of the victim, as well as their mental and physical state. The wording mirrors the (then forthcoming) federal definition of rape without citing it

directly. The DCL also uses consent to indicate the “will” of the victim while participating in the Title IX investigation. It stipulates that “schools also should inform and obtain consent from the complainant...before beginning an investigation.”²⁵ The letter also instructs schools to inform local law enforcement to report a criminal complaint to run simultaneous with a Title IX investigation if the victim “consents.”²⁶ Consent is a vital component of the DCL, even as it is not necessarily a vital component of rape law in most states. Importantly, consent exists not only in the move to define the Title IX violation, but also to define the parameters of the investigation. Consent is vital to starting the investigation of the sexual assault and many of the other parts of the Title IX process.

Many schools have also gone further than state and federal law to define consent on their campuses, and I postulate that the DCL ignoring of state statutes is what enabled them to do so.²⁷ This disparity – or leapfrogging – is critical for our considerations of consent for the way that it is taken up as part of the claims of lack of due process. On the campuses chosen for this study, the definitions of consent vary. Some stick to their state’s definition of sexual assault (not openly discussing consent), some use the DCL’s definition, and some employ their own definition.²⁸ In his book, *The Transformation of Title IX*, Shep Melnick documents the ways in which Title IX persists as federal law, but is changed and enforced by an administrative body: the Office of Civil Rights. He refers to the manner in which the Office for Civil Rights (OCR) disciplines schools through the 2011 DCL as “institutional leap-frogging,” the circumventing of approval by Congress and state statute by issuing rules couched in guidance.²⁹ He notes that changes to Title IX have occurred without being signed by the president. “OCR has evaded these requirements by labeling these commands ‘interpretations,’ ‘clarifications,’ and ‘guidance’ rather ‘rules,’ and denying—quite unconvincingly—that they add anything new.”³⁰ In this way, it is also important

to realize that while colleges receive both federal and state funding, they are required to follow federal legislation enforced by the Department of Education. This is why in accordance to the Controlled Substances Act of 1970 and the Drug-Free Schools Act, schools that receive federal funding are required to follow federal law on their campuses, even if their state has passed recreational marijuana legislation.³¹ They also must conform to federal understandings of sexual violence and consent.

The controversy over consent matters for at least two reasons: laws are predominantly written in terms of the negative (e.g. what can't be done to an individual) and have a history of privileging the accused (a.k.a. "innocent until proven guilty"). Kenneth Burke argued that "laws are essentially negative; 'mine' equals 'not thine'; insofar as property is not protected by the thou-shalt-not's of either moral or civil law, it is not protected at all."³² In the same way, Burke discusses the ways that the words "yes" and "no" are defined in their relation to one another, but that the no precedes the yes: to know positively what something is, we have to know what it is *not*.³³ Given that laws are generally written in a negative or prohibitive manner, many have built an understanding of unwanted sexual contact through the expression of "no" as opposed to the expression of "yes." As well, each of the complaints rides on how *they* are being held accountable to prove consent occurred, instead of the person who accused them being accountable for not refusing consent. In each story, there is the constant assumption that both parties arrived with the same intentions, that both parties enjoyed the encounter, but afterward, the accuser became vindictive. The focal point in the narrative becomes the interactions: willingness. There was a willingness to engage in certain activities: drinking together, sharing the enclosed space of a dorm room together, kissing, certain sexual acts...but then (according to the accused) *suddenly* that willingness disappeared. Questions begin to appear in response to this

narrative change. Where did the willingness go? What does that disappearance of willingness say about the accused?

Not only are the accused concerned about consent during the incident itself (they claim that all sexual activity was consensual for both parties involved), but they use “innocent until proven guilty” language to claim that the school lowered the standard of evidence to position them as needing to prove that they attained consent from their accuser—instead of the other way around, as used in a criminal court. They all use versions of the same language:

“Problems include: accused students effectively are presumed guilty; instead of requiring accusers to prove they were assaulted, the accused students have to prove they had consent; and schools apply the very lowest standard of proof — preponderance of the evidence.”³⁴

As argued in the previous chapter, accusers build their case on the rhetorical assumptions of what form an investigation of sexual assault should take. However, their due process cases hinge on issues of what they perceive to be consent. If our understandings of law are built around constitutive authority, then perhaps our understandings of consent are built rhetorically along lines of gender and dominance.

Performatives of Gender, Consent, & Precarious Life

Although discussions of consent are often embedded in sexual violence research, consent itself is understudied. It is especially crucial to study consent because it is one of the most commonly asked questions of a sexual violence victim in any setting. In this section, I first illustrate how scholars have been quick to identify the cause of sexual violence as lack of consent. Overwhelmingly, they conclude that affirmative consent (in law and culture) may be the solution. However, as I note second, affirmative consent may not be nuanced enough to address the complexities of consent. Lastly, I push consent literature to incorporate performative lenses. I find consent literature to be missing elements of power and dominance, a gap that scholarship

around performatives scholarship can begin to remedy. Current consent literature somehow separates the act of consent from the violence that is enacted without it. I reject that separation—I argue that refusing to ask for consent, not listening, taking advantage of prior consent, incapacitating people are all a part of the power of violence and violence in domination.

Overwhelmingly, consent scholars examine consent in its binary form, rather than questioning its roots in system injustice. Scholars have argued that rape prevention is a vital piece of risk management communication and that with proper or modified communication approaches, the sexual violence problem can be solved.³⁵ In her 2004 article, Rachel Hall suggests shifting the burden of prevention onto men as potential perpetrators instead of women as potential victims.³⁶ After studying campus disciplinary hearings, Susan Ehrlich and others have found that defendants in rape cases frame themselves as innocent by counting lack of consent as “deficient communication” from the victim.³⁷ This argument effectively obscures the gendered power dynamics of consent because it does not acknowledge social-sexual scripts of gender (men as dominant and women as submissive) that permeate heterosexuality.³⁸ Kitzinger and Frith argue that the “just say no” campaign of the 1990s was counterproductive to preventing date rape because it assumed that silence, palliatives or weak acceptances were open to reasonable doubt.³⁹ They instead push for affirmative consent policies suggesting that requiring an enthusiastic ‘yes,’ negates arguments that silence and coercion are consensual. Candelas de la Ossa focuses on ‘positive consent’, ‘talk, listen, think’, and ‘moral–aesthetic’ discourses—discourses that draw on normative ideas of morality—in order to argue that consent discourses paint masculinity as inherently violent and men must be taught to be otherwise.⁴⁰ A.A. Hasinoff compares common sex tips to sexting tips with an eye toward consent, noting that sex tips usually assume consent, while those giving advice about sexting very often stress the need to

seek consent before initiating, as unwanted sexts can cause particular harm.⁴¹ Stephen Schulhofer argues that considering affirmative consent would force defense attorneys to prove beyond a reasonable doubt that a victim said "yes" rather than the burden of proof being placed on prosecutors.⁴² Caringella critiques Schulhofer's model as impractical as it has not caught up with political opinion despite the fact that we have already seen affirmative consent laws appearing in state legislatures around the nation. Across these scholarly works, we can see an attention to consent, but not a hearty interrogation of the binary of consent itself.

The yes/no binary has been useful to politically separate rape from sex, but recent scholarship has argued that the binary is harmful to further scholarly work on sexual violence. Affirmative consent does not quite address the complexities of consent because "yes" and "no" are not the only words said in sexual interactions, and only focusing on those isolated words obscures socio-political histories and gendered socialization. Harris argues that the two following communication myths are the perfect metaphor through which to see these insufficiencies: 1) the conduit metaphor of communication does not mirror reality and 2) local discourse is disconnected from social/historical context.⁴³ Consent is not just about asking (though persuading people to ask is a struggle to which many campus activists can relate), it is about listening, feeling heard, and being empowered to refuse—all of which are gendered. Harris argues that discourses on sexuality and consent exist in and outside of the moment in which they appear—that we know that relationship histories, previous activities, and systems of gender push upon these sexual situations making consent radically more complex than a simple yes/no question. I conclude this chapter by exploring Robin Bauer's notion of critical consent, which is theorized from dyke and queer bondage, discipline, sadism, masochism (BDSM) communities. Within critical consent, consent becomes "an active, ongoing collaboration for the mutual benefit

of all involved” that “leads to an ethics of heightened responsibility and accountability for the consequences of one’s actions.”⁴⁴ In this way, consent centers on the practice care as opposed to a one-size-fits-all standard, which tends to ignore issues of power and difference.

Consent scholars have illustrated the ways in which affirmative consent operates to serve victims, but they have also shown that local consent is not doing enough to disrupt long-standing histories of violence.⁴⁵ As well, these scholars have decidedly not interrogated due process in sexual violence cases. I believe that campus sexual assault (CSA) provides a perfect inroad to nuancing the binary of “no” and “yes,” while also attending to due process, as college campuses are simultaneously home to close relationships and hook-up culture, are a microcosm of the national issues of consent, and they have their own due process issues under Title IX. However, to be able to interrogate the intermediary space between “yes” and “no,” where much power and anguish reside, I must contextualize the gendered patterns of interpersonal communication.

Linguists have theorized gendered communication patterns for years arguing that women (in general) are socialized toward passive linguistic patterns. In her 1975 book, *Language and Woman’s Place*, Robin Lakoff argued that cultural forces oblige women to speak differently than men: women are socialized to use strategies like question intonation and hedges (e.g. “y’know,” “kinda,” etc.) to be polite, not to come across as domineering, and avoid imposing themselves on others.⁴⁶ Lakoff argues that women’s lack of choices in communication is intimately connected to their lack of social value and power.⁴⁷ In her book *Speaking Freely: Unlearning the Lies of the Fathers’ Tongues*, Julia Penelope demonstrated that this linguistic pattern is a “primary dogma” of what she referred to as the “patriarchal unit of discourse” (PUD).⁴⁸ PUD is a “consensus reality” in which patriarchal communication practices are invisibilized by being automatically considered the norm.⁴⁹ Charlotte Krollokke & Anne Scott Sorensenhose argue in *Gender*

Communication Theories and Analyses: From Silence to Performance that those who accept PUD assume that it accurately reflects reality, “but in fact, PUD reflects a monodimensional, male-imposed reality.”⁵⁰ In 1985, Dale Spender noted that dominance cycles are perpetuated in moments of public address or assertive speech—women tended to shy away, conforming to the norm for women: silence.⁵¹ Speaking is associated with power while listening with passivity. Krolokke & Sorensenhose argue that when “women use tag questions in their speech, they appear hesitant, noncommittal, uncertain, and powerless.”⁵² These authors illustrate while there is nothing empirically gendered about the phrases negotiating consent that I noted at the beginning of this chapter, gendered patterns emerge and are attached to bodies and power. what Julia Wood names “feminine speech communities” are characterized by particular patterns that signal care, deference, and indecisiveness.⁵³ These communities are socialized and constructed over centuries of raising women. In contrast, masculine speech communities are characterized by aggression, decisiveness, and individuality, but similarly, they are also socialized, constructed, and enacted. These arguments are critical for the ways we can complicate the yes/no pattern. The yes/no may signal these same dynamics, but perhaps “no” is not readily available to folks socialized to hedge and qualify in their speech.

I argue that we need to think of consent through both gender performativity and precarity.

In *Doing Gender*, West and Zimmerman contend that gender is performed or “done:”

We contend that the “doing” of gender is undertaken by women and men whose competence as members of society is hostage to its production. Doing gender involves a complex of socially guided perceptual, interactional, and micropolitical activities that cast particular pursuits as expressions of masculine and feminine ‘natures.’⁵⁴

For the purposes of this chapter, I use this lens of gender and sexuality as performatives in moments of heterosexuality. These consent narratives are not just patterns, these are ways of negotiating that are indicative of not only gendered habits, but how thoroughly gendered patterns

are embedded in logics of domination and subjugation, enacted by language and symbolic interaction. Patricia Hill Collins argues that violence structures intersections of social hierarchies contending, “Rather than viewing violence primarily as part of distinct social hierarchies of race and gender, violence may serve as conceptual glue that binds them together.”⁵⁵ These gendered moments of negotiation are caught up in histories of violence and of framing bodies that have grander implications for performances heterosexuality. If women are not socialized to speak and cannot be heard by men even when they do, there is little to be gained from mandatory consent laws. And in that way, if we are to only consider, as Kate Harris notes, “the localized instance of consent,” then we miss the influence of and participation with larger narratives of dominance and subordination inherent in performing heterosexuality.

Perhaps to get a better handle on this question, we can start to parse out the ways in which women performing heterosexuality are framed such that they are silenced (even when they speak). In *Frames of War*, Butler argues that “frames” (or a lens through which we come to know things and people) are essential to the conduct of war; in times in order to animate war, the Other has to be framed as “ungrievable.”⁵⁶ For Butler, ungrievable lives are inherently precarious, or always in the hands of the other.⁵⁷ Butler’s conceptions of precarity and grievability help us better understand how, within heterosexual sex, women are in a perpetual state of precariousness in the hands of their male partners. As well, if we understand gender to be a performative, then we can also comprehend how performances of heterosexuality enable the framing of women’s bodies as ungrievable.

Since they conform to norms of heterosexism, it is fair to ask: how can heterosexual women live in a state of sexual precarity? For Butler, precariousness “implies living socially, that is, the fact that one’s life is always in some sense in the hands of the other... Reciprocally, it

implies being impinged upon by the exposure and dependency of others.”⁵⁸ Not only are our bodies living socially but it is worthwhile to consider how, for these college women, their body is in the hands of their male partner. Is it perhaps that they are expressing “no” to sexual activity but that their male counterparts are unable to hear their “no.” Their bodies are in the hands of these college men (even the supposedly “woke” ones), who are unable to listen to their voices and/or bodies. Precariousness allows us to understand frames of feminine powerlessness that perhaps are inherent in performing heterosexuality and the language used in that performance.

Also implicated in a state of precarity is the framing of the body as (un)grievable. Butler’s notion of grievability is defined as “the presupposition for the life that matters...without grievability, there is no life...sustained by no regard, no testimony, and ungrieved when lost.”⁵⁹ In *The Body in Pain*, Elaine Scarry notes, “...for the most crucial fact about pain is *its presentness* and the most crucial fact about torture is that it *is happening*.”⁶⁰ Which brings me to a crucial point: grievability of bodies in pain lies at the juncture of power and familiarity. In *Precarious Life*, Butler notes, “...each of us is constituted politically in part by virtue of the social vulnerability of our bodies--as a site of desire and physical vulnerability, as a site of publicity at once assertive and exposed,”⁶¹ but contends that grievability is caught up in narratives of imperialism (i.e. bodies as grievable through a Western gaze) and familiarity with that body (i.e. her example of Daniel “Danny” Pearl).⁶² The evaluation of the body in pain by a body that is not in pain is reliant on familiarity in order to become grievable. Scarry also notes that one person can be in the presence of a person in pain and not know, but that “inevitably to a second question... ‘How is it that one person can be in the presence of another person in pain and not know it—not know it to the point where he himself inflict it, and goes on inflicting it?’”⁶³ Given that it is impossible to comprehend a body’s pain in a body without pain, the

grievability of a female victim's pain stems from its relatability and familiarity to the male perpetrator—and how is that possible? Does this mean that vaginal pain may not be grievable because a man has not experienced that pain and does not have a vagina? Perhaps. We already know that differentiation is important to the doing of heterosexuality, as the practice is predicated on narratives of complementary opposition (the vagina as supposedly made to fit the penis; the penis made to fit the vagina). But this differentiation naturally conflicts with the familiarity necessary to make bodies grievable. If heterosexuality is grounded in how bodies are different, then empathy is less possible. Since men do not fear heterosexual violation in the same way women fear it, they are unable to hear that fear manifest itself in reality.

Butler asks, “at what cost do I establish the familiar as the criterion by which a human life is grievable?”⁶⁴ The cost, I argue, is that marginalized bodies in pain are evaluated based on their relatability to nonmarginalized bodies. Their grievability is at least partially in the hands of bodies that cannot empathize, making their lives more precarious. There are powerful implications in this discussion for heterosexual bodies. MacKinnon notes, “having defined rape in male sexual terms, the law's problem, which becomes the victim's problem, is distinguishing rape from sex.”⁶⁵ The inability of heterosexual men to empathize with rape and fear of rape has legal and material consequences for victim bodies, who have the task of explaining why their violation was not simply sex. If their own identification of their experiences does not qualify a violation, how can we identify women's bodies as grievable at all?

Rather than considering heterosexual women's *lives* as ungrievable (though there is an argument for that if we consider female deaths in abusive relationships), what if we consider a woman's body as ungrievable within performances of heterosexuality? To return to Scarry's question, it is worth interrogating what makes it possible to continue to harm someone without

knowing that you are doing it. This brings to mind Gayatri Spivak's discussion of the subaltern in which she argues that the subaltern cannot speak because she is constantly being spoken for. In a similar fashion, what if we were to consider men as unable to hear women in sexual settings because, similar to the subaltern, women's bodies are always being spoken for. If heterosexuality is premised on the male penetration of the female, then the woman's body is ungrievable in the sense that little care is afforded to its willingness or participation.

While Butler has noted that lives are inherently (un)grievable from the start, I offer this counterpoint: if ungrievability provides "animus for war,"⁶⁶ then perhaps grievability operates both pro- and retro-actively. We frame lives as currently and always having been ungrievable in order to end them without remorse. In the same way, what if we were to think about moments of perceived consent (or the act of *not* saying "no") as holding together to frame the heterosexual woman's body as ungrievable in the aftermath: her state of dress, kissing, sharing drinks, providing a phone number, entering the apartment, etc. In this same way, a lens of (un)grievability makes it possible to consider how violations of women's bodies are happening within performances of heterosexuality without men's knowledge. To be clear, I do not waive their responsibility, but instead seek to interrogate how women's bodies are constructed in a way that their pain is both unable to be heard and ungrievable.

I also discuss moments of violent persuasion in the context of ungrievability. Sally Gearhart was one of the first to theorize such types of persuasion arguing, "The act of violence is in the intention to change another."⁶⁷ She cites colonialism as a cultural manifestation of the intention to change minds, but differentiates between the conquest and the conversion models: the conquest model invades and violates, while the conversion "model [is] more insidious because it gives the illusion of integrity."⁶⁸ It is the difference between capture and imprison and

convince to enter the prison, “to get every assurance that our conquest of the victim is really giving her what she wants.”⁶⁹ Gearhart connects excitement and challenge to conversion, comparing it to pornography and Hollywood romance. I extend her comparison in order to consider dominance in heterosexuality outside of the cannot speak/cannot hear framework. Perhaps there is heterosexual male pleasure taken in convincing their woman partner (whether that be through drugs, alcohol, not listening, or pushing boundaries) to have sex with them.

Parts of what I have just stated have already been theorized. MacKinnon contends that misogyny stems from sexual sadism, writing, “If the violation of the powerless is part of what is sexy about sex, as well as central in the meaning of male and female, the place of sexuality in gender and the place of gender in sexuality need to be looked at together.”⁷⁰ She specifically disagrees with Brownmiller’s contention that rape is solely about power and control, arguing that “men violating women has a sexual component. I think that men rape women because they get off on it in a way that fuses dominance with sexuality.”⁷¹ In this way, MacKinnon theorizes that much of the pushback victims receive when they come forward stems from a confluence of factors: domination is inherent in heterosexual sex that translates onto rape, and the fact that laws are written from a male perspective (where they control sex and do not understand rape fear) thus the burden of proof that rape is not sex is higher. In a system where violence in sex has become so normalized that it is difficult to know where sex ends and rape begins. These authors show not only how gender is an integral part of sexuality, but it is in the romanticizing of violent sex where rape becomes normal.

I have pulled work from the scholars discussed in the above paragraphs to show that consent cannot be taken out of the context of a culture of gendered violence. To assume that consent is localized is to assume that consent exists between two equal parties. Consent

scholarship must consider grander notions of violence persistent and pervasive within heterosexuality in order to theorize the ways in which consent can actually work.

He Said, She Said: Narrativizing Consent

This section endeavors to make sense of the narratives from the accused about consent during incidents that were reported as Title IX violations as well as the Title IX investigation itself. Much scholarly and popular discussion of consent focuses on the victim's narrative about why what happened was *not* consent, but I join several of the scholars I have referenced in the above sections to analyze how these college men narrativize why what happened *was* consensual. I postulate that we learn more about the role of dominance in sexuality from the way that the accused aggressor narrativizes their experience with both the victim and the Title IX system. From each narrative, one thing remains clear: these college men do not believe that they did anything wrong (morally or legally). I will interrogate that belief on its own terms with the intent not to prove that consent did not occur or to theorize an if-we-could-turn-back-time solution, but rather to argue that consent may not be possible. My analysis unearthed the following themes: confusion about accusers consenting to one act but not others, especially under the influence of alcohol or drugs and an obsession with fair treatment under perceived rules of order and why the accused were (in some cases) unable to cross-examine an accuser to prove that she was inconsistent in her narrative of the incident. These themes, while seemingly unrelated, paint a picture of the need for constant masculine dominance and a lack of personal responsibility that some might be quick to blame on immaturity. Following from the work of this chapter thus far, I argue these tropes are latent in the performance of heterosexuality.

This, Not That: Redirecting & Incapacitation

Several of the Does' complaints prominently featured a confusion about the parameters of sex acts—that the accuser consented to certain sex acts but not others, and how she responded to those unwanted acts. One of those responses was redirection. Cincy Doe notes that Jane Roe asked him to “hold on” before they engaged in intercourse.⁷² He reports that they “talked for a bit and then engaged in consensual sex.”⁷³ The complaint follows this acknowledgment with the following decree: “John Doe stated that the sexual encounter was completely consensual.”⁷⁴ In his report, Doe makes sure to point out that Jane Roe acknowledged that she sat on John Doe's lap while they were kissing and “that consent for sexual activity after he removed her dress was ‘gray’” because she consented to sex acts, including oral sex and digital penetration, but when he retrieved a condom “she did not indicate that she did not consent to sexual activity but, instead, tried to redirect Doe.”⁷⁵ It is clear from the previously mentioned literature that women hedge and redirect all the time in order to voice displeasure or discomfort without ruffling feathers or taking up space. It is a safety mechanism, as to be a woman in the world is to fear violence at the hands of men, and thus staying safe often means keeping men happy by using redirection instead of direct confrontation. While all of this is important, it is most vital for my project to follow the logic line in which Cincy Doe firmly states that the entire encounter was completely consensual, but then goes on to point out several moments in which Roe exhibited hesitation so clear that he remembered to include it in his complaint against the school. While he alludes that it is correct that she did not clearly say “no,” what is clear is that he knew she was unwilling to participate in certain sexual acts, and he decided to engage in them anyway.

A similar situation occurred between TAMU Doe and Roe whose dispute stems around types of sexual interaction. The Texas A&M administrative hearing panel heard testimony from

Doe claiming there was consent at each stage of all three sexual encounters, and from Roe who testified that she had not consented to the anal intercourse but had consented to vaginal intercourse and oral sex.⁷⁶ Roe claims that during consensual vaginal intercourse, Doe switched to anal intercourse without her consent, so she redirected him to something she was more comfortable with: oral sex. TAMU Doe reports, “at no time did Roe protest or voice any concerns regarding any actions that Doe and/or Roe engaged in. Especially revealing [sic] was Roe’s voluntary third sexual act of performing oral sex on Doe.”⁷⁷ This example brings me to a far bigger set of questions: is it rape if the activity has to be redirected to a more comfortable space? Or perhaps more fittingly, is it still sex if the activity has to be redirected at all? This situation is not just about whether or not TAMU Doe should have attained verbal consent for anal sex, but rather why it was that he felt that he could put his penis in another part of her body without asking first. Why did TAMU Doe feel entitled to her body at all? And why did he use her redirection to oral sex as evidence for her supposed consent?

Another vital piece of the consent narrative for these Does was incapacity through ingestion of alcohol. The Does complain that they had no way of knowing that the Roes were unable to consent, especially because they initiated the sexual activity. Boulder Doe referred to Roe as a close friend, his reason for stating surprise when she accused him of assaulting her while she was blacked out. He notes that she initiated the sexual encounter and he saw “no indication that [she] was intoxicated—he was familiar with the signs because he had spent many nights during their friendship caring for her when she was drunk.”⁷⁸ This logic is revealing of a complex angle and cause of a major “gray area” of sexual violence—the drunk friend hookup. These two people were close friends, who had built enough trust to drink to excess together and had kept their relationship platonic, so (unlike stranger rape) Boulder Doe knew more about

Boulder Roe’s background, lifestyle, and boundaries. He also presents himself as the expert on her drunkenness; he indicated that had been cataloging the signs of her drunkenness for a long time. While from that perspective, Boulder Doe may sound creepily obsessive, this quote reveals the degree to which his interpretation of her capacity to consent matters. Why does it matter to a judge and jury if he knew she was too drunk? It certainly does not change the outcome. The next day when they spoke, he was “shocked because Jane Roe claimed not to remember the encounter.”⁷⁹ While it seems that Boulder Doe sincerely believes that Roe showed no signs of intoxication, it is also clear that he remembers their interaction in which she presented no memory of the incident, and became visually upset.⁸⁰ It is also clear from these admissions that Boulder Doe realized that something went wrong, but he also stresses that she initiated the sexual activity (which she cannot remember enough to refute). In other words, he is enthymematically asking, why would she initiate sex if she did not want it?

Michigan Doe faced a similar dilemma around the definition of “incapacitated” during his Title IX investigation. Doe and Roe consumed a single vodka shot together before dancing at his fraternity house and going up to his room. Doe claims that since he had only seen Roe consume one shot, he had no way of knowing that she was incapacitated when they had sex later that night.⁸¹ He notes, “the complainant was not asleep or unconscious” and he “had no knowledge of her having consumed alcohol (other than one drink) or experiencing blackouts or flashbacks.”⁸² However, after the fact, Roe “appeared emotionally distressed,” rushed out of the room, called an Uber with a friend, and left.⁸³ Michigan Doe argues that the Title IX investigation recognized that “many of behaviors [Roe] exhibited [such as leaning on Witness 2 while they were walking together] were consistent with those of a person experiencing ‘significant emotional distress,’ as opposed to behaviors of an incapacitated person.”⁸⁴ Doe

decided to attack the University of Michigan's definition of “incapacitation” as opposed to question why it was that Roe was emotionally distressed after a sexual encounter with him. This leads to an important question: why doesn't the emotional distress matter?

The first thing to come to mind as we consider the questions that I raised across these accounts is the utopian goal of sex as pleasurable for all parties involved. However, what if we were to hypothesize that incapacity to consent might go further than alcohol and have gendered implications of its own. It is clear from these four examples that the women accusers in these situations redirected and presented outward signs of intoxication, but those signals were unheard or irrelevant. The Does knew about these signs, but stipulate that the Roes did not clearly say “no,” were not clearly incapacitated, and thus were framed as just reticent or inexperienced—which apparently signaled consent for sexual activity. However, if these Roes are arguing that reticence, intoxication, and redirection do not qualify as sexual consent, then what does that disjuncture between the accounts of Doe versus Roe mean for the performance of heterosexuality? What does it tell us about the rhetorical underpinnings of precarity?

Legal Fairness, Consent to Appear, & the Right to Cross-Examine

For one thing, these cases show us what happens when norms of fairness (which stem from a white male dominant system) are upended, even in non-legal, campus disciplinary proceedings. When female precarity is taken into consideration, the backlash cries, “no fair!” The accused in these cases narrativize conceptions of fairness around the right to face their accuser and cross-examine them. They are disappointed when Roe does not attend their sanctioning hearings and criticize Title IX's recommendation against having students cross-examine each other, claiming it allows for a lack of fairness. I argue that the Does' construction of fairness here has more to do with a masculine need for dominance than an interest in justice.

It is even more important to note that criminal law typically would embrace this dominant frame of fairness. Michigan Doe argued that complainants in sexual assault cases should not be able to appeal the investigatory findings. He argues that “due process protections exist to protect the accused and permit the accused to appeal an erroneous determination of guilt,” not the other way around.⁸⁵ In a criminal court, all of this would be true. In a criminal court, appeals function to present evidence that did not previously exist that would fundamentally change the outcome of the trial, and they are predominantly utilized by the defendant, not the prosecution. The previous chapter notes the continual conflation of the legal and administrative realms in Title IX complaints, but it is interesting to take a slightly different angle when analyzing the accused concerns about fairness. If due process protections exist only for the accused, is the process fair and equal? Or is Michigan Doe indignant because Title IX changes the status quo, allowing *both parties* to appeal sanctioning decisions if new information emerges that contradicts already-existing evidence? I ask these questions in order to lay the groundwork for the ways in which law and male dominance coincide, especially in cases of sexual assault. Title IX and the DCL try to buck some of these norms by leap-frogging state statutes, but masculine dominance is a difficult obelisk to deconstruct.

There are also significant pieces of the narratives that refer to and complain about the ability of the accused to cross-examine accusers. In three out of the four cases, Roe is not present at the hearing, which was the site of anguish for some Does. The Does lament that they were “never provided any opportunity to confront and question the witness who had made the charges against him.”⁸⁶ Cincy Doe argues that if he had “been able to question Jane Roe, he would have been able to demonstrate that she was not credible” through inconsistencies in her statements and special treatment she received through accommodations.⁸⁷ Cincy Doe would have used this line

of cross-examination to argue that “the accommodations provided to Jane Roe created a significant incentive for her to fabricate the allegation of sexual assault.”⁸⁸ It is rare to see two systems operating around the same time performing similar tasks but in different ways: both are seeking accountability for sexual assault, but the law guarantees the right to face your accuser and have that accuser cross-examined, while Title IX does not. The fact that the victim can consent to whether or not they appear is unheard of in a legal trial setting. Victims are commonly cross-examined, even if the accused is not. But Cincy Doe’s complaint is not just comparing or conflating the two accountability systems. The discourse is about performing dominance in that space—in the alleged incident, he dominated her body to get his way and he attempts to do it again, in the investigation, forcing her appearance and controlling her movements against her will in order to avoid punishment by his school. Title IX allowed Roe to escape the possibility of such a fate by conducting the investigation ahead of the hearing, collecting evidence from both parties separately, and not allowing them to cross-examine each other, hence why he is suing the college for damages.

Boulder Doe feels similarly, and he combines Michigan Doe’s argument about fairness and Cincy Doe’s clear for his rights. Boulder Doe claims that CU Boulder denied him right to due process by denying him the right to “ask questions of Jane Roe or the witnesses in the case, to test credibility.”⁸⁹ He contrasts this with other hearings into violations of the student code of conduct that allow the accused to submit written questions to the presiding conduct officer to be asked of the complainant and witnesses.⁹⁰ In this case, Boulder Doe feels as if complainants in sexual misconduct cases are being given special treatment in being exempt from cross-examination, even though complainants for other code violations are subject to it.

For these Does, narratives of fairness and rights serve in actuality to narrativize how much our legal system is predicated on masculine dominance. These narratives frame their

bodies as grievable in this setting and the bodies of their victims to be ungrievable. This only serves to reinforce my argument that within heterosexuality, women's bodies are precarious, always in the hands of their male counterpart, and ungrievable when they identify their experience as violent. For crimes of sexual violence, due process protects the accused (predominantly men) from appeals even though the criminal system is notorious for failing to hold rapists accountable.⁹¹ Title IX policies (whether they recognize gender politics or not) circumvent state laws about consent, policies of appearance, and the right to cross-examine to provide low-stake accountability measures for victims of CSA. But, even the low-stakes punishment of expulsion is considered subjugation to these men because it does not compare to the state-sponsored dominance that they have benefitted from their whole lives, whether they knew it or not. The idea of that disappearing? Now that's something worth suing for.

Through this analysis I have used the themes of interpersonal gendered communication norms and entitlements around fairness to illustrate a serious problem in the performance of heterosexuality: the precarity of women's bodies in the moment where consensual sexual activity becomes violent and their ungrievable bodies in the aftermath. I have analyzed these narratives through Butler's lens of performativity and her theories of precarity and grievability in efforts to explain what past consent scholars have labeled as miscommunication. The miscommunication label effectively obscures power dynamics by assuming complete equality in dyads of sexual interaction. Given that, much is at stake for heterosexuality. If men cannot hear women who redirect, and women are socialized never to say no, can there be consensual heterosexual sex?

Implications for Heterosexuality & Possibility of Critical Consent

In this chapter, I have used the lens of consent to make an argument about performances of heterosexuality. I have argued that the performance of heterosexual relationships is implicated in

narratives of dominance and subordination, and so thus are narratives of consent. The grander contextual power dynamics make accountability systems for sexual assault notoriously difficult. In considering the moments between utterances of “yes” and “no,” I have shown how both our understandings of gender, sexuality, and the law are inherently value-laden. I have pondered how rhetorically these narratives consider not listening, taking advantage of, and pushing boundaries as “normal” sexual behavior—functioning to sustain rape culture. I have shown that it is possible to probe larger understandings of the violence latent in performances of heterosexuality if we cannot understand the complexities of consent. And in this way, I have come to suggest that Title IX exists as a tactic to avoid the inherently perpetrator-biased parts of criminal law. My argument is *not* that consent is gray with nuance so we should avoid dealing with it. Consent is vital, but it is not just about utterances of “yes” and “no.” Rather, I am arguing for the importance of contextualizing consent scholarship within a discussion of everyday violence.

Books such as *The New Assertive Woman* (1975) and *A Woman in Your Own Right* (1982) popularized the idea that the lack of feminine social power was, in large part, due to an inability to communicate assertively. Much of the work around gendered norms of speech has only served to reinforce masculine speech patterns as the norm and has influenced the rise in assertiveness training programs. Those programs focus on ways women need to change their way of speaking to be clearly understood. The underlying assumption remains that if women talk more like men in the workplace, they will gain more positions of leadership.⁹² This is also the center of the “lean in” movement – which is pitched to women as a counter performance they can engage to better position themselves against much of the marked female habits in communication I cite earlier in this very chapter.⁹³ Radical feminists opposed this strategy. As Spender pointed out, “Women will still be judged as women no matter how they speak, and no

amount of talking the same as men will make them men, and subject to the same judgments.”⁹⁴

My point here is that consent needs to be understood as a part of the grander context of sexuality in which it resides: the gendered power dynamics embedded within performances of heterosexuality. The assertiveness aspect of consent education usually only serves the purpose of victim-blaming rather than empowerment.

Radical feminists have also argued for the re-valuation woman-ness and womanhood. But is that the answer? Gearhart argues that “communication, like the rest of the culture, must be womanized, that in order to be authentic, in order to be nonviolent communicators, we must all become more like women.”⁹⁵ Strategies for this might include circumstances that encourage the mutual generation of ideas where everyone feels like a willing participant. However, as Bonnie Dow notes, “in the current world we live in...such a position reifies the very definitions used to oppress and exclude women from public life, to devalue their labor, and to enforce ‘womanly’ behavior” and that this essentialist view does not take into account differences among women.⁹⁶ Iris Marion Young argues that gynocentric feminism as contended by Gearhart as well as Foss & Foss in “An Invitational Rhetoric” risks becoming “only a moral position of critique rather than a force for institutional change.”⁹⁷ Nina Reich-Lozano and Dana Cloud indict invitational rhetoric for undoing protests for social justice by requiring civility.⁹⁸ They instead call for an “uncivil tongue to challenge oppressive forces.”⁹⁹ I use these critiques to argue that instead of trying to undo centuries of silencing women by challenging men to “think/act like women” (whatever that means within a multitude of women), we consider the larger issue of dominance more critically.

As a critical-legal feminist scholar, Catherine MacKinnon has been on the cutting edge of radically redefining popular understandings of rape laws. In response to the sex/violence dichotomy, she argues that “calling rape violence, not sex, thus evades, at the moment it most

seems to confront, the issue of who controls women's sexuality and the dominance/submission dynamic that has defined it."¹⁰⁰ She furthers that "if sex is normally something men do to women, the issue is less whether there was force and more whether consent is a meaningful concept."¹⁰¹ In a state of masculine dominance, can women ever truly consent? Given the assumption that performing heterosexuality is rife with narratives of dominance, we can perhaps see a pathway out of this violent labyrinth.

One way out of the performance of heterosexual dominance might be to look to queer communities for guidance. As I have mentioned in previous chapters, Robin Bauer's notion of "critical consent" provides interesting insights into both consent and domination. Grounded in the practices of dyke and queer BDSM communities, Bauer illustrates how consent is messy, flexible, interdependent, indeterminate, and constantly created through social networks.¹⁰² Through this lens, consent is "an active, ongoing collaboration for the mutual benefit of all involved" that "leads to an ethics of heightened responsibility and accountability for the consequences of one's actions."¹⁰³ For Bauer, there is no possibility for equality between sexual partners as there are too many factors at play. They deconstruct most feminist conceptualizations of consent, arguing that "yes means yes"/ "no means no" both fail to consider the complex ways in which social inequalities impact the ability to provide meaningful consent.¹⁰⁴ Instead, actors should rely on practices of care to avoid a single standard of power differentials and false senses of equality. In this way, sexual agency becomes less about have versus have not, but is an issue of "how to act within a field of limited choices."¹⁰⁵ Critical consent foregrounds self-responsibility and the negotiation of boundaries, which enables actors to feel a heightened sense of agency within the situation. In *Precarious Life*, Butler quotes Emmanuel Levinas, "Peace as

awakeness to the precariousness of the other.”¹⁰⁶ Critical consent opens up the possibility of a male recognition of female precarity, and in that recognition peace.

But truthfully, I am not sure that I am satisfied, as critical consent is predicated on a queer context, and thus is not troubled with the gendered power dynamics of heterosexuality—not that queerness lacks power dynamics, but that those dynamics are different. Kate Harris posited Bauer’s “critical consent” as a way to nuance consent in the teaching of rape prevention. This idea holds much appeal, but it does not do much to address the unreachable facets of masculinity: the 10% of any group of men, as psychologist David Lisak theorized, is determined to commit violence.¹⁰⁷ It also does not readily address my concerns with the precariousness, grievability of a woman’s body. How can we break Spivak’s unending cycle of unable to hear/unable to listen in order to see the precariousness inherent to performing female heterosexuality, and promote framing all women’s bodies as grievable? In this #metoo moment, I argue that it takes male buy-in at a baseline, but it also might take us asking MacKinnon’s central question: “instead of asking what is the violation of rape, what we ask, what is the non-violation of intercourse? To tell what is wrong with rape, explain what is right about sex.”¹⁰⁸ I believe this idea is more possible on college campuses due to “institutional leapfrogging” of Title IX. In what other context could we hold perpetrators of violence systematically accountable without having to change the entire criminal justice system? Even with all of its flaws (see Chapter 2), Title IX performs tactically for survivors. If combined with systematic consent education that includes some of the critical notions I have already laid out, I believe resistance is possible, and probably inevitable. Can consent education and Title IX stop these incidents from occurring? Unclear, but it’s a start.

¹ Katie Way, “I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life,” *Babe*, January 13, 2018, <https://babe.net/2018/01/13/aziz-ansari-28355>.

² Ibid.

³ Caitlin Flanagan, “The Humiliation of Aziz Ansari,” *The Atlantic*, January 14, 2018, <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/>; Julianne Escobedo Shepherd, “Babe, What Are You Doing?,” *Jezebel* (blog), January 16, 2018, <https://jezebel.com/babe-what-are-you-doing-1822114753>; Bari Weiss, “Opinion | Aziz Ansari Is Guilty. Of Not Being a Mind Reader.,” *The New York Times*, July 31, 2018, sec. Opinion, <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html>.

⁴ “Statistics,” .org, Know Your IX, n.d., <https://www.knowyourix.org/issues/statistics/>. “Campus Sexual Violence,” .org, Rape, Abuse & Incest National Network (RAINN), n.d., <https://www.rainn.org/statistics/campus-sexual-violence>. “RAINN | Rape, Abuse and Incest National Network,” accessed March 20, 2019, <https://apps.rainn.org/policy/>.

⁵ Caitlin Flanagan, “The Humiliation of Aziz Ansari,” *The Atlantic*, January 14, 2018, <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/>; Julianne Escobedo Shepherd, “Babe, What Are You Doing?,” *Jezebel* (blog), January 16, 2018, <https://jezebel.com/babe-what-are-you-doing-1822114753>; Bari Weiss, “Opinion | Aziz Ansari Is Guilty. Of Not Being a Mind Reader.,” *The New York Times*, July 31, 2018, sec. Opinion, <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html>.

⁶ “RAINN | Rape, Abuse and Incest National Network,” accessed March 20, 2019, <https://apps.rainn.org/policy/>.

⁷ “Consent Laws - California,” RAINN | Rape, Abuse and Incest National Network, accessed March 20, 2019, <https://apps.rainn.org/policy/policy-crime-definitions.cfm?state=California&group=9>.

⁸ Rushlynn Ali, “Dear Colleague Letter, Office for Civil Rights, April, 2011,” 1-2.

⁹ Ibid, 5 & 7.

¹⁰ Erica Gordon, “How Accepting The Hook-Up Culture Is Getting 20-Somethings Nowhere,” *Elite Daily*, accessed March 20, 2019, <https://www.elitedaily.com/dating/hookup-culture-non-relationship-generation-getting-nowhere/664654>; David Masciotra, “The Real Problem With Hooking Up: Bad Sex,” *The Atlantic*, April 1, 2013, <https://www.theatlantic.com/sexes/archive/2013/04/the-real-problem-with-hooking-up-bad-sex/274543/>; Nancy Reynolds, “The Teen Hookup Culture: What Parents Should Know,” *Raising Teens Today* (blog), February 5, 2018, <https://raisingteens.today.com/the-teen-hookup-culture-what-parents-should-know/>; Katie Klabusich, “The Unspoken Problem With College Hookup Culture,” *The Establishment* (blog), March 24, 2017, <https://medium.com/the-establishment/the-unspoken-problem-with-college-hookup-culture-8cf7c88e1c07>; “What the Hook-up Culture Has Done to Women,” *Crisis Magazine*, June 14, 2016, <http://www.crisismagazine.com/2016/hook-culture-done-women>.

¹¹ Donna Freitas, *The End of Sex: How Hookup Culture Is Leaving a Generation Unhappy, Sexually Unfulfilled, and Confused about Intimacy* (New York: Basic Books, 2013).

¹² Lisa Wade, *American Hookup: The New Culture of Sex on Campus*, First edition (New York, N.Y: W.W. Norton & Company, Independent Publishers Since 1923, 2017). “College Hookups Are Becoming Less Emotional and More Dangerous, Says an Expert,” *Harvard* (blog), June 23, 2017, <https://thetab.com/us/harvard/2017/06/23/college-hookups-becoming-less-emotional-dangerous-explains-expert-4272>.

¹³ Laura Kipnis and Gabra Zackman, *Unwanted Advances: Sexual Paranoia Comes to Campus.*, 2017.

¹⁴ Ibid. Robert David Johnson and Stuart Taylor, *The Campus Rape Frenzy: The Attack on Due Process at America's Universities* (New York: Encounter Books, 2017).

¹⁵ Anna North, “Aziz Ansari Actually Talked about the Sexual Misconduct Allegation against Him like an Adult,” *Vox*, February 13, 2019, <https://www.vox.com/2019/2/13/18223535/aziz-ansari-sexual-misconduct-allegation-me-too>.

¹⁶ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass: Harvard University Press, 1987) p. 105.

¹⁷ Susan Caringella, *Addressing Rape Reform in Law and Practice* (New York: Columbia University Press, 2009).

¹⁸ *Black's Law Dictionary*, s.v. “Criminal Intent.”

¹⁹ Catharine A. MacKinnon, *Sex Equality*, 2nd ed, University Casebook Series (New York : [St. Paul, Minn.]: Foundation Press ; Thomson/West, 2007) p. 831.

²⁰ Ibid.

-
- ²¹ “RAINN | Rape, Abuse and Incest National Network,” accessed March 20, 2019, <https://apps.rainn.org/policy/>, except for California.
- ²² “An Updated Definition of Rape,” The United States Department of Justice Archives, January 6, 2012, <https://www.justice.gov/archives/opa/blog/updated-definition-rape>.
- ²³ Ibid.
- ²⁴ Rushlynn Ali, “Dear Colleague Letter, Office for Civil Rights, April, 2011,” 1.
- ²⁵ Ibid, 5.
- ²⁶ Ibid, 7.
- ²⁷ “Campus Affirmative Consent Policy Maps (College Yes Means Yes/Title IX Policy) | Affirmative Consent / Stopping Campus Sexual Assault,” accessed March 20, 2019, <http://affirmativeconsent.com/consentpolicy/>.
- ²⁸ Ibid.
- ²⁹ R. Shep Melnick, *The Transformation of Title IX: Regulating Gender Equality in Education* (Washington, D.C: Brookings Institution Press, 2018), 153.
- ³⁰ Ibid, 43.
- ³¹ “Student Code of Conduct, Policies & Procedures, 2018-2019,” CU Boulder Office of Student Conduct & Conflict Resolution, https://www.colorado.edu/sccr/sites/default/files/attached-files/2018-2019_student_code_of_conduct_0.pdf, 6.
- ³² Kenneth Burke, “Definition of Man,” *The Hudson Review* 16, no. 4 (1963): 11, <https://doi.org/10.2307/3848123>.
- ³³ Kenneth Burke, “Definition of Man,” 12.
- ³⁴ *William Norris v. University of Colorado, Boulder*, No. 1:18-cv-02243 (The United States District Court for the District of Colorado 2018) 6. *Austin Van Overdam v. Texas A&M University*, No. 4:18-cv-02011 (United States District Court Southern District of Texas Houston Division 2018) 4. *John Doe v. The University of Cincinnati*, No. 1:16-cv-987 (The United States District Court for the Southern District of Ohio Western Division 2016) 27. *John Doe v. David H Baum, Susan Pritzel, Tabitha Bentley, E. Royster Harper, and Nadia Bazy*, No. 2:16-cv-13174 (United States District Court Eastern District of Michigan Southern Division 2016).
- ³⁵ Rachel Hall, “‘It Can Happen to You’: Rape Prevention in the Age of Risk Management,” *Hypatia* 19, no. 3 (August 2004): 1–18, <https://doi.org/10.1111/j.1527-2001.2004.tb01299.x>.
- ³⁶ Ibid.
- ³⁷ Susan Ehrlich, *Representing Rape: Language and Sexual Consent* (London; New York: Routledge, 2001) p. 150-51.
- ³⁸ Ibid, 168.
- ³⁹ Celia Kitzinger and Hannah Frith, “Just Say No? The Use of Conversation Analysis in Developing a Feminist Perspective on Sexual Refusal,” *Discourse & Society* 10, no. 3 (July 1999): 293–316, <https://doi.org/10.1177/0957926599010003002>.
- ⁴⁰ Abigaël Candelas de la Ossa, “‘Talk, Listen, Think’: Discourses of Agency and Unintentional Violence in Consent Guidance for Gay, Bisexual and Trans Men,” *Discourse & Society* 27, no. 4 (July 2016): 365–82, <https://doi.org/10.1177/0957926516634549>.
- ⁴¹ A.A Hasinoff, “How to Have Great Sext: Consent Advice in Online Sexting Tips,” *Communication and Critical/Cultural Studies* 13, no. 1 (January 2, 2016): 58–74, <https://doi.org/10.1080/14791420.2015.1077980>.
- ⁴² Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge, Mass: Harvard University Press, 1998).
- ⁴³ Kate Lockwood Harris, “Yes Means Yes and No Means No, but Both These Mantras Need to Go: Communication Myths in Consent Education and Anti-Rape Activism,” *Journal of Applied Communication Research* 46, no. 2 (March 4, 2018): 155–78, <https://doi.org/10.1080/00909882.2018.1435900>.
- ⁴⁴ Robin Bauer, *Queer BDSM Intimacies: Critical Consent and Pushing Boundaries* (Basingstoke: Palgrave Macmillan, 2014) 106.
- ⁴⁵ Kate Lockwood Harris, “Yes Means Yes and No Means No.”
- ⁴⁶ Robin Lakoff, “Linguistic Theory and the Real World,” *Language Learning* 25, no. 2 (December 1975): 309–38, <https://doi.org/10.1111/j.1467-1770.1975.tb00249.x>.
- ⁴⁷ Ibid.
- ⁴⁸ Julia Penelope, *Speaking Freely: Unlearning the Lies of the Fathers’ Tongues*, The Athene Series (New York, NY: Teachers Coll. Press, 1990) xiii.
- ⁴⁹ Ibid, 37.
- ⁵⁰ Charlotte Kroløkke and Ann Scott Sørensen, *Gender Communication Theories & Analyses: From Silence to Performance* (Thousand Oaks, Calif: Sage Publications, 2006) 67.
- ⁵¹ Dale Spender, *Man Made Language*, 2nd ed (London / New York: Routledge & Kegan Paul, 1987) 42.

-
- ⁵²Charlotte Kroløkke and Ann Scott Sørensen, *Gender Communication Theories & Analyses: From Silence to Performance*.
- ⁵³Julia T. Wood, *Gendered Lives: Communication, Gender, and Culture* (Belmont, Calif: Wadsworth Pub, 1994).
- ⁵⁴Candace West and Don H. Zimmerman, "Doing Gender," *Gender & Society* 1, no. 2 (June 1987): 126, <https://doi.org/10.1177/0891243287001002002>.
- ⁵⁵Patricia Hill Collins, "The Tie That Binds: Race, Gender and US Violence," *Ethnic and Racial Studies* 21, no. 5 (January 1998): 919, <https://doi.org/10.1080/014198798329720>.
- ⁵⁶Judith Butler, *Frames of War: When Is Life Grievable?*, Pbk. ed (London ; New York: Verso, 2010) 26, 15.
- ⁵⁷Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (London ; New York: Verso, 2006); Judith Butler, *Frames of War: When Is Life Grievable?*, Pbk. ed (London ; New York: Verso, 2010).
- ⁵⁸Judith Butler, *Frames of War*, 13.
- ⁵⁹Ibid, 15.
- ⁶⁰Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World*, First issued as paperback, Oxford Paperback (New York, NY: Oxford Univ. Press, 1987) 9.
- ⁶¹Judith Butler, *Precarious Life*, 20.
- ⁶²Ibid, pages 41 & 37, respectively.
- ⁶³Elaine Scarry, *The Body in Pain*, 12.
- ⁶⁴Judith Butler, *Precarious Life*, 38.
- ⁶⁵Catherine MacKinnon, "Feminism, Marxism, Method, and the State: An Agenda for Theory," in *On Violence: A Reader*, ed. Bruce B. Lawrence and Aisha Karim (Durham [NC]: Duke University Press, 2007) 289.
- ⁶⁶Judith Butler, *Frames of War*, 26.
- ⁶⁷Sally Miller Gearhart, "The Womanization of Rhetoric," *Women's Studies International Quarterly* 2, no. 2 (January 1979): 196, [https://doi.org/10.1016/S0148-0685\(79\)91809-8](https://doi.org/10.1016/S0148-0685(79)91809-8).
- ⁶⁸Ibid.
- ⁶⁹Ibid.
- ⁷⁰Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass: Harvard University Press, 1987) p. 6.
- ⁷¹Ibid, 92.
- ⁷²*John Doe v. The University of Cincinnati*, No. 1:16-cv-987 (United States District Court for the Southern District of Ohio Western Division 2016) 26.
- ⁷³Ibid,
- ⁷⁴Ibid, 29.
- ⁷⁵Ibid, 29-30.
- ⁷⁶*Austin Van Overdam v. Texas A&M University*, No. 4:18-cv-02011 (United States District Court of Southern District of Texas Houston Division 2018) 3.
- ⁷⁷Ibid, 2-3
- ⁷⁸*William Norris v. University of Colorado, Boulder*, No. 1:18-cv-02243 (United States District Court for the District of Colorado 2018) 18.
- ⁷⁹Ibid.
- ⁸⁰Ibid.
- ⁸¹*John Doe v. David H Baum, Susan Pritzel, Tabitha Bentley, E. Royster Harper, and Nadia Bazy*, No. 2:16-cv-13174 (United States District Court Eastern District of Michigan Southern Division 2016) 5-6.
- ⁸²Ibid, 16, 21.
- ⁸³Ibid, 9.
- ⁸⁴Ibid, 21.
- ⁸⁵Ibid, 20.
- ⁸⁶*John Doe v. The University of Cincinnati*, 31.
- ⁸⁷Ibid, 31
- ⁸⁸Ibid, 31
- ⁸⁹*William Norris v. University of Colorado, Boulder*, 42.
- ⁹⁰Ibid, 15.
- ⁹¹This exemplified by Bill Cosby's 2017 trial, Brock Turner's 6 month sentence, R Kelly, Chris Brown, many players in the NFL, and many other less-famous, but still egregious crimes.
- ⁹²Deborah Cameron, *Verbal Hygiene*, 1st ed. (Routledge, 2012), <https://doi.org/10.4324/9780203123898>.
- ⁹³*Lean In: Women, Work, and the Will to Lead*, accessed March 20, 2019, <https://www.npr.org/tags/175862482/lean-in-women-work-and-the-will-to-lead>.

-
- ⁹⁴ Dale Spender, *Man Made Language*, 2nd ed (London / New York: Routledge & Kegan Paul, 1987) 79.
- ⁹⁵ Sally Miller Gearhart, "The Womanization of Rhetoric," 201.
- ⁹⁶ Bonnie J. Dow, *Watching Women's Liberation, 1970: Feminism's Pivotal Year on the Network News* (Urbana: University of Illinois Press, 2014) 112.
- ⁹⁷ Iris Marion Young, *Justice and the Politics of Difference* (Princeton, N.J: Princeton University Press, 1990) 89.
- ⁹⁸ Nina M. Lozano-Reich & Dana L. Cloud (2009) The Uncivil Tongue: Invitational Rhetoric and the Problem of Inequality, *Western Journal of Communication*, 73:2, 220-226, DOI: 10.1080/10570310902856105
- ⁹⁹ Ibid.
- ¹⁰⁰ Catherine MacKinnon, "Feminism, Marxism, Method, and the State" in *On Violence*, 290.
- ¹⁰¹ Ibid.
- ¹⁰² Robin Bauer, *Queer BDSM Intimacies: Critical Consent and Pushing Boundaries* (Basingstoke: Palgrave Macmillan, 2014) 101.
- ¹⁰³ Robin Bauer, *Queer BDSM Intimacies*, 106.
- ¹⁰⁴ Ibid, 97.
- ¹⁰⁵ Ibid.
- ¹⁰⁶ Judith Butler, *Precarious Life*, 134
- ¹⁰⁷ David Lisak, "Predators: Uncomfortable Truths about Campus Rapists," *Connection*, Summer 2004, 19–21; David Lisak and M. Claire Harwell, "Why Rapists Run Free," *Sexual Assault Report* 14, no. 2 (November 2010): 17–32; David Lisak and Paul M. Miller, "Repeat Rape and Multiple Offending Among Undetected Rapists," *Violence and Victims* 17, no. 1 (February 2002): 73–84, <https://doi.org/10.1891/vivi.17.1.73.33638>.
- ¹⁰⁸ Catherine MacKinnon, "Feminism, Marxism, Method, and the State" in *On Violence*, 287.

Chapter 4

Legalizing Sexuality: A Pro/Con List

Conclusions present a unique kind of challenge for scholars interested in sexual violence, if for any reason more than it is relatively impossible to maintain a neutral stance. In pedagogy, rhetoricians are (in)famous for instructing their students to argue a point of view, whether or not they agree with it, and they will be graded on their ability to construct an argument or intervene in rhetorical theory, not the veracity of that argument. While more is at stake in a thesis project, the rationale remains the same. My job is to persuade you, the reader, of my ability to put rhetorical texts in conversation with one another, in order to intervene in rhetorical theory through my chosen artifacts or case studies, not necessarily to take a political stance on concrete ways to address campus sexual violence. The conclusion is the place to wrap up my arguments and put them into context with the artifacts with a hint at a plan to move forward. But having already noted the scope of the problem of sexual violence, what does a plan for moving forward that is based in rhetoric resemble? In a perfect world, perhaps, I could end this thesis with a roadmap for new interpersonal prevention efforts that would effectively undo centuries of systemic subjugation via sexual assault. Or, more possibly, I could suggest a way that rhetoricians could intervene in legal discourses in order to make it more possible to find more perpetrators guilty of sexual violence. Alas, I cannot offer either of those things, and I especially cannot promise to maintain political neutrality on the topic of sexual violence (if I ever took on a neutral tone in the first place). Sexual violence is not just harmful to the bodies and minds of those who experience it; it is a systematic effort to dissuade certain raced, sexed, and classed bodies of their humanity. While I have maintained that individuals are complicit in this effort, I have also argued that law is equally as complicit, even as it operates under the guise of

objectivity. I title my closing chapter “Legalizing Sexuality” not because I have much to say about law or sexuality on their own. Rather, I have much to say about administrative proceedings that are conflated with law and sexual assault that is conflated with sexuality. As well, I have a few conclusions about the process of defining what makes certain aspects of sexuality (il)legal. All of this is to say that performing scholarly research on the relationship between law and sexual violence presents a unique challenge because of what is at stake. Catherine MacKinnon said it best: “Assault that is consented to is still assault; rape consented to is intercourse.”¹ In many ways, this thesis is inspired by her words for they remind us of the uniqueness of sexual violence—that the reason that defining and adjudicating it is messy is because it is so closely tied to intimacy and pleasure.

Throughout this thesis, I have performed a narrative analysis of complaint statements made by men suing their colleges for expelling them under Title IX. These Title IX violators assert that they were denied due process of law throughout their school’s investigation, and thus experienced discrimination. Three tensions emerged throughout my analysis; first, the tension between rhetoric and law. The law is popularly considered to be objective and concrete, and above all else fair to every individual, while rhetoric has historically been considered to be a means of manipulation.² I established that law is constitutive and thus is inherently rhetorical, then I showed how the 2011 DCL oscillates between legal and administrative language, effectively existing in the intermediary space. This oscillation enables campus Title IX to act with the authority of law, but with none of the consequences or baggage; its administrative oscillation constrains the college’s ability to discipline perpetrators of sexual violence with only expulsion at stake.

The second tension I examine exists around what qualifies as sexual consent. Much of this tension relies on gendered assumptions of heterosexuality—who gets to distinguish sex from rape? In the ever-gendered performative of heterosexuality, is it possible that “yes or no” narratives we tell about sexual assault fail to account for nodes of power in relationships? I note these nuances because we have to pay attention to the interpersonal negotiations of consent beyond “yes” and “no” because these are also negotiations of gender and power. I argued that the doing of heterosexuality involves the socialization of women as unable to refuse consent without fear of retribution, and men as unable to hear and respond to their female partners’ reactions of discomfort or distress. This lens complicates both our understandings of consent and of consent under the law. What are the possibilities for legal (hetero)sexuality?

The last tension, which has been latent in the past two chapters, but I will argue more explicitly in this chapter, exists between fairness and justice. Criminal processes have been widely coded as fair to all (meaning that all are treated the same). Title IX and the other educational amendments were engendered by the 1964 Civil Rights Act, which seeks to amend the concrete processes of U.S. law in order to make reparations for otherwise legal discrimination (the 3/5 compromise, poll tax, segregation, and more). These amendments unearth the messiness and nuance of providing equity, instead of the rigid processes of equality. For the purposes of this final chapter, I ponder how the notoriously unambiguous legal system can address the nuance of issues like consent, which is often not nearly as clear as legally necessitated.

This last chapter will take the following form. First, I will use the Title IX violators’ appeals to fairness and justice to show how the two previous chapters, while seeming to jump between two disparate topics, are actually more intertwined than a cursory read might indicate.

Second, I hope to address the ways in which I have posited more questions than answers at the intersection of sexual violence, law, and consent. I realize that a thesis is supposed to posit an overarching argument, but I instead posited a question: what can these complaints of lack of due process in Title IX tell us about what is at stake at the nexus of law, heterosexuality, and violence? Lastly, I will explore implications for each chapter's conclusions: Title IX's oscillations and institutional leapfrogging, as well as critical consent. I ponder Title IX's future in solving campus-based injustices—it has been boxed into occupying a space between law and Human Resources, but could reframing it under restorative justice provide it new avenues for movement? To build on this argument, I start by analyzing these men's claims of being presumed guilty.

Guilty Until Proven Innocent?

The U.S. criminal justice system is built on the following assumption: innocent until proven guilty. While seemingly confined to a courtroom, this narrative permeates other parts of our society, often coming up in casual conversations about petty theft or predictions about celebrity wrongdoing. This innocent-until-proven-guilty narrative also permeates disciplinary settings at work and in academia. Discussions of legality and consent are caught up narratives of fairness, which are all caught up in gender. In this section, I endeavor to bring together two major narrative streams: due process as fair, thus Title IX lacking in legal fairness; and consent unfairly placed upon male shoulders, which presumes them to be guilty of violating Title IX.

As I discussed in both chapters two and three, these Title IX violators complain Title IX proceedings unfairly assume their guilt by requiring them to prove that they had received consent, which is discrimination against them as men under Title IX. Several of the narratives that I studied cited a 2014 *Chronicle of Higher Education* article titled “Presumed Guilty:

College men accused of rape say the scales are tipped against them.” It bears repeating that they all quote the same passage:

Under current interpretations of colleges’ legal responsibilities, if a female student alleges sexual assault by a male student after heavy drinking, he may be suspended or expelled, even if she appeared to be a willing participant and never said no. That is because in heterosexual cases, colleges typically see the male student as the one physically able to initiate sex, and therefore responsible for gaining the woman’s consent.³

This article argues that college Title IX proceedings assume a male sexual aggressor and fail to recognize the sexual agency of the women in their heterosexual hook-ups-gone-awry situations.

It goes on to discuss the ways in which Title IX demands more from the accused than the accuser, which violates due process norms of “innocent until proven guilty.” These norms automatically place the responsibility of proving the crime was committed on the accuser.

However, I am less interested in this article, and more interested in the ways in which it has been taken up by these Title IX violators: to show how the deck were already stacked against them to be found responsible. The men who cite this article accuse the DCL “crackdown” of going too far, effectively operating as gender discrimination it seeks to eradicate. Schools are deemed “ill-equipped” to adjudicate sexual assault. They reason that the DCL’s preponderance of evidence standard enables schools to presume guilt by requiring the accused to prove that they had consent (as opposed to accuser having to prove that they were assaulted) and having a low standard of what qualifies as evidence.⁴ Cincy and TAMU Doe used the Chronicle article to argue that “schools treat male students accused of sexual misconduct with a presumption of guilt.”⁵ Gender is the focus for these two Does—how their school’s Title IX proceedings discriminates against them as men, which is technically prohibited under Title IX.

The nature of their complaint is simple: fairness = justice; Title IX is not fair, so it cannot be just. This syllogism relies on series of assumptions to make that argument: first, that fairness entails two equal participants in the sexual act, both able to give/withhold consent; second, that

fairness reflects the criminal justice system, which has been built up to be the ultimate measure of equality; and third, that fairness in policy as clearly stated without nuance or gray area. For these Title IX violators, these combined elements of fairness are the only way justice can be possible under Title IX.

The quote chosen for these complaints of lack of due process laments the classification of men as sexual aggressors, but this lamentation is blatantly contradicted by the complainants' noted refusal to heed the Roes' warning signs. The author notes that even in cases where the woman accuser "appeared to be a willing participant and never said no," the burden is on the male student to prove that he gained consent from her before engaging in a sexual act. In noting the appearance of "willingness" and the lack of the use of "no," the author of the article is able to frame both parties as two equal participants in sexual activity with the ability to stop it any point. As chapter three argued, this perspective completely ignores the centuries of gendered power dynamics that have built compulsory heterosexuality and the precarity of women's bodies. The complainants in these Title IX cases negotiate and redirect each time the respondents proceeded with certain kinds of sexual activity, and yet these yellow flags (a somewhat universal warning sign) are not perceived as "unwilling" or endowed with the same clout as an out-right "no." The complaints note the Roes' negotiations and redirections, so they absolutely remember them (enough to include them in a lawsuit) but they still considered the plethora of yellow flags to be willingness because it was not met with a clear "no."

The gendering of sexual activity is an age-old argument, as there is a long history of mythology painting women as gatekeepers to sex, and men as using both physical and figurative battering rams to penetrate the gate. It would be relatively easy for me to connect this to a rhetorical history of the construction of heterosexual women as sexual gatekeepers; from Greek

mythology to campaigns such as “no means no,” women have been protecting their own sexuality from male violation. However, it might be more pertinent to these examples to interrogate why, when these yellow flags presented themselves, these men did not stop. I have no doubt that these events occurred, or they would not have thought it pertinent to include them in their lawsuit, but to them those moments seemed to indicate willingness, as opposed to unwillingness. However, I wonder what would have happened if it were common practice for these men to stop what they were doing entirely at the sign of a yellow flag to check in with their partner. But, as chapter three argued, performatives of heterosexuality do not allow for listening. These performatives rely on narratives of domination and subjugation to enact a precarity on women’s bodies. In these cases, we see that these parties are not, were never, and (dare I say) can never be considered equal when women’s bodies are always at the mercy of their male sexual partner. And to make matters worse, the use of the *Chronicle of Higher Education* article only serves to illustrate the lack of grievability for the bodies of these women. If they are unable to explicitly show unwillingness through the use of the word “no,” then there is nothing to mitigate what happens to their bodies. Not only is the previous sentence a common example of victim-blaming language, but it also exposes the double-bind structure that makes up modern rape culture—the belief that women and men are equal partners in sexuality until a violence occurs and then it immediately becomes the woman’s fault that she felt violated because she stood by and said nothing. I am leading up to a question that I hope to discuss more fully in later in this chapter: is there something irreparable about heterosexuality?

To even begin to answer that question, we also have to interrogate why these lawsuits center around fairness rather than sexuality. The use of this article by all four complainants also compares and contrasts the school’s Title IX policy to the criminal court system to make its

argument about fairness. This move by the complainants is critical for the ways it illustrates their fundamental attachment to the privileges afforded to them by the criminal justice system. Title IX's evidence standard is the subject of much angst in all four complaints, as it is far lower than the criminal standard of "beyond a reasonable doubt." These men ask why colleges would adjudicate violence using a different standard than the criminal justice system? In this question, the criminal justice system is coded as a fair, in converse relation to Title IX. Michigan Doe quotes portions of his school's website which contends that their policy is in line with Michigan law, stating that intoxicated people cannot consent to sexual activity because they are incapacitated. The site gives a series of questions to consider before engaging in sexual activity with a person who has consumed alcohol (e.g. Are they slurring their words? Have they vomited?). If "yes" is the answer to any or all of the questions, the University advises the reader not to initiate sexual activity. Michigan Does instead argues that Michigan law only counts intoxication as incapacitation if the substances were administered to the person *without* their consent.⁶ Because Michigan Roe willingly consumed alcohol she was offered by Michigan Doe, she could not be incapacitated—even though he notes that she vomited after the incident in question. He uses the article to argue that under the law, he would never have been found guilty for sexually assaulting a woman who was incapacitated because even if she was too drunk to consent, she willingly consumed that alcohol, so it is not illegal to have sex with her. Ignoring the flawed logic of the Michigan statute on incapacity for a moment, this example illustrates how these men construct Title IX as unfair by contrasting it with state law. This move, by way of negation, constructs the law as fair, and fairness as justice. But I push on this claim: fairness for whom? From other scholars, we have learned that the law exists by and for those who had the power to write it:

land-owning white men. Equality under the law, in American culture, is imbued with European Enlightenment sensibilities and directly benefits the white men whose ancestors theorized it.

In this way, we can come to understand the complaints about fairness and justice to be also tied up in institutions of dominance. If ideas of fairness and justice are caught up in a U.S. system written by and for Anglo-white, cis, heterosexual men, then those ideas are imbued with the dominance narratives that constituted colonialism and domination of women. This conclusion begs the question, is justice possible in a system that was built on the hierarchizing of bodies? As argued in chapter two, Title IX exists in the intermediary space between law and administrative policy, which operates as both a blessing and a curse. The confusion about its narrative structure has opened the door for emergence of these lawsuits, but the institutional leapfrogging of Title IX has also made resistance to oppressive legal norms more possible. Later in the chapter, I will explore the implications for connecting Title IX and justice in hopes of addressing the ways in which Title IX could pursue non-legal forms of justice and community building.

Lastly, for these men, fairness must be clearly stated and unambiguous, which poses a potential problem because sexual violence (before, during, and after) tends to be complex and muddled. Even with the 2011 DCL as guidance, it is clear by sheer volume of popular press articles, think pieces, and op-eds on the subject that federal Title IX rules and on-campus Title IX proceedings are full of ambiguity. The publication of the above-cited article in the *Chronicle of Higher Education* only further illustrates nationwide anxiety about the ways in which Title IX rules and guidelines are vague at best. Michigan Doe uses this ambiguity to argue that Title IX processes are void under Due Process:

Under the Due Process Clause, an enactment is void if its prohibitions are not clearly defined or does not provide explicitly standards for enforcement...the policy in effect at the time the Complainant and Plaintiff engaged in sexual activity was unconstitutionally vague because it failed to properly define the term “incapacitation.”⁷

The 2011 DCL is pretty vague about incapacitation, it is true, and the University of Michigan Title IX policy, as noted in the previous paragraph, leaves the term incapacitation linked to intoxication. Understanding the intentionality behind this ambiguity would be interesting, but I find it more vital to discuss the ways in which narratives of clarity and ambiguity operate. Practically (and as someone who teaches college students), rules are much easier to follow when they are clear and unambiguous. But, also, it is important to realize that perpetrators of sexual violence rarely do it accidentally; it is not as if they would have changed their actions if they had better known the rules.⁸ Even if the University of Michigan had been able to more clearly define “incapacitation,” it is still very likely that Michigan Doe would not have thought twice before taking advantage of a drunk woman. Narratives of clarity, here, operate to negate Title IX’s ability to treat students fairly and equally. If we understand law as clear, and thus just, then we can see how Title IX would be constructed in the negative. But I am interested in the ways in which ambiguity could be harnessed for more progressive *telos*—one that is less interested in aligning itself with a broken legal system that we know statistically and anecdotally is not serving survivors (on and off college campuses). This chapter will conclude with a discussion of equity and the potential in a restorative justice approach to CSA.

This brief analysis of the repetitive use of the article from the *Chronicle of Higher Education* shows how discourse of Title IX, consent, law, and heterosexuality are not so disparate from one another. In fact, they are caught up together, reinforcing norms that prop up condoning certain kinds of sexual violence as “not illegal per se” or “college kids are just experimenting”—which are just more acceptable ways of saying “boys will be boys.” It would be simpler for me, as a scholar, to write these lawsuits off as sexist arguments propped up by lawsuit-happy patriarchal society that would rather not change the status quo, but that move

would discount the effects of the backlash. Like I said in chapter one, these lawsuits from college men are *doing something*. Men's Rights Activist groups are no longer on the periphery; Secretary of Education Betsy DeVos handed them a spotlight and a megaphone when she met with them over Title IX regulations in 2017. As I mentioned in chapter one, President Trump spoke out on this issue, bemoaning that it is “a very difficult time for young men in America... now you're guilty until proven innocent—that is a very difficult standard.”⁹ In a field where we place a lot of value in presidential address, this should mean a great deal. Lawsuits like these represent more than just the confusion of campus Title IX proceedings with criminal law or the violence inherent in performatives of heterosexuality, singularly—it is that they exist together, mutually reinforcing one another. Given their connection, we can understand the patriarchal violence inherent in our constitutive discourse of law as well as the blurring of the cut-and-dry legal discourse around consent to sexual activity. In this way, we can also better comprehend the ways in which performatives of heterosexuality identity and practices are created in the act of doing heterosexuality—that we enact performatives of dominance and submission in the everyday doing of heterosexual sex. Those performatives are dangerous and violent to some bodies, but totally and completely normal to others.

So, what are our alternatives? Heterosexuality and U.S. law may as well be load-bearing pillars in the construction of the nation—until recently, the state only recognized heterosexual marriage, and even today heterosexual marriages are rewarded via tax incentives and other norms which often pass by under the radar. These pillars are very difficult to disassemble, but since they were constructed in the first place, it is still possible: brick by brick.

A Laundry List of Implications: Equality/Equity, Restorative Justice, & Critical Consent

In the section that follows, I detail some of the ways that campus Title IX policies could mobilize tactically to better serve survivors of CSA, what justice might mean in the context of CSA, and introduce some research on how schools could use restorative justice techniques to be able to move in the direction of justice. I also discuss critical consent at length, problematizing masculinity, binaries of consent, and what it would mean to “queer” heterosexuality.

Equality v. Equity: Pros and Cons of Title IX leapfrogging

As noted in chapter 1, Title IX and the other educational amendments are housed under the 1964 Civil Rights Act, which sought (and continues to seek) to amend the concrete processes of U.S. law in order to make reparations for otherwise legal discrimination. I noted the 3/5 compromise, poll tax, and Jim Crow segregation, but I also include gender-based discrimination in educational institutions. Instead of just requiring institutions to consider female applicants and applicants of color or make sure to offer women’s soccer, these laws *guaranteed* their acceptance and their existence. For those who passed Title IX, it was not just about equality, it was about breaking down the barriers blocking our ability to make up for lost time. However, these amendments also unearth the messiness and nuance of providing equity in a legal system that only values the rigid processes of equality. If we understand, from chapter two, Title IX to exist in an intermediary space between administrative policy and law, then we also know that schools have been committing what Shep Melnick called “institutional leap-frogging” in order to follow the guidelines of the DCL and provide some semblance of equity. The lawsuits I analyzed illustrate a backlash on the grounds of equality through due process. How does Title IX get around that? This section will lead with a discussion of racialized and gendered components of equity versus equality through Derrick Bell’s interest-convergence paradigm; it will then

problematize the law's ability to break such a paradigm and examine the possibility of Restorative Justice.

Flashing back to another Civil Rights issue, Title IX directly reflects conclusions from Derrick Bell's application of his interest-convergence paradigm to *Brown v. Board of Education*. He stipulates that "the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."¹⁰ Title IX discourses operates in a similar fashion with gender. The law successfully elevates access so that women and men have equal opportunities to educational programs, but only when that elevation does not disrupt currently existing rights of men. In this way, law is both raced and gendered, as Patricia Hill Collins wrote, "In the United States, socially constructed distinctions between legitimated and non-legitimated violence remain grounded in intersecting power relations of race and gender."¹¹ This construction is mediated through the state, meaning that there will be different outcomes for different folks dependent on their identity markers. With the change in focus as a result of the 2011 DCL, Title IX no longer operated within the interest-convergence framework by trying to provide some form of justice for victims of sexual assault. Current Title IX policies strive to serve victims' interests by punishing students who assault other students and protect students who have been assaulted. Through my analysis of the artifacts I selected and their respective contexts, I have outlined a growing fear from men, their parents, legal scholars, and popular news media that Title IX policies infringe upon the rights of those accused of sexual assault, who, as reported, are predominantly men.¹² We also know, according to MacKinnon, that the law adjudicates "the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior, rather than at the victim's point of violation."¹³ What would it mean to see rape from the victim's point of view? With men's rights in jeopardy, so are any

progressive changes to Title IX, unless in some way those changes benefit men. While I acknowledge that both men and women benefit from a rape-free society, sexual harassment and rape are weapons used predominantly by men to aggregate power, and thus men, as a group, may benefit from the Title IX inability to address it. Thus, colleges and universities reach a defining moment: to either break from the interest-convergence paradigm or continue working within that mold. Are they in a position where they may act in the interest of victims at the expense of potential perpetrators in order to provide some sort of justice? At this moment in time, the answer hangs in the balance. In its current state under Betsy DeVos, schools are being left (relatively) to their own devices, which is, while nerve-wracking, fertile ground for school-lead progressive possibilities for justice, perhaps possibilities for restorative justice approaches.

Given these competing and complex directives, Title IX, in its current capacity, can never achieve justice for victims of CSA. As Derrida states, “Law is not justice. Law is an element of calculation, and it is just that there be law, but justice is incalculable, it demands that one calculate with the incalculable.”¹⁴ Put simply, for Derrida the law can never be just because justice is divine, and therefore unattainable, especially by an umbrella-style legal system that tries to address everyone’s needs in just a few words. The law calculates fairness using discourses of equality: treating everyone with the same protections and rights. However, those umbrella rights do not account for the uniqueness of each individual case and (as noted above) are embedded with discourses of whiteness, maleness, and heterosexuality. Campbell argues in favor of a more substantive due process (rather than procedural), which could alleviate some of those barriers to justice that I named, but that approach does not solve all of Title IX’s problems.¹⁵ Title IX is positioned to provide justice where the legal system has failed, but as Derrida contends, it is impossible to get justice from the institution of law. I argue that, in the

same way, Title IX discourses fail victims of campus sexual assault. Title IX adjudications strive to create the same environment that existed before the complainant was raped, "...end the violation, prevent its recurrence, and remedy its effect on individuals and the community."¹⁶ However, in its current state the university has no power to erase a violation, and it has very little power to penalize the respondent or protect the complainant after the investigation is over. The college can only (at most) expel the respondent or enact a no-contact order; it cannot incarcerate or further punish respondents. Title IX grievance policies have no theory of justice, no way to provide recourse for victims; education and expulsion are all a college can offer.

Legal scholars Mary Koss, Jay Wilgus, and Kaaren Williamsen reject the notion that a quasi-criminal justice should govern Title IX procedures.¹⁷ They argue that the criminal justice approach is too narrow and instead re-read the OCR's requirements in the DCL in terms of restorative justice.¹⁸ Restorative justice is founded on the notion that "harm has been done and someone is responsible for repairing it."¹⁹ They write:

The focus of restorative justice is present and future oriented. Looking back to weigh evidence and deliberate fault is the function of adversarial justice, which we believe the DCL guidance encourages by not highlighting the utility of informal resolution options in which responsible persons accept responsibility early and work collaboratively with impacted parties and support resources to repair the harm and prevent reoffending behaviors.²⁰

These scholars support shared interest in justice without using the same tactics as the legal system. Koss et al. intend for restorative justice to replace adjudication processes and move away from the law to a space more capable of providing justice for survivors and supporting affected communities.²¹ In their conclusion, Koss et al. argue,

Traditional resolution processes were designed to offer due process adjudication for accused students. They were not designed to meet a victim's needs or achieve goals other than punishment. A variety of options are needed to be victim-centered.²²

Koss et al. reject notions of legality in reference to Title IX and instead push for a restorative justice understanding of the DCL. Their interpretation refuses legal recourse for unhappy

respondents because restorative justice is very clearly not associated with the criminal justice system, but argues that there is something to be gained from that rejection.²³ Koss et al. stipulate that the criminal justice approach is too narrow to adjudicate campus sexual assault, and colleges should utilize restorative justice.²⁴ Restorative justice offers no particular option for recourse, and instead allows the victim and community to choose the outcome of the investigation.²⁵

While the restorative justice approach certainly addresses the law's uneven relationship to justice, I have concerns about its feasibility. Restorative justice is inherently built around a lack of procedure. This ambiguity presents a challenge with widespread implementation, but in this way, ambiguity might be its greatest asset. Restorative justice also operates around the community where the crime is committed and what outcome would most benefit that community. Inherently, it is not punitive because it lacks the protections, regulations, and procedure of the legal system. In past writings, I have stipulated that a restorative justice approach to campus adjudications serves to decriminalize a felony by not punishing campus rapists for the crime they committed, but after completing this research project, I wonder what is possible in having justice systems that do not rely on the judicial branch. And some schools have very successfully operating restorative justice programs for minor infractions and community disputes (my home institution of CU Boulder being one of them), and the University of Michigan has implemented a Restorative Justice process addition to Title IX. While sexual assault cannot be compared to stealing your roommate's clothes or minor property damage, it still might be a better option for community growth than a punitive approach. In this way, it might be helpful to view restorative justice, not as decriminalizing rape and silences voices of victims, but instead as a community-centered way of addressing the DCL's objective for Title IX policies: "...[to] end the violation, prevent its recurrence, and remedy its effect on individuals and the community"²⁶

but with a slightly different *telos*. Instead of trying to return the campus to its pre-sexual violence state (which is impossible), a restorative justice approach would circumnavigate the due process concerns that cause schools to be sued, and also could promote community healing in a more holistic manner that addresses the ever-silent victims of sexual violence that may not report because they do not want to punish the person who assaulted them. Restorative justice may be a more viable option with more research and revision; however, restorative justice would have to avoid mediation practices that tend to re-traumatize victims, and work not just to repair the damage, but also doing additional work to improve the community that they harmed (e.g. writing an essay about why rape is bad is *not* improving the community). I only note these examples because they exist as Title IX sanctions at schools nationwide. By embodying these new strategies, collegiate Title IX processes mimicking the legal system would have to break away from a mold that only allows for change that is mutually beneficial to powerful and historically oppressed groups. That kind of change is radical and has potential to alter the gendered power dynamics surrounding sexual assault. It also makes critical notions of consent more possible.

The Problems and Possibilities for Critical Consent

I introduced the Robin Bauer's theory of critical consent in chapter three in hopes that it might be able to provide some ways to think about consent not as simply the presence of "yes" or "no." Their theory of consent, which as mentioned, stems from queer, dyke, and BDSM communities, relies on the process of checking in to make consensual sex an active, collaborative process. In the past, feminist scholars have been careful to avoid conversations of sexual violence that support the victim-blaming perspective that there is much "gray area" between sex and rape. In chapter three, I illustrated that through exploring those gray areas, we can better understand conditions of heterosexuality that support masculine dominance and feminine

subjugation. I also wondered at the constructed goal of heterosexuality, which Bauer answered for me: harmonic sex. I have pondered the possibility of harmonic sex, where both partners simultaneously experience matching levels of enjoyment and lack of pressure to perform a certain way. Bauer makes it clear that harmonic sex is an impossible to achieve, as power is not absent from even the most egalitarian relationships.²⁷ Hence the need for critical consent—a way to check your power with your partner by literally checking in. In this way, consent becomes more fluid, and the ability to negotiate or revoke it becomes more possible. I find this theory of consent compelling because it accounts for the gray areas of consent without assigning it to a binary. Critical consent enables a type of script not often seen in discussions of sexuality: the acknowledgement of power, the troubling of that power, and the embrace of transparency.

But heteronormative masculinity presents a major roadblock to this theory. It has been argued that much like femininity, there is a double-standard of masculine sexuality. Susan Bordo notes that science has constructed and reinforced the naturalness of male sexual aggression. Comparing 20th Century men to their Neanderthal and chimpanzee brethren, popular science discourses frame men as aggressively seeking sex with women, not caring for their partners' interest or sexual satisfaction. These narratives produce the image of men, who when their sexual "fire is lit, they're just as likely to rape you as woo you."²⁸ Bordo also shows, however, that we socialize boys to become both man and beast: "We fabulously reward those boys who succeed in our ritual arenas of primitive potency, and humiliate the boy whose sexual aggression quota doesn't match up to those standards. But at the same time, we want male aggression to bow to civilization when a girl says 'no' and to be transformed into tender passion when she says 'yes.'"²⁹ Bauer names the double standard Bordo describes the "ideal of harmonic sex" in which there are two egalitarian partners whose interaction is completely devoid of power dynamics.³⁰

But as Bordo (and others)³¹ argue, not only is harmonic sex idealistic, it has never existed, and they are not sure it can ever exist. Especially in queer contexts, where sexual norms are already being violated, it is vital to account for power. Bauer observes queer and dyke BDSM communities to be creating “alternative/exuberant intimacies” which reject harmony and equality, and instead celebrate difference, tension, and fluidity.³² This exuberance creates alternative sexual ethics that have the potential to fundamentally change how we think, teach, and legislate consent.

But there are other ethical considerations to assess before jumping on the chance to use critical consent in heterosexual Title IX cases. In the ensuing paragraphs, I discuss the following questions: what would it mean to queer heterosexuality? What are the politics of queering heterosexuality? I cannot move forward with this project without problematizing critical consent’s roots in the queer + dyke BDSM communities. It is not a question of how can queer power dynamics relate to heterosexual violence, but rather what are the politics of co-opting a queer theory for heterosexual use? I do not mean to argue that heterosexuality can learn nothing from the queer community, but to instead think critically about two facets of this argument: first, that using this theory turns into a form of cultural appropriation, and second, that it is inherently problematic to assign the assumed roles in Dom/Sub relationships on the basis of gender within heterosexuality. In the ensuing discussion, I ponder: what is at stake in deciding that gender roles are power roles in sexuality?

Perhaps what we can take from critical consent is its complete and utter attention to the movement of power to be mark violence and consent. A big part of doing intersectional scholarship, especially as a cis, straight-passing, white woman, is to be reflexive about the cultural relevance of theories that inspire us. Critical consent inspires me because it

fundamentally recognizes the role of power in sexuality, but I also recognize that removing critical consent from its queer + dyke BDSM contexts does the theory a fundamental disservice.

However, Patricia Hill Collins has argued:

While violence certainly seems central to maintaining separate oppressions...violence may be equally important in structuring intersections among these social hierarchies. Rather than viewing violence primarily as part of distinct social hierarchies of race and gender, violence may serve as conceptual glue that binds them together.³³

The article from which this quote originated argues that the ties that binds humans together is not our collective humanity, but is instead, violence. It is experiences of violence that create our intersectional lives, and those ties bind us together through moments of pain and triumph. As MacKinnon has contends, “If sexuality is relational, specifically if it is a power relation of gender, consent is a communication under conditions of inequality.”³⁴ In this way, of course it would culturally appropriative to suggest that critical consent should be mobilized in consent pedagogy and advocated for in legislative settings without contextualizing it. But it might be more possible to use the theory of critical consent to locate and negotiate power in intimate heterosexual relationships *because* those power relationships are caught up in violence.

It is my second concern that is there something prescriptive in the recognition power in heterosexuality. For so long, sex roles were collectively visible and invisible, in the sense that everyone knew about male dominance, but it did not have a name. Feminists have spent the last 50 years trying to make space for feminine power to exist in the workforce, the academy, the household, and in the bedroom. MacKinnon noted in the 1990’s that “seldom is rape [studied] in normal circumstances, in everyday life, in ordinary relationships, by men as men.”³⁵ Collins furthered: “Rape is deemed non-legitimated violence, but the threat of force that accompanies it, the verbal violence that is designed to belittle, humiliate, and strip rape victims of their sense of self as worthwhile, powerful individuals typically falls outside the purview of the very definition

of violence.”³⁶ Rape in itself is illegal (both systemically and socially), but the coercive techniques of abuse and control absolutely are not. MacKinnon argues that a more feminist view “sees sexuality as a social sphere of maleness where forced sex is paradigmatic.”³⁷ If we resist or reject the ideal of harmonic sex, then what are we left with? Assuming that men will be men (dominant) and women will be women (submissive)? Truthfully, as a scholar, teacher, woman, and someone in what I consider to be a loving heterosexual relationship, I am not sure that I can live with the conclusion. In these BDSM relationships, those roles are chosen and enacted with both parties explicitly aware of the power dynamics. That is not the case in the artifacts I chose to the study, and it is not the case for many heterosexual couples, where those roles are implicit and fraught. In this way, some of the foundational aspects of critical consent are concerning for heterosexuality, but I wonder if there is a way to harness the awareness of power dynamics without necessarily embodying the role of dominance or submission. More might be possible if we educate men on the power they hold in heterosexuality, and how they can disrupt it. In the same way, it would do some good to continue to educate women on their bodily autonomy with special emphasis on their value and that their desires deserve to be heard.

On Future Studies of Sexual Violence in Communication

It is not my goal to provide easy fixes for any of the problems with heterosexuality, Title IX or law, but instead my study sought to interrogate the whiteness, masculinity, and upper-middle-class-ness that imbue much of the national conversation around CSA. I find it vitally important for rhetorical scholars to directly address the problems that they analyze. It may not be enough to use case studies to intervene in rhetoric theory; case studies change quickly as our news cycle, and our memories are shorter than ever before in the endless parade of tragedy and loss that circulate via social media. While rooming with two of my fellow graduate students who

study sexual violence at the 2019 Western States Communication Association annual conference in Seattle, we commiserated over pizza about our collective fear of being referred to as the “rape scholars” and being essentially relegated to our artifacts, as opposed to being considered radical (though burgeoning) scholars in our respective communication interest areas. Two of us were brainstorming with the third to help her address some questions she would have to answer about the future of sexual violence research in communication field on a panel the next day called, “Advocating With(out) Evidence: Sexual Assault in a Post-Truth Era.”³⁸ I will share what we came up with, that my colleague and friend Logan Rae Gomez was so eloquently able to put into words that day: First, that instead of utilizing case studies of sexual violence to intervene into rhetorical theory, how can scholars use sexual violence as a lens or cultural frame? Could analyzing moments outside of explicit gender violence using a gender violence framework show the pervasiveness of violent gender norms?; second, that sexual violence scholars need to do more to dismantle binaries (male/female, victim/survivor, victim/perpetrator, and yes/no); and third, that sexual violence is inherently intersectional, and scholars need to treat it as such, which means embracing the necessity of exploring literature outside of the discipline.³⁹

I do not mean to imply that scholars are not already blazing new trails with some of these suggestions,⁴⁰ but rather that this is the direction that we (emerging scholars) envision the discipline to be going. I endeavored to follow these guidelines in the creation of this thesis project. Yes, my artifacts of choice pertained to sexual violence, but the ability to read legal and administrative texts with a sexual violence lens on the top of my narrative criticism methodology made a huge difference for the conclusions I was able to argue. I also found that taking the time to question and complicate binaries fundamentally shifted the direction of my chapter about consent and led me to Bauer’s notion of critical consent, which I find enormously helpful, but

unbelievably complex. And lastly, but absolutely not least, intersectionalizing communication literature on sexual violence was a difficult and complex task, but one worth doing. What I have produced is nowhere near complete, and for that I sincerely apologize, but I hope that future endeavors will build out the areas in which my work was weak or incomplete because building an intersectional archive of sexual violence scholars can only push the discipline forward. I will close this thesis project with a quote from indigenous legal scholar Sarah Deer: “Sexual violence is not an epidemic...an epidemic is biological and blameless.”⁴¹ Sexual violence is historical and political, so works like Deer’s and other pieces of intersectional scholarship that tackle this problem head-on are able to accomplish more than depressing their audience at the state of world, but rather to show what is possible. Rhetorical scholarship is perfectly configured to provide similar analyses through problematizing discourse, much like the discourse above. If we can get past the horror of sexual violence to see how discourse enables and regulates it, we have a chance of moving out of the narrow box of case-specific sexual violence research to playing a role in the grander arena of communication theory, not just praxis, pedagogy, and advocacy.

I call for rhetorical scholars, especially those of us invested in the tradition and committed to progressive and power-savvy principles of analysis, to consider narratives that we take for granted in our analyses—how discourses of law as value-neutral permeate outside of courtrooms. These questions are important because they have material consequences for raced, gendered, and victimized bodies, but they lead us to new kinds of projects. They remind us of the possibilities like the study of due process logics in narrative, and how the form, vocabularies, and characterization can intervene in sexual violence scholarship to provide much-needed insight.

-
- ¹ Catherine MacKinnon, "Feminism, Marxism, Method, and the State: An Agenda for Theory," in *On Violence: A Reader*, ed. Bruce B. Lawrence and Aisha Karim (Durham [NC]: Duke University Press, 2007), 289.
- ² Edward Schiappa, *Protagoras and Logos* (University of South Carolina Press: 2003) 3-11. James Williams, "Introduction to Greek Rhetoric," of *An Introduction to Classical Rhetoric*. (Wiley-Blackwell, 2009).
- ³ Chronicle of Higher Education article: "Presumed Guilty: College men accused of rape say the scales are tipped against them." September 1, 2014. Also seen in Cincy Doe and Michigan Doe
- ⁴ *William Norris v. University of Colorado, Boulder*, No. 1:18-cv-02243 (The United States District Court for the District of Colorado 2018) 6. *Austin Van Overdam v. Texas A&M University*, No. 4:18-cv-02011 (United States District Court Southern District of Texas Houston Division 2018) 4. *John Doe v. The University of Cincinnati*, No. 1:16-cv-987 (The United States District Court for the Southern District of Ohio Western Division 2016) 27. *John Doe v. David H Baum, Susan Pritzel, Tabitha Bentley, E. Royster Harper, and Nadia Bazy*, No. 2:16-cv-13174 (United States District Court Eastern District of Michigan Southern Division 2016).
- ⁵ *John Doe v. The University of Cincinnati*, No. 1:16-cv-987 (The United States District Court for the Southern District of Ohio Western Division 2016) 4. *Austin Van Overdam v. Texas A&M University*, No. 4:18-cv-02011 (United States District Court Southern District of Texas Houston Division 2018) 9.
- ⁶ *Doe v. David H Baum, Susan Pritzel, Tabitha Bentley, E. Royster Harper, and Nadia Bazy*, No. 2:16-cv-13174 (United States District Court Eastern District of Michigan Southern Division 2016) 24-27.
- ⁷ *Doe v. David H Baum, Susan Pritzel, Tabitha Bentley, E. Royster Harper, and Nadia Bazy*, **need pg number**
- ⁸ David Lisak, "Predators: Uncomfortable Truths about Campus Rapists," *Connection*, Summer 2004, 19-21; David Lisak and M. Claire Harwell, "Why Rapists Run Free," *Sexual Assault Report* 14, no. 2 (November 2010): 17-32; David Lisak and Paul M. Miller, "Repeat Rape and Multiple Offending Among Undetected Rapists," *Violence and Victims* 17, no. 1 (February 2002): 73-84, <https://doi.org/10.1891/vivi.17.1.73.33638>.
- ⁹ Jeremy Bauer-Wolf, "Trump Bemoans That Men Are Now 'Guilty until Proven Innocent,'" *Inside Higher Ed*, October 3, 2018, <https://www.insidehighered.com/news/2018/10/03/trump-bemoans-men-are-now-guilty-until-proven-innocent>.
- ¹⁰ Derrick A. Bell Jr., "Brown v. Board of Education and the Interest-Convergence Dilemma," *Harvard Law Review* 93, no. 3 (1980): 523.
- ¹¹ Patricia Hill Collins, "The Tie That Binds: Race, Gender and US Violence," *Ethnic and Racial Studies* 21, no. 5 (January 1998): 922, <https://doi.org/10.1080/014198798329720>.
- ¹² Demonstrated in this collection of articles: Timothy M Phelps, "Guidelines to Curb Campus Sexual Assault Raise Concerns for Accused," *Los Angeles Times*, Apr. 29, 2014.; Rees T Shapiro, "Key elements of Rolling Stone's U-Va. Gang Rape Allegations in Doubt," *Washington Post*, Dec. 5, 2014.; Judith Shulevitz, "Accused College Rapists Have Rights Too." *New Republic*, Oct. 11, 2014, <https://newrepublic.com/article/119778/college-sexual-assault-rules-trample-rights-accused-campus-rapists>; Emily Shire, "Columbia Student Joins the Men Fighting Back in Campus Rape Cases." *The Daily Beast*, Apr. 24, 2015, <http://www.thedailybeast.com/articles/2015/04/24/columbia-student-joins-the-men-fighting-back-in-campus-rape-cases.html>; and Emily Yoffe, "The College Rape Overcorrection," *Slate.com*, Dec. 7, 2014, http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html. As well demonstrated in these legal articles: Stephen Henrick, "A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses," *Northern Kentucky Law Review*. 40, no. 49 (2013): 1. and Mark W. Shaughnessy and Jeffrey E. Dolan, "Emerging Litigation Regarding Campus Sexual Assaults," *Massachusetts Lawyers Weekly* (2015): 2.
- ¹³ Catherine MacKinnon, "Feminism, Marxism, Method, and the State," 289.
- ¹⁴ Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" in *Acts of Religion*, ed. Gil Anidjar, 2002, 244.
- ¹⁵ Campbell, Peter Odell. "The Procedural Queer: Substantive Due Process, *Lawrence v. Texas*, and Queer Rhetorical Futures." *Quarterly Journal of Speech* 98, no. 2 (May 2012): 203-29.
- ¹⁶ U.S. Department of Education: Office for Civil Rights. "2011 Dear Colleague Letter." April 4, 2011, 11.
- ¹⁷ Mary P. Koss, Jay K. Wilgus, and Kaaren M. Williamsen, "Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance," *Trauma, Violence & Abuse* 15 (2014): 242.
- ¹⁸ Koss et al., "Campus Sexual Misconduct," 243.
- ¹⁹ Koss et al., 246.
- ²⁰ Ibid, 246.
- ²¹ Ibid, 246.
- ²² Ibid, 254.

-
- ²³ Ibid, 254.
- ²⁴ Ibid, 242.
- ²⁵ Ibid, 254.
- ²⁶ U.S. Department of Education: Office for Civil Rights. "2011 Dear Colleague Letter." April 4, 2011, 11.
- ²⁷ Robin Bauer, *Queer BDSM Intimacies: Critical Consent and Pushing Boundaries* (Basingstoke: Palgrave Macmillan, 2014).
- ²⁸ Susan Bordo, "Gentleman or Beast? The Double Bind of Masculinity," in *The Male Body: A New Look at Men in Public and in Private*, Nachdr. (New York: Farrar, Straus and Giroux, 2015), 232.
- ²⁹ Ibid, 242.
- ³⁰ Robin Bauer, *Queer BDSM Intimacies: Critical Consent and Pushing Boundaries* (Basingstoke: Palgrave Macmillan, 2014) 3.
- ³¹ Michel Foucault, *The History of Sexuality*, 1st American ed (New York: Pantheon Books, 1978); Michel Foucault, "The Subject and Power," *Critical Inquiry* 8, no. 4 (July 1982): 777–95, <https://doi.org/10.1086/448181>; Margot Danielle Weiss, *Techniques of Pleasure: BDSM and the Circuits of Sexuality* (Durham: Duke University Press, 2011).
- ³² Robin Bauer, *Queer BDSM Intimacies*, 4.
- ³³ Patricia Hill Collins, "The Tie That Binds," 919.
- ³⁴ Catherine MacKinnon, "Feminism, Marxism, Method, and the State," 291
- ³⁵ Ibid, 287.
- ³⁶ Patricia Hill Collins, "The Tie That Binds," 923-4.
- ³⁷ Catherine MacKinnon, "Feminism, Marxism, Method, and the State," 287.
- ³⁸ "Advocating With(Out) Evidence," Western States Communication Association 90th Annual Convention, Seattle WA, <https://cdn.ymaws.com/www.westcomm.org/resource/resmgr/programs/2019program.pdf>.
- ³⁹ Personal Knowledge.
- ⁴⁰ Ashley Mack, Nina Lozano, Kate Harris being exemplars within the Communication field but there are many more.
- ⁴¹ Sarah Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America* (Minneapolis: University of Minnesota Press, 2015).

Selected Bibliography

- Agthe, Donald E., and R. Bruce Billings. "The Role of Football Profits in Meeting Title IX Gender Equity Regulations and Policy." *Journal of Sport Management* 14, no. 1 (January 2000): 28–40. <https://doi.org/10.1123/jsm.14.1.28>.
- Ali, Rushlynn. "Dear Colleague Letter, Office for Civil Rights, April, 2011." United States Department of Education, April 4, 2011.
- Asen, Robert. "Reflections on the Role of Rhetoric in Public Policy." *Rhetoric & Public Affairs* 13, no. 1 (2010): 121–43. <https://doi.org/10.1353/rap.0.0142>.
- Austin Van Overdam v. Texas A&M University, No. 4:18-cv-02011 (UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION 2018).
- Barnet, Sylvan, ed. *Types of Drama: Plays and Contexts*. 8th ed. New York: Longman, 2001.
- Bauer, Robin. *Queer BDSM Intimacies: Critical Consent and Pushing Boundaries*. Basingstoke: Palgrave Macmillan, 2014.
- Bell, Derrick A. "Brown v. Board of Education and the Interest-Convergence Dilemma." *Harvard Law Review* 93, no. 3 (January 1980): 518. <https://doi.org/10.2307/1340546>.
- Bennett, W. Lance, and Murray Edelman. "Toward a New Political Narrative." *Journal of Communication* 35, no. 4 (December 1, 1985): 156–71. <https://doi.org/10.1111/j.1460-2466.1985.tb02979.x>.
- Berlant, Lauren. *The Queen of America Goes to Washington City Essays on Sex and Citizenship*. Durham: Duke University Press, 2012.
- Birkland, Thomas A. "Focusing Events, Mobilization, and Agenda Setting." *Journal of Public Policy* 18, no. 1 (January 1998): 53–74. <https://doi.org/10.1017/S0143814X98000038>.
- Bordo, Susan. "Gentleman or Beast? The Double Bind of Masculinity." In *The Male Body: A New Look at Men in Public and in Private*, Nachdr., 229–64. New York: Farrar, Straus and Giroux, 2015.

- Brownmiller, Susan. *Against Our Will: Men, Women, and Rape*. New York: Simon and Schuster, 1975.
- Bumiller, Kristin. *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence*. Duke University Press, 2009.
<https://doi.org/10.1215/9780822389071>.
- Burke, Kenneth. "Definition of Man." *The Hudson Review* 16, no. 4 (1963): 491.
<https://doi.org/10.2307/3848123>.
- Butler, Judith. *Frames of War: When Is Life Grievable?* Pbk. ed. London ; New York: Verso, 2010.
- . *Precarious Life: The Powers of Mourning and Violence*. London ; New York: Verso, 2006.
- Campbell, Karlyn Kohrs. "Agency: Promiscuous and Protean." *Communication and Critical/Cultural Studies* 2, no. 1 (March 2005): 1–19.
<https://doi.org/10.1080/1479142042000332134>.
- Campbell, Karlyn Kohrs, and Thomas R. Burkholder. *Critiques of Contemporary Rhetoric*. 2nd ed. Wadsworth Series in Communication Studies. Belmont, CA: Wadsworth Pub, 1997.
- Campbell, Karlyns Kohrs, and Kathleen Jamieson, eds. *Form and Genre Shaping Rhetorical Action*. Place of publication not identified: Natl Communication Assn, 1975.
- Campbell, Peter Odell. "The Procedural Queer: Substantive Due Process, *Lawrence v. Texas*, and Queer Rhetorical Futures." *Quarterly Journal of Speech* 98, no. 2 (May 2012): 203–29. <https://doi.org/10.1080/00335630.2012.663923>.
- Caringella, Susan. *Addressing Rape Reform in Law and Practice*. New York: Columbia University Press, 2009.
- Carlson, A. Cheree. *The Crimes of Womanhood Defining Femininity in a Court of Law*. Urbana: University of Illinois Press, 2009. <http://site.ebrary.com/id/10532364>.

- . “The Role of Character in Public Moral Argument: Henry Ward Beecher and the Brooklyn Scandal.” *Quarterly Journal of Speech* 77, no. 1 (February 1991): 38–52. <https://doi.org/10.1080/00335639109383941>.
- Carr, M. Kelly. *The Rhetorical Invention of Diversity: Supreme Court Opinions, Public Argument, and Affirmative Action*. Rhetoric and Public Affairs Series. East Lansing: Michigan State University Press, 2018.
- Collins, Patricia Hill. *Black Sexual Politics: African Americans, Gender and the New Racism*. London: Routledge, 2004. <http://public.eblib.com/choice/publicfullrecord.aspx?p=199609>.
- . “The Tie That Binds: Race, Gender and US Violence.” *Ethnic and Racial Studies* 21, no. 5 (January 1998): 917–38. <https://doi.org/10.1080/014198798329720>.
- Condit, Celeste Michelle. “Democracy and Civil Rights: The Universalizing Influence of Public Argumentation.” *Communication Monographs* 54, no. 1 (March 1987): 1–18. <https://doi.org/10.1080/03637758709390213>.
- . “In Praise of Eloquent Diversity: Gender and Rhetoric as Public Persuasion.” *Women’s Studies in Communication* 20, no. 2 (October 1997): 91–116. <https://doi.org/10.1080/07491409.1997.10162405>.
- . “What Makes Our Scholarship Feminist? A Radical/Liberal View.” *Women’s Studies in Communication* 11, no. 1 (April 1988): 6–8. <https://doi.org/10.1080/07491409.1988.11089712>.
- Cuklanz, Lisa M. *Rape on Trial: How the Mass Media Construct Legal Reform and Social Change*. Feminist Cultural Studies, the Media, and Political Culture. Philadelphia, Pa: University of Pennsylvania Press, 1996.
- Currie, Dawn H. “Women’s Safety on Campus: Challenge the University as Gendered Space.” *Humanity & Society* 18, no. 3 (August 1, 1994): 24–48.
- Daniels, Cynthia R., and Rachelle Brooks, eds. *Feminists Negotiate the State: The Politics of Domestic Violence*. Lanham: University Press of America, 1997.
- Deer, Sarah. *The Beginning and End of Rape: Confronting Sexual Violence in Native America*. Minneapolis: University of Minnesota Press, 2015.

- Derrida, Jacques. *Force of Law: The Mystical Foundation of Authority*. Deconstruction and the Possibility of Justice. Paris: Éd. Galilée, 1994.
- Devitt, Amy J. *Writing Genres*. Rhetorical Philosophy and Theory. Carbondale: Southern Illinois University Press, 2004.
- Donat, Patricia L. N., and John D’Emilio. “A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change.” *Journal of Social Issues* 48, no. 1 (April 1992): 9–22. <https://doi.org/10.1111/j.1540-4560.1992.tb01154.x>.
- Dow, Bonnie J. *Watching Women’s Liberation, 1970: Feminism’s Pivotal Year on the Network News*. Urbana: University of Illinois Press, 2014.
- Ehrlich, Susan. *Representing Rape: Language and Sexual Consent*. London ; New York: Routledge, 2001.
- Enck, Suzanne Marie. “Accountability Amidst the ‘Me Too’ Reckoning: Kevin Spacey’s Homopatriarchal Apologia.” *QED: A Journal in GLBTQ Worldmaking* 5, no. 2 (2018): 80. <https://doi.org/10.14321/qed.5.2.0080>.
- Enck, Suzanne Marie, and Blake A. McDaniel. “‘I Want Something Better for My Life’: Personal Narratives of Incarcerated Women and Performances of Agency.” *Text and Performance Quarterly* 35, no. 1 (January 2, 2015): 43–61. <https://doi.org/10.1080/10462937.2014.975271>.
- . “Playing With Fire: Cycles of Domestic Violence in Eminem and Rihanna’s ‘Love the Way You Lie’: Playing With Fire.” *Communication, Culture & Critique* 5, no. 4 (December 2012): 618–44. <https://doi.org/10.1111/j.1753-9137.2012.01147.x>.
- Enck-Wanzer, Suzanne Marie. “All’s Fair in Love and Sport: Black Masculinity and Domestic Violence in the News.” *Communication and Critical/Cultural Studies* 6, no. 1 (March 2009): 1–18. <https://doi.org/10.1080/14791420802632087>.
- Estrich, Susan. *Real Rape*. Cambridge, Mass: Harvard University Press, 1987.
- Fisher, Walter R. “Narration as a Human Communication Paradigm: The Case of Public Moral Argument.” *Communication Monographs* 51, no. 1 (March 1984): 1–22. <https://doi.org/10.1080/03637758409390180>.

- Fixmer, Natalie, and Julia T. Wood. "The Personal Is *Still* Political: Embodied Politics in Third Wave Feminism." *Women's Studies in Communication* 28, no. 2 (July 2005): 235–57. <https://doi.org/10.1080/07491409.2005.10162493>.
- Flores, Lisa A. "Constructing Rhetorical Borders: Peons, Illegal Aliens, and Competing Narratives of Immigration." *Critical Studies in Media Communication* 20, no. 4 (December 2003): 362–87. <https://doi.org/10.1080/0739318032000142025>.
- . "Gender with/out Borders: Discursive Dynamics of Gender, Race, and Nation." In *The SAGE Handbook of Gender and Communication*, edited by Bonnie J Dow and Julia T Wood. Thousand Oaks, Calif.: Sage Publications, 2006. <http://public.eblib.com/choice/publicfullrecord.aspx?p=996614>.
- Fraser, Nancy. "Sex, Lies, and the Public Sphere: Some Reflections on the Confirmation of Clarence Thomas." *Critical Inquiry* 18, no. 3 (April 1992): 595–612. <https://doi.org/10.1086/448646>.
- Gearhart, Sally Miller. "The Womanization of Rhetoric." *Women's Studies International Quarterly* 2, no. 2 (January 1979): 195–201. [https://doi.org/10.1016/S0148-0685\(79\)91809-8](https://doi.org/10.1016/S0148-0685(79)91809-8).
- Geisler, Cheryl. "How Ought We to Understand the Concept of Rhetorical Agency? Report from the ARS." *Rhetoric Society Quarterly* 34, no. 3 (June 2004): 9–17. <https://doi.org/10.1080/02773940409391286>.
- Goldzwig, Steven R., and Patricia A. Sullivan. "Narrative and Counternarrative in Print-mediated Coverage of Milwaukee Alderman Michael Mcgee." *Quarterly Journal of Speech* 86, no. 2 (May 2000): 215–31. <https://doi.org/10.1080/00335630009384290>.
- Gooch, John Casey. "Reading, Writing, and Imagining the Law: Using James Boyd White's Theories as an Approach to Analyzing Legal Rhetoric." University of Texas at Dallas, 2011.
- Grabill, Jeffrey T. "Shaping Local HIV/AIDS Services Policy through Activist Research: The Problem of Client Involvement." *Technical Communication Quarterly* 9, no. 1 (January 2000): 29–50. <https://doi.org/10.1080/10572250009364684>.
- Griffin, Rachel Alicia. "Gender Violence and the Black Female Body: The Enduring Significance of 'Crazy' Mike Tyson." *Howard Journal of Communications* 24, no. 1 (January 2013): 71–94. <https://doi.org/10.1080/10646175.2013.748602>.

- . “The ‘Morning/Mourning’ After: When Becoming President Trumps Being a Sexual Predator.” *Women’s Studies in Communication* 40, no. 2 (April 3, 2017): 140–44. <https://doi.org/10.1080/07491409.2017.1302259>.
- Grosz, Elizabeth. “Feminism, Materialism, and Freedom.” In *New Materialisms Ontology, Agency, and Politics*, edited by Diana H Coole and Samantha Frost. Durham [NC: Duke University Press, 2013.
- Hall, Rachel. “‘It Can Happen to You’: Rape Prevention in the Age of Risk Management.” *Hypatia* 19, no. 3 (August 2004): 1–18. <https://doi.org/10.1111/j.1527-2001.2004.tb01299.x>.
- Hariman, Robert. *Popular Trials: Rhetoric, Mass Media, and the Law*. 1st paperbound ed. Studies in Rhetoric and Communication. Tuscaloosa: University of Alabama Press, 1993.
- Harris, Jessica C., and Chris Linder, eds. *Intersections of Identity and Sexual Violence on Campus: Centering Minoritized Students’ Experiences*. First edition. Sterling, Virginia: Stylus, 2017.
- Harris, Kate Lockwood. “Feminist Dilemmatic Theorizing: New Materialism in Communication Studies: Feminist Dilemmas.” *Communication Theory* 26, no. 2 (May 2016): 150–70. <https://doi.org/10.1111/comt.12083>.
- . “Mapping Gender and Violence: Describing Reality, Resisting Abuse.” *Women’s Studies in Communication* 41, no. 2 (April 3, 2018): 113–16. <https://doi.org/10.1080/07491409.2018.1463770>.
- . “Re-Situating Organizational Knowledge: Violence, Intersectionality and the Privilege of Partial Perspective.” *Human Relations* 70, no. 3 (March 2017): 263–85. <https://doi.org/10.1177/0018726716654745>.
- . “Show Them a Good Time: Organizing the Intersections of Sexual Violence.” *Management Communication Quarterly* 27, no. 4 (November 2013): 568–95. <https://doi.org/10.1177/0893318913506519>.
- . “The Next Problem With No Name: The Politics and Pragmatics of the Word *Rape*.” *Women’s Studies in Communication* 34, no. 1 (May 5, 2011): 42–63. <https://doi.org/10.1080/07491409.2011.566533>.

- . “Yes Means Yes and No Means No, but Both These Mantras Need to Go: Communication Myths in Consent Education and Anti-Rape Activism.” *Journal of Applied Communication Research* 46, no. 2 (March 4, 2018): 155–78.
<https://doi.org/10.1080/00909882.2018.1435900>.
- Harris, Kate Lockwood, and Karen Lee Ashcraft. “Organizing Sexual Violence: Communicative, Intersectional Dilemmas around Mandated Reporting.” 2013. http://0-gateway.proquest.com/libraries.colorado.edu/openurl?url_ver=Z39.88-2004&rft_val_fmt=info:ofi/fmt:kev:mtx:dissertation&res_dat=xri:pqm&rft_dat=xri:pqdis:s:3607312.
- Harris, Kate Lockwood, and Jenna N. Hanchey. “(De)Stabilizing Sexual Violence Discourse: Masculinization of Victimhood, Organizational Blame, and Labile Imperialism.” *Communication and Critical/Cultural Studies* 11, no. 4 (October 2, 2014): 322–41.
<https://doi.org/10.1080/14791420.2014.972421>.
- Harris, Kate Lockwood, Kellie E Palazzolo, and Matthew W Savage. “‘I’m Not Sexist, but . . .’: How Ideological Dilemmas Reinforce Sexism in Talk about Intimate Partner Violence.” *Discourse & Society* 23, no. 6 (November 2012): 643–56.
<https://doi.org/10.1177/0957926512455382>.
- Hasian, Marouf Arif. “Critical Legal Rhetorics: The Theory and Practice of Law in a Postmodern World.” *The Southern Communication Journal* 60, no. 1 (1994): 44–56.
- . *Legal Memories and Amnesias in America’s Rhetorical Culture*. Polemics Series. Boulder, Colo: Westview Press, 2000.
- . “The Aesthetics of Legal Rhetoric: The Ambiguities of Race in *Adarand v. Pena* and the Beginning of the End of Affirmative Action.” *The Howard Journal of Communications* 8 (1997): 113–27.
- Hasian, Marouf Arif, Celeste Michelle Condit, and John Louis Lucaites. “The Rhetorical Boundaries of ‘the Law’: A Consideration of the Rhetorical Culture of Legal Practice and the Case of ‘Separate But Equal’ Doctrine.” *Quarterly Journal of Speech* 82 (1996): 323–42.
- Hasian, Marouf Arif, and Earl Croasmun. “Rhetoric’s Revenge: The Prospect of a Critical Legal Rhetoric.” *Philosophy and Rhetoric* 29, no. 4 (1996): 384–99.

- Hasian, Marouf Arif, and Trevor Parry-Giles. “‘A Stranger to Its Laws’: Freedom, Civil Rights, and the Legal Ambiguity of *Romer v. Evans* (1996).” *Argumentation and Advocacy* 34, no. 1 (1997): 27–42.
- Hasinoff, A.A. “How to Have Great Sext: Consent Advice in Online Sexting Tips.” *Communication and Critical/Cultural Studies* 13, no. 1 (January 2, 2016): 58–74. <https://doi.org/10.1080/14791420.2015.1077980>.
- Hoekema, David A. *Campus Rules and Moral Community: In Place of In Loco Parentis*. Issues in Academic Ethics. Lanham, Md: Rowman & Littlefield, 1994.
- Holland, Shannon L. “The ‘Offending’ Breast of Janet Jackson: Public Discourse Surrounding the Jackson/Timberlake Performance at Super Bowl XXXVIII.” *Women’s Studies in Communication* 32, no. 2 (July 2009): 129–50. <https://doi.org/10.1080/07491409.2009.10162384>.
- Jasinski, James. “(Re)Constituting Community through Narrative Argument: *Eros* and *Philia* in *the Big Chill*.” *Quarterly Journal of Speech* 79, no. 4 (November 1993): 467–86. <https://doi.org/10.1080/00335639309384047>.
- John Doe v. David H Baum, Susan Pritzel, Tabitha Bentley, E. Royster Harper, and Nadia Bazy, No. 2:16-cv-13174 (United States District Court Eastern District of Michigan Southern Division 2016).
- John Doe v. The University of Cincinnati, No. 1:16-cv-987 (THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION 2016).
- Johnson, Kc. “The War on Due Process.” *Academic Questions* 28, no. 1 (March 2015): 22–31. <https://doi.org/10.1007/s12129-015-9475-2>.
- Johnson, Michael. “Gendered Communication and Intimate Partner Violence.” In *The SAGE Handbook of Gender and Communication*, edited by Bonnie Dow J. and Julia T. Wood, 71–88. 2455 Teller Road, Thousand Oaks California 91320 United States: SAGE Publications, Inc., 2006. <https://doi.org/10.4135/9781412976053.n5>.
- Karp, David R., and Thom Allena, eds. *Restorative Justice on the College Campus: Promoting Student Growth and Responsibility, and Reawakening the Spirit of Campus Community*. Springfield, Ill: C.C. Thomas Publisher, 2004.

- Kimble, Matthew, Andrada D. Neacsiu, William F. Flack, and Jessica Horner. "Risk of Unwanted Sex for College Women: Evidence for a Red Zone." *Journal of American College Health* 57, no. 3 (November 2008): 331–38. <https://doi.org/10.3200/JACH.57.3.331-338>.
- Kirkwood, William G. "Narrative and the Rhetoric of Possibility." *Communication Monographs* 59, no. 1 (March 1992): 30–47. <https://doi.org/10.1080/03637759209376247>.
- Kitzinger, Celia, and Hannah Frith. "Just Say No? The Use of Conversation Analysis in Developing a Feminist Perspective on Sexual Refusal." *Discourse & Society* 10, no. 3 (July 1999): 293–316. <https://doi.org/10.1177/0957926599010003002>.
- Knieval, Michael S. "Rupturing Context, Resituating Genre: A Study of Use-of-Force Policy in the Wake of a Controversial Shooting." *Journal of Business and Technical Communication* 22, no. 3 (July 2008): 330–63. <https://doi.org/10.1177/1050651908315984>.
- Konradi, Amanda. "Can Justice Be Served on Campus?: An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland." *Humanity & Society* 41, no. 3 (August 2017): 373–404. <https://doi.org/10.1177/0160597616651657>.
- Koss, Mary P., Jay K. Wilgus, and Kaaren M. Williamsen. "Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance With Title IX Guidance." *Trauma, Violence, & Abuse* 15, no. 3 (July 2014): 242–57. <https://doi.org/10.1177/1524838014521500>.
- Krebs, Christopher, Christine Lindquist, Tara Warner, Bonnie Fisher, and Sandra Martin. "The Campus Sexual Assault (CSA) Study," December 2007.
- Kroløkke, Charlotte, and Ann Scott Sørensen. *Gender Communication Theories & Analyses: From Silence to Performance*. Thousand Oaks, Calif: Sage Publications, 2006.
- Lakoff, Robin. "Linguistic Theory and the Real World." *Language Learning* 25, no. 2 (December 1975): 309–38. <https://doi.org/10.1111/j.1467-1770.1975.tb00249.x>.
- Larson, Stephanie R. "'Everything inside Me Was Silenced': (Re)Defining Rape through Visceral Counterpublicity." *Quarterly Journal of Speech* 104, no. 2 (April 3, 2018): 123–44. <https://doi.org/10.1080/00335630.2018.1447141>.

- Lee, Philip. "The Curious Life of In Loco Parentis at American Universities." *Harvard Law Review* 8 (2011): 65–90.
- Lewis, William F. "Telling America's Story: Narrative Form and the Reagan Presidency." *Quarterly Journal of Speech* 73, no. 3 (August 1987): 280–302.
<https://doi.org/10.1080/00335638709383809>.
- Lisak, David. "Predators: Uncomfortable Truths about Campus Rapists." *Connection*, Summer 2004, 19–21.
- Lisak, David, and M. Claire Harwell. "Why Rapists Run Free." *Sexual Assault Report* 14, no. 2 (November 2010): 17–32.
- Lisak, David, and Paul M. Miller. "Repeat Rape and Multiple Offending Among Undetected Rapists." *Violence and Victims* 17, no. 1 (February 2002): 73–84.
<https://doi.org/10.1891/vivi.17.1.73.33638>.
- Lucaites, John Louis. "Between Rhetoric and 'the Law': Power, Legitimacy, and Social Change." *Quarterly Journal of Speech* 76, no. 4 (November 1990): 435–49.
<https://doi.org/10.1080/00335639009383935>.
- Lucaites, John Louis, and Celeste Michelle Condit. "Reconstructing : Culturetypal and Counter□ cultural Rhetorics in the Martyred Black Vision." *Communication Monographs* 57, no. 1 (March 1990): 5–24. <https://doi.org/10.1080/03637759009376182>.
- . "Re-Constructing Narrative Theory: A Functional Perspective." *Journal of Communication* 35, no. 4 (December 1, 1985): 90–108. <https://doi.org/10.1111/j.1460-2466.1985.tb02975.x>.
- Mack, Ashley Noel, Carli Bershon, Douglas D. Laiche, and Melissa Navarro. "Between Bodies and Institutions: Gendered Violence as Co-Constitutive." *Women's Studies in Communication* 41, no. 2 (April 3, 2018): 95–99.
<https://doi.org/10.1080/07491409.2018.1463765>.
- Mack, Ashley Noel, and Bryan J. McCann. "Critiquing State and Gendered Violence in the Age of #MeToo." *Quarterly Journal of Speech* 104, no. 3 (July 3, 2018): 329–44.
<https://doi.org/10.1080/00335630.2018.1479144>.

- MacKinnon, Catharine A. "A Sex Equality Approach to Sexual Assault." *Annals of the New York Academy of Sciences* 989, no. 1 (January 24, 2006): 265–75.
<https://doi.org/10.1111/j.1749-6632.2003.tb07311.x>.
- . *Are Women Human? And Other International Dialogues*. Cambridge, Mass: Belknap Press of Harvard University Press, 2006.
- . *Feminism Unmodified: Discourses on Life and Law*. Cambridge, Mass: Harvard University Press, 1987.
- MacKinnon, Catharine A. "In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education." *The Yale Law Journal* 125 (2016): 2040–2104.
- MacKinnon, Catharine A. *Only Words*. 1. Harvard Univ. Press paperback ed. Cambridge, Mass: Harvard Univ. Press, 1996.
- MacKinnon, Catharine A. "Rape Redefined." *Harvard Law & Policy Review* 10 (2016): 431–77.
- MacKinnon, Catharine A. *Sex Equality*. 2nd ed. University Casebook Series. New York : [St. Paul, Minn.]: Foundation Press ; Thomson/West, 2007.
- MacKinnon, Catharine A. "Substantive Equality Revisited: A Rejoinder to Sandra Fredman." *International Journal of Constitutional Law* 15, no. 4 (November 3, 2017): 1174–77.
- MacKinnon, Catharine A. *Toward a Feminist Theory of the State*. Cambridge, Mass: Harvard University Press, 1989.
- . *Women's Lives, Men's Laws*. Cambridge, Mass: Belknap Press of Harvard University Press, 2005.
- MacKinnon, Catharine A, and Reva B Siegel. *Directions in Sexual Harassment Law*, 2008.
<https://www.degruyter.com/doi/book/10.12987/9780300135305>.
- MacKinnon, Catherine. "Feminism, Marxism, Method, and the State: An Agenda for Theory." In *On Violence: A Reader*, edited by Bruce B. Lawrence and Aisha Karim, 286–90. Durham [NC]: Duke University Press, 2007.

McCann, Bryan J. "Entering the Darkness: Rhetorics of Transformation and Gendered Violence in Patty Jenkins's *Monster*." *Women's Studies in Communication* 37, no. 1 (January 2, 2014): 1–21. <https://doi.org/10.1080/07491409.2013.867914>.

———. *The Mark of Criminality: Rhetoric, Race, and Gangsta Rap in the War-on-Crime Era*. Rhetoric, Culture, and Social Critique. Tuscaloosa: The University of Alabama Press, 2017.

McGee, Michael Calvin, and John S. Nelson. "Narrative Reason in Public Argument." *Journal of Communication* 35, no. 4 (December 1, 1985): 139–55. <https://doi.org/10.1111/j.1460-2466.1985.tb02978.x>.

McKinnon, Sara L. "Citizenship and the Performance of Credibility: Audiencing Gender-Based Asylum Seekers in U.S. Immigration Courts." *Text and Performance Quarterly* 29, no. 3 (July 2009): 205–21. <https://doi.org/10.1080/10462930903017182>.

———. "Excavating Gender in Women's Early Claims to Political Asylum in the United States." *Women's Studies in Communication* 33, no. 2 (September 13, 2010): 79–95. <https://doi.org/10.1080/07491409.2010.507540>.

———. "Gender Violence as Global Phenomenon: Refugees, Genital Surgeries, and Neocolonial Projects of the United States." *Cultural Studies ↔ Critical Methodologies* 16, no. 4 (August 2016): 414–26. <https://doi.org/10.1177/1532708616640002>.

———. *Gendered Asylum: Race and Violence in U.S. Law and Politics*. Feminist Media Studies. Urbana, Chicago, and Springfield: University of Illinois Press, 2016.

———. "Positioned in/by the State: Incorporation, Exclusion, and Appropriation of Women's Gender-Based Claims to Political Asylum in the United States." *Quarterly Journal of Speech* 97, no. 2 (May 2011): 178–200. <https://doi.org/10.1080/00335630.2011.560176>.

———. "Review Essay: The Law and Its Bedfellows: Nation Making through the Rhetoric of US Courtrooms." *Quarterly Journal of Speech* 96, no. 3 (August 2010): 324–37. <https://doi.org/10.1080/00335630.2010.499113>.

Melnick, R. Shep. *The Transformation of Title IX: Regulating Gender Equality in Education*. Washington, D.C: Brookings Institution Press, 2018.

- Nakayama, Thomas K., and Robert L. Krizek. "Whiteness: A Strategic Rhetoric." *Quarterly Journal of Speech* 81, no. 3 (August 1995): 291–309. <https://doi.org/10.1080/00335639509384117>.
- Ossa, Abigaël Candelas de la. "'Talk, Listen, Think': Discourses of Agency and Unintentional Violence in Consent Guidance for Gay, Bisexual and Trans Men." *Discourse & Society* 27, no. 4 (July 2016): 365–82. <https://doi.org/10.1177/09579265166634549>.
- Palmer-Mehta, Valerie. "The Subversive Power of Survivor Rhetoric: An Innovative Archive of Survivor Discourse in *New York Magazine*." *Women's Studies in Communication* 41, no. 2 (April 3, 2018): 159–82. <https://doi.org/10.1080/07491409.2018.1471764>.
- Paludi, Michele Antoinette, ed. *Campus Action against Sexual Assault: Needs, Policies, Procedures, and Training Programs*. Women's Psychology. Santa Barbara, California: Praeger, 2016.
- Parry-Giles, Trevor. "The Character of Criticism: Reflections on the Critical Inquiry of Political and Legal Rhetoric." *Review of Communication* 10, no. 1 (January 2010): 84–95. <https://doi.org/10.1080/15358590903248785>.
- Pearson, Kyra. "Mapping Rhetorical Interventions in 'National' Feminist Histories: Second Wave Feminism and Ain't I a Woman." *Communication Studies* 50, no. 2 (June 1999): 158–73. <https://doi.org/10.1080/10510979909388482>.
- . "The Trouble with Aileen Wuornos, Feminism's 'First Serial Killer.'" *Communication and Critical/Cultural Studies* 4, no. 3 (September 2007): 256–75. <https://doi.org/10.1080/14791420701472791>.
- Penelope, Julia. *Speaking Freely: Unlearning the Lies of the Fathers' Tongues*. The Athene Series. New York, NY: Teachers Coll. Press, 1990.
- Phillips, Joshua Daniel, and Rachel Alicia Griffin. "Crystal Mangum as Hypervisible Object and Invisible Subject: Black Feminist Thought, Sexual Violence, and the Pedagogical Repercussions of the Duke Lacrosse Rape Case." *Women's Studies in Communication* 38, no. 1 (January 2, 2015): 36–56. <https://doi.org/10.1080/07491409.2014.964896>.
- Reich, Nina M. "Towards a Rearticulation of Women-as-Victims: A Thematic Analysis of the Construction of Women's Identities Surrounding Gendered Violence." *Communication Quarterly* 50, no. 3/4 (Summer 2002): 292–311.

- Richards, David A. J. *Women, Gays, and the Constitution: The Grounds for Feminism and Gay Rights in Culture and Law*. Chicago: University of Chicago Press, 1998.
- Richards, Tara N., Kathryn A. Branch, Ruth E. Fleury-Steiner, and Katherine Kafonek. "A Feminist Analysis of Campus Sexual Assault Policies: Results from a National Sample." *Family Relations* 66, no. 1 (February 1, 2017): 104–15.
<https://doi.org/10.1111/fare.12236>.
- Rowland, Robert C. "On Limiting the Narrative Paradigm: Three Case Studies." *Communication Monographs* 56, no. 1 (March 1989): 39–54.
<https://doi.org/10.1080/03637758909390248>.
- Scallen, Eileen A. "Judgment, Justification and Junctions in the Rhetorical Criticism of Legal Texts." *The Southern Communication Journal* 60, no. 1 (1994): 68–74.
- Scarry, Elaine. *The Body in Pain: The Making and Unmaking of the World*. First issued as paperback. Oxford Paperback. New York, NY: Oxford Univ. Press, 1987.
- Schulhofer, Stephen J. *Unwanted Sex: The Culture of Intimidation and the Failure of Law*. Cambridge, Mass: Harvard University Press, 1998.
- Sloop, John. "Introduction: Critical Rhetoric, Public Argument, and Gender Trouble." In *Disciplining Gender: Rhetorics of Sex Identity in Contemporary U.S. Culture*, 1–25. University of Massachusetts Press, 2004.
- Sorensen, Anne Scott, and Charlotte Kroløkke. *Gender Communication Theories & Analyses: From Silence to Performance*. 2455 Teller Road, Thousand Oaks California 91320 United States: SAGE Publications, Inc., 2006. <https://doi.org/10.4135/9781452233086>.
- Spender, Dale. *Man Made Language*. 2nd ed. London / New York: Routledge & Kegan Paul, 1987.
- Spry, Tami. "The Accusing Body." Edited by Michael D. Giardina and Norman K. Denzin. *Cultural Studies ↔ Critical Methodologies* 11, no. 4 (August 2011): 410–14.
<https://doi.org/10.1177/1532708611414675>.

- Streng, Tara K., and Akiko Kamimura. "Perceptions of University Policies to Prevent Sexual Assault on Campus Among College Students in the USA." *Sexuality Research and Social Policy* 14, no. 2 (June 2017): 133–42. <https://doi.org/10.1007/s13178-016-0245-x>.
- Unger, Roberto Mangabeira. *The Critical Legal Studies Movement*. Cambridge, Mass: Harvard University Press, 1986.
- Vats, Anjali. "Created Differences: Rhetorics of Race and Resistance in Intellectual Property Law." Dissertation, University of Washington, 2013.
- . "Marking Disidentification: Race, Corporeality, and Resistance in Trademark Law." *Southern Communication Journal* 81, no. 4 (August 7, 2016): 237–51. <https://doi.org/10.1080/1041794X.2016.1200128>.
- Warnick, Barbara. "The Narrative Paradigm: Another Story." *Quarterly Journal of Speech* 73, no. 2 (May 1987): 172–82. <https://doi.org/10.1080/00335638709383801>.
- West, Candace, and Don H. Zimmerman. "Doing Gender." *Gender & Society* 1, no. 2 (June 1987): 125–51. <https://doi.org/10.1177/0891243287001002002>.
- West, Isaac. "Legal Trans/Scripts: Transgender Rhetorics of Law and Everyday Life." Indiana University, 2008.
- . *Transforming Citizenships: Transgender Articulations of the Law*, 2016. <http://dx.doi.org/10.18574/nyu/9781479832149.001.0001>.
- White, Hayden V. *The Content of the Form: Narrative Discourse and Historical Representation*. Baltimore: Johns Hopkins University Press, 1990.
- White, James Boyd. *Justice as Translation: An Essay in Cultural and Legal Criticism*. Chicago: University of Chicago Press, 1990.
- . "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life." *The University of Chicago Law Review* 52, no. 3 (1985): 684–703.
- William Norris v. University of Colorado, Boulder, No. 1:18-cv-02243 (THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO 2018).

Wood, Julia T. "Ethics, Justice, and the 'Private Sphere.'" *Women's Studies in Communication* 21, no. 2 (October 1998): 127–49. <https://doi.org/10.1080/07491409.1998.10162553>.

———. *Gendered Lives: Communication, Gender, and Culture*. Belmont, Calif: Wadsworth Pub, 1994.

———. "Telling Our Stories: Narratives as a Basis for Theorizing Sexual Harassment." *Journal of Applied Communication Research* 20, no. 4 (November 1, 1992): 349.

Young, Iris Marion. *Justice and the Politics of Difference*. Princeton, N.J: Princeton University Press, 1990.

———. *On Female Body Experience: "Throwing like a Girl" and Other Essays*. Studies in Feminist Philosophy. New York: Oxford University Press, 2005.