

Title IX Policy and Campus Sexual Assault: Reflecting on
the Past to Reimagine the Future

by

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Table of Contents

Introduction: Contextualizing Today's Debate	1
<i>A Brief History of Title IX</i>	
<i>Kangaroo Courts? Establishing the Significance of Civil Rights Law</i>	
<i>Today's Debate</i>	
<i>Re-Orienting the Debate</i>	
<i>Framework: Sources, Chapters, and Choices</i>	
Chapter Two: Title IX on Campus	28
<i>Institutionalizing a Response to Sexual Violence</i>	
<i>Contemporary Title IX Policy</i>	
<i>Evaluating the Effects of the Current Model</i>	
<i>Policy Responses: Changing the Model?</i>	
Chapter Three: Legislating Campus Sex	54
<i>Theorizing on Consent and Sexual Violence</i>	
<i>Contextualizing Campus Policy</i>	
<i>Critiquing a Hostile Environment</i>	
<i>Avenues For Change</i>	
<i>The Effects of University Policy on the Campus Environment</i>	
Chapter Four: Envisioning Justice	92
<i>A Feminist Agenda, Failing?</i>	
<i>A System (Un)Fit for the Crime</i>	
<i>Shifting Systems of Accountability, Changing Relations</i>	
<i>Imagining Remedy: Possibilities for Restorative Justice</i>	
<i>Integrating Restorative Justice Under Title IX</i>	
<i>Title IX as Only a Starting Point</i>	
Concluding Thoughts on the Past, Present, and Future of Title IX	129
Bibliography	134

Introduction:

Contextualizing Today's Debate

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.
—Title IX of the Education Amendments of 1972¹

One in five women will be sexually assaulted during her college career.² This fact has caused outrage among campus activists, led to high-profile investigations of esteemed universities, gained traction in national news coverage, and ultimately demanded attention from the federal government. Title IX of the federal Education Amendments of 1972 governs campus sexual violence as part of its mission to ensure equal education for women. Campus assault and the policy surrounding it have emerged as a national issue, although one defined by extreme contention.

Student activism across the country has drawn attention to the harm and pervasiveness of campus sexual violence and elicited an institutional response at the collegiate, state, and federal level. Columbia University student Emma Sulkowicz's protest and senior arts thesis, 'Carry That Weight,' exemplifies the power of the student movement against campus sexual violence. Sulkowicz vowed to carry a mattress around campus for an entire year unless the university expel her rapist, and when Sulkowicz graduated, her mattress was in tow.³ Her message led to a national day of action on 130 campuses across the country.⁴

¹ "Title IX and Sex Discrimination," U.S. Department of Education, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

² "Campus Sexual Assault," in *Statistics About Sexual Violence* (www.nsvrc.org: National Sexual Violence Resource Center, 2015).

³ Lauren Gambino, "Columbia University Student Carries Rape Protest Mattress to Graduation," *The Guardian* 2015.

⁴ Alexandra Svokos, "Students Bring out Mattresses in Huge 'Carry That Weight' Protest against Sexual Assault," *The Huffington Post* 2014.

While the survivor movement has maintained momentum, it has been met with significant backlash as well. Accused students have been increasingly emboldened to appeal responsible findings by their colleges, and a growing number of court cases have been found in their favor.⁵ Brock Turner, a convicted rapist from Stanford University, became a symbol of injustice against survivors when he was sentenced to merely six months in jail for raping an unconscious woman. Upon his release from prison after only a three-month sentence, he subsequently announced his plan to appeal his guilty conviction and has come to represent the opposition movement.⁶ As the debate stands today, there is little neutral ground on this issue.

This controversy picked up traction once again upon Trump's appointment of Betsy DeVos as Secretary of Education. Within her first six months in office, DeVos commenced plans to revisit Obama-era Title IX regulations on campus sexual assault, marking the matter as a top priority, and within her first year, she rescinded the policy of her predecessor.⁷ DeVos's agenda is to reinstate "due process" on college campuses to restore the rights of accused students.⁸ She and her supporters argue such protections were undermined by the Obama administration's policy, which aimed to correct for institutional inaction and neglect towards survivors.⁹ This differential

⁵ George Lead, "Two Key Lawsuits Lead Counterattack against Title IX Overreach," The James G. Martin Center for Academic Renewal.

⁶ Maya Salam, "Brock Turner Is Appealing His Sexual Assault Conviction," *The New York Times* 2017.

⁷ Sheryl Gay Stolberg, "DeVos Says She Will Revisit Obama-Era Sexual Assault Policies," *ibid.*

⁸ "DeVos: New Sex Assault Policies 'Give Due Process Back to College Students'," (2017), <http://insider.foxnews.com/2017/09/26/betsy-devos-fox-exclusive-new-education-college-sexual-assault-policies-give-due-process>.

⁹ Tanya Somanader, "President Obama Launches the 'It's on Us' Campaign to End Sexual Assault on Campus," The White House, President Barack Obama, <https://obamawhitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus>.

framing of this issue, stemming from contrasting opinions on who is disenfranchised by campus hearings on sexual violence, reflects the deeply divided national climate.

I plan to delve into the crux of this debate, seeking to understand how to improve universities' response to survivors without impinging upon the rights of those accused. I want to delineate the way Title IX came to apply to campus sexual assault, the obligations universities have to their students surrounding this issue, and the effects of current policy on the campus environment. Using critical feminist perspectives, I will analyze the historical and legal background of the current debate to locate the roots of contemporary policy and its failures as well as potential openings for change. I hope to address the political, legal, emotional, and ethical stakes of this debate, without limiting myself to its current dimensions. My hope is that this work will instead give way to new dialogue by broadening the scope of discourse on campus sexual assault and thinking creatively about ways to envision justice. I turn now to the first step of this task in exploring the history of federal policymaking on this issue.

A Brief History of Title IX

Campus sexual assault is governed by Title IX of the federal Education Amendments passed in 1972. The brief 37-word statute, inscribed at the top of this chapter, establishes a wide-reaching provision of sex-equality in education. The law is firmly rooted in the onslaught of legislation passed during the civil rights era. Title VII of the Civil Rights Act, passed in 1964, prohibits discrimination based on sex,

race, and nationality in employment. Yet Title VI of the same act, which applies to education, only outlawed discrimination based on national origin.¹⁰ The opportunity for a sex discrimination clause regarding educational institutions arose in 1970 when a presidential executive order prohibiting federal contractors from discrimination was amended to include sex, in addition to race, color, religion, and national origin.¹¹ Bernice Sandler, a professor at the University of Maryland was the first to make the claim that universities should be legally prohibited from sex discrimination as institutions under federal contract, and the issue was soon taken up in Congress.¹² A bill was initially crafted to amend both Title VII, expanding its reach to employees in educational institutions, and Title VI, broadening its scope to include sex discrimination. However, upon the request of African American Congressional leaders, who did not want racial protections to be overshadowed, Title IX was instead written as an independent statute.¹³

Title IX's prohibition of sex discrimination gives it an extraordinarily broad scope. Alone, it does not mandate anything specific. The contexts in which it applies must be determined by the Department of Education. Within the Department, it is the Office for Civil Rights (OCR) that deals directly with Title IX's enactment and enforcement.¹⁴ After the law was passed in 1972, the OCR spent two years receiving and reviewing input from the public: teachers, students, parents, lobbyists, lawyers,

¹⁰ Alexandra Brodsky and Elizabeth Deutsch, "The Promise of Title IX: Sexual Violence and the Law," *Dissent* 62, no. 4 (2015).

¹¹ Iram Valentin, "Title IX: A Brief History. 25 Years of Title IX," in *WEEA Digest* (Newton, MA Washington, DC: Education Development Center, Inc. Department of Education, 1997), 1-2.

¹² *Ibid.*, 2.

¹³ *Ibid.*

¹⁴ Linda Jean Carpenter and Vivian R. Acosta, *Title IX* (Champaign, IL: Human Kinetics, 2005), 5.

and educational administrators sent in over 10,000 comments.¹⁵ Taking this information into account, the OCR drafted *policy regulations* that were approved and enacted by Congress in 1975. Such *regulations* are not the law, but hold the “*force of law*,” meaning courts must give them equal consideration as the law under which they fall.¹⁶

These original regulations prohibited preference based on sex in admission, employment, and education in all institutional programs and activities, in addition to defining other important terms embedded within the law, such as the kinds of educational institutions to which it applies.¹⁷ Title IX is commonly associated with sports and this is rooted in its early implementation. Over 90% of the comments sent to the OCR after Title IX was passed concerned equity in athletics,¹⁸ leading the issue to be clearly addressed in these first regulations.¹⁹ Title IX had a dramatic impact in this area. The proportion of high school girls participating in sports increased from 1 in 27 when the law was passed in 1972, to 1 in 4 by 1978.²⁰ The law gave way to immediate change but these regulations still lacked specification. They outlined preliminary areas to which Title IX applied but did not provide a way to actually measure equality. With regard to athletics for example, the regulations mandated that there be equal opportunity between the sexes in areas such as “the provision of

¹⁵ Ibid.

¹⁶ Ibid., 6-7.

¹⁷ "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance", in 34, ed. The Department of Education's Office for Civil Rights (ED.gov: U.S. Department of Education).

¹⁸ Carpenter and Acosta, 6.

¹⁹ "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance", § 106.41 Athletics.

²⁰ Margaret E. Juliano, "Forty Years of Title IX: History and New Applications," *Delaware Law Review* 14, no. 1 (2013): 84.

equipment and supplies,” and “travel and per diem allowance,” but they do not explicate how these criteria be determined.²¹

This ambiguity made the law difficult to enforce, and thus *policy interpretations* were put into place, creating more specific guidelines for following the law. Such *policy interpretations* do not carry the “force of law” but are rather framed in terms of “*deference to the law.*” They are meant to support what the law and its regulations require but must always be interpreted in relation to their fulfillment of these higher statutes.²² Title IX’s first *policy interpretations* went into effect in 1979, and focused completely on athletics. This legislation aimed to clarify *how* to create an equal environment in the context of collegiate sports.²³ The OCR defined its specific standards for compliance, establishing a three prong test for institutions, which had to fulfill at least one of the following criteria: (a) create opportunities proportionate to the ratio of male or female students, (b) show a history of investing in women’s programs, or (c) meet the interests and abilities of women at their institution.²⁴ These standards served to guide the implementation and enforcement the law in a more concrete way.

Clearly, the scope of Title IX has broadened significantly from these early developments to apply to sexual violence. Interpretations of the law are still changing, as evidenced by competing legislation passed by the Trump and Obama administrations. This debate is playing out at the level of *policy interpretations*, rather

²¹ "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance", § 106.41 Athletics.

²² Carpenter and Acosta, 14.

²³ "A Policy Interpretation: Title IX and Intercollegiate Athletics," ed. Education Department of Health, and Welfare (www2.ed.gov: Office for Civil Rights, 1979).

²⁴ Carpenter and Acosta, 14-15.

than *regulations* as such. It is at this level where political differences regarding what kinds of support the civil rights law guarantees come into play. Corrections can be made to the specific policies and processes of educational institutions based on where they are understood to be falling short. I look in the following section at how Title IX came to be applied to sexual violence on college campuses and what the law has come to offer students in this context.

Kangaroo Courts? Establishing the Significance of Civil Rights Law

Sexual assault is a crime that can be taken up in criminal court. Given this fact, many critics today ask why it should be addressed on college campuses at all. They paint collegiate investigations and hearings as ‘kangaroo courts’ and emphasize the importance of ‘due process.’²⁵ Institutions of higher education do not technically treat sexual violence as a criminal issue, however. As I mentioned, Title IX is a civil rights law, and thus insofar as it addresses sexual violence, it frames the problem differently than we may be accustomed to.

The argument in favor of applying Title IX to campus sexual violence was established in a 1980 court case, *Alexander v. Yale*. Five students sued Yale University for sexual harassment they experienced by their professors. Catherine MacKinnon—now an (in)famous radical feminist thinker and activist—had only just graduated from Yale Law School when she helped these women to develop a novel legal argument. Their case asserted that the university, as well as individual perpetrators of sexual harassment, should be held accountable for the harassing

²⁵ KC Johnson, "Will Trump End Campus Kangaroo Courts?," *The Wall Street Journal* 2017.

behavior. They argued sexual harassment was not only a violation of their individual autonomy but of their Title IX protection to a discrimination-free education.²⁶

In arguing that sexual harassment was a form of discrimination against female students, the plaintiffs drew on the logic of a court case from earlier that year which established that Title VII—the civil rights law protecting employees from sex-discrimination—applied to instances of sexual harassment by a supervisor.²⁷ The Yale students centered their legal argument on their personal experiences of discrimination. One plaintiff, Ronni Alexander quit playing the flute after her music professor harassed and assaulted her. Another, Pamela Price, suffered academically because her professor offered her an A in exchange for sex, but threatened to give her a C if she denied him.²⁸ They experienced personal harm as a result of such harassment but more importantly for the context of their case, their education suffered.

In the case of *Yale v. Alexander*, the dissenting students took issue with the fact that their university offered no recourse for students who had been sexually harassed. Yale had even threatened one of the plaintiffs with arrest for libeling her professor in the filing of the case. The students went to court, not looking for personal reparations but seeking the implementation of grievance procedures at Yale in response to harassment complaints.²⁹ The students had to establish several novel arguments in making their case: that they had standing to sue their school under Title IX, that female victims of sexual harassment and assault constituted a ‘protected

²⁶ Brodsky and Deutsch, 136.

²⁷ Risa Lieberwitz et al., "The History, Uses, and Abuses of Title IX," *Acadme* 102 (2016): 73.

²⁸ Brodsky and Deutsch, 136.

²⁹ Tyler Kingkade, "How a Title IX Harassment Case at Yale in 1980 Set the Stage for Today's Sexual Assault Activism," *Huffington Post* 2014.

class' rather than a 'collection of individuals,' and that instances of sexual harassment detracted from women's access to their education.³⁰ The students lost their case, as they had all graduated by the time it was heard, but their argument was upheld. Schools would now be required to address sexual harassment or be found in violation of Title IX.³¹ Yale established a Sexual Harassment Grievance Board within a year³² and hundreds of colleges and universities followed in the next half a decade.³³

The Office for Civil Rights published a policy memorandum in 1981 defining sexual harassment as a form of discrimination. Their definition included only incidences between faculty and students, however, like the instances *Alexander v. Yale* addressed.³⁴ It was the 1999 case *Davis v. Monroe County* that held schools liable for student-on-student harassment if the administration "acted with deliberate indifference."³⁵ The case went all the way to the Supreme Court after the mother of a fifth grade student sued the Monroe County Board of Education because it refused to meaningfully address the persistent harassment her daughter experienced at the hands of a classmate.³⁶ The finding of the case held that although a member of the school's faculty was not inciting the harassment, the institution was nonetheless liable. It established that such behavior, when left unaddressed, contributes to an environment

³⁰ Ann Olivarius, "Title IX: Taking Yale to Court," *The New Journal* 2011.

³¹ Brodsky and Deutsch, 137.

³² Ibid.

³³ Olivarius.

³⁴ Lieberwitz et al., 74.

³⁵ Robb Jones, "Understanding How and Why Title IX Regulates Campus Sexual Violence," ed. United Educators (<https://www.ue.org/uploadedFiles/History%20of%20Title%20IX.pdf>: United Educators, 2015), 3.

³⁶ Todd A. DeMitchell, "Davis V. Monroe County Board of Education," in *Encyclopaedia Britannica* (<https://www.britannica.com>: Encyclopædia Britannica, inc., 2016).

in which women cannot reap the full benefits of their education. The decision applied to institutions of higher education as well.³⁷

Deliberate indifference lawsuits are challenging to win however and the survivor community continued to seek pathways for making greater change to campus culture and the criminal justice system. OCR policy guidance published in 2001 helped to advance this agenda by lowering the standard of responsibility established in *Davis v. Monroe County*. It held that under Title IX, colleges would be responsible for eliminating harassment about which they *knew or should have known*, not merely that which they have *known and acted with deliberate indifference*. This change was based on the reasoning that harassing conduct itself has the power to create a “hostile environment” that interferes with women’s right to education.³⁸ This applied just to the enforcement of Title IX by the OCR, not to personal lawsuits surrounding the issue, but nonetheless gave survivor advocates an avenue for establishing greater support for victims of sexual violence on campuses.³⁹

This attention to the hostility of the college environment is critical to contemporary interpretations of Title IX’s purpose as a civil rights law. Unlike criminal law, which locates accountability through incarceration, civil rights laws like Title IX are meant to offer remedy over retribution.⁴⁰ Title IX gives attention to particular instances of sexual harassment and assault in addition to the culture in which such violence occurs. This feature of the law dates back to *Alexander v. Yale* (1980) when women and victims of sexual violence were established as a class. This

³⁷ Lieberwitz et al., 75.

³⁸ Ibid.

³⁹ Jones, 3-4.

⁴⁰ Brodsky and Deutsch, 143.

case established that sexual harassment was not simply an individualized act but resulted from and reinforced a campus climate that created an unequal power dynamic between men and women. The plaintiffs' argument demonstrated the ways in which Yale's negligence toward instances of harassment prevented women from fulfilling the promises of their education. The Title IX violation at the heart of this case extended beyond the personal harm inflicted upon the plaintiffs to include the systematic injustice caused by sexual harassment and assault at the university.

Alexander v. Yale led schools to implement a system for responding to complaints and laid the foundation for institutional attention to the effects of sexual harassment on the campus environment.

The significance of Title IX's status as a civil rights law is that it offers redress both for individual cases of sexual violence as well as structural remedies for the hostile environment such conduct creates.⁴¹ Today universities are expected to institute prevention programs to educate students about sexual violence, offer grievance procedures to resolve individual cases, and create interim systems of support that enable survivors to continue their education. Such interim measures can include a no-contact order against a perpetrator, changing classes, moving dorm rooms, getting tutoring, or receiving counseling.⁴²

Criminal courts can take months or even years to resolve cases of sexual violence, that is, when such cases are reported and prosecuted at all—a relatively

⁴¹ Ibid.

⁴² Ibid., 139, 43.

infrequent occurrence within the current criminal justice system.⁴³ Moreover, a ‘successful’ case in the criminal courts ends in incarceration, individualizing matters of sexual violence rather fostering institutional, cultural, or behavioral change. By approaching sexual violence as a civil rights issue, institutions of higher education can address a wider range of conduct, offer more accessible adjudications than a criminal court, and provide remedies beyond individual investigations.⁴⁴ While sexual violence and the hostile environment it causes have been established to be under Title IX’s domain, whether college have succeeded in adequately addressing instances of assault or making cultural change on campus remain matters of dispute.

Today’s Debate

The Obama administration published new Title IX policy interpretations in 2011 for the first time in a decade. This took the form of a ‘Dear Colleague’ Letter signed by the Russlynn Ali, the Assistant Secretary for Civil Rights, and addressed universities across the country regarding the handling of sexual violence on college campuses. The letter marked the beginning of a sustained campaign by the Obama administration to combat campus sexual violence, and has continued to generate national debate. The *Dear Colleague Letter* came as a surprise to many as it did not provide notice or undergo the standard comment period for federal rule-making

⁴³ 310 out of every 1,000 instances of rape are reported to the police, 57/1,000 lead in to an arrest, 11/1,000 are referred to prosecutors, 7/1,000 results in a felony conviction. "The Criminal Justice System: Statistics," RAINN, <https://www.rainn.org/statistics/criminal-justice-system>.

⁴⁴ 141-43.

despite mandating substantial changes to campus adjudication processes.⁴⁵ In the years following its publication, the Obama administration launched the *It's On Us* Campaign to raise awareness and eliminate sexual violence on college campuses,⁴⁶ tasked the White House Council on Women and Girls with a series of actions titled "Rape and Sexual Assault: A Renewed Call to Action,"⁴⁷ and stepped up OCR investigations of non-compliant universities. The Obama administration publicly named the universities under Title IX investigation for the first time in 2014. That May there were 55 active investigations; by May 2016, 185 institutions were under investigation.⁴⁸

The most controversial change to the college adjudication process made by the *Dear Colleague Letter* was to require the use of a *preponderance of evidence* standard in cases of sexual harassment or violence. This mandated schools judge responsibility based on proof that it is 'more likely than not' that sexual violence occurred. Many schools had been using a higher standard of *clear and convincing* evidence that required finding an instance of sexual assault to be 'highly probable or reasonably certain.' Many universities thus had to lower the standard of evidence used in sexual assault cases in response to the federal guidance.⁴⁹ Other significant changes the *Dear Colleague Letter* instituted included: discouraging personal cross-examination between complainant and respondent, defining a prompt timeframe for an investigation as approximately 60 days, recommending an appeals process, and

⁴⁵ Lieberwitz et al., 78.

⁴⁶ Somanader.

⁴⁷ Jackie Calmes, "Obama Seeks to Raise Awareness of Rape on Campus," *The New York Times* 2014.

⁴⁸ "About the Chronicle's Title IX Investigation Tracker," The Chronicle of Higher Education Inc., <https://projects.chronicle.com/titleix/about/>.

⁴⁹ Russlynn Ali, "Dear Colleague Letter," ed. US Department of Education (Office for Civil Rights, 2011), 10-11.

requiring, if an appeals process is instituted, that both parties be given the ability to appeal.⁵⁰

The Obama White House made its purpose and sympathies clear in this letter and through its continued work on this issue. The President publicized the statistic that one in five women is sexually assaulted during her college career. Furthermore, he problematized the fact that just 12% of those assaults are reported, and only a fraction end in punishment for the perpetrator.⁵¹ The Obama administration framed its work as addressing a serious problem that had thus far been met with institutional inaction. The *Dear Colleague Letter* assured that the rights of survivors were protected, holding that “steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay Title IX protections for the complainant”⁵² and established that the school should “minimize the burden on the complainant” in instituting interim measures.⁵³ The mission of the *Dear Colleague Letter* was to fight against sexual assault and improve the university response towards survivors.

While the *Dear Colleague Letter* was applauded and defended by women’s groups and victim advocates,⁵⁴ it also raised critical questions and incited backlash. The American Association of University Professors responded by expressing concern over its preponderance of evidence standard.⁵⁵ A group of twenty-eight Harvard Law Professors wrote an open letter when their university’s policy was changed to comply

⁵⁰ Ibid., 12.

⁵¹ Somanader.

⁵² Ali, 12.

⁵³ Ibid., 15-16.

⁵⁴ National Women’s Law Center 85 Undersigned Organizations, “Sign-on Letter Supporting Title IX Guidance & Enforcement,” (2016), <https://nwlc.org/resources/sign-on-letter-supporting-title-ix-guidance-enforcement/>.

⁵⁵ Lieberwitz et al., 79.

with the *Dear Colleague Letter*. They problematized the lack of impartiality resulting from the new adjudication standards and encouraged Harvard to risk the withdrawal of federal funding for non-compliance with Title IX.⁵⁶ One of the law professors, Jeannie Suk Gersen, wrote an additional piece discussing the disproportionately negative implications this process would have on students of color and particularly black men, who have historically been victimized by false accusations and unfair assessments of guilt. She urges a challenge to the ‘always believe’ sentiment that she sees as having infiltrated and weakened campus adjudications.⁵⁷ Many have identified a fundamental injustice of the *Dear Colleague Letter* in its framing of the rights of the victim and the accused as in conflict, and its explicit prioritization of the complainant’s rights over that of the defendant.⁵⁸

Although the Obama administration’s Office for Civil Rights contended that the preponderance of evidence standard provides consistency between Title IX adjudications and all other civil rights investigations which adhere to this standard of proof, critics argue the severity of sexual violence and the potential consequences of a responsible finding merit a higher degree of certainty. They do not agree that Title IX investigations on campus can be compared to civil rights cases pursued in a court of law, given that college adjudications lack formalities that help to protect defendants and ensure a just finding, such as access to an attorney, a comprehensive discovery process, the cross-examination of witnesses, and the right to a jury.⁵⁹ Defenders of due process have also argued the *Dear Colleague Letter* problematically enables

⁵⁶ Elizabeth Bartholet et al., "Rethink Harvard’s Sexual Harassment Policy," *The Boston Globe* 2014.

⁵⁷ Lieberwitz et al., 79.

⁵⁸ *Ibid.*, 78.

⁵⁹ *Ibid.*, 79.

cases of double-jeopardy by allowing complainants to appeal non-responsible findings. They oppose the time frame imposed by the letter as well, believing it accelerates the investigation and adjudication process at the expense of being properly thorough.⁶⁰

DeVos took up these issues, explicitly sympathizing with the position of the accused, meeting with their families as well as men's rights groups.⁶¹ Her office has reversed the framing of the issue by the Obama administration, emphasizing not harm to survivors but to those falsely accused of sexual violence. Candice Jackson, DeVos's appointment to lead the Office of Civil Rights, captured the climate of the current administration in stating: "the accusations—90 percent of them—fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she decided that our last sleeping together was not quite right.'"⁶² In response, the president of the National Women's Law Center, Fatima Goss Gaves, expressed concern saying she was "worried that the department will turn into apologists for the sort of violence that happens on campus" and "allow myths about rape to perpetuated" such as "the whole idea that rape is just a drunken encounter gone wrong."⁶³

DeVos ultimately decided to revoke the *Dear Colleague Letter* in its entirety. In the interim period before a fully revised policy interpretation is written, she has granted the previous OCR guidance from 2001 authority on the issue and published a

⁶⁰ KC Johnson and Stuart Taylor, "The Path to Obama's 'Dear Colleague' Letter," *The Washington Post* 2017.

⁶¹ Erica L. Green and Sheryl Gay Stolberg, "Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear," *The New York Times* 2017.

⁶² Ibid.

⁶³ Ibid.

Q&A on Campus Sexual Misconduct for further clarification.⁶⁴ The latter document restores choice for schools to implement *either* a preponderance of evidence or a clear and convincing standard of evidence in the adjudication process. It mandates, however, the standard used be consistent with that of other misconduct cases handled by a school. This is a reference to the case *Doe v. Brandeis University* in which a judge found the preponderance of evidence standard was intentionally used by Brandeis to make sexual assault cases easier to prove, insofar as it was a lower standard of evidence than required in any other student hearing.⁶⁵ While DeVos's policy interpretations seem to allow for choice in the standard of evidence, this case reveals that they may actually serve to encourage the use of a higher standard, making sexual harassment and assault more difficult to prove. The *Q&A* also addresses the question of what timeframe constitutes a 'prompt investigation,' reverting Obama's guidance of 60 days and concluding that there is no fixed timeframe in which an investigation must be completed.⁶⁶ The document additionally reverses the *Dear Colleague Letter's* mandate that the appeals process be available to both parties, reinstating an institution's ability to choose whether allow appeals solely by respondents or by both parties.⁶⁷

The debate between these two policy interpretations centers completely on the adjudication process. It creates a staunch conflict between the rights of survivors and those accused, a framing that has aroused strong emotion on both sides. The difficult question of how to resolve a history of institutional inaction by universities to find

⁶⁴ "Q&A on Campus Sexual Misconduct," ed. Department of Education (Office for Civil Rights, 2017), 1.

⁶⁵ *Ibid.*, 5.

⁶⁶ *Ibid.*, 3.

⁶⁷ *Ibid.*, 7.

justice for survivors of sexual violence without impinging upon the rights of those accused remains unresolved. I believe debates between standards of evidence, investigative timeframes, and access to an appeals process reveal themselves as a limited scaffold for the stakes of this issue. I want to step away from this reductive framework and acknowledge the personal and political dynamics of this issue in all its complexity. While not attempting to directly resolve the technical concerns raised by defenders and critics of the *Dear Colleague Letter*, I instead aim to raise other issues this debate has sidelined, hopefully opening up possibilities for more holistic resolutions to campus sexual violence.

Re-Orienting the Debate

Investigating and adjudicating whether an assault has occurred as to assign blame and punishment seems fundamental to addressing campus sexual violence. In the current debate it is presented as the crux of the issue—*if only* we could institute a fair adjudication process, *then* justice would be served. This task has created controversy rather than clarity however, producing doubt as to whether campuses are equipped to undertake such a task at all. Colleges lack the infrastructure and resources of a criminal court, yet have tried to replicate this process nonetheless. This has caused campus hearings to appear weak from all sides. Survivor advocates argue universities have failed to take the crime seriously and by all accounts this is true; reporting rates and guilty findings are all too rare.⁶⁸ Defenders of those accused of

⁶⁸ Approximately 90% of campus sexual violence victims do not report. "Campus Sexual Assault." In *Statistics About Sexual Violence*. www.nsvrc.org; National Sexual Violence Resource Center, 2015.

sexual violence are angered by the lack of protections guaranteed to them in the college process. They too make an important point that to impinge upon the rights of respondents is to disproportionately punish racially marginalized students on campus.⁶⁹ I argue these problems stem not from the particular policy interpretations of the Obama or Trump administrations, but rather from the fact that colleges have tried (and failed) to mimic criminal courts in the first place.

I believe that there has been a fundamental misunderstanding about the purpose of Title IX in recent debates about sexual violence on college campuses. Title IX does not obligate universities to determine whether a crime has occurred, but rather whether the rights of a student have been violated as a result of sex-discrimination.⁷⁰ At first glance, this appears as a frustrating limitation of the law—the university is supposed to protect a victim’s rights, but not her?⁷¹ I argue, however, that this perspective can help to frame the problem at hand in a new way. Universities, and federal guidance governing universities, have become distracted by the task of adjudicating crimes of sexual violence. The promise of Title IX as a civil rights law has been lost within the current debate about the adjudication process. Title IX was applied to sexual violence because this issue on college campuses requires more than a hearing, but a more holistic assurance of one’s right to their education. I will argue for a renewed commitment to the law’s original purpose as such, using a broad interpretation of what forms of remedy civil rights law can offer to victims,

⁶⁹ Jeannie Suk Gerson, "Shutting Down Conversations About Rape at Harvard Law," *The New Yorker* 2015.

⁷⁰ Jennifer Doyle, *Campus Sex, Campus Security* (South Pasadena, CA: Semiotexte(e), 2015), 23.

⁷¹ *Ibid.*, 34.

accused perpetrators, and students more generally, who live in an environment and take part in a sexual culture that is significantly impacted by this form of harm.

In the following chapters, I will use critical feminist perspectives to analyze the current state of Title IX on college campuses as well as to shed light on alternative approaches to the issue. Title IX was enacted as a civil rights law because of a radical feminist argument that women are a class. This perspective on gender upholds the claim that women are uniquely harmed by sexual violence and thus require categorical legal protection. In focusing particularly on the rights of individuals in the adjudication process, current college policy has moved away from this conception of the problem and towards a liberal feminist model of sexual violence. Under this framework, sexual violence is compared to any other crime and treated as a gender-neutral violation between two autonomous individuals. The power dynamics that exist between victims and perpetrators as well as between women and men in the campus community are rendered invisible. Yet while the radical feminist analysis correctly identifies some of the ways in which male power is exercised, it fails to address the full panoply of issues, which arise in adjudicating campus sexual harassment and assault.

An intersectional feminist framework, on the other hand, recognizes multiple systems of oppression, drawing particular attention to the intersection of sexism and racism. This perspective emphasizes the unique challenges women of color face in finding justice for crimes of sexual violence as well as the suffering of men of color as a result of false accusations made against them. Intersectional feminists aim to find justice in protecting both victims and defendants. Doing so has required turning away

from the police force and criminal courts given the criminal justice system's long record of mistrust in cases involving women of color as complainants and the disproportionate imprisonment of black men. As an alternative to statist intervention, intersectional feminists have invested in community systems of accountability as a means to address instances of sexual violence.

The differences between these models capture the stakes of my investigation into Title IX. Policy interventions rest on significant assumptions about the nature of sexual violence. The university's response is dependent upon how it conceives the harm of sexual violence and the ways sexual violence is understood to affect the campus environment. In addition to drawing on particular perceptions of sexual violence, administrative action also serves to shape the campus climate surrounding this issue, making it all the more important to analyze. Determining how to best redress sexual violence on campus requires a more comprehensive framework for thinking about the issue than current political debate provides.

With this work, I aim to reorient the debate surrounding Title IX by redirecting attention towards the potential of the law to provide support and cultural change and away from adversarial disputes and individualized sanctioning. In the chapters that follow, I will explore what theoretical frameworks the current model for addressing campus assault is rooted in, its effects on the campus environment and the current political debate, and what alternative possibilities may exist for addressing campus sexual violence. Through this in-depth analysis of the implications of Title IX policy, I look beyond short-term and individualistic policy initiatives, exploring the underlying power dynamics and relations between individual survivors and

perpetrators, community members, and the university, which in many ways define the law's operation and impact. In refusing to adhere to the confines of current debates and policy surrounding Title IX, I am able to identify inherent issues with the contemporary approach to campus violence and elucidate far more meaningful opportunities for accountability and healing. In the next section I discuss more specifically how I plan to undertake this ambitious project.

Framework: Sources, Chapters, and Choices

The questions I seek to answer in this work exist at the nexus of several fields. This project will draw on a wide range of sources including legal, historical, and theoretical feminist scholarship. My analysis will draw critical connections between these disciplines, seeking to use each thread of thinking to illuminate and critique the others and the issue at hand. Feminist frameworks for thinking about sexual violence will serve to shed light on the stakes and assumptions embedded within debates about Title IX, while socio-legal scholarship helps to demonstrate the strengths and weaknesses of various feminist approaches and concretize debates about sexual violence. In embracing the multiplicity of perspective relevant to discussing Title IX and campus sexual violence, I believe this work will provide a comprehensive analysis of the stakes of this issue and a meaningful exploration of the possibilities for finding a more fulfilling, effective, and just resolution.

I will carry out this project in the following three chapters. The next chapter, *Title IX on Campus*, will address more specifically how the current model for campus

adjudications emerged. I will use this history to better understand the particular role the university has adopted in addressing campus sexual violence. I will describe in greater detail the current model for adjudication processes as well as the other services and educational initiatives colleges' offer and engage in, revisiting the changes to this system encouraged by the Obama and Trump administrations. Lastly, I want to assess how the university's distinct positionality and approach has impacted the effectiveness of its intervention, looking at the practical limitations of the current model as well as engaging in a theoretical critique. I hope to develop a preliminary understanding of what ways campus policy is fulfilling or falling short of Title IX's promise as a civil rights law and determine what areas are in need of re-evaluation.

In Chapter Three, *Legislating Campus Sex*, I situate the current model of university intervention in a larger conceptual framework, focusing attention on the relation of policy to the broader campus environment. I work to understand both how university policy conceptualizes the campus environment and itself shapes it, looking to evaluate whether policy has been successful in dismantling the hostile environment created by campus sexual violence. I analyze college policy on consent and sexual violence, asking how these terms are defined and evaluating what other questions such legislation raises, such as: how to express consent and when, what the harm of sexual violence is and who is at fault, and how policy contributes to establishing a greater sexual ethics on campus. I seek to elucidate the potential ways the hostile environment created by sexual violence has been overlooked, perpetuated, or fostered by campus policy. I will also begin to explore alternative approaches for creating a

more supportive and open environment for students' engagement with one another and with the university.

In the final chapter, *Envisioning Justice*, I will tie together strings left undone in the previous chapters to posit what changes the current system requires. I will draw out the problems I have discussed throughout the rest of the work and expand on solutions I pointed to only briefly. I will provide an in-depth analysis of the underlying socio-legal issues survivors and perpetrators face in their engagement with the current adjudication process on college campuses. Looking for ways to create a safer and more just environment, I consider the needs of survivors in healing from sexual violence, of perpetrators in changing behavior, and of the community in grappling with the hostility caused by this crime. Ultimately I recommend restorative justice conferencing because I believe it meets these needs and serves to create a deeply supportive campus environment that upholds Title IX's promise of remedy.

In my writing throughout this work, I must make a several choices. One such choice concerns language. Drawing on the literature on sexual violence, I use 'she' pronouns for victims and 'he' for accused perpetrators. Feminists have employed these pronouns as not to lose sight of the gendered dynamics of this issue and the purpose of Title IX. This was a difficult choice however, because anyone can be a victim of sexual violence. Male victims, the LGBTQ community, and women of color have been marginalized by systems of support as a result of assumptions about who 'she' is that can be harmed by sexual assault. All victims of sexual violence are legally ensured access to campus adjudications and systems of support under Title IX. Not only is it critical that the harm caused to all victims is acknowledged and

addressed by the university but that the effects of identity on victims' experiences is recognized in the healing process. I address this latter problem explicitly in Chapter Four and work to employ an intersectional feminist perspective throughout this thesis, pointing to the inherent problems with universal understandings of womanhood and victimhood and trying to foster more inclusive conceptions of survivors experiences wherever I can.

I will also refer to 'survivors' and 'victims' interchangeably. Although I never say 'alleged survivor or victim,' I do consistently use the phrase 'accused perpetrator.' I think the caveat of 'alleged' undermines survivor narratives, whom I choose to generally believe. Yet with regard to accused perpetrators, adding 'accused' or 'alleged' is an effort to emphasize and respect their right to be considered innocent until proven guilty. This differential framing for each party challenges ideas that the finding of an adjudication is the final word on an issue. One party's adjudicated innocence does not always mean another was not deeply affected by a sexual experience between them, or that consent actually existed. Likewise, findings of responsibility have been wrong before, a mistake that disproportionately affects men of color. While acknowledging the difficulty of these issues, and the need for intersectional awareness as to the ways that accusations operate in different contexts, these are the decisions that made sense to me. Part of what I am trying to navigate in this thesis is this very question of how to find voice for both victims and perpetrators under the law. Hopefully the decision to use references that reflect each party's preferred framing will help to facilitate this agenda.

With my approach to this project, I hope to achieve a broad look at Title IX and the stakes of the current national debate on campus sexual assault. There are many other directions I could have explored with this thesis however. Personal narratives for instance, are critical to understanding the stakes of this issue, as well as the effects of current policy and the areas where improvement is needed. While I do not want to lose sight of the individuals Title IX affects, I have chosen to focus on policy, institutional power dynamics, and cultural norms more generally, all of which impact personal experiences. I also could have fully committed to a strictly legal analysis, delving into case studies and particular policies at different schools. While there is plenty of room for further research here as well, I am more interested in the overarching effects of federal Title IX guidance.

I believe my framework will illuminate the systematic implications of policy on college campuses, contributing needed breadth and depth to discourse on campus assault. By making a historically grounded claim and using critical feminist perspectives to understand the effects of and assumptions embedded within campus policy, I will develop a strong sense of the value of Title IX's past, the status of its present state, and a desirable path for its future. I hope to be methodical, critical, and imaginative in contextualizing the current debate and illuminating ways to enable access to an education free from violence that Title IX promises.

I develop a robust understanding of the law's current effectiveness and implications, giving attention to the technicalities of university policy and practice as well as to the campus environment and culture. By consistently directing my analysis towards support and remedy, I center values that have been marginalized within

mainstream legal and feminist discourse on Title IX. My emphasis on community norms and relations throughout the work sheds much needed light on the hostile environment caused by sexual violence, a core concern of Title IX legislation that I believe has been sidelined within contemporary debate. I examine the relations between individual survivors and perpetrators, the university, and the college community, identifying the ways in which these are strained by the current system and locating areas for transformation. I do not rest my argument by establishing the law's shortcomings, but look for the roots of its failings. This allows me to make informed suggestions for shifting the law's trajectory that I believe will work to meaningfully change the cultural and institutional response to sexual violence in the long-term. It is through an incisive analysis of the law's status and effects that I finally come to envision an approach to sexual violence that I believe will transform the harmful relations and imbalanced power dynamics that have come to characterize Title IX policy. In the end, I advocate for restorative justice because I believe it can give way to a more holistic and humanistic response to sexual violence and provide genuine remedy within, and hopefully beyond, the university.

Chapter Two:

Title IX on Campus

“A university that obeys the letter of the law is ‘compliant’; a university that does not is ‘non-compliant.’ The non-compliant university is ‘in violation’ and vulnerable to fines and lawsuits...Title IX is the administrative structure through which the university knows what exposure feels like, what vulnerability is. It is the sex of bureaucracy.”⁷²

Title IX has evolved significantly since its inception in 1972, but today colleges across the country share basic reporting and adjudication procedures. In this chapter I delve deeper into the current state of Title IX, looking at federal guidance and its implementation at the institutional level. Although modifications to Title IX put in place by the Obama and Trump administrations have significant implications for the law, which I will explore, I argue this federal back-and-forth has left the law’s underlying structure and mechanisms fundamentally unchanged. After providing a comprehensive discussion of the contemporary standards governing campus assault investigations, I analyze the power dynamics this approach has fostered between the university and its students, giving particular attention to the position of survivors on campus. I seek to problematize the impression of the university as a neutral mediator of sexual violence cases and to identify its investment in controlling, containing, and ignoring this pervasive issue. I use low reporting rates, the scarcity of responsible findings, and outright instances of institutional denial as evidence of the utter ineffectiveness that defines the current systematic approach to Title IX. I do not view the failures of Title IX policy as irreparable however. I use this assessment of the law to demonstrate the consistent problems that policy changes have perpetuated, while recognizing the current adjudication system as merely one possible response to

⁷² Ibid., 24.

campus violence. By acknowledging the socially constructed nature of the institutionalized responses to campus assault, I am able to look beyond the limited framework of contemporary policy debates and open up space for reclaiming Title IX's purpose as a civil rights law.

Institutionalizing a Response to Sexual Violence

While federal legislation has played a key role in shaping Title IX's trajectory, it has not been the only instigator of change. At the level of the university, campus activism has also been a defining factor in Title IX's application to sexual assault, often garnering widespread media coverage and resulting in a variety of policy initiatives. In this section I discuss feminist activism surrounding campus sexual violence in the 1980s and '90s, which played a formative role in institutionalizing a response to sexual assault. Tracing this history will allow me to probe the tactics and goals of this movement and to deconstruct the contemporary model for addressing campus assault. In looking to the roots of Title IX policy, I hope to highlight its provisional nature and to challenge the relational dynamics and institutional procedures that have nonetheless become customary.

A groundbreaking survey by *Ms. Magazine* in 1985 set the stage for a new wave of student activism. The study collected responses from 7,000 women across 35 college campuses and revealed that one in four had experienced rape or attempted

rape and moreover that nearly 90% knew their perpetrator.⁷³ Interestingly, the study determined the prevalence of sexual assault based on legal precedent rather than women's self-identification as rape victims. In fact, the article revealed that 75% of women who had been assaulted by somebody they knew did not identify the experience as rape.⁷⁴ This figure alone serves to demonstrate the drastic cultural and institutional change that has surrounded conceptions of sexual assault.

Feminists used the 'one in four' statistic produced by this survey as a rallying cry. It was picked up by the media and used as proof by activists who had argued for years that women were suffering from sexual violence during their college careers.⁷⁵ College feminists claimed this problem was not new, but had simply been hidden from the public eye because of a common misconception by victims, campus security, and law enforcement that rape is committed by strangers, and therefore that sex with acquaintances could not qualify as legitimate assault.⁷⁶ The *Ms.* survey turned the table on this issue in reconceptualizing the nature of the problem itself.

College women were newly identified as victims of rape, while men on college campuses were being recognized as this crime's (potential) perpetrators. National news stories covered men's involvement in campus sexual assault cases as college activism became increasingly focused on the pervasiveness of student perpetrators.⁷⁷ This work is exemplified by an action organized by female art students at the University of Maryland in 1993 who chose the names of 50 male students at

⁷³ Ellen Sweet, "Date Rape: The Story of an Epidemic and Those Who Deny It," *Ms. Magazine*, October 1985. Cited in John J. III Sloan and Bonnie S. Fisher, *The Dark Side of the Ivory Tower: Campus Crime as a Social Problem* (New York: Cambridge University Press, 2011), 86-87.

⁷⁴ Sloan and Fisher, 87.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, 89.

⁷⁷ *Ibid.*, 91.

random and printed posters with their names and the caption ‘Potential Rapists.’⁷⁸

This wave of activism combined with media attention redefined the meaning of rape and dramatically altered public understandings of the people it affected and context in which it occurred. The college campus was constructed as a site of crisis.

Campus feminists emerged as “claimsmakers,” establishing themselves as authorities on the issue and communicating a specific narrative of the problem and its solution to the media and legislators.⁷⁹ Campus sexual violence was portrayed as a “national epidemic,”⁸⁰ a framing of the issue that still echoes in contemporary discourse. Activists successfully mobilized to make change on a number of fronts through revising school policy, filing lawsuits, and advocating for new federal legislation. In 1991, women at Antioch College famously instituted a consent policy in their Code of Student Conduct that required consent be given “at each stage of sexual contact advanced toward intercourse.”⁸¹ When unable to alter university policy directly, many victims of sexual assault sued their schools for compensatory and punitive damages. The financial pressure this placed upon colleges created further incentive to change policy, a sentiment captured by the 1989 Boston Globe headline “Lawsuits New Weapon Against Campus Rape.”⁸² In 1992, the *Campus Sexual Assault Victims’ Bill of Rights* was passed under the Bush administration, creating a set of federal requirements regarding how colleges and universities respond to campus crime and specifically to acquaintance rape.⁸³ A set of amendments following

⁷⁸ Ibid., 91-92.

⁷⁹ Best, Joel cited in *ibid.*, 101.

⁸⁰ Ibid., 98.

⁸¹ Ibid., 107.

⁸² Ibid., 117-19.

⁸³ Ibid., 108.

the legislation mandated that colleges publish their plans and procedures for addressing sexual assaults as well as guarantee certain rights to victims and alleged perpetrators on campus.⁸⁴ In less than a decade after the *Ms. Magazine* survey, shock and disbelief were transformed into shifting cultural attitudes and institutionalized changes.

Each of these tactics aimed to address campus sexual assault by focusing on an institutional response by the university. Lawsuits in particular held schools accountable for failing to adequately protect students. Yet making change in student handbooks and through the *Campus Sexual Assault Victims' Bill of Rights* similarly framed the problem at hand and its solution in terms of appropriate administrative intervention. The university was firmly established as the party accountable for preventing and handling cases of sexual violence among students. This creates a particular dynamic in which the university is both in control of and liable for handling cases of sexual violence, a model for campus sexual assault that has served as a blueprint for all subsequent changes in policy. In a survey of campus sexual assault policies in 2012, Iverson found that the university took on a role of being both “at-risk” and a “risk manager.”⁸⁵ Insofar as Title IX mandates the university protect its students’ rights, colleges are positioned “risk managers.” Yet Title IX also establishes the possibility of noncompliance, putting the university “at risk” of lawsuits and federal sanctions.⁸⁶

⁸⁴ Ibid.

⁸⁵ Susan V. Iverson, "A Policy Discourse Analysis of Sexual Assault Policies in Higher Education," in *The Crisis of Campus Sexual Violence*, ed. Sarah Carrigan Wooten and Roland W. Mitchell (New York: Routledge, 2016), 19, 22.

⁸⁶ Doyle, 24.

The university is put in the potentially contradictory position of protecting its students as well as itself. In theory, a university's dedication to serving its students' best interest should ensure its own compliance with the law. In practice however, the increasingly corporatized university has been driven to manage both its own and its' students risk through bureaucratic systems.⁸⁷ Not only has the university taken on a position in which its interests are not necessarily aligned with those of sexual assault victims, but in which it is primarily invested in minimizing liability regarding particular cases of sexual assault rather than in facilitating broader systematic and cultural change.

Student activists made significant strides in creating an institutional response from the university by contextualizing sexual violence within the campus environment. By redefining sexual assault to grant greater legitimacy to acquaintance rape, feminist advocates located victims and perpetrators of sexual violence squarely within the bounds of the university, creating a crisis that demanded institutional action. The success of activists' efforts to bring attention to campus sexual assault is clear, although I argue that attempts to create institutional accountability had critical drawbacks as well. The university became incentivized to protect itself, instituting standardized bureaucratic systems to manage risk rather than seeking more meaningful remedy for the student body. To this extent, even early attempts to address campus assault lost sight of the potential for support and cultural change that I believe civil rights law offers. Current debate surrounding Title IX has perpetuated the precarious dynamic in which students become dependent upon institutional

⁸⁷ Ibid.

processes that do not necessarily prioritize their best interests. In the next section, I look at contemporary Title IX policy before offering further analysis of its effects.

Contemporary Title IX Policy

Federal Title IX guidance requires postsecondary institutions to institute a process for handling sexual assault cases. While individual schools are at liberty to tailor this process to their particular student populations and administrative systems, they must nonetheless adhere to certain procedural points.⁸⁸ In this section, I delineate what federal guidance demands of colleges beginning with publicizing their grievance procedures, to conducting investigations, determining responsibility, instituting an appeals process, and offering students interim measures. In doing so, I highlight enduring aspects of Title IX policy as well as areas of disagreement between the Obama and Trump administrations. I focus primarily on federal policy interpretations but will use Wesleyan University's Student Code of Conduct to exemplify more concretely how these guidelines are applied and the degree of choice schools have in fulfilling them.

Currently, a *Q&A on Campus Sexual Misconduct* published under the Trump administration governs what processes and standards are universally required of postsecondary institutions in combination with more comprehensive policy interpretations issued in 2001. Since September of 2017, these policy interpretations have taken the place of guidelines published in 2011 and 2014 by the Obama

⁸⁸ "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," ed. U.S. Department of Education Office for Civil Rights (2001), 14, 20.

administration.⁸⁹ Policy debates between the Trump and Obama administrations concern a relatively narrow scope of the Title IX's mandates however. Many foundational components of the law have withstood such recent reforms. For instance, guidance from 2001 onward (2001, 2011, 2014, 2017) has consistently required colleges to designate a Title IX coordinator whose position is solely committed to responding to and monitoring Title IX complaints.⁹⁰ Likewise, students and employees must be made aware of how to file a sexual harassment complaint and of the steps that a school's grievance procedures entail.⁹¹ Colleges must of course then abide by their own policy when complaints of harassment or assault are made against an employee, student or third party.⁹²

According to federal guidance, a school must institute "prompt and equitable grievance procedures."⁹³ This must involve the "adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence."⁹⁴ While these standards themselves are longstanding, administrative differences emerge in interpreting what more specific requirements they entail. Guidance published in 2011 under the Obama administration clarifies that grievance procedures generally include an investigation and hearing component.⁹⁵ DeVos's

⁸⁹ "Q&A on Campus Sexual Misconduct," 1.

⁹⁰ "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," 4; Ali, 5; Catherine E. Lhamon, "Questions and Answers on Title IX and Sexual Violence," ed. United States Department of Education Office for Civil Rights (2014), ii; "Q&A on Campus Sexual Misconduct," 1-2.

⁹¹ "Q&A on Campus Sexual Misconduct," 3; "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," 20.

⁹² "Q&A on Campus Sexual Misconduct," 3; "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," 20.

⁹³ "Q&A on Campus Sexual Misconduct," 3.

⁹⁴ Ibid.

⁹⁵ Ali, 10.

2017 *Q&A* holds that informal mediation may be appropriate if all parties agree,⁹⁶ an option that the *Dear Colleague Letter* prohibited for cases of sexual assault.⁹⁷

As for what more precisely, constitutes “prompt and equitable grievance procedures,” there is further disagreement among administrations. The meaning of this phrase rests at the heart of the contentious debate between the Obama and Trump administrations’ respective approaches to campus sexual assault. The *Dear Colleague Letter* published in 2011 by the Obama administration creates a specific requirement surrounding this standard for the first time. It holds that for an adjudication to be “equitable,” complaints should be evaluated according to a *preponderance of evidence* standard, meaning it should be determined whether one is responsible for sexual harassment or assault based on the finding that it is *more likely than not* such conduct occurred.⁹⁸ In 2017, under the authority of Betsy DeVos, the Department of Education rescinded this piece of guidance and reinstated a choice between a preponderance of evidence standard and a higher *clear and convincing* standard that holds it is *highly probably or reasonably certain* that harassing or violent conduct occurred. DeVos’s *Q&A* requires only that the standard of evidence used in cases of sexual assault is consistent with that of other misconduct cases colleges’ handle.⁹⁹ It may however, implicitly favor a clear and convincing standard, since in some cases schools lowered their standard of proof solely for cases of sexual violence to comply with the *Dear Colleague Letter*. A 2016 court case, *Doe v. Brandeis University*

⁹⁶ "Q&A on Campus Sexual Misconduct," 4.

⁹⁷ 8.

⁹⁸ *Ibid.*, 10-11.

⁹⁹ "Q&A on Campus Sexual Misconduct," 5.

concluded Brandeis did just this to the disadvantage of accused students.¹⁰⁰ There is also disagreement about the meaning of “prompt,” with guidance under the Obama administration recommending investigations should be complete within a 60-day time frame¹⁰¹ and DeVos repealing this constraint without instating a fixed limit to replace it.¹⁰²

After a determination of responsibility is made, both parties should be informed of the finding simultaneously.¹⁰³ Sanctions are determined based on a school’s specific code of conduct, but disciplinary action should always be proportionate to the violation.¹⁰⁴ Schools can but are not required to institute an appeals process. The Obama administration’s *Dear Colleague Letter* recommended an appeals process be provided and in such cases required it be equally accessible to both complainants and respondents.¹⁰⁵ Overriding guidance published under DeVos however allows an appeals process to be offered either to both parties or solely to the responding party (i.e. the accused).¹⁰⁶

Given Title IX’s status as a civil rights law, disciplinary outcomes will never result in a criminal conviction. While expulsion and suspension are possible sanctions, the remedy Title IX is meant to offer extends beyond disciplinary measures. Title IX policy is meant to provide resolution on a larger scale than individualized sanctioning, which includes working to “end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from

¹⁰⁰ Ibid.

¹⁰¹ Ali, 12.

¹⁰² "Q&A on Campus Sexual Misconduct," 3.

¹⁰³ Ibid., 6.

¹⁰⁴ Ibid.

¹⁰⁵ Ali, 12.

¹⁰⁶ "Q&A on Campus Sexual Misconduct," 7.

occurring again.”¹⁰⁷ Title IX sexual assault policy is designed to offer more than retribution, but do what is needed to fulfill students’ right to their education. This can certainly include direct sanctioning to prevent future offenses, but also requires additional forms of remedy to support the complainant and address the hostile environment impacting the greater student body.¹⁰⁸

The 2017 *Q&A* issued by the Trump administration explicitly states that any determination of disciplinary action should consider “the impact of separating a student from her or his education.”¹⁰⁹ Mandated separation between responding and reporting parties is considered by this document as an example of a sanction that works to do more than just discipline but to remedy the hostile environment created by sexual violence.¹¹⁰ It is also a solution that does not severely impinge upon either party’s education. Complainants and respondents should have equal access to accommodations such as counseling, modified course schedules, changes in housing, leaves of absence, and a guaranteed separation between parties.¹¹¹ These options must not only be offered after an investigation concludes but beforehand and while it is ongoing. The provision of these choices, termed interim measures, is meant to assure that instances of sexual violence do not detract from a student’s education at any point.

Title IX accepts that the occurrence of sexual violence does not solely impact the parties directly involved but the greater student body and campus culture by

¹⁰⁷ "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," 15.

¹⁰⁸ *Ibid.*, 14-16.

¹⁰⁹ "Q&A on Campus Sexual Misconduct," 6.

¹¹⁰ *Ibid.*

¹¹¹ "Q&A on Campus Sexual Misconduct," 2.

potentially creating a hostile environment. Schools are responsible for responding to this as well by putting in place broader remedies that will reach the wider student population. This can include disseminating information or policy statements that make clear harassment is not tolerated, instituting prevention measures, and offering training to employees, faculty, and students that discusses what sexual violence is and how to respond.¹¹² Following the *Dear Colleague Letter*, the Obama administration published more explicit *Questions and Answers on Title IX and Sexual Violence* in 2014, which further specify acceptable remedial measures such as: providing school-wide access to a counselor specializing in trauma, developing bystander intervention programs, targeting trainings to specific student groups (such as athletic teams, residence halls, or Greek institutions), and conducting periodic assessments of the campus climate to determine the effectiveness of such efforts and delineate what future steps to take.¹¹³

Given all of these regulations and suggestions, it is clear that federal guidance strongly influences college policy surrounding sexual violence. Federal policy interpretations outline specific stages of the investigation process and create certain standards to which this process must comply. The details of a school's grievance procedures are still the domain of each individualized institution however. College and universities are given the freedom to adapt federal guidelines to their specific codes of conduct, administrative structures, and student populations. Wesleyan University, where I am situated as the author of this thesis, exemplifies this discretion as it has significantly shifted its own adjudication process within the past year.

¹¹² "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," 16, 19.

¹¹³ Lhamon, 35-36.

Today, upon receiving a formal complaint of sexual misconduct, an investigation takes place, which includes interviews with the complainant and respondent as well as the collection of relevant documentation and witness testimony. After the first round of fact-finding, both parties can submit questions or comments about the report for the investigator to review and determine if (according to their own judgment) they are relevant to pursue further.¹¹⁴ Once this investigation closes, a four-person panel reviews all of the information independently and comes to a determination of responsibility using a preponderance of evidence standard.¹¹⁵ Wesleyan's code of conduct provides sanctioning guidelines, stating for example that a finding of unwanted or non-consensual penetration should bring about a sanction of dismissal or at a minimum suspension until the reporting person graduates.¹¹⁶ This process was instituted in the 2017-2018 academic year and replaced the former system, in which a hearing was conducted with both reporting and responding parties present.¹¹⁷ That shift was a result of student activism and critical feedback that demonstrated both reporting and responding parties found the hearing process to be traumatic.¹¹⁸

These two systems can both be found across college campuses along with other individualized permutations of these processes. The differences between them do matter. Being interviewed at a hearing in the presence of the person who assaulted

¹¹⁴ "Wesleyan University Student Handbook," ed. Wesleyan University (<http://www.wesleyan.edu/studentaffairs/studenthandbook/StudentHandbook.pdf>: Wesleyan University, 2017-2018), 26-28.

¹¹⁵ *Ibid.*, 28.

¹¹⁶ *Ibid.*, 29-30.

¹¹⁷ Reporting parties did have the option to call into the hearing or be separated from their perpetrator with a shield if they chose to attend. "Student Handbook: University Standards and Regulations," ed. Wesleyan University (Wesleyan University, 2016-2017), 11-13, 28.

¹¹⁸ "Deborah Colucci, Wesleyan Deputy Title IX Officer, personal communication, 2018"

you (or who is accusing you) makes for a very different experience from being interviewed in a neutral space by an investigator. The difference clearly impacts the experiences of the students involved as well as affects relations between both reporting and responding parties and the review panel. At Wesleyan, the shift in adjudication procedures also reflects attention to student interest and activism. Nevertheless, the changes that Wesleyan made are by no means revolutionary. In fact, several core elements of the adjudication process have remained consistent across these different models. Since early feminist claimsmakers established sexual assault as an issue demanding an institutional response, university policies and federal Title IX guidance have consistently reproduced a role for the administration that maintains its control over the issue and the parties involved.

The Title IX Coordinator, campus security officers, investigators, hearing panel, and counselors are all employed by and responsible to the university.¹¹⁹ At Wesleyan, where the Title IX Office has made an effort to emphasize choice surrounding interim measures by offering several avenues for students to seek resources, a look at the school's relevant webpages reveals that off-campus resources have been shirked aside in favor of support offered by the university. On the homepage of the Office for Equity & Inclusion, the heading that addresses 'Title IX' exclusively lists 'Campus Resources,'¹²⁰ despite linking to an article further down the page titled "Wesleyan Strengthens Sexual Assault Prevention Efforts by Partnering with Community Services."¹²¹ Likewise on the university page titled "Sexual

¹¹⁹ Doyle, 39.

¹²⁰ "Title IX," Wesleyan University, <http://www.wesleyan.edu/inclusion/misconduct/titleix.html>.

¹²¹ Olivia Drake to News @ Wesleyan, February 25, 2015, <http://newsletter.blogs.wesleyan.edu/2015/01/06/mousexualassaultprevention/>.

Misconduct at Wesleyan: Support and Resources,” exclusively on-campus resources can be found under the sub-heading “Support & Resources.”¹²² Only a hyperlink located to the side of the ‘Welcome’ page¹²³ will direct one to a sheet with ‘Sexual Assault Response Options’ that lists off-campus resources such as the Middletown Police or the local Women and Families Center.¹²⁴ This emphasis on campus-directed resources and reporting options insulates students’ experiences with sexual violence within the university setting, precluding real choice while highlighting the accessibility, ease, and immediacy of on-campus options.¹²⁵

Title IX adjudication systems have become enclosed from the outside world, offering investigations, hearings, sanctions, an appeals process, no contact orders, and counseling—all on campus, governed by university oversight.¹²⁶ Feminist activists, federal lawmakers, and campus administrators have worked to implement an institutional response to sexual violence because this problem is contextualized squarely within the campus environment. College students are recognized as common victims and perpetrators of this offense, and Title IX also gives specific attention to the hostile environment sexual violence creates in the greater campus community. In this section I have outlined the specific ways federal guidance and university policy address sexual violence, describing the personnel involved, the phases and standards institutional processes must adhere to, and the forms of remedy colleges offer to provide support throughout such an ordeal. Although federal administrations have

¹²² "Looking for Support and Resources?," Wesleyan University, <http://www.wesleyan.edu/sexualassault/resources/index.html>.

¹²³ "Welcome," Wesleyan University, <http://www.wesleyan.edu/sexualassault/index.html>.

¹²⁴ "Sexual Assault Response Options," Wesleyan University, http://www.wesleyan.edu/sexualassault/images/AMM17252_SARTchart8-5x11_0830_LL.pdf.

¹²⁵ Iverson, 24-25.

¹²⁶ Doyle, 44.

differed in their stance on critical aspects of the law, the application of Title IX even across diverse collegiate institutions has in many ways remained standardized. While institutionalizing a response to sexual violence may have been a well-intentioned effort to legitimize this issue and support survivors, I have suggested this approach is also defined by critical shortcomings in the face of overwhelming control of these processes by the university. In the next section, I build upon this discussion through an in-depth analysis of the theoretical and practical implications of campus Title IX policy.

Evaluating the Effects of the Current Model

The ability to report an assault on campus and find accessible resources is of course an invaluable support system for students, but it is nonetheless critical to question what power dynamics this particularly insular set of relations creates. As I discussed earlier in this chapter, the university's status under Title IX as both 'at-risk' and a 'risk-manager'¹²⁷ establishes its control over campus sexual violence as well as its own vulnerability in the face of the federal law.¹²⁸ This positionality has motivated to the university to contain the problem at hand in the name of helping and protecting students while also preventing self-exposure.¹²⁹ In this section I explore the consequences of this dynamic by examining the interactions between the administration and student survivors and perpetrators. To develop an understanding of the systemic effects of the campus adjudication system, I draw on both qualitative

¹²⁷ Iverson, 22.

¹²⁸ Doyle, 24.

¹²⁹ Iverson, 22.

analyses and quantitative data, which in combination demonstrate the failure of Title IX to provide effective remedy for instances of sexual violence.

The enclosure of the campus adjudication process affects the relationship between the administration and its students, and survivors of sexual assault in particular, in several respects. Students report their assault to the university, looking for protection and justice, despite the fact that these assurances have been compromised by the assault itself.¹³⁰ This creates a precarious dynamic in which the university is simultaneously invested in intervention yet removed from any role of responsibility.¹³¹ Survivors become dependent on the institution to grant legitimacy to their experience through logistical, disciplinary, and therapeutic interventions.¹³² The impression of the university as a detached and impartial manager of sexual violence cases may not only be incorrect, but also serve to render the survivor passive and less likely to challenge the “protective” institution in the face of the administration’s vast oversight and control.¹³³

University intervention goes so far as to replace the victim as an authority on instances of sexual assault. This becomes particularly problematic in light of the university’s self-interest in containing the aftermath of sexual violence. The issue reported to the university is technically a conflict between the alleged perpetrator and the university insofar as he is accused of violating the school’s code of conduct, yet through the investigative process this offense is recast as a conflict between the

¹³⁰ Ibid.

¹³¹ Ibid., 24.

¹³² Ibid., 22, 24-25.

¹³³ Ibid.

victim and perpetrator over which the university will act as a neutral judge.¹³⁴ The university takes on the role of defining such a violation, tasked with probing and then judging the victim's narrative: "Did s/he consent or not? Did s/he resist or not? Was s/he incapacitated? Was the sexual contact 'unwelcome' or was the 'pressure' for sex 'unreasonable'?"¹³⁵ As the survivor's experience is reduced to a series of yes or no answers, the respondent suffers from disembodiment insofar as he is largely relegated to a sequence of behaviors.¹³⁶ Both parties thus ultimately become submissive to the university's bureaucratic systems, which appear to be aimed more so at managing risk than providing relief.¹³⁷

The university's oversight impacts the filing of complaints, determinations of responsibility, and compliance with federal guidance not only on an individualized scale, but an institutional one. While it is estimated that one in five women and one in sixteen men experience sexual assault during college, more than 90% of victims do not report their assault.¹³⁸ Even when assaults are reported however, investigations and adjudications are all too rare. A report from the Senate Subcommittee on Financial and Contracting Oversight found that more than 40% of schools have not carried out a single investigation in the last five years and more than 20% of the country's largest private universities conducted fewer investigations than the number

¹³⁴ Doyle, 39.

¹³⁵ Iverson, 27.

¹³⁶ Ibid.

¹³⁷ Doyle, 33-34.

¹³⁸ "Campus Sexual Assault." in *Statistics About Sexual Violence* (www.nsvrc.org: National Sexual Violence Resource Center, 2015).

of reported incidents.¹³⁹ When adjudications do take place after a report *and* result in a responsible finding, still only between 13-30% of perpetrators of sexual assault face expulsion.¹⁴⁰ Given the underreporting and institutional inaction surrounding campus sexual assault, only a marginal number of campus assailants face consequences for their actions. This is despite the fact that 63% of college men who self-reported having attempted or committed assault disclosed they were serial offenders.¹⁴¹

Wesleyan's data on sexual violence helps to concretize these statistics. Over the past several years Wesleyan has worked to increase its reporting rates, and they have changed dramatically. In 2009, only three students reported sexual misconduct, while 24 reports of sexual misconduct were made in 2016.¹⁴² This change in reporting rates is likely more reflective of institutional standards than an actual rise in instances of sexual misconduct. In 2009, all three cases were instances of sexual assault—as opposed to sexual harassment, intimate partner violence, stalking, or sexual exploitation. They all resulted in campus hearings, two of which led to responsible findings, leading one student to be suspended and another to be put on probation.¹⁴³ In 2017, all 24 reports were of sexual assault, yet 18 were made confidentially. Among the six formal reports, only four led to a hearing. All four parties were found responsible, two were suspended and one was expelled.¹⁴⁴

¹³⁹ "Sexual Violence on Campus: How Too Many Institutions Are Failing to Protect Students," (U.S. Senate Subcommittee on Financial and Contracting Oversight, 2014), 1; Lauren J. Germain, *Campus Sexual Assault: College Women Respond* (Baltimore: Johns Hopkins University Press, 2016), 102.

¹⁴⁰ Tyler Kingkade, "Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion," *HuffPost* 2017.

¹⁴¹ "Campus Sexual Assault."

¹⁴² Antonio Farias, "Annual Report on Wesleyan's Response to Sexual Violence," (Wesleyan University, 2017), 2.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

In looking at this data, it is easy to become frustrated. The minimal number of expulsions in particular seems to be unjust given the actions of the perpetrator and furthermore inconsistent in light of the current sanctioning guidelines in Wesleyan's Student Handbook, which range from suspension to expulsion for offenses of penetrative sexual assault.¹⁴⁵ These statistics are also characterized by resistance on the part of survivors to undergo formal adjudications and sanctioning procedures however. In looking at a study by Germain that extricates data from the narratives of 22 women on college campuses who decided not to report their assaults,¹⁴⁶ I hope to further investigate whether the prospect of a formal investigation and disciplining of one's perpetrator is an attractive or effective solution from the point of view of survivors.

Germain delineates three primary reasons victims chose not to report their assaults to the university, which I believe can help to provide context for understanding Wesleyan's own reporting and investigation statistics. First, women felt their assaults would not be seen as legitimate in an investigation because they lacked physical evidence. This belief reflects traditional conceptions that rape is a physically forceful attack committed by a stranger.¹⁴⁷ Survivors' doubt that their experiences with sexual misconduct will be seen as valid may help to explain a general trend of underreporting as well as the fact that the only reports made to Wesleyan were of sexual assaults, rather than instances of sexual harassment or exploitation. Students may feel that anything less than assault is unworthy—either

¹⁴⁵ "Wesleyan University Student Handbook," 29-30.

¹⁴⁶ Germain, 80.

¹⁴⁷ Ibid., 80-81.

from the perspective of the administration or in their own opinion—of an official report of investigation.

The second most common reason students cited for not reporting their assaults was a concern for their perpetrator. In small communities such as college campuses, it is especially likely that a survivor experienced sexual assault by a peer, acquaintance, friend, or intimate partner. Many of the women Germain interviewed did not want to ruin their perpetrator's life.¹⁴⁸ Although suspension or expulsion may appear to be the just and appropriate sanction for committing sexual assault, this presumption may ultimately prove to be an inhibitor to reporting. Title IX is meant to cater to just this sort of dilemma however. As a civil rights law, it gives institutions the liberty to take an alternative approach to sanctioning through its focus on remedy. While contemporary federal guidance has not necessarily encouraged schools to take this route—an issue I will discuss momentarily—I believe it is nonetheless a serious possibility for the law's future, which I will return to in greater depth in the Chapter Four.

The final reason Germain's study elucidated for lack of reporting was a perception that the administrative process is ineffective.¹⁴⁹ Universities are motivated to contain and avoid investigative procedures, as well as downplay the occurrence of sexual violence on their campus. The increasingly corporatized nature of higher education incentivizes universities to generate a positive and marketable reputation, which certainty does not entail publicizing the prevalence of sexual violence on campus. A 2015 survey of college and university presidents found 77% disagreed that

¹⁴⁸ Ibid., 81.

¹⁴⁹ Ibid., 81-82.

campus assault was widespread on their campus.¹⁵⁰ Ironically however, high rates of reporting would likely be indicative that a university is not more dangerous than others, but rather has successfully established grievance procedures its students feel are accessible.

Unfortunately, denials of campus assault do not only appear in administrative attitudes but official records as well. Under the Clery Act, universities are required to submit annual data to the Department of Education regarding campus crime, which includes documenting the number of forcible and non-forcible sex offenses. Although statistics tells us approximately one in five women experience sexual assault during college, Clery Act data suggests only 0.02% of students are assaulted each year.¹⁵¹ This is not purely the result of underreporting by students, but colleges' undercounting of such reports. When audits have been performed on schools by the Department of Education, self-reported levels of sexual assault increase to 198% above average. After the audit period however, these rates have proceeded to drop 141%, returning to their former level.¹⁵² This trend is limited to crime reports of sexual assault and is not seen in other crime categories such as aggravated assault, robbery, or burglary.¹⁵³ Unlike with other forms of crime, universities are clearly shown to be put in a compromised position in resolving sexual assault complaints.

Administrative responses to campus sexual violence, while meant to create systems for personal and institutional accountability have granted the university

¹⁵⁰ Tara N. Richards et al., "A Feminist Analysis of Campus Sexual Assault Policies: Results from a National Sample," *Family Relations* 66, no. 1 (2017): 112.

¹⁵¹ Corey Rayburn Yung, "Concealing Campus Sexual Assault: An Empirical Examination," *Psychology, Public Policy & Law* 21, no. 1 (2015): 2-3.

¹⁵² *Ibid.*, 5.

¹⁵³ *Ibid.*

unwarranted control over adjudication processes and support services. Institutional self-interest to contain, ignore, and deny occurrences of sexual assault has negatively interfered with the effectiveness of Title IX. Analyzing the implications of the current model for Title IX policy has revealed that the university gains the power to define and (in)validate instances of sexual violence through security, investigative, and therapeutic interventions.¹⁵⁴ Survivors and accused perpetrators become dependent upon institutional processes that ultimately render both parties passive through bureaucratic systems that remove personal voice and reduce the holistic experiences of those involved.¹⁵⁵ These imbalanced power relations are not only problematic in theory, but impact rates of reporting and sanctioning, which are extremely low on campuses across the country.¹⁵⁶ Survivors are resistant to reporting their assaults not only out of a sense of mistrust towards the process but because even the ideal outcome of an adjudication may not provide the remedy they are looking for.¹⁵⁷ Taken together, this evidence points to the fact that despite mandating grievance procedures and resources for support, the promise of Title IX to provide accessible recourse and resolution for students who have experienced sexual violence has gone unfulfilled.

¹⁵⁴ Iverson, 25.

¹⁵⁵ Ibid., 22, 24-25, 27.

¹⁵⁶ "Campus Sexual Assault," in *Statistics About Sexual Violence* (www.nsvrc.org: National Sexual Violence Resource Center, 2015); Kingkade, "Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion."

¹⁵⁷ Germain, 81-82.

Policy Responses: Changing the Model?

As the failures and frustrations surrounding Title IX have accumulated and garnered national attention, both the Obama and Trump administrations have been moved to publish new federal guidance on the issue. When Obama published the *Dear Colleague* letter in 2011, it was the first federal change to the law in a decade. In the seven years since then however, two subsequent issuances of guidance have been made. Although taking starkly different opinions on what aspects of Title IX require adjustment, both administrations have made a clear and direct effort to correct for injustices surrounding the law's application.

The Obama administration attempted to address the very concerns I raised above about the systematic inaction surrounding complaints of sexual violence, specifically publicizing the underreporting of assaults and the rarity of adjudications that result in sanctions for the perpetrator.¹⁵⁸ His administration's *It's On Us* campaign worked to generate national awareness about combatting sexual violence.¹⁵⁹ The *Dear Colleague Letter* sympathizes with survivors of assault, aiming to increase reporting, investigations, and responsible findings by requiring a lower standard of evidence in campus adjudications, making appeals accessible to reporting parties, and ensuring that complainants bear a minimal burden in the implementation of interim measures.¹⁶⁰ This administration also worked to establish compliance with these measures, increasing the number of Title IX investigations into potentially non-complaint universities three-fold between 2014 and 2016.¹⁶¹

¹⁵⁸ Somanader.

¹⁵⁹ "It's On Us," Civic Nation, <http://www.itsonus.org/>.

¹⁶⁰ Ali, 10-12, 15-16.

¹⁶¹ Lieberwitz et al., 80.

These changes were overturned by the Department of Education in 2017 under DeVos's authority however. The Trump administration's *Q&A on Campus Sexual Misconduct* was a first attempt in an unfinished project to correct for the violation of the rights of respondents. DeVos allowed schools to once again raise the standard of evidence they use, granted greater access for responding parties to appeal, and encouraged sympathetic consideration for the effects of sanctioning on the education of responsible parties.¹⁶² This is a step backwards for the survivor movement because it will make responsible findings harder to come by. However, by directly reversing the mandates of the Obama administration, DeVos's *Q&A on Campus Sexual Misconduct* has served to center national debate around this relatively narrow set of policies, without actually altering the vast majority of the law's mandates.

Despite the immense amount of controversy surrounding the federal guidelines issued by both administrations, neither radically changes the existing model schools use to address sexual assault. The Obama administration's 2011 *Dear Colleague Letter* attempted to make the existing model for Title IX more accessible and effective for survivors. It did not actually change the system for investigating complaints of sexual violence, which I have argued is not merely in need of adjustment but greater structural changes. Obama-era guidance does not fundamentally alter the dynamics between reporting and responding parties or between students and the administration. The *Dear Colleague Letter* accepts that the university should remain the authority on instances of sexual violence without assessing its motivations to contain and cover up the problem at hand. It takes the

¹⁶² "Q&A on Campus Sexual Misconduct," 5-7.

adversarial conflict between victim and accused for granted and in fact precludes alternatives to the hearing process such as mediation.¹⁶³ The *Dear Colleague Letter* and the greater debate surrounding its revocation by DeVos draw attention to the details of individual cases, rather than addressing areas for systematic change.

The focus of policy on the adjudication process has ultimately distracted from a greatly needed conversation about the fulfillment of a woman's right to an education free from harm. The original purpose of Title IX as a civil rights law has been misplaced in confining debate about campus assault to an adversarial process that directly, and problematically, mirrors the criminal justice system. I argue for a renewed commitment to the potential Title IX offers as a civil rights law for thinking about campus assault in alternative ways that ultimately emphasize accountability and remedy over adversarial confrontation and retribution. To approach this issue in a new light, I must first reevaluate how sex, sexual violence, and justice have been conceptualized on college campuses. In the next chapter, I take on this task, working to identify what assumptions current policy rests on in hope of understanding what changes to campus policy and culture must be made to better meet the needs of both survivors and perpetrators.

¹⁶³ Ali, 8.

Chapter Three:

Legislating Campus Sex

“If the construction of solutions diverts attention away from understanding the complexity of campus sexual violence, then incidence of sexual violence will not be reduced.”¹⁶⁴

Current federal guidance on Title IX mandates colleges create grievance procedures for addressing particular cases of sexual violence, in addition to confronting the effects that sexual violence has on the community. A consideration for the environment in which sexual harassment and assault occur rests at the core of Title IX, dating back to *Alexander v. Yale* (1980), which successfully established that sexual harassment interferes with a student’s rightful access to their education.¹⁶⁵ Title IX guidance has consistently defined a hostile environment as one in which harassing conduct is “sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from an education program or activity.”¹⁶⁶ Although it has now been overturned under DeVos’s authority, the Obama administration’s 2011 guidance held that “the more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment” and established that “a single instance of rape is sufficiently severe to create a hostile environment.”¹⁶⁷ While technicalities regarding liability may waver, the responsibility universities have to address the culture in which sexual violence occurs is fundamental to the protection Title IX offers as a civil rights law. In this chapter I assess the campus sexual culture that Title IX has fostered, exploring whether the law has indeed dismantled the hostile

¹⁶⁴ Iverson, 16.

¹⁶⁵ Brodsky and Deutsch, 136-37.

¹⁶⁶ "Sexual Harassment Guidance 1997," ed. Department of Education Office for Civil Rights (1997). "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties."

¹⁶⁷ Ali, 3.

environment created by sexual assault and the extent to which it enables or limits students' right to an education free from violence.

I expand my scope from the previous chapter, which delineated how the adjudication process directly addresses campus sexual violence, now looking to understand the greater framework in which campus policy is situated. To build upon my argument in Chapter Two, which held that the current model for resolving sexual violence cases has proven ineffective in providing remedy, I must delve deeper into the ways in which university policy affects the campus culture, as well as how the university conceptualizes consensual and violent campus sex, as this framing influences its modes of intervention. The conceptual underpinnings of a college's policy deeply influence its effectiveness, having the potential to make strides in combatting rape culture or sidestep fundamental dynamics of the issue.¹⁶⁸ I believe that issues with Title IX extend beyond debates over standards of evidence, investigative timeframes, and appeals processes. To recenter the purpose of Title IX policy on support and remedy, I must first fully deconstruct the current policy model, which includes understanding the norms and assumptions it rests upon to identify the potential sources of its failure and propose pathways for change.

Campus policy must define what acts constitute sexual violence, which requires delineating what a consensual sexual encounter consists of in relation. Defining consent and violence in policy has implications beyond judging a sexual act in itself, requiring further consideration about how consent should be communicated, what harm sexual violence causes individuals and the community, and how to resolve

¹⁶⁸ Iverson.

this conflict. In this chapter, I hope to address each of these dynamics by employing radical, liberal, and intersectional feminist perspectives to reveal and critique the larger framework that campus policy is both situated within and affects. My analysis will address the policy and culture that governs students' engagement in consensual and nonconsensual sex and that dictates their interaction with the university when they have in fact been harmed. I will first explore the range of frameworks that can be used to theorize about consensual sex and sexual violence, establishing the malleability of these concepts. This will lead me to discuss specific institutional responses for legislating consent and sexual violence. I compare 'No Means No' versus 'Yes Means Yes' models for consent policy and then move to examine sexual assault adjudications. I contextualize both analyses within feminist discourse that will help me to critically evaluate the effects of such policy on the campus culture. Ultimately, I conclude that the current model for legislating consensual and violent sex serves to perpetuate rather than remedy a hostile campus environment. This realization enables me to posit new avenues for fostering a more respectful and empowering sexual culture, which I believe requires breaking with traditional models that individualize sexual engagement and violation to consider strategies for creating more sustainable cultural change on campus.

Theorizing on Consent and Sexual Violence

Sexual violence may be fundamentally defined as sex without consent, but this notion is ripe with greater assumptions about the boundaries of consensual sex,

the context in which sexual violence can take place, and the identity and status of its victims and perpetrators. In this section, I lay out the fundamental questions raised in legislating sexual violence and the potential implications this holds for all members of a sexual community, and for survivors and perpetrators of sexual violence in particular. Throughout the chapter, I return to two recurring themes: (I) Consent and (II) Sexual Violence. Using this format throughout the chapter will enable me to address the specific discourse that surrounds each subject as well as to draw critical connections between the ways both consent and sexual violence policy influence campus regulations and culture. Here, I work to demonstrate the various historical, cultural, and legal constructions of both consent and sexual violence and the challenges posed in institutionalizing definitions for such intricate concepts.

I. Consent

Adjudications of sexual violence cases have come to rest on the question: was there consent? Answering this question first requires grappling with a host of others. How is consent communicated? Is it through verbal affirmation, a lack of resistance, a nod? Must consent always look or sound the same? When must consent be established? Do you have to consent to a first kiss, to sexual intercourse, or continuously throughout a sexual encounter? How do you know you have consent? Does engaging in one sexual activity lead to another, do you have to ask outright, or can you assume what your partner wants?

There is no universally recognized signal of consent and thus creating legislation to define it involves making a series of important choices. These questions are

intertwined and answering one impacts the potential answer to another. A larger framework of consensual sexuality emerges as each is addressed. I will draw out two critical dynamics at stake in formulating a policy on consent: how consent should be communicated and how it is interpreted.

Efforts to communicate consent can be broadly characterized as attitudinal or performative.¹⁶⁹ Attitudinal expressions of consent are defined by a mental state of willingness. Such implicit communication of consent is widely practiced and has traditionally been considered acceptable. Many people feel it is unnecessary to say yes or no outright, believing they can infer what their partner wants. The potential ambiguity in such an exchange, however, has become a site of concern. Many feminists are troubled by the fact that, under an attitudinal model, a mere lack of resistance may seem to qualify as consent. Perpetrators of sexual violence commonly claim sex was consensual on the basis of their personal perception of willingness, given the way a woman was dressed or her engagement in other forms of sexual activity.

Feminists have thus rejected attitudinal conceptions of consent and instead advocated for a performative model, which requires explicit verbal or physical affirmation. Performative expressions of consent can include saying yes or nodding. This approach seeks to avoid any need to make assumptions about another person's emotional state and prevent miscommunication at all costs. Unlike with an attitudinal approach to consent, under a performative model silence alone cannot be interpreted as affirmation. In the case of an assault, it necessitates that the alleged perpetrator

¹⁶⁹ Rebecca Whisnant, "Feminist Perspectives on Rape," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (<https://plato.stanford.edu/archives/fall2017/entries/feminism-rape/>; Metaphysics Research Lab, Stanford University, 2017).

indicate exactly what their partner said or did to indicate their consent.¹⁷⁰ The concept of performative consent has faced ridicule since the first attempt to institute it formally in Antioch College's policy in 1993, which required that students receive verbal consent for every sexual act. The college policy was parodied on *Saturday Night Live* and harshly critiqued by an article in *The New York Times* for its unrealistic attempt at 'legislating kisses.'¹⁷¹

The question of *mens rea*—a guilty mind—is also pertinent in constructing policy on consent. The most conservative argument on the issue holds that a perpetrator must believe they are violating another's consent.¹⁷² In stark contrast, some feminists have argued that crimes of sexual violence should not have a *mens rea* requirement, citing the systematic neglect, devaluation, and misinterpretation of women's desires at the hands of men.¹⁷³ Relative moderates argue consent should be interpreted according to a standard of 'reasonable belief,' although there is further disagreement about what constitutes reasonableness, circling back to questions discussed in the previous paragraphs about how consent is communicated in the first place.¹⁷⁴ I turn now to discuss conceptions of sexual violence, which will further demonstrate the stakes of this conversation by delineating the culturally and historically malleable conditions that have defined the violation of consent.

¹⁷⁰ Ibid.

¹⁷¹ "'Ask First' at Antioch," *The New York Times* 1993.

¹⁷² Whisnant.

¹⁷³ Catherine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge MA: Harvard University Press, 1989), 180-81.

¹⁷⁴ Douglas Husak and George Thomas, "Date Rape, Social Convention, and Reasonable Mistakes," *Law and Philosophy* 11, no. 1 (1992). Cited by Whisnant.

II. Sexual Violence

Campus policy on sexual violence employs one particular conceptualization of victims, harm, criminality, and the environment in which sexual violence occurs. Ideas about the occurrence and harm of sexual violence have shifted significantly throughout history, and even during the past few decades. For instance, female slaves were never considered rape victims because their bodies were conceived as the property of their owners, laws across state lines still vary on the age that constitutes statutory rape, and marital rape was not federally criminalized until 1993. More colloquially, claims of sexual assault and harassment are frequently denied and contested. Disagreement about what counts as sexual violence is influenced not only by competing perceptions of when a line is crossed, but also by identity politics.

Age, ability, sexual orientation, gender, and race all deeply influence how sexual assault is defined and criminalized. Black victims of sexual assault suffer from doubt and disbelief, stemming from a long history of the hypersexualization and violation of black women. The role of the tragic rape victim has long been rooted in conceptions of white womanhood as innocent and in need of protection.¹⁷⁵ Black men have been historically criminalized and killed on the basis of false accusations of assaults on white women.¹⁷⁶ Queer and trans men have similarly suffered from false accusations and greater scrutiny under the punitive state. Although homosexuality is no longer criminalized, cultural anxiety surrounding queerness has not dissipated.

¹⁷⁵ Jessica C. Harris, "Centering Women of Color in the Discourse on Sexual Violence on College Campuses," in *Intersections of Identity and Sexual Violence on Campus: Centering Minoritized Students' Experiences*, ed. Jessica C. Harris and Chris Linder (Sterling, Virginia: Stylus Publishing, 2017), 49-50.

¹⁷⁶ Chris Linder, "Reexamining Our Roots: A History of Racism and Antirape Activism," *ibid.*, 62-64, 67.

Gay men are subject to accusations of pedophilia and trans men too continue to generate fear of sexual abuse as is seen in debates about gender-segregated bathrooms.¹⁷⁷ At the same time, queer and trans people have been marginalized in narratives of victimhood within discourse on sexual violence.¹⁷⁸

Feminists have led the movement to draw attention to the frequency and harms of sexual violence and to establish how it should be handled in communities and courts of law. They have worked to dispel persistent myths that women most often experience assault at the hand of strangers, when in fact most victims know their perpetrators.¹⁷⁹ Feminists have also worked to shift blame away from victims and onto perpetrators and to create policies that account for the effects of trauma. These efforts have required debunking the conservative theory of rape, which identifies the crime as a violation of a man's property and thus places partial blame on the victim for being unchaste.¹⁸⁰

Yet even among feminist thinkers and activists there are multiple and conflicting approaches to this issue. A radical feminist argument works to draw attention to the fundamentally gendered nature of sexual violence. To this end, radical feminists construct women as a class victimized by this crime and define all men as potential perpetrators, problematizing the power dynamics in normative sexual interactions between men and women. Their conception of 'women' as a class has

¹⁷⁷ Roger N. Lancaster, *Sex Panic and the Punitive State* (Berkeley, Los Angeles, London: University of California Press, 2011), 112-15.

¹⁷⁸ Daniel Tillapaugh, "'The Wounds of Our Experience': College Men Who Experienced Sexual Violence," in *Intersections of Identity and Sexual Violence on Campus: Centering Minoritized Students' Experiences*, ed. Jessica C. Harris and Chris Linder (Sterling, VA: Stylus Publishing, 2017).

¹⁷⁹ 70% of victims know their perpetrator. Cited in "Perpetrators of Sexual Violence: Statistics," RAINN, <https://www.rainn.org/statistics/perpetrators-sexual-violence>.

¹⁸⁰ Keith Burgess-Jackson, *Rape: A Philosophical Investigation* (Aldershot, England: Dartmouth Publishing Company Limited, 1996), 44-45, 47.

historically universalized the experiences of white women, however, and disregarded the unique challenges women of color face as victims of sexual violence. For instance, women of color themselves may be more hesitant to seek help from the law, wanting to protect their own communities from the racial brutality of the police and criminal justice system. In working to institute the Violence Against Women Act, for example, radical feminists expressly ignored this challenge for women of color and furthermore, drew on cultural narratives of black male criminality to gain support for the act, which required the arrest of domestic abusers.¹⁸¹

Liberal feminists on the other hand, attempt to turn completely away from the identity politics of race and even gender by equating sexual assault with any other form of crime or harm. Whether this is done in ignorance or in an effort to foster a more inclusive understanding of sexual violence, in practice it can lead to the erasure of critical power dynamics. Intersectional feminists reclaim the important role of identity in characterizing victims and perpetrators and have specifically worked to correct for the race-blind (read: exclusionary) approach of both radical and liberal feminists. An intersectional framework for sexual violence takes into account the added difficulties women of color confront in reporting crimes of sexual violence and the risk men of color face of being falsely accused.

Each of these feminist perspectives provides a distinct framework for considering the identities and relations between victims and perpetrators of sexual assault. Comparing these models helps to highlight the stakes of implementing a concrete definition or educational approach to sexual violence in campus policy. Even

¹⁸¹ Donna Coker, "Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review," *Buffalo Criminal Law Review* 4 (2001).

well intentioned work to protect women on campus, be inclusive to a greater diversity of victims, or legitimize instances of sexual violence by implementing an institutional response can serve to perpetuate problematic and exclusionary historical and cultural trends. Intersectional feminists give particular attention to these dynamics and to the ways in which the experiences of victims and accused perpetrators of sexual violence cannot be suppressed by reductive policy. For this reason, I will embrace an intersectional feminist framework in my analysis of campus policy and my exploration of alternative solutions for providing remedy and support to victims throughout this chapter and the remainder of this thesis.

Defining sexual violence in policy requires grappling with a series of complex questions from how consent is communicated and interpreted to what specific instances and individuals sexual violence concerns. In this section, I discussed the intricacy of pinpointing what consent looks like or sounds like given that is there simply no one universal signal. Courts of law and campus adjudications have nonetheless centered cases of sexual violence on determining whether consent was granted in a sexual interaction. I delineated the differences between attitudinal and performative models of consent, the implications of which will become more concrete in the next section when I discuss the logics behind ‘No Means No’ versus ‘Yes Means Yes’ models for consent policy. Questions of consent do not stand alone however, but go hand in hand with definitions of sexual violence. I worked to demonstrate the malleability of both concepts, which have shifted historically and still

exist as site of heated debate. While feminists have disagreed on how to best address questions of consent and instances of sexual violence, radical, liberal, and intersectional feminist perspectives can be used together to develop an understanding of how campus policy conceptualizes these issues and its effects on the campus environment. In the next section, I build upon the theories of consent and sexual violence I have discussed to trace their differential influence on campus consent policy and adjudications.

Contextualizing Campus Policy

Models for consent and sexual assault adjudications on campus have honed in on the personal interaction between sexual partners and specifically upon the contractual agreement they make before engaging in sexual activity. In this section, I analyze the nature of this agreement, seeking to understand the positionality and power dynamics campus policy on consent and sexual violence assumes and in turn, fosters between sexual partners, and survivors and perpetrators of sexual assault in particular. I compare two prevalent approaches to consent policy, ‘No Means No’ and ‘Yes Means Yes,’ and then turn to explore how these affect conceptions of victimhood and responsibility in policy on sexual violence. By situating this analysis within the context of theories on consent and violence, I can investigate more deeply what relational norms campus policy relies upon. I aim to demonstrate the ways in which policy itself, not merely occurrences of sexual violence, has the power to impact the campus environment. By the end of this section, I believe a stronger sense

of the ways in which campus policy attempts to—yet ultimately falls short of—dismantling the hostile environment created by sexual violence will begin to emerge.

I. Consent

Legislation on sexual violence has long centered on questions of consent, but there is a critical difference between defining policy by non-consent versus affirmative consent. Traditionally, laws defining sexual violence have required victims to prove non-consent through force and a lack of will. This definition of rape dates back to William Blackstone's *Commentaries on the Laws of England*, a 1769 treatise with great influence on English and American rape law.¹⁸² In defining rape as an act "forcibly and against her will," Blackstone set a precedent that the violence of rape must be resisted.¹⁸³ Of course, Blackstone's already high standard of proof was still completely inapplicable to large swaths of the population such as black slaves or married women as they were considered 'unrapeable.' While policy has been altered since Blackstone's time, contemporary rape law still abides by the standard of non-consent and requires proof of a victim's 'reasonable resistance' to qualify as a felony.¹⁸⁴ Under this standard, it remains exceedingly difficult for women to have a sexual assault case prosecuted, let alone result in a guilty finding,¹⁸⁵ and still today

¹⁸² William Blackstone, 4 *Commentaries*. Cited in Michelle J. Anderson, "Negotiating Sex," *Southern California Law Review* 78, no. 6 (2005): 1403.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ Out of every 1,000 rapes, only 310 are reported to the police, 57 lead to arrest, 11 are referred to prosecutors, and 7 will result in a felony conviction. Cited in "The Criminal Justice System: Statistics," RAINN, <https://www.rainn.org/statistics/criminal-justice-system>.

women of color face a greater challenge to have claims of sexual violence believed and acted upon by authorities.¹⁸⁶

Campus policy on sexual violence also came to be defined by the logic of non-consent in adopting the ‘No Means No’ model. A ‘No Means No’ policy defines sexual violence as occurring when consent is withdrawn from a sexual encounter. It does not require that a victim physically resist, but it does necessitate the performative withdrawal of consent from a sexual interaction to qualify an act as rape. This model attempts to create a clear standard by which to measure a perpetrator’s *mens rea*, yet in practice it does more to establish a code of conduct that a victim must follow.¹⁸⁷ Instead of requiring an alleged perpetrator of assault to prove consent was granted, this model requires proof from the victim that consent was withdrawn. A victim’s narrative, without evidence of resistance, is permeated by inherent doubt.

‘No Means No’ was nevertheless a popular slogan in feminist anti-rape campaigns of the 1980s and ‘90s. Feminists attempted to use this approach to grant greater legitimacy to a victim’s word. The sentiment of ‘No Means No’ drives home the idea that the withdrawal of consent must be taken seriously. It resists the requirement that rape must be physically forced, instead defining acts of sexual violence by a disregard for a victim’s will. This standard works to rebuke the underlying assumption that a victim’s non-consent is insufficient.

Radical feminists have critiqued the conventional two-fold requirement of force and non-consent, believing it is redundant and serves to erode women’s

¹⁸⁶ Estelle Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Cambridge, Massachusetts: Harvard University Press, 2013), 11.

¹⁸⁷ Anderson, 1414.

autonomy. Dworkin argues it is the formal instantiation of the masculinist assumption that “a woman can never be raped against her will” for “if she does not want to be raped, she does not know her will.”¹⁸⁸ ‘No Means No’ is an early attempt to break with the traditional model and to challenge the idea that a woman’s word alone is adequate in establishing that a sexual violation occurred.

The model has several critical shortcomings. In practice, it does not realistically consider the implications of trauma on consent. Trauma commonly causes victims to freeze, rather than to actively resist.¹⁸⁹ Under the ‘No Means No’ model, a victim unable to resist or even say no because of their response to trauma, has technically consented.¹⁹⁰ Victims in this circumstance lose their credibility for a reason out of their control, leading to self-blame on the part of the victim and the diffusion of responsibility away from the perpetrator. Moreover, this approach perpetuates the assumption that consent is the default state of a sexual interaction. It upholds the idea that sexual activity is permitted until the moment consent is explicitly withdrawn.

The shift from the ‘No Means No’ model of consent to ‘Yes Means Yes’ has been driven by the desire to correct this fundamental problem. In name alone, the ‘Yes Means Yes’ initiative is a reversal of the logic of its predecessor. The ‘Yes Means Yes’ model requires evidence that consent was granted, rather than withdrawn. It is referred to as an affirmative consent standard because it rests on the indication of willingness to engage in sexual activity. Feminists campaigned for the

¹⁸⁸ Andrea Dworkin, *Our Blood: Prophecies and Discourses on Sexual Politics* (New York: Perigee Books, 1976), 30.

¹⁸⁹ Anderson, 1402, 05.

¹⁹⁰ *Ibid.*, 1405.

change to ‘Yes Means Yes’ in hope of defining sexual encounters according to women’s willingness rather than resistance.

‘Yes Means Yes’ alters conceptions of *mens rea* as well by requiring that a sexual partner know they were granted consent before engaging in further activity. Under this model, a guilty mind is one that did not obtain consent and proceeded without it. This standard expands the scope of *mens rea* beyond circumstances in which consent was explicitly withdrawn, now including as rape situations in which consent was not given.¹⁹¹ Under this model, silence can no longer be interpreted as consent. Whereas under ‘No Means No’ consent is assumed to be present until it is withdrawn, with ‘Yes Means Yes,’ the default state of a sexual encounter is defined by the absence of consent.¹⁹²

The ‘Yes Means Yes’ model is championed by campus activists across the country who have employed slogans such as ‘consent is sexy.’ This phrase works to establish consent as more than just necessary under the law, but critical to any enjoyable sexual encounter. It rejects claims that affirmative consent is unrealistic, which have persisted since criticism of Antioch’s 1993 ‘Ask First’ policy. While federal Title IX guidance does not mandate an affirmative standard of consent, state legislatures in California, Illinois, Connecticut, and New York have required that college campuses enact affirmative consent policy.¹⁹³ Supporters of this model frame affirmative consent as a step to enhance a sexual experience, rather than as something that will detract from it, as critics have argued.

¹⁹¹ Ibid., 1414.

¹⁹² Ibid., 1404-05.

¹⁹³ "50 States of Consent," Affirmative Consent and Respect <http://affirmativeconsent.com/affirmative-consent-laws-state-by-state/>.

While a significant improvement from the logic of ‘No Means No,’ affirmative consent policy is not without limitations. Although the ‘Yes Means Yes’ model does not accept silence as a form of consent, its proponents generally support both attitudinal and performative indicators of consent as valid. State legislation enacted thus far defines affirmative consent as “voluntary, affirmative, and conscious,” yet nonverbal cues are accepted to be equally legitimate as verbal affirmations of consent.¹⁹⁴ As I discussed earlier, feminists have problematized the ambiguity inherent in attitudinal expressions of consent because it enables the prevalent and systematic misinterpretation of women’s behavior as sexual by men.¹⁹⁵ This is a significant limitation of the ‘Yes Means Yes’ model insofar as it contradicts its initial purpose in establishing a clear affirmation to sexual activity. To the extent that attitudinal ambiguity is permitted, once a sexual encounter advances silence regains legitimacy as an expression of consent. If consent has been granted to one form of sexual activity, silence may appear as willingness to continue, thus essentially undermining a primary tenet of this approach and falling back on the norms of the ‘No Means No’ model.¹⁹⁶

In attempting to draw greater attention to affirmative expressions of consent, the ‘Yes Means Yes’ model falls short of establishing a clear standard of willingness. Moreover, in its attempt to focus on one partner’s permission to engage in sexual activity, the behavior of the sexual initiator is disregarded. While affirmative consent policy does create a wider framework of accountability for violations of consent,

¹⁹⁴ “‘Yes Means Yes’ & Affirmative Consent,” End Rape on Campus <http://endrapeoncampus.org/yes-means-yes/>.

¹⁹⁵ MacKinnon, 180-81.

¹⁹⁶ Anderson, 1405.

sexual assault remains defined by the actions of the victim rather than the perpetrator. ‘Yes Means Yes’ requires that consent is granted, but does not specify that consent be asked for. The actions and words of a perpetrator of sexual violence are rendered invisible under this model as they are by ‘No Means No’ policy.¹⁹⁷ ‘Yes Means Yes’ attempted to correct for the flaws ‘No Means No,’ yet it remains aligned with its predecessor’s logic in problematic ways. Each model ultimately fails to define consent in a manner that guarantees a legal standard of respect for each partner’s autonomy and holds perpetrators fully accountable.¹⁹⁸

It is necessary to address definitions of consent on college campuses because this rests at the crux of investigations and adjudications of sexual violence. ‘Yes Means Yes’ and ‘No Means No’ models do not only provide a formal definition of consent, but serve to create an implicit code of conduct for all sexual encounters on campus. Although policy alone cannot be expected to ensure a respectful and sex positive sexual culture, it does create a concrete framework with the potential to encourage or limit a healthy sexual environment. The questions I have drawn out regarding sexual autonomy, the behavior of perpetrators, and attitudinal versus performative expressions of willingness are relevant beyond formal adjudications of assault. Title IX policy explicitly recognizes the fact that instances of sexual violence and campus policy impact the greater campus environment. Deconstructing ‘No Means No’ and ‘Yes Means Yes’ models of consent has helped to identify the wide reaching stakes of campus policy and to highlight the fact that both models ultimately rest on problematic assumptions, which foster a campus environment that is hostile to

¹⁹⁷ Ibid., 1414.

¹⁹⁸ Ibid.

survivors. I continue this discussion in the next part of this section as I assess the ways models of consent influence conceptions of fault and harm in instances of sexual violence, before addressing the effects such policy on the campus environment more directly.

II. Sexual Violence

Title IX was formatively shaped by a radical feminist framework, which views sexual violence as a crime against women as a class. This approach is responsible for establishing campus assault as a civil rights issue that the university is accountable for preventing. This perspective on sexual violence did more than create institutional liability however. It affected the larger campus environment and student body by framing all female students as potential victims of sexual assault and all men as potential perpetrators.¹⁹⁹

The radical feminist agenda can be understood as a direct response to a traditional conservative framework, traces of which still remain in the adjudication process. The conservative theory of sexual violence conceives the harm of rape as affecting a male patriarch. It thus holds rape victims as partially to blame for their assault by accusing them of infidelity or at least immodestly. She must have been misleading or irresponsible; she cannot be fully innocent.²⁰⁰ Pervasive victim blaming even today is reflective of the legacy of this framework. Victims continue to be treated as though they themselves are on trial. Campus ‘No Mean No’ and ‘Yes Means Yes’ policy actually enable questioning of a victim’s role in her own assault

¹⁹⁹ Sloan and Fisher.

²⁰⁰ Burgess-Jackson, 44-45, 47.

by focusing the ways in which her actions indicated that consent was given or withdrawn instead of emphasizing the behavior of the accused perpetrator.

By analyzing the roots of current policy through these frameworks, their wide range of effects on the campus environment begin to crystalize. The conservative framework casts inherent doubt upon victims' innocence, redirecting attention away from the actions and responsibility of accused perpetrators. Adversarial adjudication systems as well as both 'No' and 'Yes' models of consent can be seen to perpetuate the logic of the conservative framework in campus policy today. This effects the relations between complainants and the university by fostering undue hostility towards survivors. It also perpetuates the idea that sexual assault stems from a failure to negotiate between survivors and perpetrators rather than clearly framing the conflict as one between the respondent and the university.²⁰¹

Although the radical feminist approach to campus policy worked to correct for this patriarchal framing, it is accompanied by its own set of issues for the campus environment. Framing sexual violence as a civil rights issue was an attempt to acknowledge the power dynamics between men and women. Yet in seeking legitimacy through an institutionalized response and ultimately mimicking criminal courts through the establishment of an adversarial adjudication process, the radical feminist agenda failed to achieve its goal, allowing problematic elements of the conservative framework to persist. This framework affects the campus culture even more broadly however. By explicitly categorizing sexual violence as a crime committed by men against women (read: white women) as a class, the experiences of women of color as well as lesbian, male, trans, and gender non-conforming victims

²⁰¹ Doyle, 39.

are excluded. In essentializing the gender of victims and perpetrators, radical feminists detract from the legitimacy of a diversity of experiences with sexual assault, which may make many students who do not identify with this narrative hesitant to report their violation to the university.

Beyond dictating students' interaction with the university, I argue this framing of sexual violence impacts the nature of consensual sexual interactions between students on campus. On the one hand, non-female and queer identifying students may not feel welcomed in identifying themselves as survivors or their experiences with non-consensual sex as assault. On the other hand, insofar as heterosexual women are constructed as the ideal victims of male violence, these students are positioned to be potentially at risk of being assaulted in every sexual encounter. Heterosexual women and men are thus always conceived as potential victims and perpetrators within this framework. In the next section, I argue this dynamic factors heavily in creating a hostile environment for all students.

Recently, many universities have adopted a liberal feminist approach to sexual violence, working to combat the inherently exclusionary narrative established by a radical feminist perspective. The liberal approach frames sexual violence as a conflict between two reasonable autonomous people, one whose consent was violated and the other who knowingly did so.²⁰² It takes an explicitly gender-neutral perspective on sexual violence in an attempt to expand the definition of sexual assault and reach as many victims as possible, working to include the LGBTQ community in particular. Although I just argued for the importance of dismantling the heterosexism and

²⁰² Burgess-Jackson, 49-51.

essentialization of gender in campus policy, unfortunately the liberal feminist approach does so by problematically erasing relevant power dynamics.

In focusing on the fact that sexual violence can happen between any two people, this approach individualizes instances of assault to the point where this issue becomes removed from critical social and cultural context. It is insufficient to include LGBTQ people in a framework of sexual violence that does not consider the fact that assault is often perpetrated as a hate crime against members of this community. Ignoring gender inequalities between men and women in the name of including LGBTQ people similarly fails to do justice to this issue. Rather than dealing with the problems underlying sexual violence and the corresponding need for the university to respond to systemic inequalities, these dynamics are rendered invisible by the individualized framework of the liberal model.²⁰³ Here again, the affects of campus policy are seen to extend beyond formal investigations and shown to implicate the very perception of sexual assault and the identity of and relationship between its victims and perpetrators. In the next section, I build upon the particular ways these dynamics contribute to a hostile campus environment, ultimately arguing for the embrace of an intersectional framework for conceptualizing and addressing campus assault.

Policy on consent and sexual violence has greater implications than defining instances of violation and governing adjudications. By contextualizing such policy within a wider theoretical framework, their effects on the relations among students

²⁰³ Linder, 73.

and between students and the university have become apparent. With regards to consent policy, I discussed the shift from a ‘No Means No’ to a ‘Yes Means Yes’ model, which shifted the default state of a sexual interaction from one in which consent is present to a framework in which consent must be established. The effects of this change are significant to the way violations of consent are defined and to conceptions of *mens rea*. I ultimately argued however, that both models are similarly flawed in focusing attention on the communication of the potential victim rather than on the actions of the potential perpetrator and his responsibilities in initiating communication regarding consent.

This serves to uphold a conservative model of sexual violence that places blame upon victims. Adversarial campus adjudications continue to center upon questions surrounding victims’ behavior and mischaracterize instances of assault as resulting from a failure to negotiate.²⁰⁴ Efforts to correct for these pitfalls by radical feminists have attempted to highlight gendered power dynamics, while liberal feminists have worked to frame sexual violence as a gender-neutral issue. While demonstrating the critical implications of these feminist perspectives on experiences of victimhood in particular, I argue both frameworks fall short of adequately addressing the problem at hand.

Throughout the entire section, I worked to draw attention to the ways in which policy widely affects the relations and environment on campus. This analysis has already begun to suggest that these implications are often negative. In the following section, I advance this argument by returning to these policy models of consent and

²⁰⁴ Doyle, 39.

sexual violence to analyze the specific ways they contribute to a hostile environment for women and victims of sexual violence on campus.

Critiquing a Hostile Environment

Title IX not only acknowledges that sexual violence can create a hostile environment on campus but mandates the university to dismantle this environment. I have used this chapter thus far to establish the ways in which university intervention itself serves to impact the campus culture. Here, I argue that despite being tasked with eliminating the hostile environment caused by sexual violence, in many ways university policy has perpetuated this. I build upon my analysis of ‘No Means No’ and ‘Yes Means Yes’ models of consent and sexual violence policy to evaluate the problematic and imbalanced power relations they foster amongst students and the university, and their negative impact on women and survivors of assault in particular. By addressing the code of conduct that governs consensual relationships between students as well as the dynamic created between students and the university when a violation does occur, I examine the full spectrum of ways that a hostile environment is maintained. This work will allow me to identify the source of inherent issues with Title IX’s approach to sexual violence and better grasp the stakes of resolving this issue. This sets me up to explore alternative approaches for upholding a safe and supportive environment for students in the final section of this chapter.

I. Consent

A fundamental similarity between the ‘Yes Means Yes’ and ‘No Means No’ model of consent policy is the distinction they maintain between partners in a sexual interaction; one initiates and the other responds, either with consent or refusal. The initiator is the potential perpetrator of sexual violence and the responding partner, their potential victim. This is a deeply gendered, racialized, and heterosexist construction of sexuality. It is based upon conceptions of men as eager, impatient, and even aggressive in their pursuit of sex and women (read: white women) as coy and innocent, yet potentially desiring if given encouragement. A man initiates; a woman acquiesces. To the extent that women of color are discriminately perceived as hypersexual, their desires are at an even greater risk of routine neglect. Lois Pineau calls this the ‘aggressive-contractual model’ of sexuality.²⁰⁵ It assumes sex is heterosexual, essentializes constructed gender norms as natural, and universalizes the positionality of white women. I argue that this model of sexuality is not only exclusionary and limiting but has the potential to cause direct harm.

This model is reliant upon women’s performative reticence to be sexual – she must be prompted to engage in sex. Her response, to either agree or disagree to have sex, holds different meaning under a ‘No Means No’ or ‘Yes Means Yes’ policy, but in both cases her role consists merely of a reaction to the initiator. This perpetuates and contributes to the myth that women cannot be forward about their sexual desires, but want sex nonetheless. Performative consent is reduced to a formality. Men fall into the roll of propositioning women to express their—already assumed—willingness as consent. Women lose their autonomy to drive a sexual interaction and

²⁰⁵ Lois Pineau, "Date Rape: A Feminist Analysis," *Law and Philosophy* 8, no. 2 (1989).

are reduced to a relatively passive participant. Her desires can only be reflected in the initiator's, whose behaviors and requests define the interaction.

A lack of autonomy is inherent to this aggressive-contractual model at the heart of campus and legal policy. A sexual initiator's actions can become aggressive insofar as they have the power to ask for what they want, until they get the response they desire. The potential for coercion is thus introduced into every sexual interaction. The 'No Means No' model of sexuality is clearly based on the default attitudinal willingness of a woman, and while 'Yes Means Yes' is an attempt to remove this aspect of 'unrapeability,' insofar as it maintains the dynamic of a sexual initiator and respondent, it perpetuates and re-constructs an aggressive sexual ethics defined by male desire alone. The aggressive-contractual model of sexuality not only introduces the possibility of coercion, it undermines the validity and believability of women who claim their consent has been violated. To the extent that women are seen as always 'wanting it' and simply requiring a degree of convincing, statements claiming otherwise may seem doubtful. This is especially oppressive of women of color, whose perceived desire for sex is heightened, as is disbelief towards their claims of violation.

The 'No Means No' and 'Yes Means Yes' models of consent are thus inherently hostile in my opinion. To create a sexual ethic that is respectful and empowering towards women's desires, and thus to fulfill the Title IX obligation of dismantling a culture of harassment and assault, I believe campuses must abandon the aggressive-contractual model of sexuality. There must be a shift in the way sexual interactions and violations are framed. In the next section I argue that adjudications of

sexual assault should not rest only on the question of consent, but on whether there was active communication among partners. First however, I build upon this argument, further detailing the pervasive sense of risk, disbelief, and retaliation that stem from campus sexual violence policy

II. Sexual Violence

The way in which campus policy conceptualizes sexual violence does not only affect its mode of intervention but the way in which the problem is conceived and made visible in the wider campus community and culture. According to federal guidance, colleges must offer grievance procedures after an assault occurs in addition to instating preventative measure for educating their student bodies about avoiding, interrupting, and reporting risky situations.²⁰⁶ Yet an insightful analysis by Iverson of sexual assault policy on 22 campuses reveals that these programs and procedures take on the role of *responding* to sexual violence rather than actually working to *eliminate* it. Under such policy, sexual assault is established to be '*always already present*.'²⁰⁷ The administration frames itself as able to help prevent this crime, but expressly does not take responsibility for its existence, directly in contradiction to the purported intent of Title IX as a civil rights ordinance.

As I discussed in Chapter Two, under Title IX the college administration is established both as a risk-manager and at risk.²⁰⁸ As a risk-manager, the administration must address the risks its students face as a result of sexual violence through grievance procedures and prevention initiatives. Yet the university is also

²⁰⁶ Ali, 2,8,14.

²⁰⁷ Iverson, 24.

²⁰⁸ Ibid., 22.

itself at-risk, insofar as it must protect itself from complaints of being in violation of Title IX, as well as from other problems with its public relations that activism or lawsuits can cause. The university is thus motivated to distance itself from the root causes of sexual violence. It maintains that the campus is a safe place under its jurisdiction, yet holds it cannot control forces outside itself.

Constructing sexual violence as one such external force works to shift the risk away from the institution and onto students, and women in particular. Students must live in this environment, understood to be insolvably unsafe. Colleges protect their rights, but deem it impossible to actually protect students.²⁰⁹ They can educate them before an assault and address the harm caused after an assault occurs, but the university is ultimately not responsible for their students' safety. By creating this false dichotomy between a student's rights and their protection, the university guarantees a response to sexual violence but not a real solution. This strategy allows the university to distance itself from the issue in service of protecting its own image and avoiding a real sense of accountability. The university lowers its own risk in this way and increases that of its students. College students, and women in particular, must live in this conclusively hostile environment in which sexual violence is seen as inevitable.

Doyle imagines what potential exists for subverting this pervasive hostility and creating space for open and generous sexual experimentation. She posits how to account for the harm caused by sexual violence without creating a state of panic. Sexual coercion should not be normalized but it should also not define campus sexual ethics. Sexual awareness should allow for open communication and mutual respect

²⁰⁹ Doyle, 34.

rather than fostering a sense of risk and fear.²¹⁰ By normalizing ‘rape culture,’ the problem of sexual violence on campus has become impenetrable. Sexual violence has been reinscribed in a sexual culture rather than being challenged. This discourse has fostered complicity, fear, and hostility, rather than openness, support, and safety.²¹¹

This hostility is imbued in a campus sexual ethics in addition to affecting the relationship of survivors to the university. Insofar as women are marked as potential victims, they become a risk to the university. This risk is fully realized and must be managed by the institution when an assault is reported.²¹² The university retaliates against the victim because of the threat she poses through an adversarial adjudication that calls her own innocence into question. Her reliance on the university becomes warped by the administration’s incentive to protect its own interest over hers. The hostility of the campus culture emerges from the background, directly affecting her experience with the reporting and adjudication process.²¹³

Her healing process too is contained. The university is responsible for providing her with health services and counseling, but like the adjudication process, these remedies are shut off from the outside world. Victims become dependent on the university to name, validate, adjudicate, and support their experience. They are rendered passive and dependent in the face of the university’s overbearing process of protecting itself.²¹⁴ A survivor does not live in a supportive environment but, from the time she arrives on campus to when she reports a sexual assault, a deeply hostile one.

²¹⁰ Ibid.

²¹¹ Ibid., 63.

²¹² Ibid., 30.

²¹³ Ibid., 30, 33.

²¹⁴ Iverson, 22, 24-25.

Analyzing the effects of both consent policy and the university's response to sexual violence compounded in this section to demonstrate the university's failure to dismantle the hostile environment created by sexual violence, despite its obligation to do so under Title IX. In fact I argued that current policy models directly contribute to an environment that is hostile for women and survivors in particular. In analyzing the effects of both 'No Means No' and 'Yes Means Yes' policy I concluded that these models uphold an imbalanced power dynamic between sexual respondents and initiators that is based on essentialized gender roles, heteronormative relations, and the positionality of white women. In addition to perpetuating such problematic norms, I argue this model for sexuality introduces the potential for coercion into every sexual encounter, and puts women of color at a greater risk to the extent that they are culturally perceived as hypersexual and thus suffer from a greater disregard for their desires.

I identified even deeper roots to this issue in the university's framing of sexual violence in the campus environment. Although under Title IX, colleges are meant to address and work to prevent sexual violence, drawing on a study by Iverson, I argued that universities have in fact positioned themselves to respond to sexual violence without in fact taking really accountability for eliminating it.²¹⁵ This has served to further inscribe risk into all sexual encounters by accepting sexual violence as an inevitable fact of campus life. The need to protect itself has ultimately led the university to conceive survivors on campus as a risk that must be managed through bureaucratic systems that aim to shift blame and accountability away from the

²¹⁵ Ibid., 24.

institution and contain any fallout. In conclusion, I have argued that university policy is utterly failing to provide genuine remedy for the hostile environment created by sexual violence.

Avenues For Change

The recognition of the hostility caused to the campus culture and environment by university policy is disheartening, of course. From the outset of this chapter however, I have maintained that legislating consent and sexual violence revolve around a series of intricate questions and that university policy is only one particular manifestation of a wide number of possibilities for creating a sexual code of conduct. Here, I posit possibilities for shifting the current conceptions for establishing consent and redressing sexual violence upon which university policy is founded. In place of an aggressive-contractual model of consent, I argue in favor of Anderson's negotiation model that gives attention to active communication from all parties involved in a sexual encounter.²¹⁶ Regarding sexual assault policy, I turn to an intersectional feminist framework because I believe it attends to the complexity of sexual violence and its impact on the community through more effective and meaningful avenues than either radical or liberal feminist approaches. The purpose of this chapter was to identify the university's contribution to fostering or dismantling a hostile campus environment, not to identify an applicable solution to this problem. To this extent, these proposed changes remain suggestions for exploring new directions in the quest for remedy, rather than extensive policy guidelines. I do however

²¹⁶ Anderson.

dedicate the next chapter to reimagining Title IX's future and hope to develop more robust ideas for changing university policy and culture at that point.

I. Consent

'No Means No' and 'Yes Means Yes' policy rely upon an aggressive contractual-model of sexuality that measures consent according to one partner's response to another. Given the problematic norms this perpetuates and the potential for harm it inscribes in sexual interactions, I argue instead, to define sexual encounters by mutual communication. Pineau conceives a communicative model of sexual engagement to be in direct opposition to the aggressive-contractual model. This model redefines the ethical obligation of a sexual interaction; it is not to seek consent but rather to understand the desires of one's partner. Sexual engagement is not framed as a contract between an initiator and a responder but a conversation between two equal partners.²¹⁷

Pineau's communicative conception of sexuality can be expressed through a model of consent put forward by Anderson that rests on negotiation. Anderson's model does not hinge on the question of whether consent was granted or revoked, but whether an active effort was made by all participants in a sexual encounter to openly communicate and negotiate their desires with their partner. It requires not a yes or a no before a sexual act occurs, but a joint consultation. Agreement resulting from an active and open process of communication takes the place of the one-sided, ask-and-answer notion of consent.²¹⁸

²¹⁷ Pineau.

²¹⁸ Anderson.

Unlike the ‘Yes Means Yes’ model of consent, the negotiation model fundamentally shifts the underlying assumptions about a sexual encounter and constructs a more mutual, autonomous, and inclusive sexual ethics. The heterosexism and essentializing gender roles inherent in the aggressive-contractual model are lost in favor of an equal distribution of volition and autonomy among partners. It is for this reason, that I strongly urge a shift towards a negotiation model of consent. The difficult task of judging expressions of consent under a ‘Yes Means Yes’ model can be abandoned in favor of a sexual ethics grounded in the clarity of mutual agreement. I firmly believe that dismantling the hostile campus environment created by sexual assault and upheld by university policy requires reconsidering the stakes of consent in this light. It is only by giving attention to the social, cultural, and historical positionality of survivors of sexual assault—and women of color, queer and trans individuals in particular—that Title IX’s promise to dismantle the hostile environment created by sexual violence can be fulfilled. I expand on the ways in which I believe an intersectional feminist framework can be used to advance this project in the following discussion.

II. Sexual Violence

Danger and fear surrounding sexual violence have worked to control women—for instance, leading them not leave domestic spaces after dark²¹⁹—and have further marginalized possibilities for intimate encounters driven by sexual

²¹⁹ Esther Madriz, *Nothing Bad Happens to Good Girls* (Berkeley, Los Angeles, London: University of California Press, 1997), 10-16, 34-35.

freedom, positivity, desire, respect, and enthusiasm.²²⁰ While underrepresented in campus policy, I ultimately turn to an intersectional feminist framework for addressing the pervasive anxiety, unequal power dynamics, and hostility created by the current institutional response to assault. An intersectional perspective builds upon the strengths of the radical feminist model while avoiding its totalizing tendency to characterize all women and all men as alike, by giving attention to gendered and racial power dynamics, as well as to other systems of power. This framework adds nuance by considering differential experiences with sexual violence that result from various intersecting racial, gender, and sexual identities.

Women of color have led successful intersectional campaigns against sexual violence for over a century, a legacy that dates back to activism by Ida B. Wells, who worked to both amplify the voices of women of color who had been victims of assault and to protect men of color from false accusations. This focus on finding justice for both victims and accused perpetrators has not detracted from victim support but rather enabled women to speak up with less fear that they are contributing to an unjust system.²²¹ Contemporary intersectional campaigns such as the women of color collective, Communities Against Rape and Abuse (CARA), continue this project by locating resolutions for sexual violence with communities rather than between two isolated individuals or in bureaucratized, incarceration-oriented, and racist criminal justice systems.²²² By engaging communities in efforts to create accountability and enable processes of healing, restorative justice models proposed by organizations like CARA avoid the pitfalls of the current model for Title IX, which is defined by

²²⁰ Doyle, 51-52.

²²¹ Linder.

²²² *Ibid.*, 71.

imbalanced control of the university over systems of adjudications and support. This alternative model for justice has the potential to reintegrate instances of sexual violence into the context of the community environment and reclaim voice for survivors and accused perpetrators in the process. In Chapter Four, I explore more specifically ways I believe restorative justice can be integrated within campus Title IX policy to create more genuine remedy in the wake of sexual violence.

Differential frameworks for approaching consent and sexual violence do more than impact how a just adjudication is made but affect how sexual violence is conceived in policy as well as in the community. For instance, while radical feminists locate victims and perpetrators within our communities, in seeking institutional redress they locate solutions outside of these communities. As I argued in the last section, this contributes to a pervasive sense of risk in which all women and men are potential victims and perpetrators, and students can only turn to the university for support after they have already been violated. Intersectional feminists likewise situate those affected by sexual violence within our communities, yet in emphasizing community systems of accountability rather than institutional control and intervention, they also locate solutions within our communities. As opposed to fostering an abstract sense of fear, I believe this gives way to promising potential for shifting sexual culture and creating more effective systems of support and accountability.

In this section I have argued that altering relations among sexual partners as well as between survivors and perpetrators, community members and the university is necessary for conceptualizing alternative modes of creating change under Title IX. I have suggested that a negotiation model of consent as well as an intersectional perspective on sexual violence and systems of accountability offer promising potential pathways for finding remedy. Later, in Chapter Four, I explore these options in greater detail, working to reimagine a radically different future for Title IX.

The Effects of University Policy on the Campus Environment

Legislating campus sex is not an insular act and analyzing the effectiveness of college policy requires contextualizing its relation to the campus environment. In analyzing consent policy and discourse on sexual violence, I undertook an exploration of this relationship, to understand both how the university perceives and responds to the campus environment, and how its policy actually shapes this environment. This added critical depth to my analysis in Chapter Two, of how the current adjudication process operates, by showing how policy situates itself within the campus culture. I wanted to know how the university addresses the hostility caused by sexual violence on campus as well as how university policy itself fosters a supportive or hostile environment.

The campus environment is critical to the discussion of Title IX because as a civil rights law, Title IX is meant to offer more than a guilty finding and assign a sentence, but create a greater support system for victims and work to prevent the

occurrence of this crime in the first place. Title IX guidance has interpreted this obligation to include the work of eliminating the ‘hostile environment’ caused by sexual violence.²²³ Ultimately, I found that while college policy draws on a progressive model of consent and a radical feminist framework for addressing sexual violence, its approach falls short of guaranteeing autonomy and support for students, failing to eliminate hostility and in various ways actually fostering it.

While both ‘No Means No’ and ‘Yes Means Yes’ models of consent aim to restore voice for survivors, both are limited in their effectiveness. ‘No Means No’ assumes consent is the default state of an interaction and thus renders women’s autonomy irrelevant until she actively withdraws consent. ‘Yes Means Yes’ worked to correct for this by requiring that affirmation be given before a sexual act, yet in permitting attitudinal indications of consent, this model falls back on its predecessors logic in which consent is assumed, rather than explicitly granted.²²⁴ This intervention by the university in the campus sexual culture attempts to provide a positive precedent for sexual relations but ultimately fails to adequately address the stakes of consent in a sexual encounter. Both ‘No Means No’ and ‘Yes Means Yes’ models of consent rely upon an aggressive-contractual model of sexuality in which a (male) sexual initiator proposes acts to a (female) respondent. Under this model, women can only navigate a sexual interaction through the desire of the initiator, losing the autonomy to define sexual experiences themselves. Consent policy on campus has thus constructed an environment in which even consensual sexual interactions are always imbued with a degree of hostility.

²²³ Ali, 3-4.

²²⁴ Anderson, 1405.

Similarly in defining sexual violence, Title IX has employed a feminist model of thought that attempts to acknowledge the power dynamics between men and women on campus. Title IX emerged as a civil rights law as a result of work by radical feminists to establish women as a class harmed by sexual violence. Yet a conservative framework for sexual violence nonetheless pervades the campus adjudication processes which calls into question a victim's role in her own assault. Universities have attempted to increase support for victims by broadening access to their support services, but this liberal feminist model only further individualizes instances of sexual violence. In erasing relevant power dynamics in a sexual assault, this strategy only draws college policy further away from its purpose as a civil rights law. Ultimately I found that university policy may work to intervene in instance of sexual violence but does not take responsibility for what it frames as an inevitable occurrence. This leads possibilities for open, autonomous, and radically respectful sex to be diminished and moreover enables the university to distance itself from the problem at hand²²⁵

With regard to both consent policy and discourse on sexual violence, I argued that university policy has proved its response to sexual violence to be severely limited. The university fails to fully recognize the stakes of this issue and thus falls short in its commitment to dismantle the hostile environment created by sexual violence. With consent policy, the university has limited discussion of sexual autonomy to how consent is framed, rather than opening up dialogue about how to produce the most respectful sexual relations. Likewise, in defining sexual violence, the university has made strides to recognize this as problem in the campus community

²²⁵ Doyle, 30, 33, 52.

and offer support to victims, but in making improvements to its approach, there has been a failure to fully consider the implications of the current system. By taking an individualizing approach to broaden the reach of its services for instance, the university has ultimately undermined the potential of its policy to create cultural change. The university has neglected its responsibility to foster an environment free from hostility and has failed to protect and support victims. I believe current policy fails to uphold the promise of Title IX as a result of the perpetually threatening culture it has established as the norm.

Creating sustainable environmental change requires breaking with traditional models governing sexual violence, or at least calling them into question, to consider how best to encourage an open and respectful sexual ethics on campus. Universities' reluctance to take on such an imaginative task has limited their ability to change cultural norms on campus and thus to fulfill their Title IX obligation. In the next and final chapter of this thesis, I take on this task myself, expanding upon the suggestions I have made for finding remedy by engaging in an open-ended exploration of how to reclaim Title IX's purpose as a civil rights law.

Chapter Four: Envisioning Justice

“Crimes of dominance have a ritualized element designed to isolate the victim and to degrade her in the eyes of others...It is this dishonoring of the victim that renders crimes of sexual and domestic violence so intractable and so impervious to the formal remedies of the law.”²²⁶

Sexual violence on college campuses presents a crisis, forcing communities prided for their progressivism to confront fundamental questions about safety and justice: Why does sexual assault occur here? How can it be prevented? Is it possible to uncover the truth of such an intimate moment between two people? How can survivors best be supported? How can this community hold perpetrators accountable? What is an apt punishment for crimes of sexual violence? Can victims and perpetrators go on sharing this community? Is remedy possible?²²⁷

In a tightly knit community like a college campus, these questions are particularly pressing. The intimacy of this environment and the well-known place of survivors and perpetrators within it, as acquaintances, friends, and even community leaders, also makes them especially challenging to answer.²²⁸ Sexual violence heavily impacts the communities in which it takes place, yet is simultaneously construed as too delicate to approach. Instances of campus assault have become consigned to the authority of the institution to be handled by professionals, despite the fact that survivors most often turn to their friends and families for support.²²⁹ Communities struggle to make sense of this issue that is so close to home yet racked with

²²⁶ J. L. Herman, "Justice from the Victim's Perspective," *Violence Against Women* 11, no. 5 (2005): 572-3.

²²⁷ *Ibid.*, 571.

²²⁸ *Ibid.*

²²⁹ Alisa Bierria et al., "Taking Risks: Implementing Grassroots Community Accountability Strategies," in *Color of Violence: The Incite! Anthology*, ed. INCITE! Women of Color Against Violence (Durham; London: Duke University Press, 2006), 250.

contradictions. Blame, accountability, support, and redress seem to spread across the levels of the institution, community, and individual. Any adequate resolution to campus assault cannot shy away from the intricacies inherent to the issue, but must embrace and incorporate these entangled relations.

Student activists, university administrators, and policymakers have grappled with the complexities of campus sexual violence through the framework of Title IX. The preceding chapters have discussed the various interpretations and applications of Title IX resulting from these efforts and explored their effects in-depth. Controversy surrounding the institutional response to campus assault demonstrates widespread dissatisfaction with the current approach to and effectiveness of the law. I have argued, however, that popular debate surrounding this issue is misdirected towards shortsighted solutions. The underlying flaws of current policy have been consistently reproduced, when in fact a more profound paradigm shift is required to fulfill the promise of the law. To carry out this work, the needs of survivors and the greater community must be reevaluated and new relations between the university, campus community, and individual survivors and perpetrators must be forged. I use this final chapter to take on this very task by thinking creatively about how to engage these disparate groups in remedying campus sexual violence. Before I continue however, let me briefly review the ground I have covered thus far and will need to draw on in this chapter.

Campus sexual violence is currently addressed through adjudications in combination with interim and remedial measures meant to provide support to survivors and the wider community. Although Title IX mandates the implementation

of such formal processes, in practice universities' response to campus assault has been largely defined by inaction, as I demonstrated in Chapter Two. Institutional denial, retaliation against survivors, and low rates of reporting and sanctioning have resulted in widespread mistrust of university administrations and stalemated the fulfillment of Title IX across the country. Debates about how to correct for this at the federal level between the Obama and Trump administrations have honed in on specific changes to the adjudication process such as its standard of proof, the timeframe for investigations, and options to appeal. National conversation surrounding this issue has taken the existence of an individualizing and adversarial approach for addressing cases of sexual violence for granted. In Chapter Two, I argued that in mimicking this aspect of the criminal justice system, Title IX has reproduced many of its shortcomings and failed to uphold its promise as a civil rights law.

Controversy regarding bureaucratic procedures and personal sanctions has outweighed discussion about holistic, campus-wide remedy. Interim and remedial measure have been sidelined but still include access to counseling, trainings on consent and bystander intervention, and community standards for positive sexual encounters. Designed to address community norms and the hostile environment caused by sexual violence, the effectiveness of these initiatives are severely limited by their emphasis on individual support and personal relations. They fail to stand on their own in fostering a supportive environment for the student body, and for women and survivors in particular. Instead these measures prove merely to bolster the adjudication process, providing an outlet for individualistic support for which the

adversarial system alone is ill equipped. Ultimately, as I argue in Chapter Three, university Title IX policy does more to protect the institution than its students, failing to offer meaningful prevention or redress for sexual violence. Normative sources of rape culture are not merely overlooked by university policy, but perpetuated through problematic community standards, which assume and reinscribe a campus culture that is inherently hostile.

In this chapter, I aim to think imaginatively about how to fulfill Title IX's promise as a civil rights law, one meant to provide an alternative solution to sexual violence that engages the greater community and emphasizes remedy. To summarize, under Title IX policy in its current state, individuals affected by sexual violence become isolated and the campus community becomes disengaged as the university manages cases through bureaucratic systems meant to preserve the status quo. I use this chapter to understand what went wrong in the course of implementing the law, identify specific ways the response to sexual violence can better address the harm caused by the offense and the needs of the individuals involved, and lastly to propose a radically different approach for addressing the issue. In the following section, I work to develop an understanding of how the law's feminist agenda has failed, pointing to its exclusionary premise and arguing for an embrace of intersectionality in approaches to support and conflict resolution. I build on this in a critical evaluation of why an adversarial and individualistic system for addressing complaints does not provide an apt response to crimes of sexual violence. In reevaluating the dynamics of such cases, I argue for a shift in notions of accountability and in the relations among individuals, community members, and the university. Given the opportunity to

envision such a redistribution of power, I advocate for restorative justice, believing it to offer a truly transformative approach to campus sexual assault. By centralizing support and remedy in responses to sexual violence, I believe Title IX can reach its potential and meaningfully contribute to the greater project of eradicating rape culture and sexual violence altogether.

A Feminist Agenda, Failing?

Title IX came to govern sexual assault cases on college campuses through an explicitly feminist agenda, heavily influenced by campus activists and meant to ensure women's holistic access to their education. I have discussed the trajectory and institutionalization of this agenda, yet return to it now in hope of finding the roots of Title IX's shortcomings. By locating the underlying issues with the radical feminist agenda that championed the law's instantiation and the liberal feminist approach that characterizes it today, I seek to identify inherent flaws that may fuel the law's persistent inadequacies. By comparison, an intersectional feminist perspective helps to illuminate how systems of support and adjudication processes are failing to justly represent the needs of a diverse student body. It is by first addressing the exclusionary source of universities' model for both support and adjudication that avenues for achieving more genuine remedy begin to crystalize.

Radical feminists started organizing around sexual violence through consciousness-raising groups in the 1960s, and sexual violence activism on college campuses mirrored the trajectory of this larger movement in a number of ways years

later. Feminists in this era strove to establish sexual violence as a serious crime. As college feminists did later with regard to campus assault, they aimed to gain legitimacy by institutionalizing a response to their cause. The Violence Against Women Act passed in 1994 exemplifies the long-term effects of their movement. The law was defined by its mandatory arrest policy for domestic-violence-related calls. It includes a range of measures however, including reporting and response requirements for universities.²³⁰ This effort by feminists, like with Title IX, aims to validate the experience of survivors by drawing on traditional responses to crime and punishment.

Feminist reforms such as VAWA, while intended to embolden women through legal recourse are easily subdued by the dominance and control of the state.²³¹ The feminist movement's turn to state intervention and imprisonment in an attempt to bring gendered issues into the mainstream has been termed 'carceral feminism.'²³² This framing brings attention to the fact that this strategy for feminist change ultimately does more to empower the state than survivors of sexual violence and causes harm to individuals and communities by contributing to the prison-industrial complex.²³³ Campus activists and administrators have reproduced this dynamic with Title IX policy by promoting adversarial hearings and punitive outcomes. Through these mechanisms, the university has gained (and abused its) systematic control over this process and the individuals involved. This strategy, based in the logic and tradition of the criminal justice system, has not only been ineffective

²³⁰ Linder, 68.

²³¹ Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence* (Durham; London: Duke University Press, 2008), 97.

²³² Elizabeth Bernstein, "Carceral Politics as Gender Justice? The "Traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights," *Theory and Society* 41, no. 3 (2012).

²³³ Coker.

in combatting this issue and supporting survivors, but is part of a greater failure by mainstream feminists to incorporate an intersectional perspective into their agenda.

Although the mainstreaming of sexual violence activism is accredited to the second wave movement in the 1960s, black feminists have organized around this issue since the late 1800s. A defining characteristic of black feminist activism missing from the mainstream (read: white) feminist movement is an attention to the intersection of racism and sexism.²³⁴ Radical feminism institutionalized a response to sexual violence that treated women as a class, universalizing both survivors of sexual violence as women and the experience of all women as similar. Black feminist activism on the other hand has consistently emphasized intersectionality over universality, bringing attention to the ways racism and sexism are compounded to create a unique experience for women and men of color in grappling with sexual violence. The current institutionalized response to sexual violence on campuses has overlooked these complexities of experience and thus severely limited the potential for support and change that Title IX offers.

The legacy of radical feminist organizing around the notion of women as a class has led campus prevention and support programs to centralize and essentialize the experiences of white women. White women have their own history and particular cultural experiences with sexual violence, however, and these are far from universal. Insofar as white women are socially constructed as pure and sexually modest, their violation is treated as severe. The effects of this throughout history have been extreme – simply the accusation of rape against a white woman has resulted in the lynching of

²³⁴ Linder, 60.

thousands of black men, who continue to be painted as sexually aggressive.²³⁵ Black women are culturally constructed as hypersexual and have suffered from the systematic delegitimization of their experiences with sexual violence, dating back to the era of slavery in which the rape of a black woman was legal. Latina and native women have likewise been marked as ‘sexually violable’ and viewed as promiscuous and dirty, while Asian women have been constructed as passive and eager to please.²³⁶ Race factors heavily into personal experiences with sexual violence, potentially contributing to the infliction of such harm, shaping the cultural meaning of the violence, and additionally creating alternative dynamics of self-blame. Healing from sexual violence therefore too requires attention to these dynamics.²³⁷ Cultural and institutional responses to sexual violence are also impacted by racism. By instilling disbelief in response to the experiences of women of color and putting men of color at risk of false accusations and disproportionate punishment, possibilities for justice have been systematically delimited.

Sexual violence can affect anyone, but is not identity neutral. In efforts to be more inclusive, university programming has emphasized the fact that anyone can be sexually assaulted, without, however, properly attending to the distinctive experiences this entails. By employing a liberal rather than intersectional feminist framework, support systems and prevention efforts on campus have invisibilized the role identity plays in instances of sexual violence. This has essentially reproduced the approach of

²³⁵ Jessica C. Harris, "Centering Women of Color in the Discourse on Sexual Violence on College Campuses," *ibid.*, 50.

²³⁶ *Ibid.*, 49.

²³⁷ *Ibid.*, 54; Ciera V. Scott, Anneliese A. Singh, and Jessica C. Harris, "The Intersections of Lived Oppression and Resilience: Sexual Violence Prevention for Women of Color on College Campuses," *ibid.*

radical feminism by falling back on experiences of cisgender heterosexual women as the universal victims of sexual violence.²³⁸ The alienating effects of an identity-neutral discourse are demonstrated by the unmet needs of the diversity of survivors on campus.

College women of color experience sexual violence at higher rates than white women.²³⁹ Yet they are significantly less likely to seek mental health services in response.²⁴⁰ Likewise, only a fraction of male survivors of sexual assault find support on campus.²⁴¹ As women of color may grapple with self-blame, queer survivors may experience feelings of victimization, and men often struggle with a sense of being emasculated.²⁴² These difficulties often stem from a lack of representation and require explicit attention and effort to overcome in the healing process.

The concept of universal womanhood may have been well intentioned in creating a law that would bring attention to gendered power dynamics, but sexual violence is influenced by intersecting systems of power, a complexity that radical and liberal feminists have rendered invisible. Insofar as it is recognized by universities that anyone can be sexually assaulted, Title IX is being limited by the failure of college programming to address the diversity of issues facing survivors. In neutralizing the identity of survivors and perpetrators, college programming has offered only superficial support without truly attending to the hostile environment caused by sexual violence. Support is meant to be a central tenet to Title IX's purpose

²³⁸ Chris Linder, "Reexamining Our Roots: A History of Racism and Antirape Activism," *ibid.*, 70-73.

²³⁹ Jessica C. Harris, "Centering Women of Color in the Discourse on Sexual Violence on College Campuses," *ibid.*, 42.

²⁴⁰ Ciera V. Scott, Anneliese A. Singh, and Jessica C. Harris, "The Intersections of Lived Oppression and Resilience: Sexual Violence Prevention for Women of Color on College Campuses," *ibid.*

²⁴¹ Daniel Tillapaugh, "'The Wounds of Our Experience': College Men Who Experienced Sexual Violence," *ibid.* (Sterling, VA), 102-03.

²⁴² *Ibid.*, 104, 08.

of providing remedy, yet without an intersectional foundation the university is limited in its conception of how sexual violence affects students and is unable to fulfill Title IX's mandate. To correct for this, attention to identity and intersectionality must be centralized in systems of support moving forward.

The exclusionary nature of radical and liberal feminist agendas has detracted from an intended emphasis on remedy under Title IX policy through such ineffective support systems as well as universities' central reliance upon the adjudication process. While the radical feminist agenda that shaped the university's response to sexual violence focused primarily on the experience of survivors, intersectional activism has actively attended to both amplifying the voices of survivors and protecting black men from false accusations of sexual assault and unfair punishment. The emphasis college programming has placed on the essential woman, has not only excluded consideration for men as survivors but as accused perpetrators. A history of false accusations of assault made against black men persists today as men of color face disproportionate sanctioning from universities. Members of the LGBTQ community also experience disproportionate risk of being perceived as sexual predators. Although homosexuality is no longer explicitly criminalized, panic surrounding gay men as abusers or pedophiles as well as anxiety about the use of gender-segregated bathrooms by trans people has subject LGBTQ individuals to closer scrutiny and greater punishment by the carceral state.²⁴³

Perpetuating these unjust trends by potentially granting legitimacy to false accusations is a source of grave concern among critics of the Obama administration's *Dear Colleague Letter*, which attempted to increase the likelihood of responsible

²⁴³ Lancaster, 112-15.

findings.²⁴⁴ Herein lies a primary reason that women of color have long organized separately from white women. Women of color have been historically empowered to speak out against sexual injustice when they can also ensure men in their community are safe, not only from false accusations but racially biased sanctioning.²⁴⁵

Since the 1970s feminists of color have fought for prison abolition and advocated for investment in community justice systems.²⁴⁶ Rather than relying on an ineffective, harmful, and racist retributive prison system, through feminist organizations like CARA (Communities Against Rape and Abuse), communities of color have embraced alternative avenues for providing accountability that take into consideration both the humanity of perpetrators as well as the safety and support of survivors. In relying upon adjudication and sanctioning as the primary means to address sexual violence, Title IX policy has replicated the criminal justice system's carceral response to sexual violence and lost sight of an intended emphasis on alternative forms of remedy. Under the current approach to Title IX influenced by radical feminists, discipline is upheld for its own sake without guaranteeing behavioral change from perpetrators or attention to the impact of sexual violence on the greater community.

An embrace of traditional responses to crime by the radical and liberal feminist agendas influencing Title IX traded mainstream legitimacy for inclusive and holistic possibilities for remedy. Systems of support have been sidelined in favor of bureaucratic adjudications. The resulting institutional approach to sexual violence has individualized instances of sexual violence without taking into account the

²⁴⁴ Lieberwitz et al., 79.

²⁴⁵ Linder, 69.

²⁴⁶ Ibid.

intersectional needs of survivors and perpetrators, proving to be utterly ineffective. In tracing the roots of the current model, the shortcomings of its feminist influence have become apparent as have openings for change through a commitment to an intersectional perspective. This will influence my analysis moving forward as I explore how to unite systems of support and accountability with the goal of real and radical remedy.

A System (Un)Fit for the Crime

Campus adjudications create an adversarial conflict between victims of sexual violence and alleged perpetrators. This framing of the conflict allows universities to evade accountability by presenting the role of the institution as merely an independent mediator of a two-sided dispute.²⁴⁷ Complainants come to the university for help, yet the university addresses their violation because it is required to under the law and is fact more motivated to protect itself rather than the victim.²⁴⁸ Both victims and perpetrators lose agency as their needs are overshadowed by the university's control. The system is not designed to deal with holistic healing; rather bureaucracy itself becomes the dominant concern.²⁴⁹ Little relief is to be found in the imbalanced power dynamics that define this process, and in this section I seek a deeper understanding of why this is. I want to contextualize the ineffectiveness of the campus adjudication system within an analysis of the particular stakes involved in a case of sexual violence. By examining the specific issues an adversarial and bureaucratic system

²⁴⁷ Doyle, 39.

²⁴⁸ Ibid., 33-34.

²⁴⁹ Richards et al., 106, 12.

presents to survivors and perpetrators of sexual violence, I can then transition into an assessment of what forms of remedy would better serve the parties involved.

The style of adversarial adjudications is inherently aggressive to both parties, premised on the idea that hostile attacks on the other provide the best basis for finding truth.²⁵⁰ This system is based on (falsely) neutral power relations, not accounting for differential effects of gender, race, social status, age, or wealth. The criminal justice system emphasizes the power dynamic between the state and the defendant rather than between citizens, ensuring protections for defendants that plaintiffs do not share.²⁵¹ The reasons an adversarial system is acutely harmful in cases of sexual violence are beginning to emerge.

Sexual violence is a crime of dominance and involves a purposeful denigration of the victim. Coming forward about this crime is strongly associated with stigmatization and in this way is unlike other crimes, even violent ones. Yet in a court of law—and similarly in campus adjudications—the crime is approached in the same fashion as any other. Neither the power dynamics employed by the perpetrator nor the shame that affects many victims is adequately addressed. These defining characteristics of sexual violence cases are not merely impervious to the concerns of the criminal justice system, but are reproduced by the adversarial structure of criminal and campus hearings.²⁵²

The specific nature of sexual violence cases calls for a system apt to address the harm this offense causes, yet the mainstream feminist agenda has worked to

²⁵⁰ Herman, 572.

²⁵¹ Ibid.

²⁵² Ibid., 572-73.

institutionalize a response to the crime that treats it like any other.²⁵³ Radical feminists sought validation by correcting for power imbalances between men and women, while liberal feminists desired a response to cases of sexual violence equal to that of any other violent crime. These agendas compounded to institute strong responses from the state by raising sentences for rape, instituting rape shield laws to protect victims from irrelevant questioning about their pasts, removing corroboration requirements, and creating a sex offender registry.²⁵⁴ This carceral approach to feminist reform is not only problematic in principle because of its contribution to the state's prison-industrial complex, but has also proven to be ineffectual in practice. Rates of reporting, prosecution, and conviction have remained almost unchanged decades after the implementation of such strategies designed to increase institutional responsiveness.²⁵⁵

The foregrounding of an adversarial adjudication under Title IX policy has mimicked the criminal justice system's inattention to the unequal power dynamics and cultural norms that define the experiences of survivors and perpetrators of sexual violence. A study by Judith Herman, a leading researcher in the psychiatric study of traumatic stress of victims of violence, draws on the experiences of 18 victims of sexual violence and helps to further elucidate what the best interests of survivors actually are and the specific ways they remain (un)satisfied by the criminal justice system.²⁵⁶ Herman explains that victims benefit from social acknowledgment and

²⁵³ Ibid., 573.

²⁵⁴ Mary P. Koss, Karen J Bachar, and C Quince Hopkins, "Restorative Justice for Sexual Violence: Repairing Victims, Building Community, and Holding Offenders Accountable," *Annals of the New York Academy of Sciences* 989 (2003): 387.

²⁵⁵ Ibid.

²⁵⁶ Herman, 579-80.

support to remedy the stigmatization and shame of the offenses committed against them. Yet adversarial questioning casts inherent doubt on the credibility of victims' narratives.²⁵⁷ Healing requires that victims reclaim a sense of power over their lives, a process that is facilitated by choosing when and how to communicate a personal narrative of their assault. By participating in a formal investigation and adjudication however, victims must comply with complex, senseless bureaucratic procedures, giving up control over this process and losing their voice in a series of yes/no answers.²⁵⁸ Finally, victims generally are best off when they can avoid reminders of their traumatic experience as well as direct contact with their perpetrators, yet a courtroom demands a hostile confrontation between the two parties.²⁵⁹

With the freedom Title IX provides to explore alternatives to the criminal justice system, some colleges have attempted to evade triggering aspects of the adversarial process. Wesleyan University stopped holding hearings to determine responsibility,²⁶⁰ instead conducting an investigation that is then reviewed by a closed panel to determine responsibility.²⁶¹ This process does not require complainants and respondents to cross paths at any point in an attempt to avoid the trauma direct confrontation can cause.²⁶² Reforming the adjudication process in this way works to make the existing system more bearable without addressing deeper issues inherent to the system. A 'successful' outcome by these standards still is not likely to provide satisfaction, closure, or healing to victims. Panel decisions remain private and

²⁵⁷ Ibid., 574.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ "Student Handbook: University Standards and Regulations," 11-13, 28. (2016-2017)

²⁶¹ "Wesleyan University Student Handbook." (2017-2018)

²⁶² "Deborah Colucci, Wesleyan Deputy Title IX Officer, personal communication, 2018"

investigations are rendered confidential, making it difficult for the victim to process the event, voice their narrative, and garner support from the community.²⁶³

The adjudication process creates deeply stressful circumstances for accused perpetrators as well. They must confront the possibility that their community will turn against them and that they may even face formal suspension or expulsion. People of color and LGBTQ individuals are at a greater risk of this, increasing anxiety and injustice. From the perspective of perpetrators as well, the 'best case scenario' of campus adjudications fails to take their experiences and interests into account. They are not offered an opportunity to make things right or to change their behavior, and in these ways any potential for genuine and remedy is foregone. Their humanity is compromised as is the well-being of the greater community which would benefit from assurances against discrimination, lower recidivism rates, and a commitment to shifting behavior that could prevent future violations. As current policy stands, it is difficult to blame victims for not voluntarily reporting, perpetrators for remaining silent, and communities for being unengaged. The very system in place encourages these attitudes in failing to address the basic needs of those affected by sexual violence. In the next section I work to locate space for changing these relations and identify alternative goals in finding remedy.

²⁶³ Katherine Van Wormer, " Restorative Justice as Social Justice for Victims of Gendered Violence: A Standpoint Feminist Perspective," *Social Work* 54, no. 2 (2009): 108.

Shifting Systems of Accountability, Changing Relations

In campus adjudications, the institution is meant to act as a neutral authority on the responsibility and sanctioning of the accused party. It is believed that judgment by the university offers the best gage of a fair outcome as a result of its dispassionate involvement in the case and thus its impartial opinion. Victims, perpetrators, and community members have no voice in this process and thus its outcome fails to fulfill any meaningful expectations of remedy. It is feared that victims would pursue revenge and that a just agreement would be impossible to solicit from parties so deeply invested in the outcome of the case.²⁶⁴ In this section, I explore what survivors and perpetrators conceive remedy to mean, and discuss how changed relations between individuals, community members, and the institution could give way to more fulfilling approaches to support and accountability.

Herman's study of victims' reactions to the criminal justice system includes a discussion of what they actually desired in response to their experiences of sexual violence. While their answers proved to require a different set of actions than the criminal justice system or campus adjudications provide, they did not entail the retributive fantasies one might imagine. Herman found most victims she interviewed were not in fact interested in punishment for their perpetrators as an end in itself. They expressed little interest in seeing their perpetrators suffer.²⁶⁵ Already, here is a critical point of breakaway from the exiting criminal justice system that creates real potential for an improved outcome for both victims and perpetrators. What many desired more than punishment for its own sake was to dispossess their perpetrators of

²⁶⁴ Herman, 575-76.

²⁶⁵ Ibid., 589-90.

undue status. Victims wished to expose their perpetrators and have their communities condemn the offense. It was believed a communal stand against the act of violence would serve to establish solidarity with victims and stigmatize the actions of the perpetrator.²⁶⁶

Community support was the paramount concern of Herman's subjects. To them, support entailed validation that the offense occurred and of the harm it caused. While almost all the victims Herman interviewed desired an acknowledgement of the offense from the perpetrator, it was equally or even more important for them to receive such a response from the community.²⁶⁷ Similarly with regard to reconciliation and forgiveness, victims commonly believed an apology from the perpetrator was unrealistic, and instead emphasized the importance of receiving an apology from friends and family members who may have enabled the violation to occur.²⁶⁸

Victims' stance towards their perpetrators were less concerned with forgiveness than accountability. While these two concepts may be conflated in common discourse, they have distinct meanings. Victims largely viewed forgiveness as a burden for them meant to provide the community with closure more so than themselves. They feared their own forgiveness of a perpetrator's behavior could prevent the greater community from confronting the perpetrator and the harm his actions caused. Victims instead focused on accountability, which they understood to entail a change in behavior from the perpetrator. They believed consistency and commitment in sanctioning to be more important than the severity of discipline

²⁶⁶ Ibid., 585, 93.

²⁶⁷ Ibid., 585.

²⁶⁸ Ibid., 588.

insofar as it would better encourage a shift in conduct from the offender.²⁶⁹ Safety for themselves and others was essential, and while some believed this required traditional discipline through imprisonment, for most survivors the path to personal and communal safety was unconventional and I will continue to explore what such alternative approaches to justice involve more specifically.²⁷⁰

Ultimately, victims expressed a stronger desire for repairing their relationship with the community than their individual relationship with their perpetrator.²⁷¹ Communal remedy is utterly inaccessible through adversarial adjudications, which inherently individualize conflict, isolating the parties involved and the issue itself from the greater community. Yet as Herman writes: “They [victims] were highly aware of the social ecosystem in which the perpetrators were embedded, and viewed the crime as a responsibility of a community as well as an individual.”²⁷² Although adjudications may fail to address these dynamics of sexual violence, Title IX policy is in fact directed towards this exact purpose. Title IX clearly situates the occurrence of sexual violence and its effects on victims within a larger campus culture by giving attention to the hostile environment sexual violence causes and framing sexual violence policy as part of a larger project to ensure women’s holistic access to education. Colleges can offer an alternative approach to justice precisely because Title IX conceives sexual violence as a phenomenon that affects and is affected by the community. As seen above, however, interim and remedial measures meant to support survivors and engage community members have been relegated to the

²⁶⁹ Ibid., 588, 91-93, 95.

²⁷⁰ Ibid., 594-95, 97.

²⁷¹ Ibid., 597.

²⁷² Ibid., 588.

periphery of Title IX policy and campus processes. Today these measures function primarily to bolster an adversarial adjudication system. The potential for the campus justice system to provide real steps towards healing and redress has gone unrealized, despite the open-ended nature of the law itself.

Victims and perpetrators have been absorbed into hostile and individualized bureaucratic processes. Victims become dependent on the institution and overly invested in an outcome that opposes their needs, while perpetrators are reduced to a series of behaviors and threatened with disciplinary sanctions not geared towards change or prevention. Choice is lost when in fact the lives of victims and perpetrators would be improved if it were emphasized. Victims benefit from reclaiming power through choice, while accountability for perpetrators stems from choices that demonstrate behavioral change. The removal of choice, so fundamental to the bureaucracy of the adversarial adjudication system, directly limits possibilities for remedy. As Bumiller puts it, simply the “performance of compliance” with institutional procedures does nothing to prepare its adherents to combat cultural power imbalances in the community and within the institutional system.²⁷³

Engaging the campus community in cases of sexual assault would encourage communal accountability for deconstructing rape culture, provide needed support to survivors by remedying the stigmatization that crimes of dominance cause, help to ensure changed behavior from perpetrators, and prevent the occurrence of sexual assault the future. This involves a fundamental shift away from the relations created by the current adjudication process and campus culture. To the extent that the current adversarial system isolates the community and fosters a passive yet pervasive

²⁷³ Bumiller, 131.

acceptance of sexual violence,²⁷⁴ community standards have become that of the institution and the patriarchy.²⁷⁵ In the next section I hope to imagine possibilities for radical remedy through the framework of restorative justice, which I believe will allow for such a transformation of the roles and relations between individuals, the community, and the institution.

Imagining Remedy: Possibilities for Restorative Justice

Restorative justice is an approach to crime and wrongdoing that emphasizes the harm an offense caused to its victim and the greater community rather than the act of law breaking.²⁷⁶ The philosophy behind the restorative justice process emphasizes resolution rather than retribution, aiming to establish appropriate forms of accountability and redress rather than to determine guilt and assign punishment.²⁷⁷ In practice, a restorative justice approach can be employed in civil proceedings, mediation, and community conferencing. Civil cases often involve reparation through monetary compensation and while this can be productive, like the campus adjudication process, it relies on an adversarial determination of responsibility, which is often problematic and even traumatizing in cases of sexual violence.²⁷⁸ Mediation is similarly inadequate for addressing the dynamics of sexual violence cases as it gives an equal platform to victims and offenders without recognizing the unequal

²⁷⁴ Koss, Bachar, and Hopkins, 388.

²⁷⁵ Herman, 598.

²⁷⁶ Van Wormer, 109.

²⁷⁷ Ibid.

²⁷⁸ Koss, Bachar, and Hopkins, 388.

power dynamics between them.²⁷⁹ Community conferencing is most widely embraced among these models for upholding the founding principles of restorative justice. In this scenario the victim, offender, and supporters of each party convene, and with the help of a trained facilitator, address the incident as well as the harm it caused and create a plan for reparation.²⁸⁰ It is this concept of restorative justice I would like to consider and build upon in the context of Title IX.

In this process the victim is granted the freedom to voice her own narrative of events and their effects, while the offender is meant to take responsibility and, with the help of his community supporters, commit to a long-term accountability plan for behavioral change.²⁸¹ Community members play an essential role in supporting the transitional processes of both parties. As the victim is granted the opportunity for closure and takes an important step towards healing, community members validate the harm caused and provide ongoing care. For the perpetrator, community members oversee his path towards shifting behaviors and his gradual reintegration into the community. As Van Wormer puts it, “at the macro level, restorative justice is about peacemaking—at the micro level, about relationship.”²⁸² Restorative justice is deeply impactful at the level of the individual and the community. It enables personal rehabilitation and accountability as well as an opportunity for the community to accept its own critical role in making this possible, which includes confronting community norms that may have enabled the occurrence of this offense.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Van Wormer, 109.

²⁸² Ibid.

The foundations of a restorative justice system are radically different than those of adversarial adjudications and traditional sanctioning. I believe this model sufficiently shifts interpersonal relations and directly addresses the concerns I raised in the previous section. The restorative justice process is grounded in the acknowledgment of a power differential and aptly provides validation and support for the survivor. It also allows the survivor to reclaim control by providing voice through self-expressed narratives and choice over what reparations are necessary. It enables accountability without dehumanizing the perpetrator and in fact permits for greater support of the offender, including their eventual reintegration into the community. In this way it provides a productive path for confronting the perpetrator and their actions, putting an end to the cycle of passive acceptance and victim isolation while also diminishing a carceral emphasis on retribution. By engaging the community through systems of personal support and wider accountability, incidents of sexual violence and the individuals involved can escape from the confines of bureaucratic processes and the control of the university. I believe restorative justice conferencing centralizes support and remedy for individuals and the greater environment. In theory, restorative justice thus offers a strong alternative to the current campus adjudication process, but I want to take a look at how the process is being carried out more concretely before I determine whether it fulfills the promise of Title IX.

The Skidmore College Project on Restorative Justice conducts research and training surrounding restorative justice and is leading the nation's college campuses by implementing the principles it studies in its own community.²⁸³ This project works to include the principles of restorative justice with regard to all violations of the

²⁸³ "Project on Restorative Justice," Skidmore College, <https://www.skidmore.edu/campusrj/>.

student code of conduct. This includes sexual misconduct, for which a specific program named Campus PRISM (Promoting Restorative Initiatives for Sexual Misconduct) has been developed to address the particular relational dynamics and harm caused by this offense. As with the theoretical model for restorative justice conferencing I described, Campus PRISM revolves around a “collaborative decision-making process” designed to help an offender “accept and acknowledge responsibility...repair the harm they caused to harmed parties and the community, and work to rebuild trust by showing understanding of the harm, addressing personal issues, and building positive social connections”²⁸⁴ Skidmore works to bring questions of harm and repair into various models built for different scenarios: from conferences which allow for a facilitated dialogue between an offender and harmed party, to administrative hearings in which a panel of people engage with offenders and potentially harmed parties, to circles that allow for larger communal discussions.²⁸⁵

While all of these approaches are potentially suitable for addressing instances of campus sexual violence, Skidmore tends towards community conferencing in combination with restorative justice circles, which I will expand on. After a survivor chooses to pursue a restorative resolution, the preparation process begins. Victims and offenders meet with trained facilitators to learn more about the process, prepare personal statements related to impact and harm caused, and choose individuals to be

²⁸⁴ Ibid.

²⁸⁵ "Campus RJ: What Are Campus RJ Practices?," Skidmore College, <https://www.skidmore.edu/campusrj/campusrj.php>.

their support persons.²⁸⁶ Depending on the case of misconduct, preparation for a restorative justice conference can consist of a couple of meetings or take a couple of months. The strong role of preparation differentiates restorative conferencing from mediation in which participants are engaged only in the confrontational stage.²⁸⁷ The restorative justice conference itself includes a discussion of the nature of the harm, an exploration of how the harm can be repaired, and an agreement upon a concrete plan for change, which includes tasks, timelines, and a clear role for supporting persons.²⁸⁸ If the survivor does not wish to be present at the conference, they have the option to participate remotely or have an advocate take their place. The conference is voluntary for all parties; survivors or perpetrators can choose to end their participation at any point.²⁸⁹

Reparation may include counseling as well as more traditional sanctioning such as no-contact orders, probation, or suspension. Even with these more severe forms of discipline, there is still an emphasis on reparation and eventually reintegration. Skidmore emphasizes that unlike traditional sanctioning these measures are never passive on the part of survivors or perpetrators.²⁹⁰ After the conference, the offender will meet with facilitators regarding their progress to ensure accountability. Facilitators will notify the survivors of this process and check in with them to make sure their support systems are functioning well.²⁹¹ Long-term support and

²⁸⁶ David R. Karp et al., "A Report on Promoting Restorative Initiatives for Sexual Misconduct on College Campuses," in *Campus PRISM* (skidmore.edu: Skidmore College, 2016), 25-26.

²⁸⁷ Ibid.

²⁸⁸ Ibid., 26.

²⁸⁹ Before choosing a restorative justice option, survivors are also presented with choice to undergo a traditional adjudication process, report their violation to the police, or receive support without pursuing a formal resolution. Ibid., 25-26.

²⁹⁰ Ibid., 28, 30.

²⁹¹ Ibid., 26.

accountability as well as reintegration are facilitated by Circles of Support and Accountability (CoSA): groups of 4-6 chosen supporters accompanied by trained professionals from the counseling center, academic support services, and safety department.²⁹² The survivor's CoSA meets to discuss a survivor's evolving needs in the healing process, striving to avoid feelings of being unsafe or isolated.²⁹³ For offenders, these meetings support one's behavioral shift as he completes reparations and does everything possible not to reoffend. The offender's CoSA also create space for confrontation should any issues arise.²⁹⁴

Restorative justice conferencing, from preparation to long-term support plans, presents a very different process than traditional adjudications as well as radically shifted relations between individual survivors and perpetrators, community members, and the institution. The college is involved in making a positive contribution to redress; the institution is a vital facilitator of this process but is not totally in control of it. Victims and perpetrators retain greater voice, humanity, and support without becoming completely dependent on, defined by, or reduced by the administration. The choice and agreement of both parties to the terms of reparation is highly valued and well informed. The college provides the space, preparation, and follow-up necessary to make this process possible but emphasizes the unique and collaborative nature of each case. By directly involving community supporters in the healing and accountability process, the greater campus environment as well as individual survivors and perpetrators are affected. In emphasizing the communal aspect and engagement necessary for meaningful accountability and reintegration, the dynamics

²⁹² Ibid., 26, 36.

²⁹³ Ibid., 36.

²⁹⁴ Ibid., 34.

of the campus culture begin to shift. Skidmore gives explicit attention to this process of addressing the hostile environment caused by sexual violence by organizing circular dialogues that specifically address “precursors to sexual and gender-based misconduct, hostile campus climate, and collateral harm.” This may consist of an open community conversation or a discussion with a particular campus group that has perpetuated problematic norms such as drinking or hazing.²⁹⁵ The role of the institution is shown to be primarily as a facilitator of community engagement and personal support.

Victims, perpetrators, and community members become active members in the accountability process—critically reclaiming power from the administration and transforming possibility for remedy. Both victims and perpetrators fare better under this arrangement and through a commitment to repairing harm and achieving reintegration. While realizing accountability is central, offenders must be supported in their efforts to fulfill their obligations, which must always be fair and realistic. Skidmore’s guiding principles for restorative justice emphasize the importance of giving equal respect, concern, commitment, and involvement to victims and offenders.²⁹⁶

In each of these respects I believe Skidmore’s policy on restorative justice offers a solution that benefits both parties involved in addition to correcting for systematic failures that have defined Title IX policy for far too long. The control that the university has held over Title IX cases is redistributed under this model by granting greater power to the individuals involved and to community members. I

²⁹⁵ Ibid., 24.

²⁹⁶ Ibid., 23.

believe this strategy also serves to address intersectional issues that I discussed earlier in the chapter. Granting greater voice to survivors and perpetrators by creating a personalized plan for expressing the harm caused, the remedy desired, and the support required opens up space for addressing the unique dynamics of each case and every individual's experience.

Avoiding bureaucracy and standardization in this way allows the response to each case to be carefully tailored to address the relevant role that intersections of race, gender, and sexuality may have contributed to the offense or the healing process. Moreover, perpetrators are given more holistic consideration. Rather than being relegated to a passive role and being reduced to a series of behaviors, the perpetrator maintains voice, is provided with avenues for support, and granted the opportunity to rebuild trust within the community. This works to combat the dehumanizing effects of the process on perpetrators and can help to protect black and LGBTQ perpetrators from undue bias that can lead to even greater disparagement. By focusing on remedy, this strategy avoids assigning discipline for its own sake, and may help to correct for the disproportionate sanctioning of marginalized students. This greater consideration for the humanity of perpetrators may also serve to further encourage survivors—and queer survivors and survivors of color in particular—to come forward about their experiences without fear of hurting those in their community or ruining the life of somebody they may still care about.

Restorative justice conferencing cannot be applied in every situation however. First and foremost, it relies upon a perpetrator admitting responsibility. While I believe restorative justice presents a better option for perpetrators than the traditional

adjudication process, not every individual can be expected to participate. Even once the process begins, it consistently demands openness from all parties and support from the community, which can be extremely difficult to achieve. Community education systems and an extensive preparation process are intentionally implemented to establish appropriate expectations from all parties, but of course cannot guarantee this. Nonetheless, not all community members may be comfortable having perpetrators on campus and in some cases it may in fact be inappropriate or even dangerous. Skidmore acknowledges the risks in offering restorative justice for instances of direct victimization such as sexual harassment and assault and discusses their potentially conflicting legal obligations. Ultimately however, the institution works to evaluate each case individually and make an assessment of whether restorative justice is a suitable response.²⁹⁷

Conventional processes to undergo a campus investigation, report to the police, or simply receive counseling must exist in addition to a restorative justice option, as is the case at Skidmore.²⁹⁸ Although restorative justice conferencing may not be a viable option for all situations, other forms of adjudications can still work to include a restorative lens that gives attention to harm and accountability, rather than wrongdoing and retribution. I believe this model for providing remedy offers a much needed paradigm shift, changing how sexual violence is conceptualized and what is prioritized in offering a response. I believe instituting restorative justice as an option, if not a universal response, for cases of sexual violence can lead to radical change for

²⁹⁷ Ibid., 27.

²⁹⁸ Ibid., 25.

encouraging prevention, supporting survivors in their path towards healing, and bettering our communities by acknowledging and working to eliminate rape culture.

Integrating Restorative Justice Under Title IX

Title IX has been criticized from all sides as untrustworthy and ineffective. It has come to be defined by exclusion, retaliation, and punishment, a far cry from Skidmore's active commitment to respectful engagement. Support and remedy have become peripheral to the law's application, as it has centralized adversarial adjudications. By mimicking the criminal justice system's approach to sexual violence, Title IX has failed to deliver its promise of remedy, support, and elimination of a hostile environment. I strongly believe restorative justice conferencing has the potential to fulfill Title IX's purpose in this regard by returning these principles to the forefront of the law's approach to sexual violence.

While it is widely agreed upon that Title IX is in need of change, this alternative response to sexual violence does not share universal support. In fact, under the 2011 Title IX guidance published by the Obama administration, it was arguably illegal as it says, "in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis."²⁹⁹ While this resistance to mediation may be misplaced, mediation and restorative justice conferencing are also distinct. While they share a commitment to empowering participants to reach an agreement through facilitation, each procedure approaches this confrontation very differently. Mediation does not require preparation from either party. Both parties engage with mediation

²⁹⁹ Ali, 8.

through a single confrontation, which creates an equal platform for two parties to resolve a dispute without acknowledging unequal power dynamics between them. Moreover, it is only through the mediation process that participants actually come to an agreement of accountability, negotiating the degree of responsibility each bears. Restorative justice conferencing explicitly opposes these dimensions, requiring thorough preparation from both parties, a clear acknowledgment of responsibility beforehand by the offender, and a clear commitment to remedying the unequal power dynamics between survivor and perpetrator.³⁰⁰

The Obama administration's policy guidelines for Title IX were widely embraced by feminist advocates because they were designed to provide stronger support and accountability for survivors. Supporters of the *Dear Colleague Letter* wanted to see a stronger institutional stand against sexual violence. The desire for the legitimacy of this offense to be acknowledged through a formal response and sanctioning may foster fear that any alternative approach to the issue undermines its severity.³⁰¹ This is not a wholly unreasonable reaction, but as I argued at the start of this chapter, such a carceral feminist agenda is problematic and has ultimately proven to be ineffective at increasing reports, sentencing, survivor empowerment, and prevention. Opposing liberal feminist principles, feminists of color have put forward an intersectional model for restorative justice that works to avoid the failings of the criminal justice system, represent the interests of survivors and perpetrators, and emphasize community accountability and cultural change.

³⁰⁰ Karp et al., 28-29.

³⁰¹ C. Q. Hopkins and M. P. Koss, "Incorporating Feminist Theory and Insights into a Restorative Justice Response to Sex Offenses," *Violence Against Women* 11, no. 5 (2005): 699.

Communities Against Rape and Abuse (CARA) is a shining example of this work, and their ten strategies for implementing grassroots accountability serve as a cornerstone to the work being done on college campuses to correct for the injustices that have for too long characterized Title IX. CARA's organizing principles for pursuing restorative justice are meant to serve as a guide rather than a stringent model as to allow flexibility in applying them to a diversity of communities. Their primary guidelines are as follows:

- 1) **Recognize the humanity of everyone involved:** This includes “the survivor(s), the aggressor(s), and the community.”
- 2) **Prioritize the self-determination of the survivor:** “When a person is sexually assaulted, self-determination is profoundly undermined. Therefore, the survivor’s values and needs should be prioritized.”
- 3) **Identify a simultaneous plan for safety and support for the survivor as well as others in the community:** “Remember that a ‘safety plan’ requires us to continue thinking critically about how our accountability process will impact our physical and emotional well being.”
- 4) **Carefully consider the potential consequences of your strategy:** “Holding someone accountable for abuse is difficult and the potential responses from the abuser are numerous.”
- 5) **Organize collectively:** “A group of people is likely to do a better job of thinking critically about strategies because there are more perspectives and experiences at work.”
- 6) **Make sure everyone in the accountability-seeking group is on the same page with their political analysis of sexual violence:** “A shared political analysis of sexual violence opens the door for people to make connections between moments of rape and the larger culture in which rape occurs.”
- 7) **Be clear and specific about what your groups wants from the aggressor in terms of accountability:** “It’s important to make sure that ‘accountability’ is not simply an elusive concept.”
- 8) **Let the aggressor know your analysis and you demands:** “Relay the specific steps for accountability to the aggressor.”
- 9) **Consider help from the aggressor’s community:** “Friends and family can be indispensable when figuring out an accountability plan...[This] ensures long-term follow through.”
- 10) **Prepare to be engaged for the long haul:** “Accountability is a process, not a destination, and it will probably take some time.”³⁰²

³⁰² Bierria et al.

These principles foster an approach that prioritizes respect and safety and demands open engagement from everyone involved. To achieve this, thorough preparation is required to foster appropriate and specific expectations of what accountability should entail as well as to promote an understanding of the harm caused by sexual violence that takes personal experiences and cultural norms into account. Extensive planning and follow-up is also necessary to ensure support and security in the long-term.³⁰³ CARA's principles are comprehensive and perhaps arduous, but they can be adapted to a wide range of communities and this includes college campuses. As a civil rights law, Title IX presents the opportunity to put these holistic principles into practice and I believe Skidmore's policy has successfully realized this potential.

In revoking the *Dear Colleague Letter*, DeVos' Department of Education reintroduced the possibility for restorative justice, stating that, "the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution."³⁰⁴ While I believe DeVos's office has been dismissive of survivors' experiences, and although it may be unexpected to find an opportunity for remedy in a document essentially published just to reverse the authority of its predecessor, I do believe its stance on 'voluntary resolution' presents a fruitful possibility. Perhaps there is a grain of sense in the fact I have drawn upon a document working to better protect accused students—I did in fact begin this work in search of a system that would serve survivors by combatting institutional inaction without violating the rights of accused perpetrators. While I do not accept the vast majority of the agenda put forward by DeVos's Department of Education or the Trump

³⁰³ Ibid.

³⁰⁴ "Q&A on Campus Sexual Misconduct," 4.

administration, this particular move to relax enforcement of traditional adjudications opens up an exciting possibility to create something new. I believe universities must take advantage of this opportunity—especially if it exists only as a loophole in an otherwise dangerous agenda—to reclaim a commitment to justice for survivors, perpetrators, and community members affected by sexual violence on campus.

It has been through this extensive exploration—of Title IX’s purpose, implementation, effectiveness, and framework—that I have developed a clear recognition of what is needed from this system. Since first learning of Title IX’s inception as a civil rights law meant to provide an alternative solution to better allow women and survivors of sexual violence to access their education, the concept of remedy and the power it holds have not been lost on me. It is the radical potential I saw in Title IX that motivated me to continue questioning, searching, and analyzing possibilities for improving it throughout the duration of this project. I wholeheartedly embrace restorative justice as a fulfillment of Title IX’s promise, believing it is revolutionary enough to reverse the bureaucratic stagnation and shortsighted debate that defines the law today.

On this note, I will leave you with guidelines from Skidmore University about how all campuses can begin integrating the principles and practice of restorative justice into their communities:

Adopt a restorative lens: Look at harm and accountability whenever possible rather than rule breaking and retribution.

Promote awareness: The benefits of restorative justice are not immediately apparent and it is critical start conversations about what this system offers.

Create a restorative justice committee: Start building an action plan.

Develop capacity: Take advantage of training opportunities and build a community qualified to facilitate dialogues surrounding restorative justice on campus

Engage in research: Be active in understanding what strategies are effective and invest in evidence-based approaches.

Update policies: Include restorative justice options as alternatives to adjudication procedures.³⁰⁵

I will add one more recommendation: *Assess, reassess, and assess again.* Committing to research, dialogue, and policymaking is not a one-track remedy for sexual violence, each of these processes require time, consideration, feedback, and active ongoing attention. Do not allow bureaucratic planning to stop this initiative, but take heed to the very nature of restorative justice which requires engaging in preparation, open dialogue, and long term follow through. Do not lose sight of the original purpose of this commitment and of Title IX.

Title IX as Only a Starting Point

College campuses may be increasingly closed off from their surrounding communities, but campus policy and activism are not disconnected from the greater world and I do not believe a commitment to remedying sexual violence must be either. Campus activism has grappled with difficult questions about sexual violence, identity, and consent for decades, long preceding the momentum of the #MeToo movement. Title IX itself is closely tied to a slew of civil rights legislation and protections against sexual harassment in the workplace. I hope the changes I have proposed to Title IX do not serve as a way to excuse elite students from real world consequences, but create a radical platform and mode for more widespread change.

³⁰⁵ Paraphrasing Karp et al., 40-41.

The discourse this discussion of Title IX policy is embedded within from intersectional feminism to prison abolition extends far beyond college campuses. Grappling with concepts of inclusion, remedy, and restorative justice relate to issues ranging from overcoming sexual harassment in the workplace, to combatting carceral feminism through prison reform, to giving greater representation to women in the Black Lives Matter movement.³⁰⁶ In my analysis of Title IX, I argued that individual offenses and cultural norms are deeply connected and that fighting one entails attention to the other.³⁰⁷ Building on this idea by giving recognition to the interconnection between state violence against women, interpersonal gendered violence, and the patriarchal and racist norms that pervade our culture will enable strides to be made in eliminating these and other oppressions.³⁰⁸

Sexual violence is not an isolated issue and the stakes of Title IX policy are not limited to college campuses. Locating accountability and remedy on campus is part of a much larger movement for gender justice. The work to carry out this project is not easy or straightforward, it can be challenging and even painful for individuals and communities. It is the vital, intricate, meaningful, and unceasing nature of this work that matters most however.³⁰⁹ A commitment to this process holds greater significance and momentum for change than any short-term bureaucratic policy fix, adjudication, or sanction ever could. Dedication to this larger movement and to the

³⁰⁶ Andrea J. Richie, "Law Enforcement Violence against Women of Color," in *Color of Violence: The Incite! Anthology*, ed. INCITE! Women of Color Against Violence (Durham; London: Duke University Press, 2006), 156.

³⁰⁷ Bumiller, 161.

³⁰⁸ Statement by Critical Resistance and INCITE! Women of Color Against Violence, "Gender Violence and the Prison-Industrial Complex," in *Color of Violence: The Incite! Anthology*, ed. INCITE! Women of Color Against Violence (Durham; London: Duke University Press, 2006), 223, 26.

³⁰⁹ Bierria et al., 266.

process of making change itself is what must ultimately drive feminists and supporters of Title IX if we wish to truly eliminate sexual violence.

Concluding Thoughts on the Past, Present, and Future of Title IX

Campus sexual assault has created a crisis across the nation's colleges as well as controversy ranging from student activism to federal policy debates. The Trump administration's revocation of Obama-era legislation on campus assault and its effort to protect 'due process' and the rights of accused students through new federal guidelines has reignited conversation about the purpose of the Title IX.³¹⁰ Demands for greater due process are seated within accusations that campus adjudication systems are 'kangaroo courts' unequipped to handle such an important issue.³¹¹ I worked to situate this debate within the history of the law to argue that the purpose of Title IX is not in fact to mimic criminal courts on college campuses but to provide alternative recourse to students. As a civil rights law Title IX is meant to ensure women's holistic access to education, giving attention both to the personal harm caused by sexual violence as well as its detriment to the greater campus environment. From the outset of my thesis, I argued that today's debate between Trump and Obama administrative policy interpretations provides only a limited scaffold for discussing the stakes of remedying campus sexual violence. My goal throughout this work has been to widen the possibilities for creating change, moving beyond disagreement between appropriate stands of evidence, investigative timeframes, and appeals processes, and instead creating space to reevaluate the implications of campus policy and recenter the focus of Title IX legislation on support and remedy.

³¹⁰ "DeVos: New Sex Assault Policies 'Give Due Process Back to College Students'".

³¹¹ Johnson.

Taking on this task first required challenging the efficacy of the current campus adjudication model. I worked to do this in Chapter Two. By first establishing what current Title IX guidelines require in greater detail, I then aimed to highlight the university's positionality in implementing this policy. Despite framing itself as a neutral arbiter of sexual violence, I demonstrated that in fact the university administration is invested in the occurrence, outcome, and publicity of such cases. Insofar as colleges are meant to oversee students' complaints *and* must protect themselves from violations of Title IX, they become both 'risk managers' in addition to being 'at-risk.'³¹² Universities' best interest ceases to align with that of students, and survivors in particular. Through closed off bureaucratic processes, both victims and accused perpetrators are rendered passive.³¹³ This system is not only problematic in theory but has proved to be ineffective, defined by low rates of reporting,³¹⁴ investigations,³¹⁵ and sanctioning.³¹⁶ I suggested that the current model for Title IX policy is not merely flawed, but that even the best-case scenario under the current model is widely believed to be undesirable.³¹⁷ Despite heated debate between legislation put forward by the Obama and Trump administrations, I argued both are looking in the wrong direction for making meaningful change insofar as they accept that validity of the current systematic approach to campus sexual violence.

To understand the implications of university policy more deeply, in Chapter Three I directed my attention to the culture that defines both consensual sexual

³¹² Iverson, 19, 22.

³¹³ Doyle, 24.

³¹⁴ "Campus Sexual Assault."

³¹⁵ "Sexual Violence on Campus: How Too Many Institutions Are Failing to Protect Students," 1; Germain, 102.

³¹⁶ Kingkade, "Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion."

³¹⁷ Germain, 80-82.

relations on campus as well as students' relations with the university when they have in fact been harmed. By giving attention to the campus environment I was able to explore the fulfillment of Title IX's promise to eliminate the hostility caused by sexual violence as well as to expand my framework from the previous chapter and deconstruct how consent and sexual violence have been conceptualized in university policy. I situated my analysis of consent and sexual violence policy within theoretical feminist frameworks, working to demonstrate the potential of university policy to affect the greater sexual culture on campus through assumptions about who can make sexual contracts, the power relations between sexual partners, and which party is responsibly for obtaining or granting consent. Ultimately, I argued that current models of consent and sexual violence problematically rest on an aggressive-contractual model for sexual relations³¹⁸ and accept that sexual violence is always already present on campus.³¹⁹ I found that university policy is positioned to respond to sexual violence, without taking real accountability for eliminating it and thus has not only failed to dismantle the hostile environment created by sexual violence but directly contributed to it.

In the final chapter—after considering the range of effects Title IX has on campus adjudications as well as the greater campus culture—I looked for openings to break away from university policy's failed imitation of the criminal justice system. I explored in greater depth what would benefit all parties involved in instances of sexual assault and pondered how to shift relations on campus. I aimed to find a resolution that would foster greater community engagement rather than individualize

³¹⁸ Pineau.

³¹⁹ Iverson, 24.

cases of sexual assault, draw attention to cultural norms and rape culture, reclaim voice and humanity for survivors and perpetrators, and give attention to the intersectional systems of power that affect cases of sexual violence. I argued on behalf of a restorative justice approach, believing it to meet these criteria and offer genuine remedy, a concept I have been deeply moved by from the start of this project.

I began this thesis with a very real problem, to which I did not in fact have an answer: How could Title IX work to correct for institutional inaction surrounding cases of sexual assault without impinging upon the rights of accused perpetrators? As I learned more about the present state of Title IX, I realized how deeply flawed it was. Looking to the past helped me to see the potential of the law despite problems with its implementation, and I began to believe efforts to improve it could usefully redirect existing law. I used Title IX's status as a civil rights law as a pathway towards more meaningful change for its future. Despite the ineffectiveness and even harm caused by the current adjudication system, a hostile campus environment, and overwhelming institutional control, I hold onto the possibility of finding remedy through Title IX. By reexamining conceptions of sexual violence, the campus environment, and the power dynamics imbued within personal, community, and institutional relations, I looked for the roots of current problems with Title IX as well as possibilities for creating change. Looking past the limitations of popular political debate is critical as not to take the solutions it offers for granted. It is important to converse, argue, and search for a more satisfying resolution, until what formerly seemed far too radical, begins to seem possible. I believe that is what I have found here. I hope that by widening the framework for considering campus sexual violence policy that my thesis

does contribute to new conversations and ultimately, I do to see a better and more meaningful future for Title IX, which I believe it has always promised.

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