“This is Not a Legal Proceeding:” Deconstructing the New Title IX

by

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Certificate of Approval

This is to certify that the accompanying thesis by Samantha Grainger Shuba has been accepted in partial fulfillment of the requirements for graduation with Honors in Rhetoric Studies.

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Abstract

In this senior thesis, I analyze the legalistic framework of Whitman College's Title IX grievance policy from 2011-2016 and its effect on the public understanding of Title IX. Examining the Office for Civil Rights' push for collegiate adjudication of sexual assault as a direct result of the 2011 Dear Colleague Letter (DCL), I find that the DCL shifts the focus of Title IX from equal representation to student safety. I argue that this shift led to a series of campus policies that speak in legalese, but have none of the authority of the law. For me, the exigency of college Title IX grievance policies stems from a failure of the legal system to provide justice for victims of sexual assault. Yet, I found that Title IX does not resolve that exigency or provide justice. Employing a feminist deconstructive strategy, I argue that the legalistic framework in collegiate adjudications (which are not legal proceedings) portray themselves as a fair system that putatively delivers justice. I also argue that meeting the standards of the judicial system can never develop into justice. I utilize a feminist interpretation of Jacques Derrida's theory of deconstruction to demonstrate how required collegiate adjudication of sexual assault functionally decriminalizes rape instead of offering a just means of redress.

A Historical Understanding of Title IX

Title IX marked great change in education. No longer could a person be denied access to or discriminated against in any federally funded educational program on the basis of sex. It meant that women could go to co-educational colleges and play sports; they could expect the same treatment as their male counterparts. Part of the Educational Amendments, Title IX was signed into law in 1972. It reads as follows:

> "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."[1]

Along with the above 37-word law, the Department of Education's Office for Civil Rights (OCR) was charged with establishing the details, definitions and exceptions to assist the executive branch in enforcing Title IX.[2] The regulations, enacted in 1975,[3] defined the previously ambiguous scope of Title IX. The regulations mandated that institutions establish a Title IX coordinator to oversee compliance with the law and address the complaints and questions of all students and employees, that non discrimination policies and grievance procedures must be made public, that institutions conduct a self-evaluation to modify any practices that do not comply with Title IX, and that schools must seek to increase participation in programs where discrimination has previously occurred.[4]

Attaching Title IX to Athletics

For women, Title IX initially meant more ways for them to participate in educational programs, such as sports. While Title IX has always included protections

against sexual harassment, until 2011, the law was predominantly known for mandating access for women interested in intercollegiate and K-12 sports. Demonstrating the deep connection between Title IX and athletics in popular culture, there is even a high-end athletic clothing store that shares the law's name. The connection is not accidental, as Title IX was designed with extracurricular activities in mind. The initiative has been successful, and achieves its intended goal. According to the Women's Sports Foundation, since 1972, female involvement in high school varsity sports has increased by over 500% due to Title IX—from 1 in 27 women participating to 2 in 5.[5]

However, Title IX seemed to negatively impact football. In post-1972 America, schools with college football teams were found in violation of Title IX for having no female counterpart. This is a significant finding because football is the largest source of fan-based revenue at most Division I schools, earning 43% of total sports revenues and incurring 26% of costs.[6] With college football on the line, many stakeholders started to get nervous. Heightened anxiety continued following the Supreme Court decision of *Cohen v. Brown*, which gave schools three options to comply completely with Title IX: 1) expand offering of sports to the gender experiencing deficiency, 2) cancel all school-sponsored athletics, or 3) eliminate men's sports until gender balance is reached.[7] In May of 1995, stakeholders presented at congressional hearings, arguing to amend Title IX. Investors, coaches, and past players argued that revenue sports such as football and men's basketball should be treated differently because they raise the revenue necessary to fund the other sports that meet Title IX requirements.[8] These arguments highlighted mainstream understandings of Title IX and contended that revenue sports (specifically,

popular men's sports) should be exempted from the Title IX options stipulated by the *Cohen v. Brown* decision.[9] Eventually, the House of Representatives attached a floor amendment to exclude revenue sports like football from having to comply with gender equity requirements of Title IX.[10] From the 1995 hearings and the passage of the amendment, the mainstream understanding of Title IX is clear: equality is an encroachment on men's sports.

A Move Away from Athletics

In 2011, Assistant Secretary for Civil Rights at the Office for Civil Rights (OCR) Russlyn Ali wrote a Dear Colleague Letter directly addressing Title IX, re-interpreting the law to include sexual assault.[11] The exact legal status of the letter is murky. A Dear Colleague Letter (DCL) is an official, public way for federal agencies to communicate with Congress and other agencies.[12] There is no legal mandate to follow the recommendations stipulated in the letter, but compliance is all but guaranteed because noncompliance threatens access to federal funding essential for both public and private schools. The specific 2011 letter was widely distributed to congressional offices and among programs that receive federal funding, such as colleges and K-12 public schools. It was widely recognized that the 2011 DCL marked a shift in focus for those trying to comply with Title IX. The revision redefined sexual harassment to include complaints of sexual assault, which—as a felony—had previously been directed to the local police.[13]

The 2011 DCL outlines recommendations for how schools should adjudicate sexual assault. First, it states that college grievance processes must be "adequate, reliable and impartial."[14] For the Office for Civil Rights (OCR), this meant that

grievance processes should use a more lenient evidence standard—a preponderance of evidence.[15] A preponderance of evidence standard means that "it is more likely than not that harassment or violence occurred," making it a far lower standard that "beyond a reasonable doubt" or "clear and convincing"—both of which are used in the criminal justice system.[16] For historical precedent, preponderance of evidence is often used by the Supreme Court in Title VII to evaluate discrimination cases and by the OCR to evaluate complaints from those who fall under the purview of Title IX.[17] Thus, according to the 2011 DCL, "in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard."[18] The DCL includes one small caveat in relation to preponderance of evidence: when adjudicating Title IX cases, state schools are required to use due process because they are considered government entities based on their funding, but private schools are not required to comply with due process standards.[19] According to the Due Process Clauses of Fifth and Fourteenth Amendments, no person shall "be deprived life, liberty, or property without due process of law."[20] Yet, the DCL does not define "due process" in text or footnote, and thus public schools are left to define it for themselves.[21] Thus, many schools subscribe to the above definition of due process for their Title IX processes, even though those processes are not legal proceedings. Many private schools use the idea of fundamental fairness instead. Fundamental fairness is defined as "meeting the standards of due process"—meaning that they are essentially the same, but have potentially different discursive connotations.

Second, the DCL also instructs schools to conduct their investigations in an efficient manner—60 days or less. However, the OCR did stipulate that the time limit

was not applicable in complex cases, specifically cases that address multiple incidents at once.[22] Third, and counter to the specificity of a previous directive, the OCR is ambiguous about the role of lawyers in a Title IX investigation. It states that schools can choose whether or not to let parties involved hire lawyers, but only if all parties are allowed.[23] However, at the same time, the OCR "strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing" because it could create a "hostile environment" in which the alleged victim is traumatized while having to confront his or her attacker.[24]

These three instructions were featured parts of the 2011 DCL and prompted most colleges to change their policies in the years after the letter appeared.

Post-Dear Colleague Title IX

Following the DCL in 2011, more regulations from the OCR surfaced, requiring Title IX to be included in the student code of conduct and as a part of each school's disciplinary policies and procedures. The OCR called for a process using the criminal justice system as a model while also framing this new process as a way for victims of sexual assault to get justice through redress. With more lenient evidence standards and absence of police or lawyers, the Title IX process presents itself as more progressive for survivors of sexual assault—many of whom do not seek out a rape kit, delete, throw away or wash away evidence, and often times do not process the fact that they have been raped for months or even years. In its 2014 report titled "Not Alone," The White House Task Force to Protect Students from Sexual Assault made the distinction between the criminal justice system and Title IX. They wrote, "These two systems serve different (though often overlapping) goals. The principal aim of the

criminal system is to adjudicate a defendant's guilt and serve justice. A school's responsibility is broader: it is charged with providing a safe learning environment for all its students – and to give survivors the help they need to reclaim their educations."[25]

Title IX has since become the buzzword of the 2010s. Newspapers and magazines report on some aspect of it weekly—not to mention online blogs, forums and entertainment/news sources like Buzzfeed. The May 2014 cover of Time Magazine featured a collegiate pennant with the word "RAPE" printed in large font, and subtitled: "The Crisis in Higher Education."[26] The documentary "The Hunting Ground" that features stories about Title IX and campus sexual assault has been shown at over 700 colleges and universities only months after its release.[27] A backlash has formed in response to Title IX processes—most complaints coming from men who have been expelled from elite private schools or from schools with big sports programs attesting that the Title IX process is not as fair as it seems to be.[28] This current backlash further indicates that the discourse surrounding Title IX shifted from equal gender representation in sports to adjudicating campus sexual assault.

Whitman College's Title IX

After the 2011 Dear Colleague Letter, Whitman College changed its Title IX policy and grievance policy to suit demands made by the federal government. The Whitman Archives has no written history of Title IX policies; to compensate for the lack of information, I interviewed current Title IX Administrator Juli Dunn. According to Dunn, until the 2013-14 school year, the process worked very similarly to the criminal justice system.[29] The claimant would file with the Title IX coordinator and present their case to a grievance council (made up of two faculty, two staff and two

students).[30] The respondent presents their arguments at the same time, similar to a court proceeding, except that the claimant and respondent act as their own attorneys. In 2014, the Whitman administration decided to change their grievance process for Title IX disputes. Under this new policy, a case is assigned an investigator that is trained by the college to assemble information from the claimant, the respondent, and any witnesses. After gathering the information, the investigator meets with the Title IX Coordinator to decide whether or not the case meets the preponderance of evidence standard. If it does, the respondent moves to the grievance council for sanctioning (this could mean anything from temporary suspension from student activities to expulsion). If it does not, the case is dropped.

Whitman has decided to use fundamental fairness instead of due process for discursive reasons. Title IX Administrator Juli Dunn says,

> When they say 'due process,' they mean in a very specific way. When we see due process in the criminal courts, you get to face your accuser and it's very adversarial. The OCR says it should not be an adversarial hearing. So they're talking about due process in a very specific way—in that you know what you're accused of, you have the opportunity to confront the evidence and speak to that. That's a very different case than if you were in the criminal court system. There, you have the right to question witnesses and the person that accused you…and to some extent the hearing investigation model [used by Whitman up until 2013-14] allows for that.[31]

Here, Dunn points to ambiguity in the DCL's definition of due process, which allows colleges to come to their own conclusion about how to implement due process. Dunn notes that to avoid confusion, the College uses fundamental fairness because it is essentially the same thing as due process, but does not carry the same connotations.[32]

Since the Office for Civil Rights has not given an example of a sufficient Title IX grievance process, nor have they named any one school as an example for how to

set up a Title IX process system, I use Whitman's Title IX grievance policy as my artifact. Whitman has met the expectations of the 2011 Dear Colleague Letter in the following ways: it defines sexual misconduct as "any unwelcome behavior of a sexual nature that is committed without consent or by force, intimidation, coercion or manipulation," the grievance process uses a preponderance of evidence standard, and the process allots 60 days for each investigation.[33] Also, according to Whitman's Clery Crime Statistics, reports of sexual assault tripled from 2011 to 2014, which indicates that more people have reported to the school over time, and not necessarily that more people are being assaulted.[34] Since 2011, more and more people have utilized Whitman's Title IX process and this project focuses on the implications of that popularity: to get justice.

Understanding the New Title IX

According to recent statistics, 1 in 4 women, 1 in 6 men, and 1 in 2 trans* students will be sexually assaulted in their four years on a college campus.[35] American mainstream media is overrun with articles about protecting college students peer-to-peer sexual assault. This discourse has unearthed the 40-year-old law Title IX. Since the release of the 2011 DCL, colleges have been scrambling to meet the requirements by forming positions for Title IX coordinators, and assembling grievance hearing committees and processes. Students file in and out of the processes, some expelled for sexual misconduct and some found not responsible.

The Obama administration hailed the process, indicating that the Title IX process would allow individuals who had been assaulted and had not gotten a rape kit or kept any evidence to get justice. However, these college policies are not legal

proceedings; they do not make up any part of the law, nor are they bound to it. This distinction allows colleges to use a lower standard of proof than a legal proceeding, calculating the probability of a violation to the code of conduct, rather than beyond a reasonable doubt. Not being a legal proceeding also means that colleges can, at most, expel student attackers for violating the student code of conduct. Respondents do not go to jail and their victims have no legal protections such as a restraining order or police protection. I focus my study on the legalistic framework of Whitman College's Title IX grievance policies from 2011-2016, which is not a legal proceeding, yet functions to portray a fair system striving to make those involved feel safe. I also argue that the appearance of fairness undermines justice. Justice is more complicated than determining the guilt of a perpetrator and punishing them; it is about helping the survivor of sexual assault recover from being violated and move forward with their life. I demonstrate how collegiate Title IX adjudications cannot repair an unjust criminal justice system and are, in fact, worse because adjudications lure in victims with the idea of fairness but are unable to deliver justice or even the same protections offered the criminal justice system.

In the next chapter, I situate this paper in the field of Rhetoric Studies and explore Title IX through a legal lens. As well, I investigate Derridian Deconstruction, as demonstrated by Drucilla Cornell, to show how the legalese of Whitman College's Title IX grievance policies portray a fair system that putatively provides justice for survivors.

Title IX, Rhetorical Studies, and Deconstruction

The first part of this chapter explores the way that the field of Rhetoric has addressed post-2011 Title IX grievance policies and procedures. I illustrate a void in the rhetorical analysis of Title IX. Second, I use sources from fields outside of—but related to—Rhetoric to demonstrate existing literature on my object of study, and I examine what scholars are currently writing about Title IX grievance policies relating to sexual assault on college campuses. Third, I review feminist legal deconstruction, my chosen method. Here, I examine Jacques Derrida's idea of deconstruction and how feminist legal scholars like Drucilla Cornell have interpreted his theory as a method to reveal resistive ideas that have productive potential.

Post-Dear Colleague Title IX in the Field of Rhetoric

There is very little literature in rhetorical studies about post-2011 Title IX. The lack of literature demonstrates a need for rhetorical scrutiny in this area. There is a conglomeration of scholarly work that, when combined, demonstrates that rhetorical analysis of Title IX is a fledgling area of analysis. As such, I have chosen to show the span of discontent surrounding the processes to get recourse for gender-based harassment and assault over time.

Complaints about college grievance procedures have been circulated as far back as 1974. In the Bulletin of the Association of Departments & Administration in Speech Communication, activist and scholar Julie Andrzejewski wrote about unequal employing practices for women in higher education, even though various laws, including Title IX, proclaim affirmative action.[36] She contends that many campuses

comprehend affirmative action through a racial lens, but refuse to promote or hire women.[37] Andrzejewski writes that college grievance procedures provide no remedy to complaints of gender inequality for three reasons: the laws referenced (Title IX, Title IV, the Civil Rights Act of 1964, and several Executive orders) are ambiguous, there are no penalties for schools that do not comply, and mandatory reporters are all white, male administrators with a personal bias toward their own kind.[38] Andrzejewski does not address Title IX singularly, nor does she address the issue of campus sexual assault; however, she does demonstrate that dissatisfaction with grievance policies and procedures have only intensified and become more public as stakes have gotten higher. Andrzejewski's indictments of the law still have not been addressed, as those same complaints surface in present-day articles, blog posts, survivor testimony and litigation over Title IX cases on college campuses. Though instead of unfair hiring practices, frustration with grievances policies now stems from perceived erroneous adjudication by colleges in regard to sexual assault.

In 1997, scholars Lilia Cortina, Suzanne Swan, Louise Fitzgerald, and Craig Waldo examined the experiences of university women who have reported sexual harassment to their institutions, specifically the relationship between victimhood and the academic climate.[39] Their results indicated that 100% of college women have experienced some form of gender-based harassment (excluding any unwanted touching), 11% percent reported sexual assault and 28% had experienced both during their time in higher education.[40] Cortina et. al concluded the following:

> The widespread nature of victimization…confirms that women's strong fear for personal safety and perception of negative treatment on campus are well-founded. Women enter academia expecting to find challenge, acceptance, and respect; too often, they encounter a climate of

> indifference, hostility, exploitation, and worse. The past two decades have seen universities nationwide implement policies and procedures to create a safer, more hospitable environment for women students. Nevertheless, it seems clear that these measure fall short of their goals, and additional interventions are still needed to thaw the chilly climate.[41]

This work notes a growing divide along gender lines on college campuses and credits divisions to a fear for personal safety deriving from sexual harassment and assault. Assaults and harassment, they conclude, enable a hostile environment for women exercising their access to education. The conclusions of this article help to construct the framework of the 2011 Dear Colleague Letter. Understanding sexual harassment and assault as creating a hostile environment for previously disempowered groups on college campuses re-translates Title IX to include sexual harassment and assault—something novel for this time period. The DCL functions in the same manner, making collegiate adjudications for sexual assault a requirement for all institutions.

In her 1989 book, *Feminism Unmodified*, Catharine MacKinnon addresses Title IX specifically, but only refers to it as many do: the law's influence for women in sports.[42] Her chapters on rape deal with the issue more generally, and are not focused on college campuses. In the chapter "Sex and Violence: A Perspective," Mackinnon contends that our society defines rape "according to what men think violates women."[43] She conversely contends that we should define rape from a woman's point of view and not around penetration.[44] By that standard, she points out, rape and heterosexual sex are not all that different—violence is the only key difference. Mackinnon writes,

> Now this gets us into intense trouble because that's exactly how judges and juries see it, who refuse to convict men accused of rape. A rape victim has to prove that it was not intercourse. She has to show that there was force and she resisted, because if there was sex, consent is

> inferred. Finders of fact look for 'more force than usual during the preliminaries.' Rape is defined by distinction from intercourse—not nonviolence, intercourse. They ask, does this even look more like fucking or like rape? But what is their standard for sex, and is this question asked for the *woman's point of view*? The level of force is not adjudicated at her point of violation; it is adjudicated at the standard of the normal level of force. Who sets this standard?[45]

Mackinnon takes issues with the way that the law affects certain populations differently because the law is set to a white male standard. In the above paragraph, Mackinnon demonstrates that women (the primary group of individuals targeted for rape) are put on the spot to prove to a court that they were raped, and did not just have sex, as opposed to vice versa, or seeing rape and sex differently. Mackinnon questions who decides the amount of violence to turn sex into rape. She observes that commentators criticize rape for being a "her word against his" situation, and proclaims that "it really is her perspective against his perspective, but the law has been written from *his* perspective."[46] The law affects women differently than men by putting an inordinate burden of proof on women who report rape; they must be able to prove the event was different from sex.[47] Mackinnon calls for a change in laws, seeing them as serving men's interest and silencing the voices of female rape victims.[48]

In 1998, York University scholar Susan Ehrlich used MacKinnon's ideas to inform her own study of York University's grievance procedures. Specifically, she studied the "discursive means by which a defendant in a sexual assault tribunal attempts to represent himself as innocent."[49] Her study analyzed the transcribed audiotape of a York University disciplinary hearing dealing with two cases of sexual harassment by the same man (the case was what most would consider sexual assault, but in the university system, it is categorized under the umbrella of sexual harassment). During the hearings, the accused shifted blame toward the victims using phrases like,

"She never said 'no,'" "she said she was tired, you know, she never said like 'no,' 'stop", 'don't,' you know 'don't do this' uhm 'get out of bed,'" and when one woman came back to her own bed after briefly escaping the perpetrator to tell another person that the accused was trying to rape her, he said, "I do not think it's appropriate to get back into a bed with somebody who you claim was taking advantage of you."[50] The accusers did not tell the accused not to do or to stop doing the things that he was doing, therefore he frames himself as innocent. As such, he cannot be blamed for their lack of communication.[51] Ehrlich argues that this is a common trope; defendants in rape cases frame themselves as innocent by counting on deficient communication from the accusing party during the act.[52] Inspired by Catharine MacKinnon's ideas regarding sex discrimination in U.S. law and policy, Ehrlich understands this "deficient communication" effectively obscures the power dynamics in a gendered sexual assault situation.[53] She compiles evidence to support MacKinnon's theory that communication assumes a stagnant state of the victim is understood in the affirmative—an assumed 'yes,' rather than understanding silence or lack of 'no' to mean 'no.'

The arguments in all of these pieces illustrate a tone of desperation over time as scholars have been confronted with gender-based crimes committed on college campuses. All of the scholars I mention call for justice for victims of sexual assault. They note tropes that deny survivors chances to use adjudication processes to get justice and gender equality. The work of these four women over the course of thirty or so years shows that sexual assault and Title IX need to be explored. They consult sexual assault on a legal level, and thus since Title IX deals with these same issues under the guise of a criminal system I will too enter a legal political sphere.

Exploration of the legal-political sphere serves three purposes: it fills a void in the literature, illustrates the tone of desperation, and performs my argument that Title IX operates within a legal framework.

Title IX Grievance Procedures through a Legal Lens

Two main areas of concern for Title IX grievance procedures that have surfaced are important for my analysis. I present them below in the form of two research questions:

1. Is there something special about campus assaults that make Title IX adjudications of sexual assault necessary?
2. Are the OCR's recommendations in the 2011 DCL fair and equitable?

In the next section I use feminist deconstruction to assist in answering these research questions. I employ Jacques Derrida's "Force of Law: The 'Mystical Foundation of Authority.'" to show how current discourse around Title IX inextricably links it to the criminal justice system.

For their 2015 American Psychological Association study, David DeMatteo, Meghann Galloway, Shelby Arnold, and Unnati Patel conducted a 50-state survey of criminal statutes related to sexual assault. Confronted with rising rates of reported college assault and prevalent displeasure with collegiate adjudications and the criminal justice system's approach to dealing with rape cases, DeMatteo et al. sought to understand why Title IX adjudications are perceived to be necessary. Is it because the state laws do not account for instances of sexual assault happening on college campuses? To answer this question, the team researched over 432 subsections of statutes, finding that many states had more than one statute related to sexual assault—

New York alone had 26.[54] Their results showed that while every state had at least one statute relating to sexual assaults committed on and off campus, the laws were vague at best.[55] Seven states explicitly defined "consent," only 12 address the mental state or "capacity" of parties to give consent, and most do not use gender neutral language—meaning that, in some states, rapists are only men and women are the only people able to be raped—further limiting what qualifies a "victim."[56] DeMatteo et al. argue that these three shortcomings "limit the applicability and utility of the sexual assault statutes in cases of campus sexual assault."[57] Specifically, they point out that many assault cases occur when one or both parties are intoxicated from alcohol and/or drugs. Temporary incapacity is often left out of statutes, or the statutes require that accused perpetrators were aware of the victim's incapacity at the time of the offense.[58] As well, they note that many laws do not account for the role consent discourse plays in prosecuting sexual assaults when the word is not defined in the statute.[59] Lastly, regarding gender-neutral language, while most sexual assaults reported come from women, men, non-gender-conforming and trans* individuals experience sexual assault, and those victims are left without access to legal recourse under many of the statutes studied.[60] DeMatteo et al. demonstrate that the legal system does not meet the needs of survivors of campus sexual assault, justifying the development of Title IX as a mechanism to adjudicate assault cases.

There is a multi-faceted discussion between university professors and practicing lawyers, about the effect of the DCL on harassment and assault adjudication on college campuses—specifically regarding the DCL's due process and evidence standards. In their article "Emerging Litigation Regarding Fundamental Fairness of Investigation

and Resolution of Sexual Assault Claims by Colleges and Universities," Mark Shaughnessy and Jeffery Dolan use open letters from Penn Law School and Harvard Law school to predict what lawsuits will follow the updated OCR requirements of the collegiate Title IX adjudications.[61] They document how both law schools argue that the OCR-recommended procedures are biased against the accused party and inconsistent with standards of due process.[62] While each school's individual policies are somewhat different, both sets of faculty take issue with the prohibition of legal representation in the process, and, furthermore, that present lawyers cannot cross-examine any witness or the complainant.[63] They also contend that Title IX's use of a preponderance of evidence standard is not as accurate as "clear and convincing" and "coupled with media pressure, effectively creates an assumption in favor of the woman complainant."[64] Lastly, both faculties (Harvard and Penn) disputed the investigative processes taken up by both schools in which an investigator or investigative team collects facts and presents their findings to a panel for sanctioning. They argue that this does not allow the accused to face the complainant or present a defense.[65] Shaughnessy and Dolan argue that the complaints of Penn and Harvard Law Schools are starting to appear in lawsuits filed against colleges by respondents that have been expelled for Title IX violations and will emerge in coming years.[66] They hint in their conclusion that greater compliance with due process would reduce the number of lawsuits.[67]

Stephen Henrick takes Shaughnessy and Dolan's argument about due process further, arguing that current OCR Title IX regulations actually create a hostile environment for students accused of sexual assault.[68] Hostile environment was the original reasoning to include sexual assault cases under the umbrella of Title IX—

sexual violence creates a hostile environment on the basis of gender, as sexual assault is often a gendered crime.[69] Henrick concludes that the colleges, via OCR requirements, are more concerned with providing justice for complainants because it is in the school's best interest to do so.[70] However, he contends that schools favor the complainant at the expense of due process.[71] Henrick vehemently argues that colleges should not adjudicate sexual assault claims because many Title IX administrators do not have the "necessary training and expertise to competently adjudicate sexual assault claims," and they also have too many conflicts of interest to be able to adjudicate fairly.[72] He notes these conflicts of interest as financial ("…acquitting an accused student carries the threat that OCR could exercise its enforcement authority and thereby cost a college over half a billion dollars in federal funding."), concerns for professional career ("The primary goal of modern academic administrators is to buy peace during their tenure and to preserve the appearance of competence on their watch—an appearance essential to their careers."), the university's reputation ("Because universities appeal to popular sentiment to attract students and receive alumni donations, they shun negative publicity."), and ideology ("For some schools, a desire to change societal and cultural attitudes toward sexual violence (or perhaps a simple desire to see what they want to see) can even lead to illegal conduct.").[73] For Henrick, the Title IX system acts too much like the authority of law without the same rights or protections, while for Shaughnessy and Dolan, the processes lack major components of legal due process. Henrick also disagrees with DeMatteo et al. when they declare Title IX a necessary answer to deficient laws addressing campus sexual assault. He argues

that sexual assaults should be left to the criminal justice system "to ensure justice for all concerned."[74]

Lavinia Weizel disagrees with Henrick, as well as Shaughnessy and Dolan. She uses the Supreme Court's due process balancing test to "examine the constitutional due process rights of public college and university students and argues that the preponderance of the evidence standard is a sufficient minimum standard to ensure due process protections for accused students in campus disciplinary proceedings for sexual assault."[75] In her test, Weizel employs three questions that determine balance as a result of *Mathews v. Eldridge*: 1) what private interests will be affected by state action?, 2) is there risk of erroneous state action?, and 3) are there public interests by requiring certain state action?[76] In answering the first question, Weizel found that "a student's reputation, career goals, educational advancement, and relationships with faculty and peers" are at stake, and thus there can be significant loss.[77] For the second question, she found that "because the interests at stake are significant for both the accused student and the school in the event of an erroneous finding of fact, the preponderance of the evidence standard is most appropriate under the second Mathews factor because it allocates the risk of error equally between the accused student and the school"—meaning that the preponderance of evidence standard weighs the events evenly to come to a decision (50/50 plus a feather), and thus it is far more fair than any other standard.[78] Lastly, answering the third question, she argues that, the preponderance of the evidence standard "best accommodates a school's concern for erroneous findings in either direction because the standard allocates the risk of error equally between the parties."[79] Weizel uses legal standards and tests to evaluate an

administrative process, as do many of the other scholars that I discuss here. She also proves that, assuming Title IX could be considered a legal or criminal proceeding, the preponderance of evidence standard is the fairest standard to use based on a Supreme Court-proven test.

Converse to all of the authors discussed above, Mary Koss, Jay Wilgus, and Kaaren Williamsen reject the notion that a quasi-criminal justice should govern Title IX procedures.[80] They argue that the criminal justice approach is too narrow and instead re-read the OCR's requirements in the DCL in terms of restorative justice.[81] Restorative justice is founded on the notion that "harm has been done and someone is responsible for repairing it."[82] They write that

> The focus of restorative justice is present and future oriented. Looking back to weigh evidence and deliberate fault is the function of adversarial justice, which we believe the DCL guidance encourages by not highlighting the utility of informal resolution options in which responsible persons accept responsibility early and work collaboratively with impacted parties and support resources to repair the harm and prevent reoffending behaviors.[83]

These scholars support shared interest in justice without using the same tactics as the legal system. Koss et al. intend for restorative justice to replace adjudication processes and move away from the law to a space more capable of providing justice for survivors and supporting affected communities.[84] In their conclusion, Koss et al. argue,

> Traditional resolution processes were designed to offer due process adjudication for accused students. They were not designed to meet victim's needs or achieve goals other than punishment. A variety of options are needed to be victim-centered and to appropriately pair process with more than 40 distinct forms of sexual misconduct identified earlier and with the variation among students and their situations.[85]

Koss et al. reject notions of legality in reference to Title IX and instead push for a restorative justice understanding of the DCL. Their interpretation would negate any

legal recourse for unhappy respondents because restorative justice is very clearly not associated with the criminal justice system.[86]

Legal Rhetoric as Performative Authority

For the remainder of this chapter, I utilize Jacques Derrida's article "Force of Law: the 'Mystical Foundation of Authority'" as a reference for both my theory and method as it applies to both. Subsequently, I examine the authority of the law as performative in nature. In "Force of Law," Derrida understands the law as follows:

> Laws are not just in as much as they are laws. One does not obey them because they are just but because they have authority. The word *credit* carries all the weight of the proposition and justifies the allusion to the mystical character of authority. The authority of laws rest only on the credit that is granted them. One believes in it; that is their only foundation. This act of faith is not an ontological or rational foundation.[87]

Derrida points out that laws are constitutive in nature; laws reside in a cyclical motion in which they must have authority, and it is those who follow the law that make up its authority. James Boyd White elaborates on this concept, arguing that legal rhetoric determines the ways in which audiences and rhetors understand legal controversies.[88] The law is constitutive in that it standardizes a particular social order and those relationships between people, which it does through identity categories such as class, gender and race.[89] White's ideas can be used in tandem with Robert Hariman's claim that "society reproduces itself through performance before spectators in public space…The performance of laws then becomes a singularly powerful locus of social control, for it is the very means by which the members of the community know who they are."[90] According to White and Hariman, the law enables the layperson to understand where they stand: inside or outside the law, and specifically for Hariman, it

acts as a "locus for social control." Hariman points out that trials act out the authority of the law by showing a shared set of values and placing people as sharing those values and not. However, both White and Hariman neglect to address any conception of justice assuming the constitutive aspect of laws.

Derrida speaks to this constitutive aspect of laws:

> Law is not justice. Law is an element of calculation, and it is just that there be law, but justice is incalculable, it demands that one calculate with the incalculable; and aporetic experiences are the experiences, as improbably as they are necessary, of justice, that is to say of moments in which the *decision* between just and unjust is never insured by a rule.[91]

For Derrida, society has multiple levels of understanding for retribution. He sees justice as "incalculable" and, as a result of its status, is absolute and divine. The law can only aspire to justice because the law is only "an element of calculation"—a string of umbrella terms attempting to apply itself to every individual case, most of which have some level of fine detail that the law is too broad to cover. Therefore, the law must keep justifying itself internally or expanding to include new and special situations as they arise. Since a Title IX grievance process is too broad to address the individual, and has none of the same authorities or protections of laws, it raises the question, where does Title IX fall? Derrida's response would be: it is an administrative process that aggregates authority by imitation.

Feminist Deconstruction

My method draws from feminist scholar Drucilla Cornell's application of Derridian deconstruction to address how gender binaries more negatively affect women, and how that system of power directly affects the legal precarity of women's

rights. Title IX illustrates the legal precarity of women, as it litigates how women interact with educational programs. About deconstruction and the law, Derrida writes:

> It is this deconstructible structure of law or, if you will, of justice as law, that also ensure the possibility of deconstruction. Justice in itself, as such a thing exists, outside or beyond law, is not deconstructible. No more than deconstruction itself, if such a thing exist. *Deconstruction is justice.* It is perhaps because law (which I will therefore consistently try to distinguish from justice) is constructible, in a sense that goes beyond the opposition between convention and nature, it is perhaps insofar as it goes beyond this opposition that is constructible—and so deconstructible and, better yet, that it makes deconstruction possible, or at least the exercise of a deconstruction that, fundamentally, always proceeds to questions of law and to the subject of law.[92]

Here, Derrida shows how deconstruction can be more than a theory. To deconstruct something shows that it is constructible in the first place—unlike justice, which is "beyond the law," divine.[93]

Cornell uses a feminist legal decontructionist method to grasp how "traditional explanations of the distribution of political power" help us understand why women's rights are constantly stripped away and restored.[94] Derrida outlines two ways to employ deconstruction: 1) to demonstrate historical, logico-formal paradoxes, meaning to essentially prove binaries false or complicate them, 2) show a historical amnesic reading of texts, meaning forgetting a text's own history.[95] Cornell uses both methods. First, she documents the history of her text, beginning with Jacques Lacan's understanding of the gender hierarchy through the construction of the Other, the discussing Carole Pateman's understanding of basis of our social order as "the implicit *sexual contract* that gives men access to women."[96] She then uses Niklas Luhmann's systems theory to show paradoxes in our system of binaries. Cornell writes,

> Gender, then is a classic example of how a functional systems structures itself through a binary opposition…Using Luhman's language, Lacan, then, shows us why the structure of this binary opposition, as a set of

> duplication rules, perpetuates itself through the repudiation of the feminine.[97]

Cornell shows how the gender binary is constructed through Lacan's language of binary opposition. She asserts that this binary is not equal, but hierarchically ordered whereby masculinity is defined as the negation of the female—to be a man is defined by what he is not.[98] She then puts this theory to the test with an example of a law firm that has introduced a "mommy track" to allow female lawyers to be successful at the law firm and still maintain their role as primary caregiver to their children.[99] Cornell wonders if this change has dismantled the gender hierarchy. She ultimately decides that it does not because it is predicated on the idea of the woman's (primary) role as the mother in the home, and the man's place at work, but does not account for the possibility of gender reversal (primary caregiver dads), which means that the hierarchy continues.[100]

Cornell suggests that there is the possibility of justice, but it never arrives. She relies on assumptions made in "Force of Law" to make this claim, namely where Derrida argues that "…justice as the possibility of deconstruction, the structure of the right or of the law…the founding or the self-authorizing of law as the possibility of the exercise of deconstruction."[101] Cornell states in her article that descontructing an object, event, or law can show the possibility for resistive readings and resistive action, however, she does not demonstrate a resistive response to systems theory and gender in the workplace.

In light of these observations, I will now use feminist deconstruction to analyze Whitman's Title IX grievance policies.

Analysis of Whitman's Title IX Policies

Whitman College's Title IX grievance policy can be found in the chapter titled "Student Rights and Responsibilities" in the Student Handbook. Whitman's Student Handbooks are edited annually, but typically do not change substantially year-to-year. Before the 2012-13 edition of the Whitman student handbook, Title IX-based grievance procedures did not exist. Instead, the College had a generalized grievance policy, shown step-by-step solely for instances of plagiarism. Coinciding with the release of the DCL in April of 2011, staff in the Dean of Students' office developed an interim grievance policy for 2012-13, which they finalized for the 2013-14 school year.[102] A few changes have been made to the Whitman Title IX grievance policy since 2014, but none as substantial as the inclusion of the Title IX grievance policy to the Student Handbook.

This chapter explores Whitman's post-2011 Title IX grievance policies and procedures. In the first section, I illustrate how legal and administrative language intermingle in policies from 2011-2016. In the second section, I compare terminology used in the administrative context of the grievance policies to Washington State legal definitions in statutes pertaining to sexual assault. I have chosen to compare Whitman's policies to Washington's sexual assault statutes for two reasons: first, rape statutes vary state to state, and there is not all-encompassing federal law defining rape and penalties of rape. Secondly, Whitman is located in the state of Washington and has stipulated in every grievance policy that "all students have the responsibility to obey federal, state, and local laws."[103] In the last section, I review the protections and sanctions presented in the Title IX policies in comparison to penalties for those convicted of rape in the

state of Washington. Here, I compare the potential findings and protections of each option (criminal and administrative) available to Whitman College's student victims of sexual assault.

Specific Use of Legal Language

I discovered that Whitman's grievance policies employ legal jargon interspersed with administrative language. The statement "The College prohibits sexual misconduct in any form"[104] appears in all of their policies. "Prohibit" is a legal term which denies an individual's access to a thing or action—a simple example being a sign that prohibits parking a car in certain places. The word "prohibits" affords the owner of the space—be it private or publically owned—to take systematic, legal action against the perpetrator who parked there. In this way, the word "prohibits" suggests that the College has the legal authority to take action against those who violate their sexual misconduct policy. That the College repeats the word "prohibits" several times in its policies only reinforces this notion. Whitman also repeats several words associated with the criminal justice process, specifically "evidence," "rights," "alleged violation," and "the accused," more than 100 times throughout 5 years worth and 50 pages of documents.

In many sections, the College borrows ideas and language from Washington state laws. Specifically, the policy employs both definitions and the evidence standard. Whitman utilizes a "preponderance of evidence standard" when adjudicating Title IX violations.[105] The preponderance of evidence standard is usually employed in proceedings that are neither civil nor criminal, but solely administrative. In comparison, Washington State Court Rules states that "disciplinary counsel has the

burden of establishing an act of misconduct by a clear preponderance of the evidence."[106] The College uses the legal definition of "more likely than not" to determine if a respondent is responsible for violating its sexual misconduct policy.[107] The College also employs a rewritten version of Washington's definition of consent for their grievance policy. The College writes, "The College defines consent as a freely and affirmatively communicated willingness to participate in sexual activity, expressed by clear, unambiguous words or actions," which is hardly different from Washington's definition: "'Consent' means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."[108] By repeating specific legal terminology and borrowing legal definitions, the College aligns itself with the criminal justice system.

Replacement of Legal Language

While Whitman College borrowed heavily from Washington state law to create and define the terms of their grievance policy, it also avoided certain legal terminology, replacing those terms with new ones. As the policy states, the College must "…end the violation, prevent its recurrence, and remedy its effect on individuals and the community."[109] In Washington state law, this phrase would be replaced with penalties. For example, Washington state law mandates that those convicted of rape in the first-degree serve at least three years in prison.[110] The College is not that specific, but instead relies on a vague policy that can be shaped to the situation.

Other words and phrases in Whitman's grievance policy stand in for legal terminology as well. "Grievance" and "grievance statements" stand in for "report" or "case"—as in filing a report with the police or bringing a case to court. Those who file

grievances are referred to as "complainants" and those who respond to those grievances are "respondents," as opposed to "plaintiff" and "defendant," which are widely used in legal processes. The Title IX Administrator needs to have "reasonable cause" to start an investigation, which replaces "probable cause," the standard by which police have the grounds to get a warrant to search, arrest or seize items.[111] The Title IX Administrator can issue a "no-contact order or a no-trespass order," which operate similarly to a restraining order with subtle differences.[112] A plaintiff can never violate a restraining order; it is the duty of the defendant to meet the requirements. Comparatively, it is completely possible for either the complainant or respondent to violate a no-contact order.[113] At the end of the investigation, the Title IX Administrator presents a finding: "responsible or not responsible," which takes the place of guilty or innocent verdicts. If found responsible, the respondent is "sanctioned," which replaces the word "penalized." Most of the legal terms used by the College in their grievance policy were intermingled with some of the replacement legal terms above—at times in the same sentence. Two representative examples are as follows: "[The Title IX Administrator] assists complainants and respondents in understanding their rights" and "…investigating reports of alleged sexual misconduct involving students and issuing no-contact and no-trespass orders."[114]

According to the guarantee of the Miranda Rights, plaintiffs and defendants have a right to an attorney unless they wish to represent themselves in court.[115] However, that same right does not apply in Whitman's grievance policy. It states, "Individuals may consult an attorney; however, the College's investigations, hearings, and appeals are not legal proceedings and attorneys may not be present or

participate."[116] Whitman distances itself from the law by referring to the processes as "not legal proceedings," which exempts Whitman from having to provide attorneys for students or bringing in their own attorneys.

Washington state law also allows for a personal representative to accompany victims of sexual assault "to proceedings concerning the alleged assault."[117] Whitman's grievance policy allows for a similar role, but this individual is called an adviser. The policy states that "individuals involved in a hearing have the rights to an adviser to help prepare for the hearing. The adviser must be a member of the Whitman community (current students, or employees of the College only)."[118] The role of the adviser has been expanded since 2013. The section has now 11 bullet points outlining duties of the adviser, and it also allows for an individual's attorney to serve as adviser as long as they do not "actively represent the party in hearing and appeals process."[119] Allowing an attorney to serve as adviser complicates the rule above banning attorney involvement in Whitman's Title IX grievance policy.

Educational Protections

Educational outcomes are another way Title IX differentiates itself from the legal system; the system seeks to educate, not to punish. The Students Rights and Responsibilities section of the student handbook states that "the College seeks to educate students, faculty, and staff about these issues and provide a means of recourse for those students who believe they have experienced such behavior."[120] The grievance policy also includes a section on education about sexual assault and sexual assault prevention. That section includes an explanation of bystander intervention program Green Dot and online trainings that students and employees complete before arriving

on campus.[121] Also, the sanctions stipulated in the policy have educational undertones. Those found responsible could be subject to "conduct probation, suspended conduct probation, or other actions including verbal warnings, written warnings, prohibition of participation in commencement activities, dismissal, suspension, restitution or other actions appropriate to the offense."[122] The focus on education shifts attention away from punishment or retribution.

In my final chapter, I use these interpretations to argue that the legalistic framework of Whitman College's Title IX grievance policies from 2011-2016 functions to portray an authoritative legal proceeding. I also argue that while the appearance of judicial fairness discursively aligns with justice, a legal-administrative proceeding can never achieve justice. I conclude that collegiate Title IX adjudications cannot repair an unjust criminal justice system, and, in fact, are worse because adjudications lack the same protections of the law. The consequence is that Title IX grievance proceedings functionally decriminalize rape.

Conclusion

This thesis has documented the history of Title IX and shown that in the wake of sexual assault victims' discontent with the criminal justice approach to adjudicating sexual assault and the 2011 Dear Colleague Letter, colleges and universities have bolstered Title IX grievance policies in an attempt to address that exigence. I documented the exigency of Title IX policies, which stems from the failure of the criminal system to effectively prosecute instances of sexual assault. I conclude by making three major arguments. First, I argue that the legalistic framework of Whitman College's Title IX grievance policies function to portray an authoritative legal proceeding, but instead functionally neglect the history of how Title IX came to address sexual assault; rape and the threat of rape were seen to create a hostile environment for women, and the law was perceived to create a similar environment for rape victims. Secondly, I argue that while the appearance of judicial fairness discursively aligns with justice, Title IX can never achieve justice. Lastly, I argue that Title IX adjudications cannot make up for the failings of the criminal justice system and fundamentally lack protections that the law provides, which is even worse than the legal system. In sum, these arguments lead me to conclude that framing an administrative process as a replacement for criminal proceeding discursively functionally decriminalizes rape.

First, Title IX policies use legal language and definitions along with legalistic language, which strengthens the College's authority to enforce the policy. Whitman's Title IX grievance policies simultaneously align with judicial process and exist at a distance—sometimes in the same sentence. Whitman's replacement terms like

"fundamental fairness" do not work in opposition to legal terms like "due process," they are watered down legal imitations. Fundamental fairness works under the assumption that it replaces due process, and in fact, due process is included in the definition of fundamental fairness. Thus, the replacement legal language works with legal terms to imitate the law rather than oppose it. Impersonating the law also makes the grievance policies seem fair because of how law is discursively understood to provide both fairness and justice. In Chapter 2 of this thesis, Derrida stated, "The authority of laws rest only on the credit that is granted them. One believes in it; that is their only foundation."[123] To use White's concept, the law is constituted through a collective understanding of authority by the people it protects and controls. Since the United States legal system has been constitutively established for generations, Title IX is able to piggyback on its authority by imitating existing legal language. While Whitman College's grievance process reads and functions similarly to a criminal proceeding, it does not provide the same protections as the legal system in three specific areas: no contact orders, sanctions and educational punishments.

As noted in chapter three, the Title IX Administrator can issue a no-contact order or a no-trespass order that operate similarly to a restraining order, but without the same subjectivities in place; a plaintiff can never violate a restraining order, meaning that it is the duty of the defendant to meet the legal requirements. It is completely possible for either the complainant or respondent to violate a no-contact order and be sanctioned for it.[124] Title IX treats both parties as equally capable of breaking the contact order, in contrast to a restraining order, which places the responsibility on the responsible party or perpetrator. Moreover, at the end of a Title IX investigation, if the

Administrator finds a respondent responsible for violating the sexual misconduct policy, then the respondent is "sanctioned." I argue that these sanctions are not punitive. Those found responsible could be subject to "conduct probation, suspended conduct probation, or other actions including verbal warnings, written warnings, prohibition of participation in commencement activities, dismissal, suspension, restitution, or other actions appropriate to the offense."[125] When a student is dismissed from the College, banned from commencement, or prohibited from participating in clubs or sports, the College is merely "…end[ing] the violation [and] prevent[ing] its recurrence"—as stipulated in the grievance policy. [126] However, the student is not being punished. Punishment requires paying penance—meaning not only paying a neighbor back for damaging his car, but also having a driver's license suspended for dangerous behavior behind the wheel. Title IX sanctions are not punitive because they do not offer anything outside of resolution of the crime with the potential prevention of its reoccurrence. Students found responsible are not punished further, and definitely not to the extent of the law imitated by the College's Title IX policy.

Also, as the policy states, the sanctions are "appropriate to the offense," meaning that for certain cases more assignment-based measures may be taken. For a crime of the caliber of sexual misconduct of any degree, the legal system does not consider an educational penalty unless paired with a punitive measure such as jail or probation. I argue that, in a backwards fashion, educational reprimands function to reward criminal behavior. Most, if not all, students pay Whitman College for a service: to be educated by professors and peers. Following state-based logic of due process, the state can deprive a citizen of "life, liberty and property" if, by due process, they are

found guilty of a crime.[127] In the case of Title IX, being found responsible could mean that a respondent gets more education in the form of written assignments and verbal/written warnings. The burden to educate falls back on the institution for an otherwise personal and behavioral problem. Someone found responsible for harming another student (unlikely to be penetrative sexual assault, but since sanctions are determined for each case by the Sanctioning Panel and not by the policy, level of sanction is based on the prerogative of the panel and is thus a Schrödinger's Cat of possibilities) could get more of what they are in school to get for the same amount of money as those who did not break the rules. The school then spends more money and time to educate this student, which takes time and money away from students who have not violated school policy. In this case as well, the school offers the responsible student a very particular service: covert lessons in maturity. College is a place of learning, and while arguably those who attend mature incredibly by the end of their four years, the College is not responsible for socializing their students to the adult world. By discursively including sexual assault prevention and adjudication under the purview of Title IX, it has become the College's job to protect students from each other and to adjudicate the situations that have somehow escaped those protective measures. Without the punitive power and protections provided by law, the College is limited in its available sanctions. It can only serve its students in its intended capacity: education. These lessons in maturity and humanity (e.g. taking a class on consent, writing an essay about why groping is harmful, etc.) come at no extra cost to the student found responsible, serve as a resolution to the conflict (not a punishment), and involve no measures that protect the victim such as prison or probation. The student leaves school

with no marks on their permanent record, and more of an educational service than students who followed the rules and matured on their own. What does that say about harming another student? Under the purview Title IX, it pays off in education.

Second, I argue that Title IX can never achieve justice. As Derrida states, "Law is not justice. Law is an element of calculation, and it is just that there be law, but justice is incalculable, it demands that one calculate with the incalculable."[128] Put simply, for Derrida the law can never be just because justice is divine, and therefore unattainable, especially by an umbrella-style legal system that tries to address everyone's needs in just a few words. The law calculates fairness to treat all who enter the legal system with the same protections and rights. However, those umbrella rights do not account for the uniqueness of each individual case. Title IX is positioned to provide justice where the legal system has failed, but Derrida contends that it is impossible to get justice from the institution of law. I argue that, in the same way, discourse frames Title IX in such as way that it can only fail victims of campus sexual assault. Title IX adjudications strive to create the same environment that existed before the complainant was raped, "…end the violation, prevent its recurrence, and remedy its effect on individuals and the community."[129] However, the College has no power to take away that someone has been violated by one of their peers, and it has very little power to penalize the respondent or protect the complainant after the investigation is over. The College can only (at most) expel the respondent or enact a no-contact order; it cannot incarcerate or further punish respondents. Title IX grievance policies have no theory of justice, no way to provide recourse for victims; education and expulsion are all the College can offer.

Third, Title IX grievance policies tend to forget the historical intentions of the law itself: to create a non-hostile educational environment for women. Historically, educational institutions have been a white male space. The Title IX Educational Amendment of 1972 made a concerted effort to rectify that unequal situation and create a space where women and men could be co-educated without hostility. In 2011, the DCL re-framed what constitutes a hostile environment to include rape and the threat of rape. Thus, colleges must strive for a non-hostile environment by preventing and adjudicating campus rape. The College sought legal language to establish the constitutive authority to adjudicate rape—the system that had failed victims of assault in the past. Mackinnon notes that the law, as written, is to be hostile toward women. She observes criticism of rape often being a "her word against his" situation, and declares that "it really is her perspective against his perspective, but the law has been written from *his* perspective."[130] According to MacKinnon, because the law has been written from "his perspective," the victim has to work harder to prove that what happened was rape, not sex. Here, I locate a paradox. In the efforts to remedy a hostile environment, Whitman College takes language from a system historically hostile toward victims of rape. However, by imitating the language of law, Title IX actually expands an exploitational system that continues a hostile environment for women. By forgetting its own history, Title IX grievance processes become exactly what Title IX hoped to remedy in the first place.

Title IX also forgets that it resides in a system that only exists if it mutually benefits the group in power: men. Flashing back to another Civil Rights issue, Title IX directly reflects conclusions from Derrick Bell's application of the interest-

convergence thesis to *Brown v. Board of Education*. He stipulates that "the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[131] Title IX operates in a similar fashion with gender. The law successfully elevates access so that women and men have equal opportunities to educational programs, but only when that elevation does not disrupt currently existing rights of men. Thus, when Title IX disputed the legality of funding men's football without an equally funded women's team, an amendment was added for the law to continue to benefit the group in power. With the change in focus as a result of the 2011 DCL, Title IX forgot that it still operates within the interest-convergence framework by trying to provide justice for victims of sexual assault. Title IX policies continue to serve the interests of dominant group by being unable to punish students who assault other students or protect students who have been assaulted. However, throughout this thesis, I outlined a growing fear from legal scholars and popular news media that Title IX policies may infringe upon the rights of those accused of sexual assault, who, as reported, are predominantly men.[132] With men's rights in jeopardy, so are any progressive changes to Title IX, unless in some way those changes benefit men. While I acknowledge that both men and women benefit from a rape-free society, sexual harassment and rape are weapons used predominantly by men to aggregate power, and thus men, as a group, may benefit from the inability of Title IX to punish it. Thus, the College reaches a defining moment: to either break from the interest-convergence paradigm or continue working within that mold. Is the College in a position where they may act in the interest of victims as the expense of potential perpetrators in order to get justice? At this moment in time, the answer hangs in the balance.

This thesis culminates with a final conclusion: replacing a criminal process with an administrative one functions to decriminalize rape. Finding that the criminal justice system was failing to effectively prosecute instances of campus rape, Title IX expanded its purview to include those instances of sexual assault; Title IX grievance policies are framed as a non-legal (administrative) processes by which victims of campus sexual assault can get justice. However, to establish the authority necessary to adjudicate such a crime, Title IX policies borrow heavily from legal language and definitions. The imitation of the law functions to bolster the authority of Title IX. However, including rape victims in the administrative process of Title IX equates them with students who plagiarize or commit petty theft since those students enter roughly the same process. Framing Title IX administrative processes as *the* way to get justice—and not the criminal justice system—serves to diminish the crime of rape, effectively decriminalizing a felony.

Does my analysis indicate that I believe in abolishing Title IX? Absolutely not. In Walla Walla, specifically, Title IX is one of very few ways for college survivors of sexual assault to get recourse after being raped, and those few ways become even more limited as the amount of evidence decreases. Historically, rape cases are incredibly difficult for county prosecutors to win. Mackinnon argues, "A rape victim has to prove that it was not intercourse. She has to show that there was force and she resisted."[133] As well, because the Walla Walla county prosecutor is an elected official, it is in his best interest to only take on cases that he can win. The situation with the prosecutor may be symptomatic of a broader issue with rape cases that is outside the scope of this project,

but certainly affects the climate surrounding Title IX. With this climate, Title IX is a necessary avenue for recourse, as it may be the only option many victims have.

Mary Koss would disagree with me. She argues that the criminal justice approach is too narrow to adjudicate campus sexual assault, and colleges should utilize restorative justice.[134] Restorative justice offers no particular option for recourse, and instead allows the victim and community to choose the outcome of the investigation.[135] While this approach certainly addresses the language-based problems I have noted in above paragraphs, I question its feasibility. Restorative justice is inherently built around a lack of procedure. This lack presents a challenge with widespread implementation. Restorative justice also operates around the community where the crime is committed and what outcome would most benefit that community. Inherently, it is not punitive because it lacks the protections, regulations, and procedure of the legal system. Thus, I stipulate that a restorative justice approach to campus adjudications still serves to decriminalize a felony by not punishing rapists for the crime they committed. Rape cannot be compared to stealing your roommate's clothes or incorrectly citing a source for a final paper. In the state of Washington, rape is a Class A felony worthy of up to life in prison. Decriminalizing it with Title IX or restorative justice negates the significance of the act of rape and silences the voices of victims everywhere.

As illustrated in chapter two, there is great need for further research into post-2011 Title IX policies and procedures. This thesis has provided a small intervention into a growing topic, and unfortunately I cannot provide a solution for the problems with Title IX. Instead, I offer areas for future research. Restorative justice may be a

more viable option with more research and revision; however, restorative justice would have to adopt punitive repercussions for it to avoid discursively decriminalizing sexual assault—not just repairing the damage, but also doing additional work as punishment for committing a crime. As well, the legal system and, in the same way, collegiate Title IX processes mimicking the legal system would have to break away from a mold that only allows for legal change that is mutually beneficial to powerful and historically oppressed groups. That kind of change is radical and has potential to alter the gendered power dynamics surrounding sexual assault.

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