The Construction of Legal Credibility for Rape Survivors Who Are International Students

MASTER'S THESIS

Presented in Partial Fulfillment of the Requirements

for the Degree Master of Arts in the

Graduate School of The Ohio State University

By Angela Tu, B.A.

Graduate Program in Women's, Gender and Sexuality Studies

The Ohio State University

2016

Master's Examination Committee:

Cathy A. Rakowski, Adviser

Martha Chamallas, Co-Adviser

Abstract

According to scholar Carol Bohmer, one out of four female students is a survivor of rape. This disturbing statistic is reflective of the prevalent US rape culture. Given the overwhelming influence of US rape culture within the legal system and on campuses, this thesis analyzes the ways the US legal system polices international student survivors of rape in higher education. Specifically, how do US legal institutions police or protect international survivors given their statuses as survivors, students, non-Americans and sometimes non-white? Within the context of my research, I define the act of disciplining and regulation as social norms and expectations that govern an individual's conduct, behavior and appearance, based on Foucault's theory of biopolitics. Thus, even in situations where survivors win their cases, a level of regulation still exists because the government imagines the ideal survivor who is deserving of legal protection. In this study, I examined two cases: *Liu v. Striuli* and *Commonwealth v. Khan* for the purpose of analyzing cultural biases or norms that appear explicitly and implicitly within the legal texts. Such evidence of bias bolsters my argument that besides victim blaming, survivor disciplining still persists in even well-meaning institutions. Near the end of each chapter

and in the final chapter of my thesis, I present recommendations for the US legal system that could lessen existing survivor policing and increase survivor's well-being.

Dedicated to all the survivors of violence. You are all loved.

Vita

2009……...…….Glen A. Wilson High School

2011……...…….....University of California, Irvine

2013……....University of California, Los Angeles

2014-2016…….Graduate Teaching Associate, Department of Women's, Gender and Sexuality Studies, The Ohio State University

Field of Study

Major Field: Women's, Gender and Sexuality Studies

Table of Contents

Chapter 1: The Invisible Survivors of Campus Sexual Assaults

I was raped in my own dorm bed...since then
that space has become fraught for me

Emma Sulkowicz, Columbia Daily Spectator Youtube interview[1]

In the middle of the Columbia University campus, a college student painstakingly carried a mattress, with one side of the mattress slightly tilted on her head for balance. The college student, Emma Sulkowicz, engaged in this daily behavior whenever she traveled around campus up until she graduated in May 2015. Far from a mere spectacle, the mattress represented more than just a visual art performance piece completed for a senior thesis. Two years before, Emma became a survivor of sexual assault, becoming part of the 17.7 million US women who are victims of rape.[2]After the school failed to hold the rapist accountable, Emma took her grievances into the public space by carrying a mattress everywhere she went on campus. She said she would only stop when her rapist was expelled (which never happened).

---

[1] Frost, Sarah, Becca Guthrie, and Megan Cunnane. "Emma Sulkowicz, CC '15, to Mix Performance Art, Sexual Assault Protest." Columbia Daily Spectator. N.p., Sept. 2014. Web. 04 Apr. 2016. <http://columbiaspectator.com/multimedia/2014/09/02/emma-sulkowicz-cc-15-mix-performance-art-sexual-assault-protest>.

[2] Who Are the Victims?" Rape, Abuse and Incest National Network, n.d. Web. 11 Apr. 2016. <https://rainn.org/get-information/statistics/sexual-assault-victims>.

Many people were not happy about Emma's performance, including the rapist who later sued the school for gender discrimination.[3] The response of the Columbia University to Emma's movement was also far from positive. During Emma's graduation ceremony, the university president refused to shake Emma's hands.[4] The university president along with other rape apologists who critiqued Emma's actions reflected what feminists have called the pervasive influence and hegemony of "US rape culture" in general. Rape culture, as defined by scholars Emilie Buchwald and Pamela Fletcher, "is a complex of beliefs that encourages male sexual aggression and…is a society where violence is seen as sexy…"[5] Additionally, sexual violence is regarded as "a fact of life"[6] within a rape culture society.

On a more positive note, feminists from all over the United States applauded Emma's bravery and turned the mattress performance into a national anti-violence movement called "Carry that Weight."[7] Since then, the movement had been involved in an annual National Day of Action on April 13, 2015, in which students from diverse college campuses publicly carried mattresses or pillows as a symbol of protest against

---

[3] Bazelon, Emily. "Have We Learned Anything From the Columbia Rape Case?" *The New York Times*. The New York Times, 28 May 2015. Web. 04 Apr. 2016. <http://www.nytimes.com/2015/05/29/magazine/have-we-learned-anything-from-the-columbia-rape-case.html?_r=0>.

[4] Taylor, Kate. "Mattress Protest at Columbia University Continues into Graduation Event." *The New York Times.* The New York Times, 19 May 2015. Web. 9 May 2016. <http://www.nytimes.com/2015/05/20/nyregion/mattress-protest-at-columbia-university-continues-into-graduation-event.html?_r=0>.

[5] Buchwald, Emilie, Pamela R. Fletcher, and Martha Roth. *Transforming a Rape Culture*. Minneapolis, MN: Milkweed Editions, 1993. vii. Print.

[6] Ibid.

[7] Hargrave, Katie. "Carrying the Weight of Sexual Assault Together." National Organization for Women, Nov. 2014. Web. 7 Mar. 2016. <http://now.org/blog/carrying-the-weight-of-sexual-assault-together/>.

campus rape culture.[8] While such movements are important for raising consciousness and pressing for policy changes, it is important to note that the more popular faces of the campus anti-violence movements are overwhelmingly white, American, and/or cis-gender women, with Emma Sulkowicz being one example. A lack of representation or visibility of marginalized individuals can reproduce dominant discourses constructed from the experiences of those with privileged identities. Historically within the anti-violence movement, the narratives and experiences that have influenced policies are based primarily on white, American, able-bodied, cis-women's experiences. Unfortunately, this is not the first time the US mainstream anti-violence movement built their rhetoric on assumed whiteness or citizenship status. Famed feminist Angela Davis complained that "black women were absent from contemporary anti-rape movement during its early days."[9] While Davis was referring to the well-known 1970s anti-violence movement, similar situations of unequal representation still persist today. For example, the organization INCITE! states that "the prevailing ideological conditions in the antiviolence movement made it incredibly difficult for women of color with a radical vision of structural oppression to do radical antiviolence work"[10] and that women with less power and whose identities are outside the margin of the hegemonic (white, middle-

[8] Mead, Rebecca. "Two Beds and the Burdens of Feminism - The New Yorker." *The New Yorker*. N.p., 06 Apr. 2015. Web. 7 Mar. 2016. <http://www.newyorker.com/culture/cultural-comment/two-beds-and-the-burdens-of-feminism>.
[9] Davis, Angela Y., and Joy James. *The Angela Y. Davis Reader*. Malden, Mass: Blackwell, 1998. 143. Print.
[10] Smith, Andrea, et al. "The Color of Violence: Introduction." *Color of Violence: The INCITE! Anthology*. Cambridge, Mass: South End, 2006. 3. Print.

class, straight, etc.) still do not benefit from anti-violence reforms, since these reforms benefit only a particular group of people.[11]

Similar to other representations of survivors with non-normative racial and national identities, existing literature and scholarship about international students' experience and response towards rape are rare.[12] In fact, sometimes studies “dealing with sexual assault on American campuses have intentionally excluded non-American students."[13] Because of this lack of scholarship, I decided to shift my research to how the legal institution disciplines international student survivors. The purpose of this study is to analyze possible cultural biases or norms that appear explicitly and implicitly within the legal texts and then offer a feminist critique of the policing of international survivors. For this thesis, I use court cases to observe, analyze and predict the possible ways in which a court can discipline and police an international student survivor. Specifically, I use a combination of intersectional feminism and postmodern feminism to evaluate court discourse and reasoning within these cases. Under intersectional feminist theory, how do the courts within these cases police international survivors given their statuses as survivors, students, non-Americans and sometimes non-white? What does victim blaming

---

[11] Ibid., 2.

[12] While researching for background literatures, I only found three sources that deal with international students’ experiences with campus rape or US rape culture, all of which examine international students' social attitudes towards consent, fear of rape and knowledge of bystander intervention. These three texts are: 1) Carrie Ann Hartwell's *International student's experiences, acknowledgements and scripts of rape*, which is about how female international students’ rape scripts differ from female American students’ rape scripts. 2) Hirata, Fujimori D. L. Understanding *the Reporting Behavior of International College Student Bystanders in Sexual Assault Situations*, which is about international students' bystander intervention characteristics. 3) Murat Daglar's "A Comparative Study of Fear of Sexual Assault and Personal Property Theft between International and Noninternational Students on an Urban University Campus," which is about international versus noninternational students’ fear level of sexual assault and theft, see references for full citations.

[13] Hartwell, Carrie Ann. *International Student's Experiences, Acknowledgements, and Scripts of Rape*. Diss. James Madison University, 1994. 12. Print.

and disciplining look like for a survivor who is an international student? On the other hand, under postmodern feminist theory, what types of performance or characteristics render the survivor less credible in these cases? How is the standard of survivor credibility biased or hegemonic?

Within the context of this study, I use the words "police," "regulation," and "discipline" to refer to Foucault's concept of biopolitics, where the state coerces and disciplines individuals to produce "subjected and practised bodies, 'docile' bodies."[14] In his book the *History of Sexuality*, Foucault differentiates between two types of governmental powers: the power over life and the power over death. The power over death refers to the government's right to take life, while power over life refers to the government's control over the subjects' life, whether that is through disciplining the individual or regulating the population. Because this power over life allows the government to correct and hierarchize, power over life has the effect of applying increased importance towards upholding the norm.[15] While Foucault focuses his analysis on the military and prison institutions, disciplinary discourses impact rape survivors as well in the form of normative expectations, specifically the expectation to adhere to the perfect rape victim trope. The perfect rape victim trope are victims who deserved the sympathy of the public and whose rape experiences are viewed as legitimate. Even though the image of the perfect rape victim has varied throughout history, the trend of victim-blaming or the expectation for survivors to take responsibility for the rape and its

---

[14] Foucault, Michel. *Discipline and Punish: the Birth of the Prison /* Michel Foucault; translated from the French by Alan Sheridan. New York: Vintage Books, 1979, c1977. 138. Print.
[15] Foucault, Michel. *History of Sexuality Volume I: An Introduction.* New York: Vintage Books, 1978. 144. Print.

aftermath are still overwhelmingly prevalent in the US society. For rape survivors, the disciplining is felt more strongly in the lack of institutional protection for victims who lack "credibility" according to normative standards, rather than in the punishment aspect of disciplining. For example, prosecutors often employ the perfect victim trope in order to evaluate whether to proceed with a rape case.[16] As seen in later chapters, many courts also use rape myths and the perfect rape victim trope to assess evidence within rape cases.

As mentioned earlier, the epistemology and methodology of my research is structured around intersectional theory and postmodern theory. Coined by the feminist Kimberle Crenshaw, "intersectional theory" refers to theory that takes into account the complexity of multiple identities such as gender, race, and class differences. Like other women of color activists who criticize the mainstream antiviolence movement, intersectional feminists accuse the mainstream movement of essentializing the experiences of women and focusing exclusively on gender at the expense of other identities.[17] The problem with equating "women" with "white women" is that it risks reproducing and reinforcing oppression against other marginalized identities, like racial identities.[18]

Similar problems still exist in the contemporary campus anti-rape movements, where campus programs and campaigns unconsciously imagine the survivors as white,

---

[16] Reddington, Frances P, and Betsy W. Kreisel. *Sexual Assault: The Victims, the Perpetrators, and the Criminal Justice System*. Durham, N.C: Carolina Academic Press, 2005. 282-287. Print.
[17] Chamallas, Martha. *Introduction to Feminist Legal Theory*. New York: Wolters Kluwer Law & Business, 2013. 93-94. Print.
[18] Crenshaw, Kimberle. "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color." *Stanford Law Review*. 43.6 (1991): 1252. Print.

cis-gender and American. As such, since international students can be argued to be "at the margins,"[19] it is appropriate to utilize intersectional theory in order to theorize how the existence of real and perceived differences are impacted by the legal system's treatment of sexual assault. Despite intersectional theory's strengths, many feminists saw shortcomings to the theory, with many criticizing it as "being particularistic."[20] Within the context of sexual assault cases, intersectional theory does not explain why one minority or marginalized individual is a target of oppression while other marginalized individuals, sometimes in the same ethnic group, are not. Because of this, I will utilize postmodern theory, particularly performance theory, to cover the gaps. Postmodern theory is a theory that proposes, "There are multiple subjective, relative truths of personal construction."[21] This theory postulates that perception of a given identity is fluid and based on social relations. The sub-category of postmodern theory, performance theory, focuses on how an "individual presents his or her difference…through…dress, language, personal style and everyday behaviors."[22] Postmodern theory help me examine an institution's expectation of victims' proper performance as survivors and non-citizens. Given the importance of a survivor's credibility in court, survivors who want to win their cases have to perform desired aspects of their identities. The performance of the survivor to depict the proper rape survivor and the proper non-citizen is one of the reasons why survivors who win their cases have their stories taken seriously. However, this standard

[19] Ibid., 1265.
[20] Hesse-Biber, Sharlene Nagy. *Feminist Research Practice: A Primer.* 2nd ed. N.p.: SAGE Publications, 2014. 57. Web.
[21] Ibid., 46.
[22] Chamallas, Martha. *Introduction to Feminist Legal Theory*. New York: Wolters Kluwer Law & Business, 2013. 26. Print.

has negative implications for all survivors, where victim blaming is not only upheld but a false binary is created between the ideal victim or non-citizen against the not-so ideal victim or non-citizen. In the end, this binary does not benefit any survivors nor does it challenge patriarchal, racist and xenophobic hegemonies.

The Politics of Consent

The foundation of policing rape survivors rests on narrow institutional definitions and standards of rape, specifically what rape should consist of and the elements of rape. Despite the existence of rape reforms, currently "a majority of jurisdictions rely on the concept of force in defining rape."[23] Because this definition of rape is outdated and harmful for survivors whose rape experience falls outside of the force requirement, the theories guiding my analysis of the primary source are based on feminist legal scholars such as Joan McGregor and contemporary anti-rape feminists like Jessica Valenti. Specifically, Joan McGregor advocates for affirmative consent as the core definition of rape and the main way rape cases should proceed. Affirmative consent is the belief that anything that falls short of "actually welcoming the [sexual] encounter"[24] is rape, hence the commonly heard motto "yes means yes." Based on this definition, if a person is impaired, asleep, or does not express anything, then any sex act that comes afterwards is considered rape. However, since the "yes means yes" model does not take into account the "yes" given in an environment of coercion, I propose adding other definitions to the affirmative consent model such as pushing for an enthusiastic yes free from the influence

[23] Tuerkheimer, Deborah. "Rape on and Off Campus." *Emory Law Journal*. 65.1 (2015). 15. Print.
[24] Chamallas, Martha. *Introduction to Feminist Legal Theory*. New York: Wolters Kluwer Law & Business, 2013. 293. Print.

of coercion and ongoing consent throughout the sex act, definitions that are advocated by feminists such as Cara Kulwicki.[25] In addition to that, similar to feminists Hazel and Cedar Troost,[26] I also argue that consent should be verbal or should be recommended as such.

Methodology and Outline

My study consists of two court cases involving international student survivors: *Liu v. Striuli* and *Commonwealth v. Khan.* These cases are divided into two sections based on the case types: criminal case and Title IX case. Because each case type has different standards and judicial processes, I separate the two cases in their own section to make the analytical process more feasible. The research process consists of both content analysis and critical discourse analysis. For the content analysis, I highlight the main points of each case and the types of evidence and reasoning that are used to justify the decisions. I then examine the main ideologies or logical assumptions that hold up the decisions, which requires connecting the language and the available evidence to legal theories, feminist critiques, survivor's epistemology, and sometimes to my own epistemology[27] as it pertains to non-white survivor perspectives.

When it comes to legal analysis, I run the risk of erasing the humanity and voices of the survivors since the lives of plaintiffs are very much abstracted in the legal text. As such, rape cases are not representative of the majority of complaints, both from

[25] Kulwicki, Cara. "Real Sex Education." *Yes Means Yes!: Visions of Female Sexual Power & a World Without Rape*. Ed. Friedman, Jaclyn, and Jessica Valenti. Berkeley: Seal Press, 2008. 305-311. Print.
[26] Troost, Cedar and Hazel Troost. "Reclaiming Touch: Rape Culture, Explicit Verbal Consent, and Body Sovereignty." *Yes Means Yes!: Visions of Female Sexual Power & a World Without Rape*. Ed. Friedman, Jaclyn, and Jessica Valenti. Berkeley: Seal Press, 2008. 171-176. Print.
[27] Epistemology is a theory of knowledge and a way of knowing.

international students and American survivors. For one, rarely do rape cases make it to the prosecution stage[28] and those that do rarely end up with the rapist's conviction.[29] Secondly, because the US government aims to attract international students only as consumers but not as permanent settlers,[30] many policies and restrictions that set limitations on how long the student can stay in the US can possibly diminish international student survivors' ability to pursue and proceed with their rape cases. As such, some of the cases where international student survivors won do not exemplify the conditions of most rape cases. However, I still think it is necessary to study these cases because it is important to evaluate how judicial processes fail to protect survivors and because research about international students is almost non-existent, I am hoping that this study can illuminate whether there is another dimension operative within the legal system that is not present in other cases involving white American students.

[28] Reddington, Frances P., and Betsy W. Kreisel. *Sexual Assault: The Victims, the Perpetrators, and the Criminal Justice System*. Durham, N.C: Carolina Academic Press, 2005. 281. Print.

[29]According to the well-known organization called RAINN, out of 32 rapes that gets reported to the police, only two leads to felony convictions. From: "Reporting Rates." *RAINN*. n.d. Web. 9 May 2016. <https://rainn.org/get-information/statistics/reporting-rates>.

[30] Kretsedemas, Philip. "The Limits of Control: Neo-Liberal Policy Priorities and the US Non-Immigrant Flow." *International Migration*. 50.1 (2012). 7. Print.

Chapter 2: The Conflation of the Campus Judicial Process and the State: Title IX and Beyond

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 education program or activity receiving Federal financial assistance.

--From Title IX[31]

In 1972, the ground-breaking federal law Title IX was passed. The law prohibits discrimination on the basis of sex in any federally funded education program or activity. Since then, the law has played a role in somewhat leveling the playing field for female students, particularly when it comes to sport participation.[32] It was not until 1992 when the court system started to cover sexual violence under Title IX.

Because students have the option of reporting to the police, many individuals have wondered why there are laws dictating how schools handle sexual assault cases. The main reason has to do with the fact that many survivors are not comfortable with utilizing the criminal justice system given its many pitfalls, and thus reporting to school officials is

[31] Title IX of the Education Amendments of 1972, 20 U.S.C. §1681.
[32] Anderson, Paul M. and Osborne, Barbara. "A Historical Review of Title IX Litigation." *Faculty Publications* 18.1 (2008): 127. Web. <http://scholarship.law.marquette.edu/facpub/582/>.

another alternative.[33] In this chapter, I give a historical account of Title IX's development then specify the type of Title IX process the *Liu v. Striuli* case falls under. Because Title IX process has often been misunderstood or not well-known, this chapter can clarify misconceptions for readers in addition to providing necessary information about the Title IX system.

Title IX Background Information

There are three major court cases that have shaped the role of Title IX in addressing sexual violence: *Cannon v. University of Chicago* (1979), *Franklin v. Gwinnett Public Schools* (1992), and *Gebser v. Lago Vista Independent School District* (1998).[34] When Title IX was first enacted, sexual violence was not the main priority of the legislation and the Department of Education was solely in charge of overseeing schools' compliance with the legislation. However, in 1979, the Court ruled in *Cannon v. University of Chicago* that individuals can sue under Title IX. Thus, even though the *Cannon* did not address sexual violence,[35] after this case plaintiffs could use Title IX to file a civil suit and/or file a complaint with the Department of Education. Individuals who do not know the full extent of Title IX history often assume that Title IX suits are the same as Title IX administrative complaints. Although the same plaintiff can file a complaint and bring a suit at the same time, the two processes are different. When a plaintiff files a complaint with the Office of Civil Rights (OCR), which is part of the US

[33] "Why Schools Handle Sexual Violence Reports." Know Your IX, n.d. Web. 17 Apr. 2016. <http://knowyourix.org/why-schools-handle-sexual-violence-reports/>.
[34] *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274 (1998).
[35] The plaintiff sued because she was denied admission to the university based on sex.

Department of Education, OCR will then start an investigation[36] and if the school is found in violation of Title IX, then OCR would try to obtain voluntary compliance. Many regard "voluntary" compliance as a misnomer because on paper, schools that don't "voluntarily" comply face enforcement action such as possible court actions and then, as a last resort, termination of federal funding.[37] Because plaintiffs who file Title IX complaints do not get material relief for damages incurred by rape, plaintiffs would sometimes sue the university in court instead.

Since 1992, survivors of sexual harassment may sue schools for monetary damages thanks to the *Franklin v. Gwinnett Public Schools*, a case in which a student sued her school when a teacher harassed her. While the *Franklin* case was a victory for survivors of sexual violence, many courts in the late 1990's ruled in favor of the institution. For all Title IX suits filed after the 1998 *Gebser* case,[38] the courts usually use two standards in assessing whether to hold schools liable (and sometimes other standards as seen in the *Liu* case). Specifically, schools will be liable if they have "actual notice" about the sexually hostile situation and are "deliberately indifferent" to the situation. Actual notice means that in order for schools to be held liable, school officials need to have actual knowledge of the specific misconduct. "Deliberate indifference" refers to

[36] "How to File a Title IX Complaint." Know Your IX, n.d. Web. 17 Apr. 2016. <http://knowyourix.org/title-ix/how-to-file-a-title-ix-complaint/>.
[37]According to the Ohio State Title IX coordinator, "no schools ever lost funding before," (Brennan) so it is not clear whether the OCR are assertive in their enforcements.
[38] In the *Gebser* case, the Court held that schools are not liable for the sexual violence that occurred unless school officials have actual notice of the plaintiff's sexual misconduct and was deliberately indifferent.

when school officials who are informed of the misconduct do not take any action to rectify the problem.[39]

Individuals who do not know the full extent of Title IX history often assume that Title IX suits are the same as Title IX complaints. Although the same survivor can make a complaint and file a suit at the same time, the two processes are different. For one, as demonstrated by the OCR's historical trend of broadening schools' liability, there seem to be positive changes made in the area of complaints. In 2011, the OCR wrote a "Dear Colleague" letter in which the Department strengthened and clarified the many requirements that schools have to abide by.[40] At present, increased school accountability is quite visible; from 2014 to 2015, the number of schools that are under Title IX investigation grew from 55 schools to 106 schools,[41] partially due to persistent activists who filed complaints and raised awareness about the issue. Nevertheless, survivors who filed Title IX complaints do not get material relief in the form of damages incurred by rape, which is why most survivors would go on to file a lawsuit under Title IX. As it pertains to the *Liu v. Striuli* case, a Title IX case that involves an international student survivor, the case utilized the civil suit route, not the administrative complaint process.

[39] Deliberate indifference can be interpreted differently. While some courts say that no action is equated to deliberate indifference, some courts go further to include ineffective interventions as also constituting deliberate indifference [*Wills v. Brown University*, 184 F. 3d 20, 26 (United States Court of Appeals, First Circuit 1999)].

[40] "Dear Colleague Letter." Office of Civil Rights. US Department of Education, 4 Apr. 2011. Web. 17 Apr. 2016. <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

[41] Kingkade, Tyler. "106 Colleges Are Under Federal Investigation For Sexual Assault Cases." The Huffington Post. TheHuffingtonPost.com, Apr. 2015. Web. 17 Apr. 2016. <http://www.huffingtonpost.com/2015/04/06/colleges-federal-investigation-title-ix-106_n_7011422.html>.

Chapter 3: The Limits of Title IX

For as long as we live in a social system that
defines right on the basis of group or personal above-ness, or superiority,
rape must continue, as must the depredations connected
with racism, destruction to the biosphere, elitism, homo- and lesbophobia,
child abuse, and all the subtle and gross manifestations of trickle-down conceptualizations
of the nature of the good, the real, and the wholesome.

-Paula Gunn Allen[42]

In 1999, Mary Liu, an international graduate student from Taiwan who was studying history at Rhode Island's Providence College, had a visa problem and was referred to Professor Giacomo Striuli who was a Designated School Official (DSO) at that time.[43] Striuli used his position of power to coerce Liu into a sexual relationship, in which he threatened to expel and deport Liu unless she had a sexual relationship with him. While they were in this relationship, Striuli raped Liu more than 100 times.[44] After Liu reported the incident to the Sexual Harassment Officer, the Sexual Harassment

[42] Allen, Paula G. *Off the Reservation: Reflections on Boundary-Busting Border-Crossing Loose Canons*. Boston, Mass: Beacon Press, 1998. 67. Print.
[43] DSO are school administrators who are in charge of immigration affairs.
[44] *Liu v. Striuli,* 36 F.Supp.2d 452, 460 (D.R.I. 1999).

Officer concluded that the relationship was consensual. At that point, Liu sued the school and the professor.

Unfortunately, the Court held that Liu had insufficient evidence to file for "vicarious liability"[45] against Providence College and also dismissed the Title IX count against Striuli because "individuals cannot be held liable under the statute."[46] While the *Liu* case did not garner much attention, the case still influenced the outcomes of some later cases, sometimes in ways that reproduced existing power structures.[47] In this chapter, I give an account of arguments used in the *Liu* case, and then do a critical analysis of the Court's opinions. Specifically, I argue that the Court's ruling pertaining to tort liability creates a "double bind" for marginalized individuals beyond those who are survivors, which restricts survivors' options in pursuing their causes. The term double bind refers to the constrained options an individual possesses, in which all the existing options have unsavory consequences for the individual. I also argue that the existing survivors' burden of proof stems from a tradition of survivor regulation, the same where victim blaming originated. Both the double bind situation and the excessive burden of proof create an unrealistic standard for survivors to fulfill. They also steer the problem of rape away from its structural foundation. Thus, despite existing laws to rectify

[45] Vicarious liability is when plaintiffs want to sue business or enterprise "for the damage done by its employees" (Chamallas 134). From Chamallas, Martha. "Vicarious Liability in Torts: the Sex Exception." *Valparaiso University Law Review*. 48.1 (2013): 133-193. Print.

[46] "RI Court Allows to Stand Most Harassment Claims Against Professor." Rev. of Liu v. Striuli. *Andrews Sexual Harassment Litigation Reporter* Mar. 1999: n. pag. Westlaw. Andrews Publications. Web. 14 Apr. 2016.

[47] For example, in the 2009 *Herndon v. College of Mainland (*United States District Court, S.D. Texas, Galveston Division, 2009), the Court rejected a survivor's claim that the school has sufficient evidence of actual notice of the sexual harassment situation, based on the past decisions made in *Liu v. Striuli.*

inequalities the underlying hegemonic structure of rape is still not addressed and this can create a modern form of survivor policing.

Double Bind in the Law and How It Hurts Marginalized Individuals

When Liu filed a suit against her school, she claimed that the school was liable on eight counts including violation of Title IX, Violence Against Women Act, Rhode Island Civil Rights Act, and Rhode Island Privacy Act. Although the Court acknowledged that there was sufficient evidence that Liu was raped, the Court still denied that the school was liable. There were many fallacies in the Court's reasoning, but the Court's main biases included clear favoritism towards protecting the college's rights and towards favoring the traditional English common law principles over the rhetoric of civil rights, privacy rights, and women's rights. These biases create a condition where survivors and other marginalized individuals cannot win, a situation I call a "double bind." Within the *Liu* case, the Court consistently blamed the plaintiff for failing to "adduce any evidence..."[48] However, when looked at more closely, I postulate that a more structural problem is at play because Liu could have won her case if the Court had used a more expansive interpretation of existing laws specifically the more recent Rhodes Island Civil Rights Act of 1990 (RICRA). What happened instead is that the Court chose to privilege laws that restricted how Liu could obtain evidence. This has implications for future cases because survivors would continue to lose if Courts can legally use existing laws to restrict a plaintiff's ability to seek monetary damages.

[48] *Liu v. Striuli*, 36 F.Supp.2d 452, 467 (D.R.I. 1999).

The double bind occurred within the sections pertaining to the school's liability which involves Title IX, state tort laws, and the Rhode Island Civil Rights Act. Within the context of the case, the *Liu* case falls under a type of civil lawsuit called tort, most specifically a type of tort claim known as a vicarious liability claim. Tort is "a private wrong doing by one person or entity to another, for which the doer is legally. Unlike criminal cases, tort cases do not put guilty defendants in jail but instead the defendant must pay money damages to the plaintiff. There are only two types of torts that are relevant in discrimination cases: negligence and intentional. The Rhode Island state tort law during the time period of the *Liu* case only applied to negligence claims, while the Court's interpretation of the RICRA limited the claims that count as liability to intentional claims. Based on this information, the combination of RICRA's narrow interpretation and the Rhode Island tort law canceled out marginalized individuals' options for obtaining monetary relief.

The RICRA or the Rhode Island's Civil Rights Act is a state law that was enacted in 1990 to expand upon the then more restrictive 1866 federal Civil Rights Act, 42 U.S.C. §1981. Even though the Court could have interpreted RICRA more expansively, the Court decided to narrowly interpret RICRA using the federal Civil Rights Act instead. This was ironic because the RICRA was created to respond to the federal Civils Rights Act's flaws and to provide more protection to marginalized individuals. When the Court narrowly interpreted RICRA using the 1866 Civil Rights Act,[49] they postulated that the

[49] There are many updated version of the federal Civil Rights law since 1866. However, the revised version of the Civil Rights Act covers only race discrimination, not sex discrimination, which may explain why this particular court used the 1866 Civil Rights Act.

RICRA only applies to intentional discrimination and not negligence. In other words, the federal Civil Rights Act does not take into account racism or sexism that is produced subconsciously. When the Court in the Liu case restricted both the option of negligence and intentional claims, survivors and even other marginalized individuals who live in states like Rhode Island and who rely on the Civil Rights Act are left without other options when it comes to suing. This has negative consequences because civil suits are the most common way marginalized individuals use the law to rectify harm.[50]

I argue that far from being a sorry coincidence, the Court unconsciously or consciously displayed on two types of biases: one that favors business-like institutions or economic interests of the state over the well-being of the survivor and the other that favors "precedent" cases or laws over newer laws. While universities are legally framed as non-profit public services,[51] overwhelmingly within our neoliberal society universities are appropriating business-like qualities. For example, Frank Newman observed that there is a "growing dependence of political leaders on marker forces to structure higher education."[52] Author Christian Gilde describes the overcommercialization of higher education as "disabling" for colleges and universities.[53] In the *Liu* case, the Court also seemed to frame the university as a money-making entity, especially when they mentioned "the reluctance of the Rhode Island Supreme Court to…act in furtherance of

[50] Next to suits, criminal law is the popular route for survivors as well but the standards to convict the rapist is just as high if not higher (Grana 39). From: Grana, Sheryl J. *Women and (In)justice: The Criminal and Civil Effects of the Common Law on Women's Lives*. Boston: Allyn and Bacon, 2002. Print.
[51] Braunig, Dietmar. "Why Universities are not Businesses." *The University As a Business?* Ed. Saliterer, Iris, and Paolo Rondo-Brovetto. Wiesbaden: VS VerlagfürSozialwissenschaften, 2011. 23. Web.
[52] Newman, Frank, Lara Couturier, and Jamie Scurry. *The Future of Higher Education: Rhetoric, Reality, and the Risks of the Market*. San Francisco: Jossey-Bass, 2004. 31. Print.
[53] Gilde, Christian. *Higher Education: Open for Business*. Lanham, MD: Lexington Books, 2007. 23. Print.

the employer's business…"[54] In other words, the Court framed the college and the rapist professor as constituting a business institution.

Unfortunately, the Liu case was not the first (nor the last) case where the Court explicitly expressed favoritism towards business-like institutions. In the *Gebser* case, the US Supreme Court justified limiting liability using the actual notice and deliberate indifference standards because vicarious liability under Title IX would provide a "greater damages recovery than is available under Title VII"[55] since there are no caps on "the amount of damages that maybe recovered in Title VII cases."[56] Because "Title IX was enacted pursuant to Congress's spending power,"[57] the federal funds have to go to a source, whether that source is a school or to a student if a school is found to be liable. Based on numerous courts' hesitation of unlimited caps, possible favoritism towards schools instead of the students as the potential recipients of those funds may exist. Continuing in the *Gebser* tradition, the *Liu* case cited this part of the *Gebser* case in order to further solidify the reason to not grant monetary relief to Mary Liu.

Additionally, the Court also used the argument of precedent in order to justify the prioritization of the state tort law over the expansive language of the RICRA. This can be seen when the Court, in addressing how to interpret RICRA, decided to "analyze useful state and federal authorities in order to shape an informed prediction" since there is

---

[54] *Liu v. Striuli*, 36 F.Supp.2d 452, 470 (D.R.I. 1999).
[55] Fisk, Catherine L., and Erwin Chemerinsky. "Civil Rights Without Remedies: Vicarious Liability Under Title Vii, Section 1983, and Title Ix.(symposium: Strengthening Title Vii: 1997-1998 Sexual Harassment Jurisprudence)." *The William and Mary Bill of Rights Journal*. 7.3 (1999): 779. Print.
[56] Yudof, Mark G. *Educational Policy and the Law*. Belmont, Calif: Wadsworth Cengage Learning, 2012. 623. Print.
[57] *Liu v. Striuli*, 36 F.Supp.2d 452, 472 (D.R.I. 1999).

"precious little case law addressing the scope of RICRA…"[58] Additionally, the Court justify this move by explaining how, "vicarious liability principles are unlikely to be imported into the right of action created by RICRA given the substantial common law in Rhode Island limiting employer liability…"[59] Individuals who are not well versed in the legal discourse would probably question why the Court would not be creative with its own interpretation. The Court could do that, but the US system is based on the common law system, a system that primarily relies on the precedent principle. Precedent principle is when previous decisions guide present decisions.[60] According to many legal feminist scholars, the precedent principle and the US legal system in general unfairly favor elite white males' interests. For example, noted feminist legal scholar Robin West argues that the "human being assumed by legal theory precludes the women…"[61] while scholar Sheryl Grana traced the patriarchal origins of common law principles partially to Sir William Blackstone's contributions, one of the writers of 1700s common law who had a very patriarchal Judeo-Christian view of women.[62] In terms of tort law, professor Martha Chamallas argues that a "higher value is placed upon the lives of white men and that injuries suffered by this group are worth more than injuries suffered by other less privileged groups in society."[63] Because laws pertaining to women and other marginalized individuals are often made after the traditional laws, racial and gendered

[58] Ibid, 469.
[59] Ibid., 478.
[60] From Grana, Sheryl J. *Women and (In)justice: The Criminal and Civil Effects of the Common Law on Women's Lives*. Boston: Allyn and Bacon, 2002. 16-17. Print.
[61] West, Robin. *Feminist Jurisprudence.* Oxford Univ Press, 1993. 513. Print.
[62]Ibid., 18-19.
[63]Chamallas, Martha. "The Architecture of Bias: Deep Structures in Tort Law." *University of Pennsylvania Law Review* 146.2 (1998): 465. Web.

prejudices are reinforced when the US legal system in general relies heavily on the precedence principle.

Regardless of whether the Court in the *Liu* case consciously or subconsciously made it harder for Mary Liu to win, the biases towards business-like institutions and in favor of the common law have negative ramifications besides the re-victimization of survivors. In situations where an outdated or ineffective law is not reversed, judges with a certain bias can use traditional laws as a basis of interpretation no matter how many social justice laws are passed to rectify the same issue. Although broadening the federal Civil Rights Act can be a necessary step towards changing survivors' and even minorities' low chances of winning a case, there is a possibility that judges who are biased towards businesses and/or who are biased towards traditional common laws would still use the traditional laws as the basis for their interpretation. If the legal system would allow for individuals with non-white, non-male and non-citizenship identities to center the legal system on their terms, some of the current problems with the legal system would be solved. Unfortunately, because the US, like many common law systems, treats common laws as reliable,[64] that may never happen.

Survivor's Burden of Proof as a Tool of Disciplining

There are many times within the *Liu* case where, despite the existence of evidence, the judge dismisses the evidence as not sufficient enough. I argue that far from being objective, this impossible burden of proof ignores existing power relationships between Mary Liu and the actors involved in creating the hostile sexual environment. By

[64] Grana, Sheryl J. *Women and (In)justice: The Criminal and Civil Effects of the Common Law on Women's Lives*. Boston: Allyn and Bacon, 2002. 17. Print.

cutting out this part of the narrative, the Court indirectly contributed to victim blaming. This can be seen when the Court used a narrow scope for the actual notice standard where none existed before and also when the Court used a distorted notion of what consent is.

The actual notice standard has garnered many negative criticisms over the years. For example, legal scholar Walker mentions how the need for actual notice can "'[creates] perverse incentives for schools not to have effective reporting mechanisms' as a means of insulating themselves from receiving actual notice of sexual harassment."[65] In other words, schools can legally avoid liability by feigning real or pretended ignorance to a sexually hostile environment situation. Additionally, another legal scholar, Suyin Sohas, criticizes the standard as difficult for plaintiffs or survivors to overcome.[66]

Unfortunately, the responsibility for burdens of proof, such as actual notice, historically falls to the survivors. According to Bohmer, the "burden is placed on the complainant…to prove guilt, and not on the defendant…"[67] I argue that this obligation is unfair. It does not take into account the unequal power relations that exist between the rapist and the survivor in addition to the fact that having to find evidence creates more hardship for survivors who not only have to endure the impact of rape such as trauma, but also have to take the initiative to file complaints and provide the evidence. Particularly as it pertains to the relationship between the survivor and an educational institution within the context of a Title IX suit, the power dynamics between the two is even wider as the

---

[65] Walker, Grayson S. "The Evolution and Limits of Title Ix Doctrine on Peer Sexual Assault." *Harvard Civil Rights-Civil Liberties Law Review*. 45.1 (2010): 108. Print.
[66]So, Suyin. "Sexual Harassment in Education." *Georgetown Journal of Gender & the Law*. 4.1 (2002). Web. Date Accessed: 2015/10/25.
[67] Bohmer, Carol. *Sexual Assault on Campus: the problem and the solution.* New York: Lexington Books, 1993. 88. Print.

educational institution has more power and resources than the survivor. According to Deborah Rhode, "students often have fewer options for avoiding an abusive situation...their capacities for resistance are less developed," while on the other hand "schools are powerful socializing institutions."[68]

Instead of taking this disparity into account, the Court subscribed to a liberal legalistic conception of the law, in which people assume that everyone is equally free. It is common for the legal system to present a liberal legalistic worldview; however, given the different experiences of a variety of communities and the hierarchical order of our US society, the assumption that everyone has equal ability to prove their cause is not true. In other words, since different communities have unequal access to power, protection, and resources; it would be more appropriate for courts to "ask what justice demands in a society with a history of injustice"[69] instead of operating in a mindset that everyone in our society has equal opportunity or ability to obtain evidence. As a result, this double standard as it pertains to survivor's responsibility does not take into account the difficulty survivors have in obtaining necessary evidence while leaving schools and perpetuators accountability-free.

The *Liu* case demonstrated how actual notice ignores the significance of power disparity between college institutions and individual students. Mary Liu did gather evidence that the school had actual notice. Liu testified that at least two college officials, specifically the Director of Financial Aid and another professor named O'Malley, knew

[68] Cited in Bartlett, Katharine et al. *Gender and Law: Theory, Doctrine, Commentary*. New York: Wolters Kluwer Law & Business, 2013. 368. Print.
[69] Mills, Charles W. "Racial Liberalism." *Pmla*. 123.5 (2008): 1384-1385. Print.

of her relationship with Striuli but they did not take any corrective actions. Another two college employees, Sexual Harassment Officers, were notified of the situation, and although they initially took corrective actions in launching an investigation, they concluded that the relationship was consensual and that a "letter of reprimand…was a fitting sanction for Striuli."[70] While I believe that this conclusion was irresponsible on the Sexual Harassment Officers' part, the Court may have assumed that the Sexual Harassment Officers did not act with deliberate indifference to the situation, as shown by the lack of discussion about the officers' potential mishandling of the case. In addition to ignoring the actual notice given to the Sexual Harassment Officers, the Court also ruled that the actual knowledge of misconduct by Director of Financial Aid and professor O' Malley did not count as violations because both were "not an official of the College 'with authority to take corrective action to end the discrimination.'"[71] The *Liu* Court viewed the proper official as a supervisor of the perpetuator or an official "who had the authority to police relationships between faculty and doctorial students."[72] I believe that this standard for who qualifies as an official with authority does not take into account the realities of sexual assault victims--in particular the disabling effect a hostile environment may have on an individual's available resources or whether an individual even has access to knowledge of available resources. Institutions have the power to limit the amount of resources or knowledge of resources from marginalized individuals, which could explain why Liu's disclosure of the rape incidents was limited to certain individuals.

[70] *Liu v. Striuli*, 36 F.Supp.2d 452, 462 (D.R.I. 1999).
[71] Ibid., 466.
[72] Ibid.

Furthermore, Liu would not have known of the specific actual notice standards because the *Gebser* case was decided a year before the *Liu* case and the *Gebser* case is the first case to use the actual notice standard. Given the timeframe and the possible lack of knowledge of who was the proper official, it was not possible for Liu to meet the Court's requirements.

With respect to who qualifies as an appropriate official within the actual notice standard, the appropriate official "with authority" is very narrow, as I believe that the scope of authority can extend beyond employees who work with sexual harassment issues. In the *Gebser* case, the Court described the "appropriate person" as someone who "at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination."[73] As it pertains to the *Liu* case, if a victim-centered approach was used, the two other employees (ie. The financial aid director and professor O'Malley) with knowledge of the misconduct would be liable under *Gebser* because under the College's sexual harassment policy, all employees are responsible to report sexual harassment misconduct.[74] The Court dismisses this evidence because they believed that solely reporting misbehaviors would not have ended the discrimination.[75]

I disagree with the Court. While reporting does not directly end discrimination, it may hold the hostile environment accountable in the long run. However, by dismissing the impact reporting can have on an environment pervaded by rape culture, the Court played a role in ignoring the need to hold rape culture accountable. Limiting

---

[73] *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998).
[74] *Liu v. Striuli*, 36 F.Supp.2d 452, 466 (D.R.I. 1999).
[75] Ibid.

responsibility to employees who are the rapists' supervisors or who specialize in corrective action also does not take into account that rape is a social issue that should be the responsibility of everyone, including bystanders. Thus, rather than addressing injustice, the standard of actual notice impose additional burden on the survivor, who also has to deal with trauma and social stigma that comes along with rape.

Likewise, the framing of consent by the Court, which was somewhat similar to employees at Providence College, also erases the violence of rape by ignoring the power disparity between professors and students and also by framing Liu's silence as consent. According to Liu, besides not taking any action to ending the abuse, the Director of Financial Aid also played a role in allowing Striuli to continue the abuse, since the Director and Professor Striuli were friends. Liu told the Court that although she did not tell D'Arcy, the Director of Financial Aid, that the relationship was violent, D'Arcy was always in the company of Striuli and Liu and thus knew that the faculty person and student were in some sort of "relationship" with each other. Liu said that she was afraid to tell D'Arcy that rape was occurring because D'Arcy and Striuli often made lewd comments about women and Striuli's sexual exploits in front of her.[76] Such actions count as sexual harassment even within the most liberal legal system, but the Court did not make that connection and instead said that Liu "does not allege that she ever objected in any way to those comments," so therefore there is "inadequate basis for finding that D'Arcy had actual knowledge of sexual harassment..."[77] Saying a survivor consented because she was silent is often used as a mechanism of victim-blaming. It also

[76] *Liu v. Striuli*, 36 F.Supp.2d 452, 460 (D.R.I. 1999).
[77] Ibid., 465.

demonstrated the Court's lack of knowledge about what consent is. Disturbingly, the Sexual Harassment Officers who framed Liu's relationship as romantic and thus not abusive also did not understand what consent is.

Briefly defined, a majority of feminists agree that consent should be explicit, verbal, and include an enthusiastic yes before and throughout the sexual act. Scholars Joseph Weinberg and Michael Biernbaum define consent as "the continual process of explicit, verbal discussion, a dialogue...taken one step at a time, to an expressed 'yes' by both parties and a shared acknowledgement that at this moment what we are doing together is safe and comfortable for each of us."[78] Famed activist Jessica Valenti further added that, "enthusiastic-consent models will help to change the thinking from 'sex when someone says no and fights back is wrong' to 'sex when someone doesn't openly and enthusiastically want it is wrong.'"[79] Therefore, no matter how "romantic" Liu's and Striuli's relationship seemed like to bystanders or how silent Liu was, the relationship was still abusive because Liu was threatened into it.

Conclusion: Title IX Now and the Work Ahead

Eight years after the *Liu* case a breakthrough decision was passed by the *Simpson v. University of Colorado Boulder* case.[80] Ruling in favor of Lisa Simpson, the plaintiff, the Court decided that the University did perpetuate and then fail to remedy a sexually hostile environment. On December 2001, Lisa Simpson and Anne Gilmore were raped during a football recruiting party after CU football players were promised the opportunity

[78]From Buchwald, Emilie, Pamela R. Fletcher, and Martha Roth, eds. *Transforming a Rape Culture*. Minneapolis, MN: Milkweed Editions, 1993. 93. Print.
[79]From Friedman, Jaclyn, and Jessica Valenti. *Yes Means Yes!: Visions of Female Sexual Power & a World Without Rape*. Berkeley: Seal Press, 2008. 309. Print.
[80] *Simpson v. University of Colorado Boulder,* 500 F.3d 1170 (10th Cir. 2007).

to have sex by an athletic department tutor. The ruling was monumental because it broadened the actual notice standard to include what some scholars termed as "early notice," which somewhat improved a survivor's chances of winning. Early notice is the ability of schools to receive "notice of high risk students and groups before the Title IX litigant is ever assaulted."[81] In terms of targeting perpetuators, usually these high risk groups are football players or fraternities. However, as it pertains to the imagined high risk victim group, I can see international students as potentially fitting into this high risk group category just because of international students' vulnerabilities to risks of deportation, which can create a situation similar to Mary Liu's where people in a position of power or citizenship status can take advantage of a vulnerable international student. On the other hand, early notice can also reproduce colonial norms if activists and educators see the early notice liability as an opportunity to discipline a certain racialized or nationalized group based on the colonial idea that people outside the US need to be taught not to rape,[82] and international students are often racialized or nationalized through school programs that function as an assimilation tool.

Thus, rather than disciplining bodies, I argue that the institution, both schools and other systems that work with survivors, should be disciplined instead. Some feminists are against the idea of surveillance or disciplining, such as the organization called INCITE! whose members do not believe prisons or the criminal justice system are an answer to

---

[81] Walker, Grayson S. "The Evolution and Limits of Title Ix Doctrine on Peer Sexual Assault." *Harvard Civil Rights-Civil Liberties Law Review*. 45.1 (2010): 100. Print.

[82]For example, in an article called "Attitudes Toward Rape" by Joohee Lee, the author argues that "Asian students are more likely than Caucasian students to believe women should be held responsible for preventing rape" and therefore, "Asian students should be target populations for such [outreach] program" (177).

gender violence. Nevertheless, I argue that when the general public or a minority holds an institution accountable, then the process can become less oppressive for survivors. This is what I call "regulative accountability." We can start by making the Office of Civil Rights (OCR) also responsible for overseeing remedies or overseeing how federal funds are used by schools. Although remedies are available if schools have a survivor funding program, not all schools have that type of program. The only problem I see with this idea is that OCR or the schools might be selective in choosing which survivor can get this funding and this can produce an imagined hierarchy among survivors. More research needs to be done on how to avoid this. Within the realm of Title IX suits, I would like to see courts apply actual notice and deliberate indifference as the maximum damage, not the minimum standard defining where liability can start.

In terms of defining the minimum standard of liability, I want court to use a lenient standard similar to that of women of color feminist epistemology. Because courts have the freedom to interpret however they wish if the law does not cover a specific topic, I argue that we need to pass laws that would keep the courts in check. If these recommendations are fulfilled, however, there is still a possibility that courts would still choose common law interpretation over statutory laws that protect minorities or women, as seen clearly in the *Liu* case. While I wish that many common laws are replaced with laws that reflect our nation's diversity, this does not seem realistic since our country overwhelmingly rely on the common law. However, it is not impossible as many other countries use a different format in their legal system that is not the common law.

Chapter 4: Survivors on Trial: The Prevailing Existence of Character Evidence within Criminal Rape Trials

Because I was ashamed. I've been a victim. I've been molested as a child by a minister in my church. I've been raped a couple of times. So I was just ashamed and I didn't want to face the rape. I didn't want to face it.

----A survivor (anonymously named R.C.) from the Holtzclaw trial

In the 1994 *Commonwealth v. Khan* case, multiple survivors from Gettysburg, Pennsylvania reported the same rapist to the police, including the main complainants Riko Hayashi, a Japanese international student, and an American student, Jill Tomlinson. After many complaints were reported, the court decided to consolidate all of the different cases into a single rape case against the defendant, Zaigham Khan, a Pakistani international student. After being found guilty, the rapist decided to file an appeal that was ultimately unsuccessful. Despite the victory, many racist and sexist assumptions were made that targeted the survivors in the form of character evidence and the judge's assessments of these character evidence. Specifically, racial and sexist biases were the most obvious when survivors Tomlinson and Hayashi did not receive a similar degree of protection under the state's "rape shield statute." While there were some notable

differences between Tomlinson's and Hayashi's rape incidents, the situations in which Hayashi and Tomlinson were raped were very similar. Specifically, both Hayashi and Tomlinson barely knew the defendant, were intoxicated during their rape incidents, and reported the same rapist months after the rape occurred.

In this chapter, I first describe character evidence and the rape shield statute. Afterwards, I analyze how character evidence and rape shield protection for both Hayashi and Tomlinson were utilized or excluded for the purpose of illuminating the general rape shield statute's limitations. The limitations of rape shield statutes in general include the problematic exception portion of the rape shield and the narrow scope of the rape shield. After elaborating on these limitations, I introduce recommendations in rectifying problems pertaining to rape shield constraints and the existence of character evidence.

Character Evidence and Rape Shield Statutes

Victim-blaming during a criminal trial usually appears in the form of character evidence, which is evidence that uses character traits, reputation or specific acts or behaviors to prove that a witness is lying.[83] The most common form of character evidence within a rape trial is the admission of the survivor's sexual history. Besides harming survivors, character evidence can be argued to be an unreliable assessment as to whether rape has occurred. Character evidence "adds little firm evidence that a jury can use to decide what actually happened."[84] Furthermore, a survivor's character cannot be equated with whether consent was given during the rape incident in question.

[83] Merritt, Deborah J, and Ric Simmons. *Learning Evidence: From the Federal Rules to the Courtroom*. St. Paul, MN: West, 2009. 293. Print.
[84] Bourque, Linda B. *Defining Rape*. Durham: Duke University Press, 1989. 103. Print.

Unfortunately, while "to some extent, victim-blaming occurs with all offenses…this phenomenon is exacerbated in rape cases,"[85] perhaps due to historical processes of prioritizing elite white men's rights over women's rights in common law. In her writing "Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes," legal feminist scholar Joan McGregor argues how traditional rape laws were formulated to first and foremost protect white men's property rights before white women's rights, since rape threatens the wives and daughters of these white men. However, restricting rape can also contradict the goals of protecting white men's sexual autonomy, particularly for rapists. Because restricting male sexuality is "equally threatening…distrust of female victims was incorporated into the definition of the crime [of rape] and the rules of proof."[86] This distrust of victims and history of protecting men's sexual autonomy over women's autonomy feeds into rapists' justifications for admitting a victim's sexual history.

Given the history of US rape laws, many feminists over the years have pushed for rape law reforms with the rape shield statutes being the most well-known reform effort. The first statute was passed in 1974 in Michigan and since then all states except Arizona have passed rape shield statutes.[87] Rape shield exclude as evidence a survivor's sexual history in order to "minimize harassment and humiliation of victims."[88] While the rape shield statute is necessary for reform, some scholars question the effectiveness of the law

[85] Legal scholar Joshua Dressler argues that although "to some extent, victim-blaming occurs with all offenses…this phenomenon is exacerbated in rape cases" (582-583).
[86] McGregor, Joan. "Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law." *Legal Theory* 2 (1996): 175-208. Cambridge Univ. Press. 176-177. Web.
[87] Bartlett, Katharine et al. *Gender and Law: Theory, Doctrine, Commentary.* New York: Wolters Kluwer Law & Business, 2013. 624. Print.
[88] Bourque, Linda B. *Defining Rape*. Durham: Duke University Press, 1989. 111. Print.

in protecting survivors. For example, in a 1993 research, scholars Spohn and Horney discovered that although the number of rape cases with non-ideal victims increased, the rape shield reform did not have an impact on the outcomes of rape cases.[89] Given that the present conviction rate is still low, I can reasonably conclude that the rape shield statue has not been completely effective in protecting survivors. Using an intersectional lens, the next section looks at why that is.

Analysis of Hayashi's Character Evidence and the Application of the Rape Shield

During the *Khan* case, one instance of racial and sexual bias occurred during the prosecutor's closing argument, when the prosecutor made an improper remark about Hayashi's sexual history.[90] During the prosecutor's closing while attempting to respond to the defendant's defense that his past sexual conduct was consensual, the prosecutor blurted out the question, "Is Ms. Hayashi the type of woman who would jump in the sack with the first man she met after getting off the boat from Japan?"[91] While the court agreed that under the rape shield statute such information about the victim would not be admissible during the trial, during the closing arguments the Court stated that "the prosecutor's reference was a comment upon Ms. Hayashi's demeanor during trial and her credibility."[92] The Court then remarked that since "one's demeanor on the witness stand is certainly a factor which can be used in determining credibility...we [as the court] do not find that...the prosecutor's remark constituted reversible error."[93]

---

[89] Spohn, Cassia, and Julie Horney. "Rape Law Reform and the Effect of Victim Characteristics on Case Processing." *Journal of Quantitative Criminology*. 9.4 (1993): 383-409. Print.
[90] *Commonwealth v. Khan* 22 Pa. D. & C.4th 239, 248 (Pa.Com.Pl. 1994).
[91] Ibid.
[92] Ibid.
[93] Ibid.

This is a strange case. Ordinarily, prosecutors are supposed to support the victim of crimes, such as rape survivors. Bringing up the sexual history of the victim, which can hurt a victim's credibility, is a common tactic for the defense, not the prosecution. Furthermore, similar to a survivor's sexual history, one's demeanor is not connected to whether a rape occurred nor whether someone is being less than truthful. Because the survivor won in this case and because a prosecutor's role is to land a conviction, the prosecutor might have thought that bringing up Hayashi's sexual history for the purpose of disproving questions about Hayashi's sexual behaviors may strengthen the survivor's claim that the rape occurred. However, in doing so, the prosecutor's comments can potentially reinforce rape myths about how some victims "deserved" to be raped due to their sexual lifestyles. While that possibility may or may not influence the juries' decisions, the judge did reframed Hayashi's sexual behavior as a question of demeanor and then argued how demeanor can influence Hayashi's credibility assessment.

This part of the case revealed that credibility can exist beyond sexual credibility, in what I would term as racialized credibility. Depending upon a survivor's intersectional identity, racialized credibility within the court would expect survivors to perform normative, proper or respectable characteristics or trait in order to appear credible. The *Commonwealth v. Khan* case is not unique in this respect.

In the 2015 infamous Holtzclaw trial, where a police officer was charged with sexually assaulting 13 African American women in Oklahoma, the defense team used racial stereotypes in order to discredit the survivors. For example, the defense team

questioned the survivors' criminal history and drug use in the attempt to show that "they [survivors] have 'agendas.'"[94]

In mainstream US society, black lives are often imagined as deviant. Many scholars have analyzed the influence of this racist assumption including famed activist Angela Davis, who argues that "the racial imbalance in incarcerated populations is…invoked as a consequence of the assumed criminality of black people."[95] Besides justifying the high rate of black individuals within prisons, the assumption of black people's criminality can also be used to discredit black survivors especially since the assumption of deviancy can be connected to ideas about false reporting or lying. As it pertains to the *Khan* case, I argue that bringing up Hayashi's demeanor has racist undertones as well because ideas about demeanor are tied to stereotypes of non-Americans or non-white individuals as unassimilable. Even in current mainstream society, "many non-Asian Americans persist in thinking of Asian Americans as foreign."[96] This means that if mainstream attitudes construct a certain group of naturalized citizens as foreign, then people who are actual foreigners, like international students, would be seen as unassimilable as well.

The existence of "racial credibility" reveals that rape shield statutes are narrow in scope since rape shield statutes only prohibit one aspect of character evidence, sexual history, but they do not take into account that there are many others traits court actors

---

[94] Testa, Jessica. "The 13 Women Who Accused a Cop of Sexual Assault, in Their Own Words." Buzzfeed News. Buzzfeed, 10 Dec. 2015. Web. 5 May 2016. <https://www.buzzfeed.com/jtes/daniel-holtzclaw-women-in-their-ow?utm_term=.ckbZD8K7no#.jjd6y7pLZO>.
[95] Davis, Angela Y, and Joy James. *The Angela Y. Davis Reader*. Malden, Mass: Blackwell, 1998. 64. Print.
[96] Chang, Robert. "Toward an Asian American Legal Scholarship." *Critical Race Theory: The Cutting Edge*. Ed. Richard Delgado. Ed. Jean Stefancic. Philadelphia: Temple University Press, 2000. 470. Print.

could use to discredit the survivor. Particularly in the age of rape reform, "new methods of victim blaming emerged—and with them new legal practices aimed at discrediting victims".[97] Fortunately, some Court actors circumvent this limitation by using the rape shield statute broadly to protect character evidence that is related to or could reference sexual history but is not a sexual act in itself. This is shown in the *Commonwealth v. Khan* case, where Tomlinson's alcohol history and her history of alcoholic blackouts were excluded as a possible rapist's defense because they alluded to possible consensual sex.[98] However, this is only on a case-by-case basis, since not all courts use the rape shield protection broadly. For example, according to an Iowa Court nude posing was not seen as a sexual conduct to be excluded by the rape shield statue, but the Court does acknowledge that it "could be determined to be so."[99] As such, while it could be argued that rape shield statutes can be broadly interpreted to cover other character evidence that are somehow related to sexual history, the possibility of interpreting the rape shield statute to benefit rapists also exist since courts' interpretations of rape shield requirements can vary inconsistently. As such, the scope of the rape shield statute should be expanded to curtail the admittance of a survivor's character evidence in general.

Besides assumptions made about Hayashi's sexual propensities, other personal information about Hayashi was not exempted and they illustrate another issue with the

---

[97] Richards, Tara N, and Catherine D. Marcum. *Sexual Victimization: Then and Now*. Thousand Oaks, California: Sage, 2015. 4. Print.

[98]This is not an accurate understanding of sexual consent, since many scholars view alcohol impairment as lacking consent. For example, in McGregor's *Is it Rape?* book, the author detailed how alcohol impairment can undermine consent (146-147). Michelle Anderson, in her writing "Negotiating Sex," also argued that "Meeting at a party, drinking alcohol, and making out would not constitute a negotiation for sexual penetration" (1424).

[99] About the *State v. Alberts* (722 N.W.2d 402), From Bartlett, Katharine et al. *Gender and Law: Theory, Doctrine, Commentary*. New York: Wolters Kluwer Law & Business, 2013. 619. Print.

rape shield statute, particularly the impact of the rape shield exception in undermining survivors' right to privacy. During the trial, the testimony about Hayashi's further sexual involvement with the rapist after her rape occurrence was not excluded. The subsequent act, if consensual, is not related to whether the actual rape incident took place. When the Court was instructing the jurors, the Court mentioned the subsequent sexual involvement then also acknowledged that, "if you find rather that the subsequent sexual contact was consensual, that does not itself mean that the earlier contact…is not criminal."[100] However, the Court also said that the additional information can still be considered in "deciding whether or not the earlier contact [the rape in question]…was consensual…"[101]

This attitude toward Hayashi's personal information mirrors existing mainstream attitudes about what "real" rape victims are like or supposed to be like. Specifically, mainstream attitudes assume that victims experience certain types of trauma or act in certain ways that demonstrate trauma, including the attempt to avoid their rapist due to traumas and triggers. For example, scholar Kristin Bumiller, in her book *In an Abusive State,* detailed the significant influence the therapeutic institution and its trauma theory have on contemporary mainstream society and in the courtroom. According to Bumiller, "when women fail to conform to the expectation that they will experience sexual violence as trauma, their reactions are often seen as…evidence that they were not sexually violated."[102] However, not all survivors experience trauma the same way or at all.

---

[100] Transcript of Proceedings of Trial at 71, Commonwealth v. Khan, 22 Pa. D. & C.4th 239 (1993).
[101] Ibid., 75.
[102] Bumiller, Kristin. *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence*. Durham: Duke University Press, 2008. 92. Print.

On the other hand, the court did not hesitate to protect Ms. Tomlinson's sexual or drinking history as ordained under the rape shield statute. When the rapist brought up Tomlinson's previous 1991 alcohol incident that was not related to the rape he was charged with, the Court prohibited that information from being admitted as evidence. According to the Court, if sexual intercourse did took place during the 1991 incident then the rape shield statute excluded the information; further, if sexual intercourse did not take place then the incident is "irrelevant and prejudicial."[103] Hence, while the Court questioned whether Tomlinson would be harmed by possible bias, similar concerns for Hayashi were not addressed. Hayashi's and Tomlinson's different treatment under the rape shield statute revealed the inconsistencies of the rape shield exception.

The Rape Shield exception allows evidence about the survivor to be admitted provided that defendants meet certain requirements. Under Pennsylvania's rape shield statute, an exception can be made if the evidence "has probative value which is exculpatory to the defendant."[104] In other words, if the sexual history information is more relevant in exonerating the defendant's case than prejudicial towards the survivor, then the information can be used for the rapist's defense argument. For example, Hayashi's information most likely met the "more probative value" requirement because compare to myths about alcohol use and consent, assumptions about what trauma looks like might have a stronger influence on mainstream attitudes, since some feminists have used rape trauma theories as means of improving the image of survivors.[105] Thus generic

[103] *Commonwealth v. Khan* 22 Pa. D. & C.4th 239, 252 (Pa.Com.Pl. 1994).
[104] Ibid., 251.
[105] There are also feminists who see the categorization of trauma as problematic, such as Kristin Bumiller.

assumptions about trauma might be viewed as the truth. On the other hand, myths about intoxication and rape, such as the belief that rape survivors are responsible for their rape if they were voluntary drunk, has been challenged by feminists for years. For example, in the 1993 book *Sexual Assault on Campus,* sociologist Carol Bohmer argues that "rape takes place when a victim is unable to consent by virtue of her state of intoxication."[106] However, even if evidence has high probative value ultimately the survivor could be harmed by any exceptions to the rape shield since these exceptions could contribute to a "second assault"[107] or re-victimization of the survivor. Unfortunately, there was no mention of how the prejudice stemming from sharing sexual history could harm Hayashi and yet for Tomlinson that discussion did take place. This erasure of the full extent of Hayashi's injury reveals hegemonic assumptions at the time of the trial of whose well-being was more disposable or more valued. And, commenting on the *Holtzclaw* case, an anti-rape advocate stated that "the word of a women of color is likely to be worth even less than the word of a white woman to those who matter in the criminal justice system."[108] While international students may or may not identify as a person of color, the particular treatment of Hayashi, who is non-white and is a non-citizen, may be a result of hegemonic values favoring patriarchal, white elite institutions.

Conclusion

---

[106] Bohmer, Carol. *Sexual Assault on Campus: the problem and the solution.* New York: Lexington Books, 1993. 164. Print.

[107] Campbell, Rebecca, and Sheela Raja. "Secondary Victimization of Rape Victims." National Violence Against Women Prevention Research Center, 2000. Web. 11 Apr. 2016.<https://mainweb-v.musc.edu/vawprevention/research/victimrape.shtml>.

[108] Redden, Molly, and Lauren Gambino. "Oklahoma Officer's Trial Defense Attacks Credibility of Vulnerable Black Women." *The Guardian* 27 Nov. 2015. Web. 7 May 2016. <http://www.theguardian.com/us-news/2015/nov/27/oklahoma-officer-daniel-holtzclaw-trial-defense-attacks-credibility-of-vulnerable-black-women>.

While some states are updating their rape laws, rape laws within the criminal context are generally slow to change. In a recent 2015 article about the criminal justice system, legal scholar Deborah Tuerkheimer remarked that the US "rape law is in desperate need of modernization."[109] Beyond claims that rape laws are built on patriarchy, as argued by McGregor and many other scholars, the *Commonwealth v. Khan* further reveals other structural problems with the criminal justice system. Specifically, The *Commonwealth v. Khan* demonstrates how both credibility and burden of proof within the criminal justice system can restrict justice for a survivor. Given that the rape shield statute is limited in protecting survivors from other forms of character evidence, particularly survivors who deviate far from the perfect rape victim trope, I argue that it is probable that the strict requirements of criminal cases' standard of proof, in combination with the particular nature of rape cases, can be one of the factors that encourages a pervasive victim-blaming courtroom environment.

The US criminal justice system uses a very high burden of proof called "proof beyond a reasonable doubt" and this responsibility falls onto the complainant's side, particularly the prosecutor. The defendant can offer a defense but it is not required. Proof beyond a reasonable doubt is the standard in which all elements of a crime are supported with a high probability of certainty.[110] Because of this high standard, a "mere suspicion of guilt"[111] is not enough to enter a guilty verdict. The rationale behind this high burden of proof is based on the "innocent until proven guilty" standard. That is, a person charged

[109] Tuerkheimer, Deborah. "Rape on and Off Campus." *Emory Law Journal*. 65.1 (2015). 3. Print.
[110] Dressler, Joshua. Understanding Criminal Law. 6th ed. New Providence, NJ: LexisNexis, 2012. 76. Print.
[111] Transcript of Proceedings of Trial at 52, Commonwealth v. Khan, 22 Pa. D. & C.4th 239 (1993).

with a crime is presumed to be innocent and is treated as such until the reasonable doubt standard is met. According to William Blackstone, "the law holds that it is better that ten guilty persons escape, than that one innocent suffer."[112] However, this focus on an accused person's "innocence"[113] can unfairly supersede other innocent individuals' needs for justice and safety, including victims of crime. The high standard of proof ultimately harms rape survivors, the other group of innocent subjects who often do not benefit from the protection of the law throughout the history and even today.

Besides the high burden of proof, the particular circumstances of rape crimes also partially play a role in the victim-blaming environment of court. The particular nature of rape cases refers to the fact that if there is no physical evidence available then the type of evidence available include mostly or solely witness testimony. Since most rapes take place in private settings in which other witnesses are usually absent, the survivor often ends up being the main witness to the crime and thus can end up being "put on trial."[114] As described in the *Commonwealth v. Khan* case and in scholarly books about evidence,[115] when it comes to evaluating the complaint's side[116] assessing the credibility of witnesses is the main job of the jury. Given that juries are the ones who make the decisions about the outcome, societal attitudes combined with the structural problems of

---

[112]Dressler, Joshua. Understanding Criminal Law. 6th ed. New Providence, NJ: LexisNexis, 2012. 70. Print.

[113] Of course, given the fact that a high proportion of prisoners are African American and Latino individuals, I am also well aware that this standard does not equally apply to every accused individual

[114] Bumiller, Kristin. *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence*. Durham: Duke University Press, 2008. 98. Print.

[115]In *Understanding Evidence* by Paul Giannelli, one of the rules governing witnesses as evidence has to do with credibility (6).

[116]And this applies to cases outside of rape cases as well.

the law may be the cause of the higher degree of victim blaming in rape cases, as mentioned before by scholar Joshua Dressler.[117]

Since it would be difficult to modify the amount of attention the witnesses would receive, especially in situations where the survivors are the sole witness, it would be easier to rectify the structural legal problems by focusing on lessening and/or modifying the high standard of proof to perhaps a "preponderance of the evidence" standard,[118] not just for rape cases but for all other criminal cases as well. I also recommend reducing the conditions needed to fulfill rape cases' requirements for the guilty verdict. Conditions, such as the presence of non-consent, are a significant aspect of legal rape definitions since sentencing of guilt are evaluated by definitions and conditions from these definitions.

Definitions of rape are included in both the federal rape law and state statutes, although state statutes' definitions vary.[119] In *Commonwealth v. Khan*, these requirements in order to prove that rape had occurred, are: existence of penetration, the non-spousal requirement of the victim, the fact that the victim was unconscious or did not consent, and that the defendant knew that his action constitute rape prior to the act or that he recklessly disregarded the victim's unconsciousness or non-consent. Given that many rape laws have changed since the mid-1990s to exclude the non-spousal requirement, it is obvious that the Pennsylvania Commonwealth rape law from the 1990s was outdated.

---

[117] Dressler, Joshua. Understanding Criminal Law. 6th ed. New Providence, NJ: LexisNexis, 2012. 582-583. Print.

[118] Preponderance of the evidence standard is a requirement that when at least 50% of the evidence favors one side, then that particular side wins the case.

[119] Reddington, Frances P., and Betsy W. Kreisel. *Sexual Assault: The Victims, the Perpetrators, and the Criminal Justice System*. Durham, N.C: Carolina Academic Press, 2005. 30-31. Print.

Unfortunately, in the present while some states have revised their criminal rape laws, others have not[120]and laws that are passed to update the criminal rape laws are still deemed to be traditional by feminist. For example, the Model Penal Code, which is a model provision adopted in 1962 by the American Law Institute as an effort to update the nation's penal law, is today seen as a relic that "should be pulled and replaced."[121] That being said, I agree with other scholars that rape laws should be revised to center on the definition of the lack of consent and that requirements, such as the non-spousal requirement, should be omitted. Many feminists have advocated for changing the definition of rape and for changing the requirements needed to prove that rape occurred, including Deborah Tuerkheimer who argues that the question of consent should be the definitive core of rape laws.[122]

I also support the recommendation to limit or eliminate the use of survivor's character evidence in rape trials by strengthening and broadening the rape shield statute to restrict all character evidence against the survivor instead of just restricting sexual history or information related to sexual history. As explained with Hayashi's and Tomlinson's case, information about the survivor's character or history is not related to whether a rape has really occurred. In other words, I argue that it is faulty to assume a connection between consent and someone's demeanor or personality trait. This should also apply to inconsistencies within a survivor's testimony. Inconsistencies within the testimony can be a product of many things and do not necessarily prove that someone is

[120]For example, Deborah Tuerkheimer claims that "a majority of state still retain a force requirement, effectively consigning most rape—that is, non-stranger rape—to a place beyond law's reach" (1).
[121] Dressler, Joshua. *Understanding Criminal Law*. 6th ed. New Providence, NJ: LexisNexis, 2012. 568. Print.
[122] Tuerkheimer, Deborah. "Rape on and Off Campus." *Emory Law Journal*. 65.1 (2015). 4, 45. Print.

lying. For example, author Kristin Bumiller criticizes the Central Park Jogger trial in which the defense attorney claimed that the survivor had given inconsistent testimony and Bumiller explains that the loss of memory and trauma can be a cause of the inconsistencies.[123]

Of course, it is very likely that many legal critics will disagree with this recommendation. Given that many critics of the rape shield statute already argue that the rape shield statute restricts defendant's means of defending for themselves,[124] if the legal system further restricts admission of character evidence, then people might complain that defendants would have no other means of defending their innocence. I disagree because lawyers have also used *mens rea* defense presently and in the past. *Mens rea* takes into account whether the rapist consciously did not know he was doing something wrong before and during the rape incident. In other words, the rapist "is not found guilty of rape if he entertained a genuine and reasonable belief that the female voluntarily consented..."[125]

Unfortunately, this defense ignores that the rape in question did take place and that survivors are harmed by the action regardless of whether the rapist did not know he was committing a crime. I firmly believe that the need to answer for a crime does not disappear when the accused claims ignorance. Similar to McGregor, I view *mens rea* to some extent as a product of societal assumptions about different genders' sexual roles in society, specifically false assumptions that women really want sexual intercourse but are

---

[123] Bumiller, Kristin. *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence*. Durham: Duke University Press, 2008. 99, 102. Print.
[124] Dressler, Joshua. *Understanding Criminal Law*. 6th ed. New Providence, NJ: LexisNexis, 2012. 592. Print.
[125] Ibid., 585.

too passive to make this known.[126] Since a survivor's rights to privacy has historically not been protected, more research is needed and should be conducted in the future to correct these problems without compromising the goal of fairness or reproducing patriarchal hegemony.

[126] McGregor, Joan. *Is It Rape?: On Acquaintance Rape and Taking Women's Consent Seriously*. Aldershot, Hampshire, England: Ashgate, 2005. 203. Print.

Conclusions: Alternative Futures

The U.S. culture of rape makes the voices
Of women of color inaudible…The reality that no one will believe
A woman of color, or the sentiment that no one would rape you,
continues to silence women of color.

--Samhita Mukhopadhyay[127]

Eliminating the discourse of survivor policing can be a starting point for undermining rape culture because the act of policing survivors falsely put the blame on the survivors and thereby justify current indifference towards the seriousness of rape as a crime. As observed from the *Liu v. Striuli* and the *Commonwealth v. Khan* cases, policing of survivors is not always in the overt form of victim-blaming, where court actors find faults with the survivors through character evidence. In fact, restrictive standards of proof have been the overlooked tool of survivor policing as well. Hence, while it is important for anti-rape movements to challenge direct victim-blaming and other forms of policing within the legal institution, I believe that there need to be more discussions about the restrictive nature of the legal system's standards and how unrealistic standards for evidence can create conditions of survivor policing. As the *Liu v. Striuli* and the

[127] Friedman, Jaclyn, and Jessica Valenti. *Yes Means Yes!: Visions of Female Sexual Power & a World Without Rape*. Berkeley: Seal Press, 2008. 159. Print.

Commonwealth v. Khan cases have demonstrated, far from being fair these standards of evidence not only uphold the problematic ideal rape survivor norm but they also create unnecessary obstacles for survivors trying to pursue justice, especially survivors from marginalized communities who might lack access to knowledge about legal proceedings.

Above, I discussed how in the *Liu* case the restrictive requirements of state tort law in combination with the federal Civil Rights law resulted in constraining Liu's options for presenting evidence. Such problems would not exist if the standards of evidence were not so restrictive and if liability standards would allow for both negligence and intentional liabilities. The same can be said for Title IX's actual notice and deliberate indifference standards. I mentioned how actual notice can give colleges incentives to ignore campus rape culture in the attempt to avoid liability. Because situations similar to the *Liu v. Striuli* case reveal that the absence of actual notice does not necessarily mean that schools are in compliance with Title IX regulations, I propose that the legal system adjust the existing standards so that both actual notice and deliberate indifference are the *maximum* standard, not the *minimum* standard of liability. Similar to Title IX standards and civil standards, I propose that the criminal standard of "proof beyond a reasonable doubt" should be more lenient, perhaps by adopting the "preponderance of evidence" standard.

Moreover, the two international student cases also reveal that judges' interpretations of rape laws can limit anti-rape reforms. Because judges' interpretations are not always consistent, as shown in the previous discussion about the application of the rape shield, I propose that feminists should concentrate their efforts on preparing for

worst-case scenarios where judges may use traditional patriarchal and capitalist interpretations or interpretations that rely on the precedent principle.

In Chapter 3, I also discussed the need for regulative accountability, which is when citizens keep institutions accountable. As it pertains to Title IX regulations, I proposed that we should give more financial remedy responsibilities to the Office of Civil Rights (OCR) so that survivors can have more options for recovering damages. In terms of regulating interpretations within criminal trials or within civil suits where survivors have intentions other than monetary remedies, it would be helpful if scholars in the future would evaluate whether activists can push for laws governing interpretations. This would include advocating for laws that make women-of-color epistemology or a justice-focused approach, the basis of interpretation before proceeding to common law interpretations. In order to make that possible, we first need to make these epistemologies publicly accessible and at the core of legal education. While it will be difficult or nearly impossible to change the underlying structures of the US legal system, it is still important that people become aware of how sexist, capitalist and racist hegemony play a role in strengthening the foundation of law. After all, as seen by the immense progress rape laws have undergone, changes start with knowledge, and knowledge of limitations within the legal system can empower people to push for effective changes that can transcend this culturally-constructed limitation.

References

Allen, Paula G. *Off the Reservation: Reflections on Boundary-Busting Border-Crossing Loose Canons*. Boston, Mass: Beacon Press, 1998. Print.

Anderson, Paul M. and Osborne, Barbara. “A Historical Review of Title IX Litigation.” *Faculty Publications* 18.1 (2008): 127-168. Web. <http://scholarship.law.marquette.edu/facpub/582/>.

Bartlett, Katharine et al. *Gender and Law: Theory, Doctrine, Commentary*. New York: Wolters Kluwer Law & Business, 2013. Print.

Bazelon, Emily. "Have We Learned Anything From the Columbia Rape Case?" *The New York Times*, 28 May 2015. Web. 04 Apr. 2016. <http://www.nytimes.com/2015/05/29/magazine/have-we-learned-anything-from-the-columbia-rape-case.html?_r=0>.

Bohmer, Carol. *Sexual Assault on Campus: the problem and the solution.* New York: Lexington Books, 1993. Print.

Bourque, Linda B. Defining Rape. Durham: Duke University Press, 1989. Print.

Braunig, Dietmar. “Why Universities are not Businesses.” *The University As a Business?*

Ed. Saliterer, Iris, and Paolo Rondo-Brovetto. Wiesbaden: VS VerlagfürSozialwissenschaften, 2011. 23. Web.

Brennan, Kellie. “Interview with Title IX Coordinator.” 14 Aug. 2015. Personal Interview.

Buchwald, Emilie, Pamela R. Fletcher, and Martha Roth. *Transforming a Rape Culture*. Minneapolis, MN: Milkweed Editions, 1993. Print.

Bumiller, Kristin. *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence*. Durham: Duke University Press, 2008. Print.

Campbell, Rebecca, and Sheela Raja. "Secondary Victimization of Rape Victims." National Violence Against Women Prevention Research Center, 2000. Web. 11 Apr. 2016. <https://mainweb-v.musc.edu/vawprevention/research/victimrape.shtml>.

Cannon v. University of Chicago, 441 U.S. 677 (1979).

Chamallas, Martha. “The Architecture of Bias: Deep Structures in Tort Law”. *University of Pennsylvania Law Review* 146.2 (1998): 463–531. Web.

Chamallas, Martha. *Introduction to Feminist Legal Theory*. New York: Wolters Kluwer Law & Business, 2013. Print.

Chamallas, Martha. "Vicarious Liability in Torts: the Sex Exception." *Valparaiso University Law Review*. 48.1 (2013): 133-193. Print.

Chang, Robert. “Toward an Asian American Legal Scholarship.” *Critical Race Theory: The Cutting Edge*. Ed. Richard Delgado. Ed. Jean Stefancic. Philadelphia: Temple University Press, 2000. Print.

Color of Violence: The Incite! Anthology. Cambridge, Mass: South End Press, 2006. Print.

Commonwealth v. Khan, 22 Pa. D. & C.4th 239 (Pa.Com.Pl 1994).

Crenshaw, Kimberle. "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color." *Stanford Law Review*. 43.6 (1991): 1241-1299. Print.

Daglar, Murat. "A Comparative Study of Fear of Sexual Assault and Personal Property Theft between International and Noninternational Students on an Urban University Campus." Order No. 3359505 Spalding University, 2009. Ann Arbor: ProQuest. Web. 1 May 2015.

Davis, Angela Y., and Joy James. *The Angela Y. Davis Reader*. Malden, Mass: Blackwell, 1998. Print.

"Dear Colleague Letter." Office of Civil Rights. US Department of Education, 4 Apr. 2011. Web. 17 Apr. 2016. <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

Dressler, Joshua. *Understanding Criminal Law*. New Providence, NJ: LexisNexis, 2012. Print.

Fisk, Catherine L, and Erwin Chemerinsky. "Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX." (Symposium: Strengthening Title Vii: 1997-1998 Sexual Harassment Jurisprudence)." *The William and Mary Bill of Rights Journal*. 7.3 (1999): 755-799. Print.

Foucault, Michel. *Discipline and Punish: the Birth of the Prison.*

translated from the French by Alan Sheridan. New York: Vintage Books, 1979, c1977. Print.

Foucault, Michel. *The History of Sexuality Volume I.* New York: Vintage Books, 1978. Print.

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

Friedman, Jaclyn, and Jessica Valenti. *Yes Means Yes!: Visions of Female Sexual Power & a World Without Rape*. Berkeley: Seal Press, 2008. Print.

Frost, Sarah, Becca Guthrie, and Megan Cunnane. "Emma Sulkowicz, CC '15, to Mix Performance Art, Sexual Assault Protest." *Columbia Daily Spectator*. N.p., Sept. 2014. Web. 04 Apr. 2016. <http://columbiaspectator.com/multimedia/2014/09/02/emma-sulkowicz-cc-15-mix-performance-art-sexual-assault-protest>.

Gebser v. Lago Vista Independent School District, 524 U.S. 274 (Supreme Court of the United States 1998).

Giannelli, Paul C. *Understanding Evidence*. New Providence, NJ : LexisNexis, 2013. Print.

Gilde, Christian. *Higher Education: Open for Business*. Lanham, MD: Lexington Books, 2007. Print.

Grana, Sheryl J. *Women and (In)justice: The Criminal and Civil Effects of the Common Law on Women's Lives*. Boston: Allyn and Bacon, 2002. Print.

Hargrave, Katie. "Carrying the Weight of Sexual Assault Together." National

Organization for Women, Nov. 2014. Web. 7 Mar. 2016. <http://now.org/blog/carrying-the-weight-of-sexual-assault-together/>.

Hartwell, Carrie Ann. *International Student's Experiences, Acknowledgements and Scripts of Rape*. Diss. James Madison University, 1994. Print.

Hesse-Biber, Sharlene Nagy, and Patricia Leavy. *Feminist Research Practice a Primer*. Thousand Oaks: SAGE Publications, 2007. Print.

Hirata, Fujimori D. L. *Understanding the Reporting Behavior of International College StudentBystanders in Sexual Assault Situations*. Los Angeles, California: University of Southern California, 2010. Web.

"How to File a Title IX Complaint." Know Your IX, n.d. Web. 17 Apr. 2016. <http://knowyourix.org/title-ix/how-to-file-a-title-ix-complaint/>.

Kingkade, Tyler. "106 Colleges Are Under Federal Investigation For Sexual Assault Cases." *The Huffington Post*. TheHuffingtonPost.com, Apr. 2015. Web. 17 Apr. 2016. <http://www.huffingtonpost.com/2015/04/06/colleges-federal-investigation-title-ix-106_n_7011422.html>.

Kretsedemas, Philip. "The Limits of Control: Neo-Liberal Policy Priorities and the US Non-Immigrant Flow." *International Migration*. 50.1 (2012). Print.

Joohee, Lee, Elizabeth C. Pomeroy, Yoo Seo-Koo, and Kurt T. Rheinboldt. "Attitudes Toward Rape: a Comparison between Asian and Caucasian College Students." *Violence against Women*. 11.2 (2005): 177-196. Print.

Liu v. Striuli. 36 F.Supp.2d 452, 460 (D.R.I. 1999).

Lull, James. "Hegemony." *Gender, Race, and Class in Media*. Ed. Gail Dines and Jean

Humez. N.p.: Sage Publications, 2011. Print.

Richards, Tara N, and Catherine D. Marcum. *Sexual Victimization: Then and Now*. Thousand Oaks, California: Sage, 2015. Print.

Matus, Claudia. "Interrupting Narratives of Displacement: International Students in the United States." *Perspectives in Education*. 24.4 (2006): 81-92. Print.

McGregor, Joan. *Is It Rape?: On Acquaintance Rape and Taking Women's Consent Seriously*. Aldershot, Hampshire, England: Ashgate, 2005. Print.

McGregor, Joan. "Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law." *Legal Theory* 2 (1996): 175-208. Cambridge Univ. Press. Web.

Mead, Rebecca. "Two Beds and the Burdens of Feminism - The New Yorker." *The New Yorker*. N.p., 06 Apr. 2015. Web. 7 Mar. 2016. <http://www.newyorker.com/culture/cultural-comment/two-beds-and-the-burdens-of-feminism>.

Merritt, Deborah J, and Ric Simmons. *Learning Evidence: From the Federal Rules to the Courtroom*. St. Paul, MN: West, 2009. Print.

Mills, Charles W. "Racial Liberalism." *PMLA*. 123.5 (2008): 1380-1394. Print.

Naples, Nancy A. *Feminism and Method: Ethnography, Discourse Analysis, and Activist Research*. New York: Routledge, 2003. Print.

Newman, Frank, Lara Couturier, and Jamie Scurry. *The Future of Higher Education: Rhetoric, Reality, and the Risks of the Market*. San Francisco: Jossey-Bass, 2004. Print.

Ong, Aihwa. "Mutations in Citizenship." *Theory, Culture & Society*. 23 (2006): 2-3. Print.

Redden, Molly, and Lauren Gambino. “Oklahoma Officer’s Trial Defense Attacks Credibility of Vulnerable Black Women.” *The Guardian* 27 Nov. 2015. Web. 7 May 2016. <http://www.theguardian.com/us-news/2015/nov/27/oklahoma-officer-daniel-holtzclaw-trial-defense-attacks-credibility-of-vulnerable-black-women>

Reddington, Frances P, and Betsy W. Kreisel. *Sexual Assault: The Victims, the Perpetrators, and the Criminal Justice System*. Durham, N.C: Carolina Academic Press, 2005. Print.

“Reporting Rates.” *RAINN*. n.d. Web. 9 May 2016. <https://rainn.org/get-information/statistics/reporting-rates>.

"RI Court Allows to Stand Most Harassment Claims Against Professor." Rev. of Liu v. Striuli. *Andrews Sexual Harassment Litigation Reporter* Mar. 1999: n. p. Westlaw. Andrews Publications. Web. 14 Apr. 2016.

Richie, Beth. *Arrested Justice: Black Women, Violence, and America's Prison Nation*. New York: New York University Press, 2012. Print.

Simpson v. University of Colorado Boulder, 500 F.3d 1170 (10th Cir. 2007).

Smith, Andrea, et al. "The Color of Violence: Introduction." *Color of Violence: The INCITE! Anthology*. Cambridge, Mass: South End, 2006. 3. Print.

So, Suyin. "Sexual Harassment in Education." *Georgetown Journal of Gender & the Law*. 4.1 (2002). Web. 25 Oct. 2015.

Spohn, Cassia, and Julie Horney. "Rape Law Reform and the Effect of Victim Characteristics on Case Processing." *Journal of Quantitative Criminology*. 9.4 (1993): 383-409. Print.

Taylor, Kate. “Mattress Protest at Columbia University Continues into Graduation Event.” *The New York Times* 19 May 2015. Web. 9 May 2016. <http://www.nytimes.com/2015/05/20/nyregion/mattress-protest-at-columbia-university-continues-into-graduation-event.html?_r=0>.

Testa, Jessica. “The 13 Women Who Accused a Cop of Sexual Assault, in Their Own Words.” Buzzfeed News. Buzzfeed, 10 Dec. 2015. Web. 5 May 2016. <https://www.buzzfeed.com/jtes/daniel-holtzclaw-women-in-their-ow?utm_term=.ckbZD8K7no#.jjd6y7pLZO>.

"Title IX in Detail." Know Your IX. N.p., n.d. Web. < http://knowyourix.org/title-ix/title-ix-in-detail/>.

Title IX of the Education Amendments of 1972, 20 U.S.C. §1681.

Transcript of Proceedings of Trial at 71, Commonwealth v. Khan, 22 Pa. D. & C.4th 239 (1993).

Tuerkheimer, Deborah. "Rape on and Off Campus." *Emory Law Journal*. 65.1 (2015). Print.

Walker, Grayson S. "The Evolution and Limits of Title Ix Doctrine on Peer Sexual Assault." Harvard Civil Rights-Civil Liberties Law Review. 45.1 (2010): 95-133. Print.

West, Robin. *Feminist Jurisprudence.* Oxford Univ Press, 1993. Print.

“Who Are the Victims?” RAINN, n.d. Web. 04 Apr. 2016. <https://rainn.org/get-information/statistics/sexual-assault-victims>.

"Why Schools Handle Sexual Violence Reports." *Know Your IX*, n.d. Web. 17 Apr. 2016. <http://knowyourix.org/why-schools-handle-sexual-violence-reports/>.

Williams, Raymond. "Hegemony." *Marxism and Literature.* Oxford: Oxford University Press, 1977. Print.

Wills v. Brown University, 184 F. 3d 20, 26 (United States Court of Appeals, First Circuit 1999).

Yudof, Mark G. *Educational Policy and the Law*. Belmont, Calif: Wadsworth Cengage Learning, 2012.