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Due Process Demands as Propaganda: The Rhetoric of Title IX Opposition

Annaleigh E. Curtis*

INTRODUCTION

How universities should deal with campus sexual assault is thorny and divisive, perhaps more so than any other current topic in the academy. Title IX is at the center of the debate on this issue, particularly following the issuance of the “Dear Colleague Letter” (“DCL”) by the Department of Education’s Office of Civil Rights (“OCR”) in 2011. The DCL made it clear that sexual assault and harassment are a form of sex discrimination proscribed by Title IX and outlined some necessary features of the adjudication of these issues. Beyond its formal requirements, the DCL made clear that OCR was going to dedicate more attention to the issue.

This Article will focus on a particular kind of objection to Title IX, which I call due process demands. They may take many forms, but the central idea is that students who are accused of misconduct, like sexual harassment or assault, are denied due process in campus adjudications—such adjudications are unfair to the accused. This has become a criticism of Title IX, rather than universities themselves, largely because of the DCL, which clarified some of the ways that universities must conduct these adjudications. This, in turn, is taken to be either a devastating objection to compliance with the DCL and/or an imperative on universities to provide more process for the accused, whether within the bounds of the DCL or not. I argue that such demands function as political rhetoric, specifically as a sort of propaganda, drawing on a recent

* Lawyer in private practice. The views expressed in this Article are my own and do not represent the views of my employer. I thank Kevin Tobia and the Yale Journal of Law & Humanities for their help. I also thank Alison Jaggar, Diane Rosenfeld, Jason Stanley, Jennifer Saul, Antuan Johnson, Barrett Emerick, and Jason Wyckoff for their thoughts on previous drafts.


2. I will focus on the case of student-on-student harassment and assault rather than professor-on-student harassment and assault. Both are serious problems on campus, they are related to each other in ways we should not ignore, and due process demands are made in both cases. However, the legal rules for the cases differ, so it pays to be distinct in dealing with them even abstractly.
taxonomy of propaganda. First, I explain what due process demands are, focusing particular attention on the discourse surrounding Title IX at Harvard Law School. Second, I explain what propaganda is and is not, drawing on recent philosophical work on propaganda and philosophy of language generally. Third, I apply the analysis to the case of due process demands, showing how and why such demands function as propaganda. Finally, I draw conclusions about what this means for the debate over Title IX itself.

I. DUE PROCESS DEMANDS

One particularly salient example of due process demands (“DPD”) is found in the opinion letter of twenty-eight Harvard Law professors, “Rethink Harvard’s sexual harassment policy,” published in the Boston Globe in the fall of 2014 (hereinafter “The Twenty-Eight Letter”). In the piece, twenty-eight law professors outline their complaints about a new harassment policy adopted by Harvard without their input. Their criticisms center on due process demands and related academic freedom concerns. Due process demands tend to involve a common set of elements: cursory expression of concern about the problem of harassment and assault on campus, claims by the speaker to some knowledge about the process of campus adjudications (and thus, authority to speak), and some purported procedural failings. The Twenty-Eight Letter contains each of these elements.

First, the cursory expression of concern. “We strongly endorse the importance of protecting our students from sexual misconduct and providing an educational environment free from the sexual and other harassment that can diminish educational opportunity.” These expressions are typically limited to one sentence, depending on the length of the piece making the DPD. For longer pieces, such expressions might be found both in the introduction and conclusion so that the reader comes to and from the piece believing that the demand is not about taking away from the problem, but rather confronting it in the proper way.

Second, a claim to knowledge and authority. Here, The Twenty-Eight Letter signatories lay claim to authority through their positions as law professors generally, though they surely hope the reader attaches some extra significance to the fact that they are Harvard law professors. “As teachers responsible for educating our students about due process of law, the substantive law governing discrimination and violence, appropriate administrative decision-making, and the rule of law generally, we find the

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5. Id.
new sexual harassment policy inconsistent with many of the most basic principles we teach.”

Third, a recital of some perceived procedural failings. The Twenty-Eight Letter notes the following four complaints about the procedures Harvard had adopted for adjudications:

The absence of any adequate opportunity to discover the facts charged and to confront witnesses and present a defense at an adversary hearing.

The lodging of the functions of investigation, prosecution, fact-finding, and appellate review in one office, and the fact that that office is itself a Title IX compliance office rather than an entity that could be considered structurally impartial.

The failure to ensure adequate representation for the accused, particularly for students unable to afford representation.

These procedural deficiencies made the Harvard policy “overwhelmingly stacked against the accused.” Note that there is actually no discussion about why these procedural facts would result in a policy so biased as to be unacceptable. Nor is there any explanation of what the professors view as an appropriate level of process. There is also no engagement with the facts of how campus adjudications work, who they may favor or not, or their typical outcomes.

II. PROPAGANDA AND IDEOLOGY

We are all familiar with the idea of propaganda, whether alarming examples from the Third Reich or the more benign stuff of anti-smoking campaigns. However, propaganda is not limited to a set of narrowly circumscribed instances of government speech, as our common concept might suggest. Each of us engages in propagandistic speech at some point in our lives, probably with extreme regularity.

Philosopher Jason Stanley argues that political propaganda is speech “that fundamentally involves political, economic, aesthetic, or rational ideals, mobilized for a political purpose.” Distinguishing between supporting and undermining propaganda, he defines the latter as “a contribution to public discourse that is presented as an embodiment of certain ideals, yet is of a kind that tends to erode those very ideals.” Of primary interest to Stanley’s book, and to this argument, is what he calls Undermining Demagoguery (“UD”): “A contribution to public discourse that is presented as an embodiment of a worthy political, economic, or rational ideal, but is in the service of a goal that tends to undermine that

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6. Id.
7. Id.
8. Id.
9. STANLEY, supra note 3, at 52.
10. Id. at 53.
very ideal.”

Importantly, Stanley rejects the initially-plausible idea that such propaganda must be false and uttered insincerely. On his view, even the most extreme instances of demagoguery can be uttered truly and sincerely. This feature of the view is attractive because it allows us to make sense of the use of propaganda by good, well-meaning people, and so provides an avenue for criticism that takes aim at language and social structures rather than individuals. Thus, when I say that due process demands are examples of propaganda in the campus sexual assault context, I am not saying that due process is unimportant, that those making the demands are doing so disingenuously, or that they are bad people. Rather, I am criticizing the way language and society have developed in tandem in ways that ultimately harm and exclude victims of sexual assault while also making it harder to achieve a genuinely fair process for all involved. Of course, this leaves open the option that some propagandistic speakers do knowingly utter falsehoods in an insincere way for the purposes of swaying others or inciting strong feelings, but this is not the most interesting sort of political rhetoric.

Sincerity is not required for a statement to be propagandistic, even demagogic, because of the essential relationship between ideology (in the generally-Marxist sense) and propaganda. Ideology is not bad in itself. “It is an essential part of any form of social life because it functions as the background that we assimilate and enact in order to navigate our social world.” However, ideologies are epistemically dangerous because they may “function as persistent barriers to the acquisition of knowledge.” For example, racism as an ideology has as a necessary epistemic feature that it obscures and distorts knowledge in racialized ways.

[H]ere, it could be said, one has an agreement to misinterpret the world. One has to learn to see the world wrongly, but with the assurance that this set of mistaken perceptions will be validated by white epistemic authority, whether religious or secular. . . . There will be white mythologies, invented Orientseven, invented Africaseven, invented Americaseven, with a correspondingly fabricated population, countries that never were, inhabited by people who never were—Calibans and Tontos, Man Fridays and Sambos—but who attain a virtual reality through their existence in travelers’ tales, folk myth, popular and highbrow fiction, colonial reports, scholarly theory, Hollywood

11. Id. at 69.
12. Id. at 41.
13. Id.
14. Id.
cinema, living in the white imagination and determinedly imposed on their alarmed real-life counterparts.\textsuperscript{17}

The ideological constrictions of racism, then, act with particular force on the way people racialized as white see and interact with the world. These constrictions, however, will be especially hard to see for those under their sway.

Further, when ideology is combined with actual social power, as it is in the case of racism, ideology can have the power to mold the world to its own image. "When ideologies become hegemonic, their effects blend into and, in an important sense, become part of, the natural world, so we no longer see them as social."\textsuperscript{18} The question, then, whether certain statements arising out of ideologies are true or false may sometimes be beside the point. Something might turn out to be true because of ideology or it might pass as true because of ideology.\textsuperscript{19} As Stanley argues, what makes propaganda epistemically flawed is not that it is false, but that it is resistant to evidence in a particular sort of way.\textsuperscript{20}

When we live in and among hegemonic ideologies like racism, sexism, and classism (or more accurately, perhaps, the intersectional masses of connected ideologies), our language and thought are structured thereby. This fact helps explain why propaganda is not an exceptional form of communication, but it is actually quite common. It also helps to explain why beliefs arising from flawed ideologies are particularly difficult to challenge. "Structural features of a society can inhibit rational revision of belief to preserve desirable outcomes for the group privileged by that structure. . . . [They] are not merely the cause of flawed ideology; they also may constitute it."\textsuperscript{21}

Given the centrality of ideology to propaganda, then, it is a vital part of the analysis of propaganda to give some account of the ideology that informs it. In the next Part, I make the case that what is often called rape culture is the ideology that most closely informs DPD qua propaganda. This is not to say that rape culture, however defined, is the only ideology that gives rise to the propaganda function of DPD. Because ideologies do not exist in isolation from other ideologies, it seems likely that rape culture, whatever it turns out to be, intersects with racism, classism, and a belief in objectivity and neutrality as both attainable and commonplace.
III. *WHY DUE PROCESS DEMANDS FUNCTION AS PROPAGANDA—RAPE CULTURE AS IDEOLOGY*

Rape culture is a social phenomenon often-mentioned but under-theorized. In this Part, I attempt to remedy that gap in theory by offering an account of rape culture as ideology. This, in turn, will inform how rape culture gives rise to propagandistic speech. In saying that rape culture has been under-theorized, I mean mostly that the concept and phrase itself are under-theorized. Feminist theorists have, for decades, been theorizing about and around rape culture, but I aim to provide a distillation of that theory and a rigorous accounting that will aid in the task of this paper.

Rape culture is difficult to distill down for precisely the reasons that any ideology is difficult to analyze clearly and cleanly: It pervades our world, structures many of our interactions, and passes itself off as normal. One article mentions that it comprises “the perpetuation of rape myths, sexual objectification of women, and media’s legitimization of sexual aggression and violence against women [which is] pervasive throughout American society.”

Two notes of caution before moving on. First, when I talk about rape culture in this Article, I am talking about rape culture specific to the context of higher education in the United States. There may be relevant differences between rape culture in that context and rape culture in other countries or other contexts within this country. Of course, rape culture may also differ in important ways within the United States higher education context as well. The rape culture of a large public university with a robust Greek system may be quite distinct from the rape culture of a mid-sized commuter school or a small liberal arts college. Second, much of the literature I cite focuses on sexual assault of women. Women do make up the majority of victims of sexual violence, in and out of the campus context. However, a recent Bureau of Justice Statistics study on campus sexual violence found that 7% of undergraduate men had experienced a completed sexual assault since entering college, compared to 21% for undergraduate women. 7% comes out to roughly 1 out of every 14 undergraduate men, which is less than 1 in 5 for women, but still a stunningly high prevalence of sexual assault during college years.

A. Rape Myths

There are so many different sorts of rape myths that it is almost hard to start listing them because any list begins to feel incomplete. Payne and
colleagues tested acceptance of seven common rape myths: they asked for it, it wasn’t really rape, they didn’t mean to, they lied, rape is trivial, and rape is deviant. Rape myths are the tropes in our narratives about rape that recur over time in different ways, and which serve to “blame the victim for their rape, express a disbelief in claims of rape, exonerate the perpetrator, and allude that only certain types of women are raped.”

These myths have taken on a life of their own on college campuses, where young adults are often alone for the first time, both newly empowered and desperate to belong. Rape myths collide with a culture of group masculinity in fraternities, sports teams, and other spaces with toxic effects.

Athletes and fraternity members are more likely to commit gang rapes. Membership in these exclusive groups “confers on them an elite status that is easily translated into entitlement, and because the cement of their brotherhood is intense, and intensely sexualized, bonding”. I have seen a tremendous rise in the number of multi-perpetrator sexual assaults over the past few years, correlative with the rise in ‘gonzo’ porn, that involves several men taking turns penetrating, or penetrating all at once, one woman. Rather than being spontaneous cases of drunken misbehavior, evidence indicates that the vast majority of these rapes (around 71%) are premeditated and even scripted. Acts of sexual violence appear not to be random, unrelated events, but rather central, even necessary, to the bonding that supports the sexual culture.

Picking up on the influence of pornography on rape myths in the college context, Kelly Oliver says, “this is the generous interpretation of the ‘No Means Yes’ campaign on college campuses, namely, that these college men really believe that girls and women want to be raped. Perhaps fraternity brothers or college athletes who are prone to sexual assault have bought into the pornutopia, and at some level really believe that ‘No’ mean ‘Yes.’”

27. See generally PEGGY R. SANDAY, FRATERNITY GANG RAPE: BROTHERHOOD AND PRIVILEGE ON CAMPUS (2007).
B. Objectification

Objectification plays a key role in rape culture. The objectification of women helps to explain why rape is so rarely prosecuted criminally, why victims are so rarely believed in any context (legal or otherwise), and why the narrative of misunderstanding or regret has come to dominate the discussion of campus sexual assault. The testimony of victims of assault is so undervalued that they are often not just passively disbelieved, but actively and aggressively disbelieved for expressing their belief that they were raped.\(^{30}\) As Oliver notes, the increasing use of social media in party rapes has resulted in some high-profile convictions, suggesting “that the ‘testimony’ of unconscious girls is more believable than that of conscious ones.”\(^{31}\)

What it means to be objectified is partially precisely to be unable to speak credibly on one’s own behalf. Sally Haslanger, following Catharine MacKinnon, argues that objectification involves seeing someone or something as having a particular nature. “For example, if men desire submission, then in objectifying women men can view women as having a nature which makes them (or, under normal circumstances, should make them) submissive, at the same time as they force women in submission.”\(^{32}\) Objectification set against the backdrop of persistent inequality enforces that “No Means Yes” because women are constructed as the kind of things that are incapable, or minimally capable, of saying no in a credible way. If they say no, it’s as if a football said no to being thrown or kicked, which is to say very confusing and probably mistaken.

C. Media

While traditional media and pornography have integral roles to play in the perpetuation of rape culture, it seems that social media is beginning to bridge the gap between traditional media and pornography, particularly in the campus context.

Pornographic photographs have also become part of party rape. Creepshots of party rape are circulated on social media. It is noteworthy that in most of the recent high profile rape cases there have been groups of young men involved, some of whom took photos and videos using cellphones. This suggests that rape has become a spectator sport worthy of candid photographs to be disseminated after the event. These young men are “having fun,” and they see the

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30. By distinguishing between passive and active disbelief, I have in mind the difference between a person saying they want to be neutral, hear all the evidence before they make a decision, etc. and a person outright accusing a victim of lying or aggressively questioning her story and motives. The former is not neutral, despite what its proponents may think, but it’s also the case that most victims who report their rapes face the latter with extreme frequency. Thus, it is disingenuous to suggest that one’s failure to believe a victim at her word is a harmless act.
31. Oliver, supra note 29.
32. HASLANGER, supra note 15, at 66.
photographs of naked “dead” girls in compromising positions as “funny.”

It may be that, in participating in rape through video, bystanders are able to distinguish themselves from what they would otherwise recognize as wrongful and act to stop. So much of our lives is mediated through phones and computers now that being behind a camera is (phenomenologically) similar to watching something that is happening far away or long ago, something over which one has little power. In the Steubenville case, some bystanders who were not filming are heard objecting, even strenuously, to the scene, while those filming or in front of camera are laughing and joking. In another case, at Vanderbilt, “college men smiled and clowned for the camera, joked and jeered for posterity, and took pleasure not only in sexually abusing their victims, but also in capturing it on film, and then sharing it with friends.” Through social media, rape, and especially gang rape, is made to involve not just the people in the room, but an extended community, many of whom will be known to both the victim and the perpetrator(s).

IV. HOW DUE PROCESS DEMANDS FUNCTION AS PROPAGANDA

Stanley describes the mechanism by which certain forms of propaganda operate to undermine the very ideals to which they appeal. Supposing, as he does, that reasonableness is the norm of public reason in a liberal democracy, there will be expressions such that:

1. Use of the relevant expression has the effect on the conversation of representing a certain group in the community as having a perspective not worthy of inclusion, that is, they are not worthy of respect.

2. The expression has a content that can serve simply to contribute legitimately to resolving the debate at issue in a reasonable way, which is separate from its function as a mechanism of exclusion.

3. Mere use of the expression is enough to have the effect of eroding reasonableness. So the effect on reasonableness occurs just by virtue of using the expression, in whatever linguistic context.

Call the first condition the inclusion condition, the second the legitimate expression condition, and the third the erosion condition. I address each of these conditions in turn to show how DPD function as propaganda. However, I will take them out of order. The inclusion condition is likely to

33. Oliver, supra note 29.
34. See HARDING, supra note 26, at 48-49 (“[Offscreen Guy 2]: Dude, this is not cool. They’re raping a girl. [Michael Nodianos]: They’re not raping her, ‘cause she’s dead. [Offscreen Guy 1]: Y’all don’t understand how it is, all right? I got a fuckin’ little sister. What happens if that was my little sister, who just turned, like sixteen?”).
35. Id.
36. STANLEY, supra note 3, at 130.
be the most controversial, so I will address it last.

A. The Legitimate Expression Condition

I begin with the legitimate expression condition. This condition is surely easy to fulfill in the case of due process demands. Due process is one of the great unfulfilled promises of our legal system. The concept of due process in American law is multifarious, which is part of what makes it ripe for confusion, double-speak, and misuse. Due process, as an ideal, transcends individual areas of law. We assume our systems, whether criminal, civil, administrative, or even informal adjudications must be procedurally fair both to protect the rights of the parties and to ensure the best outcomes. The Fourteenth and Fifth Amendments to the Constitution enshrine the importance of due process of law as a pre-requisite to any governmental taking. In the criminal context, it is often said that it would be better to let ten guilty people go free than to imprison an innocent person because the deprivation of liberty imposed by incarceration is so dire.\(^\text{37}\) The reality, of course, is that due process is often denied to criminal defendants.\(^\text{38}\) Virtually all defendants plead out to avoid a trial, and criminal trials are notoriously unfair.\(^\text{39}\) This failure to meet with the high standards of due process is often particularly grave for defendants of color and poor defendants.\(^\text{40}\) In the civil context, due process is held in similarly high regard, though with similar failures for people who need protections the most, like immigrants.\(^\text{41}\) Because of this context, demands for due process are generally a serious charge to be taken seriously, investigated, and remedied.\(^\text{42}\)

B. The Erosion Condition

As a result of both the exalted theoretical place of due process in our system and the well-known failures with respect to many who are accused of wrongdoing, demands for due process can appeal to those on both the right and the left. What DPD signal in the conversation is that substance must take a back seat until process can be considered fair, and that failure to do so undermines all subsequent discussion of substance. This, in turn,

\(^{37}\) See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES *358.


\(^{42}\) For a comprehensive analysis of the role narratives of race play in debates on Title IX, see Antuan M. Johnson, Title IX Narratives, Intersectionality, and Male-Biased Conceptions of Racism, 9 GEO. J. L. & MOD. CRIT. RACE. PERSP. 57 (2017).
erodes reasonableness by presenting the person “ignoring” the process as unwilling to engage in our collective norm of concern for fair play.

This happens through an entirely banal feature of language use: the role assertions play in conversation.

To assert something, as the linguist Sarah Murray describes, is to propose to add it to the common ground. To assert something is to advance it as something the speaker knows, and to thereby propose that its content be added to the common ground Subsequent argument is debate about whether or not to accept the proposal. . . . [Langton and West] argue that pornography has the effect of subordinating women, not by explicitly communicating a subordinating message, but by presupposing it. 43

Thus, assertions can subtly propose adding all sorts of things to the conversational context. We do this so naturally every day that we often do not even notice when it is happening. This may be particularly true in the propaganda context because we are so used to the phrases at issue being deployed to convey a rich array of background information. Making DPD in the campus sexual assault context, in particular, involves a number of assumptions about the campus adjudication process such that the mere assertion that due process is needed can serve to undermine reasonableness. I outline some things DPD propose adding to the common ground in the rest of this section, though this likely does not exhaust those additions.

DPD suppose that victims who come forward receive significant institutional support, while the accused do not. Janet Halley makes this presupposition explicit, arguing that feminists are now in a position of substantial power and influence in government and universities.

But as feminists issue a series of commands from within the federal government about what the problem of campus sexual violence is and how it must be handled, and as they build new institutions that give life to those commands, they become part of governmental power. Now that they have the power to adjudicate cases and determine sanctions, they are facing the full range of cases. For those feminists — and I would argue they should include, by now, the advocacy branch — the days of specialization should be over. It is time to govern. 44

This view—seemingly common among Title IX skeptics—that feminists have somehow taken over the government translates directly into the view that victims receive unparalleled support when they make

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43. STANLEY, supra note 3, at 134–35.
Looking at suits filed by accused students against their Universities reveals the extent of the belief that male students are denied due process, while female students are given extra support. An increasing number of mostly male students are accusing their Universities of violating Title IX by disciplining them for sexual misconduct on the theory, *inter alia*, that the University punished them as a result of gender bias against men. That is, students accused of sexual misconduct are increasingly turning to Title IX itself, alleging that Title IX’s own requirements discriminate against them on the basis of their sex—a logical extension of the argument advanced by the Twenty-Eight Letter that they have been wronged for no other reason except that they are men who happen to have been accused of misconduct. 47

One such plaintiff alleged that he was punished because of “national and local backlash against sexual assaults on campuses, including campaigns directed against male students,” including an awareness campaign called “Don’t Be That Guy,” the presentation of statistics showing that the majority of sexual assaults on campus were committed by men, and a discussion in which the President of the University was criticized “for not finding more men guilty.” 48 In another case, the plaintiffs introduced to show bias against men such evidence as: the school’s Title IX policy, guidance for bystander intervention, adjudication rules, a statement that a grant-giving entity “supports efforts to end violence against women,” and an article indicating that men “commit the great majority of all sexually violent crimes.” 49

These suggestions that any sort of advocacy for victims—or even neutral attempts to ensure fairness and disseminate facts about sexual assault on campus—are seen by some as having decided the matter in advance. Jeannie Suk Gersen criticizes the victim advocate’s entreaty for belief as being at odds with fair process (by conflating the request for belief to us as individuals who interact with victims and a request for

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45. Accord Johnson, *supra* note 42 (providing an analysis of the presuppositions about race in Halley’s work on Title IX).
46. While I have not seen such a case involving a female student accused of sexual misconduct, there may be such a case.
49. Doe v. Salisbury Univ., 123 F.Supp.3d 748, 768 (D. Md. 2015) (rejecting plaintiff’s argument that this evidence supported his claim, but denying the motion to dismiss on the grounds that plaintiff had succeeded in pleading other facts sufficient to make a claim).
automatic belief in adjudication).\textsuperscript{50}

Fair process for investigating sexual-misconduct cases, for which I, along with many of my colleagues, have fought, in effect violates the tenet that you must always believe the accuser. Fair process must be open to the possibility that either side might turn out to be correct. If the process is not at least open to both possibilities, we might as well put sexual-misconduct cases through no process at all.\textsuperscript{51}

All of this is directly undermined by evidence that victims themselves are reluctant to report their rapes to anyone, particularly anyone involved in a legal proceeding, because they fear they will not be believed. In a recent comprehensive study of campus climate at Harvard, for example, only 53.8\% of female undergraduate students and 51.3\% of female graduate students thought it was very or extremely likely that a victim would be supported by other students if they made a report.\textsuperscript{52} 35\% of female undergraduate students and 25.4\% of female graduate students thought it was very or extremely likely that a victim would face retaliation for a complaint.\textsuperscript{53} Asked whether a complainant would be taken seriously by campus officials, about 42.3\% of undergraduate females and 55.8\% of graduate females thought it was very or extremely likely.\textsuperscript{54}

Interestingly, when asked whether students thought that investigations of sexual misconduct would be fair, 38.6\% of all students said this was very or extremely likely, and female students were less optimistic than male students (28.6\% of undergraduate females and 37.2\% of graduate females compared to 38.4\% of undergraduate males and 45\% of graduate males), suggesting that, if anything, procedures are more unfair to victims, who are more likely to be female.\textsuperscript{55} Similarly, female students tended to think that an offender would receive punishment at much lower rates than male students (15.6\% of undergraduate females and 26.5\% of graduate females thought it was very or extremely likely, compared to 34.9\% of undergraduate males and 44.5\% of graduate males).\textsuperscript{56} All of this is confirmed in the responses of students who indicated that they had been assaulted, most of whom did not report the incident to anyone.

Penetrative acts involving physical force were much more likely to be reported to an agency or organization when compared to penetration


\textsuperscript{51} \textit{Id.}


\textsuperscript{53} \textit{Id.} at 9.

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{Id.}

\textsuperscript{56} \textit{Id.}
by incapacitation. Among penetrative acts, 30.6 percent of the victims reported an incident involving physical force was reported [sic]. This compares to 21.6 percent for penetrative acts involving incapacitation. Even fewer reported sexual touching incidents, with 7.7 percent of those by force and 6.9 percent by incapacitation.\(^57\)

That means that nearly 70% of those who were *penetrated with a threat of force* did not report this to the school or police. Among those students, 64.6% indicated that they did not think the incident was serious enough to report.\(^58\) About 32% said they did not report because they thought nothing would be done.\(^59\) These results at Harvard are broadly consistent with victims’ general unwillingness to report sexual assaults.\(^60\)

What explains the gulf between perception and reality on this issue is, in part, the elements of rape culture identified above. Rape culture as an ideology that structures our world makes any attempt at achieving a fair process for both accusers and accused begins to look like an attempt by a feminist ruling class to subjugate all men at the whims of anyone who decides to make a complaint. Thus, against this backdrop, DPD activate all the unexamined assumptions about how assault adjudications work, which in turn activate attendant assumptions from rape culture.\(^61\) This has the collective effect of making a discussion on campus sexual assault in which DPD are made unreasonable.

C. The Inclusion Condition

Having established the ways in which DPD, despite serving a legitimate function, can erode reasonableness, we can now turn to the question of who is excluded in the debate and how. Propaganda often has the effect of eroding empathy for some group.\(^62\) The most insidious forms of propaganda do this by using terms that are broad and neutral on their face. Consider an example from Ta-Nehisi Coates’ masterpiece, *Between the World and Me*:

> The question is not whether Lincoln truly meant “government of the people” but what our country has, throughout its history, taken the political term “people” to actually mean. In 1863 it did not mean your mother or your grandmother, and it did not mean you and me. Thus America’s problem is not its betrayal of “government of the people,”

\(^57\) Id. at 17.
\(^58\) Id.
\(^59\) Id.
\(^61\) They also “run interference” in the conversation by “subtly chang[ing] the subject matter . . . in a way that is difficult to perceive or to reverse, perhaps by cueing up questions to which new information is posed as an answer.” Olu\-femi Taiwö, *Beware of Schools Bearing Gifts: Miseducation and Trojan Horse Propaganda*, 31 PUB. AFFAIRS Q. 1, 6 (2017).
\(^62\) STANLEY, *supra* note 3, at 140.
but the means by which “the people” acquired their names.\textsuperscript{63}

This example shows that exclusion can happen even, and especially, when terms seem maximally inclusive. This reveals the power of language, but also the language of power, which is deployed strategically to quiet demands for justice through appeals to sweeping principles of inclusion never meant to cover the excluded, but which provide a veneer of plausible deniability.

DPD in the campus sexual assault context serve to exclude victims and their advocates from having a voice in the discussion by casting them as already being in control of the process (as Halley suggests), demanding an unfair adjudication (as Suk suggests), and benefiting from the anti-male bias of Universities (as several suits brought by accused students suggest). Behind these specific assumptions, rape myths are always lurking: perhaps they asked for it. Or they were lying. Maybe it was a misunderstanding, or they just regret consenting. All of this content can be packed into the charge that campus adjudications lack sufficient process for the accused, particularly when backed by the cursory expressions of concern for victims and claims to authority I have argued are common to DPD.

This all has the effect of reducing empathy for victims of assault by making them seem both powerful and suspicious, while also activating the fear of false accusations. One way of thinking about how this works linguistically is as an alteration to our “preference ordering on possible situations in the common ground.”\textsuperscript{64} In other words, DPD have the effect of indicating that worlds in which victims are actually lying or actually mistaken or actually in control are closer than worlds in which victims are not.

It is plausible that a word like “welfare” has, in the American political context, as its not-at-issue content, a generic content like \textit{that Blacks are lazy}... \textsuperscript{65}The result of using the term “welfare” would be to change the preference ordering over worlds in the linguistic context so that, for any given American citizen of African descent, worlds in which that person is lazy are closer than worlds in which he is not lazy. In this way, uses of the term “welfare” change the context in ways that go beyond simply adding propositions to the common ground, or proposing to add them to the common ground.

DPD may operate in the same way, both for victims and advocates as a group, and for individual victims and their advocates. This will be the case even more where the speaker can lay some claim to both epistemic and practical authority.\textsuperscript{66} Stanley argues that this confluence of authority can

\textsuperscript{63} TA-NEHISI COATES, BETWEEN THE WORLD AND ME 6 (2015).

\textsuperscript{64} STANLEY, supra note 3, at 144.

\textsuperscript{65} Id. at 144-45.

\textsuperscript{66} Id. at 145.
turn a proposed addition to the common ground into an imperative that one is believed: “One can command someone to believe something, by presenting oneself as an epistemic authority, whose expert testimony is sufficient to back up one’s practical command.” The fact makes the role of Harvard Law professors in making DPD quite clear.

V. ENCOUNTERING AND ENGAGING PROPAGANDA ON CAMPUS

Armed with a way of understanding DPD as propaganda leaves open the question of how to respond. In this final section I offer a suggestion for how victims and advocates should approach debates over Title IX in which DPD are wielded as propaganda. One of the benefits of a rigorous theory of how propaganda works is that we can see precisely where the weak points and inferences in the operation are. One such weak point is the reliance of propaganda on epistemically flawed ideology, which can be revealed in the communicative context through ideology critique.

Ideology critique begins by taking aim at the particular masking of social schemas that occurs when they become hegemonic, but it takes further moral or political critique to determine whether the structures they constitute are legitimate or just. Questions of justice don’t arise for the common sense world that is taken for granted. To raise normative issues we must first make visible the social dynamics that create our social worlds; once articulated ideology can (in principle) be debated. So showing how something is simply presupposed as common ground and that it needs critical examination is one goal of ideology critique.

Ideology critique can help us push back against DPD without pushing back against due process. Once we recognize DPD as propaganda, which seeks to add false assumptions and myths to the common ground, we have “the option of blocking the move” through conversation, e.g., through negating the assumptions.

Another way ideology critique can work is through providing people with counter-hegemonic narratives to use in discussing the issue for debate. The evolution of how we talk about rape serves as an example of how to do this. The advent of concepts like date rape, marital rape, and now target rape (along with the ideas of affirmative consent and wanted sex) provide us with ways of talking about rape that helps to side-step some of the pitfalls of talking about sexual assault using only the language of the powerful. If we accept that the paradigm of sexual assault on

67. Id.
68. HASLANGER, supra note 15, at 474.
69. Id. at 456.
70. Id. at 475.
71. See, e.g., Diane Rosenfeld, Confronting the Reality of Target Rape on Campus, 128 HARV. L. REV. FORUM 359 (2015).
campus is target rape, rather than drunken confused hookups, and that schools can provide fair process for both accuser and accused, then DPD will cease to serve as discussion-ending propaganda.