

**Yes, No, and #MeToo**  
Whose Law Is It Anyway?  
Podcast 3 Transcription

Matthew Martinez Hannon: Thank you for joining us on our third episode of Whose Law Is It Anyway?, an American Bar Foundation podcast. In this episode, we'll be discussing consent to sex -- how attitudes toward consent have evolved in recent years, how institutions create rules and handle training around consent, and how laws and regulations respond when consent is violated. We've got a lot to cover, but first...

I want to begin this episode by stating that some of the content may be triggering for some listeners. Although most of today's conversations will examine laws, regulations, and training around consent, some of the topics and stories we delve into will include descriptions of sexual assault and sexual violence. If this is a sensitive topic for you, feel free to revisit our past episodes, and we hope to have you back for future episodes.

With that in mind, when we say "consent": at its most basic level, consent to sex is an agreement to participate in sexual activity. Now, that may sound obvious, but it's important to remember that consent is required for setting and respecting personal boundaries, and any sexual activity done without consent is sexual assault or rape.

But how does the law define and regulate consent? And how do institutions such as colleges and universities handle training around consent? For that matter, how do they handle rape and sexual assault allegations?

The issue of consent has been making headlines in recent years. Whether it's the #MeToo movement, discussions of rape culture, or simply more open discussions of sexual assault and violence, our evolving understanding of consent has recently been at the forefront of public debate.

Our first guest, Laura Beth Nielsen, is a Research Professor at the American Bar Foundation and the Chair of the Department of Sociology at Northwestern University. Laura Beth's research examines legal consciousness, or how ordinary people understand the law, and the law's capacity for social change. Her current research project is examining the impact of federal government guidance on undergraduates at universities as it relates to sexual harassment, including sexual violence.

Stay tuned after our interview with Laura Beth for a word from our sponsors. Just kidding. We don't have any...yet. After Laura Beth, I have the pleasure of interviewing Margaret Drew, Associate Professor at UMass Law. And to wrap things up, I get to talk to one of the most influential women in my education, Kristina Fluty, an Assistant Professor at the Theater School at DePaul University who also works as an Intimacy Director.

And, now, let's talk about consent.

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Matthew Martinez Hannon: So today we have Laura Beth Nielsen, you know, briefly describe your background, uh, the scholarship that you have been awarded and are working on and we'll take it from there.

Laura Beth Nielsen: I'm a research professor at the American bar foundation, and I am the chair of the department of sociology at Northwestern university. I started my academic career at the university of California, Santa Cruz -- go banana slugs, -- where I was a legal studies and sociology major. It's kind of fateful because that's what I ended up being for my life. So after undergraduate, I went to Berkeley, I received my PhD in a program called jurisprudence and social policy, which is an interdisciplinary law and PhD. There are really only a few of them in the country. And I also received my law degree from University of California, Berkeley, formerly known as bolt hall, school of law, but they've now taken away that name. So it's just the university of California, Berkeley law school.

Matthew Martinez Hannon: You know, I also went to UC Berkeley.

Laura Beth Nielsen: When?

Matthew Martinez Hannon: I actually graduated in 2015, but I was a theater student. So that should tell you everything you need to know about me. I actually double majored in theater and psychology

Laura Beth Nielsen: Oh, cool combination.

Matthew Martinez Hannon: It was really great. There was, you know, the very like sort of practical performance aspect and then like the theoretical tearing apart of people's psyches. But today what we were actually speaking to you about is consent and your work within consent, which is exciting because it is something that I think the sort of national dialogue, and I guess even globally has come up a lot more. So when we say consent, what do we mean? Is there a standard definition that we should be using? Has it evolved over time? Let's start there.

Laura Beth Nielsen: This is a great question because what is consent is the fundamental question in part, because of the way the law sets up the issue, right? The definition of sexual assault or rape is that it's a sexual activity or penetration or whatever, you know, level of touching done without consent. So in a way you have this very circular issue. So what is consent? What constitutes it? Is it nearly the lack of a rejection? Is it something that occurs until someone says no? Or is it something you haven't achieved until someone says yes. And what does the yes mean? And we're increasingly becoming cognizant of the fact that we would like it to be closer to the second definition it's not achieved until there's either a verbal yes. Or something darn close to a verbal.

Whereas 50 years ago, 20 years ago. And even now in some people's own minds, consent is really something that is happening until someone says, no. Right. And so, you know, it sounds like a basic question. Well, what's the definition of this thing that the central concept. Yeah. But it's very tricky. So I think that's what we're trying to figure out. I think that's what law is trying to decide. You know, law can't really decide anything, but people who write laws and make rules like on university campuses and so on, are trying to decide what's the appropriate role for an

authority in this kind of interaction. Can it really work to do anything? Can you know, and if so, what can it do? And if we're going to punish nonconsensual things, how are we going to prove it? So it's just a real sticky area of both formal law administrative rules and what I study legal consciousness, how ordinary people understand what the law is doing.

Matthew Martinez Hannon: Right. So then what does the law look like right now regarding consent? And is there sort of a national or federal standard or does it vary state by state?

Laura Beth Nielsen: In terms of state law about rape and sexual assault, the general sort of law on the books in most states has increasingly made clear that you do not have to physically resist. So 50 years ago non-consent was sort of typified by fighting back and increasingly the idea of indicating non-consent verbally, right? Saying, no, get off, stop. Don't touch me. Those sorts of things are increasingly being incorporated into the law to indicate non-consent, we're also increasingly criminalizing marital rape and marital sexual assault, right? That's a big hurdle. The idea was that, you know, consent is implied in the marriage versus that consent is something that needs to be achieved in each sexual activity. And then at the university level, which is where my research is, we have an interesting situation where California has a law that if you receive any funds from the state of California, for your school, your rule about consent has to be something close to active, ongoing, and affirmative consent. It's not exactly a verbal yes, but almost.

No other state has that rule. And so my research uses three universities in California and four universities outside of California in what you can think of as “no means no” universities vs. “yes means yes” universities. So I'm looking at sort of match schools in California and outside California, talking to undergraduates about really your first question, what is consent? When do you know you're living in it?

Matthew Martinez Hannon: Do you want to talk a little bit more about how that research came up, and sort of what the research entails.

Laura Beth Nielsen: My fundamental research question that goes through all of my work for the last, you know, 20 years is how and where, and under what circumstances can law intervene in social relationships to change power dynamics, particularly around issues of unearned privilege. So that sounds complicated, but when, and how can law intervene in some sort of situation where race is at play? So in 1963, we didn't have the civil rights act. You could just not hire people because of their race and say, I'm not hiring you because I don't like people of your race. And then you pass the law. And then what really happens? People don't immediately become not racist. What else is pushing against the law or pushing with the law? So a lot of times social norms are changing, but the law hasn't changed yet. I was really interested going into this project of how religious values would also matter in sort of the moments of sexual activity, where you're establishing consent.

So the research involves these matched universities. So they're matched on things that might affect sexuality culture. If you will, they're matched on GPA and sat scores. Basically they're matched on percent of the university that's involved in Greek life. They're matched on the division of their sports team because sports culture tends to go hand in hand with party culture, fraternity culture. So looking at that, so I'm trying to hold as much of that stuff constant as I can. And then there's an elite private university, a Catholic university, and a large commuter school

university. One of each one in the yes means yes state and one in the no means no states and I'm interviewing undergraduates.

And I'm asking them just quite a bit about how they were taught consent, right? So a lot of the universities now have, before you can register, when you're a first year student, you have to have gone through this online training. So I'm talking them through what they learned, how it added on or contradicted, what they learned in sex education in high school, how their families talked about sex. If they were open about that, if this represents a paradigm change and then a whole bunch of questions about how it works in practice, both in terms of their own sexual experiences. So there's a long series of questions where the initial prompt is now I'd like to talk about your last sexual interaction and then we go through, but then I also have a bunch of scenarios where I read them complicated, really hard questions. It's funny because they always say, these are really hard. I always say, well, yeah, if they were easy, then I wouldn't need to do research. So where the signals are mixed or where the power dynamics are shifted and try to ask them what they think would be ideal. But also what actually happens in practice.

Matthew Martinez Hannon: Why consent on college campuses, right? We're talking about this larger issue, but you're sort of focusing it in a specific environment. So why there, and what drew you to do it on college campuses?

Laura Beth Nielsen: There are a lot of reasons that college campuses are special or deserving of their own analysis. I mean, one of the first interesting things to me as a socio-legal scholar is you have this activity that we think these young folks are going to be involved in doing, and you've just trained them in how to do it. And so in one way, I'm really interested in how does that training shape what they understand a sexual encounter to be. These are people who have just received this training. And so that's really interesting to me.

It's also really interesting to me because sexual assault in college is one of the greatest producers of gender inequality in this country that you can really imagine. So if you're sexually assaulted in college, the odds that you are going to drop out, go up significantly, your GPA drops significantly, which of course means when you go out into the working world, your GPA is lower. If you've suffered this kind of trauma in the college environment. Salary, job opportunities, even just the learning that they're doing on the university campus is dramatically impacted.

Matthew Martinez Hannon: So the next question that I have is how do colleges handle sexual assault or misconduct accusations, but before we get there, I'm actually curious, is there a differentiation between sexual assault and sexual misconduct when we are talking about this in terms of consent?

Laura Beth Nielsen: There is definitely a difference. And I think whether we're consciously aware of it or not more modeling what happens in the workplace, my last book was about workplace discrimination, which includes sexual harassment. So in a way I think we're mirroring what we have set up in that sphere. So there's sexual misconduct, which you might imagine as like sexual harassment in the workplace, lots of loaded sexual talk or teasing, but that doesn't involve touching the definition of assault for the quintessential component of assault is that it does involve touching, but colleges and universities are also thinking about, you know, what about speech? What kind of harms can that have?

And college campuses are really interesting if you think about it, because some people live there - it's their home. You would not have to let someone sexually harass you in your own home. They are workforces for our staff, but they're also, it's a learning environment where we want to allow people to try even edgy or disfavored ideas. And it's also public sphere, right? There's public spaces on universities. So how we think of what constitutes something actionable really matters on where it happens and universities have all of those locations in one, sometimes the same location is all of those things, right. There can be a classroom, you know, in a dorm building. And one of the examples that I often use when I'm talking is this chant that fraternity guys occasionally will chant outside of women's dorms, especially in the first week of school or during sexual assault survivor week or whatever: No means yes, and yes means anal. Charming chant. So what does that mean in the context of being in your dorm room, your first week of college, if that's being chanted outside your window and how is that different than discussing that as a first amendment issue in a classroom? Right? So it's complicated.

Matthew Martinez Hannon: Yeah. So how do colleges handle something like that?

Laura Beth Nielsen: At that point, colleges have a PR nightmare because somebody is taping it and putting it up on YouTube. So, if someone can be identified, most colleges and university have a mechanism for making a complaint about student, on student sexual harassment. And whether they would consider that to be it or not, I think it would really mostly depend on how vigorously the students who did it resisted, acknowledging that that was probably not a great thing to do. If they say, oh, it's our first amendment. Right? And all of these things, then there might be some sort of reticence to punish. But mostly universities, if it can be determined who did it and someone complains they're going to do something. And so there's a whole, I would argue overly legalized set of processes in place to conduct essentially like mini trials of people who are accused.

And this is one of the big debates in this area. So it's kind of like a trial. The accused can have a representative, the victim can have a representative and then there's like a panel or a Dean of students or something. They would operate with an investigatory report out of the title nine office at the university that would have a finding of facts. And you have this little trial like thing, and almost all of them also have the opportunity to appeal, right? So if you don't like the outcome or the determination, you can appeal to a higher level for a determination either about whether or not it happened or what's the appropriate punishment.

During the Obama administration, they were really beefing up Title IX and trying to really fight sexual assault on college campuses, by giving university administrators more than we way to investigate and punish. And the backlash, which in part came from the Harvard law faculty is, Hey, you're doing these trials, these little mini trials and the accused does not have all of their constitutionally protected rights. The answer to that is, what's at stake here isn't going to jail. What's at stake here is being expelled from college. Then the answer back that the Harvard law school and a lot of the proceduralists would say it becomes substantive because if you're Brock Turner and the Stanford swimmer rapist, right. It ruins your whole life. So yeah, you're not going to jail, but every time his name is Googled for the rest of his life, the fact that he is a rapist -- and he is, and he was convicted-- will always come up. But imagine, you know, imagine it's something more murky. We don't really know, you know, you wouldn't be able to prove it beyond a reasonable doubt, but you can prove it by a preponderance of the evidence person gets

expelled that does kind of ruin your life. So maybe they should have all the rights of the accused, like in a criminal trial. That's actually a really sort of big debate.

Matthew Martinez Hannon: So you mentioned Title IX. Now this is something, you know, I was what call a non-traditional student. So I was in college later in life. And this sort of came about as I was in school and I still don't have a full grasp on what Title IX is and what its purpose was, or maybe I do. And it's a bit simpler than I think it is. But can you describe Title IX and the implications that has on consent?

Laura Beth Nielsen: Sure. Title IX is a federal civil rights act that requires any school that receives federal funding for their educational mission to provide equal educational opportunity for women. First thing, except for a couple of religious universities that do not take federal funding, every university takes federal funding. So it applies to all universities in the United States. And for many years after it was passed, it was used to challenge and equalize opportunities in higher education for women athletes. So if you're spending all of these millions of dollars, giving male athletes scholarships, and women should have those same kinds of opportunities. And so for a long time, the seventies, eighties, that was primarily what title nine was used for.

And then as sort of the feminist movement got going and strong in universities, the question of, well, can we use this to require universities to take sexual assault seriously? And like I said earlier, there are all these negative education outcome, negative impacts that are disproportionately felt by women. So there began to be, Hey, let's use Title IX to force or to encourage universities to take sexual assault on campus seriously. And what they do is it's really interesting because it gets implemented by lawyers. There's a whole cadre of people in my work, I call them or, and other people to call them compliance entrepreneurs. So as soon as there's this push, there becomes a vendor that's going to sell, you know, a video module that you can make the students watch. And then you can say, okay, we educated them. You know, we did our best and that begins to create a whole complex of compliance. So then you have a Title IX office, you have the compliance entrepreneurs, you have the lawyers who are certifying that, you know, we're doing these things. So it becomes very legalized and trial like.

Matthew Martinez Hannon: Something that was brought up as we were prepping for this, is the Obama dear colleague letter, which I had never heard about. So, what is that?

Laura Beth Nielsen: Like most civil rights acts title nine is enforced by an agency. Federal agencies apply the law. And when a new president comes in, the new president can give the agencies directives. The presidential administration and the people that the president puts in can have sort of emphases or things they want to push and reducing sexual assault on college campuses was one of Obama's. And so the department of education sent out this dear colleague letter, which isn't really law, right?

So if it were a regulation, it would be law, but it's a dear colleague letter. It's this friendly little missive that says, Hey, think about these things. And so one of the things in the dear colleague letter that was very controversial was the question of what should the standard of proof be for proving that someone sexually assaulted you. So do I need to show it, obviously not beyond a reasonable doubt, that's the criminal standard, but is it a preponderance of the evidence? How much do I have to prove? Is it 51%? Is it 75%? And that's what the Harvard faculty were really responding to. The dear colleague letter said to universities, you can lower this standard of proof.

And then the Trump administration sort of rescinded that dear colleague letter Betsy Devos did, but that was one of the moments that things really bubbled up to a head of, you know, how committed are we to this? And what are the negative impacts of sort of quasi litigating this in the university context?

The interesting thing, though, I will tell you is I've interviewed 155 students on six campuses. None of them have any idea what the legal standard is, and they don't have opinions about what it should be. This is one of the points of the research is to show this real disconnect between what lawyers are fighting about. If you see my hands, it's up here, it's kind of up by my forehead. I'm waving one hand. What lawyers are fighting about and policymakers and Harvard law professors are fighting that about up here. And then there is these people who are in engaged in this activity and trying to do it without harming them each other, and what they understand. And that gap is huge.

So there's all this policy and op-eds, and you know, feminists arguing with procedural constitutionalists about what should this standard be. But when you really get down to talking to the people that this law is intended to guide, they have no idea that debate, that debate is the least important thing happening in that moment. And that's one of the really interesting moments where you go law has a hard time overcoming or becoming more important than other things that are operating when you're in a sexual encounter. Like how much you like that person, how you understand gender norms, what you've been taught about religion and what religious beliefs you hold. If you think you're going to be labeled and disregarded and your community, if you have sex, or if you don't have sex. So in one way, I've sort of trapped myself because I'm studying this thing that everybody's discussing and we're making all these rules and stuff. But when you get down to the people, the law is supposed to impact their behavior. That's not what they're thinking about.

Matthew Martinez Hannon: In terms of title nine institutional compliance, did that vary at the universities that you observed or was it reasonably upheld sort of across the match schools, as you mentioned?

Laura Beth Nielsen: They almost all match, but they're also in transition, right? Basically, they're all in compliance with the law. The dear colleague letter was never lost. So like Northwestern, where I teach, Betsy Devos, didn't get to this until very late in the Trump presidency. So Northwestern has an interim policy, which I think as soon as the Biden administration allows again for the Obama era administration standards, they're just going to get rid of the interim policy and go back.

Let me explain it. So there's beyond a reasonable doubt. That's your criminal law standard. We cannot deprive you of your Liberty by putting you in jail or probation or parole, unless we are sure beyond a reasonable doubt. So you can kind of think of that as like 99.9 or 99.99, nine nine, whatever. And then there's clear and convincing evidence. This one, you kind of think of as like 75%, do we know with 75% assurance that the accused person did something, did this sexual assault, or did this rape.

And then there's preponderance of the evidence, which is the preponderance of evidence standard as the civil law standard. So if you're suing somebody for money, it's 51%, right? If we're 51% sure that they broke their contract or that they crashed into your car and it was their fault, they're civilly liable. So we know we're not going to do beyond a reasonable doubt in a university quasi

trial. So is it going to be clear and convincing? And that's what it was. And then Obama came in and he said, you know, it could be preponderance of the evidence. And so a lot of schools dropped to the lower standard of preponderance. And then Betsy Devos said, no, no, no. We got to keep it clear and convincing because these falsely accused men. There are not very many falsely accused men. There are some, it is not zero, but there are not nearly as many falsely accused men as there are women who are raped and don't complain about it. That's the bigger problem.

Matthew Martinez Hannon: Right. And I think my question was going to be, you know, has title IX and these policies, has there been an increase in people coming forward with cases or has it sort of helped resolve more cases?

Laura Beth Nielsen: So that's a really good question. And it's a classic conundrum in empirical research, right? Right. If you start to see more complaints, is it because there are more rapes or is it because we have a good policy in place and the targets of sexual assault are more comfortable coming forward? Is it that social norms have changed and there's not as much victim blaming. So they feel more comfortable. And, you know, we don't know, there's a lot of good work that tries to figure out the incidents. And so some people say one in four, some people say one in five women experienced sexual assault in their college years. It's probably closer to one in five, but yeah, at some point I did this calculation of what's the difference between the odds that you will be wrongfully accused of rape or sexual assault versus the odds that you will be sexually assaulted. And the person won't be punished. And I can't remember the number, but it was like you're 70 to a hundred thousand times more likely to be sexually assaulted. And the person not be punished than you are to be wrongfully accused of sexual assault.

Matthew Martinez Hannon: Have the, um, social movements, you know, such as like me too. And time's up have those supported an understanding?

Laura Beth Nielsen: They've really raised awareness. And I think they've raised the idea that if you talk about being sexually assaulted or abused, that there shouldn't be negative consequences for bringing these troubling issues to light. Because in fact, you're doing a very positive thing by bringing awareness. If it's about a particular individual like Harvey Weinstein, you might be the person that breaks the dam and then they can't do that anymore to women. I will say, I did about 75 or 80 interviews. And I guess it was more than that. It's was like, when I hit about a hundred interviews for Floyd was killed by the police. And a lot of my questions around race, the answer has changed. So I think the anti incarceration, decarceration movement also makes some folks skeptical about punishment and how it will be racialized, which is a huge concern and how it can especially be racialized, you know, in an administrative context where you don't have judges and, you know, you have unconscious bias. So I think students are processing a lot of stuff that they're learning.

Matthew Martinez Hannon: Based on your research, what does the future look like for not only college campuses, but our societal understanding of consent?

Laura Beth Nielsen: Right. So we're just getting into the detailed analysis of the data. The interviews are done, they're transcribed, and now we're sort of looking at various patterns and interesting questions. One of the things that I think is really interesting, that's going on is there's a



serious distrust of both the university to handle these things and have the police to handle sexual assault claims. And so in the absence of trust in either of those institutions, there are a number of really interesting informal things that people are doing to protect themselves and others. And one of my favorite examples of this is I ask a question: what's a typical weekend night with your friends, what would you do? And so if it goes into, you know, we would go dancing a club or we would go to a fraternity party or whatever, do you take any precautions to stay safe?

And the most interesting answers to that question? So a woman said, yeah, I have a group of about 10 women. We don't usually all go out together, but you know, three or five of us are here and there, we have a dance move. And if they see you doing this dance, move on the dance floor, it means come save me from this creepy guy. And so then all the other women will come over and sort of form a circle around the woman who is being touched inappropriately or whatever. There are university wide lists like Google docs just totally anonymous that are: here are the rapey guys. And there is quite a bit of evidence that shows that a large number of the sexual assaults are happening at the hands of a small number of men. So if you can warn people off of the very big perpetrators, you can have a really big impact on lowering the incidence of these things.

So for example, at one of the universities, there was a Google doc and women would just write in it. And actually, the university forced them to shut it down. Another university that I interviewed folks at that had fraternities before you could come into a fraternity party, you had to read the definition of consent. They had it on a card and you had to read it out loud to come in the door. I have no idea if that works. They have no idea if that works, but the fraternity guys that I'm interviewing, they're like, we don't want to get kicked off campus. We want to do things. And so here's this thing we've thought of. And I just think that's fascinating, like the dance, you know, the read the definition of consent right before you come into the party and everything in between. So people are taking care of each other and taking care of themselves in a way that's easier if you will.

Matthew Martinez Hannon: They're more immediate, certainly. So, if people, you know, want to take action or need to learn more, are there resources that you would point people to in order to continue their own education about this?

Laura Beth Nielsen: Oh, sure. So there are a lot of great organizations. There's a great two great organizations about campus sexual assault. One is called end rape on campus, E R O C and one is Know Your IX. So like K N O W Y O U R and then Roman numerals I X. And so know your nine and end rape on campus, have a lot of resources. And they're very realistic about, here are your options for who you can report it to. Here's the kind of process you'll likely see, cause you can report it to the civil rights division of the department of education, right? Or you can report to your campus or you can go to a therapist or you can call an anonymous. So both of those organizations have resources and information about the resources so that you can sort of go a direction that feels comfortable.

Matthew Martinez Hannon: Systematically, what needs to change, and this may not actually be applicable to this, but systematically, what needs to change to improve our understanding of consent and support, whatever policies and laws are put into place?

Laura Beth Nielsen: Well, the students answer to that question by and large is we need targets of sexual assault to come in-person and talk about the impact of being sexually assaulted, right? So if you talk to students about where they get their information about this from they go, oh, you know the online thing, oh, our resident assistant in the dorm made us do this. But then if they've seen a victim of rape, talk about how it impacted them. That is really the difference. They say that was moving. And so if you have any compassion at all, if you're not a sociopath and you really understand the harm of this action, you're going to be way more careful with it. And so that's where the students expressed to me that they felt the most growth in taking this issue seriously, was knowing someone, hearing a speaker, really talk about how sexual assault impacted their life. And then they go, oh my God, you know, my five-minute decision over here is going to last that long. I better be really careful. It is going to do a lot in terms of these, if you think of them as communication misfires or my son calls him low key sexual assault, it can make a big difference there.

Matthew Martinez Hannon: Well, I actually, I do have consent from one of my best friends to share this story. And I'm really, really curious based on what you just said, like low key sexual assault. So she was hanging out with a friend of hers, a guide and you know, they had hooked up once before, but they're labeled their relationship was just friends and they were hanging out alone one night. He was sort of making sexual advances and you know, she very clearly said, no, I don't, you know, I just want to keep the friendship a friendship. You know, we can cuddle, but like let's just maintain our friendship. And there was not any sort of like verbal pressure from him, but definitely physical advances then, you know, like sort of getting closer, hugging, tighter, a little petting kisses on the neck.

And you know, she, in her own words was like, you know, I was desperate for affection at that point and decided to go for it and then verbally gave consent. She wants to be very clear on that. The next morning she woke up and she was like, man, I really wish I hadn't done that for all the reasons I said no at the beginning. Right. I feel like it's blurred the friendship. I feel like now I question the motives when he reaches out and wants to hang out and felt, you know, if he had respected this first, no, we wouldn't be dealing with this. And while she feels she has agency in her decision, it was like persistence that she felt was small enough to not be bad. Right. But enough to change the initial, no, he sends a text message the next day and just like, Hey, I just want to make sure that we're both happy with what happened, which is when she really sort of thought that clues me into like the, you knew it. Wasn't what I ultimately wanted. And I mean, I guess I don't know what the question is because there is like a murkiness there.

Laura Beth Nielsen: Those are the really hard cases. And one of the things that I'm heartened by is that like your friend, I'm hearing a lot of stories in these interviews of something like that happening, and then there's clarifying discussion of it later. So I said, yes, verbally, therefore it was consensual. And yet I wish I hadn't. I felt pressure. So next time we're going to do it some other way or we're not going to, or that's that. And I think that kind of conversation and that kind of recognition of the murkiness, which is antithetical to law, right? Cause law it's either this or this. Yes. And we have to determine, is it this or this, but this what you're describing and what a lot of my subjects describe is how sex and sexual relationships actually work. And so partly I think all of this education all of this debate about what should the standard of proof be, it's not doing what we think it's doing, I would argue, but it might be doing something else which is making it more okay and acceptable to have these kinds of conversations. Because that was not a

conversation that happened 50 years ago, 20 years ago. There's quite a lot of discussion of enthusiastic at this point, which is a realization of, well, what Shamus Khan and his work called sexual citizenship. So owning your sexuality in a way where you get to own it, it gets to change. Right? I can, I am in charge of it. I still don't think it's the norm in society, but it's more becoming something that's talked about and understood that it's active, ongoing, affirmative, hopefully enthusiastic consent.

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Matthew Martinez Hannon: Thanks to Laura Beth for sharing her work and insight with us. Next up, we'll hear from Margaret Drew, a University of Massachusetts Law Associate Professor and ABF Fellow. Established in 1955, the Fellows of the American Bar Foundation comprise a global honorary society of leading attorneys, judges, law faculty, and legal scholars. Fellows support the ABF's research with their donations and help promote and disseminate the ABF's findings to the legal profession.

Prior to entering academia full time, Professor Drew was a practicing lawyer in Massachusetts for twenty-five years. She teaches courses about Domestic Violence Law and has written about the criminal law's influence on the Title IX process. Professor Drew has also served on the American Bar Association Commission of Domestic and Sexual Violence since its founding. She received a 20/20 Vision Award for her work in implementing the Violence Against Women Act and mobilizing attorneys to represent survivors of domestic violence. Today, I'll be speaking with her about her work, both as a practicing lawyer and a law professor.

So what drew you to this work?

Margaret Drew: Well, um, it was coincidental, you know, I know we often say there are no coincidences, but I had started my sole practice. I started my practice a year out of law school after having worked for a firm. And one of the first calls I received was from a woman who was inquiring about a divorce and I, we spoke for a bit and then sometime later she called me and she was actually, her husband was trying to break down the bathroom door to, uh, abuse her. And she would not permit me to call the police and also just wanted me to stay on the line. So I followed her instructions that did not call the police, even though it was very tempting. And at some point things settled and he left the house. So that, um, case by case went to trial, we did very well with in the trial.

And she started referring all sorts of, uh, clients to me. And, uh, many of whom had domestic violence as it concern as part of the relationship. So that's how I became involved. And then that expanded, um, my interest in not only abuse, but also, um, you know, gender violence and taking also an interest in other forms of gender violence, such as trafficking, which is, is not a specialty for me, but, um, is related very often to abuse and campus violence, uh, gender violence. Um, so it's, it was an interesting way to begin. And I learned a lot from my clients and I learned that I had good instincts for it when the client said do not call, um, I did not call the police. And, um, as the more I practice, first of all, I was, um, mindful that, that that was the client's decision, but also, um, realized as, uh, the more I practice how unhappy many clients are when they proceed

through the criminal system. So I learned to listen to my clients particularly on issues of safety and that just grew my interest as well as my practice.

Matthew Martinez Hannon: Now, these instances of domestic and gender abuse, um, do you see those, uh, permeate sort of all socioeconomic statuses, uh, communities, different cultures is, um, is it something that is everywhere?

Margaret Drew: It is everywhere. I started my practice in the city of Boston and then moved to the suburbs and I learned there was no difference in the types of abuse and money, financial status, uh, where someone lives, what religion they are. There's no protection for women in domestic abuse. So it's, it's across every spectrum.

Matthew Martinez Hannon: Wow. Um, if you would describe, um, your founding of, and then the ongoing work with the ABA commission of domestic and sexual violence, how that came about and what its purpose is and how it's going.

Margaret Drew: Yes, thank you. Um, the commission was founded many years ago under a first female president, Roberta Ramo, and, uh, she established the commission at the time I was working with, uh, the national association of women lawyers. I I'm still involved with them. And the president of Nall, uh, asked the then chair the co-chairs of the first commission, whether or not I could participate. And I started as a liaison with the commission. So I was fortunate enough to be involved from the beginning. And since then I've had various positions. I'm now a special advisor. At one point I was chair, I've been a member. Um, but I've always had some connection with the commission. And the work is so important. Uh, there are not a lot of resources for lawyers doing this work and the commission is invaluable in providing training and support for those doing the work.

Matthew Martinez Hannon: Great. So you've written about the title nine process. I'm gonna switch just a little bit here. You've written about the title nine process and the impact of criminal law and criminal lawyers. Can you describe your findings there?

Margaret Drew: My concern with the criminal process is that it's become the standard, the system that everyone looks to in terms of, uh, resolving abuse issues. And for survivors, that's not typically their first choice and the criminal system, as we know, has a much higher standard of beyond a reasonable doubt. So obtaining convictions in the criminal forum is not easy. Um, you know, the perfect case would have some physical injuries, good documentation, uh, witnesses, um, that doesn't happen very often. Uh, and so survivors have often disappointed. Certainly the criminal system is necessary and there are some survivors who are alive only because their abusers are incarcerated, but for the most part, the survivors are not looking for retribution or incarceration. What they're looking for is safety. And that's something that the criminal system can not necessarily offer.

Matthew Martinez Hannon: Do we have alternatives to, to the criminal system? I mean, I guess, does this become a civil?

Margaret Drew: My opinion is that if protection orders is safe to use, in other words, they're not going to so antagonize the abusive partner that it escalates the risk, then civil protection orders

can be effective, depending upon the police enforcement. You know, if the police are willing to enforce the orders, they're successful, uh, in jurisdictions where the police don't enforce the orders they're, they're not effective. So what the civil system needs to do is really provide survivors with what they need to remain independent. The violence against women act funding helps much of this, but not all of it. You know, the survivors of any gender need financial support, because typically it's the abusive partner that controls the finances. They need safe housing, they need jobs, they need what the rest of us have or want to have independent lives. Um, and that's where we really need to focus. So if the, either criminal or civil system we're tied to those services, um, that would be lovely.

Matthew Martinez Hannon: So ABF research professor Laura, Beth Nelson, uh, is studying consent to sex on campus. And you had mentioned, uh, campus abuse. Um, but since you're studying that and the impact, if any of the Obama era, dear colleague letter on undergraduate universities, as it relates to drinking drugs, sexual activity, have you engaged at all with this process and have any idea of how it's evolved?

Margaret Drew: I have, I would say that during the Obama administration, things were running more smoothly. Um, I think what happened with the revocation of the then vice president Biden's letter, dear colleague letter, uh, things became a bit more chaotic and more difficult for survivors in reading one of Ms Nelson's articles. I was struck by something she said and that consent, which always is a huge issue on campus. Sexual assault is it's very difficult to, to accomplish in any successful way so long as we still have bias against women and bias against those who, whose genders are not, you know, cis-gender straight males. And so this spills over into the law also, you know, so long as we have these presumptions that women lie and women lie about primarily about sexual assault or other abuse, um, it's not going to be an even playing field. And those stereotypes do influence, uh, much of what happens in the title IX process from, from my perspective. So it's not necessarily a safe forum for survivors, um, because it can very much feel like once under attack. And that's where, you know, some schools have automatic reporting to the police. That's where it gets all mixed up. Once the criminal system becomes involved,

Matthew Martinez Hannon: This is not on my list of questions. And if it is not something you want to answer by all means, we will skip right past it. So these biases against women, where did they come from? Like, why do these exist?

Margaret Drew: Well, that's, that's a big question. They've rarely been part of our culture since our founding. So, you know, when women are and others are considered property, um, there is that dehumanization so that they're always the lesser of, and when you think of how long it took for women to even get the right to vote, and for African-American women that right, really prides as a practical didn't happen until 1964, then that there's just been all these presumptions that women are either incompetent or they're spiteful.

And Freud didn't help the matter at all. He treated many women who talked about incest in their lives and he was a proponent for them and advocate, but then his peers started to, um, disregard what he was saying. And so he changed his theory from incest to hysteria that the women were being hysterical because that was acceptable to his peers. That did enormous damage to women and their complaints about sexual assault. Women and I will add children and other genders. So there has been this presumption of minimize that minimize what people say about having been

sexually assaulted. And, you know, the rates are really high and, and for, uh, trans women it's around 80% that they've experienced abuse. The numbers are extraordinary, but the courts are having a hard time accepting that the numbers are extraordinary. So they just assume that they really couldn't be this much abuse going on in the world. So they attributed to other things: vengeance, trying to get a leg up on a divorce, which doesn't work by the way. Sp it's just so embedded in our culture that it's, it's going to take a lot of work to change the culture.

Matthew Martinez Hannon: Well, you sort of in this beautiful and brief history lesson that you've just given me. Thank you. How have you seen issues of consent evolve over time in positive ways? Uh, the perception around, um, you know, social movements such as the #MeToo movement have these impacted perceptions of consent?

Margaret Drew: I think the, um, there are two things, one, it has opened the door for women who have experienced sexual assault, to be heard, that wasn't always the case. And as we're seeing in the press, some of these cases have been going on for decades, but I think the most hopeful piece of it is that younger generations are aware of the need for consent and are discussing consent. So I think, uh, not only are girls more empowered, but also I think boys are also more socially aware of what other components of have freely given consent.

Matthew Martinez Hannon: What does the future look like based on what you've learned and where do you, where do you hope we're headed?

Margaret Drew: I hope we're headed to a generation that calls out inappropriate behavior. You know, with younger people, I don't mean calling out in terms of, uh, public shaming or canceling. I mean that someone is able to first as it's happening, say, this is not right, stop it, that was disrespectful. But take the person aside and see what less formal education can be given to this person. So that whether no matter what the gender there's some education and assistance around how to be respectful in our culture and appreciate boundaries.

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Matthew Martinez Hannon: Thanks to Margaret Drew for sharing her wisdom and offering a glimpse of what the future may hold for consent.

Our final interview today is with Kristina Fluty, Associate Professor at the Theatre School at DePaul University. Kristina is a Chicago-based movement artist/educator/consultant, and she has provided choreography, movement coaching, and intimacy choreography for numerous productions at the Theatre School and around the city. I'll be speaking with her about her work as an Intimacy Director and what the broader public can learn from her work with actors.

Hi Kristina. This is such a treat. Um, first of all, thank you for doing this because it, I think it's going to be really informative in terms of the stuff that we, you know, talk about with laws being created and how they're enacted. And we really sort of see how that plays out in daily life and in a variety of circumstances. So I will, I, you know, I know a little bit about you, but for everybody else, do you want to just tell us your name, where you're from, what you do...

Kristina Fluty: So I'm Kristina Fluty and, uh, the job that takes up the most of my time and energy and that I adore of course, is that I'm an assistant professor at the theater school at DePaul

university. I teach movement to actors there in the conservatory program. And I come to that from the dance world. So I still dance in Chicago and I still teach dance in Chicago. That is my first love. That is sort of my identity. But I also, the way that I know you of course, is that I teach actors how to be in their bodies, how to express, how to feel connected.

Matthew Martinez Hannon: Truly of the most fundamental people in my life and those regards. So, as you know, this, uh, this podcast is about consent to sex. So how do you define consent in relation to the work you do as an intimacy director?

Kristina Fluty: I love this question because to me it really speaks to how, you know, ideally systems are actually informed by personal experiences, but also that can lead to right discrepancies because the truth is every person really does have their own idea of what consent is. And that's true for artists coming into creative process together, too. Right? So when they're working with intimate material and using their bodies to tell stories about intimacy, whether it's sexual or not, truthfully, we have to establish a mutual agreement around what that can, what consent means for everyone in the room and in the process right now, a lot of intimacy professionals are using the planned parenthood version. Um, and that's sort of what we're taught to. I don't know if you're familiar with that term?

Matthew Martinez Hannon: I'm not familiar with that. Would you mind telling me?

Kristina Fluty: It's so great, it's an acronym and the acronym is FRIES like French fries. Yeah. Right. Everyone loves fries. So it's really fun to remember. And the acronym stands for freely given right. Consent is freely given. It's not coerced and it's, you know, I have to be sober in order to actually give consent. It's reversible, so I might say, yes, I'm ready to do this. And then as we're doing it, I might say, Nope, I'm done with that. We gotta make a change. It's informed meaning I know exactly what I'm consenting to before hand it's enthusiastic. Right. So it's, yes. I want this. It's not, oh, maybe or I don't, I'm not sure. And it's specific. Just because I consent to one thing doesn't necessarily mean that I consent to another thing. But it's a really great little tool fries. Yeah.

Matthew Martinez Hannon: And you've sort of touched on this, but you know, this evolving view of consent, how does it inform your position as an intimacy director?

Kristina Fluty: Right. So it's really, and you know, all intimacy directors might answer these questions differently. I just want to say that right off the bat, um, because it's still kind of the wild west out there. It's starting to become a little more standardized and codified in terms of training people and what people are learning in order to do the work. But the way that I work is I think it's really important to connect with the people in the room, right? I'm not just coming in there with my set of rules and methodologies that may or may not have anything to do with how they're working. And while we have this sort of this FRIES acronym, which is so clear, and we have parameters around this is consent. I think it's really important to have the conversations and that sort of the main thing about what intimacy directors are doing is we're having conversations. We're having hard conversations about things that people might not like to talk about. You know, we're super fearful of the body in our white Western culture in general. So it's, it's hard to, to talk about things regarding our bodies. And so, as far as those, those variations go, we have to get

everybody on the same page for the process, maybe outside of your, outside of that room, outside of that creative process, you have some different ideas about things, but we have to have agreements about what's happening in the room.

Matthew Martinez Hannon: Great. And so how does one ensure the safety and wellbeing with regards to consent for actors in this case?

Kristina Fluty: Oh my gosh. It's such a huge question. You know, we have a lot of procedures that we implement and follow and some of them have to do with, you know, the whole broader production. Like everyone in the organization knows when the intimacy rehearsal is happening. So, you know, the random intern doesn't wander into the rehearsal room during their lunch break munching on a salad while we're trying to choreograph simulated sex, right. That has happened. So that sort of thing, just the broader, you know, if an organization needs it, we might offer a seminar or a workshop on how to handle concerns if they come up, what's the reporting procedures, that kind of thing, you know, stage and film unit unions have guidelines, but non-union theater companies. They don't necessarily have them. There is, in 2017, I'm sure you know of this organization, Matthew, Not in Our House here in Chicago.

They developed the Chicago theater standards that a lot of the non-equity theater companies are using now. But, if an organization needs it, the intimacy person, the intimacy professional can offer that sort of broader infrastructure for the organization and then in the room, right. In terms of how do I ensure safety well-being, how do we have these conversations about consent? Um, well, first of all, we have the conversations, and I can lead those conversations right. In ways that someone else might not feel comfortable doing. Actors have to be frank with each other and me and the director, you know, about what they're feeling confident about. Actually we're starting to change from saying comfortable because right. Art we're often pushing the boundaries of what's comfortable. And we're actually, it's actually okay to move out of comfort zones.

As long as we're supported in that, we feel confident enough. We can say, hold stop. We need to make a change. Right. But if you think about consent being reversible, that's a, that's an underpinning of this intimacy work is because you might say, oh yeah, you're having the conversation. You're like, I'm okay with this. We have conversations about, you know, where do you feel confident being touched or touching other people with what qualities of touch we speak very, um, we use anatomical language for the body. There's no slang, right? We make sure that we're not talking about bodies or, or sex outside of the context of the scene. But you know, an actor might say, I'm, I'm comfortable. I'm confident with these things. And then they go to try it and they actually don't feel confident or maybe they are feeling a little unsettled.

So sometimes I'm helping actors understand what's happening in my body, right? How do I know when I need to stop or rest or change something like things that we take for granted about just being nervous, like sweaty palms or an increased heart rate. You know, those are signs if they get past a certain point, but maybe you just need to pause and check in. We always choreograph. That's a really important part about the safety that can happen in a lot of different ways, depending on how the professional works. But however we get there, something is set and it's notated and everyone knows what's going to be happening. The stage manager has notes. The director knows what to expect. All the people in the room know what to expect. And then also the intimacy director can, can serve as a liaison, right? Someone that the actors can go to with concerns, someone they can talk to about material, they don't feel maybe completely confident talking about with the director or the designer or a producer become a sort of like point person.



Matthew Martinez Hannon: That's awesome. So, what can the broader public learn from the intimacy choreography process?

Kristina Fluty: You know, I think that everyone can benefit from understanding what it means to have mutual respect in relationships, period. And how would the broader public benefit from that? It would be because people who are learning or working in this way are moving out into their lives, into the world and bringing these principles and this knowledge into more relationships. Right. But that's essentially what we're doing is we're helping people understand each other a little bit better. We're having hard conversations about topics that we, you know, like I said before that we usually don't talk about, again, we're getting frank about our bodies. I think that's huge. I mean, obviously I'm biased, but if we were more comfortable and confident about our bodies, the world would be such a different place. It just really would.

Matthew Martinez Hannon: As things come up in society and we start having conversations like this, there's always going to be a counter-argument. So what are arguments against consent culture and how do you dispel them?

Kristina Fluty: Well, I'm going to stay specific to this field because I think, you know, consent culture covers so much, right. But in term, this is a huge question. And the world of theater and film, especially for, you know, there are naysayers who are like, this is baloney. I can't work this way. I need people to be able to follow their impulses. I need people to be creative. Why can't I feel it? Why can't I just be in the moment? Why can't I just go with the flow? You know, all those things which actually do translate to someone might maybe defending themselves in a situation where they've violated consent in an everyday situation. Right. But, but certainly, you know, actors have been trained to just serve the process, right. I'm, I'm serving a greater, some sort of ideal of the greater good of what we're making. And so whatever it takes to get there, I'm going to do it.

And so I'm always going to say yes, and. I've got to be game or I won't be hired or I will be fired. I've got to be able to say, I'll do anything you ask me to do. Um, regardless of if I feel okay, consenting to it or not, that's been sort of hammered into a lot of performing artists really for the last century. And, you know, we're, we must change because it's not just recently that harm has been done. It's just recently that we've begun to speak out about the harm. And so I think that you can go with the flow. I think you can be in the moment. I think that you can follow impulse as long as we have these conversations about consent and boundaries first.

Yes. Yeah. You know, I grew up in Southeastern Kentucky and I don't know if anybody's ever driven on a mountain before, but if you're winding your way up the mountain and that road doesn't have a guardrail, I'm going to freeze. I'm freezing up. I don't know how to drive my car just mentally. I just am going to feel like I'm going to get sucked off the mountain because there's no guard rail there. I know how to drive my car. I know how to drive on the road. But if there's no guard, if there's no guard rail, I'm fearful because I don't have a guideline. I don't have a literal boundary. Right. So the boundaries and the consent are the frames for the creative process. They're the guard rails.

Matthew Martinez Hannon: Thank you to our guests: Laura Beth Nielsen, Margaret Drew, and Kristina Fluty. And thank you for joining us for episode three of Whose Law Is It Anyway?, an American Bar Foundation podcast.

This podcast was produced by Whitney Peterson and Crissonna Tennison, with associate producers Nina Darner, Devin Johnson, and Natalie Shoop. And I'm your host, Matthew Martinez Hannon. We'll see you (or you'll hear us) on the next episode, where we'll be covering the impact of covid-19 on health equity, in the United States and globally.

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Until next time, be well.