

The Discourses of Sex Crimes

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A dissertation

submitted in partial fulfillment of the
requirements for the degree of

Doctor of Philosophy

University of Washington

2017

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Program Authorized to Offer Degree:

English

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Abstract

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This project critically examines the language of sex crimes in order to reveal the ways that legal structures are embedded with what Susan Ehrlich describes as “androcentric and sexist assumptions that typically masquerade as ‘objective’ truths.” I use a feminist interdisciplinary approach to assess the common discourses of acquaintance rape and sex work in the United States in order to demonstrate how cultural myths of sexual behavior inform legal standards. These presumably neutral legal standards in turn influence broader discourses of sexuality and sexual crime, lending them a convincing authority. Consequently, these inherently gendered discourses have become inextricable from the legal realities of sexual crime and serve to mitigate or justify violence against women while at the same time defending perpetrators. My research supports the idea that legal reform of sex crimes and the eradication of harmful sex crime discourses requires a two-pronged approach on a legal level and a cultural level. Changing societal attitudes about sex crimes, in particular ideologies of sexuality and gender, is necessary

for these harmful discourses to be discontinued. Simultaneously, more attention needs to be paid to judicial training and continuing education regarding sexual crime in order to eradicate these discourses from our legal system and achieve successful legal reform of these crimes.

Acknowledgments

I would like to first thank Professor Beth Britt, whose Rhetoric of Law class at Northeastern University first introduced me to legal rhetoric and inspired my love for legal discourse, and who was infinitely encouraging and supportive of my choice to attend graduate school.

I would also like to thank my committee for their insightful comments and conversations about this project, without which this project would be a lot less coherent.

Thank you to Sandy Silberstein, who provided much-needed editing and constructive feedback and came through for me in clutch moments when I thought this project would never get done.

Thank you to Tom Cobb, who I roped into my research several years ago, and who has been invaluable in furthering my legal education and encouraging me with his enthusiasm ever since. I'm sorry for always trying to foist carbs on you.

Special thanks to my Chair Gail Stygall, who has been guiding me through the abyss of legal interdisciplinary work since day one. You've not only been instrumental in completing this project, but you've also been a great gossip partner, rant-listener, and most importantly, mentor.

Eternal thanks to Lilly Campbell, whose friendship was at least 40% of the reason I stayed in graduate school, and who led by such example that we all knew if you were 6-8 months behind her academic accomplishments you were still in excellent shape. You've been an inspiration to me, and forever be the only reason I visit Wisconsin.

Last but not least I'd like to thank Josh. A guy who is thorny, but not totally inaccessible, and who has learned way more about rape than he probably ever wanted to. Thanks for making me laugh, for cooking me risotto, and for being a great partner. It's likely I could have written this without you in my life, but I'm glad I didn't have to.

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Introduction: Outline of the Dissertation

This dissertation is divided into six chapters, each focusing on a different aspect of the discourses of sex crimes. Chapter 1's purpose is to outline the feminist theories framing my analyses, as well as to justify my approach to examine the discourses of sex crimes with an explicit feminist focus. In Chapter 2, "Governmentality and the Gendered Language of US Prostitution Laws" I draw on Foucauldian ideas of discourse and governmentality in order to examine the language of sex work in the United States. I first briefly trace the history of prostitution in the United States and summarize the current state of sex work. I then compare how the language of the law, culled from various US state penal codes, aligns with conventional beliefs regarding women's sexuality and with traditional charges made against prostitution, in order to assess the gendered ideologies underpinning the laws.

Chapters 3 and 4 focus on rape myths and the discourses of acquaintance rape. In Chapter 3, I synthesize research on rape myths and rape scripts with traditional discourses of rape to establish a theoretical framework for my analysis in Chapter 4. I trace the origins of rape myths and rape scripts in order to illustrate that the logic of various rape discourses, in particular gray rape discourses, are justified by sexist ideologies. I demonstrate how rape myths and scripts have been built upon scientific and cultural understandings of sex and gender, and how these inform common discourse of rape. In Chapter 4 I analyze two prominent campus rape cases in order to show how folk ideas of language and sexual relationships intersect and are then used to both discredit rape victims and defend rapists, allowing for the continued denial of acquaintance rape as "real rape."

Chapter 5 explores how legal methods of interpretation can have a significant impact on how issues of gender are taken up in the law. In particular, I discuss the flaws of a Textualist

approach, from a legal theory as well as a discourse theory perspective, and argue that Textualism as an interpretive approach obscures gendered ideologies embedded within the law. Additionally, because Textualism is framed as being based in rational, logical thought, it reifies gendered stereotypes and presents them as simple truisms, allowing the law to both hide sexist ideologies and perpetuate them. Because a Textualist approach by definition ignores social context, it allows the law to ignore the realities of women's experiences and thereby denies women equal treatment on legal terms.

Finally, Chapter 6 summarizes and evaluates the conclusions of my project and delves more deeply into the relationship between law reform and cultural change. Specifically, I pull from Susan Caringella's book on rape reform to argue that legal reform of sex crimes, and the eradication of harmful sex crime discourses, requires a 2-prong approach; on a legal level and a cultural level. Changing societal attitudes about gender issues, in particular ideologies of sex and gender, is necessary for continued success in legal reform of sex crimes. In particular, I focus on how education, especially judicial training and continuing education, is the key element in eradicating these discourses.

Chapter 1: Feminist Theories of Discourse and Law

There seems little point to our academic interests [in language and gender] if they do not at some stage articulate with real-world concerns and enable us or our readers to identify practices [that are] based more on stereotypes and prejudice than they are on people's actual behavior in the real world. At some point, our research has to be able to travel out of the academy order to draw attention to and challenge unquestioned practices that reify certain behaviors as being morally, or aesthetically, better than others (Holmes and Meyerhoff 14).

Janet Holmes and Miriam Meyerhoff make this articulate pronouncement in the introduction to the book *The Handbook of Language and Gender* as part of their framing of the articles within. When I first read this passage, I was impressed with the explicitness and pointedness of such a statement; rarely in my academic pursuits had I come across such a blatant dismissal of bland theoretical research expressed in such a matter-of-fact way. I also felt like I had finally found the academic idols I had been looking for; women who only saw value in research that contributed meaningfully to real-world concerns in order to challenge the stereotypes and prejudices that plague our society. I too see little point in doing research on topics in language and gender that exist only to scintillate academic interests, and find myself increasingly frustrated by abstruse scholarly research that only serves to justify an academic's existence in the world. Therefore, I have done my best to produce scholarship that embodies what Holmes and Meyerhoff describe—every chapter attempts to draw attention to or challenge conventional views of women within the law, and illustrate when legal practice has been based on stereotypes and prejudice instead of on realities. In order to do this, I have taken an explicit feminist approach to my topics, meaning I begin this research from the position that historically, women have been unfairly discriminated against in a number of ways and my research will hopefully contribute to changing that.

Kathleen Barry, distinguished sociologist and feminist, once wrote that, “the facts of women's subordination often lie in realities that are obscured in silence or normalized in

acceptance but that nevertheless dehumanize and brutalize us as women even when we do not directly experience their most extreme manifestations” (84). That is, women’s continued relegation to “lesser than” is often camouflaged as “normal,” and the ramifications of this can be extreme, especially within the law. Though the law necessarily requires a more objective and systemized language in order to be successful, this language can also be used to hide certain ideologies in its attempt to condemn certain types of behavior, and subsequently “normalize” other types. This is most clear when examining sex crimes; the discourses of sex crimes prioritize male perspectives and norms, which continually excuse violence against women. Rape and prostitution are both crimes that promote the objectification of women, justify violence against them, and disguise their brutal realities as if they are simply the rational consequences of women’s sexuality.

The discourses of sex crimes manifest themselves in cases like the 2010 rape of Jane Doe from Cleveland, Texas, who was gang raped by over twenty men on numerous occasions when she was only 11 years old. During the trial, one defense attorney likened the situation to the fable of the “spider and the fly” arguing that the girl, who had developed early and wore makeup, lured the men into having sex with her, similar to a spider luring flies into its web (Baker). Similar discourse are at the heart of cases like the one in Steubenville, Ohio in 2012 where a 16-year-old girl was sexually assaulted multiple times while passed out, all of which was photographed and videotaped. Because the men who assaulted her were popular players on the high school football team, the girl was blamed for being a “slut” and received death threats (Harding 21). Most recently, in the case of Stanford student Brock Turner, who was found guilty of sexually assaulting an unconscious woman, Turner’s father stated in a letter of support that the verdict was “a steep price to pay for 20 minutes of action out of his 20 plus years of life.”

Although despicable, discourses such as these are extremely common, and the ways in which our legal system allows for and perpetuates these narratives is untenable.

What is clear is that the language of the law, in the form of the statutory definitions of sex crimes and the legal standards needed to prove them, is at odds with the discourses of sex crimes. The myths ascribed to prostitution and rape have a significant effect on the way these crimes are handled within our legal system, and legal reform is impossible without careful attention to how these discourses are constructed within legal language. My goal with this project is to draw attention to some of these discursive effects, specifically the ways discourses of and about sex crimes may hide or misrepresent the actual experiences of women. I explore the ways our laws have been built on cultural myths regarding sexual behavior, and how these myths have been promoted and defended within legal and societal discourses. Additionally, I hope to show *how* the subtle and intricate ways the language of the law, or the interpretation thereof, accomplishes this, drawing on theory and methods from the disciplines of Language and Gender Studies, Law and Language Studies, and Critical Discourse Studies, all with an explicit feminist focus.

Therefore, in order to explore the ways in which the harmful discourses of sex crimes are constituted in a way to assist in the ultimate eradication of them from our legal system, this particular chapter justifies and explains the various feminist theories I will draw upon in my analysis. Here, I outline the reasons for choosing a feminist approach, as well as explain the tenets of each feminist discipline I draw upon, covering Feminist Critical Discourse Analysis, Language and Gender theories, and Feminist Legal Theory. I summarize the theoretical approaches and methodologies of each, being careful to point to areas of contention within the respective fields, in order to establish the multi-disciplinary foundation that undergirds subsequent chapters.

Feminist Research

Choosing an explicit feminist approach or method in examining these topics seems like an obvious choice, and to me, an easy one. However, feminist theory has had an unfortunate reputation outside of academia (and in many ways, within it) and choosing such a framework for one's research requires, unfortunately, some initial discussion and justification that other academic theories don't necessitate. Additionally, an important tenet of feminist theory is to make clear your research aims and be as transparent as possible in your own biases, so a careful examination of what those aims are, and your methods in achieving them, should be the starting point of feminist-focused research. In regards to explicitly feminist methods, Katharine Bartlett, in her article "Feminist Legal Methods" explains (partially quoting Katharine MacKinnon and JW Singer) that:

Method 'organizes the apprehension of truth; it determines what counts as evidence and defines what is taken as verification.' Feminists cannot ignore method, because if they seek to challenge existing structures of power with the same methods that have defined what counts within those structures, they may instead 'recreate the illegitimate power structures [that they are] trying to identify and undermine (831).

Here, Bartlett's use of the term "method" is in reference to working with and understanding the law, as opposed to a research method that enables a researcher to focus their pursuits in a specific way depending on their research goals. However, Bartlett's description is relevant for any researcher, and feminist researchers especially—one's choice of approach limits what can be found, what can be said about those findings, and what is considered to be valid or significant within them. Furthermore, Bartlett points out that if the goal is to challenge existing power

structures, researchers or advocates cannot use the same tools to dismantle those structures as those used to build it.

Unfortunately, there is a tendency, even among learned academics, to equate the term feminism and its offshoots (feminist, feministic, Feminism) with less rigorous research; to be taken less seriously than other approaches. This is mainly due to the explicit political purpose of feminist research, where it focuses on “gender as a social, political, and ideological category” (Mills and Mullany 2) and often “has the overall emancipatory aim of redressing gender inequalities” (Christie 43). Because it is so openly political, there’s a concern with how a researcher’s own biases or desires may impact the research. Additionally, often those who do feminist discourse research care passionately for their cause and are women themselves. Yet part of feminist research is challenging the idea that any research can be objective and scientific, and argue that all researchers need to be self-critical about their own biases and backgrounds and the potential effects on their research (Lazar 6, Mills and Mullany 19).

Another part of the problem is that feminism, “has been involved in a struggle to establish itself as a legitimate political movement since its inception. It has met with resistance in many shapes and forms through its difficult and often turbulent history” (Mills and Mullany 10). Feminism as a political movement has encountered significant criticism, both by those against what it stands for and those involved in the movement who may have different feminist goals or approaches to achieving feminist ends. This has affected its uptake in academic research because, “academic studies do not exist in a vacuum, and research questions and areas of investigation are clearly shaped by the social, political and economic issues circulating within particular societies where research is taking place” (Mills and Mullany 1). In the 1980’s and 1990’s feminism flourished in Western academia, and was valued by many (Mills and Mullany

2). However, as feminism became more maligned, and “post-feminist” ideas became more in vogue, it became much more difficult to use the term “feminism” without significant resistance. This was due not only to the backlash against feminism, but also “paradoxically because it [was] partly integrated into mainstream agendas” (Mills and Mullany 2 qtd McRobbie). That is, as feminist thought and ideologies became more commonplace, the less important it seemed to call oneself or the work being done as “feminist” and research being titled this is looked at suspiciously.

In addition, “feminism” has been denigrated because it is a term related to women, and therefore has been subjected to discrimination and derogation. Muriel Shulz, in her classic article “The semantic derogation of woman” argues that because our language was created by men, an analysis of words used by men to describe women exposes fears and prejudices concerning the female sex. She describes:

Again and again in the history of the language, one finds that a perfectly innocent term designating a girl or woman may begin with totally neutral or even positive connotations, but that gradually it acquires negative implications, at first perhaps only slightly disparaging, but after a period of time becoming abusive and ending as a sexual slur (Shulz 134).

Shulz uses the words “hussy” and “tart” as examples; hussy derives from the Old English word for “housewife” and originally meant, “the female head of the house” (Shulz 137). However, it has since declined to be synonymous with “prostitute.” Similarly, the word “tart” was used as a term of endearment for a young woman, but has also since degenerated to mean a woman who appears promiscuous. Feminism then has also suffered from such derogation, and is often seen as a “dirty word” with negative connotations.

When it comes to public policy, there is a widespread tendency for feminists to disagree, because there are many disputes regarding the major issues affecting women that might require policy changes. Some of these disagreements include the significance of gender differences on women's lives, whether recognizing intersectional identities of women is of great necessity, and differing views on which particular laws and statutes would promote women's rights (McBride and Parry 13). Additionally, conflicts might be ideological. Over the past few decades there have been several waves of feminism, which held differing ideological tenets at their core. In the early 1900's there were the social feminists and egalitarian feminists: social feminists "considered women to be fundamentally different from men and in need of special protection [while] egalitarian feminists ignored biology and wanted women and men to be treated identically" (13). Radical feminists in the 1970's focused instead on the sexual differences between men and women and saw sexual revolution as the way to overthrow the patriarchy, with law and policy changes being less effective unless a major transformation occurred. Liberal or reform feminists "focused on the similarities of women and men as human beings and citizens, and sought removal of stereotypes and legal barriers that have kept women—and, in some cases, men—from reaching their full potential" (13-14).

How researchers understand and define discourse, gender, and feminism can have implications for the conclusions that can be reached and in how these conclusions can be used in other arenas (such as legal theory). Feminist language research often faces the obstacle of how it is taken up by society or other disciplines; not only in how the research ends up being used by those outside the field but also in how seriously other disciplines view it, as it may seem less academically rigorous and subjective than other fields. To that end, Christie, in her introduction

to *Gender and Language: Towards a Feminist Pragmatics*, points out the impossibility of “briefly” introducing what she means by both “feminism” and “pragmatics.” Christie writes:

...scholarship that might be categorised as falling within either of these areas is engaged in the investigation of a set of complex and wide-ranging phenomena, the boundaries of which are constantly being renegotiated. Inevitably therefore there are ongoing internal controversies over how scholars who see their work as either pragmatic or feminist might best describe and explain the object their research focuses on, and just as significantly controversies over which phenomena are relevant to their research and what the purpose of that research might be (2-3).

Christie’s point is that it’s necessary for any researcher within such far-reaching and broadly used disciplines to carefully articulate their research’s purpose and their chosen approach to reach that purpose. Christie continues by arguing that doing inter-disciplinary work can be especially complicated because researchers outside of a particular discipline are rarely able to appreciate all the nuances and complexities within that discipline. Therefore, although inter-disciplinary work is invaluable, the concern is in ensuring that one’s use of multi-discipline concepts and theories are taken up appropriately and with acknowledgement of their complexity (Christie 3). It’s useful to conceive of interdisciplinary work as a cobweb, where various theories and concepts cross over and around each other, with each originating from a different area. They come together and connect in different (and sometimes unusual) patterns, but in order to appreciate these patterns and their contribution to the web’s whole (the overall research project or situation) it’s necessary to trace the separate tendrils that came together in such a specific way to create the finished project. Therefore, considering the complexity of the fields I am drawing on, as well as an awareness of the importance in thinking about how one’s research might be

taken up by others, I have found it necessary to delve as comprehensively as possible into the various fields my research draws on, and to spend a significant part of this project in articulating these tendrils. The goal being that my use of such terms as “feminism” “discourse” and “legal theory,” and my choices in how I’ve combined concepts and theories, is explained, justified, and made transparent. Therefore, in the following section I outline the different linguistic and legal fields my research draws upon, as well as define how I am using these complex terms.

Critical Discourse Analysis

One of the most encompassing and yet simple ways to define discourse is “the study of language in use” (Wetherell 3). Many people may use an even simpler definition of “discourse” that is interchangeable with “language” and may further define it as either “spoken language” or “spoken or written language” (Wodak 4). In addition, depending on a theorist’s particular focus in examining language, discourse is often defined more specifically by what that theorist’s field or method sees as significant, and is often used without definition at all. As Sara Mills explains, “It has perhaps the widest range of possible significations of any term in literary and cultural theory and yet it is often the term within theoretical texts which is least defined” (Discourse 1). To do any sort of “discourse analysis” then requires an assertion up front of what exactly one is considering to be “discourse.”

In linguistics, the main definition of discourse is a rather strict one, “deriving from the organization of the discipline into levels of linguistic units, such as phonology, morphology, and syntax” (Bucholtz 44). However, an alternative definition “focuses not on linguistic form but on function. Discourse, in this view, is language in context: that is, language as it is put to use in social situations, not the more idealized and abstracted linguistic forms that are the central concern of much linguistic theory” (44). Instead of thinking about how we can organize language

into strict rules or patterns (how language should be used), discourse analysis looks at how language is *actually* being used. In their introduction to “Discourse as Data: A Guide for Analysis” Wetherell et al. explain that “Discourse research offers routes into the study of meanings, a way of investigating the back-and-forth dialogues which constitute social action, along with the patterns of signification and representation which constitute culture. Discourse analysis provides a range of approaches to data and, crucially, also a range of theorizations of that data” (Taylor, Wetherell, Yates i). Discourse analysis is concerned with how people interact with each other and the world and the role that language plays in that interaction, as well as how to examine that relationship in meaningful ways.

Taking this further, since the ‘discourse turn’ or linguistic turn’ of the 20th century, researchers have recognized that instead of an unchanging static language system, “an intimate link between language and ideology exist[s], and that by studying language use, one c[an] discover a great deal about the ways in which societies function and the way that individuals and groups construct identities and cultures” (Eckert and McConnell-Ginet 4). That is, in examining discourse critically, we can uncover not only the ways in which individuals and groups construct identity, but also how elements of power and knowledge are operating upon and within these groups. This is an important point to emphasize, because the differences between a critical approach to discourse analysis and other approaches to discourse analysis are significant. Many researchers look solely at language in use, without necessarily articulating the connection between this use and ideology or power dynamics. However, I argue that looking at discourse critically is the most productive way to view discourse, especially when one’s subject centers entirely around the ideologies within our culture and laws as well as the power dynamics between women, men, and society more broadly. This gets at an important tenet in my particular

research goals; the necessity in not only pointing to particular patterns of language in use, but to identify the problematic elements of such language in use, in order to mitigate the negative consequences of unbalanced power dynamics. If a problem exists, as one clearly does in regards to rape in the United States at this point in time, why engage in research that can't attempt to rectify or elucidate that problem?

Critical Discourse Analysis (CDA, or sometimes CDS for Critical Discourse Studies) is the field of discourse studies that puts “revealing structures of power and unmasking ideologies” as its primary mission and “aims to show non-obvious ways in which language is involved in social relations of power and domination” (Talbot 117). CDA differs from Discourse Studies (DS) in that it is critical; instead of just describing discursive or linguistic phenomenon it seeks to carefully examine it and challenge taken-for-granted understandings (Wodak and Meyer 6, Van Dijk 250). It focuses on real-world problems and is often overtly political in nature, seeking to engender change through critical understanding (Van Dijk 4). Most CDA researchers understand discourses to be, “form[s] of social practice” (Wodak and Meyer 8) and also “practices that systematically form the objects of which they speak” (Foucault 49). Discourse in this manner is not a static entity to be examined, nor does it simply reflect or represent reality, but can be thought of as constituting and creating reality. Discourses, therefore, are not to be confused with simple elements of language like a sentence or single utterance—they’re part of a larger system of production. Additionally, because the focus of study is complex, CDA is not categorized by any one method or approach, and most approaches to CDA are interdisciplinary and multi-methodological. This is due to CDA’s emphasis on making transparent the way language functions in “constituting and transmitting knowledge” which requires a more holistic

approach than single-discipline methods offer (Wodak and Meyer 7). However, Wodak and Meyer point out that CDA researchers, like other researchers have to:

be aware that their own work is driven by social, economic and political motives like any other academic work and that they are not in any privileged position. Naming oneself 'critical' only implies specific ethical standards: an intention to make their position, research interests and values explicit and their criteria as transparent as possible, without feeling the need to apologize for the critical stance of their work (Wodak and Meyer 7).

CDA offers a variety of tools and strategies that are meant specifically to examine the relationship between social practices and discourse strategies and focuses on explicitly analyzing the various forms of systemic inequalities within discourse. This is useful for feminist discourse work because "much can be learnt about the interconnections as well as particularities of discursive strategies employed in various forms of social oppression that can feed back into feminist strategies for social change" (Lazar 5). Therefore, though a variety of discourse approaches can be useful for feminist research, CDA by definition aligns most clearly with feminist goals and can be used in conjunction with feminist research for powerful political critique and social reform.

Language and Gender: A Feminist Approach

Language and Gender studies as a focused academic area is generally accepted to have begun in the mid-1970's. Language and Gender studies is a broad field, with a wide variety of methods, approaches, and assumptions classified within it. However, as its name implies, its primary function is to explore the ways in which language and gender intersect. There are a multitude of tensions within the field of language and gender, such as viewing gender as a distinct category. Most language and gender researchers avoid assuming that there is a "natural"

basis for separating the social world into two and only two sexes or genders and try not to assume that classifying someone as “male” or “female” predicts their language/discourse characteristics (Holmes and Meyerhoff 8). In addition, researchers recognize that gender as a category is bound up and intersects with other categories of social identity such as sexuality, ethnicity, social position, and geography (Lazar 1). These sorts of tensions have led to particular trends that have influenced the field significantly and are often the basis of departure for research. For instance, since the “performance turn” of the 1970’s scholars began to explore the variety of ways in which linguistic performances relate to constructing gendered identities (Eckert and McConnell-Ginet 4). Because both a “linguistic turn” and “performance turn” occurred, “discourse” and “gender” were then seen as rooted in social practices.

Some prominent issues in language and gender research are the role of agency as opposed to prevailing forms of power, the nature of context, and the analytic position of the researcher (Bucholtz 63). Beginning in the 1970’s language and gender researched could also be categorized by three frameworks/theories regarding men and women’s language, which can still be seen in research today. These were the deficit theory, reconstructed by Robin Lakoff’s book *Language and Women’s Place*; the dominance theory, of which Dale Spender’s book *Man-Made Language* is an example of; and the difference theory, which can be seen in Deborah Tannen’s book *You Just Don’t Understand: Women and Men in Conversation*.

Language and gender research does not have to be feminist in nature, and non-feminist language and gender research tends to simply describe accounts of language and gender practices or shifts and changes in language related to gender (Mills and Mullany 2, Cameron 1990 13). Recently, more emphasis has been placed on the intersections of language, gender, and sexuality due to changing understandings of how gender and sex are related to identity and discourse.

(Eckert & McConnell-Ginet, Cameron and Kulick). Feminist discourse analysis is difficult to define, because much like how Critical Discourse Analysis includes a variety of tools and approaches to studying language that might be valued differently by different academic fields, different disciplines use a variety of discourse methods to examine the intersection between gender and discourse. Bucholz explains:

Their approaches are so different that it is impossible to offer a unified treatment of discourse analysis as a tool for the study of language and gender. Hence there is no well-defined approach to discourse that can be labeled ‘feminist discourse analysis’; indeed, not all approaches to gender and discourse are feminist in their orientation, nor is there a single form of feminism to which all feminist scholars subscribe (Bucholz 43).

Ultimately, the goal of feminist language studies is to produce work which examines the role that “language plays in creating, sustaining and/or perpetuating unequal gender relations and discrimination against women and gay, lesbian and transgendered people” (Mills and Mullany 3). Though Language and Gender studies do not have to be feminist in nature, to do language and gender research that is simply descriptive and doesn’t try to understand the powers at play in the overwhelming inequalities that exist for women in this day in age seems to be unproductive and a waste of time and effort.

In doing feminist language research researchers have to be careful of which trends and tensions they focus on and embrace in doing research. For instance, Judith Butler’s idea of performativity is a standard in how language and gender researchers understand gender, but is problematic for feminists because they claim she has a tendency to “locate everything in discourse and overlook experiential and material aspects of identity and power relations” (Lazar 12). Ignoring that there are physical components of identity beyond discourse can make gender

experiences more abstract than how most understand them. If one's aim is social reform, it's key to recognize how most people view gender and understand themselves as gendered.

For instance, there is extensive evidence to indicate that gender is still a central component of many people's social world; they find it important to be able to pigeonhole others into categories of male/female, and they find linguistic or social behaviors which threaten the (perceived) stability of this "essential" distinction alarming (Holmes and Meyerhoff 9).

Language that can be used to discuss gender as male/female is important for many as well. One way this can be seen is in campaigns for gender-neutral pronouns that occasionally crop up--even among people who truly feel men and women are equal, there is great hostility in changing our language practices. Some don't accept that language practices can reflect and reinforce troubling gender ideas and see attempts to instate gender neutral pronouns and words as 'perverting language' (Cameron, 1995 119). Even Robin Lakoff, on reflecting on the revised version of *Language and Woman's Place* in 2004, comments that:

I still heave a sigh in the privacy of my own mind for a time when a writer was not constrained to resort to the awkwardness the new world has forced on us. Aesthetically, *he* is at least sometimes preferable to any of the options currently open to us. Progress, like penicillin, has side effects (103).

Lakoff, in a lengthy annotation on her use of the "neutral" masculine pronoun in the original text, is discussing how if she were re-writing *Language and Woman's Place* she would find a way to avoid it and use one of the more accepted gender-neutral options such as "they" or "he or she." However, she ends her annotation with the comment included here, that these other options are not as "aesthetically" pleasing as "he" is. Despite being an expert linguist and one of the founders of language and gender studies, Lakoff can't help but express her distaste for the

“awkwardness” that using gender-neutral terms requires. Admittedly, Lakoff does recognize that gender is a spectrum and therefore gender-neutral terms are necessary, despite her stylistic snobbery, but many people find gender-specific pronouns to be important to their own identities are therefore reluctant to part with them.

For feminist researchers societal attitudes like these are important to recognize as they have implications for how their research may be taken up or how people might object to it. Finally, viewing gender as performative can make it seem that individuals have the freedom to challenge gender roles by performing in transgressive way, which can ignore how even performing in a subversive way can reinforce gender structures (Lazar 13). According to Wodak, Feminist researchers should also be cautious in generalizing Butler’s view as performativity may only be relevant to men and women in positions of power and may be less accessible to those in less privileged spheres (Wodak 2008 194). What Wodak is cautioning against is using such a theory broadly across a gender or class spectrum; although everyone necessarily constitutes discourses and gender through their activities, women and men in more powerful positions have a greater ability in their choice to define their own roles, identities, and practices. Another way to understand this is through Eckert and McConnell-Ginet’s use of the term “toolbox” to describe the linguistic practices people have at their disposal for creating gender identities, relations, and ideologies (47). They describe:

One can look upon gender as a set of constraints that one embraces or simply accepts, that one struggles within, or that one struggles against. But these constraints are not set for all time, and it is people’s day-to-day actions that make them change. And as the constraints change, so do the resources in the toolbox (47).

One's social class or position of power can be a constraint on the performance aspect of gender; it can limit the resources in or choices made from that person's toolbox. Therefore, it's important to pay attention to the intersectional elements at play in the performance or construction of gender.

In addition to the careful attention language and gender researchers must pay to trends and tensions in the field, one of the most crucial elements to keep in mind is how your work will be *taken up* by others; how others interpret and apply language and gender research can sometimes be at odds with the emancipatory goals of feminist researchers. Because of this, even those who do Language and Gender research that isn't explicitly feminist in nature must be cautious that it does not inadvertently reify gender stereotypes in its descriptions of gender and language connections, such as the way Robin Lakoff's components of "women's language" has been. Alice Freed points out that researchers need to be aware of the popular obsession with identifying genders with language practices (a cursory glance at popular women's magazines can serve as evidence of this) and be careful of the fact that very often "complex findings end up being stripped down in the mainstream press to fit societal preconceptions and stereotypes about gender issues" (Holmes and Meyerhoff 10). Explicitly feminist research needs to be mindful of how it may provide the greatest impact or contribution to the greater social reform or change it may be part of. Mills and Mullany maintain that effective change must come at the personal and institutional level, and therefore a focus on language needs to be viewed in a wider context of social change. If one aims to change how discourses surrounding rape are informed by the construction of statutes, this might need to be situated within reforms of statutory interpretation methods. Interdisciplinary approaches where questions of gender and politics are put at the

center at the onset help to ensure one's language research is aligned with specific social change issues.

For example, research in rape discourses has proven to be effective in assisting with rape reform, and bringing attention to women's experiences of sexual violence. Wendy Hollway gathered various accounts regarding sexuality that she categorized into various discourses. One of these was the "male sexual drive" discourse of which the main tenet was the idea that men's sexuality was directly produced by a biological drive to ensure reproduction (Hollway 273). Hollway found that this idea was seen as a commonplace assumption that was reproduced by experts, even psychologists. Similarly, in her research on discourses in rape trials, Susan Ehrlich found the "male sexual drive" discourse used as a defense for a man who had raped two women, with a judge proclaiming that men need to respect when women say no just as women need to understand that men are sometimes overtaken by their sex drive and therefore women need to be cautious in arousing a man's sexual desire (Ehrlich 2001 57).

Hollway and Ehrlich relied more on CDA methods in their research, but Kitzinger and Frith used Feminist Conversation Analysis to show that the date rape prevention programs that tell women to "just say no" in response to unwanted sex are ignoring "culturally normative" ways of doing refusals. They also show that both men and women understand and utilize a wide variety of methods to refuse or decline unwanted sex. They argue that insisting that women need to explicitly "say no" is counter-productive because it implies that other ways of refusing are not adequate (167). This could then be used as a defense of a rapist in a legal context-if a woman did not "say no" it could be argued the man didn't realize sex was unwanted, justifying rape. When seen in light of "male sexual drive" discourse, the reason for the insistence of "just saying no" might be due to the perceived difficulty in getting a man to stop pursuing a sexual act

because of his biological drive--once a man's drive is initiated he may lose all cognitive ability to understand alternative ways of refusing sex.

As these researchers show, none of these discourses or linguistic strategies actually reflect reality, yet are continually relied upon casually and institutionally. Ehrlich explains that "the adjudication of sexual assault cases continues to be informed by culturally powerful interpretive frameworks that legitimate male violence and reproduce gendered inequalities" (Ehrlich 645). These researchers focused their analysis on questions and topics that could assist in achieving social change. By identifying the discourses of rape and unequivocally linking these discourses to women's treatment in rape case, these researchers helped in the movement to bring about rape law reform. If these discourses went unidentified and unchallenged our legal system would continue to rely on inherently gendered frameworks for understanding, allowing rape and violence against women to continue.

Feminist Legal Theory

It has been shown that the term "feminist" can be a subject of intense scholarly debate, and even choosing to undertake research that is feminist in nature can be off-putting to many. However, this is especially true when it comes to analyzing the law. Since its emergence in the 1980's, feminist legal theory has become a serious academic topic and an established theory within the legal community, and currently it's a fairly common class seen within law school curriculum, under various names such as "Feminist Legal Theory," "Feminist Jurisprudence" or "Gender and Law" (Chamallas xxiii). However, as this has happened, critics of legal feminism "have also proliferated, become more visible and more organized...[there is] a growing respect for feminist legal theory in some quarters and a persistent backlash that continues to mark the field as controversial and risky for many students and writers" (Chamallas 140). An example of

this backlash is described by Ann Scales, a lawyer, activist and one of the founders of the field of feminist jurisprudence, in her book *Legal Feminism: Activism, Lawyering, and Legal Theory*. In 2003, Scales gave a talk to a group of judges about the use of feminist methods for adjudication. After her talk, one of the state court judges who was “notably well-read and progressive” stayed after to speak to Scales about her talk. According to Scales, the judge said her talk, “admirably addressed how good judges actually approach their most difficult challenges” but then asked “Why would [Scales] contaminate [her] own message by labeling it as ‘feminist’? Why be so unnecessarily contentious?” (7). The judge didn’t object to the methods and approaches Scales was describing, and in fact found them to be foundational to the effective interpretation and application of law. She objected to the term “feminist” to describe such methods—as Scales describes, “it is true that feminism has a tumultuous history, complex contested meanings, and conflicted constituencies” (7). However, the fact that the term has undertaken multiple meanings and uses over time, some of which may have been negative, should in no way discount it as a useful approach to legal problems. It just requires being upfront about what one means by feminist theory and how it’s being used to interpret legal issues.

In addition, its complexity is what makes it so suitable for untangling different legal questions; it already takes into account a multitude of perspectives and seeks to show how these different perspectives might be synthesized in a cohesive and productive way (and the ways in which this fails to happen). Ultimately, feminist theory is useful (and vital) because it is, “an exploration of the actual. Whatever the appeal of broad principles or abstract rules, such tools cannot lead to justice unless they are understood and applied in ways that acknowledge the real-life experiences of those affected” (Levit and Verchick 45). Though some may object to the use of the term “feminist” this description of legal theory is the key to its defense; instead of placing

its authority in objectivity, it recognizes and makes clear how objectivity is not reality, and justice can only be reached when legal theory makes this clear from the outset.

Researchers may define feminism differently depending on their political standpoint, but most agree that a focus on women, gender relations, power, and inequality is a starting point to most feminist approaches. As Levit explains, “central to all branches of feminist legal theory are the ideas that women are socially, politically, and legally subordinated and under-valued” (13). Ann Scales writes, “What I call ‘feminism’ is not a way of thinking confined to persons born female. Rather, this feminism is the concrete analysis of systematic oppressions, which analysis has led to a critique of objectivity in epistemological, psychological, and social—as well as legal—terms” (83). Clare Dalton, in her article “Where We Stand: Observations on the Situation of Feminist Legal Thought” defines feminism as:

...the range of committed inquiry and activity dedicated first, to describing women’s subordination—exploring its nature and extent; dedicated second, to asking both how—through what mechanisms, and why—for what complex and interwoven reasons—women continue to occupy that position’ and dedicated third, to change (Chamallas 2).

At the heart of all these definitions is the idea that sex/gender has been a way to oppress individuals under the law, and a feminist approach seeks to explain the various ways and reasons for such oppression, with the ultimate goal to improve the conditions for those who have experienced such subordination or oppression.

In her first chapter of *Introduction to Feminist Legal Theory*, Martha Chamallas describes the differences between feminist legal scholars and those who study gender and the law:

Feminists tend to start with the assumption that the law's treatment of women has not been fair or equal and that change is desirable. This stance separates feminists from researchers who study gender and law with the implicit assumption that the law has not produced or reproduced systematic gender inequity...Feminist legal scholarship is more oppositional; it assumes there is a problem and is suspicious of current arrangements, whether they take the form of different standards for men and women or purportedly neutral, uniform standards that nevertheless work to women's disadvantage (1).

Chamallas' description points to an important aspect of studying gender and the law, which is the choice to make one's research explicitly feminist in nature, or to do research that simply describes gender differences in the law without taking a more critical or political stance on these occurrences. She recognizes that, unlike other courses in law school curriculum, feminist legal theory "requires an initial defense" of its merits and methodology, often due to the word "feminist" and its multiple meanings (1). In defining feminist legal theory, Chamallas recognizes that, like most feminist scholarship, there is no uniform approach or methodology, and instead points out six recurring "moves" that feminist legal theorists make in their analyses all of which can be seen in following chapters.

One of the first recurring themes in feminist legal theory is that of a focus on women's experiences. This theme is related to the consciousness-raising groups of the late 1960's and early 1970's, where it was discovered that "the personal was political" in that women's everyday experiences and problems had a political element to them. Consciousness-raising "describes the process by which individuals share personal experiences with others in an effort to derive collective significance or meaning from those experiences" (Levit 49). By recognizing that their experiences were often shared by other women, and by being more critical about what caused

these occurrences, women were able to identify places where the law had excluded them. One example of this is with sexual harassment in the workplace, which before the 1970's was usually dismissed as harmless flirtation or humor as opposed to behavior that created an unbearable working environment. However, once feminist legal theorists began to collect and make aware women's experiences, they were able to show sexual harassment in a different way, "that what was pleasurable or inconsequential from the harasser's viewpoint was disturbing and serious when seen from the eyes of the target" (Chamallas 6). Since laws have been written by men, they often fail to take into account women's experiences (whether purposefully or not) and this approach carefully examines law to see where they have been excluded, often with the intention of reforming the laws to include them.

In addition to looking to where women's experiences may have been ignored in the law, feminist legal scholars also try and see where the law has viewed women as one monolithic group with identical shared experiences, instead of recognizing that along with the identity of "woman" women have a multitude of other identities that shape their experiences as well. A woman's age, race, ethnicity, class, sexual orientation, disability or immigrant status all intersect into a complex identity, and all of these different identities shape how they view the world and how it views them. Parsing out the different ways the law affects women based on their various identities is known as an intersectional approach to feminist legal theory. One example of this is looking at rape law; it's commonly held that women are held to a good girl/bad girl standard in determining veracity of rape claims. Women's sexual histories and general conduct are examined thoroughly when they claim rape, and whether a woman appears to be "good" or "bad" is often the only factor in having her rape claim taken seriously. However, especially since the 1990's, feminists have pointed out that black women are treated much differently when it comes to

making rape claims. Regardless of how “good” a black woman seems, black women are often viewed as promiscuous, so their rape claims are taken even less seriously than white women’s are. In addition, a white woman who asserts she was raped by a black man will have a much easier time bringing that case forward successfully (Chamallas 7).

Because historically the law has been constructed by men, a third approach to feminist legal studies is to try and bring to light the androcentric aspects of legal standards. This approach is also referred to as “unmasking patriarchy” because it attempts to “uncover male biases hidden beneath supposedly ‘neutral’ laws” (Levit 45). Many feminists have pointed out how, although they may appear neutral or objective on their face, many legal standards are actually *male* standards, designed only to fit male needs and life experiences. One way to determine whether the law is male biased is to “ask the woman question,” a phrase coined by legal scholar Katharine Bartlett, where one must consider the positioning of women when looking at the implications of a legal rule or social practice (Chamallas 8). As Bartlett explains:

Asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only nonneutral in a general sense, but also “male” in a specific sense. The purpose of the woman question is to explore those features and how they operate, and to suggest how they might be corrected (Bartlett 836-837 1989)

As Levitt points out, Bartlett’s description emphasizes two particular points of feminist legal theory that are significant; there’s a need to understand women’s personal experiences in

evaluating the law's effects in regards to gender bias and the ultimate goal is to determine how gender bias in the law can be corrected (46).

One example of law that is built upon a male-biased way of thinking is the “utmost resistance” standard for rape cases. Rape was determined to have taken place only if a woman resisted her attacker “to her utmost,” because without such a man could mistakenly believe she desired the act. This standard is male-biased in several ways, the first being that it puts the onus on the woman to resist “enough” to get a man to stop attacking her, as well as letting men define what it means to “resist to the utmost” despite the fact that women are overwhelmingly the majority of those raped, not men. This implicit bias/male norms approach can be deconstructive, in that it only shows how law is male-centered and how it fails to take into account women's perspective but also reconstructive, where it focuses on how to make the law more inclusive to more fairly represent the needs of everyone (Chamallas 9-10).

Implicit male bias within the law can lead to what has been termed the “dilemma of difference for women” or situations in which women are faced with double-binds in regards to receiving equal treatment under the law. The dilemma of difference is in reference to two main methods to achieving equal protections and rights for women under the law—gender-neutrality or the special protection rule. Catherine MacKinnon describes the former as “be the same as men” and the latter as “be different from men” and argues that these have largely been the only options for women to achieve equality under the law. MacKinnon further explains that:

The philosophy underlying this approach [special protection rule] is that sex *is* a difference, a division, a distinction, beneath which lies a stratum of human commonality, sameness. The moral thrust of the sameness standard is to grant women access to what men have access to: to the extent that women are no different from men, we deserve what

they have. The differences standard, which is generally seen as patronizing but necessary to avoid absurdity, exists to value or compensate women for what we are or have become distinctively as women (by which is meant, unlike men) under existing conditions (MacKinnon 1994, 382).

The dilemma of difference, a term coined by Martha Minow, occurs when women are forced to choose between these two methods; either positioning themselves as equal to men or situating themselves as being different, as both choices are not perfect and come with various negative, and often contradictory, effects (Chamallas 122). Marilyn Frye defines this as a legal double-bind because it is one of many “situations in which options are reduced to a very few and all of them expose one to penalty, censure or deprivation” (Frye 1983, 2).

For instance, when it comes to revising laws, there are only two choices that had been available for women: either male-centric rules are kept in place, but are applied equally for every individual, or the male-centric rules are adjusted, such as by affirmative action policies. If the androcentric standards stay in place, women are not really being treated fairly, because the rules themselves are biased. However, requesting different standards in order to respect and protect the diverse experiences of men and women (like maternity leave), or also to acknowledge the historical inequities women have suffered, can leave women on an unequal footing to men. Women may seem inferior or weaker to men, reinforcing gender stereotypes and gender differences. This ‘dilemma of difference’ means that “neither ignoring nor highlighting gender will necessarily translate into progress for women. Instead, feminists find themselves grappling with how to fundamentally alter the way people think about difference and how to resist the cultural tendency to equate difference with inferiority” (Chamallas 11).

In 1979, Catharine MacKinnon challenged the “differences approach” as being fundamentally flawed for this double-edged sword dilemma it creates for women. She instead proposed a standard called the “inequality approach” to legal reasoning. The test in any challenging legal interpretation or decision should be “whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status” (Scales 93). This would be an equality standard that focuses on problems of disadvantage, domination and disempowerment instead of looking to issues of difference (Scales 92). This new standard was necessary, because beyond the double-bind of the differences approach, the problems associated with determining any sort of differences standard were extensive. How does one determine differences between the sexes? How does one determine what differences between people are relevant in a particular case and which are not? What do you do with perceived stereotyped differences? What about stereotypes that are accurate versus those that are not? Are some differences more relevant than others and therefore more worthy of accommodation? (Scales 85). Ultimately, Scales states, “it was not possible to describe a theory of women’s rights that fit the discrete, non-stereotypical, ‘real’ differences between the sexes. Attempting to do so exacerbated the underlying problem—the objectification of women—and enlisted us [feminist legal scholars and activists] in reification of the vocabulary, epistemology, and the political theory of the law as it is” (Scales 85).

Finally, even when andro-centric standards are elucidated and reformed, feminist legal theory looks to find where patterns of dominance continue, even when laws have been adjusted multiple times. For instance, rape laws have undergone several reforms over the past few decades, many attempting to put a focus on the women’s internal state during the rape. Previously, the law would consider only physical evidence to determine whether sex was

consensual or not, such as how much a woman struggled to resist the man. In later years, the law was adjusted to emphasize a woman's description of her intentions and willingness to participate.

In her book *Legal Feminism: Activism, Lawyering, and Legal Theory* Ann Scales believes that in order for feminist legal theory to be successful and make changes within the legal community, it's necessary to outline exactly how a legal problem could be practically analyzed using feminist methods. If feminist legal theory only operates on a theoretical level, it would be unsuccessful and it would contradict many tenets of feminist theory more broadly. To that end, she gives eight ideas or steps that can be useful in thinking about legal problems and incorporating feminist thought into them. Her suggestions are:

1) Don't Get Bogged Down in Conventional Political Divisions

According to Scales, lawyers have a tendency to get caught up in aligning themselves to particular sides. It's common for lawyers to find identification as either a defense lawyer or a prosecutor, for instance, or to practice a specific type of law. Because of this, lawyers tend to want to align themselves to specific political camps as well in their pursuit of legal reform. For feminist legal advocates, the instinct is to avoid aligning one's goals with individuals or groups that often have goals at odds with feminism, such as those who preach "morality" from a right-wing conservative perspective. However, Scales argues that to avoid what she terms "strange bedfellows" is to create unnecessary roadblocks to feminist reforms of the law, and that allies should be appreciated no matter what form they come in.

2) Eschew Neutrality

Scales's book focuses heavily on the misleading idea of neutrality and why pretending to adhere to a standard of "neutrality" is simply a façade for subjective judgment. As she explains:

The idea is that justice is achieved only when blind, only when the stations and characteristics of those before the law are ignored. But there is no logical sense in this idea. A truly neutral position draws no lines nor authorizes any action according to differences among situations. The law, however, is all about drawing lines, contrasting behaviors and making classifications—to an incredibly detailed degree (103).

What many argue is a neutral way of applying the law is anything but, and feminist theorists need to avoid such standards and attempt to remove them as a basis of reasoning when it comes to legal questions. As later chapters will demonstrate, the notion of neutrality is often used to justify ideologically subjective interpretations of law, and lends judges a reassuring air of authority to these interpretations, because they seem to be rooted in logic and objectivity instead of partiality.

3) Challenge False Necessities

Challenging false necessities is very much in line with most feminist thought that questions essentialist ways of defining gender and sexuality. Much of the law is organized around a series of “bottom lines” that are viewed as incontestable, but Scales argues that some of these are simply false requirements or dichotomies. There are many legal issues that require an either/or decision, when the issue at hand is much more nuanced and complicated than that. For instance, in sexual harassment law, plaintiffs often have to prove that sexual conduct toward them was “unwelcome” instead of “welcome.” However, sexual relationships are multi-faceted and complex, and it can be difficult to prove that behavior that may have once been “welcome” (a woman having an affair with her boss for several months at her home) compared to “unwelcome” (the same woman, whom, having called off the affair, continues to be harassed by her boss at her home) (Scales 105). Therefore it’s important to look for false necessities and

dichotomies as they can serve to ignore women's experiences that don't fit such neat and "bright-line" legal standards.

4) Deconstruct the Status Quo from the Level of Knowledge

Because legal results amount from a determination of facts, it's important to identify exactly how one determines what the facts are, and to challenge ideas of what it means to really "know" something; what counts as knowledge and whose knowledge is providing the basis of certain facts or legal reasoning. Scales correctly points out that certain frames of inference can be "hijacked to serve the interests of the powerful" but masquerade as what is simply "the truth." (108). Therefore, "the law needs a more dynamic conception of reality and a more sophisticated epistemology than that allowed by the assumption that there is one objective truth of the matter" (108). Questioning what counts as knowledge is a necessary step to combating oppression within the law, and is not always a simple process. "What appears true, is even accepted as true according to the rules of evidence, sometimes requires deeper interrogation. And that cannot be done through invocation of pseudo- objectivity but only through historical contextualization" (108). This deconstructing of the status quo goes hand-in-hand with eschewing neutrality, as proclamations of neutrality are often a reference to certain types of knowledge that have historically excluded women's experiences and serve only to perpetuate their oppression. One of the ways feminist legal advocates have attempted to challenge legal epistemology is through consciousness-raising, where women shared experiences they had in order to determine similarities in their collective experiences that had been ignored or challenged by the law.

5) Look to the Bottom

Scales refers to Professor Mari Matsuda's jurisprudence method that can be summarized by the phrase "looking to the bottom" as a better way of examining law. Scales describes:

The ‘bottom’ does not refer to the merit or capacity of any actor but to the situation of an actor among the usually obvious structures of social hierarchy. Looking to the bottom requires a painstaking historical, contextual analysis of whose subjectivity has been relatively unfettered and whose has been systematically constrained (109).

“Looking to the bottom” requires a minimum of three political, moral, and historical judgments. First, one needs to recognize which groups or group members have had the privilege of defining the realities of others. Next, it holds that those who have been in control of that privilege relinquish it to those who have been unprivileged. Finally, it points to the law as the acceptable place to redistribute this privilege of controlling and defining knowledge. This step requires a much more purposive interpretation method, as one needs to think more critically about what the law can and should do, instead of what a strict interpretation of the text of the law results in (109).

6) Find the Best Answer for Now

Finding the best answer for now, instead of holding out for the ultimate “best” answer is necessary because often the “in a perfect world” situation or answer that might best benefit women is simply not feasible due to political or cultural climates. Additionally, legal and social change takes time and is most often achieved through incremental steps, so solutions may need to be temporary until bigger changes can take place. Scales describes this process as:

Finding the best answer for now means to generate as many options as possible about how to deal with a situation. Then, based on information learned from the prior steps, choose the best option. The crucial idea of this step is that any option chosen can be provisional. Solutions once embraced can cease to be useful or can be coopted by others

for bad ends. Therefore, this step requires constant vigilance about when the best answer for now becomes a bad answer for the future (111).

Scales' process also highlights a necessary flexibility to legal decision-making; instead of becoming entrenched in a certain way of doing things, or continually relying on traditional answers to solve legal problems, finding the best answer for now requires a constant reevaluation of contextual conditions, with the goal being continual improvement on what's been done before. This also connects with the principle of eschewing neutrality; since neutrality relies on an a kind of objective "essence" that exists outside the fluctuating nature of being human. Believing there is one path to what is truly "objective" or "neutral" means that if one believes they've found that path, they'll return to it again and again, which contradicts what Scales is arguing for in recognizing that what is "best" might only be a temporary category. However, she points out that one concern with this step is that it "entails the careful use of stereotypes" (112). That is, it recognizes that stereotypes can be useful as they provide a way to represent a group of people in a way that is recognizable to others. Stereotypes are often rooted in some truth, and even if they're only accurate temporarily or only statistically for a large group, they can be a useful foundation for achieving some kind of legal change than if we push back on all kinds of essentialist assessments. For instance, Scales uses the example of abortion rights for teenagers. In arguing for these rights, arguments tend to reinforce the idea that teenagers are not "sexually self-possessed." This is true to the extent that teenagers are surrounded by a variety of strong messages regarding their sexuality; from their male peers, the media, sex ed classes, morality standards, et al. To ignore the many ways outside forces affect a teenager's understanding of and control of their own sexuality would not be getting the full picture of their experience, however, for the sake of getting them the right to an abortion, it may prove simpler to categorize them as

lacking control. In this case, abortion would be the “best solution for now” while the social arrangements that put them in the situation of having unwanted pregnancies can be worked on and improved (112).

7) Practice Solidarity

Minimally, this step requires lawyers and advocates to think about how legal decisions affect other people. This is a familiar tenet of feminist theory more broadly, especially in regards to feminist research, which requires that a researcher understand how their research is going to be used and taken up by others, and how they can appropriately advocate for entire groups, especially those they may not be part of. For those focusing on legal advocacy in particular, Scales emphasizes the need for recognizing how pursuing certain types of reform or legal rights might negatively impact others. For instance, the fight for same-sex marriage became a focus for feminist lawyers and advocates, though many others considered this a mistake. Instead of trying to upend a legal institution that is so entwined with religious beliefs, making it an extremely difficult fight, other protections could have been argued for on less polarizing bases, and this may have paved an easier road for marriage-equality. However, this is a difficult step to achieve successfully, and Scales admits that:

Thinking these through in the way I advocate is a big challenge because it requires understanding the connections between your own life and the lives of other people. It requires seeing how you have benefited from privilege, including by never having to notice it before. It requires understanding that group identities and characteristics and histories can be nodes in systems of oppression—whether or not consciously perpetrated—rather than falling into the habit of seeing injustices as ‘isolated incidents.’

It requires uncompromising study of how our lives and well-being are tied together, and requires resisting any reform that implicitly reincorporates systems of hierarchy (113).

This step necessitates a strong commitment to feminist legal theory as it entails research on and communication with groups outside of one's own community, all before questions of legal merit can be successfully answered.

8) Keep the Law in Proper Perspective

This step is most relevant to lawyers who are committed to feminist legal methods/are attempting to reform the law. Scales argues that lawyers need to recognize that changing legal standards, winning cases, or getting laws and statutes adjusted or re-written are simply steps, or snapshots, of true social change. Additionally, the rule of law itself is only one part of an issue, and one needs to consider the social, cultural, and political context of women's issues when the goal is social change. For instance, in regards to this project, laws about rape or prostitution are only one part of the picture of those issues. Both topics have an extensive social context that consists of a tradition of patriarchal societal standards and expectations, including entrenched gender norms, accepted practices of violence against women, and pseudo socio-biological notions of sexuality, among others. These all inform the interpretation and practice of the legal concepts of prostitution and rape, and as has been seen time and time again, changing the law does not mean changing the conversations or knowledge around a topic, and it often doesn't even mean immediate legal change. However, Scales also points out that on the plus side, failures in reforming the law do not need to be seen as failures, as even being able to raise consciousness about women's issues can go a long way to getting equality under the law.

Chapter 2: Governmentality and the Gendered Language of US Prostitution Laws

One of the ways in which gender intersects with the law is through the criminalization of prostitutes. Prostitution has historically been a “female crime” and this chapter shows how ideologies of gender, in particular those regarding women’s sexuality, are embedded in the language of prostitution laws. This chapter shows how the language of the law, or the law on the books, can appear to be gender-neutral and unbiased, while actually promoting sexist and gendered perspectives of women’s issues. This analysis is distinct from the following chapters as it does not cover rape law and instead examines the discourses of sex work. However, the conclusions I draw from this analysis have ramifications for subsequent discussions of sex crimes, as it shows how even minor language choices can have dramatic effects within a legal frame, and it demonstrates how intertwined our laws are with our cultural understandings of gender and sex. This chapter also shows how the original conceptions of sex regulation, whether it be in the form of rape or prostitution law, are foundational to understanding current legal conditions of sex crimes.

The Problems of Prostitution Law

“The world’s oldest profession” is a common description of prostitution in popular culture. This statement points both to the inevitability and perceived necessity of selling sex; prostitution is thought to be found everywhere and its prominence as “oldest” profession indicates its priority among other professions. However, as political scientists Dorothy McBride and Janine Parry trace in the 5th ed. of *Women’s Rights in the USA*, prostitution has several meanings and is treated differently in various societies; in some, there may not be a specific name for the exchange of sex for goods, while “in others, it may be accepted fully and even respected, or it may be reviled and punished. In ancient civilizations, women may have practiced

prostitution as a religious ritual” (McBride and Parry 284). These various meanings of prostitution make it a difficult subject to define and research, as well as a tough policy issue. As feminist philosopher Rosemarie Tong asks:

Is a prostitute an evil and immoral woman, a victim of unjust social and economic opportunity structures, or an enterprising business woman? Is she a criminal from whom society needs protection, or a provider of an essential service whose work should be actively supported by the state? Should the law criminalize, legalize, or decriminalize her activities? (107).

Tong’s questions are just the tip of the iceberg that is the issue of prostitution; how one defines prostitution still leads to many questions about what to do about it within a legal context. It’s also a very contentious subject and it can be difficult for academics to find common ground or consistent information with which to discuss it. As sociologist and sex work expert Melissa Hope Ditmore aptly describes in the preface of her book “Prostitution and Sex Work,” to do research on prostitution is, “to encounter a dearth of information prior to colonization, salacious tales about voluptuaries told by moralizers and advertisers, anodyne attempts to remove all matters of interest from the topic, and heated political discussion of how to address prostitution” (Ditmore 2011). Ditmore’s summation here not only points to the complexity of the issue itself, but also to the extreme ways in which researchers and policy makers have resorted to handling it as a topic because of its exceptional contentiousness.

Complicating things further, there is tremendous difficulty in defining what prostitution is in a country like the United States where prostitution laws fall under state regulation and therefore exist in 50 different forms. This difficulty is due in part to “conflicting social concepts, moral disagreements, and ambiguity of terminology... [and] is further compounded by the habit

in America of stressing the criminal aspects of prostitution almost to the exclusion of other concerns” (Davis 1993: 300). Although Davis is right to point out the United State’s habit of emphasizing the criminal aspects of prostitution, to focus only on its illegality would be remiss. Because of the various conceptions of prostitution, “the debate over prostitution has been intense and conflictual... [and] the state laws and the way they are enforced bear the imprint of past battles” (McBride and Parry 284). Our laws are not created in a vacuum; they are created by the very people who have these differing thoughts on what constitutes prostitution and what should be done about it. Using Nikolas Rose’s re-imagining of Foucault’s concept of governmentality in conjunction with Foucault’s theory of discourse, we can better understand the more complex processes of power, freedom and criminality at work within prostitution laws. According to Rose:

Once political power takes as its object the conduct of its subjects in relation to particular moral or secular standards, and takes the wellbeing of those subjects as its guiding principle, it is required to rationalize itself in particular ways... Hence ‘modern’ governmental rationalities, modern ways of exercising rule, inescapably entail a certain investment of thought, however attenuated, and a certain form of reason, however much it may be obscured (7).

This is a more theoretical view of what McBride and Parry articulated; our laws are enacted for particular purposes and rationalized in a variety of ways, though these rationalizations are not always clear. Additionally, Foucault defines discourses as “practices that systematically form the objects of which they speak” (1972: 49). Operating on these conceptions of governmentality and discourse, a critical examination of the laws governing prostitution can illuminate how prostitution, and the actors involved in it, are viewed and constructed by society. By mapping

this analysis onto the academic paradigms identified by Sociologist Ronald Weitzer as being the primary frameworks for understanding prostitution in his book *Legalizing Prostitution-From illicit Vice to Lawful Business* and by identifying the popular arguments that frame the language of prostitution laws we can organize the laws of the states into distinct categories of thought. Using insights from Foucault's *The History of Sexuality* we can see that the language used to prohibit such sexual acts is reminiscent of the explosion of discourse surrounding sex beginning in the 17th century in a variety of ways. The more effort that is put into restricting or confining sex, the more need there is to define it and label it. By doing so, the law brings what might have once been a shadowy illicit practice into the harsh light of institutional control. In addition to this proliferation of discourse, this restricting of sex can also be understood as a demarcation of freedom. According to Rose:

The programmatic and strategic deployment of coercion, whether it be in the name of crime control or the administration of welfare benefits, has been reshaped upon the ground of freedom, so that particular kinds of justification have to be provided for such practices...certain values and presuppositions about human beings and how they should live, values and presuppositions given the name of freedom and liberty, have come to provide the grounds upon which government must enact its practices for the conduct of conduct. And hence, for that reason alone, it is useful to try to ascertain the costs, as well as the benefits, of organizing our experience, our aspirations, our relations with ourselves and with others, our politics and our ethics in terms of freedom (10).

What both Foucault and Rose put forth as a productive analysis of discourse and governmentality is somewhat an examination of the inverse of each; Foucault argues that the restricting of discourse in fact encourages it to an explosive degree, while Rose argues for the necessity of

looking to the freedoms that are being allocated when power and coercion seek to restrain individuals. When we examine sex work in this way, we see that the discourse of the law, despite its seemingly “neutral” approach, perpetuates gendered assumptions about sex and prostitution. In doing so, it criminalizes women as sexual beings, removing their sexual autonomy both in their role as sex worker and as individual, while also enabling men’s sexual liberties.

A Brief History of Prostitution

Although there are a multitude of definitions for prostitution found in the United States law, most boil down to the idea that prostitution is the exchange of sexual services for goods or money. More specifically, according to a 2012 review article put out by the Georgetown Journal of Gender and the Law on prostitution and sex work, prostitution is:

...generally understood to be the exchange of sexual activity-including but not always limited to sexual intercourse, oral sex, anal sex, or assisted masturbation-for money or other financial compensation...the crime of prostitution generally involves three elements: (A) some degree of sexual activity or conduct, (B) compensation, and (C) intent to commit prostitution (Smith and Villaamil 2).

The word “prostitute” comes from the Latin words “pro” and “statuere,” meaning “to expose” and to “place up front” (Flowers 15). Historically, prostitutes have been women, and are referred to by a variety of other terms, “including whore, harlot, sex worker, streetwalker, call girl, escort, and white slave” (Flowers 15). Although the term “sex worker” is considered the appropriate phrase to describe those involved with prostitution by many feminist scholars, the current law of the United States uses the term “prostitute” almost exclusively. Prostitution is illegal in the United States in every state except for Nevada, where it is legal in a few different counties. Although many think of prostitution as occurring primarily on street corners or alleyways, most

prostitution occurs in private residences, hotels, massage parlors, and other out of public view locations (Flowers 13). The internet has also changed how sex work is advertised; instead of picking up a sex worker in a back alley in the bad part of town, sex workers can promote their services and arrange appointments online, making the selling of sex much more difficult for law enforcement to stop (Flowers 13). Because of its illegality and unfavorable reputation, it's difficult to get accurate data on those involved in sex work. In 2008 a CBS News report "Sex Work Emerges from Shadows" stated there were 82,000 prostitution-related arrests on average in the United States every year (Flowers 18). It's important to realize that although there are several different parties involved in the transaction of sex—the customer who buys sex (also referred to the client, trick, or john), and often a panderer (legally defined as a manager for prostitutes and a person who entices or coerces a person into the sex trade industry)—female prostitutes are more likely to be incarcerated and arrested (Flowers 18). This may be because it's easier to catch a sex worker in the act than it is to catch a client or panderer, but it may also have to do with the law's focus on women sex workers to the exclusion of others involved in the sex industry.

Prostitution was seen as a public problem beginning in the early 19th century, and the country's awareness of prostitution as problem coincided with urbanization. With people living together in much closer proximity than before, brothels and their clientele became difficult for the public to ignore. Initially, church reformers spoke out against prostitution first, seeing it as "evidence of social evil, individual sin, and the moral weakness of women" (McBride and Parry 285). Originally, instead of requesting laws to be put in place to curb the practice, these church reformers advised police to utilize vagrancy laws in order to "keep prostitutes away from the 'decent' people" (McBride and Parry 285). However, police in bigger cities were aware of other countries' policies and practices that regarded prostitution as a necessary evil, and in agreement,

decided the best way to deal with prostitution was to extensively regulate prostitutes. However, women's rights advocates at the time worked to thwart efforts to pass regulations, and were successful for many years. They argued that prostitution was an evil perpetuated by *men on women* and believed that the only reason women became prostitutes was because men forced them, through poverty, rape, seduction, or even bondage. They saw prostitutes as the "victims of unregulated sexual aggressions of men" and sought to regulate and control these sexual aggressions of men as opposed to policing the women involved in prostitution (McBride and Parry 285).

This continued until the Civil War, when these feminists joined with moral reformers in what was known as the "social-purity movement." It was believed that women were more moral than men, and this movement sought to bring societal practices more in line with what they considered to be moral. Therefore, their goal was to protect women and restore the moral order that men had disrupted with their "sexual aggressions." Over time, the movement became a broad coalition, consisting of an alliance of doctors, prohibitionists, social workers, and progressives. They successfully gained control of the issue of prostitution and new laws were enacted federally and ultimately in every state in the Union in the early 1900's. However, during WWI, federal policy turned away from protecting prostitutes and made prostitution a female crime. McBride and Parry describe the situation as: "The mobilization of soldiers led to increases in venereal disease, which, in turn, made War Department officials fear for the nation's defense. The campaign to keep soldier's healthy—"fit to fight"—turned into an assault on women's rights that has received little attention from historians" (286-288). Viewing soldiers' need of an outlet for their sexual needs as inevitable and perhaps even necessary for the war effort, the subsequent

consequences of such dalliances were left for women to take care of. According to Rose, this was also a common consequence of the governmentality focus of the 19th century:

The regulation of the health of the population, since the middle of the nineteenth century, has established a whole array of linkages between practices aimed at securing the strength and vitality of the nation and its ‘manpower’, and practices aimed at the maximization of individual and familial health and hygiene (6).

In order to strengthen the nation’s ‘manpower’, which in this case literally meant the bodies of men fighting the war, prostitution became a sight for these practices Rose describes--preventing the spread of STD’s became women’s responsibility, and laws were enacted that reflected this. The Chamberlain Kahn Act of 1918 allowed women suspected of prostitution to be detained for gynecological examination and treatment of STD’s; generally, any women without escorts were targeted. This cemented the idea that prostitution was firmly a woman-centered crime, and that state regulation of prostitution really meant state regulation and control of women (288). Rose refers to this as governmentality on the basis of “social disease” and compares it to similar social conduct mandates like Prohibition-- states were able to lock women up in the name of society’s “safety” (Rose 130).

In fact, at this point the emancipatory goals of the Social-Purity movement were flipped on their head, and women suffered a double-edged sword regarding their sexuality. As Rosemarie Tong puts it:

On the one hand, Anglo-American thought is dominated by the image of prostitutes as bad girls, as temptresses who lure men away from their duties and who cause them to walk other than the straight and narrow path of virtue. On the other hand, Anglo-American thought has always expressed special sympathy for the sexual wants and needs

of men, and the law's desire to punish bad girls has often been moderated by its wish to save nice boys from harm, inconvenience, or embarrassment (YEAR 107-108).

After the first World War, the focus of blame for men's improprieties was firmly placed on women both socially and legally, a fate they have been largely unable to escape.

This change is still reflected in our legal system today, with more emphasis placed on criminalizing those who are prostitutes instead of those who solicit prostitutes. According to King County Prosecutor Val Richey, "Historically, women involved in prostitution have been arrested at a rate 10 times higher than the men who paid them for sex." In 2010 the Justice Department reported 43,190 arrests for women related to prostitution while only 19,480 for men (which included men who worked as pimps, johns, and male prostitutes) (Alter). Although some states have adopted programs to reverse this trend and attempt to focus their efforts on arresting johns instead of prostitutes, like Seattle's "Buyer Beware" program, this is only a recent trend and is not promoted in all states. This trend of arresting prostitutes more frequently than johns is not only a discriminatory pattern but also has the effect Tong describes of framing prostitution as a situation that *women* are in control of; it's their choice to take part and therefore they can be held solely responsible for their actions and situation. Men can't be held responsible for their sexual needs, but women can be blamed for offering up temptations too difficult for men to resist.

Despite its extensive history prior, U.S. law did not officially address and define prostitution until the 20th century (previously some states had vagrancy laws that covered prostitution but these were barely enforced), and definitions vary from state to state and from the civil code to the criminal code. Now, prostitution is considered a type of "sex work" which is a term first coined by activist Carol Leigh in 1978 to refer to a wide variety of sexual services

exchanged for money or items of value, such as stripping, pornography, or phone sex (Ditmore p. xviii-xix). Since 1978, the term “sex worker” has become the more accepted term to refer to prostitutes among activists, but prostitution is still the accepted term under the law and many prostitutes have expressed skepticism about putting more politically correct names to the face of prostitution. For instance, Tracy Quan once explained “As a former sex worker myself, I am skeptical about a trend that puts more picturesque language out of business. During my career in the New York sex trade, the prostitutes I worked with used words like working girl, call girl, hooker, hustler, and pro” (Ditmore p.xix). Quan seems to be pointing to how the language used to describe prostitution is fruitful and excessively connotative, and also doubting that calling it something deemed to be more “politically correct” doesn’t change what the work consists of or how prostitutes have been treated. Similarly, Barry points out that terms like “sex work” or “sex labor” imply that sex is something that can be “work that anyone should be able to engage in at a fair wage with full benefits of social services...the term ‘sex work’ [then] becomes imbued with a sense of normalcy” (67). Wrapping it in this guise of normalcy allows its harmful and horrifying elements to be glossed over and creates a more palatable, and therefore ignorable, issue.

All genders and ethnicities are represented in sex work and prostitution, though regulation of prostitutes in the United States has historically only addressed female prostitution (Ditmore p. 48), in part because of the Chamberlain Kahn Act, which as previously mentioned was enacted to regulate prostitutes during WWI. Because of this gender divide, prostitution is clearly a feminist issue, but it’s also one of the most difficult legal issues for feminists to address. This is because, feminist philosopher Rosemarie Tong eloquently puts it, among feminists there is, “considerable confusion as to whether prostitutes are the paradigm of sexual liberation, the

epitome of sexual oppression, or something in between” (Tong 1984: 37). Society in general considers prostitution as everything from a moral evil to an unfortunate and unavoidable situation. Historically, both globally and in the United States, the law and the larger society often disagree in issues of conflict, and prostitution is no different. As Nanette Davis illustrates in her international handbook on prostitution, where “reformers may turn discriminatory laws around, replacing them with permissive or protective legislation, conservative elements may persist in downgrading or ignoring the legal intent and continue coercive policies” (p. ix). Even when the law itself is updated to be less restrictive of prostitution, society may still reject it and find ways around the law to keep prostitution under control. Such widely disparate views is one of the main reasons for why there is so much debate about prostitution- very few people seem to understand it and what, if anything, should be done about it.

Another difficulty in resolving the issue of prostitution is the lack of objective and comprehensive research on the topic. As Davis describes, “prostitution is not a politically ‘clean’ subject. Because it involves legal, court, and penal institutions, as well as state, occupational, and rehabilitation policies, there was often official reluctance to provide information and interviews. Researchers might be baffled with lack of access to data, or a plethora of unindexed information, or even a lack of scholarly literature” (Davis p.viii). Although the government may make information on prostitution intentionally difficult to get due to its “unclean” nature, feminist activists also contribute to the lack of unbiased information that exists about prostitution. Those who oppose it because they see it as oppressing women may “cherry pick” the most disturbing stories of prostitution to serve as representative of the issue as a whole. Gayle Rubin, a cultural anthropologist well known for her theories of sex and gender politics, recognizes this as a phenomenon that she often sees in some strands of radical feminist discourse on sexuality. As

she describes, this discourse, “presents most sexual behavior in the worst possible light. Its descriptions of erotic conduct always use the worst available example as if it were representative... This rhetorical tactic consistently misrepresents human sexuality in all its forms. The picture of human sexuality that emerges from this literature is unrelentingly ugly” (Rubin 166). Rubin’s point is that in order to make a particular point and further their political agenda, these radical feminists are cherry-picking their data and only using the most extreme cases as representative of all. Clearly, this is not acceptable academic research, but the desire to fix what these particular feminists see as a pressing problem causes them to be less than objective in their arguments.

The Empowerment Paradigm

Sex work is just as controversial in academia as it is in the wider society. According to sociologist Ronald Weitzer, there are three main paradigms, or perspectives, that sex work is seen through in academic writings. The first of these is the Empowerment Paradigm, which “highlights the ways in which sexual services qualify as work, involve human agency, and may be potentially validating or empowering for workers... [it] holds that there is nothing inherent in sex work that would prevent it from being organized for mutual gain to all parties-just as in other economic transactions” (7). Those who subscribe to this theory see the problems with prostitution as stemming solely from its criminalization, and not from the act itself. Often they advocate for alternatives to criminalization of prostitution, highlighting its benefits as a job that allows a worker’s complete control over their working conditions and job satisfaction. Some who adopt this paradigm go as far as to romanticize sex work. Weitzer quotes several writers who romanticize it in this way, such as Wendy Chapkis who describes a “sex radical” version of empowerment where sex workers “embrace a vision of sex freed of the constraints of love,

commitment, and convention.” He also mentions Camille Paglia as another proponent of this paradigm who argues the prostitute is the “ultimate liberated woman, who lives on the edge and whose sexuality belongs to no one” (p. 7). However this paradigm is presented, Weitzer is quick to point out that it’s rarely used as an absolute--that few academics would see sex work only as empowering, even though it may have empowering aspects.

The Oppression Paradigm

The Oppression Paradigm is another view that many scholars take in analyzing prostitution, most often by activists against prostitution. Weitzer describes it as being “grounded in radical feminism...the oppression paradigm holds that sex work is the quintessential expression of patriarchal gender relations and male domination” (2012 p. 10). Here Weitzer refers to radical feminism in order to emphasize that this paradigm blames our patriarchal-structured society for the injustice that is sex work. This paradigm views sex work only as a negative thing, and considers prostitution the very result of structural inequalities between men and women--women would not be involved in sex work if they had the same socioeconomic possibilities as men did. This paradigm also sees sex work as perpetuating inequalities between men and women because it objectifies and commodifies women and therefore allows men to believe they have a right to “own” women. Those who subscribe to the oppression paradigm see no neutral way to view sex work and prostitution and feel the only solution is to completely eliminate all varieties of commercial sex. Catharine MacKinnon , a prominent feminist scholar and lawyer, is an example of an oppression theorist. In her book *Women’s Lives, Men’s Law’s* she explains that women in prostitution, “are denied every imaginable civil right in every imaginable and unimaginable way, such that it makes sense to understand prostitution as consisting in the denial of women’s humanity, no matter how humanity is defined. It is denied

both through the social definition and condition of the prostituted and through the meaning of some civil rights” (MacKinnon 151). MacKinnon’s argument indicates that the specific definitions don’t matter-- prostitutes are oppressed because of the very act they’re involved in. From the Oppression Paradigm perspective, the exact *language* of prostitution law is almost insignificant; no matter how you define the shape and character of prostitution, it still dehumanizes women.

The Polymorphous Paradigm

The Polymorphous paradigm is a third view to prostitution, conceived entirely by Weitzer himself. He agrees that prostitution does consist of exploitation and empowerment, the key focus of the previous paradigms, but disagrees that either view entirely explains prostitution. Instead, his alternative polymorphous paradigm is “unlike the other two perspectives, [in that it] is sensitive to complexities and to the structural conditions shaping sex work along a continuum of agency and subordination... [it] identifies a constellation of occupational arrangements, power relations, and participants’ experiences” (16). Weitzer believes that a polymorphous view of prostitution can improve related policy; he argues that the various dimensions of prostitution, such as victimization, exploitation, agency, job satisfaction, and self-esteem should be treated as variables that can change depending on type of sex work, geographical locations and other conditions (18).

Charges against Prostitution

As prostitution is largely criminalized in the United States, it would follow that arguments in favor of prostitution will not be found in the legal code of most states. However, we can expect there to be language that represents the prevailing notions of those who oppose the legality of it. In his article titled “Charges against Prostitution: An Attempt at a Philosophical

Assessment” Lars Ericsson (1980) takes a critical look at the arguments made against prostitution and identifies five main recurrent “charges” that are made in opposition of it. In subsequent paragraphs I discuss four of these charges, as the fifth The Marxist charge, states that prostitution is simply a byproduct of class struggle and Ericsson admits that its portrayal of prostitution is “too gross an oversimplification to catch the essentials of so complex a phenomenon as prostitution” (96). Not only does the Marxist charge miss many of the complexities of prostitution in this country, it’s not particularly relevant to our historical treatment of prostitutes in this country and does not map on to contemporary thought accurately. Ericsson ultimately argues that none of these charges against prostitution are legitimate and that the reason prostitution is such a problem in the United States is due to the “hostile and punitive attitudes which the surrounding hypocritical society adopts toward promiscuous sexual relations in general and prostitution in particular” (88). Although Ericsson’s conclusions seem overly simplistic, and his logic in decrying these charges is flawed at times, these charges do represent the prevailing arguments made about prostitution and therefore are a useful starting place in unpacking the language of prostitution law.

The Charge from Conventional Morality

The most common argument made in opposition to prostitution is one founded on the idea that prostitution is a type of sexual immorality, condemned by societal and conventional moral standards. According to the moralist the prostitute is “a sinful creature who ought to be banned from civilized society...a harlot [who] is a threat to the family and corrupts the young” and prostitution is “the great social evil, representing a flagrant defiance of common decency” (Ericsson 88). In his discussion, Ericsson posits two reasons why the prostitute has been labeled so defamatorily: due to the fact that sexual activities are judged based on reproduction and that

the United States' heritage is based on patriarchal lineage and Christianity. That is, because in the past sex has been viewed as solely for the purpose of reproduction, any sexual practice that openly flouts this is morally reprehensible. And since such importance has always been placed on the male line in a family, a practice that encourages female promiscuity would be seen as a danger to the system.

The Sentimentalist Charge

The sentimentalist charge against prostitution deals with the idea that sex between two people should consist of mutual pleasure and satisfaction, and a way for two people to be intimate with each other. Those who employ this charge feel that prostitution is lacking in this fundamental purpose of sex because it is meant to be a detached and unemotional act, serving only the pleasure of the male. They feel that something as personal and necessary to life as sex should in no way be sold and bartered, and therefore prostitution should not be allowed. Additionally, the sentimentalist equates “good sex” with “marital sex” once again harkening back to Christian sentiments; “the demarcation line between marital and mercenary sex is not quality but the contrasting nature of the respective legal arrangements” (91). The sentimentalist feels that prostitution changes the erotic association of sex from one of romantic love to a more base and primal urge.

The Paternalistic Charge

The paternalist charge against prostitution is based on the idea that prostitution is harmful, both physically and mentally, and should be prohibited so that the prostitute does not get hurt. Physically, a prostitute and her clientele can risk contracting an STD or HIV, and prostitutes risk getting injured either from their pimps or from customers with sadistic tendencies. Mentally, prostitutes can experience depression and self-degrading and self-

destructive impulses. This attitude leads individuals to believe they know what's in the best interest of the prostitute and enact policies against prostitution for the prostitute's "own good" and attempt to rehabilitate prostitutes. However, Ericsson points out that the paternalistic charge is inextricably linked with the charge from conventional morality. There are multitudes of jobs that are inherently dangerous (Ericsson points to mining as an example) but society does not prohibit them. This is because we consider certain vocations to be "socially valuable, [and] do everything possible to minimize risks [of these jobs] by improving working conditions, installing various safety devices, introducing shorter working hours, etc" (93). Although an opposition to prostitution by reference to the welfare or needs of the prostitute might seem humanitarian, what undergirds this charge is the thought that prostitution defies conventional moral standards.

The Feminist Charge

The feminist charge argues that prostitution is undesirable because it constitutes an "extreme instance of the inequality between the sexes" (97). It reduces a woman to a commodity that can be bought and controlled and reifies the role of woman as a thing for a "male's pleasure, lust, and contempt" (p. 97). Prostitution not only promotes inequality but also represents it--it's a way for men to "satisfy [their] most perverse and secret desires, desires that the male is unable to reveal to his wife or girlfriend...instead of trying to solve the sexual problems together with his wife, the married man can resort to the services of the hustler; but the woman lacks the same advantage, since there are not so many male heterosexual prostitutes around" (p. 97).

Prostitution is not a choice given freely by women, but is something forced into by patriarchal oppression. This charge is the most significant and salient one that has been put forth against prostitution. It is also, oddly, the one most argued against. In his descriptions of the charges, Ericsson critically assesses each one, reasoning through each as a philosophical thought exercise

in order to undermine it. He spends the most amount of pages on the feminist charge, which demonstrates both the enormity of feminist concerns as well as the amount of backlash that a feminist argument incurs when it comes to issues of sex.

Foucault's *The History of Sexuality and Governmentality*

In his *History of Sexuality* Foucault argues that the idea that western society repressed sexuality starting in the 17th century and continuing into the 20th century is a myth, and in fact discourse on sexuality increased during this time. He explains that this discourse was not just on the societal level in the form of mockery of the new emerging code of decency, but was also seen in, “the multiplication of discourses concerning sex in the field of exercise of power itself: an institutional incitement to speak about it, and to do so more and more; a determination on the part of the agencies of power to hear it spoken about, and to cause it to speak through explicit articulation and endlessly accumulated detail” (p. 18). That is, though it seemed that sexuality was repressed during this time, the act of repression actually required it to be spoken about in more intense detail than ever before. He points to the various ways in which sex became an institutionalized discourse—including experts who attempted complex scientific classifications in order to understand it and the Church’s renewed focus on confession to purge sins. In attempting to control and regulate sex, “sex was taken charge of, tracked down as it were, by a discourse that aimed to allow it no obscurity, no respite” (p. 20). The more that institutions wanted and attempted to control the sexuality of the populace the more explicit they had to be about it and subsequently the more detail they had to include in order to classify it systematically and scientifically. It follows then, that if elements of sexual relationships became banned or illegal, the institutional discourses surrounding them would necessarily increase in order to make clear exactly what was and was not allowed.

Admittedly, Foucault makes it clear that the repression of sexuality (or the perceived repression of it) is different than the “prohibitions maintained by penal law” (4). However, Foucault’s description of his intentions in examining the repression of sexuality can be easily applied to examining the legal code. In the introduction to *The History of Sexuality* he explains his motivation in undertaking his analysis with a series of questions he aims to explore:

Why has sexuality been so widely discussed, and what has been said about it? What were the effects of power generated by what was said? What are the links between these discourses, these effects of power, and the pleasures that were invested by them? What knowledge was formed as a result of this linkage? The object, in short, is to define the regime of power-knowledge-pleasure that sustains the discourse on human sexuality in our part of the world. The central issue, then, is not to determine whether one says yes or no to sex, whether one formulates prohibitions or permissions, whether one asserts its importance or denies its effects, or whether one refines the words one uses to designate it; but to account for the fact that it is spoken about, to discover who does the speaking, the positions and viewpoints from which they speak, the institutions which prompt people to speak about it and which store and distribute the things that are said. What is at issue, briefly, is the over-all “discursive fact,” the way in which sex is “put into discourse” (11) (emphasis mine).

New laws are enacted due to specific instances of social unrest or a need for social control, and prostitution laws were no different. They were motivated or justified by discourses of sexuality at different times in our history, and it would be illogical to pretend that the law doesn’t reflect these discourses, and, in turn, constitute new ones. Rose explains:

State institutions certainly extend the scope of their operations and the depth of their

penetration into the lives of their citizen subjects. But they do so by a complex set of strategies, utilizing and encouraging the new positive knowledges of economy, sociality and the moral order, and harnessing already existing micro-fields of power in order to link their governmental objectives with activities and events far distant in space and time. These links between the political apparatus and the activities of governing are less stable and durable than often suggested: they are tenuous, reversible, heterogeneous, dependent upon a range of 'relatively autonomous' knowledges, knowledgeable persons and technical possibilities (18).

In order to justify the limitations the law places on women in prostitution law, the state must depend on various sites of knowledge in order to adequately link government goals with societal activity and understanding. These come in the form of discourses about sex and morality, and the relationship of women to men, and the obligations of women to societal and familial structures.

Sexual repression is different from legal prohibition of sex, but the relationship between the two is significant and can be examined by beginning with many of these questions Foucault poses. Admittedly, it would not be productive to look only at the language of the legal code. What is important is comparing the language to common historical charges made against prostitution and looking to see where these discourses may have affected or are perpetuated by the law. This allows us to get at some of the "effects of power" that are generated by these discourses, the law itself being an extreme source of power, as well as elucidating some of the "positions and viewpoints" from which the law originated.

Although Foucault traces the history of this "repression" starting in the 17th century, well before prostitution became a public issue for the United States, we see much of the same precedent and subsequent patterns that Foucault identifies. Foucault then is a useful theoretical

starting point for any discussion related to governmental control of the public's sexual behaviors, as many reasons for the discourses surrounding prostitution can be partially explained by Foucault's observations on the discourses of sexuality. For instance, Foucault describes that one of the most significant advances in the practices of power in the 18th century was the "emergence of 'population' as an economic and political problem...[g]overnments perceived that they were not dealing simply with subjects, or even with a 'people' but with a 'population'" (25). That is, instead of recognizing individual concerns, governmental focus moves to the entirety of the public and what was good for the whole instead of any one individual. A move from thinking about people to thinking about a population has several effects, not the least of which is the dehumanization of all subjects involved. We can see this occur with the passing of the Chamberlain-Kahn act, where the good of the country, in the form of the soldiers fighting in WWI, became the chief concern of prostitution regulation. Instead of protecting women, it became more important to protect the nation, and discourses around prostitution became once again blameful of women in order to help the war effort. Regardless of what happens to the individuals involved, as long as there is a positive net result for the public as a whole the policing of sexuality is seen as successful and necessary. In terms of prostitution law, this has had the effect of an excessively detailed criminal code, which simultaneously lays bare all the *parts* of prostitution (bodily and otherwise) and obscures the individual plight of the *people*, overwhelmingly women, involved.

Additionally, Foucault recognizes that the silences that invade discourses are just as important to examine as the discourses themselves:

Silence itself—the things one declines to say, or is forbidden to name, the discretion that is required between different speakers—is less the absolute limit of discourse, the other

side from which it is separated by a strict boundary, than an element that functions alongside the things said, with them and in relation to them within over-all strategies.

There is no binary division to be made between what one says and what one does not say; we must try to determine the different ways of not saying such things, how those who can and those who cannot speak of them are distributed, which type of discourse is authorized, or which form of discretion is required in either case. There is not one but many silences, and they are an integral part of the strategies that underlie and permeate discourses (27).

Instead of viewing silences as the boundary of discourses, Foucault notes the importance in examining them. Instead of determining the limits of discourse, we must instead look to what discourse is and is not limiting; where power dynamics oppress and where allowances are made. In regards to sex work, the illegality of prostitution focuses more on the sexual acts themselves, and little attention is paid to the participants beyond specifying orifices and the identification of buyer versus seller. Sex acts are described in infinite detail, and odd qualifications are made (prostitution is not a criminal act when performed on stage as part of a play) yet there's no acknowledgement that historically men were the sole buyers of prostitutes. Concern for surrounding neighborhoods and passerby are seen within the law (prostitution is more harshly penalized in areas of tourism or near schools and churches) yet no protections are given for sex workers under the law in regards to the many dangers and indignities they may experience. Tracing the trajectory of prostitution laws and the prevailing discourses of sex work allows us to see which discourses are silent within the law, and how, and which have made their mark.

Definitions of Prostitution

Generally a prostitute is defined solely by the acts they commit or plan to commit. Sometimes the word “prostitute” is used in reference to the person involved in the sex work, while other times the definition only refers to the act of prostitution. An example of this difference can be seen in comparing South Dakota’s definition “Any person who engages in or offers to engage in sexual activity for a fee is guilty of prostitution” and New Jersey’s definition of “Prostitution” as “a sexual activity with another person in exchange for something of economic value, or the offer or acceptance of an offer to engage in sexual activity in exchange for something of economic value.” Though there are various ways of wording this definition, the main theme of all the laws is that prostitution consists of some exchange of sexual activity for something of value.

The number of ways the various sexual acts are categorized in each state is extensive. States differentiate between “sexual conduct” “sexual contact” “sexual intercourse” “deviate sexual intercourse” “sexual act” and “sexual activity” to refer broadly to acts. The terms “sexual conduct” and “sexual activity” often act as larger categories that include more specific acts, such as Texas’ code which defines “sexual conduct” as “includes deviate sexual intercourse, sexual contact, and sexual intercourse” (Texas Penal Code § 43.01). The term “sexual contact” tends to operate as a parallel to “sexual intercourse” in that sexual intercourse means a penetration of sex organs occurred and “sexual contact” includes fellatio, cunnilingus, masturbation or other contact between two parties that may incite sexual arousal in one or both parties.

Beyond specifying the types of acts that prostitution consists of, the location of and method in which a prostitute was procured are also significant under the law. “Place of prostitution” as well as “house of prostitution” and “public place” are often defined as well as “solicitation of prostitution” and “assignation.” Arizona defines “house of prostitution” as “[it]

means any building, structure or place used for the purpose of prostitution or lewdness or where acts of prostitution occur” and the District of Columbia specifies that "Public place means any street, sidewalk, bridge, alley, plaza, park, driveway, parking lot, transportation facility, or the doorways and entrance ways to any building which fronts on any of these locations, or a motor vehicle in or on any such place.”

Gendered Language, The Oppression Paradigm and the Feminist Charge

Historically, more women than men have worked as sex workers and most terms related to prostitutes refer specifically to women. Although currently, “all gender identities and expressions are represented among sex workers” (Ditmore p. xix), to ignore the gendered connotations of prostitution would be a significant mistake. On this point, Mackinnon quotes feminist activist Dorchon Leidholdt as arguing, “What other job is so deeply gendered that one’s breasts, vagina, and rectum constitute the working equipment? Is so deeply gendered that the workers are exclusively women and children and young men used like women?” (160).

Regardless of what may be factually true about contemporary sex workers, sex work is gendered, and the word “prostitute” still conjures up the image of a woman. Penelope Eckert and Sally McConnell-Ginet describe such language as, “discourse is genderized when messages about gender categorizations are superimposed on the basic content of the discourse” (2003 p. 254).

Gendered language is a problem because although “gender” is socially constructed, each gender is seen as linked with certain ways of behaving that are attached to a person’s biological sex, even when such a connection does not exist biologically in actuality. As laws are meant to govern everyone equally, they should not be unnecessarily gendered, unless meant to protect against gender discrimination or to recognize situations in which experiences might differ due to gender identity. In the case of prostitution laws, neither of these standards are fulfilled because

the language does not serve to protect women but instead tacitly localizes the focus on them as the main participants in sex work, while ignoring the role that men play in the transactions.

In a 2010 article “What We Talk About When We Talk about Buying Sex” Johanna Niemi explores the use of commercial language to describe prostitution. Niemi argues that the way a problem is discussed, and the words used to describe it, frames and defines the variety of solutions for it (159). Though Niemi focuses on Sweden and Finland’s criminalization approaches to sex work, some of her points regarding the language of prostitution are salient for a discussion of US legal trends. Niemi points out there is, “No doubt the subject positions in sexual abuse and the sex trade are gendered, even stereotypical. However, the market language does not usually recognize sex or gender. To the contrary, the market actors are individuals without special characteristics, and their most essential characteristic is that they can be exchanged” (161). I agree with Niemi’s point that the language puts at the forefront the commercial aspect of sex work, but Niemi ignores the significance of the gendered subject positions that have been imposed on the seemingly neutral language of the law. As I demonstrate in a later section, the word “prostitute” is marked in a significantly gendered way, even when it is not explicitly indicated. However, Niemi correctly points out that within traditional discourses of violence women are often gendered and victimized, while men are generally not gendered or mentioned as men and that a similar trend can be seen in research on prostitution, which focuses on women prostitutes, “making the buyers-abusers invisible and non-gendered” (161). Consistently then, whether sex workers are gendered within the discourse or not, men as the primary buyers (or abusers or exploiters) are made invisible. Although the “market language” of prostitution may be gender neutral then, it is a mistake to say discourses of prostitution are similarly lacking in gendered associations.

Nina Persak, in her discussion of the framing of prostitution in the collection *Reframing Prostitution*, carefully examines contemporary anti-prostitution discourses in order to argue that a new type of “legal moralism” is at the root of many current discourses advocating for the criminalization of prostitution. Persak points out that when discourses focus on prostitution as a “woman issue” it not only makes other actors involved in it invisible (Persak points to the fact that male and transgender prostitutes are often “unrecognized in public discourses and seemingly entirely absent in contemporary discourse advocating criminalization”) but also indicates that only a certain “kind” of woman or a certain “type” of femininity is being endorsed as acceptable (Persak 203). What Persak means is that prostitution is often the target of societal criticism of women’s sexuality—by condemning prostitution and focusing only on female prostitutes, overt displays of sexuality by women are also being decried. “Proper” women should be modest, and explicit demonstrations of sexuality discouraged.

Both Persak and Niemi’s research indicates that any discourse that centers around women as prostitutes makes invisible others who are involved, namely male buyers or male or transgendered prostitutes. Our country’s history of sex work, and the impetus behind subsequent prostitution laws, have been gendered to such a degree that it can be argued that our primary and most salient discourse of prostitution is that of it being a “woman problem” and no amount of gender-neutral language can remove that shadow from our laws. The problem then with our legal codes is that they are not consistently gender-neutral, and even for the places in which the language is devoid of any gendered indications, it is impossible to remove the gendered connotations that cling.

This can be seen by examining the legal history of prostitution in more depth. For instance, in discussing the potentiality for prostitution to be empowering to women, Catharine

MacKinnon, echoing Niemi's points, argues that even the small amount of equality litigation that does exist in regards to prostitution still does not take into consideration the many ways in which women are oppressed by the law. She cites an older Louisiana statute that defined prostitution as "the practice by a female of indiscriminate sexual intercourse with males for compensation" (153). When this wording was contested as violating the 14th Amendment because of its sex discrimination, the court ruled in 1974 that, "differences between the sexes does bear a rational relationship to the prohibition of prostitution by females." What this means is that the court saw that defining prostitution in gendered terms was a social reality--it's not sex discrimination when it's a fact that only women are involved in sex work. MacKinnon uses this example to demonstrate how the law regarding prostitution is anything but gender neutral but she sums up her discussion by stating "by now, most legislatures have gender-neutralized their prostitution laws" (154). Yet, although most prostitution laws are gender-neutral, their application is still not.

Although MacKinnon is correct in that prostitution laws are no longer explicitly gendered, to call them gender-neutral is, though factually correct, ignoring how connotative the word "prostitute" is. If asked to imagine a prostitute, most people would probably conjure up a scantily-clad woman, even though factually this does not accurately represent all those involved in sex work. This is an example of the "prototype" effect of language, where a prototype is the typical member of a category or the common understanding of a word, as opposed to the actual or comprehensive definition of it (Cotterill p.61 2003). The gendered associations of the term "prostitute" can be seen with a simple search of COCA (Corpus of Contemporary American English). COCA is easily one of the most extensively used corpuses of English, containing more than 520 million words of text, divided equally among spoken, fiction, popular magazines,

newspapers, and academic texts (Davies). The vastness of this corpus, as well as its variety of textual genres, makes it a good choice for comparing the language of prostitution laws. The corpus serves as a stand-in for a societal understanding and use of various sex work phrases, and comparing to the law allows us to see where particular emphasis or distinction has been placed. As every state relies on the term “prostitute” in their laws, it seemed necessary to confirm whether researchers on sex workers are correct in their presumption that “prostitute” tends to mean “woman sex worker” in the minds of society.

Searching “prostitute” on COCA brought up 1,849 examples; 55 of those were part of the phrase “male prostitute” while only 7 were contained within the phrase “female prostitute.” The fact that there was such a difference between the number of times the term “prostitute” was used by itself in comparison to “male prostitute” or “female prostitute” indicating that when a sex is assigned to prostitution it is the “marked” form while “prostitute” is the unmarked form, with “female prostitute” being especially rare and unusual. This is significant because it indicates “prostitute” is a term that has (female) gendered meaning on its own, or else there would be more examples where the gender was specified. In addition, looking more closely at the context for “female prostitute” shows that in all 7 examples it was only used when in opposition to a male prostitute or to a homosexual relationship being discussed.

For example, the context for one use of “female prostitute” came during a discussion of a man who was figuring out his sexual proclivities: “he was sharing the favors of a female prostitute, when he discovered that he derived more sensual and lyrical satisfaction from consorting with an Arab boy, who offered his services.” Another example was concerning identity theft and how a male individual suddenly had various identities that he clearly saw as inaccurate and unseemly: “I’m a female prostitute in Florida. I am a convicted manslaughter in

Texas. In New Mexico, I'm a dealer of stolen goods.” In the first example, the type of prostitute being shared (female) is required so that the reader understands how the subject is jumping from one sex to another in his sexual dalliances, rather than another type of meaning such as showing a preference for young boys instead of prostitutes. With the example concerning identity theft the speaker clearly identifies as a male, and is attempting to demonstrate the absurdity and perhaps the gravity of the theft- a female prostitute going by the name Ronald Peterson would be quite unusual.

By the numbers, gendered variations of the word are clearly the exception, or the “marked” terms, and the female variant is the least common. Additionally, the female marked term is only ever used when in comparison or in opposition to a reference made to a male or to a homosexual relationship. This indicates that a “prostitute” is so frequently considered to be female that it's mostly unnecessary to mark it as such. It is necessary to mark a “male prostitute” though, indicating that men working as prostitutes are seen as more rarely occurring, at least in the view of the individuals using these terms. Even when a “male prostitute” is being specified, it only happens 55 times out of more than 1,000 examples of the word “prostitute” which shows just how uncommon this phrase is. Interestingly, when the phrase is used, it's often as a redundant gender modifier—“He worked as a male prostitute” or “A young man who I knew to be a male prostitute.” It is also frequently used to particularly emphasize the gender of the prostitute in comparison to the person soliciting them, as in cases where a heterosexual male hired a male prostitute—we see this in descriptions of evangelical pastor Ted Haggard: “Haggard's ‘outing ‘ by former male prostitute Mike Jones swamped newscasts with stories about religious hypocrisy and the wages of homophobia” and with Barney Frank: “Influential

liberal Rep. Barney Frank, D-Mass., has admitted hiring a male prostitute for sex.” It’s clear then that “prostitute” is a word synonymous with “woman.”

Although at first glance this data may seem negligible, it proves especially significant when coupled with the pronoun usage in prostitution laws. Many statutes concerning prostitution still operate on gender-specific pronouns, often switching from gender-neutral to gender-specific, even within the same chapter of the code. As an example, the Texas penal code refers to an unknown actor as “he” when that actor is attempting to solicit a prostitute as in “a person commits an offense if he knowingly offers to engage, agrees to engage, or engages in sexual conduct for a fee.” However, in the following section on the promotion of prostitution the pronouns change to include he or she as in, “a person commits an offense if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he or she knowingly receives money or other property pursuant to an agreement to participate in the proceeds of prostitution” (Sec. 43.03). The law does often depend on the word “he” to represent a person of unknown gender, but their choice to use “he or she” in the following section indicates that perhaps the use of “he” was an intentional gendered choice, not just the action of a grammatically persnickety legislature. It may be argued that the use of a few gendered-pronouns in the statute is of no real importance, or that the gendered connection between the word “prostitute” and women is sketchy at best, but that is exactly how dominant ideologies begin and continue to exist. Eckert and McConnell-Ginet explains this process succinctly when they write, “a dominant ideology typically owes its success not to brute power and conscious imposition, but to the ability to convince people that it is not in fact a matter of ideology at all, but simply natural, ‘the way things are.’ We refer to this process as naturalization” (43). Even though sex work and prostitution are no longer dominated by a single gender or sexual identity, the law

continues to view them in this way. They may remove the more explicitly gendered language, and this may be enough to avoid arguments concerning the 14th Amendment and discrimination, but the choice to switch between gendered pronouns is still significant. As an example, in an article discussing gender-neutrality in rape law, professor of criminal justice Philip Rumney points out that:

The idea of labeling or naming abusive acts as rape leads to another issue—the relationship between the lack of societal recognition of male rape and institutional neglect of the problem. The historic failure of the legal process in most jurisdictions to recognize rape outside the male-on-female paradigm may have also contributed to the failure of society to acknowledge male sexual victimization. In the context of male rape, it has been argued that “[t]he general belief persists that either men cannot be raped, or if they are, so few men are raped that it becomes a freak occurrence (485).

Although Rumney is discussing rape law, the theory behind this statement is relevant to prostitution laws, with a different focus. In rape law, women are more frequently victimized by men, and the law was written to reflect that, in the interest of, one could argue, protecting women. Although Rumney is correct that this has contributed to the invisibility of male rape, the intention was to put focus on how women are more frequently victimized than men. With prostitution laws, the gendered language did the opposite. Instead of recognizing that women have often been prostitutes in order to make visible the many dangers and inequalities women can suffer within sex work, the laws were explicitly gendered in order for society to place the *blame* on women for prostitution and solidify it as a “woman problem.”

In case the issue of gendered pronouns was not problematic simply on principle, certain states have adopted a “no defense” policy into their statutes regarding prostitution that indicate

the gendered nature of prostitution laws have proven to be an issue in court as well. An example of this can be seen in Washington's code:

In any prosecution for prostitution, the sex of the two parties or prospective parties to the sexual conduct engaged in, contemplated, or solicited is immaterial, and it is no defense that: (1) Such persons were of the same sex; or (2) The person who received, agreed to receive, or solicited a fee was a male and the person who paid or agreed or offered to pay such fee was female (9A.88.050).

This indicates that cases were previously brought forward that involved a woman soliciting a man for prostitution, or an individual soliciting sex from another individual of the same sex, or else this defense would not exist, never mind in multiple state statutes. The inclusion of this defense also indicates that the legislature was concerned enough about the language of the code that they felt the need to clarify it, which further indicates that some parties must have been successful in relying on the traditional image of a prostitute/gendered language of the statute to make their case. Additionally, it justifies the concern over the use of pronouns in other state codes that do switch back and forth from "he" or "he or she" especially when a textualist approach to interpreting the law is used. As I will demonstrate in Chapter 5, the exact wording of statutes is significant in interpretation, even when looking at smaller aspects like pronoun usage.

The Oppression Paradigm and Conventional Morality Charge

There is no better indicator of the clearly gendered nature of prostitution laws than in the inclusion of "deviate sexual intercourse" or "deviate sexual relations." The word "deviate" as an adjective is defined by the Oxford English Dictionary as "deviant- especially of social and sexual behaviour" and "deviant" is defined as "deviating from normal social, etc., standards or

behaviour” (OED). “Deviate sexual intercourse” is defined in the Texas code as “any contact between the genitals of one person and the mouth or anus of another person,” and Pennsylvania includes it under the heading of “Sexual activity” defined as “includes homosexual and other deviate sexual relations” (Texas Sec. 43.01. PA 5902 F). Reflected in the law here is the idea that “normal” or “standard” sex is between a man and a woman and constitutes vaginal penetration by a penis and anything differing from that becomes “deviate” in the eyes of the law.

Although it may be tempting to chalk up these unnecessarily detailed definitions as a general thoroughness by various legislatures, it would be a mistake to do so. According to Foucault, it is a mistake to see an increase in discourse on sex as simply that--it’s necessary to examine the purpose for the “proliferation of discourse.” In *The History of Sexuality* Foucault offers an explanation for this construction of deviate vs. non. He asks, “for was this transformation of sex into discourse not governed by the endeavor to expel from reality the forms of sexuality that were not amenable to the strict economy of reproduction: to say no to unproductive activities, to banish casual pleasures, to reduce or exclude practices whose object was not procreation?” (36). Here Foucault explains that institutional control over sex was prompted by a desire for sex to be only for procreation, so an emphasis on and encouragement toward the monogamous married couple began while legal sanctions began to limit and discourage against sexual acts that were not intended for procreation. This sentiment can also be seen in some definitions of prostitution that make sure that an individual has to be taking part in sexual activity with a person who is not his spouse, as in Colorado’s definition: “any person who performs or offers or agrees to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with any person not his spouse in exchange for money or other thing of value commits prostitution” (18-7-201). The acts themselves are not illegal, nor is the

exchange of money for them, provided that the transaction occurs between two people who are legally married to each other.

These examples fall cleanly into the oppression paradigm way of viewing prostitution. The gendered language of the pronouns in the laws reflects gender inequalities between men and women and subtly promotes the idea that prostitution is woman's work. These examples also demonstrate both evidence to support the feminist charge against prostitution and evidence of the charge from conventional morality. The feminist charge argues against prostitution on the standing that it treats the sexes unequally. As we see here, even when the laws are stripped of their most explicitly sexist language, the very word "prostitute" coupled with gendered pronoun usage still indicates that prostitution is not something held equally between men and women, and therefore the feminist charge is still justified. The focus on the "deviate sexual acts" indicates that under the law only sex for procreation is "standard."

This language highlights our society's general uneasiness with homosexuality, but also backs up Foucault's suggestion that discourse of sexuality became institutionalized in order to promote the monogamous married couples insisted upon by Christian law. Foucault hypothesizes this very idea when he writes "doubtless acts 'contrary to nature' were stamped as especially abominable, but they were perceived simply as an extreme form of acts 'against the law'; they were infringements of decrees which were just as sacred as those of marriage, and which had been established for governing the order of things and the plan of beings" (38). Though being with a prostitute, and therefore violating the sanctity of marriage, is bad, at least it's still the "standard" form of sex between a man and woman. When the sex act begins to look different from those intended for procreation it becomes non-standard or "deviate." This is also interesting in light of some codes use of switching between "he" and "he or she." Even when the

law recognizes that sex workers may have a variety of gender identities, it requires a delineation of the sex that can occur between prostitute and buyer into standard and non-standard practices, thereby legitimizing the gender of each participant. Even with prostitution laws that may seem to be gender-neutral, by indicating that certain acts (such as those between two men) are “deviate” indicates they are not the norm by societal standards of acceptable sexual conduct.

The Oppression Paradigm and Feminist and Sentimentalist Charges

Perhaps one of the most interesting parts of the language of the laws regarding prostitution is the amount of detail that is included in defining the sex acts. For example, New Jersey’s definition of “sexual activity” is that it “includes, but is not limited to, sexual intercourse, including genital-genital, oral-genital, anal-genital, and oral-anal contact, whether between persons of the same or opposite sex; masturbation; touching of the genitals, buttocks, or female breasts; sadistic or masochistic abuse and other deviate sexual relations” (2C:34-1), while Rhode Island’s code specifies that “sexual conduct means sexual intercourse, cunnilingus, fellatio, anal intercourse, and digital intrusion or intrusion by any object into the genital opening or anal opening of another person's body, or the stimulation by hand of another's genitals for the purposes of arousing or gratifying the sexual desire of either person” (§ 11-34.1-1). These intensely detailed and specific descriptions of the sex acts illustrate what Foucault describes as a need to manage and control sexuality that first emerged in the 18th century. Regarding sex, “one had to speak of it as of a thing to be not simply condemned or tolerated but managed, inserted into systems of utility, regulated for the greater good of all, made to function according to an optimum” (p. 24). It’s not enough for the law to simply condemn prostitution, but to regulate it in the most detailed manner possible to assure no individuals can slip through the cracks if the language was simpler and less specific.

Although discussing sex acts as a jumble of different body parts put together in various combinations in order to achieve sexual satisfaction is a very systematic and organized way to define the laws regarding prostitution, it also masks the humanity of the individuals involved. These definitions are often written in the agentless passive, and discussed in the most clinical of terms available, completely hiding the fact that actual men and women are the participants. When we compare these definitions to those found in the Nevada code, a state that includes multiple counties that allow prostitution, we see that the opposite holds true. In Nevada a prostitute "means a male or female person who for a fee engages in sexual intercourse, oral-genital contact or any touching of the sexual organs or other intimate parts of a person for the purpose of arousing or gratifying the sexual desire of either person" (NRS 201.295). Here we see some of the same clinical terminology such as "oral-genital" contact, but there is also the use of the words "intimate" and "gratifying" that makes the exchange much more personal sounding. The argument here is not that sex with a prostitute in Nevada is more akin to the romantic ideal espoused by sentimentalists, but simply that by reducing the act of sex into such specific and detailed terms, even the notion that sex is something that can be very personal and intimate is entirely glossed over. It is in the attempt to regulate and organize sex that it becomes something impersonal and unfamiliar to our own experiences.

When the language is reduced to such clinical terms and the human/personal aspect of sex work is lost, that often means the notion of the woman is lost as well due to the fact that the majority of sex workers are women. Kathleen Barry, a well-known sociologist and feminist who founded the NGO Coalition Against Trafficking in Women has written extensively on the subject. In her book *The Prostitution of Sexuality* she writes, "the facts of women's subordination often lie in realities that are obscured in silence or normalized in acceptance but that nevertheless

dehumanize and brutalize us as women even when we do not directly experience their most extreme manifestations” (p. 84). Though the law necessarily requires a more objective and systemized language in order to be successful, this language can also be used to hide certain ideologies in its attempt to condemn certain types of behavior, and subsequently “normalize” other types. Anne Phillips, a leading figure in feminist political theory, argues that the language employed in discussing bodies as commodities is extremely important. As she explains in her article “It’s My Body and I’ll Do What I Like With It: Bodies as Objects and Property” when bodies are treated as parts and not people the language used:

...can seduce us into what Carole Pateman describes as ‘the political fiction, the fiction that capacities can be treated as separable from the person.’ In doing so, it contributes to the obscurantism of the employment contract, minimizing both the difficulties of distancing oneself from one’s body and the risks of personal subordination (Phillips 730).

Here, she’s referring to such acts as surrogacy and sex work, both of which involve “selling” the body for a period of time to another person. She explains that both acts make it very difficult for the individual involved to treat it as an impersonal business deal- a woman can no more ignore the kicking of a child in her abdomen or her pregnancy hormones than as a sex worker can ignore the cruel treatment carried out by a customer. It is extremely difficult for a person to separate “themselves” from “their bodies,” if even possible, but is seen as necessary when you use your body for monetary gain. In the case of prostitution laws, reducing individuals into anonymous body parts performing sexual acts obscures the realities of what they’re involved in. Regardless of whether one argues that prostitutes willingly choose to partake in sex work, or whether certain social and political realities force them to, one cannot ignore the fact that

prostitution has predominately been something women “sell” and men “buy” and that there are undoubtedly issues of power at play. As Phillips aptly sums up in her article:

When we suggest that contracting out the use of the body is no different in kind from contracting out the use of a car or house, we imply a distinction between self, capacities, and the body that houses them. This normalises what remains a power relation. The relation will be more benign in some contexts than others... Yet a benign exercise of power remains an exercise of power, however normalised and obscured by a language of property and exchange (731).

Regardless of the language used to describe prostitution; whether it be in the language of the marketplace, or contracts, or agentless body parts, does not change the fundamental issues of power at the root of prostitution.

By discussing prostitution in such clinical and agentless terms, the law makes prostitution seem to be a neutral exchange of goods (albeit an illegal one) and hides the individuals taking part in the act and subsequently the power inequalities that exist between them. This use of language also makes it seem possible that an individual can be viewed as a conglomeration of parts and, separately, a person with a conscience that can and does operate with free will. It could be argued that this is an empowering way to view prostitution--that it's a legitimate and acceptable way to make a living and therefore can be discussed in a professional manner, which would necessarily need to be emotionless and clinical. However, this position cannot truly be considered when so many other negative views of prostitution are called into existence with this language pattern. Promoting the idea that the “self, capacities, and the body that houses them” can be separated is particularly dangerous in describing prostitution, as sex workers can subsequently be defended (or blamed) for their line of work because they have the ability to

choose what they do, and also can then be regulated and controlled in an impersonal and objectified way because the very nature of their work focuses on particular body parts that are bought and sold.

Those who object to prostitution because of a feminist rationale certainly appear to be justified. The very use of the word “prostitute” in the law has gendered connotations, and coupled with the gendered pronouns proves that even without overt sexist or gendered language, the laws can still promote an unequal and unfair view of women and prostitution. Additionally, this language pattern maps onto the ideas behind the sentimentalist charge-that prostitution is ultimately negative because it is impersonal and makes sex, which should be an intimate act between two loving adults, a commodity. I do not mean to suggest that the law was written this way because of a prevalence of this sentimentalist ideology amongst lawmakers, but the fact that the law is written in this manner could promote this idea that prostitution is a simple exchange of services, and viewing it in a dehumanized and depersonalized way is not only appropriate but natural.

Location and the Conventional Morality Charge

Although prostitution is commonly imagined to take place on street-corners and back alleys, about 4/5ths of prostitution transactions in the United State occur indoors (Weitzer 22). Although indoor prostitution can take place in a variety of locations (brothels, massage parlors, bars, and hotels are common places) Ronald Weitzer points out that the important distinction between indoor and outdoor prostitution doesn’t depend on the location. As he writes, “It is not the mere fact of being indoors that distinguishes indoor from street prostitution but rather that certain characteristics of indoor settings are preconditions for a work environment that can be superior to the streets” (Weitzer 22). He explains further that indoor prostitution allows for more

secrecy and privacy for customers and sex workers, for protection from the elements and from abusive customers, and most importantly removes the sex work from the public eye so it avoids being a public nuisance or disturbance. In comparison, street prostitution makes sex work visible, making it the source of the most frequent arrests, fines and imprisonment of prostitutes. This is due to the very visible harms which include, “public health dangers from discarded paraphernalia (used condoms, syringes); exposure of local residents, including children, to the sight of sex conducted in alleys, cars, bus stops, parks, and so forth; traffic congestion and noise from clients cruising in their cars; declining property values in the surrounding community’ and collateral crimes such as drug use and sales, robbery, assault, and rape” (Weitzer 57-58).

Many statutes highlight this difference and include very specific descriptions of the more inappropriate locations for prostitution to occur. For instance, the state of Delaware specifies:

(1) Any person found guilty of patronizing a prostitute and such crime has occurred on or within 1,000 feet of the property of any school, residence, church, synagogue or other place of worship shall be guilty of a class A misdemeanor. (2) It shall not be a defense to prosecution for a violation of this section that the person was unaware that the prohibited conduct took place on or within 1,000 feet of any school property, residence, church, synagogue or other place of worship (§ 1343).

The wording of the code is slightly ambiguous as it is unclear whether “residence” is intended to be part of the list of religious buildings. However, it is clear that in Delaware, prostitution is illegal, but it is especially illegal when it takes place within 1,000 feet of a school or church. The reason for this is clear--the law is attempting to keep prostitution from corrupting or dirtying the purity and sanctity associated with these sites. Religious edifices are seen as a beacon and symbol of morality, while schools represent innocence. Barry explains, “Visible prostitution

threatens the social distance male customers require of prostitution in order to keep their lives as tricks and johns separate from their roles as husband, lovers, fathers... [and concerns] parents who worry about the effect on their children of visible prostitution and pornography in their neighborhoods” (Barry 221). This concern with the visibility of prostitution aligns with the sentiments of the conventional morality charge, that prostitution is harmful because it is immoral and can corrupt impressionable youth. This emphasis on location also harkens back to the Foucauldian idea that sexual habits that interfered with or were opposite to practices meant for reproduction were especially reprehensible. Churches and schools are also locations where the family unit is at the center—religion is traditionally practiced as a family and religious traditions are passed down through the generations and the children who attend school are the direct result of proper heterosexual relations between a man and wife. Other states draw specific boundary lines of where prostitution is and is not accessible. For example, in Hawaii, “It shall be unlawful for any person within the boundaries of Waikiki and while on any public property, to offer or agree to engage in sexual conduct with another person in return for a fee” (§712-1207). Waikiki is the primary hub for most tourists who visit the island of Oahu, and it makes sense that the legal code would be most concerned with not disrupting tourist traffic with the presence of sex workers. Although prostitution is illegal in these states, the specification of location indicates that a major problem with prostitution is its visibility. That is, how visible the crime is and how that visibility disrupts the morality of the individuals nearby.

Conclusion

Despite the enormous amount of research that has been done on prostitution, it is still an extremely varied and complex issue. This is due in part to the access researchers have to sex workers; studying illegal and illicit activities can make research more difficult. However, this is

also due to the strong motivations that exist for either decriminalizing sex work or keeping it an unlawful activity; since sex workers themselves are not entirely free to express their own views or experiences, what can or should be done about them is largely left up to societal standards and desires. Therefore, instead of the law reflecting the reality of sex work by creating regulations that could actually help with decreasing prostitution or at least making it safer for the participants, it reflects societal fears or moralistic attitudes in an unfair and sexist way.

It may seem tempting to say that criminal legal codes are not required to recognize the human experience that they govern, and their role is only to set forth formal and neutral standards for people to live by. However, this view is much too simplistic and ignores significant research on language and the law. For instance, James Boyd White puts forth the idea of law as “constitutive rhetoric” in his book *Heracles Bow* and argues that it’s more productive to view law as a “social and cultural activity” and not just a system of rules. Due to the interactivity imbued in Boyd’s view of the law, he emphasizes that the role of language is tantamount to understanding law and legal theory, and it’s necessary to recognize the law more specifically as a “rhetorical and literary activity--one feature of this...is that it must act through the materials it is given--an inherited language, an established culture, an existing community--which in using it transforms” (White X). That is, the law is not a seamless and strict set of rules that exists in a vacuum and can be applied precisely in any situation. Instead, it is embedded in (and embedded by) the culture that contains it, as well as the communities that interact with it and the language in which it is written and communicated. These elements change the law and allow it certain realities while limiting others. Although on its face this seems to make the existence of a legal code illogical, or at a minimum, unnecessarily amorphous, White goes on to clarify that:

I do not mean to suggest that the law is not a set of rules and institutions or that it cannot sensibly be talked about as an instrument of policy. But to talk in those ways is to leave out a lot that is true about law, and those vocabularies have their own force that can capture the minds that use them and carry them into thinking that they are complete and adequate accounts of what they describe...[Instead] its practice requires a constant sense of the resources and limits of one's language and culture; a conscious attention to the silence against which all language action takes place, to what *cannot* be said (xii).

White isn't arguing that viewing the law as a static entity of legal rules is inaccurate, but that viewing it solely as such a system ignores a significant element of what we know to be law. We can't ignore the fact that the law is made up of language, and that *people* create and define that language; they interact with each other within that language in the process of enacting and operating within law, and the language itself is shaped by the context (cultural and otherwise) in which it was created. With prostitution laws, it's therefore necessary to examine the lines that the language of the legal code draws in regards to what is significant and what isn't (what is prohibited, to what extent it is, and what is allowed) and to critically examine the language this is expressed in.

This focus on silences and examining what cannot be said, in addition to the constitutive language of law, is a distinct echo of Foucault's views on discourses. However, both Foucault and White have found themselves defending to critics what seems to be the inevitability of these theories; an intangible and inescapable view of the world that makes what we know to be "reality" an impossibility. However, neither White nor Foucault is attempting to say the law does

not have actual consequences or that everything is only “relative” and nothing more. As Sara Mills summarizes:

Foucault is not denying that there is a reality which pre-exists humans, nor is he denying the materiality of events and experience...; it is simply that the only way we have to apprehend reality is through discourse and discursive structures. In the process of apprehending , we categorize and interpret experience and events according to the structures available to us and, in the process of interpretation, we lend these structures a solidity which it is often difficult to think outside of...he considers that there is a combined force of institutional and cultural pressure, together with the intrinsic structure of discourse, which leads us to interpret the real through preconceived discursive structures” (Mills 49).

That is, the “real” in this case is *both* the actual language of the legal code and sex work itself, and they are both conceived and constituted through discourses. The actual words used to create the code, in addition to the discourses of prostitution circulating at the time of the law and throughout the revisions of it, are what create the law. Mills’ description of Foucault’s notion of “combined force of institutional and cultural pressure” is especially apt—the law is nothing if not a combination of cultural pressure instated by institutional forces, and then cultural pressure effected by the institutional forces through force of law.

Combining Foucauldian ideas on discourse, specifically his notions on sexuality discourses, with the dominant arguments and theories surrounding prostitution, allows us not only to better understand the ideological impetus behind the US’s desire efforts to criminalize prostitution and unveil some rather startling world views imbedded in the language. Looking especially to the demarcation of silences in the legal code helps us to see what is and is not

emphasized as the concern with prostitution in our country—though arguments have been made that prostitution laws serve to protect women, it's clear that our laws were created out of a concern for the visibility of sex work as well as a preoccupation with how prostitutes were to blame for men's indiscretions. This aligns with Rose's assessment of the function of governmentality as well:

Problems of human conduct were articulated as expressions of moral character, character was construed as an outcome of the interaction between constitution or stock and habits of conduct learned by example or inculcation, and good character was to be promoted through the organization of human beings in certain relations of proximity, hierarchy, visibility and so forth. As innumerable theological, physiological and educational texts spelled out, the need was for the will to exercise dominance over conduct: a matter of moral control which could be inculcated in calculated, controlled and ordered regimes for the management of conduct (105).

The conduct of prostitutes was frequently defined as a moral one—one of the main impetuses behind prohibition of prostitutes was the instability they bring to the family unit and their seduction of men, requiring government dominance over their conduct. As I've shown here, the restrictions and allowances of the law point to some of the moral concerns related to sex work, specifically in relation to its "proximity and visibility." In this way, the law itself is a reflection of cultural and institutional attitudes towards sex, and it also allows for such interpretations to continue.

Chapter 3: The Discourses of Rape

In the previous chapter, I demonstrated how various discourses of women and sexuality have made their way into the language and structure of our country's prostitution laws in inherently negative ways. Rape laws share many similarities to prostitution laws; they focus on sexual acts and those who commit them, they were constructed by men as a way to regulate sexual practices, and they have been historically gendered. Subsequently, there are similar patterns in the relationship of rape law and rape discourses as we saw in the discourses of sexuality and gender that were reflected in the laws of prostitution. Specifically, the discourses of rape justify violence against women, while simultaneously placing blame on women for men's sexual desires. However, one key difference is the way in which agency and culpability are discussed within each crime. Issues of sexual consent are not important in prostitution law, while consent is the most salient element of rape law. In theory, sex work is premised on a consensual sexual encounter, with both parties agreeing to specific terms of their sexual interaction. With rape law, a lack of consent is the defining element, and therefore most important to proving an accusation of rape. What this does is put the site of inquiry on the relationship between the parties involved in the sexual act, requiring one or the other to prove what transpired was consensual. Because of the way that rape laws have been constructed, they have encouraged a proliferation of harmful discourses against women that serve to defend men of sexual violence. Most importantly, the disparities between the discourses of rape and the law on the books is extreme; researchers have proven that the exact wording of the law does not determine whether juries or judges will accurately identify what a rape is.

This situation is even more difficult in cases where rape began as a consensual sexual encounter—the majority of rape cases involve acquaintances involved in some sort of romantic

or sexual relationship. Therefore, this chapter focuses on the discourses of acquaintance rape, to illustrate how disconnected the language of the law is from the narratives used to describe it. Similar to my process in Chapter 1, I compare the history of rape laws to the discourses of rape in order to see how cultural narratives influenced law and vice versa. I also explain how these discourses have contributed to our current rape culture, and specifically on the “campus rape crisis” that has been at the conversational forefront for the past several years. My analysis will show that greater attention must be paid to the historical precedents that have been set both legally and culturally that encourages and fosters acquaintance rape. Our society has been dominated by a terrible sexual culture that simultaneously encourages men to aggressively pursue women while denying women the right to their own sexual agency and silencing or mitigating their protests against the oppressive culture.

“Real Rape” vs. “Acquaintance Rape”

One of the most notable discourses of rape is that of “real rape” as compared to “stranger rape.” In 1987, Susan Estrich, a professor at Harvard Law School, published the book *Real Rape* in which she argues that despite the legal definition of rape, the legal process distinguishes between two different types of rape, “real rape” and “simple rape,” and treats each very differently. “Real rape” is rape by a stranger, often under the threat of serious violence, while “simple rape” is rape by an acquaintance without explicit use of violence or threat. Estrich points to research that shows juries are four times more willing to convict a rapist when there is extrinsic violence, multiple assailants, or no relationship between the victim and defendant (4). In cases of “simple rape,” when women displayed “contributory behavior” such as dressing provocatively, hitchhiking, or meeting the man at a bar or party, juries were extremely lenient

toward the defendant, even when the legal standard for rape was more than sufficiently proven (5).

These different understandings of rape can be attributed to a phenomenon referred to as the “prototype” effect of language, where a prototype is the typical member of a category or the common understanding of a word, as opposed to the actual or comprehensive definition of it (Cotterill p.61 2003). For instance, a well-known and widely used example of an interpretive problem in the law is defining what a “vehicle” is. Though a vehicle might broadly refer to any mobile device used for transport, when people hear the word “vehicle” they tend to think of cars or trucks, as opposed to skateboards, baby carriages, or bicycles. Then, the “prototype” of a vehicle would be cars and trucks, even if the category could cover several other examples, and the other examples would be considered in a different category. With regards to rape, despite how the law defines it, there are wildly different cultural understandings of what rape consists of. The danger of the “stranger rape” prototype is that it renders invisible other types of rape that do not fit the prototype. Despite the fact that this prototype misdescribes most rapes (for instance, the vast majority of rapes are committed by someone the victim knows) those that do not fit within it will tend to be categorized as “consensual” even when there is evidence that indicates there was no consent for sexual activity.

Martha Chamallas, a prominent legal scholar and expert in feminist legal theory, argues that this erasure of other types of rape makes them seem like an isolated phenomenon, as opposed to a pervasive one, further strengthening the prototypical rape as the rare “stranger rape” (Chamallas 297). This distinction between “real” and “simple” rape is seen often in contemporary public discourse as well, as the famous example in 2012 when former Representative Todd Akin was discussing abortion rights and rape and made the comment, “If

it's legitimate rape, the female body has ways to try to shut the whole thing down.” Akin’s comments indicated that certain types of rape were legitimate or “real” while other kinds were not, and pointed to the myth that women frequently lie about rape occurrences.

Because acquaintance rape has been so widely dismissed as “not real” rape, victims themselves have difficulty understanding and classifying what happened to them as rape. This problem was illustrated in a 1988 book titled *I Never Called it Rape* published by Robin Warshaw, in which Warshaw interviewed close to 150 women about their experiences with sexual assault. Warshaw’s book built on a nationwide study on acquaintance rape done by *Ms.* magazine and psychologist Mary P. Koss that found that “one in four women respondents had experienced rape or attempted rape, that 84% of survivors knew their attackers, and that 57% of the rapes occurred during dates” (Warshaw 11). Warshaw titled her book after the finding in the study that 27% of women whose sexual assault met the definition of rape did not identify their experience as such (Goetting 57).

Currently, we understand “simple rape” better as “acquaintance rape,” a term that highlights the fact that the rape occurred between two adults who knew each other. The word acquaintance is meant to refer to a person known to the victim but not a close friend, although can sometimes mean to refer to anyone who is simply not a stranger. Acquaintance relationships can include platonic, dating, marital, professional, academic, or familial (Bechhofer and Parrot 12). Often, the term “date rape” is used interchangeably with “acquaintance rape” though in reality it is a very specific type of acquaintance rape. “Date rape” refers to nonconsensual sex between individuals with either an actual or a potential romantic/sexual relationship. Other types of acquaintance rape include “marital rape” and “non-violent coercive sex”; the latter distinguishing acquaintance rape further by identifying instances where sex was unwanted but no

force was used by a rapist. Often this type of rape occurs when there is a perceived expectation of sex that a victim feels they must meet, either out of fear or because of societal norms (Muehlenhard and Schrag). More recently, the U.S. Department of Justice has used the term “party rape” to define rape that “occurs at an off-campus house or on- or off-campus fraternity and involves . . . plying a woman with alcohol or targeting an intoxicated woman” (Sampson 2002:6).

It’s important to draw these distinctions between the types of acquaintance rape because each has been treated very differently both in the law and by society. As I introduced earlier, Estrich and others have pointed out that despite what the legal definitions or distinctions are for rape, the legal system has a history of not taking acquaintance rape seriously, and when other factors are considered (like whether the rapist and the victim were married), the classification of “rape” can be even harder to come by. “Date rape” has arguable been the most controversial and most talked about form of acquaintance rape in the last 30 years because of how often it seems to blur the lines between what we understand as consensual sex and what we view as rape. This is especially true for rape on college campuses, especially within instances of “party rape.” As of late, the term “gray rape” has been used to describe acquaintance rapes that occur within the context of a casual sexual relationship or under the influence of alcohol. As I demonstrate in Chapter 5, the term “gray rape” is used to mitigate sexual assault allegations similarly to the distinction of “real rape” from “simple rape.”

Rape Scripts

Another explanation for the disparity between “real rape” and “simple rape” is due to culturally engrained rape scripts. Rape scripts define the social scenarios that constitute rape, and have a significant psychological impact. In the 1991 book titled “Acquaintance Rape: The

Hidden Crime” Laurie Bechhofer and Andrea Parrot put forth two scenarios to introduce their chapter titled “What is Acquaintance Rape?” I have reproduced both here as they are a superior model for what constitutes a “rape script”:

1) He kissed her. When he started to unbutton her blouse, she asked him to stop. He continued to unbutton her blouse. She begged him to stop. She told him “No!” emphatically. He continued anyway. He pulled up her skirt and pulled down her panties. While holding both of her arms down with one of his hands, he unzipped his fly and took out his erect penis and penetrated her.

2) Mary and John had been dating for two weeks. Both Mary and John had slept with people in the past but they hadn’t had sexual intercourse with each other. On their fourth date, after John took Mary out for a lobster dinner and then to a wild party to meet some of his friends, the couple went to John’s apartment. Mary was wearing a sexy, provocative dress. She had spent a lot of time getting ready, because she wanted to look her best for a special evening. After they got to his apartment, they shared a bottle of wine, listened to music, talked, laughed and kissed. Mary told John what a wonderful time she was having with him. John suggested that they move to his bedroom where they could get more comfortable. She nodded in agreement. In the bedroom, they started dancing erotically and kissing passionately. John caressed Mary’s breasts, and Mary moaned. When he started to unbutton her blouse, Mary asked him to stop. He kissed her gently and continued to undress her. She begged him to stop. She told him ‘No!’ emphatically and said that she was not ready for sex with him. He continued anyway, telling her that he knew she wanted it. He told her to relax and that she was really going to like it. John assured Mary that he loved her and that he had been thinking about this

moment ever since they first met. He pulled up her skirt and pulled down her panties.

While holding both of her arms with one of his hands, he unzipped his fly, took out his erect penis, and penetrated her.

Bechhofer and Parrot use these two scenarios to make the argument that most people would classify the first scenario as rape, but not the second one, despite the fact that both situations describe a rape. As they point out, because the second scenario takes place within the confines of a consensual romantic relationship many people find it difficult to reconcile that situation with what they know of rape. Bechhofer and Parrot aptly explain this discrepancy when they write, “Dating brings to mind images of happiness, enjoyment, friendship, sexual exploration, cooperation, and sharing. Rape evokes images of force, power, hurt, violation, pain, guilt, and scars. The very term ‘date rape’ is an oxymoron” (Bechhofer and Parrot 10). Sex occurring between two individuals who have an established romantic relationship makes sense, and makes even more sense when the situation for that sex comes with all the trappings of a typical romantic date. This logic is better known as an adherence to a “rape script.”

A rape script is the term used to describe the schema upon which individuals base their understanding of how rapes typically happen. Similar to Estrich’s idea of a “prototype” version of rape, a rape script is a specific type of sexual script. The term sexual script is seen commonly in research and writing on rape, and has origins in both sociology and cognitive psychology, though both are used interchangeably (Frith 100, 2009). In psychology, a sexual script is part of the larger “Script theory”; the theory that assumes that patterns of human behavior can be organized and somewhat determined by “scripts” that describe a program of action. Essentially, scripts are “prototypes for how events normally proceed” (Schank and Abelson 1977), and can be understood as a particular frame or plan for a particular event. Within sociology, scripts are

examined more in how they are culturally produced and made available for people to learn from. Generally, those examining sexual scripts from this theoretical position are more involved in uncovering the gendered nature of them as opposed to looking to how they become internalized. However, both versions of script theory put as their focus “identifying socially shared patterns of behavior” (Frith 100, 2009).

Scripts include information about roles, props, and “rules regarding the sequence of events” (Littleton & Axsom 2003 pg 465). Scripts often function unconsciously and are not easily revised or altered (Demorest 1995). Sexual scripts include expected patterns of behavior (e.g. males initiate sex) approaches of consent (individuals are clear and direct), and methods of non-consent. Sexual scripts are “culturally determined... [they] create sexual meaning and desire, and enable individuals to interpret their own and their partner’s behavior” (Ryan 775). Therefore, sexual scripts are important to analyze in order understand how individuals perceive and evaluate different types of sexual contact, especially how they determine what constitutes non-consensual sex (Carrol and Clark 2006). In their comprehensive research on rape scripts, Carrol and Clark pulled from a variety of previous research on sexual scripts and summarily cited, “researchers have noted that one’s rape script can influence a number of processes such as perceptions of sexual intent (Lenton and Bryan 2005), the types of precautionary and resistance behaviors employed (Hickman and Muehlenhard 1997 Norris et al. 1996), victim blame (Frese et al. 2004), and the labeling of experiences of unwanted sex (Bondurant 2001; Kahn et al. 1994)” (Carrol and Clark 2008 p. 616).

Sexual scripts can be divided into specific categories; the common sexual scripts include “hook-up,” “seduction,” “rape,” and “acquaintance rape.” However it’s important to note that individuals don’t always view these categories as separate and distinct, and that some categories

have a variety of scripts that fall within them. In some studies, individuals would describe real rape scenarios when asked to write an acquaintance rape script (Clark and Carroll 2008, Turchik et al. 2010) and other individuals did not seem to realize the possibility that rape could occur within a casual setting, such as within a hook-up scenario. Carroll and Clark also found that there are several types of acquaintance rape scripts including “the too-much-to drink” scripts, the “man-is-ready-for-sex” scripts, and the “friends gone-too-far” scripts (2006).

Although individuals now acknowledge a variety of sexual scripts, and recognize that acquaintance rape is a possibility, many individuals persist in distinguishing between “real rape” and “acquaintance rape.” One vivid example of this can be seen in various letters of support for Brock Turner, a Stanford student found guilty of sexually assaulting a woman after a fraternity party in 2015. Turner’s case, and the letters of support written for him, will be discussed in more depth in Chapter 4. However, a major theme of the letters was an attempt to excuse Turner of his actions because of the party culture at Stanford. Because Turner had met the survivor at the party that same night, and both had been drinking heavily, the various defenses of Turner’s actions cited alcohol, party culture on campus, and the woman’s own responsibility in her choice to drink and “flirt” with Turner. One letter sent to the judge of the case as defense of Turner’s character was written by Leslie Rasmussen, a 20-year-old childhood friend of Turner’s. As explanation for why Turner should be found innocent Rasmussen writes:

...where do we draw the line and stop worrying about being politically correct every second of the day and see that rape on campuses isn’t always because people are rapists....This is completely different from a woman getting kidnapped and raped as she is walking to her car in a parking lot. That is a rapist. These are not rapists. These are

idiot boys and girls having too much to drink and not being aware of their surroundings and having clouded judgment.

Rasmussen's statement shows that in the almost 30 years since Estrich's book argued that distinguishing "real rape" from "simple rape" was wrong and hugely problematic for rape reform, this distinction between acquaintance rape and stranger rape is still viewed as legitimate and a worthy defense for sexual assault. Significantly, she places blame on both parties having had "too much to drink" and making poor decisions, a common excuse to defend many campus rapes in which alcohol is often a factor.

Additionally, Littleton et al. have shown that currently, U.S. women's rape scripts often involve a violent attack by a stranger, and very rarely involved a man whom they had previously had sex with. The focus on violence as a necessary component of "real rape" means that even when individuals describe "acquaintance rape" scenarios there is a level of violence or force involved in the act. This causes women to classify non-physically violent sexual assaults as something else, something that is "not rape" (Ryan 2011). Also, if women included the ingestion of alcohol in their rape scripts, the focus was often on a rapist drugging a victim by putting something in her drink. The obvious problem here is that the more an individual's experience deviates from their idea of a "real rape" or even "acquaintance rape" the more difficult it is for them to see that experience as rape. This is especially problematic for college campuses, where sexual encounters are more casual, often fueled by alcohol, and occur between individuals who might only loosely be called "acquaintances." The significance of sexual scripts is in how ingrained they are in individual's understanding of sexual behaviors; Bechhofer and Parrot were writing in 1991 when they put forth their scenarios, but current research (Ryan 2011, Littleton 2006, Edwards et al. 2011) shows that sexual scripts are just as influential today in defining rape.

In addition to their long-lasting influence, the gendered content of sexual scripts has been consistent as well. Despite how different the sexual culture and climate is from 20-30 years ago, many of the double standards regarding gendered roles in sexual scripts remain salient (Frith 101). One of the most significant roles found within traditional sexual scripts is that of the male as the aggressor and initiator of sex, as well as the commonly held idea that sexual encounters inevitably end (or should end) in sexual intercourse. For men, the traditional script includes, “actively seeking out multiple sexual partners, uncontrollable sexuality once aroused, seeking sex as a source of pleasure for its own sake and actively initiating sexual activity.” Women, on the other hand, have scripts that include, “a desire for love or affection rather than sex, passively waiting to be chosen rather than actively seeking sexual partners, belief in the importance of male pleasure above their own and acting as sexual gatekeepers by restricting or resisting sexual activities (Byers 1996; Laplante et al. 1980)” (Frith 101). Sexual scripts then are both created and perpetuated by gender norms and stereotypes, and are collectively accessed by anyone participating in sexual activities.

Rape Myths

Rape and sexual scripts are also fueled by and embedded with “rape myths.” In 1980 psychologist Martha Burt was the first to define rape myths as “prejudicial, stereotyped and false beliefs about rape, rape victims and rapists”; a definition that has been cited by many researchers who have taken up the study of rape myths (Horvath and Brown 18). However, in 1994 psychologists Kimberly Lonsway and Louise Fitzgerald redefined rape myths as “attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women” because they felt Burt’s definition had too many terms that needed further explanation and because it didn’t capture the essence of what makes

something a “myth” clearly enough. Taking this a step further, psychologist Gerd Bohner argued that an issue with both definitions was the focus on the veracity and prevalence of the myths. He points that whether a myth is “false” or not can be difficult or impossible to prove (e.g. ‘many women secretly desire to be raped’) and prevalence can fluctuate so that if a myth was once “widely held” but is less so now it would, by definition, cease to be a rape myth. Therefore, a more current and reliable version defines rape myths as, “descriptive or prescriptive beliefs about rape (i.e. about its cause, context, consequences, perpetrators, victims and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women” (Horvath and Brown 19). This definition is comprehensive and allows for cultural and historical adjustments while also focusing on the oppressive power and purpose of myths in encouraging violence against women.

Although there are a multitude of specific rape myths (e.g. women lie about being raped) there are generally agreed upon categories that most rape myths fall into. Originally, there were four main categories of belief: those that 1) blame the victim for the rape 2) express a disbelief in claims of rape 3) exonerate the perpetrator and 4) allude that only certain types of women are raped (Forvath 19). In 1999 Lonsway and Fitzgerald expanded upon these categories and identified seven different categories under which rape myths fall:

- 1) She asked for it
- 2) It wasn’t really rape
- 3) He didn’t mean to
- 4) She wanted it
- 5) She lied
- 6) Rape is a trivial event

7) Rape is a deviant event

Rape myth acceptance has been studied extensively in the social sciences, though a variety of different methods have been used to measure their reception rate. In 1994 Lonsway and Fitzgerald found that between 25% and 35% of men and women agree with the majority of rape myths and that men are more likely to endorse rape myths (Edwards et al. 2011). In 2001 Buddie and Miller found that 66% of the college students they sampled (men and women) supported the existence of a combination of rape myths. Currently, though research indicates that the number of people who openly espouse rape myths has decreased in the last 20 years, researchers acknowledge that one reason for this is that many people may explicitly reject rape myths but still implicitly support them. In 2010 sociologist Sarah McMahon studied the connection between rape myth beliefs and bystander attitudes, and found that victim-blaming myths were supported by 53% of the students (out of a sample of 2,500). However, this support was mostly implicit: for instance, students strongly agreed or agreed that “If a girl acts like a slut, she is eventually going to get into trouble” though did not necessarily agree that rape is a woman’s fault (McMahon 9). This indicates that rape myths have not necessarily decreased, but they are acting more subtly in how they affect public perceptions toward rape. This could be due to the amount of discussion regarding rape, especially on college campuses; individuals still hold onto rape myths but recognize articulation of certain sentiments regarding rape is socially unacceptable.

The discourse of rape myths is where we can more easily see the implicit nature of these harmful ideas; rarely do individuals outright state a myth (e.g. “I really believe women want to be raped!”) but the comments and justifications for sexual assault do highlight how embedded these myths are (e.g. “I mean, she wouldn’t have gone to his house that night if she wasn’t

expecting *something* to happen...”). This is particularly problematic for rape cases, as compared to other crimes, as deciding what counts as “rape” as opposed to “sex” has little to do with an objective truth as to what occurred but has more to do with *what is decided to be taken as fact*. Peter Tiersma, in a brilliant article on the language of consent in rape law, aptly describes the situation as such:

There may not be much evidence that bears directly on the question [of consent]. In addition, the evidence is often contradictory: the man testifies that she consented, the woman testifies that she did not. Whether jurors should believe that evidence often boils down to credibility. Even after jurors conclude that certain facts are true, those facts by themselves may not answer the question of whether the woman consented. Rather, since consent is a state of mind, the issue usually must be decided based on inferences drawn from the evidence, and that evidence, as mentioned, may be limited and subject to dispute. Moreover, the strength of the inferences can vary greatly, and often the same fact can support directly contradictory inferences (Tiersma 86).

That is, both sides tell competing narratives of what occurred and juries or disciplinary boards must sift through these discursive events and determine the “truth” of *what really happened*. Unlike other crimes, like murder or theft, the act itself is usually not up for debate; generally, defendants admit to having sex with the victim. What is required is determining whether both parties consented to the act, and of course, a woman’s word on what happened to her is often not enough. The lawyers and defendants in these cases, to plant the seed of reasonable doubt, will rely on a variety of narrative and discursive themes in order to avoid a charge of rape. Moreover, as Tiersma alludes to, the inferences drawn by juries from the evidence are often based on their knowledge of culturally embedded rape myths.

To assess the effects of rape myths in a trial setting, In 2010, Yale law professor Dan Kahan conducted a mock-jury experiment to determine how juries make decisions in acquaintance rape cases. Kahan used the facts from the landmark acquaintance rape case *Commonwealth v. Berkowitz* to create a mock case for participants, who were then asked to analyze and assess it using different legal definitions of rape. Kahan found that changes in the law itself did not change individuals' minds, but "preexisting cultural worldviews" mattered far more in how the mock jurors interpreted the sexual encounter (Chamallas 295). Kahan's study confirms Tiersma's conclusions, that rape cases are decided based on the rape myths at the juror's (and judge's) disposal, and how successfully the prosecution or defense can use the facts of a case to tell a story that fits with what jurors already know or believe they know about rape. My analysis of the Brock Turner rape case in Chapter 4 confirms that Kahan's findings go beyond juries, and judges' preexisting cultural worldviews are significant in their adjudication of rape cases.

Rape Myth Discourses

In addition to the cultural discourses regarding "real" rape, researchers have also identified and categorized a number of other harmful discourses that surround women in rape cases. These discourses represent prevailing notions of how sexual relationships can and should work, and are frequently based upon myths about rape. Two of the most common types of rape myths that are seen within acquaintance rape cases are those that blame the victim and exonerate the perpetrator of the rape. Blaming the victim is the distillation of a multitude of discourses concerning women's behavior and the ways it encourages men's biological need to have sex. Concurrently, myths that exonerate rapists are often built around the same sorts of biological "facts" about men's sexual needs. Women are faulted for their actions that incur men's attention,

as they're seen as their choice, while men's actions are defended as instinctual—women have free will while men are beholden to biology. Additionally, the exoneration of rape perpetrators can be built upon myths about what a “real” rapist is.

For instance, in 1984, Wendy Hollway, a prominent critical psychologist with a focus in gender relations, gathered various accounts regarding sexuality that she categorized into various discourses. One of these was the “male sexual drive” discourse of which the main tenet was the idea that men's sexuality was directly produced by a biological drive to ensure reproduction (Hollway 273). This discourse promotes ideas of men as “animals” that find it extremely difficult to control themselves when they are sexually aroused. These discourses are often reproduced by legal experts as well. For example, in her book *Representing Rape: Language and Sexual Consent*, Susan Ehrlich found the “male sexual drive” discourse used as a defense for a man who had raped two women. In that particular case, the judge justified blaming women for men's behavior when he stated that, “Young men must be sensitive to a young woman's right to say no, and young women, in turn, must realize that when a young man becomes aroused during sexual activity beyond a moderate degree there is a danger that he will be driven by hormones rather than by conscience” (Ehrlich 57). Here, the judge is reifying several problematic views of rape and sexual relationships. First, the use of the word “sensitive” deprives women of agency; the judge doesn't say men need to respect when women say no, or cease all sexual activity when a woman says no. The word “sensitive” implies only that men should be *aware* of the fact that women can say no to sex. Secondly, the reiteration of the “male sexual drive” discourse serves to provide a defense for men who rape by letting the blame fall on their biological instincts instead of their own actions, while simultaneously putting the responsibility for preventing unwanted sex on the woman's shoulders. Though women are given this responsibility, the stripping of agency

by indicating that men need not respect women's refusal means this responsibility is an impossibility. This discourse is also insulting to men, as it assumes that when a man becomes sexually aroused he loses all ability to control himself and reduces his intellect to that of an automaton.

Havelock Ellis, one of the founders of modern sexology, was one of the first researchers to put forth the idea of a male sexual drive, basing it on Darwin's research on animals. His book *Studies in the Psychology of Sex*, published between 1897 and 1910, was very popular in the United States and established some detrimental theories regarding men and women in sexual relationships. In the third volume of his book Ellis positioned men as aggressive and competitive and women as docile and accepting of men's advances. Additionally, Ellis argued that "force was a necessary ingredient of sexual excitement for both sexes" and takes up Darwin's theories on natural selection to argue that men display their virility through being sexually aggressive. When women resist men's advances, they are testing to see how forceful the man can be, as "violence is the first virtue" in life (Sanday 127-128). Ellis then was the first to articulate that all women have a desire to be raped; an instinctive need passed down from their animal ancestries. Ellis's research, though flawed, was the basis for our current ideas regarding courtship as a game where women are prey and men are hunters, and gives unfortunate credence for the belief that all women secretly want to be raped and that force and coercion are necessary and expected in sexual relationships.

The idea that women fantasize about being raped was not ignored by legal scholarship, and law journals in the 1950's and 1960's included articles that claimed that stories of rape should not be enough to convict men because women frequently fantasized about being raped and could confuse these fantasies with reality (Freedman 273). Even before that, beginning in

1860, the law was overly concerned about women's veracity in rape claims. British Chief Justice Lord Hale made the frequently cited statement that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent" (Schulhofer 18). Courts were overly concerned that women might lie about rape, either as a way to excuse their choice to have sex, or to seek revenge on a man who had romantically spurned her. Because of this concern of false rape accusations, courts imposed strict standards of proof for rape that were unique. According to Schulhofer, "one requirement barred prosecution unless the victim had filed her complaint promptly after the incident [while] another rule barred conviction unless independent witnesses or physical evidence corroborated the victim's testimony" (18). Even as late as 1970, Lord Hale's warning about using special care to examine a rape victim's testimony was included in jury instructions for rape cases.

Due to this belief in the prevarication of women, utmost resistance standards became commonplace within rape law. Ehrlich points out that until the 1950's and 1960's in the United States, there was a necessary statutory requirement of "utmost resistance" that needed to be proven in order to convict for the crime of rape. The court required them to show evidence of physical resistance that persisted throughout the act to show they were unwilling. An explanation from a Nebraska Supreme Court case overturning a rape conviction says a woman "must persist in such resistance as long as she has the power to do so until the offense is consummated" (Ehrlich 66). The utmost resistance standard seems to stem from and encourage societal ideas regarding men's sexual drive, commonly viewed as uncontrollable and automatic (Estrich 101). When we compare it to male-sexual drive discourse, this further discredits and disempowers women within sexual relationships. Men must be "aware" that women can say no, but at the same time women are known both to desire rape and also lie about it. It's also informed by a

male-centric denial of rape reality; as men were the original creators of the law and legal standards they got to decide how a woman would/should respond while being raped, which was then codified into law.

These rationales were likely based on law-makers own experiences and personal relationships; the resistance requirement may have been more accurate as a description not of the reactions of women, but of the projected reactions of men to the rape of their wives and daughters. Men certainly would have violently attacked a rapist, and they wanted to believe that their wives and children might too (Estrich 31). These ideas were maintained in our laws for a substantial amount of time; New York first revised their utmost resistance standard in 1977 but simply replaced it with a standard of earnest resistance (resistance seen as reasonable considering the circumstances), which remained in place until 1982 (Daane 4).

Susan Brownmiller argues that since these are beliefs constructed and promulgated by men, who have historically maintained power in establishing our society, these ideas have enormous weight and influence on women themselves. It's not that women confuse fantasy with reality, but they're convinced that if they are raped it's because they secretly wanted it to happen, otherwise they would have stopped it. This leads to the myth that "no woman can be raped against her will" which Brownmiller argues "is not intended to encourage women to do battle against her aggressor—rather, it slyly implies that there is no such thing as forcible rape, and that it is the will of women to be ravished" (312). Brownmiller's conclusions demonstrate the circuitry of and entwinement of discourses and myths; men construct and perpetuate realities that disempower and discredit women, which becomes codified and limits how women perceive their experiences and their abilities to contradict these myths. This is due to the extensive number of rape myths and discourses that become institutionalized.

As an example, Hollway found that ideas such as Ellis's became seen as commonplace assumptions and were reproduced by experts, even psychologists. Alfred Kinsey, trained as a biologist, was one notable example of this when he published a book in 1948 that once again compared humans to animals in regard to their sexual natures. He saw sex as a "normal biological function acceptable in whatever form it is manifested" and emphasized that individuals should have as many orgasms as possible, regardless of social responsibility (Sanday 147). This emphasis on orgasm, "helped to give scientific legitimacy to the behavior of future generations of young males, who rather than regulating their sexual activity, would mindlessly sow their seed like animals without concern for pregnancy, their partner's consent, or her pleasure" (Sanday 146). This continued uptake of human sexuality as similar to animal reproductive pursuits was particularly injurious to women, as it not only explained and defended rape, it used scientific theories to justify it. This gave these discourses particular significance and subsequently made them difficult to dispel from the general public knowledge on sexual relations.

In his book *Rape and the Culture of the Courtroom*, Andrew Taslitz argues that one of the reasons rape law reform has largely failed is due to the cultural rape narratives that are constructed in the courtroom. He defines cultural rape narratives as "the culturally pervasive tales of proper intergender sexual behavior that affect the crafting of courtroom and rape narratives at trials" (19). Taslitz refers to these as "patriarchal stories" because they tend to favor male understandings of reality and only attribute positive values to behavior and attributes associated with men (8). He points out that in the courtroom, or any similar fact-finding genre, narrative coherence is valued very highly. Juries tend to believe stories that make logical sense to them, which hinges on whether the stories conform to their own perceptions of reality, or how

they compare to standard cultural stories. In rape cases, these stories revolve around how “proper” men and women should behave, and to whom rape happens (17). Within these stories are certain recognizable themes or roles that men and women fall into. Instead of relying on the facts of the case at hand, juries will attempt to identify these themes which they can then evaluate according to their cultural value, a process which may have nothing to do with the facts of rape.

Taslitz categorizes four main rape narrative themes that he sees consistently used in rape cases, which he calls “Silenced Voices” “Bullying” “Black Beasts” and “A Little More Than Persuading.” “Silenced Voices” refers to the idea that women should not express their needs or desires explicitly, but should always be coy and demure so as not to be seen as aggressive or manly. This works against women in two ways with rape cases: Women who articulate sexual needs or pursue them openly are seen as promiscuous, yet refusing sexual intercourse makes them a “tease.” By expressing their sexual needs they should be prepared for the inevitable response by men (the male sexual drive discourse) and therefore are consenting to sex, but by “teasing” men are also deserving punishment. Both add up to a woman not really being raped. In addition, if a woman refuses to play the coy cat and mouse game of flirting, and clearly articulates her desire not to have sex, she’s often seen as aggressive, aloof, or a “bitch,” which can make her unsympathetic to a jury.

The theme of “bullying” encompasses the idea that men are naturally aggressive, that this is a valuable trait, and that this aggressiveness is about attainment, or winning and losing. Men therefore are allowed to demonstrate an extreme amount of aggression and force and are assumed to understand many aspects of sexual relationships as parts of a game that can be won or lost. Many men assume aggression is a necessary part of masculinity, and therefore any aggression in sexual relationships is part of fair gamesmanship, not a sign of force or bullying. In

addition, men assume that women are aware of the rules of the game of sex, and therefore interpret acts such as drinking heavily, dressing provocatively, or following a man back to his house as tacit consent to the inevitable conclusion of sexual intercourse (Taslitz 25).

“Black Beasts” involves the extremely racist view of black men as animalistic sex fiends that only want to have sex with white women and oftentimes have to resort to force to guarantee their satisfaction. Finally, “A Little More Than Persuading” defines rape as seduction. Since a “proper woman” is not supposed to articulate her sexual needs, and is required to act modestly and demurely, there’s an understanding that she must be “taken” sexually. Violence or force toward a woman is helping her to get what she truly wants but cannot articulate herself. This narrative contributes to the idea that “no” doesn’t always mean “no” and encourages men to persist in their efforts to have sex with a woman even after she has refused multiple times (Taslitz 33).

Because of the ambiguity and tacitness culturally embedded in women’s responses to sexual advances, in the 1970’s rape prevention programs began instructing women to “just say no” and emphasizing that “no means no” when it comes to sex. However, Celia Kitzinger and Hannah Frith used conversation analysis (CA) to show that the date rape prevention programs that tell women to “just say no” in response to unwanted sex are ignoring “culturally normative” ways of doing refusals. They show that in ordinary social interactions refusals are more subtle than direct and emphatic—pausing, hedging, and weak agreements are all commonly accepted refusal signs (181). Their research stems from the perceived difficulty for women to “say no” to sexual advances, and proves that both men and women understand and utilize a wide variety of methods to refuse or decline unwanted sex. Men who claim they don’t understand an indirect refusal are “claiming to be cultural dopes” and are admitting to “an astounding and implausible

ignorance of normative conversational patterns” (181-182). Additionally, a “no means no” standard ignores the physical and psychological limitations of the rape act itself, as many rape victims find themselves “frozen with fright” and unable to resist or offer verbal objections (Chamallas 292).

This research indicates just how intertwined the discourse of rape is to the act of rape itself. When seen in light of the “male sexual drive” discourse, the reason for the insistence of “just saying no” might be due to the perceived difficulty in getting a man to stop pursuing a sexual act because of his biological drive--once a man’s sex drive is initiated he may lose all cognitive ability to understand alternative ways of refusing sex. As the researchers show, neither of these discourses or linguistic strategies actually reflect reality, but are continually relied upon casually and institutionally. The narrative coherence of the rape story relied on in many rape cases also fails to take into account the reality of what it’s like to be raped, so legal standards for refusal are often impossible for women to meet. Ehrlich explains that “the adjudication of sexual assault cases continues to be informed by culturally powerful interpretive frameworks that legitimate male violence and reproduce gendered inequalities” (Ehrlich 645).

One such framework that has been frequently relied on in rape cases has been termed the “Patriarchal Logic of Sexual Rationality” by Gregory Matoesian in *Law and the Language of Identity: Discourse in the William Kennedy Smith Rape Trial*. Matoesian analyzes the famous rape trial and argues that despite what law in practice is supposed to be, our trial system is adversarial and the focus is really on winning or losing, instead of truth or falsity. Due to this, lawyers use a variety of linguistic and rhetorical strategies to “win” their case that may misrepresent the reality of what happened. Matoesian argues that the logic used in rape cases is male-centric; instead of using gender-neutral criteria to determine consent or non-consent all

accounts are evaluated through how the man could have understood or interpreted the act. This is backed up by other social science research that indicates, “men tend to interpret women’s behavior in a sexualized way, seeing seductiveness and sexual receptivity when women are likely to see only friendliness and sociability (Chamallas 303).

In addition, women’s actions are compared with men’s actions in initiating or refusing sexual activity, despite the fact that men and women are differently situated socially in terms of sexual relationships and behavior. This has the effect of forcing women’s accounts and stories of rape to fit into a particular mold or else be deemed “illogical.” However, the female logic is not in essence irrational, it’s only deemed irrational when seen through a male point of view. This male-centered view of rape becomes synonymous with a “genuine” rape account, and thereby erases the woman’s view of rape as valid legal knowledge within the courtroom. Louise Ellison and Vanessa Munro cite a variety of research that illustrates the ways defense lawyers portray normal behaviors of women as inconsistent with a “genuine” rape complaint, such as the delay in reporting an assault, a lack of physical resistance or injury during an attack, and even their demeanor while recounting events at trial or their behavior in reporting the rape to the police (281). These interpretive frameworks are not only used within the adjudication process, but also in constructing rape laws themselves.

Another way these ideologies and rape narratives have come into being is due to the burden of proof and definition of consent. Because the proof of sexual crime or consent is based on a woman’s actions instead of man’s, this requires a judge or jury to evaluate the woman’s actions and determine if they indicate her willingness to participate or not. This is impossible to determine definitively, because human behavior does not always match with intention or desire, which is especially clear in rape cases where women may feel threatened or in danger, so they

unwillingly consent to sex to avoid violence (Tiersma). Because this is difficult to determine, a number of different behaviors have been used to determine consent, such as whether the victim was drinking, dancing, dressed a certain way or demonstrated being sexually experienced as indicated by living with a boyfriend or taking birth control (Chamallas 302). Of course, feminist researchers and commentators have pointed out that these behaviors may have motivations behind them that have nothing to do with sex, yet they continue to be viewed as illustrations of consent.

Tiersma recommends redefining consent in rape law to include the defendant's motivations as well. He argues that one of the problems with consent in rape law is the lack of distinction between voluntary and involuntary consent. Women may "consent" to sex involuntarily, or their behavior may be interpreted according to sexist and gendered logic as "consenting" but that in no way should indicate the sex act is consensual. Instead, Tiersma suggests defining consent to require the defendant can prove he clearly received consent from the woman, or that he can prove that consent was given willingly and not under threat of violence or intimidation. This neutralizes the issue of consent because it assumes the woman may have consented (though it may have been involuntarily) and requires the man to prove that he knew without a doubt that her consent was entirely voluntary.

Affirmative Consent and The Campus Rape Crisis

Redefining consent the way Tiersma suggests is also known as "affirmative consent" and has been promoted recently as the new standard across college campuses. Under an affirmative consent model, consent can no longer be implied by the absence of a no; there needs to be proof of verbal consent, and the initiating party is required to prove they knew their partner was consenting. One of the most famous schools to instate an affirmative consent standard is Antioch

College, which was the first college to institute an affirmative-consent standard when they created their Sexual Offense Prevention Policy (SOPP) in 1991. According to this policy, consent is defined as “the act of willingly and verbally agreeing to engage in specific sexual conduct” where consent must be given for each sexual activity, with the person initiating the sexual activity responsible for verbally asking for the other person(s)’s consent (Antioch College Student Handbook 37). The National Center for Higher Education Risk Management, an organization that instructs colleges on health and safety issues, has recently said that more than 800 colleges have adopted or already had similar affirmative consent-based policies. In addition, California, Connecticut, New York and Illinois have all passed statewide affirmative consent laws, while 23 others have affirmative consent standards under consideration (Affirmative Consent.com).

The reason for these reforms is due to the “Dear Colleague” letter that the United States Education Department and its Office for Civil Rights (OCR) issued in 2011. This letter was in response to what has been termed the “college rape crisis” due the overwhelming number of rape cases that universities have mishandled. This letter stated that Title IX of the Education Amendments Act of 1972 also covered sexual violence, which they defined as a form of sexual harassment, and specified how schools that received federal education funds must respond to allegations of sexual assault on their campuses. Previously, Title IX prohibited “discrimination on the basis of sex” in education programs, and was enacted to ensure that all students received equal opportunity for education (NCWEG report). However, Title IX had not been explicitly interpreted to regulate how allegations of sexual assault were handled on campuses.

According to Russlyn Ali, the Assistant Secretary for Civil Rights at the time, the letter was meant as guidance that “elaborates on mandates that colleges have previously misunderstood

or not adhered to. While there are no brand-new regulations, it is expected to clear up some confusion about a few of the more vexing requirements that have long confounded colleges” (Grasgreen). That is, though some expressed concern over the legality of the requirements, the OCR maintained the letter didn’t introduce any new requirements, but simply made clearer the current expectations under Title IX in regards to sexual violence. Largely summarized, the letter specifies that each institution receiving federal funds must:

Disseminate a notice of nondiscrimination to students, parents and employees, designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX and adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints (Grasgreen).

Additionally, it required that colleges use a preponderance of evidence standard in sexual assault cases, which amounts to deciding if it “is more likely than not” sexual violence occurred, instead of the “clear and convincing” standard (Ali 11).

Although the “Dear Colleague” letter did not require affirmative consent standards in particular, the purpose of any campus instituting an affirmative-consent standard is part of the attempt to respond to the letter’s ultimate goal to end sexual violence on campus while also creating a more positive culture of consensual sexuality. Before affirmative consent standards, the dominant standard was “no means no.” If a woman said no, or indicated resistance to the sexual activity, then the sex was considered nonconsensual and therefore rape. However, with such a standard, the enormous gray area that can exist between a strict “yes” and “no” was allowed to be interpreted as “yes”; unless there was an explicit “no,” consent was implied. “Yes means yes” completely redefines that gray area. No longer can silence count as consent, as only

an explicit “yes” can serve as consenting (Kimmel and Steinem). The idea behind affirmative consent standards is that they emphasize the importance of women’s sexual autonomy, placing the responsibility on the initiating party (Chamallas 293). Redefining consent in this way is intended both to give women more sexual autonomy, as their consent can no longer be tacitly assumed, as well as more protection and assistance in getting their rapists to be held accountable for their crimes.

However, as I’ve shown previously in this chapter, the social attitudes and subsequent discourses of rape does not always mean that a change in law means a change in practice. Rape reforms are consistently hindered by judges, jurors, and elected officials who are influenced by ideas from outdated behavior codes. As Stephen Schulhofer explains in his book *Uwanted Sex*, “social attitudes are tenacious, and they can easily nullify the theories and doctrines found in the law books. The story of failed reforms is in part a story about the overriding importance of culture, about the seeming irrelevance of the law” (17). Though writing this in 1998, Schulhofer’s point is confirmed by a 2013 article by Lucinda Vandervort, Professor of Law at the University of Saskatchewan, who argues that even when affirmative consent is the legal standard, “the legal requirement that consent be voluntary and affirmative is often ignored, and as a result many decisions about what does and does not constitute sexual assault are not based on the law but on traditional cultural paradigms, especially stock stories about ‘seduction’ and ‘enticement’” (146). Vandervort argues that even when experts in law, such as lawyers and trial judges, encounter affirmative consent standards they ignore the rule of law and instead make decisions based on cultural understandings of sexual relationships. Furthermore, Vandervort’s conclusions are backed up by a number of studies over the past 30 years on rape trials in the

United States that have shown that a variety of harmful narratives regarding women and their behavior in sexual relationships are created and perpetuated within rape and sexual assault trials.

On college campuses, these discourses and cultural worldviews are even more dangerous, due to the procedures that schools rely on to assess rape allegations. Often, universities handle rape cases within their own institution, applying student codes of conduct as standards of assessment. Most schools have some form of a disciplinary board which hears cases of student misconduct; these issues vary from cases of plagiarism and cheating to sexual assault. Disciplinary boards in particular, made up of faculty and students who often have little to no experience evaluating sexual assault or rape crimes, are more likely to rely on these harmful “stock stories” or inaccurate and gendered understandings of sexual relationships when ruling on rape cases. Many disciplinary board panelists lack basic training in assessing rape and sexual assault claims, and Senator Claire McCaskill, a Missouri Democrat who has investigated the quality of campus rape investigations, found that out of a surveyed 440 colleges and universities, one-third had failed to properly train officials adjudicating claims (Bogdanich). This fact, coupled with Vandervort’s and others’ conclusions regarding affirmative consent standards in criminal cases, makes it especially likely that these cases are evaluated on cultural understandings and assumptions about sexual relationships instead of by how the facts of the case meet the standards of the policy. Ultimately, many rape allegations are dismissed because campus administration and disciplinary committees still rely on a mix of rape myths and traditional sexual scripts that they use to determine “proof” that consent was or was not given, often to the women’s detriment.

Current Campus Climate

One reason for the dismissal of rape allegations on campus has to do with the campus climate of many universities, which often includes a prominent “hook-up” scene. “Hook-up” culture promotes non-monogamous and casual sexual relationships, and is customarily linked with “party culture” which prioritizes excessive consumption of alcohol. Because of these overriding cultures, most college rapes are acquaintance rapes and are subject to the various myths and discourses evaluated previously. Additionally, as I explore in more depth in Chapter 4, acquaintance rape cases that involve alcohol or began as a casual “hook-up” tend to be dismissed as a “gray rape,” which is a sexual encounter that falls somewhere between rape and not-rape.

In her book “Unhooked: How Young Women Pursue Sex, Delay Love and Lose at Both,” published in 2007, journalist Laura Sessions Stepp follows a group of college women to discover exactly what the college “hook-up” scene consists of. Through extensive interviews with college women, coupled with her own observations of their behavior, Stepp defines hooking up as:

[It] can consist entirely of one kiss, or it can involve fondling, oral sex, anal sex, intercourse or any combination of those things. It can happen only once with a partner, several times during a week or over many months. Partners may know each other well, only slightly or not at all, even after they have hooked up regularly. A hookup often happens in a bedroom, although other places will do: dance floors, bars, bathrooms, auditoriums or any deserted room on campus. It is frequently unplanned, though it need not be. It can mean the start of something, the end of something, or the whole

something... Feelings are discouraged, and both partners share an understanding that either of them can walk away at any time (27).

Stepp's research shows that "hook-ups" are by definition, a fluid and ambiguous concept. They can run the gamut of relational intimacy from quasi-stranger to good friend, and this relationship does not necessarily dictate the level of sexual activity that might occur. In fact, hook-ups tend to prioritize a lack of relationship between sexual partners, instead of encouraging consistent or emotionally meaningful sex. Lisa Wade, a sociologist and expert in college hook-up culture, has found that:

In today's hookup culture, developing an emotional attachment to a casual sex partner is one of the biggest breaches of social norms... there's a dichotomy between *meaningless* and *meaningful* sex, and students have to prove that they're not emotionally attached to their sex partners, and in fact that they care *less* than the other person (NPR).

Both Stepps and Wade have found that although students are not having more sex than college students were 20 or 30 years ago, their attitudes toward sex have changed. They more frequently engage in intimate moments with people they don't know well, and social norms dictate they eschew emotional connections—this can serve to encourage ambiguous and confusing sexual encounters because individuals may hide their true motives or experiences when it comes to these relationships.

Additionally, when a successful hookup (as in Stepp's use of the term), also means demonstrating a disaffectedness toward the encounter, individuals can come to see sex as a depersonalized act, failing to care about or engage with their sexual partner's feelings. This is important to recognize in two ways. First, it represents a social hurdle that can make affirmative consent standards particularly difficult to implement successfully. The campus culture prioritizes

impersonal and unemotional sexual encounters, which in some ways discourages communication between hook-up participants. If you have just met someone at a bar and have brought them back to your apartment to “hook-up” you may be less inclined to concern yourself with their feelings, simply because you have no real relationship to speak of. Therefore, the sorts of check-ins that affirmative consent standards ask for (where the initiating party continually asks or confirms that their actions are desired by their partner) may be ignored. Secondly, this culture influences other types of communication between those engaged in hookups, especially within the context of social media. A woman who has a sexual interaction that made her feel uncomfortable may already struggle to identify it as rape, and may further conceal her feelings because of this social standard curated by hook-up culture. Therefore, though they are frequently used in assessing the veracity of rape claims, text messages and other social media interactions between a rapist and the person who was raped may not give an accurate picture of what transpired between them. Therefore, college hook-up culture not only limits the type of sexual relationships that are possible but also the ways in which men and women talk about these relationships.

Overall, rape myths and rape scripts have altered our understanding of rape, as well as our laws regarding sexual assault. The relationship amongst rape myths, and the scripts and discourses that are produced from them, is multi-faceted and complex, and not easily recognizable due to their pervasiveness. However, it’s necessary that we separate fact from fiction within our legal system as well as our culture, as eradicating rape myths from our discussion of rape is an essential element to improving rape law reform and society’s treatment of rape victims. Though many focus on changing the laws themselves, this discussion has again shown how legal policy does not always match the discourses surrounding the crime itself. We must understand how significant our cultural attitudes of rape are to our society’s rape crisis, and

to examine exactly how and why these attitudes crop up in discussion about rape. In the following chapter, I look at two prominent “gray rape” cases from the past several years in order to tease out the exact ways in which rape myths come to affect campus sexual assault cases.

“Gray rape” cases tend to be more conducive to rape myths because of their similarities in many ways to consensual sex scripts, so they are less likely to be seen as “real rape” and are therefore defended and excused as “not rape” in a variety of ways.

Chapter 4: The “Gray Rape” Discourse: When Rape Isn’t *Really* Rape

In this section I build upon the previous chapter’s discussion of rape discourses by examining two prominent campus rape cases and analyzing the ways that rape myths were used to both assess narratives of rape and defend alleged rapists. Each of these cases illustrate how prevalent rape myths are in evaluations of rape and demonstrate the subtle and explicit ways they inform judicial decisions and campus disciplinary proceedings. I use the term “gray rape” to refer to these cases, as each was framed as a “hook-up” in order to mitigate the assault in order to assess it as “not really rape.” The case of Brock Turner in particular shows how the discourses of gray rape work to distinguish acquaintance rape from the legal definition of rape, and prove that even legal experts are not immune to the effects of rape discourses.

Gray rape is a term popularized by Laura Sessions Stepp in 2007, in an article she wrote for *Cosmopolitan* magazine. In that article, titled “A New Kind of Date Rape,” Stepp defines gray rape as “sex that falls somewhere between consent and denial and is even more confusing than date rape because often both parties are unsure of who wanted what” (Stepp). In Stepp’s description, “gray rape” is differentiated from “date rape” because it’s more confusing—the defining aspect of gray rape is that some element of the situation, often a miscommunication about partial consent or alcohol, made the sexual encounter unclear in the participant’s eyes. Stepp states that, “many experts feel that gray rape is in fact often a consequence of today’s hookup culture: lots of partying and flirting, plenty of alcohol, and ironically, the idea that women can be just as bold and adventurous about sex as men are” (Stepp 2007). Gray rape is often used to describe sexual encounters where one or both individuals involved were intoxicated and can’t remember exactly what happened. However, gray rape usually involves some element

of consent; a woman may remember willingly kissing a man on his bed and enjoying it, but have been too drunk to remember the next day if she consented to sex or not after that.

One problem with the phrase gray rape is that it is rarely used by those who have experienced it, and when it is, it's generally used to defend questionable choices made while drinking, often by men. In an article on XOJane, a lifestyle website for women, writer Marianne Kirby aptly defines its usage as:

Gray rape can be a problematic term -- some people use it as a label for rape that they don't consider 'real' or 'as bad as real' rape. I use the term here to mean the kind of encounter that people sometimes have where consent is not given but it is assumed; it's a term used to describe 'nonstandard' sexual assault and, in some ways, it is a weasel term to cover the conflict we feel about consent (Kirby).

Kirby's assessment perfectly sums up the problem with the term "gray rape"—it's often used to diminish sexual assault as "not real" because there may have been partial consent and then full consent was assumed, especially when in the context of a hook-up situation. Gray rape is another way to justify sexual assault and place blame on women; the logic being if she was drinking and consented to some type of "hooking up" (in whatever form that takes), then she can't claim rape after intercourse occurs. This is a slippery slope argument, and one that relies on several myths to be justified; men as unstoppable sexual forces, women as secretly wanting sex without consenting to it, and, in the absence of extreme resistance (and with the addition of partial consent) rape isn't really rape.

Kirby puts forth a reason for why we need to have such a term when she writes, "It seems like no one wants to call gray rape just plain rape because then it's really serious. We'd have to talk about why it is so damn common for women to wind up in sexual situations they don't really

want to participate in but feel they cannot refuse. We'd much rather just call it bad sex and move on.” What gray rape really describes is our insistence in clinging to the Kinseyian and Elliseque notions of sexual relations mentioned in the previous chapter; our culture can't fully accept the idea that women should have total agency when it comes to their bodies, and how that necessitates a change to our traditional sex scripts. Our sexual culture makes consent extremely complicated for women, despite its constant assurance that women have the right to say no. Kirby's article discusses various situations where women feel like they can't say no to sex, and participate in sexual activities they don't want to. Women may engage in unwanted sex due to their desire not to cause a scene or hurt someone's feelings, because they feel like it's required of them after a date, or because they aren't conscious enough to refuse. Women may feel like they don't have the right to say no to sex after they've said yes before, or feel responsible or beholden to men's sexual desires because of something they did to encourage them (flirting, dressing provocatively, etc). Not all of these situations would qualify as rape, of course; a woman can soberly and affirmatively consent to sex with a considerate and respectful partner out of a feeling of obligation instead of desire and we wouldn't call it rape. However, gray rape is used to describe such a multitude of sexual encounters that it makes synonymous examples of sexual assault with “bad” or “regrettable” sex, which once again allows for the delimitation of “real” rape and “simple rape” aka “gray rape.”

For instance, Meghan Daum, a reporter for the *Los Angeles Times* makes this distinction in a 2015 article about rape culture when she writes, “at the risk (the guarantee) of being branded a rape apologist or worse, I'm going to say what many reasonable people have been thinking for a while: Violent rape is not the same as psychologically coercive sex, which in turn is not the same as regrettable sex, which is not the same as fielding an unwanted touch or kiss at a party.”

She places these scenarios on a spectrum, which she describes as ranging “from truly horrific to merely annoying” and goes on to argue that sexual assault activists are in the wrong to equate all of these scenarios as rape, as that diminishes from those who have “really” been raped. Although each of these scenarios that Daum describes include a lack of consent for a sexual act, and each represent a larger problem within our patriarchal society with respect to treatment of women, drawing attention to those facts are not her concern. Instead, our culture is one in which we enthusiastically focus on agreeing what *isn't rape* than discussing what is. The classification of gray rape does exactly that; dissimilar sexual experiences are determined to be ambiguous in some way and are then lumped together and subsequently dismissed as “gray rape,” immediately downgrading them from real rape. However, this insidiousness of gray rape—that it is one more way to defend and delegitimize sexual assault—is only successful when viewed within the cultural frames that embed it; our rape culture built upon rape myths and rape-supportive discourses.

Rape Culture Framing

In her book *The Everyday Language of Racism*, Jane Hill argues that disparities in economic, health, and social indicators between races in the United States has been caused by a “persistent culture of White racism” (Hill 4). This culture of white racism perpetuates inequalities between races, and affects not only white-dominate institutions (Hill mentions schools and health-care centers as examples) but also the everyday behavior of Whites operating on an individual level. Hill’s research is built upon the theory of a “white racial frame” first put forth by sociologist Joe Feagin in 2006, who defines it as “an organized set of racialized ideas, stereotypes, emotions, and inclinations to discriminate” (Hill 4). This “white racial frame” allows whites to discriminate against people of color in countless ways while also allowing them

to “render their practices invisible, and to tolerate or discount their effects” (Hill 4). By framing the world in a particular way, whites can witness discrimination against people of color without seeing it as unjust or wrong. The key of course, is making racist assumptions and stereotypes seem “common-sense”; they can be justified as not being racist because they are simply reality.

This frame is a useful model for considering how rape culture operates in our country, and helps to illustrate the pervasiveness of rape myths and the varying ways they affect women.

Historically, our society has been directed by a prominent rape-supporting culture that continues to persist today. The term “rape culture” originated in the 1970’s during the second wave feminist movement. The Encyclopedia of Rape defines “rape culture” as “one in which rape and other sexual violence against women and children are both prevalent and considered the norm...[they’re] accepted as inevitable and are not challenged” (Field 174). Rape culture is also defined as “a complex set of beliefs that encourages male sexual aggression and supports violence against women” (Field 174). A rape culture fortifies such beliefs by the promotion of rape myths, which work to excuse men for sexual violence and blame women for the sexual violence committed against them (Field 175).

Gender ideologies have developed from socialization with the opposite sex, and these gender ideologies/stereotypes inform our ideas regarding rape myths and rape scripts. These in turn define what is and is not acceptable or normal behavior regarding sexual relations, and are reaffirmed and promoted by the media in all its forms. In this way, rape myths and scripts become so commonplace and entrenched in our society that, regardless of their veracity and almost exclusively to the harm of women, they become the standard for evaluating all sexual conduct. They determine how rape is defined by the law, by judges, and by individuals. Because our society has been patriarchal, the “organized set of ideas, stereotypes, emotions, and

inclinations to discriminate” in regards to gender and sexual relations is unquestionably sexist in nature. However, much like the “white racial frame” allows discrimination to become invisible, this sexist worldview allows for a multitude of male-centric standards to go unnoticed, or to persist as social realities.

Hill uses the term “folk theory” from cognitive anthropology that’s used to “label the everyday understandings of the world, found in all societies, that are revealed by ethnographic analysis” (5). Folk theories are influenced by scientific theories, and in turn influence scientific theories. However, folk theorists, unlike scientists, tend to handle contradictions to their understandings of the world by “erasure”, a kind of inattention that makes contradictory evidence invisible” (5). That is, instead of updating their knowledge by incorporating the new information, it’s as if it doesn’t exist and becomes invisible. Folk theorizing also uses what’s known as “stipulative” or “ad hoc” explanations for contradictions. When folk theorists are introduced to evidence that defies their stereotypical understanding of something (like what “real” rape is), they determine that this example must be “untypical” of that category. This theorizing explains how “gray rape” and other rape alternatives come into existence; because it doesn’t look like what is taken as “real rape” according to folk theory of rape, it is seen as an “untypical” example, or ignored all together. Folk theories are not only resilient, they’re also extremely prominent in our culture. As Hill describes:

People use folk theories to interpret the world without a second thought. They are part of everyday common sense. But they are also more than this. Since common sense is valued, folk theories and categories are not only taken for granted, they are the objects of considerable intellectual and affective investment...To challenge this common sense is to become an oddball or a divisive radical (5).

We see evidence of this phenomenon in Meghan Duam's article; she's not only resilient to new ideas about what rape is, she also faults activists for attempting to expand our definitions of rape, claiming their attempts take away from "real" rapes. However, Duam's article is simply evidence of the larger problem--that there are a multitude of rape myths masquerading as truisms in folk theory, and they're confirmed, reinforced, and perpetuated by the rape culture frame our society currently fosters.

It's important to understand the relationship between "folk theories," "rape myths" and "rape-culture frame" for this discussion. For the purpose of this chapter, rape myths can be understood as a kind of folk theory that govern our understanding of sexual violence. Within a rape-culture frame, rape myths and violence against women flourish, but they are only one part of the frame. Other elements of a rape-culture frame would be the various discourses used to justify rape—rape apology discourses and gray rape discourses are examples. The frame also contains various folk theories that play a role in how we understand and evaluate sexual assault cases. These folk theories contribute to rape myths and support a rape culture frame, but they also exist outside of the frame. Folk theories related to gender and sex (e.g. biology determines gender) romance and dating (men ask women on dates), and sexual relationships (once men are aroused they *have* to have sex) are all examples of folk theories that influence rape myths and contribute to a rape-culture frame.

Gray Rape On Campus

The use of the term "gray-rape" is often employed in discussions of sexual assault on college campuses. This often has to do with the context of many sexual assaults; the party and hook-up culture that many see as synonymous with the college experience. One of the most well-known campus sexual assault cases in the past few years is that of Emma Sulkowicz, who

alleged that on August 27, 2012 she was violently raped by Jean-Paul Nungesser. Sulkowicz and Nungesser were both students at Columbia University, and had been close friends with an occasional “friends with benefits” relationship (Chapman). They had consensual sex twice their freshman year at Columbia, and during an initially consensual sexual experience at the beginning of sophomore year, Sulkowicz alleges that Nungesser “suddenly pushed her legs against her chest, choked her, slapped her, and anally penetrated her as she struggled and clearly repeated ‘No’” (Grigoriadis). Initially, Sulkowicz chose not to report the incident to Columbia because she was in shock over what happened and “just didn’t want to deal with it.” Additionally, she had been good friends with Nungesser and wanted to talk to him about what happened—which she made repeated attempts to do (Ryan). However, in April 2013 after these attempts failed, and after learning that Nungesser had assaulted two other women at Columbia, Sulkowicz reported the rape to Columbia’s internal justice system and eventually filed an official police report. The two other women who had been assaulted also filed claims to Columbia within days of Sulkowicz’s.

Columbia completed an official investigation into Sulkowicz’s allegations that took seven months and culminated in a two-hour hearing on October 29, 2013 at which both Nungesser and Sulkowicz testified. Ultimately, Nungesser was found “not responsible” in the case (Nungesser v. Columbia). In the other cases, he was found “not responsible” in one but “responsible” in the third. However, he was ultimately cleared of all three after he filed an appeal of the case in which he was found responsible, and the complaint was eventually withdrawn (Kaplan). It’s important to note that the complaint was only withdrawn because the woman who filed that complaint grew tired of fighting back against the proceedings, and by that time of the appeal had graduated from Columbia and simply wanted to put the whole ordeal behind her (Ryan).

The hearing panel that heard Sulkowicz's case determined there wasn't enough evidence to find Nungesser responsible. However, Sulkowicz argues that Columbia's investigation into her sexual assault was flawed and the panel made several errors in their decision-making. She became a symbol for anti-rape activists when she went public with her story as well as for her performance-art piece "Carry that Weight" in which she carried her dorm mattress around campus as a symbol of the failings of Columbia University to adjudicate her case fairly, and to bring attention to the larger issue of campus rape and how campus rape victims are treated (Kaplan). According to Sulkowicz, and reported by journalist Vanessa Grigoriadis, the panel that heard the case made several missteps:

One took incomplete notes of her story, writing that she was tipsy that night [Sulkowicz was almost entirely sober]. Adjudicators 'kept asking me to explain the position I was in,' she says. 'At one point, I was like, "Should I just draw you a picture?" So I drew a stick drawing.' She says one of the three judges even asked whether Paul used lubricant, commenting, 'I don't know how it's possible to have anal sex without lubrication first.'

Sulkowicz also took issue with the fact that the hearing was rescheduled twice, due to Nungesser's academic schedule, drawing out the experience for seven long months with no resolution.

Although transcripts of the hearing are not publically available, it's clear that the panel who handled Sulkowicz's rape allegation was not experienced enough to do so. Asking a rape victim how their rape "could be possible" due to the questioner's own lack of knowledge of the sexual act was hugely problematic, and represents the worst sorts of rape culture folk theory—assumptions about how sex "actually" happens that work to dismiss a victim's claims, as well as evidentiary logic rooted in rape myths. Instead of believing Sulkowicz's story, and requiring

Nungesser to prove that the sex was consensual, the panel put the onus on Sulkowicz to provide proof that her assault wasn't consensual—even requiring her to draw a diagram to demonstrate how the rape was physically possible the way she described.

As additional complicating factors, Nungesser offered up transcripts of conversations that happened through social media between himself and Sulkowicz, none of which were ultimately allowed in the hearing. The transcripts, according to Nungesser, proved both that “there was no evidence whatsoever that Emma’s attitude or behavior regarding Paul had changed after the alleged incident” and that Sulkowicz had a history of alleging sexual assault. Though not allowed as evidence, Columbia was informed about “their existence and content” (Nungesser v. Columbia 14). The goal in trying to introduce these as evidence was for Nungesser to prove that Sulkowicz was unreliable; that she often “lied” about sexual assault, that this time was no different, and that she couldn’t have been raped because a “real” rape victim would have had a negative emotional response after a rape and wouldn’t communicate with her rapist.

Nungesser’s attempt to discredit Sulkowicz by painting her as illogical and dishonest is a common strategy in acquaintance rape/gray rape cases (Ellison and Munroe, Matoesian). Many say that these rape cases boil down to an impossible “he said, she said” situation—there is no “proof” of the crime beyond whose testimony you want to believe. Although overly simplistic, there is an element of truth to this assessment, especially in cases where a claimant has come forward months after the assault. This is one reason why acquaintance rape trials can be so problematic and often depend on folk theories of sexual assault. In addition, because each side’s narrative is the focus of the investigation, instead of physical evidence, much attention is placed on the form and content of each narrative to assess its credibility. Therefore, an important

element to such “gray rape” cases is that of linguistic ideologies. In Hill’s book she places linguistic ideologies prominently within the structure of cultural frames, and defines them as:

Sets of interested positions about language that represent themselves as forms of common sense, that rationalize and justify the forms and functions of text and talk. They rationalize and justify what people understand to be the structures of their language (or languages) and the ways that language should be used (Silverstein 1979). They sort out language structures and ways of using language as good or bad, correct or incorrect, and link these with person who are thought to be good or bad, moral or immoral (Irvine 1989; Woolard 1998) (Hill 34).

Linguistic ideologies, or understandings about how people use language, therefore allow people to make character judgments on other’s uses of language. In addition, by examining linguistic ideologies we can better understand the cultural frame in which they are produced, and reveal folk theories of language. In rape cases, linguistic ideologies are used to compare testimonies of claimants and defendants and are often used to evaluate the strength of victims’ claims. One common way this is done is to evaluate what a woman said or did not say during the act; women who are raped are expected to protest in a direct and explicit way, put up a fight, run away from their rapist and never talk to them again. If a woman does not respond in this way, her account of the rape is seen as suspicious.

One of the reasons for this rape myth is the linguistic ideology of personalism. Hill writes:

Personalism holds that the meanings of utterances are determined by the intentions of speakers. In personalism, speakers believe something, and intend to communicate about it. In order to do so, they choose words that match their beliefs and that will therefore

best fulfill their intentions. Personalism is usually linked to a dimension of referentialist ideology that holds that the meanings of words are stable, determined in a baptismal moment by an authoritative source. That is, under this baptismal ideology of word meaning, speakers do not reshape the meanings of words, they choose them in order to correctly represent the world. Thus a word reveals the speaker's state of beliefs about the world, and also reveals the speaker's communicative intentions to assert some truth (64).

The idea of personalism puts the intention of the speaker as the most important part of a statement, and assumes that meaning is stable and can be definitively determined. It privileges discourse that is direct and straight-forward, and situations that can be clearly described in such language. It does not serve rape victims well as a folk theory in a rape-culture frame. A sexual assault and its aftermath can be extremely confusing and traumatic, especially if the rapist was an acquaintance. Especially in Sulkowicz's case, when her rapist was a good friend whom she had been very close to previously and had consensual sex with, the rape she experienced at his hands would be especially difficult to process.

For instance, in his book *Missoula: Rape and the Justice System in a College Town*, Jon Krakauer relates the experience of Kaitlynn Kelly, who was raped by an acquaintance in her dorm room. Although her roommate and her roommate's boyfriend were in the room at the time, when Kelly woke up to being digitally penetrated by her acquaintance, she didn't scream or yell. Instead, she repeatedly told the man to stop and pushed his hands away until he eventually left. When asked why she didn't do more to wake her roommate and get help, Kelly said, "I don't know. To tell you the truth I just don't know. I was very scared" (70). And then, to explain why she threw away her sheets that could have been used as evidence, she said "I didn't know what to

do. I just wanted to forget about it, like it didn't happen. It was really hard for me to even report it" (70).

In analyzing the situation, Kraukaer cites evidence from David Lisak, a clinical psychologist and renowned expert on acquaintance rape, whose research has shown that "when people are raped, the experience is so traumatic that it often causes them to behave in a wide variety of ways that may seem inexplicable"(70). Rebecca Roe, a Seattle lawyer who worked in the King County Prosecuting Attorney's Office from 1977 to 1995 and ran the Special Assault Unit, confirms Lisak's research. She explains that people who are raped often behave in ways that seem very bizarre to an outside observer, such as giving their rapist a ride home or continuing to socialize with him after the act. She references culturalization as a significant factor, "It was actually pretty common for women not to scream or call the cops in rape cases I prosecuted, at least partly because women aren't wired to react that way. We are socialized to be likeable and not to create friction. We are brought up to be nice. Women are supposed to resolve problems without making a scene—to make bad things go away as if they never happened" (Kraukauer 140).

The idea that socialization plays a significant role in how victims process rape is not insignificant, and it affects many different aspects of experiencing and reporting a rape. As shown previously, Kitzinger and Frith have argued that campaigns that tell women to "just say no" are unsuccessful because they contradict how individuals actually interact with each other; rarely do people directly say "no" to things, and instead try and soften a refusal through various discursive strategies. Of course, this is then used against women in rape trials—men are excused with "not knowing" a woman didn't want sex because her refusal wasn't direct, and laws required extreme standards of resistance to prove that sex was "really" unwanted. If we think

about socialization specifically within the hook-up culture that guided Sulkowicz and Nungesser's relationship, the interactions that occurred between them, which Nungesser used extensively to defend himself, are in no way a clear indicator of consensual sex. However, because of the rape-culture frame that Nungesser and other rape-apologists tap into, such discrediting practices have significant weight in rape cases and within the media.

For instance, Nungesser had over 16 pages of transcripts of conversations that had occurred between him and Sulkowicz over social media, primarily Facebook. Although he was not allowed to enter these into evidence at the initial hearing, the panel was informed of their existence and their content, which in all likelihood impacted their decision. Additionally, Nungesser later sued Columbia University for violating his rights under Title IX, and went to the media to offer up his side of the story to combat the impressive media coverage that Sulkowicz had after the hearing. While Nungesser was found not responsible, Sulkowicz had many supporters of her case, seeing it as emblematic of all that is wrong with how campuses handle rape cases, and Nungesser experienced a significant amount of bad press. Upon going public, the transcripts became public consumption, and he was allowed to use them as evidence in his lawsuit. Nungesser's use of the transcripts, and the response both by Columbia and the greater public to them, indicate they were very persuasive in discrediting Sulkowicz. This had everything to do with how Nungesser was able to frame their interactions; he and his lawyers painted a picture of a scorned woman, unreliable, irresponsible and promiscuous, out to get revenge on Nungesser because he had started turning his attention toward other women. These are all common narratives used to discredit rape victims, but Nungesser's most salient argument was how the interactions they had on social media after the rape clearly indicated that Sulkowicz was not upset or traumatized by her experience, which was proof that their sexual encounter was

consensual and not rape. Though not within the original hearing, looking to see how Nungesser's framing was taken up by the media, and used later in his lawsuit, gives great insight into how rape myths can greatly affect campus sexual assault hearings. In this instance, Nungesser relied on common folk theories of language, as well as victim-blaming rape myths, to successfully sue Columbia University and settled for an undisclosed amount of money.

In order to appreciate the purpose behind Nungesser's strategy, as well as its success, it's necessary to establish what he was suing Columbia for. The first part of Nungesser's claim reads:

This is an action for damages, injunctive relief and declaratory relief against Defendants Columbia University, the Trustees of Columbia University, Columbia University's President Lee C. Bollinger and Columbia University's Visual Arts Professor Jon Kessler (hereinafter sometimes collectively referred to as "Defendants"), for their acts and omissions with regard to Paul Nungesser in violation of both federal and state law which have significantly damaged, if not effectively destroyed Paul Nungesser's college experience, his reputation, his emotional well-being and his future career prospects. This case exemplifies the types of student on-student and teacher-on-student gender based harassment and misconduct that the Supreme Court has held is prohibited by Title IX of the Education Amendments of 1972...(Nungesser v. Columbia 1)

Essentially, Nungesser claims that, because he was found "not responsible" in the case with Sulkowicz, she should not have been allowed to publicly demonstrate against him. He is entitled to privacy and protection under Title IX rules regarding sexual assault hearings, and that was repeatedly violated. Sulkowicz filed a police report, which got Nungesser's name on the public record, and her performance art piece drew a lot of negative attention toward him, as well as her continued interviews in the media.

In order to make his claim, Nungesser could point out all the ways the University elected not to provide him resources and protection he was entitled to under Title IX, as that is what he is suing for. What he and his legal team chose to do was further try to discredit Sulkowicz's claims, despite the fact that he had already be found not responsible. In theory, this was to justify why Columbia should not have allowed Sulkowicz to protest publically on campus, and why they should have gone further to defend and protect him—if she made up the story, she was not entitled to protest the decision. One way to discredit a rape victim is to find contradicting evidence to their story; if a rape victim says she told a friend what happened to her, and that friend denies that the conversation occurred, that can be enough to find a victim's story unreliable. However, in absence of contradictory evidence, a more subtle method of delegitimation is the invoking of personalistic views of language—that speakers choose words to communicate their beliefs.

In Sulkowicz's case, this language ideology is used against her in two different ways. First, Nungesser attempts to prove that they had consensual sex with Facebook messages they exchanged after the rape, which occurred on August 27th. I have reproduced them here:

Aug. 29

4:10 pm Nungesser: *Small shindig in our room tonight—bring cool freshmen*

4:34 pm Sulkowicz: *lol yusss*

Also I feel like we need to have some real time where we can talk about life and thingz

4:34 pm Nungesser: *word*

4:34pm Sulkowicz: *because we still haven't really had a paul-emma chill sesh since summmmmerrrr*

9:33 pm Nungesser: *when are you guys coming through*

10:09 pm Sulkowicz: *I'll probs come at 10:45. Is that cool?0*

10:09 pm Nungesser: *sweet - yeah - you at the fencing thing.*

10:09 pm Sulkowicz: *Yeah I'm just gonna chill with them for a bit haha is ado a rager?*

10:10 pm Nungesser: *naah - a little too many guys right now haha - so bring some peepz.*

10:10 pm Sulkowicz: *Okay let them know I'll be der w dafemales soon.*

10:11 pm Nungesser: *for sure*
And get me that Michael josephs

11:06 pm Sulkowicz: *Ack are people still there? Heading over now.*

August 30th

4:55 pm Nungesser: *part II tonight*

August 31st

12:16 am Nungesser: *you're coming?*

12:25 am Sulkowicz: *lol i came and left already!!!*

12:50 am Nungesser: *lolcats - when were you here*
I dont believe you
its not the truth
to the tune of pretty women.

September 9th

6:34 pm Sulkowicz: *Wanna hang out a little bit before meeting tonight?*
Maybe you have your phone back, I'll text yaaa
Actually you're online
Or right after meeting I guess is fine too
Whatever I wanna see yoyououoyou
Respond—I'll get the message on ma phone

8:47 pm Nungesser: *lol sorry I was at the studio only saw this now*

October 3rd

Nungesser: *'oh hai*

*happy born day! you better be celebrating muchos, no?
also: donde estas tu i mi viva?
see i'm so desperate with out you, i even try to speak spanish,
anywho: merry happy days!"*

October 4th

Sulkowicz: *I love you Paul. Where are you?!?!?!?!?*

There is no evidence in these messages that would exonerate Nungesser of rape; neither Nungesser or Sulkowicz mention the sexual experience, Sulkowicz doesn't threaten to lie about it, or say anything that would contradict her story or encourage a disciplinary panel to take her claim as false. What Nungesser wants these messages to illustrate is that Sulkowicz appeared friendly toward him after the encounter, implying that a "real" rape victim wouldn't have behaved the way she did. In an article for the *Daily Beast* by Cathy Young, Nungesser explains that "it was very amiable; nothing was changed or different or weird or anything in her behavior." What this does is subtly invoke the personalism ideology; since Sulkowicz's words represent what she believes to be true, the absence of any negativity or trauma in her interactions with Nungesser is proof that nothing untoward happened between them. According to Hill, the folk idea of personalism often embodies the differentiation between "the head and the heart" in determining what is and is not true. Hill explains that:

The folk psychological concepts of "head" and "heart" emerge in three propositions: (1) the meanings of a person's words are determined by intentions that reside in a stable core of belief and thought, the heart; (2) the meanings of a person's words are inherent in the words themselves and speakers can be assumed to choose words that reflect their beliefs; (3) certain circumstances interrupt this connection between belief and meaning and can produce talk that reflects only an unstable and error-prone animating psychological locus, the head.

According to this folk belief, when Sulkowicz interacted with Nungesser online, her words betrayed only what she truly believed; Nungesser would have us think that meant consensual sex, otherwise her words would have reflected that “something was amiss.” However, to ascribe to this folk theory here means not only to take for granted several rape myths, it also requires a person to believe in an overly simplistic and linguistically inaccurate view of how language operates in a social basis.

First, to assume that social media exchanges clearly reflect reality or a speaker’s intent is to ignore the nuances of the genre of online communication, especially social media messaging. According to David Crystal, expert in internet linguistics, text messaging is a “relatively unstandardized mode of communication, prone to idiosyncrasy” (Crystal 61 2008). People who use instant messenger services, like Facebook chat, have “developed an evolving syntax that includes short-hand, acronyms, symbols, and other elements that constitute a unique lexicon, encouraging users to interact in ways not possible either in person or with other forms of electronic communication” (“7 Things”). Nungesser and Sulkowicz both use abbreviations, jokes, slang, misspellings, non-sequiturs, improper grammar, and excessive/no punctuation in their exchanges. The content of their messages often refers to people or places that are clearly familiar to them, but not to an outside observer. Although online communication can be concise and straightforward, it is often filled with linguistic hurdles that require outside knowledge to overcome—for instance, using slang and abbreviations requires knowledge that the other person you’re communicating with will understand your use of those terms. Additionally, without the use of complete sentences, full explanations of ideas or answers are not available, indicating a confidence amongst the communicating parties that context is not required for understanding.

Secondly, this was a private conversation between the two, which neither would assume would be seen by anyone else, meaning there may be missing information that an outside audience would need to truly understand the meanings behind the words. For instance, when Nungesser tells Sulkowicz that “there are too many guys” at the party he’s at for it to be a rager, this seems to rely on shared knowledge they both have that isn’t explicitly communicated. In fact, Sulkowicz seems to understand the slightly confusing request by Nungesser when he asks her to “bring some peeps”—that he’s asking her to bring female friends to the party to balance out the gender dynamics.

Conversations over social media, especially through a medium like Facebook messenger, have a fluidity to them. They don’t always happen all at once—the conversations included here happen over the course of several weeks—and they happen amidst other types of communication. Nungesser admits to having text message exchanges with Sulkowicz, as well as in-person interactions in addition to the Facebook exchanges. To then assume that the Facebook messages we see represent any sort of continuity ignores defining elements of the genre and its situation within this particular social context. Additionally, when Nungesser takes these conversations out of context—from both his established relationship with Sulkowicz as well as from other messages she sent, language patterns and habits are not easily seen. That is, we can’t take some brief snippets of Facebook messages as any indicator of how Sulkowicz “normally” interacted with Nungesser, in order to assess whether or not her responses were “different or changed” as Nungesser says. In fact, Nungesser takes advantage of the lack of context in his careful selection of messages.

For instance, in his lawsuit it’s claimed that Sulkowicz had an unhealthy romantic obsession with Nungesser, based on the amount of times she admitted to loving him. They paint

Sulkowicz as a scorned lover as a reason for why she may have falsified her rape claim. The lawsuit includes the follow messages, supposedly sent from Sulkowicz to Nungesser over the course of their friendship, all without any context or date. I have included them here in the same format they appear in the lawsuit:

wuv youuuu, "- "i miss and love you btw" - "Paul i really miss you - "i really miss you - "Paul I wuv you so much. Please stay w me foevah" - "paul I miss you so much" - "like u know when you tell people you miss them and you don't really mean it? - i actually mean it - I miss you so much - ahhh" - "pookie - i miss you - "I LOVE YOU - SO MUCH" - "I MISS YOU MORE THAN ANYTHING - "I love youuuuu" - "and l would LOVE to have you here -omg - we could smuggle" - "PAUL I MISS YOU PAUL I MISS YOU PAUL I MISS YOU PAULLL" - "DUDE I MISS YOU SO MUCH" "I love you Paul!!!!!!." (Nungesser v. Columbia 7).

Later in the lawsuit, an assessment is given of what these messages mean. The lawsuit states:

As is evident from Emma's Facebook messages to Paul during the summer prior to their sophomore year, Emma's yearning for Paul had become very intense. Emma repeatedly messaged Paul throughout that summer that she loved and missed him. She was quick to inquire whether he was in love with the woman he was seeing abroad. Thereafter, she continued pursuing him, reiterating that she loved him. However, when Paul did not reciprocate these intense feelings, and instead showed interest in dating other women, Emma became viciously angry.

Reading Sulkowicz's messages from a personalistic view, or to read them literally without any context, it could be argued that when she wrote "I love you Paul!!!" she truly meant that she had serious feelings for him. However, the overly casual way in which she uses the term "love," as well as the use of punctuation and capitalization, points more to these messages being friendly

missives, instead of declarations of serious feelings. In fact, Sulkowicz explains that her statements were often reciprocated: "Paul was one of my closest friends, and we had had consensual sex twice. We used to tell each other we loved each other" (Ryan).

In a larger linguistic context, for millennials, using the term "love" has become much more common within casual situations. According to a brief survey done by Amelia Diamond for the widely-respected ManRepeller blog, some say I love you often as "they see it as a happy reaction to honest emotions, one that doesn't need to 'mean' anything beyond a feel-good moment" and that "A huge majority of people spoke[n] to said that they say 'I love you' to all of their friends, close or not. It seemed as casual — and, paradoxically, as sincere — as a hug." Other examples given were people who say "I love you" to the pizza delivery man, or to their boss when they're given a raise. Without context or more information it's impossible to say for sure what Sulkowicz's intentions were with her effusive "I love you's" however, it's clear that the use of the phrase "I love you" in current culture does not necessarily indicate a pure romantic interest.

Furthermore, within hook-up culture, partners tend to avoid serious discussion of feelings, and attempt to demonstrate that they're not emotionally invested in their hook-up partner in order to demarcate the status of the relationship. In Sulkowicz and Nungesser's case, it's equally likely that Sulkowicz used "I love you" paradoxically--as a way to indicate she did *not* have serious feelings toward Nungesser, but only cared for him as a friend, as many of her generation use the term. Moreover, a person would feel comfortable frequently expressing love for another if they knew that it would be taken up correctly. If a person was facing a situation of significant unrequited love, as Nungesser's lawyers would have us believe Sulkowicz was, they would not continually say "I love you" in a serious manner—if anything, they might go out of

their way to avoid the topic out of a fear of rejection or revision to their current relationship. Therefore, it makes the most sense that Sulkowicz was using the term to express a platonic affection for Nungesser, and perhaps to emphasize the fact that the two were not in a serious relationship by overusing the term in casual conversations.

What is most interesting about the personalism language ideology is how it is used contradictorily in assessing Sulkowicz's allegation. If the folk idea of personalism was applied consistently, Sulkowicz would be credited with her genuine account of what happened to her, and her testimony of her experience would be given more weight. However, since our rape culture encourages continued skepticism of rape victims, especially those whose experiences adhere more to a "gray" rape script, those ideas take precedence over folk theories of language. Additionally, as rape is a crime, many approach a rape allegation with an "innocent until proven guilty" standard, which unfairly puts the legal focus on a critical examination of a victim's story, instead of the perpetrator's. Nungesser and his legal team use the personalism language ideology in two ways; they employ it to discredit her story, and to explain away how and why she might continue to profess her version of events as the truth.

In personalism theory, the concept of the "heart" is also synonymous with "truth" or personal authenticity. The folk association with the heart is that it guides genuine feelings that might defy logic—it can be intangible, and perhaps at odds with what a person knows is practical. Therefore, when a person "speaks from the heart" they're giving you their sincere thoughts and perspectives. However, your "head" is where logic resides—you can override your heart's desires or yearnings with your head. As we've seen, Nungesser and his legal team used this idea to discredit Sulkowicz by pointing out how she interacted with Nungesser online after the alleged rape. According to rape myths and rape scripts, firmly established in law and culture,

women should be extremely upset after rape; they should avoid their rapist, immediately go to the authorities to report the attack and certainly not interact with him on Facebook. However, in reality, this is not always how rape victims react. After her assault, Sulkowicz's reaction was to seek a conversation with her rapist, as she explains, "I was upset and confused. ... I wanted to have a talk with him to try to understand why he would hit me, strangle me and anally penetrate me without my consent" (Zeilinger). The interactions with Nungesser online show that multiple times Sulkowicz attempted to arrange a time to talk with him, and her reliance on friendly chitchat makes the most linguistic sense; it almost goes without saying that people do not respond well to accusations or anger. In order to encourage Nungesser to meet up with her, she interacted with him as she normally would, so he wouldn't be encouraged to avoid her.

Additionally, Sulkowicz admits to being confused and upset—having been raped by a good friend who then proceeded to behave as nothing significant had happened would be disorienting for anyone. Yet, because of the frame of rape culture that overshadows such cases, it's possible to see Sulkowicz's response as evidence of her guilt, especially when Nungesser's defense provides the plausible myths to support it; a scorned woman, out for revenge. Because her conversations with Nungesser were private and not public performances, they can be conveyed as representing her "heart" in the personalism ideology. Therefore, because her interactions seemed on par with her past conversations with Nungesser, this showed that in her heart she held no ill will toward Nungesser. Then, in order to explain away Sulkowicz's insistence that her story was accurate, so they could dispel any doubt that she might be telling the truth, Nungesser's lawyer Andrew Miltenberg made this statement to the press when asked about the lawsuit against Columbia:

Ms. Sulkowicz believes what she believes, and she's created this story for herself. The greater distress is at Columbia for allowing her to have on-campus rallies, allowing her to base her thesis on this, allowing her to essentially legitimize her story.... At this point, she's sort of a footnote (Kutner).

Here, Miltenberg makes several subtle moves to discredit Sulkowicz. First, he again casts doubt on Sulkowicz by stating that her story was "created," implying it was a kind of fiction she had creatively put together to achieve her ends. Secondly, by stating that "she believes what she believes" he carefully dodges faulting Sulkowicz for her story, and he implicitly articulates the "head" idea of the personalist ideology. Since your "heart" is where your true beliefs are constructed, and your head is where creativity and thought originate, the overall sense here is that Sulkowicz's story comes from her own mind, instead of being derived from her "heart." If we say of someone, "they believe what they want to believe" we are insinuating that their beliefs are false—that they are choosing to ignore facts in order to perpetuate their (flawed) version of events.

This follows the conclusions Hill drew from her own analysis of racist statements. In examining how personalism plays out within a white racial frame to defend racist statements, Hill finds the head and the heart dual discourses to explain why someone might *say* something racist, but not *really be* racist. Within rape culture and gray rape discourse, as we can see here, this ideology is used to convincingly explain why a rape victim's narrative is false, while still being able to use their other statements against them in defense of their rapist. It can be done subtly, while still being successful, because of the rape myths and scripts that are built into our rape culture frame.

People v. Turner

Another case that invoked both “gray rape” and the personalism language ideology in order to excuse a rapist’s actions was with Brock Turner. In this particular situation, it was strategically impossible for the defense to discredit the rape victim, however, they were able to use the context of party culture and hook-up culture, as well as several rape myths in order to excuse the behavior of the alleged rapist. Instead of using personalistic folk theory against the victim to discredit her, it was used to make Turner seem more sympathetic and genuine, allowing for his sentence to be dramatically reduced.

Brock Turner, who was a 19-year-old student at Stanford University and a member of the Stanford swim team, was found guilty in 2016 of “assault with intent to rape an intoxicated woman and sexually penetrating an unconscious person with a foreign object” after he was found thrusting on top of an unconscious female behind a dumpster on Stanford’s campus in January of 2015 (Miller). However, the judge involved in the case, Judge Aaron Persky, sentenced him to only 6 months in jail, of which he only served 3 months before being released (Grinberg and Shoichet). Unlike the Sulkowicz case, there should have been no issue of “gray rape” in the Turner case—the woman, who was in a serious committed relationship at the time, did not recall ever giving Turner consent, while multiple witnesses saw that the woman was unconscious during the assault did not regain consciousness until several hours spent in the hospital after the attack. However, because both Turner and the woman, referred to as Jane Doe, were drinking heavily and had met at a fraternity party immediately prior to the attack, Turner attempted to claim that Jane Doe had consented to sex, and he had observed her to be conscious and enjoying herself. Turner describes:

The next thing I realize is that we were both on the ground laying next to each other because it seemed as though she lost her footing heading down the slope and I went down

with her. We started laughing about it and I was just thinking of how much of a klutz I could be. I ask her if she was alright and she tells me that she thought she was. After this happened, we started kissing each other again on the ground on which we fell. When this started to happen, the thought of making it back to my dorm left my head. I thought things were going fine with [REDACTED] and that I just existed in a reality where nothing can go wrong or nobody could think of what I was doing as wrong. Never did I question the fact of where [REDACTED] and I were and where we should have been. I naively assumed that it was acceptable to be intimate with someone in a place that wasn't my room. Negating all these factors, I bring up the thought of sexual interaction with her. I idiotically rationalized that since we had been making out where each of us fell to the ground, that it would be a good idea to take things a step further since we were just in the heat of the moment at that location. I pull away from kissing her and whisper in her ear if she wanted me to finger her. She responds to me and acknowledges what I said with saying, "Yeah." Having heard her response, I decide to take her underwear off thinking that since it was established that I would finger her, the only way of accomplishing this was to pull down her underwear. After doing so, I began to kiss her again and finger her until I thought she was satisfied with the sexual interaction that had taken place based on her moaning and the way in which she held onto me with her arms on my back. While this was occurring, I asked her if she was enjoying what I was doing, to which she gave me a positive response. I stopped the fingering and began to move my hips against the upward movement of her hips, while I kissed her neck and ear mostly. At no time did it ever occur to me, or did it ever seem that [REDACTED] was too drunk to know what we were doing. I would not have done anything against anyone's will.

However, as previously stated, two (sober) witnesses, graduate students at Stanford, were present at the scene and described to police officers that Jane Doe appeared to be "laying on the ground [and] not moving" and "it looked like [she] was asleep or unconscious" (People v. Turner PR 09). When the witnesses approached Turner and Doe, one called out "hey!" to get his attention—when Turner saw them approaching he began to run away, until one of the witnesses chased after him and tackled him. The witnesses reported that Jane Doe did not respond to repeated questioning and did not wake up.

Although Jane Doe was found unconscious, and there were two witnesses who were able to not only identify Turner but were also responsible for apprehending him after he attempted to flee the scene, there were many elements of this case that Turner and his legal team were able to exploit to make this appear more like a "gray rape" than a "real rape." Turner's 11-page

statement to Judge Persky blames the “party scene” at Stanford as contributing to his actions:

I wake up having dreamt of these horrific events that I have caused. I am completely consumed by my poor judgment and ill thought actions...I've been shattered by the party culture and risk taking behavior that I briefly experienced in my four months at school... I know I can impact and change people's attitudes towards the culture surrounded by binge drinking and sexual promiscuity that protrudes through what people think is at the core of being a college student. I want to demolish the assumption that drinking and partying are what make up a college lifestyle. I made a mistake, I drank too much, and my decisions hurt someone. But I never ever meant to intentionally hurt [Jane Doe]. My poor decision making and excessive drinking hurt someone that night and I wish I could just take it all back (Jackson).

Throughout the trial, references were made by Turner's lawyer and by Turner himself about how much alcohol Jane Doe had drunk, how hooking up at parties while drunk was common behavior at Stanford, and that Jane Doe was experienced in this party culture. In his closing statement, Turner's lawyer states:

She's had more experience at college parties, maybe not fraternity parties but college parties, and she knows what it is to be in a blackout, because she's experienced it four or five times before...did she intend for what happened to happen? Of course, I don't think she did. However, that doesn't mean that she was not aware and conscious and thinking clearly and taking voluntary actions when she was with Brock Turner (Levin).

This statement distinctly relies on the conception of “gray rape”— that there are sexual situations that lie in-between rape and explicitly-given consensual sex that are not crimes. Since Jane Doe can't remember the experience (as she was unconscious) Turner can create a narrative of

consensual sex and blame the fuzzy contours of the hook-up on the alcohol both had consumed. The shifting of blame to alcohol and the insinuation that what had happened between them was “really” consensual, despite witness testimony to the contrary and Jane Doe’s own admission, is the epitome of “gray rape” discourse. When framed by our rape culture, as well as the defense’s careful inclusion of several rape myths used to excuse rapists’ behavior, Turner successfully created a “gray rape” script out of a textbook real rape script. Additionally, the Judge in charge of sentencing relied on numerous letters of support that were written for Turner, an excerpt of one which was discussed earlier, many of which alluded to rape myths or were dependent on the “drunken hook-up” rape script to defend Turner’s actions. Ultimately, Judge Persky justified his decision in one sense by using the personalism ideology, explaining that the claimant’s charge that Turner showed a lack of remorse was unjustified because Turner really did believe his version of the events. Persky stated: “I mean, I take him at his word that, subjectively, that’s his version of events.”

Before Persky got to the point of legitimizing the narrative of a rapist who claimed that he had consent from an unconscious woman for sex, he read many letters of support that friends and relatives wrote in support of Turner. They cover a variety of rape myths and illustrate how engrained the idea of “real” rape is in our culture, even across generations, occupations, gender, and education levels. Examining these letters for the rape myths they include is important, as these letters represent what the general population believes about rape, and indicates what myths and folk lines of reasoning are most persuasive in defending a rapist. Although there were several types of rape myths utilized in the letters, I have focused my analysis on the ones that appeared most frequently, and therefore represent the defining characteristics of the gray rape discourses found within this case, and I have organized them by category.

He Didn't Mean To/He Doesn't Deserve This

Brock Turner was hard-working, a champion swimmer, and all-around good guy, according to his friends and relatives. Almost every letter professed disbelief that Turner could have raped someone, and defended this belief by listing and elaborating on Turner's positive qualities. For example, one friend of Turner's described him as "Brock is one of the most humble people I know. He never gloated or wanted the attention when teachers congratulated him in front of the class; in fact, he almost seemed bashful. Brock is not one to believe that he is above the law or has any special privilege...He is extremely trustworthy, responsible, and compassionate" (Whalen). And two others wrote "If I were to describe Brock Turner's character in one word...I would choose the word gentle" (Ireland) and "I came to know a kind, loving, respectful, relaxed, silently hilarious, and determined individual" (Pocisk). The word "humble" in varying forms appeared in several letters to describe Turner, as well as the word "gentle." One reason for this could be because Turner was portrayed as entitled, unsympathetic, and sexually aggressive during the trial, but also because the crime of rape is one of power. Second-wave feminists, like Brownmiller or Griffin, first defined rape as "an act of domination denying the victim self-determination" and described how it is socially legitimated because of "a normalization of aggression in hegemonic forms of masculinity and the maintenance of patriarchal gender power relations" (Anderson and Doherty 21). Because of the prototype of real rape that lingers, it blinds people to the reality of rape, and who commits it. However, it also allows for a person's character to provide a defense for their alleged actions. If Turner's personality doesn't fit the mold of a "typical" rapist, then it decreases the plausibility of his guilt. Here, the word "gentle," which is arguably not an often-used adjective to describe a person's character, is used to combat the stereotype of a "real" rapist—an aggressive, masculine figure—

to prove that Turner would never rape someone because he doesn't possess those characteristics.

Moreover, the listing of Turner's attributes were often followed up by the author of the letter insisting that Turner didn't deserve his fate, because he had been such a great person for all of his life. For instance, Turner's guidance counselor wrote, "The verdict of Brock's trial broke my heart for him and for his family. In spite of what was said about him during that time, what I know to be true is that he is a young man of character, integrity, possesses great love and respect for his parents, honors his friends, seeks opportunities to help others, and is absolutely undeserving of the outcome" (Owens). Although letters of support are meant to argue for leniency in sentencing, and their purpose is to show the defendant in a positive light, many of Turner's letters went beyond that expectation and argued that Turner deserved leniency because he was actually innocent, or that he merited a much better fate than a guilty verdict. An ex-girlfriend of Turner's wrote, "You would think a close friendship of 8 years could predict something like this happening, but the type of person Brock is could never deserve this or do anything he has been convicted of in a thousand of his lives. I have never been so angry with God in all of my life, for instilling such pain on an undeserving soul." While Megan Davis, a friend of Turner's, wrote "...because Brock would never do something like that and nothing would come of it. Little did I know, I was wrong about his circumstances, because now I find Brock, an innocent man, fighting for his freedom." Despite the overwhelming evidence, and despite the fact that Turner went to trial and was found guilty by a jury, these women still insist that Turner is innocent and underserving of punishment, simply because *they know he's a good guy*.

Along with the myth of "real rape" comes the myth of the "real rapist." According to Kate Harding, a researcher of rape culture, "we believe there's one very specific type of rapist—

the kind who wields a weapon, attacks strangers with no warning, and leaves abundant evidence of violence on the victim's body—but not that some people deliberately rape their friends, girlfriends, wives, children, colleagues, or drunk new acquaintances” (Harding 4). Being a good person doesn't preclude you from committing a crime, yet our myths of what a “real” rapist is are so engrained that even when all requirements for rape are met, rapist's actions are defended or dismissed. Additionally, because acquaintance rapes often share many similar characteristics to appropriate sexual interactions, many people have a difficult time seeing textbook cases of rape as a real crime. These letters of support reveal that many women still have a difficult time identifying rape, as even with a guilty verdict, they profess Turner's innocence and even admit to appealing to God for bringing such an unfortunate set of circumstances into Turner's life. Turner's ex-girlfriend even insinuates that a rapist is someone you can recognize by getting to know them, as she points to her 8 years of knowing Turner as evidence of her knowledge that he's innocent.

Similar to the “not a *real* rapist” narrative, many of the letters attempted to explain to Judge Persky who the “real” Brock Turner was. Several of the letters indicated that the Brock Turner portrayed at the trial was not the Turner they knew, and they implored Judge Persky to see past the mischaracterizations to the “true” Brock Turner. Some examples include Leah Beyer's, who signed her letter as a “long-term friend and advocate of Brock Turner, and writes:

As a lifetime friend and supporter of Brock I urge that you consider the words written to you by people who have known him his whole life, as those are most important. I urge you to consider that with an overwhelming amount of supporters that are family, friends, mentors, coaches and teachers, it seems unlikely that Brock be labeled a rapist, a monster, or anything less than the fun loving person that we all know he is”

And Alexandra Lamb, who states “I am writing this letter to you to tell you how I know Brock, and hopefully to paint a more realistic picture of who Brock Turner really is...Brock Turner was misconstrued as a criminal, which he simply is not.” While Turner’s aunt, Kelly Hopkins, wrote “It is so harrowing to think that because of these incredulous circumstances that Brock will not have the life he was destined to have. Please consider Brock as the person he truly is, the person that my family and others will be telling you about, the person that respects life.” I see these comments as building off of, but slightly distinct from, the “not a real rapist” narrative, because they perform a slightly different function in exonerating Turner. These comments are clearer in their assessment that Turner is “not a real rapist” but they go further by removing agency from the crime and simultaneously vilifying those who might be responsible for putting him in this situation. The “real” Brock Turner would never rape someone, so the legal trouble he’s in is undeserved. The unfairness of his situation is tacitly blamed on everyone else; the victim, the justice system, and the prosecution, and also serves to encourage Judge Persky to make the “right” decision in order to rectify the mischaracterization and subsequent suffering that Turner has suffered at the hands of the law.

This discourse also invokes the personalism ideology, which Judge Persky explicitly responds to in his justification of the sentencing, as it implies that one can separate who they “really” are from certain actions they’ve committed, similarly to the differences in speaking from “the heart” compared from “the head.” According to Hill, the personalism ideology of language is meant to explain a persona’s intent in talk, and that “the ‘heart’ is the site of true feelings and continuity of authentic belief, and ‘head’ is where mistakes and poor choices of words are produced” (111). Though the personalism ideology is specific to language, it requires an individual have a true essence of self that can be separated from thought and action. By evoking

Turner's "true" self these discourses are also alluding to the "truth" of what happened on the night of the rape, which is Turner's account. Additionally, Turner's "true" self is always discussed in opposition to either the situation he's in or the "mistake" he made; again implying that Turner couldn't have "really" committed the crime, or, if he did, it was because he was "not of his right mind" due to the alcohol he had consumed and therefore his "true" self should not be penalized for those actions.

Therefore, often coupled with the myth of the "real rapist" are myths that portray the sexual assault as "an accident" or otherwise mitigate its significance. This is an extremely effective strategy to defend an alleged rapist because it does not ignore the fact that non-consensual sex occurred, but excuses the behavior based on the intention of the rapist. For example, Teresa Rhodes, family friend of Turner's, wrote in her letter, "In my heart, I am certain that his intent was never anything but to have a consensual encounter with a young woman" and Anne Whalen wrote "Though the jury found him guilty of assault with intent to commit rape, I know that Brock would never knowingly and purposefully commit rape. I know that he is not a threat to anyone in the community. As a woman, I have never felt intimidated by him whatsoever." These statements can only be said about gray rape cases, because the issue is not whether sex happened, but whether or not the initiating party had consent for the sexual acts performed.

This has to do with what Kitinger and Frith have identified as the "miscommunication theory" from psychology, which is used to "argue that rape and other forms of sexual abuse are often the outcome of 'miscommunication' between partners: he misinterprets her verbal and nonverbal communication, falsely believe she wants sex; she fails to say 'no' clearly and effectively" (Harding 13). Once establishing that Turner is "not a real rapist" it's necessary to

justify his actions to align with his identity; since he's not a real rapist, he must not have purposefully raped the woman, and must have just misunderstood her intentions. This has the effect of excusing Turner's actions and blaming the victim; her actions are her responsibility, and she needed to have been clearer with her objectives in regards to their interaction or else suffer the consequences. This also relies on the myth of men as unstoppable sexual forces that require women to become gatekeepers of their own bodies.

In cases like Sulkowicz's, where both parties were initially willing participants and both conscious throughout the interaction, a defense like this would be understandably persuasive to an outside observer; it's plausible (although still highly problematic) to think that a miscommunication could have occurred. However, the Turner case is unusual in that these myths were still relied on, even though the woman was *unconscious* during the attack. In order to use this narrative to defend Turner, you have to blatantly ignore significant testimony and evidence from the trial, and only acknowledge Turner's account as valid. It's as if, because the victim can't provide details of the account, due to her incapacitation, the facts of what happened to her are debatable. This gives Turner's testimony significant weight, as he becomes the only participant able to fill in the missing pieces of what happened that evening. The duplicitousness of this narrative is extensive—the very fact that Turner's victim was incapacitated to the point of not remembering what happened and was found unconscious at the scene are evidence enough that consent was not given. Therefore, Turner's account of what happened, *which does not match up to witness testimony*, should be invalid. Further, whether he intended to have consensual sex or not doesn't matter in this case, because again, *the victim was unconscious*, and the criteria for rape had been met and proven in a court of law. Yet, because of how entrenched the concept of a “real rapist” is in our rape culture frame, the idea that a smart, successful, and highly ambitious

person like Turner could rape someone is so alien that deceptive leaps of logic are constructed in order to explain Turner's actions.

One reason for the fallaciousness of such defenses has to do with the structure of our legal system and our approach to adjudicating criminal cases, as well as our history of dealing with sex crimes. The presumption of innocence until guilt is proven is foundational to our judicial system, but this concept has, according to Harding, been "co-opted and corrupted by the general public—in particular, by people who think it's unfair to ever assume that a woman who accuses a man of rape might be telling the truth" (103). That is, a fear of a false rape conviction, first articulated by Matthew Hale in the 17th century, encourages an aggressive defense of "innocent until proven guilty" in rape cases. However, this principle has been corrupted, as Harding says, in such a way that any rape beyond the textbook "real rape" case can be discounted and dismissed. Traditional sexual scripts interact with rape myths to the point that people become blind to rape, and the rape culture frame allows for such inaccurate and logically flawed assessments to be seen as normal and even standard.

A common tenet of gray rape discourse is the blaming of alcohol and/or hook-up culture to both defend a perpetrator's actions and blame the victim. As shown, Turner relied on this narrative in his defense, and several letters alluded to alcohol as the true culprit in this situation. In addition, the letters also emphasized the singularity of the event, and compared it to all of Brock's accomplishments in an attempt to minimize its severity and importance. One example of this comes from a swim coach of Turner's, who writes:

With the guilty verdict, I understand that there has to be some penal action taken, but I can see no benefit to the victim, or to society to sentence Brock to jail time. In spite of one night of alcohol-induced poor decision making, Brock is still the same intelligent

young man that enrolled in Stanford University in the fall of 2015 and can unquestionably make a significantly meaningful contribution to society given a second chance (Olson)

Olson, unlike previous letter writers, acknowledges Turner's guilty verdict and the victim herself, and seemingly accepts that consequences will befall Turner's actions. However, she minimizes the event by referring to it only as "one night of alcohol-induced poor decision making" which removes all mention of rape or sexual assault, and instead focuses only on the single mistake that Turner made. Then, she quickly pivots to declaring that this one mistake doesn't change who Turner is, and positions that against her prediction for his future and all that he has ahead of him to accomplish. This plays upon the idea of the "true" Brock Turner, while further explaining how the assault came to happen—alcohol was to blame for Turner behaving the way he did, but should not interfere with his future successes because he's not *really* that guy who committed sexual assault. The use of "in spite" here is significant—Olson could have said "although he had one night of alcohol-induced poor decision making" or another phrasing that continued to acknowledge Turner's actions, but instead she uses the phrase "in spite of" which indicates that Turner's situation was something outside of his control that he had the unfortunate chore of dealing with. Unlike victims, who are often faulted for their choice to get drunk, rapists' behavior are excused because of alcohol.

A well-publicized, and eventually rescinded, letter makes this point extremely clearly. Leslie Rasmussen, whose letter I quoted from in an earlier chapter as evidence of the prominence of the "real rape" myth, had much to say regarding the role of alcohol in rapes on campuses. She writes:

I know rape is a very sensitive subject, for everyone, and especially women. I am not backing it up or making excuses, but there is absolutely no way Brock went out that night

with rape on his mind. I think he went to a party and was drinking, like almost every student at a university does, and was flirting with this girl, like he said. The woman recalls how much alcohol she drank, which was a lot. She was no doubt about to black out if not already. I'm sure she and Brock has been flirting at this party and decided to leave together.

Just as they did she passes out, which after that many drinks, anyone would. At the same time, Brock, having a few too many drinks himself, is not completely in control of his emotions. It doesn't take a rocket scientist to know that alcohol increases emotions and feelings. I think this is all a huge misunderstanding. I think that the bikers who found him did the right thing by keeping him there in case he was attempting rape, but that after the investigation, it should have found Brock to be innocent.

Rasmussen's description follows the "drunken hook-up" script perfectly, the foundation for gray rape discourse. She references the fact that both parties were drinking heavily at a party, that they had been flirting, and then glosses over what seems to be the inevitable consequence; that the participants hooked-up. Her choice to leave out exactly what happened could be because she is supporting Turner, and doesn't want to speculate about the exact events. However, because the drunken hook-up script is so well-known, especially in the context of a college party, Rasmussen's choice to leave out this information doesn't matter, because sex, in the context of a rape case, is the inevitable consequence after the drinking and the flirting. The problem is the drunken hook-up script assumes consensual sex, which allows for a scenario like this to be seen as only a slight variant of that script, instead of sexual assault. Another problematic aspect of Rasmussen's account is that consent is prearranged before the act, and it's given implicitly. In her description, the choice of the woman to flirt with Turner and leave the party with him implied her consent, despite the fact that she was about to black-out. Therefore, when Turner assaults her, instead of it being labeled as rape it's labeled as "a big misunderstanding" and alcohol is to blame for Turner's "emotions" getting the best of him. Here, the reference to Turner's emotions is really a reference to the "man as unstoppable force" discourse—men can't

stop themselves when they're sexually aroused, so it's understandable that he still attempted to hook-up with a woman who had previously flirted with him.

Additionally, Rasmussen cites alcohol as being responsible for the situation in several ways. First, because the woman chose to drink so much, she's responsible for her own actions and the consequences of them. Rasmussen's description implies that because the victim can remember how much alcohol she drank, but nothing else about the evening, she consciously made the choice to become black-out drunk. Therefore, she's accountable for her choices while in that state of mind, meaning any consent she gave to Turner regarding sexual activity. The idea of being "black-out" drunk was a significant aspect of the trial, and is defined as "periods of amnesia during which a person actively engages in behaviors like walking and talking but does not create memories for these events as they transpire. This results in missing periods of time in the person's autobiographical record" (NIAAA). Being black-out drunk is different from being passed-out or unconscious, and would explain how consensual sex could occur without the victim remembering giving consent. It's a convenient, and problematic, defense and a cornerstone of gray-rape discourse—if an individual has drank enough to become black-out drunk, they are also displaying signs of being incapacitated to the point of not being able to give consent. Additionally, allowing for "black-out" sexual encounters to be considered consensual allows sexual predators to take advantage of incapacitated individuals while blame is heaped on the victim for her choice to drink to excess.

Secondly, Rasmussen excuses Turner's actions by citing the amount of alcohol he drank. Instead of blaming Turner for his choice to drink heavily, the alcohol itself is blamed for Turner's "increased feelings and emotions" which lead to a "big misunderstanding." Rasmussen does not clarify what "feelings and emotions" were increased, but presumably Turner's sexual

arousal and excitement at the prospect of hooking-up were what she had in mind. By describing the sexual assault as a “big misunderstanding” Rasmussen is also pointing to alcohol’s responsibility in the miscommunication between Turner and the victim—since both were drunk and one can’t remember exactly what happened, what transpired wasn’t a crime, but a simple matter of confusion between two consenting adults. Rasmussen uses rape myths that trivialize the rape, while also blaming the victim and exonerating Turner, all through her vague references to the amount of alcohol being consumed.

Turner’s sister Caroline also emphasized the role alcohol played in the assault, but her description makes the length of time in which it occurred significant. She writes:

A series of alcohol-fueled decisions that he made within an hour timespan will define him for the rest of his life. Goodbye to NCAA championships. Goodbye to the Olympics. Goodbye to becoming an orthopedic surgeon. Goodbye to life as he knew it...On that fateful night, Brock failed to recognize a series of signifiers that he surely would have if he hadn’t consumed alcohol that evening. However, it is also clear that Brock, having the good character that he does, was never out to take advantage of anyone, traumatize anyone, and especially rape anyone.

One criticism that was commonly made in the media regarding Brock Turner’s letters of support was the constant emphasis on how much Turner was suffering; that no acknowledgment of the victim and the ways in which her life had been dramatically altered was made. Turner’s sister’s letter emphasizes that fact, as she passionately articulates all the things that Turner had lost because of his actions. Arguably, Turner’s supporters were focused on assisting his defense, and their job was not to sympathize with the victim. However, Turner had already been found guilty, and the letters were meant to argue for leniency, not innocence. The choice of the majority of

Turner's friends and family to ignore the crime he had been convicted of is interesting, because rhetorically, an effective strategy would be to show some sympathy for the victim, while also emphasizing all the reasons why Turner deserved a lesser sentence based on what he could do with his future. The continued denial of the crime itself, positioned against all of the goals and aspirations that Turner and his family had for him, not only trivializes the assault but also indicates an undercurrent of misogyny—all the ways in which the victim was traumatized, and the effect this event will have on her life are insignificant compared to Turner's loss of life. Caroline Turner highlights that the crime Turner is paying the price for only took "one hour" as if the length of time has any bearing on the significance of the crime itself.

The overall attitude from many of Turner's family members was that the experience of the trial itself, and some of the consequences of being found guilty of sexual assault (such as being banned from competitive swimming) were enough punishment for the crime committed, and that Judge Persky did not need to add additional jail time to his sentence. Defending Turner in this way proves just how large the disconnect is in our society between rape as a crime and what people take to be "real" rape, and it proves how little regard we have for the crime of rape and the victims. Violating the law comes with a number of consequences—there are those imposed by a court of law, and various social ones, such as limited employment opportunities or living arrangements. However, to argue that the social ramifications of committing a felony are enough of a punishment shows that rape is not seen as a crime—it's a drunken miscommunication, and therefore legal consequences are not warranted.

Moreover, her choice of the phrase "series of signifiers" is a unique take on the miscommunication theory—the word "signifier" implies a representational aspect to Turner's exchange with the victim. It's not that Turner was trying to rape the woman, he just failed to

interpret the signals correctly, due to the alcohol that he had consumed. This descriptive relies on folk knowledge of romantic relationships—women are known to give ‘signals’ to men to indicate their romantic intrigue, and men are required to pick up on those signals and pursue the woman. By imposing this sort of script on the scenario, it once again has the effect of playing down the seriousness of what really happened—that Turner sexually assaulted an unconscious woman.

Despite the troubling rape myths that run rampant throughout Turner’s letters of support, one of the most important parts of *People v. Turner* was Judge Aaron Persky’s sentencing decision and explanation. Persky sentenced Turner to six months in jail, which was adjusted to 3 months to account for time already served. In his explanation of the sentence, Persky discusses the various Rules of Court and the eligibility requirements for probation. Most significant was his discussion of Turner’s remorse, and the influence the various letters of support had on the sentencing. Persky states:

Number seven is whether the defendant is remorseful. And that’s maybe one of the most conflicted and difficult issues in this case. Because Mr. Turner came before us today and said he was genuinely sorry for all the pain that he has caused to [Jane] and her family. And I think that is a genuine feeling of remorse.

[Jane] has stated that he hasn’t really taken responsibility for his conduct. And I think at one point she basically wrote or said that “He – he just doesn’t get it.”

And so you have Mr. Turner expressing remorse, which I think, subjectively, is genuine, and [Jane] not seeing that as a genuine expression of remorse because he never says, “I did this. I knew how drunk you were. I knew how out of it you were, and I did it anyway.” And that – I don’t think that bridge will, probably, ever be crossed.

Mr. Armstrong offered an explanation for that disconnect, which is that Mr. Turner, in his state of intoxication, sees the events in a certain way. And if he were to, just for the benefit of a lighter sentence or to pacify the Court or the public, come in at a sentencing hearing or any other time and state otherwise, which I’m sure defendants do all the time, he really would be not honest. I mean, I take him at his word that, subjectively, that’s his version of events.

The jury, obviously, found it to be not the sequence of events. Our criminal justice system relies on juries to evaluate facts – that’s why we have 12 people doing it – and to come to very difficult decisions about very specific factual incidents.

And it’s – for – some people have sat through the entire trial, and I’m sure there’s a lot of people here who weren’t able to sit through the entire trial. But the trial is a search for the truth. It’s an imperfect process. And there’s ambiguity at each stage of the proceedings.

Once a jury renders a verdict, everybody is bound by that verdict. Everybody must accept the verdict, including Mr. Turner. But I’m not convinced that his lack of complete acquiescence to the verdict should count against him with respect to an expression of remorse because I do find that his remorse is genuine.

And, finally, the factor number eight is the likelihood that if not imprisoned, the defendant will be a danger to others. I think that he will not be a danger to others. I think he has a good chance of complying with the conditions of probation. The character letters suggest that up to this point he complied with social and legal norms sort of above and beyond what normal law-abiding people do.

And, yeah, there were a lot of – a lot of character letters. And there are certain things that sort of stick out. And there is one character letter from Leslie Rasmussen, who – and there – there were a lot of them. And so some of them were more generalized – but she wrote that “Brock has been a peer of mine since elementary school,” and she talks about how she came to know him. And then she writes, [as read] “If I had to choose one kid I graduated with to be in the position Brock is, it would never have been him. I could name off five others that I wouldn’t be surprised about.” And so, to me, that just rings true as to – it sort of corroborates the evidence of his character up until the night of this incident, which has been positive. (Levin).

It’s evident here that Persky was significantly influenced by the character letters; in particular, Leslie Rasmussen’s, whose letter included some of the most explicit articulation of rape myths. However, Persky also alludes to the genuineness of Turner’s account, as well as Rasmussen’s description of Turner’s character, which “just rings true” to him. He also believes that Turner’s account of what happened constitutes a legitimate interpretation of events: *I mean, I take him at his word that, subjectively, that’s his version of events.* Judge Persky is articulating the personalism language ideology here—he believes that Turner is speaking from the heart, which by definition indicates a veracity in what Turner is saying. What’s interesting is how his phrasing

was almost identical to that used to negate Emma Sulkowicz's account—Nungesser's lawyer stated that she “believes what she believes” while Turner has “his version of events” —with entirely different consequences. Though both were insistent on their version of events, and Sulkowicz's story had no factual inconsistencies, while Turner's version of events is refuted by evidence, Turner's account is seen as credible and Sulkowicz was dismissed as a lying and vindictive woman. Although their situations were not identical (Nungesser was found not responsible while Turner was convicted of three felonies) what is clear is that the defining factor in each case was a determination of who seemed most credible, and therefore whose narrative was given greater consideration in assessing the facts.

There are some dramatic difference in how the personalism ideology was utilized in Nungesser's case compared to Turner's—as there was no eye-witness testimony to corroborate Sulkowicz's account, the focus necessarily became the perceived veracity of each narrative. Additionally, at the time that Nungesser's lawyer made the comment about how Sulkowicz “believes what she believes” Nungesser had been found not responsible. Therefore, the context for the enactment of the ideology contributed to its success. Turner of course has been found guilty of felony charges, largely due to the convincing eyewitness testimony. Therefore, the fact that Judge Persky focused on Turner's narrative of the events proves how significant rape myths are in the legal understanding of the crime of rape. His choice to emphasis his belief of Turner's testimony reveals that he viewed this situation not as a case of rape but as a “gray rape”—as if, instead of a crime, this was just a matter of conflicting viewpoints and competing narratives that had to be sifted through. However, the narrative that is given prominence here is Turner's, instead of the victim's.

Persky uses the victim's own statement to provide justification for his consideration of Turner's narrative and his subsequent light sentence. In his explanation, Persky acknowledges the victim's statement and refers to it as eloquent, while also stating that he realizes the event has been devastating for her. However, he also chooses to quote from sections of her statement in which Jane Doe acknowledges Turner's consequences of the event:

Ruin a life, one life, yours. You forgot about mine. Let me rephrase for you. 'I want to show people that one night of drinking can ruin two lives' – you and me. "You are the cause; I am the effect. You have dragged me through this hell with you, dipped me back into that night again and again. You knocked down both our towers. I collapsed at the same time you did. Your damage was concrete: Stripped of titles, degrees, enrollment. My damage was internal, unseen. I carry it with me. You took away my worth, my privacy, my energy, my time, my safety, my intimacy, my confidence, my own voice, until today.

If you think I was spared, came out unscathed, that today I ride off into the sunset while you suffer the greatest blow, you are mistaken. Nobody wins. We have all been devastated. We have all been trying to find some meaning in all of this suffering. You should have never done this to me. Secondly, you should never have made me fight so long to tell you you should never have done this to me. But here we are. The damage is done. No one can undo it. And now we both have a choice. We can let this destroy us. I can remain angry and hurt, and you can be in denial. Or we can face it head on: I accept the pain; you accept the punishment; and we move on.

It's evident here that the victim is responding to what she saw as Turner's lack of remorse during the trial, and his and his supporter's continued emphasis on and articulation of all the extra-legal consequences Turner suffered. She is attempting to reinstate herself in the scenario—to remind Turner that she was the innocent party that suffered at his hands, not the other way around. She is also endeavoring to combat the myths of acquaintance rape; that it's not "really rape" and therefore not that serious or harmful. That although she may not seem to suffer any outward consequences, her suffering is internal and significant. She encourages Turner to accept his consequences and move on; not because she is necessarily sympathetic to Turner, but because she ultimately wants him to *acknowledge what he did* and admit that it was wrong, not continue

to live in denial of his actions. However, Judge Persky reads the statement differently. He uses the victim's statement as evidence for a more lenient sentence for Turner. He writes:

So, as she writes, the damage is done... And in my decision to grant probation, the question that I have to ask myself, again, consistent with those Rules of Court, is: Is state prison for this defendant an antidote to that poison? Is incarceration in state prison the right answer for the poisoning of Jane's life? And trying to balance the factors in the Rules of Court, I conclude that it is not and that justice would best be served, ultimately, with a grant of probation (Levin "Stanford Sexual Assault").

The phrase "the damage is done" indicates that there isn't anything that can be done about the situation, as the negative consequences have already occurred and there is no taking them back. Jane Doe uses this phrase to indicate that Turner needs to stop denying what happened and living in the past and instead accept his punishment and move on with his life. Again, her emphasis is getting Turner to accept responsibility for his actions. Persky, on the other hand, uses this phrase to argue against a long jail sentence—since there's nothing to be done about the situation, what purpose would it serve to put Turner in jail? Since both Jane Doe and Turner have already suffered (Persky cites the stresses and indignities experienced through the criminal trial process and the media spectacle the case generated) what purpose would it serve to punish Turner further?

Framing it this way does several things. First, it trivializes the rape and Jane Doe's experience—it makes the rape seem unworthy of punishment beyond the natural consequences of it, and it equates Doe's experiences with being raped to her rapist's experiences in committing it. Secondly, it makes power and privilege, both elements that historically justified and excused rape, once again assets in criminal rape trials. If Turner had not lost so much in regards to his

social standing, his suffering would not have seemed as significant, and a lengthier imprisonment may have seemed more appropriate. With privilege comes entitlement, and it's likely that this was at the root of Turner's decision to rape Jane Doe—Turner's own desires outweighed Jane Doe's autonomy and agency.

Overall, Persky's emphasis on Turner's narrative in his sentencing decision prove that he was preconditioned to excuse Turner's actions and used the personalism ideology to give that decision credibility. He justifies his light sentencing by giving credence to Turner's narrative, by pointing to the ways in which Turner has already suffered, by placing importance on Turner's letters of support, and by using Jane Doe's own words to excuse further punishment for Turner. His explanation of his sentencing clearly demonstrates how rape myths fuel judicial and societal assessments of acquaintance rape, and identify the language ideology at the heart of legal justification.

Ultimately, The cases examined here illustrate the pervasiveness of rape myths in discussion of gray rape, while also illuminating how subtle and nuanced these myths make their way into discussion of rape. Specifically, rape myths are used to construct various rape narratives or scripts, which can be alluded to in a variety of strategic ways that may go unnoticed, because they appear to be common-sense ideas. Additionally, folk ideas regarding language are used in assessing victim and perpetrator's narratives, yet are constructed along lines of logic originating in rape myths, meaning they too contribute to dominant rape culture narratives that discriminate against rape victims. In reforming rape laws and how colleges adjudicate rape cases, it's clear that the cultural aspects of rape must be considered if our rape culture is to be broken down successfully.

At the time of this writing, Education Secretary Betsy DeVos has rescinded the Title IX guidelines that requires schools to handle sexual assault cases fairly. This is due in part to a vocal minority of parents who claim their sons were treated unfairly by the strict guidelines, and were falsely accused of sexual assault and suffered unjust consequences. They formed an advocacy group in 2013, called Families Advocating for Campus Equality, or FACE, which now has hundreds of families as members. According to an article in the New York Times, the members of FACE have bolstered their claims with an increasing number of “legal experts and defense lawyers [who] have argued that the Obama rules created a culture in which accused students, most of them men, were presumed guilty” (Hartocollis and Capecchi). Six years after the Dear Colleague letter was issued in response to the “rape crisis” that had seemingly reached unignorable heights, and more than thirty years after the term “rape culture” was first used to describe the sexual culture in the United States, our culture has apparently transformed into one where men are the victims and the patriarchal fear and narrative of false rape is once again the dominant one.

Of course, our culture has not transformed so drastically; these groups are simply responding to the pushback of the status quo where men routinely escaped punishment for sexual assault. This response is also largely based on the myth that women lie about rape and a continued distinction between “real rape” and “gray rape.” Men are not under attack, they are just finally being held responsible for their actions. Of course, no system is perfect, and undoubtedly some schools may have implemented the Title IX guidelines in too extreme of a manner so as to achieve unfair results for defendants. However, to completely remove these guidelines after only a few years due to a few mishandled cases shows how prevalent our rape culture is. For decades, and continuing now, women’s rape narratives have been ignored,

dismissed, mocked, and excused. Our laws required women to prove to an excessive degree that their experience could be seen as valid, and that standard has continued until today. The Obama-era Title IX guidelines represented a move to correct the system that had not only routinely failed women, but also blamed and punished them for the violence committed against them. The response by schools to enact the Title IX guidelines was a significant success for anti-rape activists, and retracting those revisions would be a substantial setback.

Chapter 5: The Problem with Textualism: A Feminist Critique

The previous chapters have demonstrated the varying ways that the discourses of sex crimes have been influential in our understanding of sex crimes in a legal sense. In Chapter 2, I showed how the language of the law can disguise gendered and harmful ideologies about women in a seemingly neutral way. Chapters 3 and 4 illustrated how the discourses of sex crimes not only inform the construction of the law, which can subsequently impact cultural narratives, but how they can actually *supersede* their legal definitions. In this chapter, I assess how certain interpretive methods used to understand the law's meaning can hide these discourses and ideologies and allow them to be perpetuated.

In 2009 Peter Tiersma, a lawyer and expert in linguistics and the law, wrote an article titled “What is Language and Law? And does anyone care?” in which he discusses the interdisciplinary field of language and law and its connection to the disciplines of both linguistics and law (Tiersma 1). After making several careful observations about the obvious links between language and law, Tiersma points to how the field of language and law is relatively obscure, with the chief aim of his article to determine why such a fruitful intersection of disciplines has been largely marginalized and ignored. Tiersma's article, almost 50 years later, echoes sentiments made in the book *The Language of the Law* by David Mellinkoff, a law professor credited with launching the plain English movement. Mellinkoff eloquently describes the legal profession's approach to language as, “The law is a profession of words. Yet in a vast legal literature the portion devoted to the language of the law is a single grain of sand at the bottom of a great sea.” However, that is not to say that the legal community has ignored issues of language—far from it. As Elizabeth Mertz, lawyer and legal anthropologist/linguist, points out in her study of American law schools:

The centrality of language and language structure to legal reasoning has long been recognized by legal theorists. From John Austin's conceptualization of law as the "command" of a sovereign through Ronald Dworkin's insistence on the centrality of interpretation to law, jurisprudence has grappled with the place of language in legal decision making. Legal scholars investigating the structure of legal reasoning from a variety of angles seem inevitably to wind up asking questions about legal language or rhetoric and how it works (26).

What these legal experts are pointing to is that there are different types of attention and focus being paid to language and law, attention that is naturally diverted in only a few narrow directions. When this happens, important considerations are missed; Tiersma believes that lawyers could benefit from understanding language theory and that this would improve their engagement with the law, while Melinkoff's mission was to point out the absurdity in the verbosity and unintelligibility of legal language. Mertz discusses how language ideologies play a significant role in legal education, even though they are not explicitly recognized.

The point is that there are significant gaps in how legal language has been conceptualized and studied, and looking to where these gaps are, as well as why they have persisted and the best ways to fill them is a necessary pursuit. There are still more improvements to be made in how the legal profession views the language of the law, especially in regards to interpretation methods, which more often than not utilize strategies and theories culled from significant linguistic theories of how language works. In the preface of *Pragmatics and Law*, editors Alessandro Capone and Francesca Poggi describe the relationship between law and language as such:

Law is a linguistic phenomenon. Legal provisions of all levels are written in natural language, and this language is supposed to guide citizens' everyday life and to ground the

courts' decisions....[however] the law is not merely a set of signs carrying a meaning; it is a more complex phenomenon and a practice...therefore, both legal experts and legal theorists engage with linguistic issues to solve practical legal problems. It is then clear that the theories and concepts elaborated within the philosophy of language can help legal scholars in their task (2017).

Because the relationship between language and law is complex, it may seem at first that attention to language philosophies or linguistic theories may not be productive as they miss the larger picture of how law fits into our lives. However, lawyers and judges do engage in linguistic issues on a consistent basis and how to resolve these issues is the basis of many legal methods. In his well-known introduction to legal reasoning *Thinking Like a Lawyer*, Kenneth Vandavelde describes the process:

assumptions that govern the realms of philosophy, religion, science, politics, literature, and other disciplines also shape our understanding of law and legal reasoning...legal reasoning is thus a patchwork of ideas that have survived from earlier times combined with ideas borrowed from contemporary thought (235).

That is, our knowledge of how language works is instrumental to legal reasoning, and new ideas related to language theory must inform our understanding of how language operates in the law. However, this “patchwork of ideas” that Vandavelde describes may in fact may serve as the reason why the intersection between language and law is not always seen as a distinct area for analysis or something that may require its own theoretical approaches. As Tiersma explains, “legal language may be so integral to the study of law that legal academics seldom explicitly distinguish it from the substantive areas in which they are interested” (Tiersma 19). Because law and language are so entwined, this both necessitates more engagement with language

philosophies and theories, and disguises this need as a matter of particular legal method or philosophy.

In particular, textual interpretation is one area of the law where research in language theory and linguistics can be particularly beneficial, as statutory interpretation has to do with how people use and understand language. As Tiersma writes:

Of course, language-based approaches are not the only way, or even the best way, to interpret statutory language. There are many nonlinguistic considerations that should be taken into account in deciding how to understand and apply a statute. But to the extent that we expect judges to carry out the intentions of legislatures, and to the extent that those intentions are expressed by language, linguistic approaches to meaning—which are based not on abstract theorizing, but on observations of how people actually use language—are obviously extremely relevant to this enterprise (21).

Tiersma, a lawyer himself, is careful to say that linguistic approaches or theories are not the only thing to look at when it comes to matters of legal interpretation. However, he mentions that linguistic approaches are not rooted in “abstract theorizing” and instead on the realities of language use, a distinction that has been missed by many who argue about statutory interpretation practices. In particular, textual interpretation methods are more often linked to theories of jurisprudence, instead of theories of language; one’s chosen legal method or foundational legal philosophy can have significant consequences for the confidence placed within the text of a document itself compared to the context and purpose of said text, regardless of the language theories undergirding such ideas.

Therefore, one of the aims of this chapter will be to explore how different legal philosophies curate and envelop particular language philosophies, and how those may differ

from, or ignore the effects culled from, the theories developed in linguistics and discourse studies. The particular gap I hope to elucidate is how theories of textual interpretation and issues of gender intertwine. I also hope to suggest ways in which research in gender and language, as well as feminist legal methods, can improve upon some of the particularly thorny interpretation questions that gender relations in law can incite. In particular, I look at how Textualism, as both an approach to textual interpretation and as part of the larger legal philosophy of Formalism is used inaccurately and illogically. Because of the flaws and inconsistencies in its use, it has particularly negative consequences for issues of gender within the law, especially in acquaintance rape cases. Because Textualism looks *only* to the text of the law for interpretation, it by definition ignores significant social, political, cultural and ideological contexts that have great bearing on how society functions. Additionally, research has shown that the language of the law can be used to disguise prejudices and negative ideologies. Therefore, interpretive methods that focus solely on the text means these sorts of unjust and harmful ideas can be continuously promoted and reified.

Ultimately, when lawyers and judges ascribe to a legal method or approach that assumes certain things about how language works, the distinction between philosophical and practical application must be made. As Textualism stems from a Formalist view that the law should aim to be objective and systematic in order to attain justice, the interpretative rules it adheres to are also bound by these ideas. However, those who ascribe to other legal philosophies, such as those related to an Instrumentalist view of law, may value flexibility within the law and look to results when determining whether the law is just, instead of method, and their view of language and how it can be interpreted will also be infused with these ideas. In the introduction to *Thinking like a*

Lawyer, Vandeveldel introduces two conclusions he says emerge from the discussion of legal reasoning:

First, although the legal reasoning process in form is structured as if it were based on logic, in reality legal reasoning is impossible without reference to the policies, that is, the values, underlying the law. Second, these policies are in conflict, and thus legal reasoning requires one to make judgments about which policies are to prevail in particular circumstances (3).

Thus, legal philosophy cannot be properly assessed without examining the legal methods it creates, and legal methods need to be assessed on its real effects and consequences, not just on one's agreement with its philosophical foundation. Moreover, since legal policies are in conflict, it's necessary to continually assess and evaluate the legal reasoning/methods that stem from them to determine best practices.

Important Policy Conflicts in American Law

While this chapter focuses on interpretative practices within the law, as articulated previously, a judge's chosen interpretation approach is informed by their subscription to various legal philosophies or ideologies. It is therefore difficult (perhaps impossible) to assess a method of interpretation without also looking to the legal philosophies that inform it, especially at a time where judges are often defined by their choice to be a Textualist/Orginalist, or to not. Therefore, a brief summary is necessary of these theoretical/philosophical tensions within the law, and how they connect to a judge's views of interpretation, is necessary.

Naturalism and Positivism

According to Vandeveldel, one of the most basic tensions in American law is that between naturalism and positivism, which he describes as being essentially a metaphysical one. It occurs

between different ideas regarding the nature and source of the law, which then can be used to rationalize various policy choices (152). Naturalism “generally holds that universal laws exist that are applicable to all persons at all times and that these laws are based on the will of God or the nature of the universe” (152). Generally, naturalists view laws that are inconsistent with natural law to be not true laws. Positivism, on the other hand, sees law as “the command of a sovereign” and thus not inherent, but created by human society (152). During the early 19th century, positivism displaced naturalism as the central theory of law, but has not entirely displaced all of naturalist ideals. For instance, Vandeveldel gives an example of interpretational difficulty to demonstrate how the two are entwined: If a statute, in clear language, provides that the beneficiary of a life insurance policy can sue the insurance company in order to enforce the statute, a court might determine that in cases where a beneficiary murders the insured in order to collect, the statute should not be interpreted to allow the beneficiary to collect the money. This is because the moral basis for such a situation would be seen as intensely unjust, and despite what the law says, most people would agree that you shouldn’t be rewarded for murder. Vandeveldel writes, “Naturalism thus provides a moral basis for interpreting the content of positive law. [It] coexists with positivism, providing the theoretical underpinnings for positivism, supplementing positive law where it seems inadequate to resolve a dispute and, in extreme cases, countermanding the results required by positivism” (153-154). Ultimately, American law contains threads of both naturalism and positivism, and the tension between the two can never be completely decided; instead, it runs throughout American law in various contexts and at different levels.

Legal Formalism vs Instrumentalism

The tension between formalism and instrumentalism is also epistemological; they are competing ideas regarding how courts determine the law, essentially the nature of adjudication, and each theory underpins a variety of different policy choices (154). Formalism “conceives of adjudication as the mechanical application of general rules to particular situations. Formal rules specify facts that give rise to rights or duties [and] [a]pplication of the rules consists of an examination of the evidence to determine whether the specified facts are present” (154). Viewing the law as a set of rules seems to bring predictability and standardization to the law, which is what formalist proponents believe is necessary for a just legal system. If the law is predictable, everyone knows what their rights and obligations are, and they can count on how the law will be applied in various situations. Instrumentalism, on the other hand, “conceives of adjudication as deciding a dispute in the way that will further the relevant policies. Under this view, a rule must always be interpreted so as to effectuate the underlying policies. If a literal reading of the terms of the rule would not serve those policies, the terms should be read more broadly” (155). Instrumentalism can be associated with both naturalism and positivism theories; if a method of interpretation looks to the intent of the legislature in creating the law, it is both instrumentalist and positivist. If it looks to what would be just or reasonable in furthering the policy, it is both instrumentalist and naturalist.

Formalists argue that their approach to adjudication produces a degree of uniformity and predictability that is superior to other approaches. However, instrumentalists argue that, “much of the predictability attributed to formal rules is illusory in any event because the language of the rules is often indeterminate” (156). Additionally, Formalists prefer more general rules that can be applied to the most situations, which instrumentalists would argue makes formalist rules even more vague; the more general a rule is, the less determinate it is. Instrumentalists also disagree

that uniformity is the desired trait of law, and that flexible standards more often provide the most just outcome in cases, as formalistic rules can often be overinclusive or underinclusive (Vandeveld 156). This is an inevitability of rules because of the “difficulty in crafting a rule that anticipates every circumstance that will arise and of finding words that precisely correspond to the exact situations in which the rule should apply” (Vandeveld 156). On the other hand, critics argue that an instrumentalist approach undermines our legal system in that it allows for judges to decide cases based on personal preferences and biases. In addition, an instrumentalist approach can lead to less engagement with the law by the general population, because the outcomes of cases appear more unpredictable than in a formalist setting.

Statutory Interpretation

When it comes to interpretative practices, the interpretation of statutes is one of the most important of all textual practices of the legal profession, and one of the most contentious (Tiersma 2010)., Kent Greenawalt, a professor at Columbia Law school, sums up the current state of statutory interpretation theories in his 2013 book *Statutory and Common Law Interpretation*. Greenawalt writes that an “often quoted comment” of Henry Hart and Albert Sacks, legal scholars and statutory interpretation experts, is “The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation” (43). That is, although there exist many different theoretical approaches and schools of thought regarding interpretation, there is no one approach that can be considered widely accepted by the legal community. However, it is possible to place interpretative theories into a few main categories, based on the importance a theory places on the text of a law compared to the intent of the law.

Formalism is primarily connected to objectivist theories of interpretation, while instrumentalism is mainly connected to subjectivist theories. Objectivists interpret from the perspective of a generalized or ideal person, while subjectivists interpret from the perspective of actual people (160-161). Viewed in this way, objectivists/formalists generalize, while subjectivists/instrumentalists particularize. Formalism is associated with the Textualist approach, while Instrumentalist is associated with intentionalism, purposivism, and nonoriginalism. Textualism, intentionalism, and purposivism can all be considered “foundational” because each one tries to ground itself on an objective base that can direct the interpretation process of all statutes (Eskridge and Frickey 1990 324-325). However, it’s important to point out that the nuances within each approach or theory are extensive and numerous, and rarely would a judge or lawyer consider themselves to be a “pure” or “strict” proponent of any one approach.

Intentionalists interpret legal texts so as to get at the original intent of the legislature in enacting the law, and allow for an examining of the history of a statute to determine the legislative intent behind it (Vandeveld 162). Textualists look only at the text itself for meaning while purposivists try to get at what the original purpose of the law was. Purposivism is different from Textualism and Intentionalism in that it doesn’t attempt to read the mind’s of the drafters of the law, and doesn’t look only to the text of the law, but instead uses various levels of context to determine the original purpose of the law in order to determine how best to interpret it. Vandeveld explains, “...the purposivist may ask simply what the mischief was that existed when the law was adopted, on the assumption that the purpose of the law was to remedy that mischief. In a sense, purposivism is an objectivist theory of intent, whereas intentionalism is a subjectivist theory” (163). Nonoriginalism is an approach that gets its name from the notion that it doesn’t depend on any original purpose or intent behind the law. Instead, it “interprets a rule in

accordance with some other source of policy, such as contemporary community values” (Vandeveld 164). These interpretative practices are not equally favored by judges, and generally judges don’t choose one or another based on how helpful or useful they feel it might be in a chosen situation. Often, judges ascribe to certain interpretative strategies as one would ascribe to a certain ideology or religious belief, and the different methods may take turns being “in vogue.” For instance, at one point in time judges were more intentionalist in their methods, relying routinely on legislative intent, as evidenced by speeches made on the floor and reports by legislative committees.

Additionally, there are numerous criticisms of each approach. Textualism’s many flaws will be discussed in depth, but the chief criticism of textualism is that it’s fundamentally flawed because interpretation of text is impossible without some reference to outside context or subjective meaning. Many point out that an Intentionalist approach is flawed because it can be impossible to determine the intention of the legislature in enacting the law, for a variety of reasons. Purposivism, although seemingly a middle ground between Textualism and Intentionalism, seems to create more interpretive questions than it answers. First, it assumes that a law “has a single purpose or a set of consistent purposes [when] in fact, statutes represent compromises among multiple conflicting purposes” (Vandeveld 164). Secondly, it’s argued that it opens up interpretation to any purpose that can be justified by the language of the law, making it an extremely unconstrained approach. On the other hand, if purposivism limits the various purposes to those found within the text, it differs very little from Textualism. Nonoriginalism is seen as the least legitimate approach to interpretation by many because it seems to give the interpreter complete discretion, and it seems that it “is not interpretation at all, but judicial legislation under the guise of interpretation” (Vandeveld 164). Although the flaws of

nonoriginalism on a practical level are numerous, on a ideological level nonoriginalism is very attractive. As Vandvelde summarizes:

Defenders of nonoriginalism point to all of the indeterminacies associated with textualism, intentionalism, and purposivism and argue that all forms of interpretation permit lawmaking by the interpreter. They assert that nonoriginalism has the virtue of authorizing explicitly an interpretation that is desirable on substantive grounds. They also contend that it is the most candid method of interpretation because it does not seek to hide the interpreter's policy choices behind a façade of the plain meaning of the text, the intent of the framers, or the purpose of the law (Vandvelde 164).

Ultimately, those who criticize nonoriginalism take for granted that there is some method that is non-subjective, and that it's possible to successfully constrain judge's answers to tough interpretive questions. However, due to the very nature of interpretation, a truly objective, systematic, and entirely constrained system is impossible. Therefore, if we accept this as fact, the best solution is to make interpretive practices transparent, and to focus those interpretative practices on picking the best choice possible considering a variety of conditions. This is the crux of Practical Reasoning, which is systematic way to approach interpretative that also aligns with the ideals of nonoriginalism.

Despite the many criticisms of each approach, when it comes to their popularity most recently, Textualism has been relied on with more frequency than other methods, and often courts initiate interpretation with the text of a statute; if they determine that the text of the statute is clear, per the Golden Rule of textual interpretation, interpretation ends with the text (Tiersma 1990 126-127, Vandvelde 162). However, Textualism has not been universally accepted and the debate currently wages between advocates of textualism and purposivism (Posner 191). This

debate can be seen as a political one regarding the respective roles of the legislature and the judiciary (Vandevelde 37).

The late Supreme Court Justice Antonin Scalia had been the foremost proponent of the textualist method, and his book *Reading Law* provides much of the evidence for the textualist perspective for this discussion. Justice Scalia explains that a textualist is one who, “look[s] for meaning in the governing text, ascribe[s] to that text the meaning that it has borne from its inception, and reject[s] judicial speculation about both the drafter’s extra-textually derived purposes and the desirability of the fair reading’s anticipated consequences” (Preface xxvii *Reading Law*). Essentially, textualists look only to the words of the statute for interpretation and don’t consider the intent of the statute or the purpose in enacting it. He feels textualism is the best approach to interpretation because relying on intentionalist or purposivist approaches gives too much discretion to judges. In the foreword to “*Reading Law: The Interpretation of Legal Texts*” Judge Frank Easterbrook, a staunch textualist himself, explains that “the more the interpretive process strays outside a law’s text, the greater the interpreter’s discretion (xxii). The fear is that if a judge is allowed to determine the “intent” or “purpose” of the law, they may choose to interpret law based on their own instincts or agendas thereby destabilizing our political system that is based on the system of checks and balances. If judges, who are not elected by the populace, are not confined to the text they can essentially invent new law, meaning the elected legislature no longer has the same power. He also claims that it’s impossible to understand the true intent of the legislature, because statutes represent a compromise of conflicting views and opinions and there is no single “intent” that can be found. Ultimately, Scalia admits that “textualism will not relieve judges of all doubts and misgivings about their interpretations. Judging is inherently difficult, and language notoriously slippery. But textualism will provide

greater certainty in the law, and hence greater predictability and greater respect for the rule of law” (xxix). The goals in pursuing textualism as the primary method of interpretation then are consistency, predictability, and stability leading to a greater confidence in the legal system.

The Problems of a Textualist Approach

An interpretive method that puts the text first *is* important because it emphasizes that the US is a democracy and attempts to stay loyal to law that was enacted by publically elected officials. In addition, a focus on legal text is positive, provided that the text is clear and explicit, because our society is large and complex and a written code of law that is available to, and understandable by, everyone is necessary. However, the limits of a strict textualist approach are significant and must be addressed. Therefore, this chapter is not intending to dispel of textualism as a practice, but to point out some of the drawbacks in using it as a sole approach to interpretation. For instance, by assuming that one’s only job is to read the text accurately in a legal context ignores the potential problems with the text itself; the language may be unclear, it may not reflect current societal realities, and more problematically it may be imbued with ideologies that are inherently unfair. However, even if the text itself is pristine, there are larger issues regarding interpretation that must be acknowledged, when putting the language of the text first.

Although textualism can seem like a logical solution to restore order when it comes to textual interpretation, Textualism depends on “the plain meaning” rule-as long as the text is clear and unambiguous, judges must rely only on the text to determine meaning. If the text is ambiguous, judges are permitted to look at legislative intent to help them determine meaning. Of course, problems arise in determining when and how a text is ambiguous, making it difficult to even determine if the plain meaning rule should be instated or not.

Even when a text appears unambiguous, confining interpretation to the “four corners” of the document can leave out important information. As Peter Tiersma explains in his article “A Message in a Bottle: Text, Autonomy, and Statutory Interpretation” “when extrinsic evidence is available, a judge who cannot look outside the text may be forced to ignore a great deal of relevant information about the context and circumstances of its writing, including the author’s intentions” (438). That is, when there is clear external information to the text that would help a judge make the most productive and fair decision, textualism asks them to ignore it, impeding a fair legal process.

Most problematic to academics regarding the plain meaning rule is the idea that a text can be entirely unambiguous or that there can be one true interpretation to a text. Tiersma sums it up:

John Henry Wigmore, the noted expert on evidence, conceded that as a general maxim the rule makes some sense in terms of policy. Yet in terms of theory, it is fundamentally unsound: “The fallacy consists in assuming that there is or ever can be *some one real* or absolute meaning. In truth there can be only some person’s meaning, and that person, whose meaning the law is seeking, is the writer of the document” (440).

This is at the heart of what nonoriginalists argue; that any one method of interpretation is going to be subjective and it’s absurd to pretend otherwise. Tiersma goes on to explain that linguists identify the goal of interpretation as understanding what the speaker/author is trying to communicate to their audience, and how the plain language meaning is simply one way to get at that communication, and should not be seen as the only approach to understanding legal texts. Of course, the “writer” of statutory “texts” are the legislature, and it has been argued that to take an intentionalist approach and to interpret a statute based on the intent of the writers requires looking at legislative history, which is fraught with problems. As Vandeveld explains:

First, the record may be silent because the issue was not anticipated or because the only way to obtain a consensus was to remain deliberately vague about the statute's intended effect. Some legislators may have had no intent at all, only motives, such as getting reelected or repaying a favor from another legislator... The history will be partial, because complete records of every relevant incident leading to enactment of the law will certainly not exist. It may be misleading, because some expressions of legislative intent may have represented the position of only a few of those voting on the statute... And of course, under even ideal circumstances, all historical accounts are shaped by the perspective of the historian. The problem of inferring intent is compounded by the fact that the statute probably was a compromise among conflicting interests and thus among competing intents (163).

Therefore, though the plain meaning rule should only be seen as one approach to determining meaning, looking beyond the text of the law can open up many more questions regarding the purpose of intent of the statute that may affect its meaning. Consequently, according to textualists, looking beyond the text of the law means increasing confusion and ambiguity in interpretation. Opponents also argue that the chief job of the legislature in imparting laws is to write them down in a clear and unambiguous manner, and therefore the text of the statutes should include all the information necessary to understand said statute. However, this defies actual practice of interpretation as we know it.

Ignoring contextual clues, or information outside the text, goes against the way that individuals attempt to make meaning in the world, according to linguistic and language experts. For example, Deborah Tannen in her article "The Relativity of Linguistic Strategies: Rethinking Power and Solidarity in Gender and Dominance" explains that:

The ‘true’ intention or motive of any utterance cannot be determined from examination of linguistic form alone. For one thing, intentions and effects are not identical. For another, as the sociolinguistic literature has dramatized repeatedly, human interaction is a ‘joint production’: everything that occurs results from the interaction of all participants.

Tannen is discussing spoken discourse, but the main premise holds true for textual interpretation as well--intentions of legislative writing are not always identical to the effects it has, and the meaning extracted is always dependent on the individuals involved in the meaning making process. I.A. Richards, a literary critic and rhetorician known for his contributions to the New Criticism movement, discusses in his article “How to Read a Page” some of the difficulties in interpreting texts. He prefaces his discussion with the statement “Neither this book nor any other can say how a page *should* be *read*-if by that we mean that it can give a recipe for discovering what the page *really* says. All it could do-and that would be much-would be to help us to understand some of the difficulties in the way of such discoveries” (17). Although Richards’ discussion is more focused on literary texts, in which ambiguity does not have the same sorts of consequences that it does in legal texts, legal writing does share many of the attributes that Richards mentions as responsible for readers’ interpretive difficulties or differences. In fact, the law and literature movement inevitably focused on the connections between reading literature and law—Ronald Dworkin being one of the strongest advocates for the view that the interpretation we do of novels is similar to the interpretation done for legal texts. Dworkin developed the concept of “constructive interpretation” as ideal, which is “an interpretation that works to make the object being interpreted the best it can be of its genre” (Bix 254).

One important observation Richards makes regarding difficult-to-interpret texts is the use of “important” words that are necessary to express more abstract or complicated ideas. He explains, “In general we will find that the more important a word is, and the more central and necessary its meanings are in our pictures of ourselves and the world, the more ambiguous and possibly deceiving the word will be” (23). Richards makes a list of some of these words in his piece, and many words that are used extensively within the law are on it. Words such as “belief,” “cause,” “fear,” “desire,” “right,” “same,” “necessary,” and “reason” are all used (in various forms) in the law, and can come to mean a variety of things depending on the context of the legal situation and the understanding of the reader doing the interpreting.

This connects to what Mellinkoff established in *The Language of the Law*-- one main characteristic of the law is the “deliberate use of words and expressions with flexible meanings.” This is useful because the law is required to *be* flexible in order to any sort of functioning system for a society that is continually changing. In his conclusion, Mellinkoff admits that despite the fact that some of the characteristics of legal language appear to be only negative and should be revised, the ambiguity of legal language is necessary. He states “If the law is a science, it is not an exact science, and its language must share some of the ambiguity of life...the common law is built for such ambiguity, hand-tailored for people. Its basic notion is that things cannot be too precise, that no matter how thin a principle is sliced, particularization is always possible” (394). Difficult aspects of legal language are necessary and unavoidable, but even across disciplines (Richards was a rhetorician) there are shared words and ways of phrasing that are difficult to interpret for all audiences. So, despite the fact that looking only to the text for meaning seems more systematic and precise, and limits the extent of interpretations that a statute can have,

textualists gloss over the fact that legal language is meant for interpretation, which necessarily means there is more than one way to understand what it says.

Beyond the necessity of ambiguity in legal language that legal theorists have pointed to, linguists have pointed out that issues of misunderstanding or confusion in interpretation may be caused by elements built into the very structure of language itself, such as lexical ambiguity, referential indeterminacy, vagueness and syntactic ambiguity (Schane 2006, Solan 1993, Tiersma 1990). Because of this, the fact that legal texts are purposefully created using flexible language makes legal language even more open to interpretational confusion or ambiguity more than other texts might (Melinkoff 394, Llewlyn 4). For instance, Solan points out that the Supreme Court decisions *United States v. Yermian* and *Liparota v. United States* revolved around ambiguity related to the scope of adverbs, and the death penalty case *California v. Brown* had to do with the scope of adjectives. Brown had to do with the definition of the word “sympathy” in juror instructions, while Yermian dealt with confusion on what the phrase “knowingly and willfully” modified in a statute (95).

Therefore, it’s clear that precise and exact text is not always clear, and even statutes that may appear unambiguous still require interpretation, due to the nature of language and our interaction with it. Then, since there is not one necessarily “correct” way to interpret a text, the question that Textualism seeks (or should seek) to answer is: how should legal language be approached so that it can be interpreted in a way that could be viewed as “successful”? And what rules or system should be relied on for that to happen? Textualists would argue that interpretation is “unsuccessful” when judges do not interpret using “the law” but instead make decisions based on their own beliefs. The recent surge in textualism is proof that this concern is shared by many, and has become a bigger concern with our rapidly changing technologically-driven culture.

When you have such a diverse population, and many different ways to interpret law, textualism looks very attractive with its insistence on a strict structure of “rules” to standardize legal interpretation. However, this “concern” with interpretation is only valid if it’s possible for judges to ignore the law and invent new and original meanings for legal concepts. Stanley Fish makes a persuasive argument that this is not reality, therefore making the concern about renegade judges defining justice as they see fit inconsequential (Levinson and Mailloux 262).

To aid in textualist interpretation are interpretive standards referred to as the “maxims of interpretation” or “canons of construction.” These are rules that can be used to help judges interpret statutes, and are predominantly featured by Scalia as the key to improving the predictability of interpretation and to ensure equal treatment of similarly situated individuals. However, as Stanley Fish points out in his response to Owen Fiss’s essay “Objectivity and Interpretation” attempting to create “rules” to constrain interpretive processes of judges and keep ambiguity to a minimum is impossible. He states “Unfortunately, rules are texts. They are in need of interpretation and cannot themselves serve as constraints on interpretation” (Levinson and Mailloux 252). That is, the canons of construction are as open to interpretation as the very texts they are intended to elucidate (Levinson and Mailloux 257, Vandeveld 99).

This view is supported by Karl Llewellyn’s observation that every canon of construction has a “counter-canon” that can give a different interpretation to a statute when used. The canons often have linguistic rationales behind them, and attempts have been made to more formally integrate linguistic strategies, like Gricean maxims, into the canons (Miller). Despite this, Lawrence Solan describes the use of canons as, “judges resort[ing] to linguistic argumentation in what appears to be an effort to find a seemingly scientific and neutral justification for difficult decisions. In many instances the linguistic argumentation either falls hopelessly flat, collapsing

into incoherence, or can best be seen as window dressing, part of an effort to mask some other agenda that is at the root of the judge's opinion" (11). Even Scalia admits this as a fundamental principle of using the canons—"no canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions" (59). He explains that it's a rare case in which the canons cannot be used to justify decisions for both sides in a case, and vaguely explains that the secret is assessing the clearness and importance of each clue and deciding where the balance lies (59). In this way Textualists who emphasize the canons as a way to legitimize textualism as objective and consistent are employing inaccurate and flawed reasoning, because there exists no strict method of textualist interpretation that is free from subjective thought/interpretation itself.

Beyond these legitimate concerns, the fact of the matter is that most judges admit to using other interpretative approaches than Textualism when evaluating the law. Most judges acknowledge that they have to rely on other factors and considerations in interpreting law, though the degree and scope in which they admit to doing it differs. At the very least, even if they are not construing the language of the law to meet their own needs (as is Scalia's fear) some assumptions about the underlying policy of law is necessary in order to properly contextualize a textualist interpretation. However, the insistence on textualist interpretation as a kind of objective science for law creates an illusion that hides the fact that the court or judge has been the one to supply meaning to a text (Vandevelde 162). This is problematic because judges may feel as if they are interpreting texts based on objective standards, but are really just using the canons to justify interpretations or decisions based on unconscious preconceptions or life philosophies or ideologies (Posner 107, Cardozo 12). A textualist approach not only rests on questionable assumptions but contains inherently indeterminate and malleable elements, and if rigorously

applied it can't accommodate changing values and policies (a necessity for a functioning legal system) (Eskridge and Frickey 325).

If the law looks solely to legal text without consideration for social realities, it is inherently unfair and unjust. As Ann Scales describes:

A legal system must attempt to assure fairness. Fairness must have reference to real human predicaments. Abstract universality is a convenient device for some philosophical pursuits, or for any endeavor whose means can stand without ends, but it is particularly unsuited for law. Law is, after all, a social tool. It is only extrinsically important. Its actual value depends upon its success in promoting goals that people decide are worth promoting (87).

A strict Textualist approach would create results at odds to what Scales accurately describes as a goal of our legal system. She refers to "abstract universality" from philosopher Carol Gould's use of the term in reference to a widely held tenet of liberal legal theory. "Abstract universality" refers to the process of determining how to apply a rule neutrally; one must determine theoretically what the similarities and differences amongst groups of people are, and then determine which differences are relevant to the case at hand. In order to do this, one needs to know what the "essential and universal" similarities are among humans, because humans by definition have an infinite number of similarities and differences, small and large (Scales 85). Then you can accurately determine when difference in legal treatment are necessary, and which may not be justified. However, this is an impossible feat and cannot possible cover the many complexities, on multiple levels, that exist within and define human existence.

Formalism, and textualism as an interpretation approach, are aligned with "abstract universality"; they all prioritize a system of rules that when applied systematically and

accurately, can lead to a fair and accurate interpretation and legal outcome. These types of approaches are very tempting because they systemize what can be a very complicated process, but as Scales points out, law (and its methods) are tools used to achieve specific goals. Instead of emphasizing a certain process, and rigidly adhering to it to the exclusion of all others, we need instead to examine the results of such methods in achieving agreed upon goals of what law and the legal system should do. This will determine which methods and processes should be used. Scales recommends, “by inquiring into the mythic structure of objectivity, we see that abstract universality explicitly contradicts the ideal of a ‘government of laws, not men.’ Our task, therefore, is to construct a system that avoids solipsism, that recognizes that the point of view of the law-maker is not the whole of reality” (87-88). Here, Scales is pointing to the inherent fallibility of the notion of “objectivity” in the law, something that has been pointed out by countless philosophers and legal experts, but upon which both Textualism and any sort of “abstract universality” principle rests. True objectivity is impossible, a myth, and we need to recognize it as such in order to construct a just and fair legal system.

Although there are many reasons why Textualism has continued to ebb and flow in popularity, a connection between text and objectivity, and the law’s desire to achieve objectivity above all else, is one of the most significant relationships in a continual reliance and revisiting of Textualism as a major interpretative theory. A text is a stand-alone document, it can be universally accessible, and the words on the page don’t change from one person reading it to another. This is wildly different than other legal processes—judges’ and legislators’ minds, instrumental in creating law, are not available in the same way as legal texts, so out of a sense of fairness and justice a focus on the text is reasonable. As Scales summarizes, “Language doesn’t point to some essential reality. Language is, instead, what our species does” (89). Although I

quote Scales above, this idea was established by Saussure and is a widely (if not universally) held belief about language: “Language is a system of signs that expresses ideas” (Saussure). That is, we use language to represent concepts, and therefore language cannot exist outside the system or the people who created it. To then examine language as if it is somehow distinct and outside our social world defies these foundational concepts and is an untenable approach to interpretation.

However, the idea that interpretation can be systematic and reliable, which imbues legal language and those who interpret it with a certain kind of authority, is something lawyers are trained to think in law school. In her book *The Language of Law School—Learning to “Think” Like a Lawyer* Elizabeth Mertz argues that law school puts forth an approach to the world that:

Focuses on form, authority, and legal-linguistic contexts rather than on content, morality, and social contexts [and] this legal worldview and the language that expresses it are imparted in...large part through re-orienting the way students approach written legal texts [which] although apparently neutral in form, in fact [is a] filtering structure of legal language... [that] is not neutral” (4-5).

What this means is that law schools teach law students to ignore many factors that a layperson would focus on in reading and interpreting a text; instead of assessing content and larger issues of social or moral context, law students are trained to look only at certain facts and follow particular trains of logic in determining legal policy. Most importantly, Mertz argues that this filtering system is taught as if it’s a neutral or unbiased; she writes in her introduction that “hidden behind standard legal concepts such as the time-honored “reasonable man” standard... are deeply social visions of what kinds of experience count—and those visions privilege some members of the American public over others” (15). Learning to “think like a lawyer” means

learning a very particular system for viewing legal texts and legal issues, revising how law students view the world around them. Although Mertz does not discuss textualism and statutory interpretation in particular, and instead focuses more on how law students are instructed to read case law and other legal texts, her observations lead to interesting implications for why textualism is so highly regarded among legal interpreters. Mertz describes:

A very stringent set of guidelines for unpacking legal texts is conveyed, through overt instruction but also through a subtle redirection of attention. As students tell and listen to the facts, they begin to notice different aspects of the conflict story encompassed in the written case law text. As they apply facts to law, they learn rules for building appropriate analogies between cases. These rules are as often gleaned from the way a professor retells the story, or redirects discussion to students who are on the right track, as from explicit admonitions. Professors also clarify the law to be applied, pushing students to identify the tests and standards to be found in lines of cases (or statutory language). At times, the limiting structure of legal procedure becomes a focus as well, when professors remind students of the effects of procedure on the establishment of facts or on the overall stance of the case (83).

Mertz's full analysis of how this process occurs on a linguistic/discursive level shows that the way in which students learn these rules and guidelines is immensely complex, but it consistently indicates a focus on hierarchies. That is, students are guided in understanding the "best" way to approach legal problems, and are taught to prioritize legal authority (in the form of precedent and established legal categories) above all else. This, coupled with the primacy of the text in legal analysis, naturally leads to an appreciation and reliance on systemized approaches to reading and examining legal text. This is in no way a fault of the law school curriculum, but is a double-

edged sword; law students need to be taught how to *do* law, but when they're not taught that this *doing* is fallible and non-neutral, they may fail to see the flaws in approaching the law from a strictly formalist perspective.

Mertz is building on ideas culled from earlier research done on legal education and training. A particularly relevant example is Duncan Kennedy's "Legal Education as Training for Hierarchy" where he argues that law schools are training students to accept a certain ideology that privileges a hierarchical view of the world, particularly when it comes to social stratification and political effort. Kennedy was one of the founders of Critical Legal Studies, and therefore one of his goals as a legal philosopher is to elucidate the sometimes murky underpinnings of our American legal system. He describes the tendency of law schools to make a distinction between "legal reasoning" and other types of reasoning as instrumental to law school curriculum and writes, "teachers teach nonsense when they persuade students that legal reasoning is distinct, as a method for reaching correct results, from ethical and political discourse in general (i.e., from policy analysis)" (Kennedy 45). What I take this to mean is that law schools attempt to divorce legal reasoning from other more "subjective" types of reasoning—like those related to ethics or politics—but this is a falsehood. Legal reasoning is imbued with ethical, moral, political, social, racial, and cultural values, even if it's in the form of prioritizing a way of thinking that purposefully avoids explicit consideration of specific iterations of these values. Textualism is an interpretive approach that does this as well—it's sold as the best approach because it supposedly allows for an interpreter to be objective and rational (as opposed to subjective and illogical) but this too is an impossibility. However, a major ideological tenet of law school is that legal reasoning is a superior form of reasoning because it's systematic, further explaining why textualism as a sole approach is both popular and disingenuous.

Feminist Critique of Textualism

These characteristics of a textualist approach are problematic for gender issues in several ways. First, a textualist approach ignores the fact that the law has historically been dominated by men (white men) and therefore statutes were written with male experiences and understanding in mind. Legal theorists have shown that “embedded within legal structures, are androcentric and sexist assumptions that typically masquerade as ‘objective’ truths” (Ehrlich 9). That is, hidden underneath the formal logic of legal codes are sexist ideas and stereotypes that often go unnoticed or are seen as reflective of societal “truths.” Because the law as institution can be successful only if it’s viewed as objective, rational, authoritative and capable of determining what is “right” and what is “wrong” it can be difficult to recognize that the very underpinnings of the law can themselves be inaccurate. In order to give law this reputation, its implicit flaws related to the ambiguities of language have been downplayed. Essentially, the “particular rhetoric embraced by law operates through the systematic denial that it is rhetoric” (Wetlaufer 1554). That is, legal argument constitutes itself by persuasively convincing its audience that its authority is more than the language used to profess it. However, scholars of contemporary rhetoric, and some lawyers and legal theorist as well, understand that “law is the very profession of rhetoric” (Wetlaufer 1554). Again, this makes a Textualist approach seem both untenable and irresistible—in order for a profession built on language to transcend the ambiguities and limitations of that language system, it must construct authority that exists outside of it. However, one of the primary ways a Textualist does this is by declaring that a coherent and logical system for organizing and interpreting that language is how it becomes consistent and therefore authoritative—circular reasoning at its finest. Lawyers and judges cannot make use of the language to achieve specific ends, implying that language is flexible and malleable, while also

maintaining that it can still be exactly precise, systematic and therefore equitable. This allows for a multitude of what we can think of as “shadowy” aspects of language to run rampant—more covert meanings of words and phrases that are often societally understood without necessarily conveyed by a dictionary definition. Connotations, nuances, biases, colloquialisms, and stereotypes are all inherent in our understanding of language, and can frequently be hidden within the language of the law or legal interpretations.

For instance, in her book *The Gender Line: Men, Women, and the Law*, law professor and feminist legal studies expert Nancy Levit writes, “Gender stereotyping is pervasive, persistent, subtle, and often unconscious. It is an amorphous subject in part because generalizations about the characteristics of a gender may be made for a wealth of reasons, ranging from heuristic efficiency to prejudice. Moreover, the conceptions of appropriate social roles for men and women are deeply embedded in society” (210). Here Levit points out that gender stereotypes can exist for a variety of reasons, one of which is for heuristic efficiency—to aid in interpreting and evaluating how the law can be applied consistently. Gender stereotypes may not always be relied on prejudicially, though that occurs, but simply to make it easier to sort people into categories in order to more easily apply the law systematically. Additionally, she points out that understandings of gender roles are embedded in our society and may be disguised as facts within the law, instead of cultural conventions that are constantly in flux. Formalist approaches prefer categories for heuristic efficiency more than other interpretive approaches, as they allow for clear-cut rules regarding interpretation. However, this also means they are more likely to rely on inaccurate stereotypes in the guise of logic than other interpretive methods.

Rape laws in the United States are rife with all manner of explicit and implicit stereotypes and gendered assumptions that unfairly protect rapists and discriminate against

women. For instance, The FBI's definition of rape was "The carnal knowledge of a female forcibly and against her will" from 1927 until 2012 (Friedersdorf). In 1984, Frances Olsen pointed out that California statutory rape laws were gender-based, when they prohibited "any act of sexual intercourse accomplished with a female not the wife of the perpetrator where the female is under the age of 18 years" (Olsen 307). First, this law defines rape as only against women, when both men and women can be raped. Secondly, it makes marriage between a perpetrator and victim a matter of legal relevancy—it was assumed that marriage meant a lifetime of consent to one's husband and therefore a woman could not be raped by her husband. These are some of the explicit problems with this law, as they represent cultural understandings of rape, sex, and marriage. What is implicitly implied are ideologies about women and men's sexual roles; men are in control of women and are the aggressors and initiators of sex, while women are beholden to men and are passive in sexual relationships. This also establishes a norm regarding sexual morality--sex is something women need protection from because they have something to lose (their virginity/reputation) while men do not.

In fact, in 1981, the Supreme Court heard the case of *Michael M v. Superior Court of Sonoma County*, where Michael M, who was found guilty of statutory rape under the California statute, argued that the statute was unconstitutional because it made only men responsible for such a crime. The Court held that the law did not violate the 14th Amendment because, "young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse" (Page 450 U. S. 479). Under the 14th Amendment, whether or not men and women are similarly situated is a relevant question, yet the Court focused on the fact of pregnancy to determine this fact. The Court determined that because women can get pregnant, while men cannot, women deserve extra protection under such laws. This of course ignores the

purpose of statutory rape laws specifically, which is to protect minors who are not legally old enough to consent to sexual activities. Whether women might suffer more than men if sexual activity leads to pregnancy is not justification enough to make this law gendered. This argument is especially suspect when compared to the multitude of other rape laws which do not provide extra protection for women, who may be differently situated because they are significantly more likely to be raped than men. The Court at the time consisted of all male justices, and such a law and the defense of it in this manner shows that gendered ideologies of men and women are at the heart of such statutes.

When ideologies are encoded in the law they take on the power of established facts, instead of socially constructed standards for the general population. This is one reason why legal change in rape laws has been so difficult to achieve; the law confirms outdated cultural views of gender, perpetuating those views among those in the legal process, which then perpetuate them by using interpretative practices that fulfill these sexist attitudes. This is where textualism fails significantly; as other interpretive approaches may allow for adjustments to the law based on shifting cultural standards as they look to the purpose of the law instead of its exact text, textualism is limited to exactly what the text said. This can lead to absurd results that defy the original purpose of the law. For instance, in the statutory rape example above you could feasibly have a scenario in which a 16 year old girl has consensual sex with her recently turned 19-year-old boyfriend who then could be charged with statutory rape. This of course is not the situation to which statutory rape is meant to apply; it's intended to protect minors from being taken advantage of by adults. However, because the law makes no distinction for relationships among the participants (beyond allowing *carte blanche* for married men), individuals who take advantage of minors are put within the same category as those who are in loving and consensual

relationships. It would be impossible for the law to include all the varying types of relationships that might need special consideration under statutory rape law, but the gender and age lines it is drawn upon is also an impossible situation for logical textualist interpretation.

Another example is the law's exclusion of male rape—similar to how the FBI's definition of rape specified only female victims, up until 2017 the law in Georgia stated that rape was a man forcing himself on a woman against her will. Russell Covey, a law professor at Georgia State University, explains that historically male-on-male rape has been “treated as not that serious, so changing the definition of rape expands the scope of our concern to a broader group of potential victims including rape victims who are transgender” (Saul). When the law changed, there were twice the amount of rapes reported compared to the previous year, and out of the 101 rapes reported, 38 were rapes that would previously have not fallen under the original definition (Saul). This not only proves that the gendered language of the law can have distinct effects, sometimes contradicting the purpose of the law, but further that the language can disguise the reality of what rape is and who it happens to. Textualists rely on categories for fair applicability, but as Scales effectively points out, this categorization of people in order to apply abstract universality is impossible, and in the case of gender categories, can serve to perpetuate unfair stereotypes instead of providing protection on the basis of said category. Instead of focusing on gendered relationships and age limits, rape laws, statutory and otherwise, should instead detail conditions in which a person would not have the capacity to consent in order for the law to achieve its purpose.

Susan Ehrlich points out that until the 1950's and 1960's in the United States, there was a necessary statutory requirement of “utmost resistance” that needed to be proven in order to convict for the crime of rape. Ehrlich explains that commonly women were believed to lie about

instances of rape, and the court therefore required them to show evidence of physical resistance that persisted throughout the act to show they were unwilling. An explanation from a Nebraska Supreme Court case overturning a rape conviction says a woman “must persist in such resistance as long as she has the power to do so until the offense is consummated” (Ehrlich 66). The utmost resistance standard seems to come from societal ideas regarding men’s sexual drive, commonly viewed as uncontrollable and automatic (Estrich 101). This can be seen in a judge’s proclamation that “Young men must be sensitive to a young woman’s right to say no, and young women, in turn, must realize that when a young man becomes aroused during sexual activity beyond a moderate degree there is a danger that he will be driven by hormones rather than by conscience” (Ehrlich 57). Here the judge affirms that although men shouldn’t rape women, women have to understand that it can be difficult for men to stop sexual activity even if a woman is not a willing participant.

Viewed together, these two standards reveal the sexist logic underlying interpretations of rape; if a woman sexually excites a man he is unable to control himself and she should be prepared for intercourse *unless* she puts up such a strong fight that he is unable to force himself on her. Thus, the ideological frame of man as unstoppable sexual force and woman as responsible for controlling and maintaining him is established. These sorts of sexist ideologies are not only embedded within the structure of our law, and coded into our statutes, but are seemingly a type of common knowledge that is used to justify certain interpretations of rape law. The problem of course is that these views are confused as being based in biology and can be scientifically justified, instead of being based in a sexist and misogynistic view of the world. Legal standards that appear to be initially rooted in science or are more aligned with naturalistic views, that is, universal laws that are valid for all people in any context, tend to be especially

unshakeable and attractive in a Formalist sense as they represent universal truths that can be applied consistently and equally. However, by now the assumption should be that any principle that is argued to be universally applicable is suspect; our understandings of the complexities of sex and gender, and their intersections with cultural values have changed so significantly that biological essentialist laws are indefensible.

Beyond biological essentialist standards, primarily male-centric norms are used to evaluate conditions for “equal” protection under the law. This can be seen in cases of constitutional and statutory equality, where judges are most concerned with neutrality and objectivity. For instance, male norms are used to determine whether claims of discrimination are legitimate, which denies rights for women for things that are unique to their situation, such as unemployment benefits for pregnancy leave (Minow 357 Fineman 54). This is a double-edge sword for feminist legal advocates; whether to position women as different from men, and therefore deserving of different protections and considerations under the law, or to champion for equality under the law, which may serve to decrease gender discrimination but prevents women from getting protections that men don’t have.

Rape law in particular contends with several gendered conditions that make reform difficult. Because it is a topic that has to do both with biology (sex drive and the desire for reproduction) and with cultural and social elements (how men and women interact when it comes to romantic and/or sexual relationships) legal definitions of rape have been informed by a multitude of male-centric standards or ways of thought. This has to do with our legal history; as men were the ones deciding cases and writing statutes, they were in charge of deciding how a woman would/should respond while being raped, which was then codified into law. As Posner and Cardozo have aptly pointed out, these rationales were probably based on the judges/law-

makers own experiences and personal relationships; the resistance requirement may have been more accurate as a description not of the reactions of women, but of the projected reactions of men to the rape of their wives and daughters. Men certainly would have violently attacked a rapist, and they wanted to believe that their wives and children might too (Estrich 31). Therefore, while the law on the books still contained explicit gendered interpretations of what rape is, a textualist approach would serve only to perpetuate these ideas.

For instance, In *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, Stephen Schulhofer points out that historically rape laws have been written so narrowly so as to allow men the most protection from rape convictions, while not protecting women from the harms of rape. Often laws provide a catch-22 for women, especially with issues of consent. At one point, the law distinguished between forcible rape and reluctant submission—this was of course after many states removed a necessary “utmost resistance” standard of force for rape. However, “forcible” rape is defined very differently from what common rapes consist of, and the requirements for forcible rape are very rarely met with the majority of rape cases. Schulhofer gives an example of a 1991 case at Stanford University where a 17-year old woman was raped by a fellow student. The woman was drinking at the man’s dorm room, and they were playing a drinking game in which she consumed around 8 shots of alcohol. She felt sick and laid down on his bed. The man she was with, a tall and physically imposing athlete at the school, came and laid on top of her, kissing her. The woman protested, and repeatedly told him no, but he reassured her he wouldn’t hurt her and attempted to penetrate her. Ultimately, under California law, a jury found there was not enough evidence to convict the student of forcible rape, as he had used very little physical force in the interaction. Additionally, because of the way the law was written, because the woman was conscious and knowingly drank the alcohol offered to her, there

didn't appear to be enough evidence to support the idea that she was too intoxicated to consent. In this situation, because of the ways in which the law was narrowly defined, a Textualist approach would acquit the student of rape, as their interaction didn't exactly fit the requirements. However, opening up the scope of the law would allow all manner of rape myths and gendered stereotypes to prevail, and reduce further the protection offered under the law.

Schulhofer, writing in 1998, describes the problems with rape laws at that time as a double-edge sword:

Criminal law standards are especially narrow. They protect women's sexual freedom from physical violence—but not from much else. Despite three decades of supposedly dramatic change in cultural attitudes and legal standards, criminal law still fails to guarantee a woman's right to determine for herself when she will become sexually intimate with another person. It still refuses to outlaw coercion and abuses of trust that prevent a woman from deciding freely whether to choose or refuse a sexual relationship. And when she does refuse, the law still fails to ensure that her clearly expressed preferences will be honored and enforced. So far as the criminal law is concerned, American women simply do not have such a right (Schulhofer 9).

What Schulhofer's description points out is that rape law has consistently ignored situations that are socially complex or move beyond black and white definitions of a "real rape." They assume that if women have sex, they wanted to, regardless of what they indicated at the time or what they reported afterward. And, due to the narrowly defined limits of the law, an interpretative approach that focuses only on the text of the law would necessarily ignore the social complexities that most rapes are infused with, while also refusing women protections against rape if they don't seem violent or "real" enough. Schulhofer's example cannot be more

exemplary of what rape is; an intoxicated and physically weaker woman said no to sex while a man persisted despite her protests. Yet, due to slow legal change and a continued reliance on male-centric standards and Formalistic ideologies, these kinds of situations will continually be denied the designation of rape.

In addition to gender ideologies and stereotypes that can hide within seemingly “neutral” rules of law and textualist approaches to interpretation, the idea of the “plain-meaning” rule is particularly problematic when it comes to gendered language. Even when language appears straight-forward and precise from a linguistic perspective, feminist legal theory has pointed out that “plain language” is often anything but. For instance, the law often relies on masculine generics in the text of statutes, though research has shown that he/man generics not only make women invisible textually, they conjure up images of men and not women (Ehrlich 11). This has caused real problems with textualist approaches. For instance, in 2006 in California judge ruled that a penal code provision that specified it was illegal for a person to “expose his person” did not apply to a woman flasher because the pronouns used were masculine. As part of his reasoning, the judge noted that other parts of the code specific “his or her” making the use of only the word “his” imply the law was meant for only men.

Certain choices of words (such as pronouns) or even the inclusion of some definitions and not others can also have the effect of “normalizing” certain views of gender or sexuality, such as social welfare benefits or sexual identities (Lacey 10). Textualist approaches also ignore the “prototype” effect of language, which can occur with many terms related to gender issues. A prototype is the typical member of a category/word, as opposed to the definition of the word (Tiersma 98 2007). The effects of prototypes of language are most clearly seen in rape laws, where many incidences that may fit the statutory definition of rape are not viewed as “real rape”

by judges, juries, and even the woman who was raped, and therefore are either not reported or are decided in favor of the rapist (Estrich). We can see evidence of this in the previous chapter, where supporters of Brock Turner, many of whom were women, were unable to identify Turner's actions as rape.

Another way in which a textualist approach ignores gender issues or worse, reinforces harmful sexist views of women, is in the way statutes are structured that puts the proof of sexual crime on women's actions instead of men's. For instance, in rape laws often the fact to be determined is whether or not the woman consented to the sexual act, which requires a judge to evaluate the woman's actions and determine if they indicate her willingness to participate or not. This is impossible to definitively determine, because human behavior does not always match with intention or desire, which is especially clear in rape cases where women may feel threatened or in danger, so they unwillingly consent to sex to avoid violence (Tiersma 2007). With textualist approaches to interpretation the structure of the statute has extreme consequences for the meaning that can be interpreted, and subsequent effects for the discourses produced during trials of rape/sexual assault. If the burden is placed on the woman to prove that she did not consent, legal standards will be produced and particular types of (often patriarchal) logic employed to help decide whether a sexual act was rape or not,. This leads to things like "the utmost resistance" standard and the logic of man as unstoppable force. Both Ehrlich and Gregory Matoesian have shown how these standards are used manipulatively by lawyers to defend rapists. Matoesian, who has written multiple books on the discourses of rape in the courtroom, shows that in rape cases consent is defined by the action taken by a woman, but argues that these actions are only viewed in light of how a man would have understood them as evidence of her sexual desire. In addition, women's actions are compared with men's actions in initiating or

refusing sexual activity, despite the fact that men and women are differently situated socially in terms of sexual relationships and behavior. He refers to this as "patriarchal logic of sexual rationale." Although courtroom discourse may not seem to be related to issues of interpretation of legal texts, how legal concepts are taken up and understood within the courtroom directly effects the meanings they are imbued with in a textualist interpretation. Ehrlich proves that concepts such as "consent" "non-consent" and even "sexual assault" are granted meanings that depart dramatically from statutory definitions of these terms (30). For instance, as was seen in the previous chapter, despite meeting the legal definition rape, acquaintance rape is often not seen as "real rape" because of myths regarding what real rape is. Similarly, a woman saying "no" has been historically been ignored as a sign of non-consent and re-interpreted as a ploy to encourage an aggressive sexual approach.

Ultimately, when it comes to issues of gender within the law, an approach that looks more to context than to the strict text of the law is required. Especially in cases of acquaintance rape, judges must sort through competing stories of what happened, and these situations can often be complicated, with the participants themselves often relying on cues from the particular context or situation they were in when they made choices to act or made statements regarding their sexual activities. Social interaction requires context for things to be understood, and it's absurd to say otherwise. However, a textualist approach not only obscures the harmful ideologies of the law that can effect women negatively, it also stems from a Formalist philosophy that enables judges to believe that if the law is applied systematically and rigorously, it is being applied equitably and justly, which is patently false.

Solutions

It's been made clear that using Textualism as a singular approach to the law is endlessly flawed; it ignores important legal context, it's applied inconsistently, its foundation of objectivity is philosophically unsound, and it can lead to reified gender discrimination, among other things. Although these shortcomings have been pointed to before by other experts (and more eloquently and comprehensively than my discussion) my focus has been on illustrating the particular negative effects this approach has on women's issues. Therefore, instead of continuing to promote Textualism as a singular method for interpretation, or even continuing to adhere to a Positivist legal philosophy, I advocate that more Legal Realism approaches to the law be emphasized in law schools and be the standard for judges. Specifically, in regards to reforming the law for gender and women's issues, lawyers and judges should instead rely on feminist legal methods. Katharine Bartlett explains the difference between more traditional methods and feminist methods in her formative *Harvard Law Review* Article "Feminist Legal Methods" and describes them as such:

Traditional legal methods place a high premium on the predictability, certainty, and fixity of rules. In contrast, feminist legal methods, which have emerged from the critique that existing rules overrepresent existing power structures, value rule-flexibility and the ability to identify missing points of view (Bartlett 832).

Bartlett is not attempting to replace Textualism with feminist legal methods, but instead is arguing for them to be added to it and other approaches. As Textualism, at least that championed by Scalia, ignores all context outside the written text, incorporating feminist legal methods would contradict this approach in its entirety. However, other more balanced approaches to the law could easily integrate more feminist legal methods into their interpretation methods. Bartlett explains that when feminists "do law" their approach is the same as other lawyers: they carefully

study the legal issues or facts, they identify the main features of those facts, they decided which legal principles should be used in resolving the legal issue or dispute, and they then apply the selected principles to the facts. Bartlett describes this process as unfolding “not in a linear, sequential, or strictly logical manner, but rather in a pragmatic, interactive manner. Facts determine which rules are appropriate, and rules determine which facts are relevant” (836).

Therefore, feminist legal methods still adhere to traditional legal process, but they also recognize how sometimes this process, being the backbone of our historically patriarchal legal system, can ignore or misconstrue facts that may be essential to women’s lives. Instead of doing away with this process, feminist legal methods look to ensure these facts are included in interpreting law or deciding cases, while keeping a clearly defined procedure in place.

Bartlett outlines four different techniques that can be classified as feminist legal methods; “asking the woman question,” feminist practical reasoning, consciousness-raising, and positionality. For the purpose of this discussion regarding methods to replace and revise Textualism, feminist practical reasoning is most useful, but all of Bartlett’s techniques will be discussed as part of the larger conversation of a feminist reformation of the law. In addition to these techniques, Bartlett also identifies three theories of knowledge that feminist legal writing typically espouse, including rational empiricism, standpoint epistemology, and postmodernism. All of Bartlett’s methods are both “critical” and “constructive” in that they point out flaws in current methods while also providing solutions for moving forward.

“Asking the woman question” is a phrase to describe a series of questions that are “designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective” (837). These questions center around a few main queries: Have women been left out of consideration? If so, in what way have they been and how might

this exclusion be fixed? In the law, asking the woman question requires looking at how the law “fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only non-neutral in a general sense, but also “male” in a specific sense” (837). That is, in addition to looking to where women’s experiences have been left out of the law (such as in rape cases), this approach presumes from the outset that not only is the law not neutral, and therefore cannot be applied equally and fairly, it is in fact premised from a male perspective. This is abundantly clear in looking at rape law, as has been demonstrated in this chapter.

Bartlett admits that the American legal system has always “assumed that method cannot serve its purpose unless it remains separate from, and independent from, substantive bias” and that “rules of legal method, like rules of legal procedure, are supposed to insulate substantive rules from arbitrary application.” That is, method should not be informed by substantive rules in order to maintain a reliable and predictable legal system. Substantive rules determine rights of individuals/entities (what the law is) while legal method governs the steps taken in order to decide and apply those rules (how to make the law work) (843-844). Critics might argue that feminist legal methods, and specifically “asking the woman question” invalidates the definition of this approach as a “method” and instead makes it more akin to a political stance. That’s because the method itself shapes “what the law is” instead of being separate from it. However, Bartlett argues that all legal methods shape “what the law is” and therefore this cannot be a legitimate critique of feminist legal methods. As this chapter and other criticism has shown, Textualism as a strict method for statutory interpretation very dramatically affects “what the law is” and the consequences of this are not always productive. Feminist legal methods, on the other

hand, always have as their goal a much more socially conscious goal intended to revise legal processes that have historically been unfair. Bartlett argues that the important thing to ask is “whether the relationship between method and substance is ‘proper’” instead of just pointing out an existence of the relationship between method and substance or the consequences of such. She argues that some relationships are clearly improper, and should not be considered legitimate methods. She writes:

A purely result-oriented method in which decisionmakers may decide every case in order to reach the result they think most desirable, for example, improperly exerts no meaningful constraints on the decisionmaker. Also improper is a method that imposes arbitrary or unjustified constraints, such as on that requires a decisionmaker to decide in favor of all female claimants or against all employers (846).

Bartlett’s description indicates the importance of a good method; it must impose some constraints on decisionmakers, and the constraints must be reasonable and not illogical or random. This of course is why Textualism has such popularity—it imposes very clear (although inconsistent) rules to interpreting law that seemingly require no subjective input. However, what a feminist legal method does is point out when there is bias in substantive rules; essentially pointing out the flaws and inconsistencies with legal rules. However, feminist legal methods do not always require a result in favor of women, or a result that necessarily promotes women’s issues, but “requires the decisionmaker to search for gender bias and to reach a decision in the case that is defensible in light of that bias” (846). Feminist legal methods, and the woman question in particular, are only biased if you consider the law to be unbiased, which definitively it is not. Bartlett explains that it, ”confronts the assumption of legal neutrality, and has substantive consequences only if the law is not gender-neutral. The bias of the method is the bias

toward uncovering a certain kind of bias. The bias disadvantages those who are otherwise benefited by law and legal methods whose gender implications are not revealed” (847).

Proponents cling to approaches like Textualism out of a fear of judicial partiality and the idea that purposivist approaches may lead to biased decisions. However, if it’s accepted that the law itself is biased, and the text of the law does not properly constrain judges to make judgments without bias, to find fault with a method that makes uncovering those biases explicit would be fundamentally hypocritical.

Practical reasoning has a variety of meanings that are used in a variety of different types of legal reasoning, due to its nature as a flexible and malleable approach to the law. However, it has been argued as a much better alternative to Textualism due to its more realistic approach to legal questions. Eskridge and Frickey in particular have promoted practical reasoning and define practical reason as “an approach that eschews objectivist theories in favor of a mixture of inductive and deductive reasoning (similar to the practice of the common law), seeking contextual justification for the best legal answer among the potential alternatives” (322). They argue that this method more accurately reflects what judges do when they interpret statutes, and that it legitimates interpretation because it “allows for deliberation and candor” (383). Bartlett defines a feminist practical reasoning that combines aspects from Aristotle’s practical deliberation with feminist ideals that consider viewpoints that have been traditionally excluded, such as women’s perspectives. She does a careful analysis of various legal theorists and their definitions of practical reasoning, starting with Amelie Rorty, who agrees with Eskridge and Frickey that “practical reasoning holistically considers ends, means, and actions in order to ‘recognize and actualize whatever is best in the most complex, various, and ambiguous situations’” (850). That is, practical reasoning has many more open questions than traditional

legal methods—each situation is considered within its individual context to determine facts and process, instead of from prescriptive definitions that are established ahead of the event itself.

Bartlett more fully summarizes it as:

Practical reasoning approaches problems not as dichotomized conflicts, but as dilemmas with multiple perspectives, contradictions, and inconsistencies. These dilemmas, ideally, do not call for the choice of one principle over another, but rather ‘imaginative integrations and reconciliations,’ which require attention to particular context. Practical reasoning sees particular details not as annoying inconsistencies or irrelevant nuisances which impede the smooth logical application of fixed rules. Nor does it see particular facts as the *objects* of legal analysis, the inert material to which to apply the living law. Instead, new facts present opportunities for improved understandings and “integrations.” Situations are unique, not anticipated in their detail, not generalizable in advance. Themselves generative, new situations give rise to “practical” perceptions and inform decisionmakers about the desired ends of law (851).

Bartlett uses the issue of minor’s access to abortions as an example to illustrate how practical reasoning would work. Although the law in a general sense might prioritize the principle that families have the right to make choices about their children’s health, and therefore the law that says minors cannot obtain an abortion without parental consent seems inherently logical, this rule would ignore many social contexts that prove significant in particular cases. The impetus behind such a law is that minors aren’t mature enough to make such a decision on their own, and would benefit from parental assistance in determining such an action. So, the law is designed to protect minors from making ill-informed decisions. However, Bartlett points out there are a multitude of reasons why a minor would want to obtain an abortion without telling their parents, and that

more harm may befall them by requiring parental permission than if they were allowed to make the decision themselves. Some parents might refuse to consent, and force children to bear children they do not have the resources or abilities to care for. Some minors might suffer abuse, both physical and emotional, if their parents found out they were pregnant. Additionally, if the pregnancy is a result of incest, involving the parents might put the minor in more danger. If the point of the law is protect minor's and assist them in making good choices, both for their sake and their potential offspring, applying the letter of the law as it might be written would contradict that purpose (Bartlett 852).

When it comes to rape cases, especially acquaintance rape cases, practical reasoning would be most beneficial in both deciding cases fairly and assisting in reforming rape law so it better protects victims and deals fairly with accused rapists. For example, statutory rape laws have in the past set the bar at 18 years of age—if a male was older than 18 and had sex with a partner under the age of 18, it was considered statutory rape because an adult was having sex with a minor. This legal rule is very easy to apply, and very easy to understand, and doesn't allow for much judicial discretion using a Textualist approach. However, doing so could lead to absurd consequences. For instance, imagine a couple who has been dating since they were 15 and 16 years old respectively, and have responsibly decided to wait to have sex until they feel ready—after two years of commitment. They're both in love and respect each other, and they practice safe sex that they both consent to, and both are happy with their decision. Under past statutory rape laws, this would be illegal and the 18 year old could suffer extreme consequences, such as being required to register as a sex offender for the rest of his life. A practical reasoning approach however, could look at the situation and determine that consequences that are meant to protect minors from sexual predators should not apply to healthy committed relationships, while

at the same time recognizing that laws should still be in place to keep minors safe from unwanted and nonconsensual sexual contact.

As another example, recently college campuses have had to overhaul their sexual conduct standards in order to respond to the attention being paid to the number of rapes that occur. Many of the cases that happen on college campuses, and in larger society, are instances of acquaintance rape where the victim and rapist know each other, and many times may have been romantically involved in some way. Sexual relationships can be complex though, and the “hookup culture” that exists on many college campuses can make sexual encounters and romantic relationships difficult to untangle from an outside perspective. Although first steps, such as including affirmative consent standards that require evidence of consent before sexual activity occurs, are an important and necessary part of fixing the issues of sexual assaults on campuses, these new policies could benefit from a more practical reason approach instead of a formalistic one, simply because the nature of certain relationships means that any pre-established rules and conditions will probably not completely fit certain situations of sexual assault.

For example, in 2013 a sexual assault report was filed at Occidental College in California and through the Los Angeles police department. The complainant, first-year student Jane Doe, claimed that she had been too intoxicated to consent to sex that occurred between her and another first-year student, John Doe. Under Occidental’s Sexual Misconduct Policy, consent must be “informed and reciprocal, freely and actively given, mutually understandable, not indefinite, and not unlimited” and any sort of force, coercion, or incapacitation would invalidate consent. Although both John Doe and Jane Doe were significantly affected by the alcohol they had both consumed that night, John Doe was found to have violated the sexual misconduct policy because he initiated the non-consensual sexual encounter by removing Jane Doe’s shirt,

and the responsibility to determine affirmative consent falls on the person initiating the sexual activity. The next day, Jane Doe could not remember all the events that occurred, and determined she was too incapacitated to have “freely and actively” given her consent. Ultimately, John Doe was expelled from Occidental College because of his actions.

If we apply a Textualist approach to the Sexual Misconduct Policy along with the facts of the case, the conclusion that John Doe was guilty of violating the policy appears correct and logical. However, this case is a bit different from other examples of acquaintance rape, and an approach using Practical Reasoning might determine a different consequence than a Textualist approach did. First, neither Jane Doe nor John Doe claimed to remember having sex—a used condom and witness testimony helped them to understand that they had. Additionally, throughout the evening Jane Doe exchanged many text messages and had several in-person conversations and encounters that indicated her willingness and desire to have sex with John Doe. For instance, while both Jane and John Doe were in his room with several others present for a dance party, both removed their shirts and Jane then initiated kissing John Doe and eventually straddling him on a bed. Her friends, determining that she was inebriated, pulled her away and took her to her room to sleep it off, though they reported she was “a little upset and indignant” about being made to leave. John texted her “The second that you’re away from them, come back” to which she responded “Okay” and “Do you have a condom?” Eventually Jane Doe snuck back to John’s room, where she performed oral sex on him and they began having sex. Jane recalls performing oral sex and that it was consensual, while John Doe did not recall oral sex. While having sex, a fellow student knocked on the door to ask if Jane was okay, to which she responded she was, multiple times. Later on, a second student opened the door and witnessed

them having sex but left them alone because, having been trained in sexual assault prevention training, he decided “This didn’t look like one [sexual assault] to me” (Hess, Slate Magazine).

Following their sexual encounter, Jane and John spoke several times over text message and in person. Jane was confused and upset because she could not remember the events of the night, and she worked with John to determine what happened. She described John’s response to the situation as apologetic, and that he was especially apologetic that she had lost her virginity in such a manner; he offered to get together with her to talk about what had happened more if she wanted to.

Clearly, the situation between John Doe and Jane Doe is more complicated than what is covered in the sexual misconduct policy, despite its straightforward and comprehensive definitions and descriptions of what counts as consent versus sexual assault and what does not. In fact, it would appear that from what both Jane Doe and John Doe remember, and from witnesses who saw the two of them engaging in sexual activity, they both gave consent that fit the qualifications of “informed and reciprocal, freely and actively given, and mutually understandable.” However, the conditions of “not indefinite and not unlimited” are unclear—since neither John nor Jane can remember having sex, and witnesses didn’t view any specific instances of continued consent to sexual intercourse, it’s impossible to determine if Jane Doe revoked her consent at some point. Additionally, the definition of “incapacitation” under the policy is important to consider:

Incapacitation is a state where an individual cannot make an informed and rational decision to engage in sexual activity because s/he lacks conscious knowledge of the nature of the act (e.g., to understand the who, what, when, where, why or how of the sexual interaction) and/or is physically helpless. An individual is incapacitated, and

therefore unable to give consent, if s/he is asleep, unconscious, or otherwise unaware that sexual activity is occurring. Incapacitation may result from the use of alcohol and/or drugs. Consumption of alcohol or other drugs alone is insufficient to establish incapacitation. The impact of alcohol and drugs varies from person to person, and evaluating incapacitation requires an assessment of how the consumption of alcohol and/or drugs impact an individual's:

- Decision-making ability;
- Awareness of consequences;
- Ability to make informed judgments; or
- Capacity to appreciate the nature and the quality of the act.

Evaluating incapacitation also requires an assessment of whether a Respondent knew or should have known, that the Complainant was incapacitated (John Doe Lawsuit pg 13).

Even if we can assume that all elements of consent were present during their interaction, the level of incapacitation of each participant has to be evaluated. Although both Jane Doe and John Doe couldn't remember all events of the evening before (and we have to assume for argument's sake they're both telling the truth about this), what's important is whether or not at the time of the sexual encounter Jane Doe was incapacitated to the point to invalidate consent and whether or not John Doe should have known that she was. However, can this be evaluated if John Doe was incapacitated past the point of being aware of even his own level of intoxication, never mind his partner's? What if they were both equally intoxicated—how can one person be too intoxicated to consent, but the other person be responsible for their own actions as well as determining the other person's level of intoxication/incapacitation? Additionally, since John Doe states he can't remember the oral sex that Jane Doe performed on him, she could also be found in

violation of the sexual misconduct policy. The definition implies that incapacitation is an ambiguous line—it admits that it varies from person to person and requires an assessment of several different components, therefore necessitating a legal method/method of interpretation to allow an official to adequately take all mitigating factors into account in order to correctly assess the situation. As Amanda Hess points out in her Slate article “How Drunk is Too Drunk to Have Sex”:

It’s clear to all reasonable people that it’s cool for two sober men and/or women to enthusiastically consent to sex and that when one person is unconscious, that’s assault. But there is an ambiguous middle ground between clear-eyed sober and passed-out drunk where one or both parties may become too intoxicated to meaningfully consent to sex, and schools have now been tasked with discerning that line for themselves. In doing so, they’ve been forced to confront a host of philosophical, moral, physiological, and practical questions—none of which have easy answers.

These types of questions don’t have clearly marked limits or easy answers, and many acquaintance rape cases are much more complex than most criminal statutes can possibly contend with. Arguably, the same can be said about a multitude of issues that involve human interaction, but that’s why practical reasoning is a better alternative than a strict textualist approach—it accounts for the complexity of individual’s relationships.

Opponents to more legal realistic approaches such as Practical Reasoning would argue that to remove an adherence to strict legal rules leads to utter discord of the legal system; there would be no bounds for judicial partiality, the reliability and reasonable expectations one can have in regards to their own responsibilities and protections under the law would disappear, and the law would cease to exist as we know it. However, Practical Reasoning does not disregard

legal rules or believe that the law should be created through a common law approach where judges get to decide cases as they see fit. In a legal context, practical reasoning works from rules, and does not reject them. Practical reasoning prefers less rigid/specific rules and instead operates better with less definite standards as guidance, but it requires rules as “signposts for the appropriate purposes and ends to achieve through law. Rules check the inclination to be arbitrary and ‘give constancy and stability in situations in which bias and passion might distort judgement’” (Bartlett 853). However, instead of limiting new perspectives on the law, rules in a practical reasoning setting would allow for new insights created by new contexts the law is applied in. Because practical reasoning believes the law cannot and should not be determined ahead of time, it assumes that each new situation will in all likelihood point the law in a new direction or highlight a new feature or issue of the law previously not thought of. In the case of Occidental College, a practical reasoning approach would allow for the condition of incapacitation to be revised to recognize how one’s own incapacitated state may interfere with the condition of being reasonably aware of one’s partner’s inability to truly consent. Practical reasoning seems especially useful when legal issues are new or new policy is being written; with rape law, more and more schools and states are adopting new sexual assault policies, and many are finding problems with a bright-line interpretation of said policies with regards to providing protection for all students.

It may be prudent to acknowledge that in order for practical reasoning to be most effective it requires well-educated and well-informed individuals who are committed to being critical of their own positioning and biases within a given case, and are willing to be transparent with their decisions and their reasoning. Bartlett points out that practical reasoning requires that decisionmakers be explicit in their reasoning; instead of stating various legal precedent as

justification for a decision, judges should “feel free honestly to express what they really were thinking about when they decided the case” in order to “clarify the moral and political views at stake in legal controversies” (Bartlett, qtd Singer 854). That is, judges should be required to explain how they came to their decisions in explicit detail; what facts of the case were most salient, how they weighed one individual’s perspective over another, and what they considered to be the larger implications of the case. As Bartlett explains, this process “reflects the commitment of practical reasoning to the decisionmaker’s acceptance of responsibility for decisions made. Rules do not absolve the decisionmaker from responsibility for decisions. There are choices to be made and the agent who makes them must admit to those choices and defend them” (854). This kind of transparency is necessary in removing bias and injustice from our legal system—if judges are held to such a standard in their decisions, and weren’t allowed to hide behind the false neutrality and logic that a textualist approach offers, it would actually be easier to constrain judicial prejudice or subjectivity because their justifications would have to be out in the open and open to scrutiny. This is a significant aspect of practical reasoning, as Scalia and other supporters of Textualism argue that its value is determined in how it limits judicial discretion and keeps judges from having too much power. Practical reasoning not only imposes limits on decisionmakers, it also opens up more possibility for progressive legal change that is a necessity in the ever-changing society we live in. Although there are several other revisions or adjustments that would need to be made in order for practical reasoning to live up to its fullest potential, on a strictly interpretational level, it’s clear that practical reasoning approach is much more productive way to decide legal issues that involve intricate social issues.

For cases that involve women’s issues, Bartlett argues for a feminist practical reasoning approach. This builds on traditional practical reasoning, but does not limit itself to a singular

community's norms in determining reason. That is, although practical reasoning looks beyond just the letter of the law as it can be applied to the strict facts of the case, it has often been limited to applying more conservative norms of society as context for determining "reason." For instance, in the Occidental College case, a practical reason assessment might include the various ways consent was given throughout Jane Doe and John Doe's encounter in determining consequences for John Doe. However, this might rely on traditional ideas of what consensual heterosexual sex and relationships look like, or even what a sexual encounter looks like from a male point of view, instead of alternative views of sexuality or sexual relationships. Feminist practical reasoning assumes that there are multiple communities, often overlapping, that one could look to for the practical reason in a case, and doesn't just consider one kind of context. With regards to Jane Doe, a feminist practical reasoning might consider certain details unique to a woman's experience in having sex, like the differences between giving oral sex and penetrative vaginal sex, and the fact that prior to her encounter with John Doe Jane Doe was a virgin. Using reasoning based on a more traditional understanding of women's sexuality, one could conclude that it was rather unusual for a woman to choose to lose her virginity to a male she didn't know particularly well, while intoxicated to the point of not remembering it the next day, and therefore would support the idea that Jane Doe was too incapacitated to consent to sex. Feminist practical reasoning considers context that may be particularly salient to a situation but is often overlooked as it is representative of a community whose experiences are not reflected in or by the law.

Ultimately, a textualist approach as a sole interpretative strategy is untenable when it comes to gender issues in the law. The concepts of sex and gender are complex in an of themselves, and our social realities that are built upon them or directly connected to them are even more so. It would be impossible to write laws to cover every conceivable sexual situation

that might occur in order to have a written statute that could account for the varying types of rape. However, it's also impossible to write laws that can textually represent people's experiences in an equitable way; interpretation is required. Therefore, an interpretative approach that combines traditional elements of legal reasoning, like a focus on the text, while also integrating other interpretative methods, like those aligned with practical reasoning, would both be a more just and also more pragmatic way to handle rape cases and other particularly gendered issues. Bartlett's point that practical reasoning would require a judge to clearly articulate exactly how they came to a certain interpretation, beyond justifying it with the text of the law, is especially beneficial. It would enable seeing when and where judges are using biased or inaccurate standards for evaluation, which could then help with legal reform of both the law and how judges are educated. Textualism, while being a flawed approach to interpretation, also allows insidious ideologies to fester and perpetuate. What we need is an interpretative approach that is not only more successful and more in line with what judges actually do but also enables for progressive social reform; feminist practical reasoning satisfies both conditions.

Chapter 6: Legal Reform and Cultural Change

In my introduction to this project, I included an excerpt from legal feminism expert Clare Dalton's article "Where We Stand: Observations on the Situation of Feminist Legal Thought" in which she defines feminism as:

...the range of committed inquiry and activity dedicated first, to describing women's subordination—exploring its nature and extent; dedicated second, to asking both how—through what mechanisms, and why—for what complex and interwoven reasons—women continue to occupy that position' and dedicated third, to change (Chamallas 2).

Dalton's definition perfectly encapsulates the different aspects of undertaking feminist research, and I would like now to use this definition to both assess my project on its feminist aims as well as organize my discussion of its contributions.

Description of Women's Subordination

In Chapter 2, I used Foucault's theory of governmentality and his definition of discourse to provide a critical framework for my analysis of the language of prostitution laws. I show how the language of sex work is inherently gendered, and how cultural attitudes about women and sex have been embedded in seemingly neutral legal codes. Ultimately I argue that the discourse of the law, despite its seemingly "neutral" approach, perpetuates gendered assumptions about sex and prostitution. In doing so, it criminalizes women as sexual beings, removing their sexual autonomy both in their role as sex worker and as individual, while also enabling men's sexual liberties. This demonstrates how women are subordinate to men; prostitution becomes a "women's issue" and women are subsequently held responsible for and blamed for their role fulfilling male desires, despite the fact that our patriarchal system is what created the need for sex work and prostitution laws.

In Chapters 3 and 4 I trace the origins of rape myths and rape scripts in order to illustrate that the logic of various rape discourses, in particular gray rape discourses, are justified by sexist ideologies. I show how folk ideas of language and sexual relationships intersect and are then used to both discredit rape victims and defend rapists, allowing for the continued denial of acquaintance rape as “real rape.” These chapters demonstrate women’s subordination to men in several ways; rape myths are constructed to defend rapists and justify violence against women, while legal standards for rape require women to prove such violence wasn’t due to their own actions or desires. Similarly to Chapter 2’s discussion of prostitution laws, these chapters establish how the law denies women sexual agency and uses the language of the law to blame women for the trauma they experience at the hands of men.

Finally, in Chapter 5 I explored how legal methods of interpretation can have a significant impact on how issues of gender are taken up in the law. In particular, I discuss the flaws of a Textualist approach, from a legal theory as well as a discourse theory perspective, and argue that Textualism as an interpretive approach obscures gendered ideologies embedded within the law. Additionally, because Textualism is framed as being based in rational, logical thought, it reifies gendered stereotypes and presents them as simple truisms, allowing the law to both hide sexist ideologies and perpetuate them. Because a Textualist approach by definition ignores social context, it allows the law to ignore the realities of women’s experiences and thereby denies women equal treatment on legal terms.

The Mechanisms of How and the Complex and Interwoven Reasons Why

Though prostitution and rape are distinct crimes, they are both manifestations of male dominance over women, as defined by the stripping of female sexual agency in the service of fulfilling male sexual desire. Therefore, women’s subordination in this context is determined by

the standard in which women are defined within the law; the overarching patriarchal structure through which the law was formed. Susan Caringella explains that:

Sex is constructed in terms defined by male pleasure, and sexual relations are constructed in terms defined by male entitlement. In other words, women are for men, hence the doctrine of implicit consent, the relevance of past sex, the implied premise that women want men: any men, anytime, and any way it suits men. Women are constructed in terms of sexual objectification, reduced to body parts, not whole human beings, even inferior human beings” (Caringella 286).

The law was created by men, and consequently has been imbued with male-centric ideals. Sex then is defined according to these standards, meaning women’s subordination comes at the hand of the language of the law itself. Within the law, women’s experiences have been consistently ignored and dismissed, allowing patriarchal narratives to persist.

Although it is easy to say that this was done intentionally; that the law was purposely written in a way to discriminate against women, this is not a claim I’m willing to make. I believe the law reflects a male perspective because that is who constructed it, and necessarily reflects a reality of how things were once seen. As Brownmiller writes, “The ancient patriarchs who came together to write their early covenants had used the rape of women to forge their own male power—how then could they see rape as a crime of man against woman?” (18). That is, as women were once considered to exist for men, that is how they were viewed; as property. Though this may explain how women’s subordination and discrimination within the law came to be, it does not excuse or explain why this view has continued to exist for so long, despite hundreds of years of social progress and enlightenment. According to Caringella, inequality has persisted because of an intentional desire to uphold our patriarchal society. Rape and violence

against women serve only to define and maintain men's power over women, as Caringella explains:

Inequality itself is a significant cause of rape, as well as of unequal laws and biased attitudes against its female victims. The social system of patriarchy infuses sexism throughout social institutions, establishing male supremacy and female inferiority. This is interwoven with class and racial inequality in modern capitalist society in ways that are mutually reinforcing. The social structure of patriarchy creates a hierarchy where all things male are superior, where male is dominance, where male is powerful. Violence is a central means to this male triumph, and rape is a part of this violence. The myths about rape and the recent conservative backlash against feminism, feminists and rape reform serve to sustain this type of ideological hegemony where these overarching rationalizations for inequality become taken-for-granted assumptions about the way things are and should be (Caringella 285-286).

The "how" of women's subordination is the implicit ideologies that appear to be neutral principles in legal reasoning or within statutes themselves, while the "why" of women's subordination has largely to do with our social system that has consistently put women as inferior to men. Explanations and justifications for this inequality, in order to perpetuate men's superior standing, are infused into the law, as we can clearly see upon examination of both legal narratives and the structure and text of the law itself. Caringella identifies the role that violence plays in this process—the continued defense of male violence against women, such as through the various rape myths that defend rapists, is a successful approach to sustaining the norm of gender inequality.

Dedicated to Change

As the majority of this project focused on the varying discourses of rape, a large part of this section will focus on the different suggestions that have been made to improve rape laws. However, assessment of my own and other's research has indicated that revisions to judicial education is a significant aspect to changing the ways women are represented in legal contexts, which includes a larger scope of gender issues than just rape. That is, although much more has been written about ways to implement reform for rape laws, prostitution and rape law are similar in several aspects so that strategies for rape law reform could also have a positive impact on prostitution laws.

In regards to rape law reform, Caringella, in the conclusion to *Addressing Rape Reform in Law and Practice*, writes “recommendations and conclusion in books on rape usually wind up saying something about the dual prongs of legal change and attitude change” and admits that this is for a good reason (285). This is because the law does not exist in a vacuum, and is continually reflective of and informed by the culture in which it resides. Legal issues that especially invoke cultural standards—like sex crimes—are especially influenced in this way, as this dissertation has attempted to show. Additionally, issues of gender that inform the systematic inequality between the sexes are particularly entrenched in cultural norms. However, the particular legal and attitude changes that must be made, and how, are not universally agreed upon. She argues that rape reform models often follow one of two paths; the first is the “weak position” in which the reforming of the law is seen as largely ineffective, as it mostly results in only symbolic results (5). This position points to how, when rape laws are altered, the importance of rape as a significant social problem dwindles, as the change in policy is seen as a successful culmination of an attempted reform. Additionally, once the reforms are enacted into law, little attention is

paid to the effect of the laws in action. The second path is the extreme reform position, which sees legal change as a panacea, and often ignores the differences between law on the books and law in action (5). Her model then attempts a middle-ground between these two positions—she gives suggestions for comprehensive legal change as well as suggestions for implementing cultural change. Caringella’s model is broad, and covers all aspects of rape law and the adjudication process—from redefining consent to adjusting juror instructions for rape trials. Caringella’s research is the gold standard in rape research—no other discussion of rape law is as all encompassing and carefully thought out as hers, and I point to her book as the leading example of how rape law reform should be enacted. However, I will focus mainly on her suggestions and observations regarding cultural change, as I see our rape culture as one of the defining factors in the discourses surrounding sex crimes, which has been the focus of my analysis.

Caringella quotes from Carole Goldberg-Ambrose, UCLA law professor, who states “there are many obstacles to measuring and achieving rape reform, the most notable being the need to eliminate juror misconceptions about rape and its victims” (58). That is, lawyers recognize that cultural attitudes are a significant factor in rape law reform. Arguably, public attitudes regarding rape and sex crimes can be more important than the law itself—as my discussion has shown, the legal definitions of rape are often ignored in favor of cultural assumptions about rape. These cultural assumptions need to be altered so that legal reform can be successful—though this is not an easy task.

Caringella identifies the media as one place where cultural change can occur on a significant level. She argues that the media has consistently eroded improvements made by feminist rape reform movements due to its tendency to frame rape cases along the lines of rape

myths and traditional rape scripts. However, recently the media has been used to challenge stereotypes about myths—women have been taking to social media to share their experiences with rape and call attention to institutions that failed them in getting justice. Social media has allowed for consciousness-raising on a massive level, and women have not be silent. Recently the hashtag #metoo has circulated on Twitter and Facebook, used by women to indicate that they too had experienced sexual harassment or assault. As consciousness-raising it was very effective; it not only made visible the experiences women have with sexual assault and harassment, but also prompted women to come forward with stories about how prominent men in society had assaulted or harassed them—movie producer, Harvey Weinstein was a notable subject of women’s stories. Therefore, the media can provide a platform for women’s voices to be heard and to encourage grassroots movements against rape, but it can also be used to spread accurate information about sex crimes. Also, criminologists need to become involved in the media representation of rape cases, to ensure the information being communicated is accurate and not rooted in sexist myths (Caringella 280).

The second main element to revising our rape culture is education. Similarly to how negative public attitudes can nullify legal reforms, it has been shown that attitudinal changes can achieve results even when legal reform has been ineffective (Caringella 282). A necessary step to changing cultural views of rape is the educating of the public on the facts of rape and sexual assault. As was illustrated in Chapters 3 and 4, rape myths have a tenacious hold on society when it comes to assessing rape. General knowledge about what rape is and who commits it are significantly lacking and seriously flawed; many women don’t report rape because they don’t even identify it as such. Caringella sums it up as, “many girls, boys, women, and men remain ignorant about rape and sexual assault dynamics, the lived effects of myths, legal definitions,

requirements, processes, and outcomes. Rape myths persevere to misinform all groups—bar none—about any and all types of rape and sexual assault” (282). With the Obama-era Title IX initiative, many colleges implemented educational programs on their campuses to teach students about consent and sexual assault, and this was a step in the right direction. These trainings include skits that illustrate what affirmative consent can look like, discussion and refutation of rape myths, as well as bystander training to help students identify situations in which they may need to intervene to prevent sexual assault. In particular, attention needs to be paid to discontinuing the differences seen between “simple rape” or “real rape” and acquaintance rape or “gray rape.” The media can also play a role in this education—the coverage of the Brock Turner trial was overwhelmingly focused on revealing the problematic aspects of Persky’s decision and Turner’s supporters’ views of rape. Two women who wrote letters of support subsequently rescinded them because of the amount of negative backlash they received. Overtime, with continued educational instruction, the rape culture of campuses should begin to shift to recognize women’s sexual autonomy and rights.

What I see as an important next step in both reforming rape laws and the ways the law handles gender issues is with revision of judicial education and training. The Turner trial is an apt example of how cultural change can be overtaken by biased legal decisions; the jury found Turner guilty of all three felony charges based on the letter of the law, while Judge Persky ultimately assessed Turner on cultural myths of rape and his own determination of what “rang true” in the case narratives. Another example of judicial misstep in recent conversation was Canadian Federal Court Judge Robin Camp’s questioning of a rape victim’s testimony. The woman was raped over a sink at a house party, and Judge Camp asked her “Why couldn't you just keep your knees together?” (Willingham and Hassan). A problematic (and bizarre) statement

made by Judge Maria del Carmen Molina Mansilla of Spain was, “Did you close your legs and all your female organs?” when questioning a woman’s report of sexual assault (Staufenberg). Both of these questions reveal the pervasiveness of rape myths; each question reveals the myth that women lie about rape, secretly desire aggressive sex, and therefore must prove they resisted their attacker. It also reveals the judges’ lack of education regarding the physical realities of rape and the structure of female anatomy.

Admittedly, most judges are not as clueless as these two, yet the prevalence of rape myths and stereotypes in rape cases, as well as the amount of general misinformation regarding sexual relationships and rape, proves that more education for legal authorities can only help to improve the process. It’s clear then that we need to require more mandatory training of judges who frequently, or ever, hear cases of sexual assault or cases that involve gendered issues.

Caringalla states:

Education needs to be widened so that police, law students, and others making decisions in the present (and future) learn about more than just the law but also about the causes and actual dynamics of rape; the statistics on offenses, offenders, victims, and case outcomes’ and some of the alternative recommended directions for ameliorating the problems surrounding these phenomena (Caringella 284).

Education can begin at law schools by requiring students to take classes on gender issues in the law, which could also include attention to feminist legal methods, such as those outlined by Bartlett. Those who move on to judicial positions should be certified to hear certain kinds of cases; I would argue that the historical problems with rape cases in particular necessitates training specific to hearing sexual assault cases. Judges then would have to be recertified in order to be continually eligible to hear sexual assault cases. Although currently, in most states judges

are required to take continuing education courses throughout their careers, they are allowed to select what courses are most beneficial to them, and courses on contemporary gender issues or rape in particular are not often offered. For example, at the Federal Judicial Center, the current “Special Focus Programs” being offered for 2017 cover the following topics: Antitrust Law and Economics, Law and Society (with a focus on technology in the law), Law and Neuroscience, Law and Biosciences, Intellectual Property, and Employment Law. Stricter continuing education requirements are needed for judges, as well as requirements that judges articulate their reasoning in decisions. As discussed in Chapter 5, practical reasoning interpretive approaches require judges to be more transparent about the factors and lines of logic that lead to decisions. In order to more critically evaluate how rape myths and other gender ideologies are being enacted in the law, we must always require judges to reveal their thought process in coming to decisions or interpretations, beyond explanations of legal precedent. To combat the continued sexism and misinformation that erodes feminist reforms of the law, judges must be held to higher standards of education in order to hear specific cases.

Ultimately, by allowing discriminatory discourses to go unchallenged, our legal system will continue to rely on inherently gendered frameworks for understanding, and simply rewording codes of conduct on campuses or changing legal codes will not be enough for reform to be effected. Change on a cultural level must be enacted through educational programs and media messages. Most importantly, judges must be held to higher standards in regards to their continued education in topics of gender and sex, specifically women’s issues that have been previously discounted by the law.

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