

SEXUAL ASSAULT JURISPRUDENCE: RAPE MYTH USAGE IN STATE APPELLATE  
COURTS

A Dissertation  
submitted to the Faculty of the  
Graduate School of Arts and Sciences  
of Georgetown University  
in partial fulfillment of the requirements for the  
degree of  
Doctor of Philosophy  
in Government

By

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Washington, D.C.  
April 19, 2016

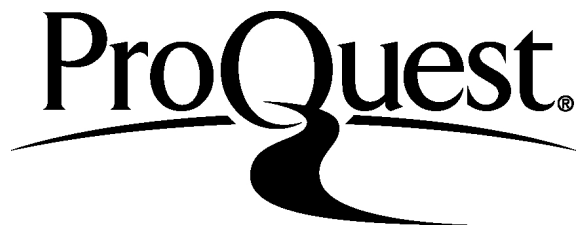
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# SEXUAL ASSAULT JURISPRUDENCE: RAPE MYTH USAGE IN STATE APPELLATE COURTS

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## ABSTRACT

While decades have passed since 1994's Violence Against Women Act, do we see American judges employing inaccurate, though widely held, myths about rape? Sexual assault has become an increasingly contested social, political, and public law issue, yet both inside and outside academia this question remains unsettled. This dissertation resolves this issue by undertaking a critical analysis of over a thousand judicial opinions discussing sexual violence in the American states. The project's foundational questions of whether rape myths are used by the judiciary anymore, and if so, when, are answered with the responses: frequently, but variably, depending on the myth in question. Following this finding, the demographic, institutional, and political correlates of this discourse are explored. The results of these analyses highlight that while women, as a monolithic group, do not seem to be judging in a "different voice," Democratic women are. Further, both men and women who choose to focus on gendered issues in their legal careers also have different rape myth usage patterns compared to those who do not. Finally, this gendered effect is also connected to the presence of a critical mass of women on the bench – where a critical mass of women can be found, rape myth usage among men and women on the bench is lowered, and challenges to rape myths increase. The results of these examinations inform how rape myth use by judges can be reduced and the findings of this study add critically to sociolegal scholarship's goal of learning more about the nexus of law and society.



## ACKNOWLEDGEMENTS

I am endlessly grateful to the faculty, friends, and family who have supported me in my graduate studies. First and foremost, I thank the members of my dissertation committee, who have provided me with invaluable guidance, direction, and support during my time at Georgetown. Jon Ladd's generosity in providing me with methodological suggestions has been a hugely valuable addition to my research. Michele Swers has been a brilliant source of knowledge about gender and politics, and I am very appreciative of how supportive she has been with her help and guidance over the years. Most of all, I am deeply grateful for having been given the opportunity to work with my committee chair, Douglas Reed. Doug always made time to listen to my ideas, he provided me with years of support and guidance that was crucial in making this project a reality, and I am very grateful for his steadfast support of my goals and my work.

I am also grateful for the years of financial support I received from the Georgetown University Department of Government. My assistantship with the Department gave me many wonderful opportunities to develop my teaching and research skills. I would also like to thank my colleagues in the Department of Political Science at Colorado State University, who welcomed me into their Department during the years while I finished this project. In particular, I am endlessly grateful to Dr. Courtenay Daum for her mentorship, her friendship, and for the opportunity to coauthor publications and work alongside her during my time in Colorado.

Finally, I will be forever grateful for the wisdom and support of my family and friends, especially my colleagues Shirley Adelstein and Briana Morgan, my brother Geoffrey Boux, and my parents, Heather and Leslie Boux.

Many thanks, Holly Jeanine Boux

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## CHAPTER 1

### **Introduction to Rape Myths and their Political Usage**

*“It was horrible enough as it is, just given her age, but it wasn't this forcible beat-up rape”<sup>1</sup>*

#### **Introduction**

With nearly one out of every five American women – almost 22 million women and girls – having been the victim of rape in their lifetimes, the wide range of physical and mental health problems that are caused by this violence, and with the economic cost of *each* of these rapes estimated at least \$87,000<sup>2</sup> (White House 2014c), it is perhaps unsurprising that sexual violence, and violence against women more broadly, is such a high profile and yet intractable political issue in the United States today. These high rates of sexual violence are evident in a variety of institutional settings: in American colleges one in five women is sexually assaulted while in college (Krebs 2009). In prisons, gay and bisexual males are at heightened risk, as are female inmates (Beck and Johnson 2012). And in the U.S. Military, though the Department of defense reported in 2015 that it was working aggressively to combat sexual assault (DoD 2015), the problem is so severe in this institution that the same year the DoD reiterated this commitment, in assessing the United States’ record on human rights, the United Nations Periodic Review Panel

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<sup>1</sup> Montana District Judge G. Todd Baugh, discussing his sentencing of a 54-year-old former teacher to 30 days in jail for the rape of a 14-year-old girl who was his student and who later committed suicide (USA Today, “Judge apologizes for teen rape remarks,” September 6, 2013).

<sup>2</sup> This estimate, which calculates the economic costs of rape as including victim and medical services, law enforcement resources expended, as well as loss of productivity and quality of life decreases, is on the low end of the figures that studies quantifying the impact of rape put forward. Other estimates, using different methodology estimate a much higher economic cost of \$240,776 per rape (White House 2014c)

Working Group<sup>3</sup> listed the prevention of sexual violence in the military, the effective prosecution of offenders, and providing redress for victims as one of their 12 key recommendations for improvement (OHCHR 2015).

Despite this high prevalence and devastating personal and societal costs of this continued violence, the legal system's response to sexual violence has been inadequate and problematic. Many offenders are never arrested or prosecuted. Tens of thousands of rape kits have gone untested (USA Today 2016). And, in the few cases that make it to trial, victims in sexual assault cases frequently encounter hostile prosecutors and judges who continue to hold "deeply held stereotypes and misconceptions [which] can undermine fairness in the court systems, especially in cases where the victim and perpetrator know each other, which are the vast majority of cases" (Legal Momentum 2015). This dissertation assesses the extent and dimensions of the judicial use of these stereotypes and misconceptions.

There is increasing recognition in the legal, feminist, and political communities that the use of these stereotypes is something that – if it is occurring – must be challenged. For instance, the executive report commemorating the Twentieth Anniversary of the Violence Against Women Act (1 is 2 Many 2014) repeatedly notes the importance of challenging these stereotypes and mythologies. It argues that bias is a continuing problem in the legal system and that the federal government should work to end sex stereotyping in rape trials. Making a compelling case that this bias is discursive (though it has concrete as well as linguistic impacts) and rooted in problematic myths about rape, the report states,

"No one says that men who are robbed or slashed went to the wrong place or wore the wrong clothes but they do say this about women. At the workplace or in schools, the law calls such victim-blaming sex stereotypes by the name of sex discrimination; so too should they bear this name in our criminal justice system." (1 is 2 Many 2014, 8)

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<sup>3</sup> This panel's role is to address the human rights records of U.N. member states.

While this report is an important indication that the issue of judicial use of misconceptions about rape is being taken seriously by many, we do not actually know the dimensions of this problem. Do judges use sexist language supporting these stereotypes in their decisions? Or, has the judiciary set this problematic language aside? And, if these stereotypes and misconceptions about sexual violence live on, is this only the case because the judiciary is still an institution disproportionately populated by men, or do women also reference these stereotypes in their jurisprudence? Though the answers to these questions would provide critical information about law's entanglement with rape culture, the impact of women's representation on the bench, and possible ways to tackle the use of these problematic discourses, at present we do not have these answers because no comprehensive studies of judicial rape myth use exist. Studies of American judges' use of rape myths are few and far between, and they do not systematically explore this issue. Rather, the studies we currently have focus upon individual cases, or on case outcomes rather than the language used in these cases. Certainly, no cross-state assessments of the dimensions of rape myth usage in the judiciary have been published. This dissertation will address this critical gap in the literature, and in exploring the questions asked above, undertakes an innovative and comprehensive analysis of judicial discourse. Ultimately, a better understanding of how we might answer these questions is imperative not only for those seeking a better understanding of how cultural norms about gendered violence permeate the judiciary, but also for those that seek greater justice in the courts for victims and survivors of sexual violence.

In recent years, the controversial, disputed, and political nature of sexual assault and rape has been particularly visible. The heavily publicized rape claims made against Kobe Bryant, Ben Roethlisberger, and Dominique Strauss-Kahn, the news that more than 70,000 rape kits in the



custody of over 1,000 law enforcement agencies across the United States have gone untested (USA Today 2016), the sentencing of former Oklahoma City police officer Daniel Holtzclaw for 263 years in prison for the on duty rapes of African American women (Larimer 2016) and the emergence (and 2015/2016 reemergence) of SlutWalks<sup>4</sup> around the globe, are only a few examples of how issues relating to sexual assault and rape have made headlines in the United States during the past several years. This issue is not only of academic interest, but is politically very salient as well, the 2012 electoral season confirmed many scholars' arguments that rape discourse remains hegemonic, and the 2016 elections have produced similarly problematic discourse. In particular, Missouri Republican Senate nominee Rep. Todd Akin's statement that "legitimate rape" rarely causes pregnancy (Blake 2012), and Indiana Treasurer and United States Senate Candidate Richard Mourdock's argument that "pregnancies are 'something that God intended to happen' — even in cases of rape" (Bradner 2012) pushed issues surrounding rape and pregnancy, and problematic political discourse about these topics, to the top of the news cycle. It has remained at the forefront of national political discourse during the 2016 presidential election as Donald Trump referred to Mexican immigrants as rapists (later telling reporters that "Someone's doing the raping" – ignoring the reality that most rapes are committed by an individual previously known to the victim), and his senior counsel, Michael Cohen made the (incorrect) claim that "you cannot rape your spouse" (Lee 2015).

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<sup>4</sup> Interestingly, the first SlutWalk was an explicit response to problematic discourse surrounding sexual assault and violence against women. The incident that sparked this movement was an episode of victim blaming by a Toronto police officer in January 2011. As was reported in *The Globe and Mail* newspaper, on January 24<sup>th</sup>, "two male officers came to York's Osgoode Hall law school to speak on a safety panel, alongside a pair of school security guards. The policeman, who reportedly prefaced his comment by saying "I've been told I shouldn't say this," instructed the audience that women should avoid "dressing like sluts" if they wanted to be safe from sexual assault." (Morrow 2011)

While Akin and Mourdock clearly reinforced rape myths in their ill-fated explorations of the topics of sexual assault and reproduction, evidence indicates that these myths – as well as the ones highlighted by the Trump campaign – are factually incorrect. This is true of many commonly held ideas about rape. For instance, the stereotype that false rape allegations are a common occurrence, though widely believed, is not true. Rather, “false rape reports are not filed more frequently than false reports of other types of crimes (Lisak et al. 2010). However, continued widespread belief in this myth, “contributes to the enormous problem of underreporting by victims of rape and sexual abuse... and a major reason for this is victims’ belief that his or her report will be met with suspicion or outright disbelief.” (Lisak et al. 2010, 1331).

Similarly, a commonly held – yet erroneous – myth about rape is that there is a certain “type” of antisocial rapist (for instance, undocumented workers), and that many men accused of rape “are not the kind of guy” to commit a sexual offense because they are considered to be “nice guys” or “family men” or otherwise upstanding members of the community. However, research indicates the converse: sex offenders are a very heterogeneous population that cannot be characterized by a single motivation (SAPAC 2015), and there is no singular typical profile of a rapist (Maas, 2007, cited by SAPAC, 2015).

Reflecting findings that these myths are inaccurate when it comes to the realities of sexual violence other American politicians have rejected Akin and Mourdock’s characterizations of rape. President Obama and Vice President Joe Biden’s January 22, 2014 announcement of the White House Task Force to Protect Students from Sexual Assault (Caller-Times 2015) was an especially high profile example of politicians challenging, rather than reinforcing, the rape myth frame. The Task Force’s goals include providing tangible support and resources to students,

advocates, and colleges and universities, but also focus specifically and explicitly on garnering media and popular attention to publicize the need for changing rape-related attitudes and the way that Americans, especially those on college campuses, speak and think about sexual assault. Specifically, the Task Force is central to two of the Obama administration's key public campaigns, both of which have received high levels of media coverage: the *It's On Us* campaign (It's On Us 2014), and the *I is 2Many* initiative.

Despite the high incidence of this type of violence and the attention violence against women has received from the media, politicians, and bureaucrats, scholars who study sexual violence and violence against women<sup>5</sup> have pointed out that “[n]o other violent crime is so fraught with controversy, so enmeshed in dispute and in the politics of gender and sexuality” (Lisak et al. 2010, 1318). Indeed, one reviewer of Brownmiller's seminal exploration of rape described the subject as “hitherto as well known to conventional scholars as the dark side of the moon” (Shorter 1977, 471 as cited in Rutherford 2011, 342).

This project continues the exploration of this controversial yet critically important issue by examining how the American judiciary writes about rape and issues of sexual violence. Currently, there is a dearth of information concerning how and why the discourses related to sexual violence against women vary (Temkin and Krahé 2008). As such, the key question that

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<sup>5</sup> There is no universally agreed-upon terminology for violence against women but for the purposes of this paper Htun and Weldon's definition, which describes this type of violence as “violence that happens to women because of their sex” (Htun and Weldon 2008, 19), will be used. This type of violence “assumes many forms, including rape, sexual assault and coercion, stalking, incest, sexual harassment, female genital mutilation, and trafficking in women” (Ellsberg and Heise 2005, 6). Sexual violence (defined by the CDC as “any sexual activity where consent is not freely given” (Centers for Disease Control and Intervention 2012)) is a particularly gendered form of violence, as women “are the victims of more than 95 percent of all sexual assaults and men are the vast majority of perpetrators” (Htun and Weldon 2008, 19). Thus, while both men and women can be the victims as well as the perpetrators of sexual violence, it is important to note that this type of violence has a deeply gendered aspect.

this project addresses is whether we still see American judges employing inaccurate myths about rape (herein described as the hegemonic “rape myth” frame) even though several decades have passed since legislation such as 1994’s Violence Against Women Act was first enacted. Both inside and outside of academia, this issue is unsettled. On one hand, legislative reformers argue that VAWA and similar programs have effected important change. Conversely, sociolegal scholars argue that judges and other courtroom actors still commonly use “rape myths,” which reiterates and reifies widely believed myths about sexual assault.

In order to resolve this unsettled issue, this project examines how judges write about rape through the concept of framing. It evaluates the presence, absence, and dimensions of a key frame that is very common, powerful, and problematic, both inside and outside of the judicial system – the “rape myth” frame. Overall, this study looks at *how* the American judiciary employ this frame, and *when, where*, and begins an exploration of *why* these elites use this prevailing, yet, troubling frame.

### **Conceptual Problem**

This project examines American judges’ use of rape myths, and tackles some questions that remain unanswered in the extant literature: Does the “discrepancy between ‘law as legislation’ and ‘law as practice’” (Ehrlich 2001, 25) that so many feminist sociolegal scholars have identified exist in relation to sexual violence jurisprudence? If so, what are the dimensions of this discrepancy? And, what are some of the underlying causes for this discrepancy? In answering these questions I build upon the work of seminal sociolegal scholars who have also critically examined this type of gendered discourse. And, I take as starting points, a) Ehrlich’s unresolved puzzle about the American legal system’s treatment of sexual violence crimes – that

the law simultaneously allows and constrains male violence against women – and b) Kim’s (2012) insistence that despite this puzzle the prosecution of rapes must be taken seriously.

The results of this project do not only have important ramifications for legal and political scholarly inquiry, they also have important political and normative implications. The concerns and topics explored herein are at the heart of feminist legal scholarship, which Conaghan (2000) argues is “of necessity, a normative project. It is concerned not just with describing or interpreting social arrangements but also with changing them, that is, with prescribing and effecting *transformation*” (Conaghan 2000, 375, emphasis in original). Indeed, particularly in the area of law and legal reform, this scholarship is often driven by the understanding “that things *ought not to be* as they currently are” (Conaghan 2000, 375, emphasis in original). However, before we can develop and advocate for a specific program of change, we need to understand how things “currently are.” When it comes to judicial discourse on the issues of sexual assault and rape, we lack this understanding. This project seeks to rectify this gap in our understanding of American legal discourse because if we are going to effectively challenge the use of this problematic frame, we need to understand how frequently the American judiciary use rape myths, what other variables impact how American judges use and acceptance of these myths, and whether or not legislative reform has been effective in challenging their supposed hegemony.

## **Background**

According to the U.S. Department of Justice, one in six women<sup>6</sup> and one in 33 men will sexually assaulted at some time during their lives<sup>7</sup>. The impact of these crimes goes beyond the

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<sup>6</sup> Rates of victimization for sexual assault and rape are notoriously hard to quantify accurately, as these crimes are often challenged on political grounds (Lisak et al., 2010), and remain extremely underreported. Belknap emphasizes this point, asserting, “at least 90% of rapes are never

effects that violence has on the individual victims. As Laurel Weldon explains, all women – even women who do not ever become victims of sexual assault or other forms of violence against women –

“are expected to alter their behavior to minimize risk: they oughtn’t stay late at the office alone, or walk unescorted after dark, or draw public attention to themselves, or be in private spaces with men – even men they know well. Thus, violence against women restricts the ability of all women to take advantage of their rights as citizens of a democratic public.” (Weldon 2002, 11)

In recent years, these alarmingly high numbers and the issue of violence against women more generally, have seen widespread publicity and press coverage. Campaigns such as the No More campaign to end domestic violence and sexual assault (nomore.org 2015) were launched in the wake of the NFL’s mishandling of the Ray Rice domestic violence case. Millions saw these commercials when they were aired during the 2015 Superbowl.

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reported to the police (not just including college samples, and this is a conservative estimate)” (Belknap 2010, 1335). These number included above are provided by the Department of Justice, and are relatively widely accepted. Another commonly cited and challenged statistic, which is frequently cited by the White House, is that one in five women who attend college are sexually assaulted before they graduate. However, this figure was recently questioned when it came to light that the one-in-five number comes from an unrepresentative sample of just two public universities (NY Times 2015). We cannot attribute the methodological challenges of quantifying rape/sexual assault rates solely to victims underreporting crimes committed against them (though certainly both pose considerable challenges), as other factors also impinge upon accurate measurement of the incidence of these crimes. For instance, “the ordinary practice of universities is to undercount incidents of sexual assault” (Yung 2015, 5). Exploring the motivations behind this underreporting, Yung highlights the importance that the continued acceptance of rape myths – the topic of the current project – have on encouraging individuals to undercount rapes: “individuals working at universities would be expected to have conscious motivations and unconscious beliefs that might lead them to undercount on-campus incidents of sexual violence (Yung 2015). Widespread adoption of “rape myths” and exaggerated belief in false reporting are the prime culprits in such pervasive hostility to sexual assault complaints.” (Yung 2015, 6). For more information on the particular challenges of quantifying the incidence of these crimes, Lisak et al. (2010) provide a useful critique of the literature quantifying sexual assault and rape rates.<sup>7</sup> Tjaden and Thoennes 2006; see also “Sexual Violence in the United States: Summary of Roundtable Proceedings,” Washington DC, Fall 2010.

The media and professional sports bodies have not been the only institutions shining a bright light on sexual assault and violence against women. Government bureaucrats have also engaged with these issues with high-profile Title IX investigations of American universities and colleges. Currently 55 higher education institutions are being investigated for “possible violations of federal law over the handling of sexual violence and harassment complaints” (Department of Education, 2014) by the U.S. Department of Education’s Office for Civil Rights Title IX. Other branches of the federal government have also gotten involved. For instance, the Secretary of the Department of Defense’s directly stated in December 2013, that “[e]liminating sexual assault in the military is one of the Department of Defense's highest priorities” (Hagel 2013). These actions have been bipartisan and have come largely in the wake of Sen. Kirsten Gillibrand (D-N.Y.) and her colleagues both on and off the Senate Armed Services Committee pushing for legislative overhaul of the way that sexual assault is dealt with in the military (ABC News 2014), though as was noted above, sexual violence within this institution continues to be endemic.

As was mentioned above, the Obama Administration has also stepped into this issue. *It’s On Us* launched September 19, 2014, and “asks everyone -- men and women across America -- to make a personal commitment to step off the sidelines and be part of the solution to campus sexual assault” (White House 2014a). It underlines how solving the problem of sexual violence lies not only with those that commit violence against women, but on all of us to change the way we think and speak about sexual violence. As President Obama argued in introducing this campaign, this cultural change is vital,

“Because that’s where prevention -- that’s what prevention is going to require -- we’ve got to have a fundamental shift in our culture. As far as we’ve come, the fact is that from sports leagues to pop culture to politics, our society still does not sufficiently value women. We still don’t condemn sexual assault as loudly as we should. We make

excuses. We look the other way. The message that sends can have a chilling effect on our young women.”<sup>8</sup> (Obama 2014).

Similarly, the *1 is 2 Many* initiative is also an executive program, but it more directly builds upon past federal programs aimed at reducing gendered and sexual violence; most notably VAWA and Vice President Joe Biden’s activism in this area. Launched in September 2011 by Biden, the *1 is 2 Many* initiative “uses technology and outreach to get the message out and to help reduce dating violence and sexual assault among students, teens and young adults” (White House 2014b). Further, with these campaigns, Vice President Biden has continued his highly visible leadership on the issue of sexual assault and violence against women more generally. As the White House’s website for the Task Force and its related campaign – *1 is 2 Many* – highlights, “[b]y targeting the importance of changing attitudes that lead to violence and educating the public on the realities of abuse, the Vice President is leading the way in an effort to stop this violence before it begins” (1 is 2 Many 2015). By doing so, it highlights attitudinal change is necessary alongside legal change to reduce the high levels of sexual violence that exist in this country, and elected officials are willing to speak out for this cause.

From Mourdock and Akin to Obama and Biden, these examples underline the importance of not only paying attention to sexually violent and coercive crimes when trying to understand

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<sup>8</sup> Interestingly, in his original remarks, President Obama finishes the final sentence of the quotation included above by noting the chilling effect this can have on “young women.” However, the White House’s blog post which summarizes President Obama’s speech, quotes this segment the following way: “‘We still don’t condemn sexual assault as loudly as we should. We make excuses. We look the other way. The message that sends can have a chilling effect’ on young men and women” (White House 2014a). This change in language has the benefit of being more inclusive of male survivors of sexual violence, whose speech can be just as “chilled.” However, it also somewhat obscures the apparent intention of the speech – discussing gendered inequalities, and violence specifically suffered by women – and is clear from the subsequent sentences in the President’s remarks, when he says “And I’ve said before, when women succeed, America succeeds -- let me be clear, that’s not just true in America. If you look internationally, countries that oppress their women are countries that do badly. Countries that empower their women are countries that thrive” (Obama 2014).



rape and rape culture, but they also underscore the importance of the paying attention to the discourse circulating about these topics. These frames put issues of sexual assault and rape into larger contexts, and are not only inaccurate, but, as the *1 is 2 Many* report highlights, they also blame victims and excuse rapists. Inside the legal system this complicity allows rape to go unpunished. Outside of the legal system it creates a culture of impunity for offenders and potential offenders, and shames and silences victims. Reflecting this, the stories that have dominated the headlines – such as those mentioned above – have focused on the violence itself and how this violence is often spoken about in ways that reinforce dominant myths about rape and sexual assault.

The same rape myth frame used to discuss rape and sexual violence by those in the public eye and the limelight of media coverage, also operates as a powerful discourse in society more broadly, where these topics are just as “fraught with misunderstanding” as Lisak (2008, 1) and the *It's On Us* and *1 is 2Many* campaigns allege it is. For instance, one common “misunderstanding” about this issue is that although most people understand sexual assault to be “a brutal crime that occurs between strangers and deserves swift and harsh punishment for the offender... [this perception is largely inaccurate, as] in actuality, most sexual assaults are committed by acquaintances of the victim, go unreported, and, when reported, typically go unpunished” (Franiuk et al. 2008, 288). Furthermore, although sexual assault and rape are commonly perceived to be “merely the results of private disputes between close acquaintances” (Boba and Lilley 2009, 168), these crimes are deeply political as well, and not just in the way they are used or challenged by political elites. As MacKinnon noted over 25 years ago, when the political is understood to mean power, rape can clearly be understood to be a political issue as “[t]he feminist theory of power is that sexuality is gendered as gender is sexualized”

(MacKinnon 1987, 50). Much of this power lies in how the issues of sexual violence are discussed, or framed. Indeed, MacKinnon explicitly connects her theory of power and sex to questions of discourse by arguing that, “power constructs the appearance of reality by silencing the voices of the powerless, by excluding them from access to authoritative discourse”

(MacKinnon 1987, 164). Moreover, she argues that these power structures of discourse are hegemonic and thus determine the many ways in which women experience sexualized violence in society as a normalized<sup>9</sup> phenomenon: “To be about to be raped is to be gender female in the process of going about life as usual. Some things do increase the odds, like being Black. One cannot live one’s life attempting not to be a Black woman” (MacKinnon 1987, 7).<sup>10</sup> Reflecting this, MacKinnon called for a revolution in law, demanding that law respond to women as it has to men.

Responding to the feminist framing of the issue of sexual violence as profoundly political, both legislative and judicial environments in the United States have reinforced these crimes as political over the past 20 years, which is particularly salient as these are the two branches of

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<sup>9</sup> Here, “normalized” means common, or frequent, but is not meant to indicate that sexual assault is a “natural” or healthy occurrence.

<sup>10</sup> It is important to note that MacKinnon was ambivalent about legal change and the prospects of using the law to further the status of women. On one hand, she argued that legal change was an insufficient challenge to rape and other forms of sexual violence against women (including pornography), and that “[f]ormal prohibition has done little to alter their frequency; it has helped make it hard to believe that they are so common” (MacKinnon 1987, 5). However, she also clearly delineates the case for advancing an agenda of legal change, arguing that getting the law to finally recognize the wrongs done to women as violations of the law “seems to be necessary to legitimize our injuries as injuries in order to delegitimize our victimization by them, without which it is difficult to move in more positive ways” (MacKinnon 1987, 104). Reflecting this tension, MacKinnon pointed out that even if legal change is problematic and insufficient, it is still something worth striving for. Thus, the question is “not whether one trusts the law to behave in a feminist way. We do not trust medicine, yet we insist it respond to women’s needs. We do not trust theology, but we claim spirituality as more than a male preserve” (MacKinnon 1987, 228).

government that directly formulate and implement laws related to sexual assault and rape.<sup>11</sup> This has not always been the case. As Laurel Weldon points out, in the 1980s, Ronald Reagan “canceled the limited federal funding available for shelters for women victims of violence, claiming it was a private problem and that domestic violence shelters were hostile to traditional families” (Weldon 2002, 2). Notably however, with then-Senator Joe Biden’s introduction of the Violence Against Women Act to Congress in 1990 (White House 2014b), and the eventual 1994 passage of The Violence Against Women Act as part of the Violent Crime Control and Law Enforcement Act of 1994, Congress moved towards MacKinnon (and other feminists)’s political understanding of rape and sexual assault. In doing so, they sent a message to the nation and the world that these types of crimes are not simply personal, but that they are “punishable criminal behaviors deserving national attention” (Boba and Lilley 2009, 168). Boba and Lilley describe the legislature’s intentions for VAWA thusly:

“The act’s primary goals were to clearly criminalize acquaintance rape, domestic assault, stalking, and other acts of violence against women as well as to increase prosecution and penalties for these serious offenses. Another purpose was to increase the amount of research done both to evaluate these responses and to understand the problem more fully...In sum, Ford et al. (2002) assert that “policy makers hoped the Act would change the attitudes of people who have traditionally been insensitive to crimes of violence against women and who view those crimes as less serious than others” (p. 7).” (Boba and Lilley 2009, 169)

Thus, the Violence Against Women Act ushered in a vast array of legal, political, and structural changes related to violence against women at both the federal and state level. Overall, VAWA’s

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<sup>11</sup> Though not a focus of this analysis, it should be noted that the Executive Branch is also involved in the issue of sexual violence, and violence against women more broadly. For instance, the CDC is overseen by the Department of Health and Human Services (HHS), which is a Cabinet department, and as such, the President appoints the head of the HHS. The Department of Justice is also an agency that is involved in issues surrounding sexual violence and assault – specifically relating to controlling these types of crimes and enforcing the law – and, like HHS, it is also an Executive agency.

goal and stated purpose was to protect the public from sexual violence (Baker 1997). Several decades after its original introduction, VAWA

“changed the way our country responded to domestic violence and sexual assault. VAWA changed law enforcement practices, improved the criminal justice system, and created a network of services for victims. The bill established new federal crimes of interstate domestic violence and stalking, doubled penalties for repeat sex offenders, and sparked the passage of laws at the state level to protect victims” (White House 2014b).

In addition to challenging the range of crimes that fall under the rubric of “violence against women,” VAWA also included language that focused directly upon rape myth usage and upon significantly reducing not only the violence American women have been encountering, but also the language used to describe and contextualize this violence. *1 is 2 Many* (2014) reiterated that this part of VAWA is central to the original VAWA’s main purpose by highlighting how “[i]f there was one thing that we knew in 1990, it was that false, and often sexist beliefs about this violence distorted our criminal justice system” (1 is 2 Many 2014, 16). Further, these efforts were central to some of the vital successes of VAWA.

“The coordinated community response model (CCR) is one of the hallmarks of the Violence Against Women Act...[CCRs] often engage the entire community in efforts to change the social norms and attitudes that contribute to violence against women. Studies show that these programs have increased both arrests and prosecutions in sexual assault and domestic violence cases. Along the way, they have helped to defuse myths and inequalities and reduce the effects of violence against women ” (1 is 2 Many 2014, 18.)

Equally importantly as being tied to past successes, the *1 is 2 Many* report highlights that this mission must remain central to the current reauthorization of VAWA, specifically arguing that “we know that rape myths and victim-blaming continue to exist in the larger community and in the criminal justice system, both at home and abroad” (1 is 2 Many 2014, 16).

Ultimately, if the substantial programs in 1994's VAWA (as well as in reauthorizations of VAWA legislation<sup>12</sup>) specifically directed at eliminating rape myth usage in the American judiciary worked as intended, the decisions of judges as the federal and state governments should not contain rape myths. In addition, other programs that predated VAWA received more financial support than previously. Reflecting this increased financial and structural support, many legal scholars have argued that both state and federal legislatures have eliminated some of the laws that were most blatantly discriminatory that relate to sexual assault in the intervening years since Congress first passed VAWA (Comack 1999). Further, many within the legal community argue that “[s]o much has been accomplished [in eliminating gender bias from American jurisprudence] that many believe there is no more to be done” (Schafran and Wikler 2001, ix)<sup>13</sup>. However, sociolegal and feminist researchers and theorists have argued that despite the elimination of many deeply sexist laws that pertained to sexual assault and rape, sexist attitudes continue to shape citizens’ and legal and political actors’ behavior. They doubt the impact legislative reform can even have, arguing instead that legislative change alone is an

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<sup>12</sup> VAWA was reauthorized in 2000, 2005, and 2013 – the latter reauthorization passed after Congress failed to reauthorize VAWA before it disbanded at the end of 2012.

<sup>13</sup> Schafran and Wikler go on to note, “While it is true that the blatant forms of gender bias in the courts (such as sexist jokes and gender-biased language) have diminished, the subtle and intractable forms persist, particularly in substantive law decisionmaking. Moreover, the gender bias that results from lack of knowledge about the social and economic realities of women’s and men’s lives can only be eliminated through education. An improved climate does not mean that everyone grasps, for example, the counterintuitive reality that rape by someone the victim knows usually causes more and longer-lasting psychological damage than rape by a stranger” (2001, 33). Their arguments underline how the most egregious forms of biased discourse, both spoken in the courtroom and written in judicial opinions have been reduced overall, but how gender bias is still an important problem, particularly in dealing with cases that are related to sexual violence and rape. However, jurisprudence is not the only area where gender bias continues to be problematic. Issues related to gender bias within judicial nominating and conduct commissions still occurs – for instance, when “only women applicants are asked about their childcare arrangements; [or when] allegations of sexual harassment against a judge are totally ignored” (Schafran and Wikler 2001, 34).

insufficient tool to transform the judiciary's treatment of sexual assault (Philadelphoff-Puren 2004). While a full analysis of the factors shaping judicial interpretation is beyond the scope of this discussion, doubts about the transformative powers of legislation highlight how judicial engagement with the issues of sexual assault and rape do not exist in a world only conditioned by the laws that judges are tasked with applying and the cases to which these laws are applied. While traditionally, judicial decisions are analyzed in a way that assesses their use of legal doctrine and precedent (Segal and Cover, 1989), arguments such as Philadoff-Puren's (2004), highlight that these factors are not the sole drivers of judicial decisions. Instead, these decisions are conditioned by, and "take place in a context already cross-hatched by power, genres and discourses" (Philadelphoff-Puren 2004, 247). Arguments such as these have found significant evidentiary support in the work of Segal and Spaeth (1996; see also Spaeth and Segal, 2002, 2007). Their work demonstrates that the law does not exclusively determine judicial decision making. These decisions are also powerfully shaped by the personal attitudes, policy preferences, and beliefs of judges.<sup>14</sup> In the current study, the salient attitudes and beliefs that shape judicial

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<sup>14</sup> The strictest of behavioralists would likely debate the extent to which "also" can be accurately added to this sentence. Reflecting their important scholarship, this project builds upon the work of those like Segal and Spaeth (1996), as well as many other empirical researchers of the judiciary in underlining that "many judicial decisions by no means limited to the Supreme Court, are strongly influenced by a judge's political preferences or by other extralegal factors, such as the judge's personal characteristics and personal and professional experiences, which may shape his political preferences or operate directly on his response to a case" (Posner 2008, 8). Ultimately, this project assesses how judges apply sexual violence related statutes to the cases that come before them, and the discourse they use to do so (and in doing so draws from the legalist tradition). This project does not take a strict behavioralist stance, however, because in addition to focusing on the role played by personal attitudes and traits, it also explores the influence of statutes and statutory language on the way judges write about sexual violence. Thus, by examining both of these sets of variables, the current endeavor also does not adopt an exclusively legalist standpoint as it also draws from the empirical findings noted above, reflecting that, as Posner eloquently argues, "even legal thinkers who believe passionately that judges should be rule applicers and unbiased fact finders and nothing more do not believe that that's how all or even most American judges behave all the time. Our judges have and exercise

decision making in are those that relate to gender and sexual assault – and, in particular, a belief in rape myths.

In the face of these alleged limitations of statutory reform feminist sociolegal scholars countered that political and “judicial decisions continue to reflect traditional cultural mythologies about rape” (Comack 1999, 234) despite this extensive program of legislative reform. For instance, they argue that

“[s]imply introducing nonsexist terms...or terms with feminist-influenced meanings (e.g., *sexual harassment*, *date rape*) into a language says nothing about how such terms will be used once they circulate within the wider speech community, especially given the sexist and androcentric values that pervade this larger community.” (Ehrlich 2001, 15)

Because of the continued power of these sexist values, scholars like Comack and Ehrlich have argued that sexist understandings of rape – in particular those grounded in “rape myths” live on in judicial behavior, opinions, and discourse. Ehrlich has perhaps most effectively described this phenomenon, noting in her book *Representing Rape* that, “the law ostensibly constrains male violence against women but in substance allows such violence to continue” (Ehrlich 2001, 61), and that “sexual assault legal processes (e.g., judicial decisions) continue to be informed by culturally-powerful interpretive frameworks that legitimate male violence and reproduce gendered inequalities” (Ehrlich 2001, 22). While this is a powerful argument, Ehrlich’s study is based on very limited data. Her critical discourse analysis analyzes and contextualizes the transcripts of the adjudication of a single offender (“Matt”). Thus, it is unclear if these findings

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discretion. Especially if they are appellate judges, even intermediate ones, they are ‘occasional legislators.’ To understand their legislative activity, one must understand their motivations, capacities, mode of selection, professional norms, and psychology” (Posner 2008, 5). In his elegant exploration of the decision making process of American judges (in *How Judges Think*, 2008), Posner – himself a distinguished member of the appellate judiciary – argues against drawing conclusions based on only from one side of the legalist/political research. He notes that “one must be careful about dividing judicial decisions (or judges) into legalist and political, or, what is closely related, asserting a Manichean dualism between law and politics” (Posner 2008, 8), and I have done my best to heed his prudent advice.

apply to other offenders, cases, or legal fora – a limitation this study, which explores hundreds of cases, seeks to overcome in order to more conclusively assess these arguments.

Ultimately, whether these legislative reforms have altered sexist attitudes in the judiciary, remains unclear. Do we see judges using sexist language supportive of rape myths in their decisions? Do we see judges using their platform to challenge these problematic rape myths? Or have references to rape myth-supportive language fallen out of use 25 years after then-Senator Biden introduced VAWA to Congress? This project uses judicial opinions to answer these vital questions.

### **Literature Review**

This project builds upon two key areas of study related to framing: the literature on framing and discourse, and the literature about framing and sexual assault.

#### *Framing and discourse*

There are many definitions of frames, and of the concept of framing, which exist across the numerous literatures that employ this concept (Kent 2006). However, a useful definition is provided by Gamson and Modigliani (1987), who define a frame as “a central organizing idea or story line...[t]he frame suggests what the controversy is about, the essence of the issue” (143).<sup>15</sup> As Berensky and Kinder add to this definition, “[a] good frame is at its heart a good story” (Berinsky and Kinder 2006, 642). But frames do not just tell a good story about a specific policy issue, they also “change understanding, and understanding, in turn, appears to shape opinion.

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<sup>15</sup> Wedeking employs a similar definition, describing frames as “a small collection of related words that emphasize some aspect of an issue at the expense of others. Framing is the selection of one particular frame over another, and framing effects occur when a frame shapes the thoughts and behavior of others” (Wedeking 2010, 617).



Frames not only enhance understanding; they influence opinions” (Berinsky and Kinder 2006, 654; see also Lazar and Kramarae, 2011).<sup>16</sup>

Several studies have emphasized the significance of elite frames for citizens’ beliefs and understandings on policy issues, finding that “[e]vidence from experiments, surveys, and political campaigns suggests that public opinion often depends on which frames elites choose to use” (Druckman 2001, 1041; see also Berensky and Kinder 2006). However, as Wedeking notes, “[u]nfortunately, relatively little is known about how political elites adopt some frames over others, and scholars readily admit that we need a better understanding of the strategic nature with which elites employ frames” (Wedeking 2010, 617). This study adds to this project of seeking a more complete understanding of the dimensions of elite framing by looking at how members of the judiciary employ a variety of frames on the issue of sexual violence. As judges, the members of these institutions are clearly members of the American political “elite,” and the frames that emerge and circulate within this body have the potential to be especially powerful, because, as Druckman points out, “[a]n important concern about framing effects is that elites face few constraints to using frames to influence and manipulate citizens’ opinions” (Druckman 2001, 1041).<sup>17</sup> The impact of elite discourse on courtroom participants has been evidenced in studies from the United Kingdom, where Temkin and Krahe found that a “key element potentially

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<sup>16</sup> Much of the research into this concept has emerged from the literatures related to public opinion and media coverage within political science. Studies of framing in these areas have noted that “framing involves the active construction of social reality” (Kent 2006, 430), as mass media frames shape political discourse and reproduce the dominant political culture. Moving past public opinion and media studies, the concept of framing has also been applied to other areas of political inquiry.

<sup>17</sup> Indeed, studies of gender and power in American legislative discourse have found that even without conscious intention, people with political power, including those that are elected or appointed to judicial office, may be able to control and shape the discourses of less powerful participants (Mattei 1998), and that “one way in which a dominant group can maintain control is through the conscious or unconscious use of discourse” (Mattei 1998, 442).

affecting jurors as the trial proceeds is the judge” (2008, 63). Even when judges aren’t the ones making the decisions on guilt or innocence – which is the case with rape and sexual violence cases, as juries often decide rape trials – the justice’s views and beliefs are important. As the research of Temkin and Krahe illustrates, “[t]o the extent that judges share prevalent stereotypes about rape, these can reinforce jurors’ stereotypic beliefs and precipitate not guilty verdicts in cases departing from the real rape stereotype” (Temkin and Krahe 2008, 64). Moreover, research has shown that this effect extends “[b]eyond judges’ explicit statements...[and] their non-verbal behavior in the course of the trial may reveal their views on whether a defendant is guilty and, in turn, affect jury verdicts” (Temkin and Krahe 2008, 64). Unfortunately, however, “[t]o date, there are no systematic studies exploring judges’ acceptance of rape myths and stereotypes, so it is hard to assess the seriousness of the problem” (Temkin and Krahe 2008, 64).

Looking at the power of discourse to shape the opinions of others in society more broadly, Comack has argued that, “according to the power effects accompanying them; certain discourses will attain a position of dominance in society” (Comack 1999, 62). As feminist legal scholars have noted, the ways that framing shapes opinion and debate have been especially influential when it comes to sexual violence against women. Judicial framing does not only have the potential to influence other members of the legal system (especially those that are immediately concerned with the case such as the lawyers and plaintiffs involved in a specific legal action), but it also has the power to shape how other members of the legal community who encounter these framings (for instance through the influence of precedent) understand and engage with these issues. Further, the judicial use of issue frames can influence public opinion outside of the courtroom and legal system. For example when courtroom decisions are publicized in the news media, the framings used by the court are often replicated and reinforced by those

reporting the story and thus their influence spreads beyond the legal system. With this expansive reach, judicial discourse is thus able to reinforce already hegemonic framings in both legal and popular discourse, as these “discursive practices contribute to the production and reproduction of unequal social relations” (Ehrlich 2001, 35) and underline that “law is more than just discourse, [a]s a mechanism of power, legal practice has material effects on people’s lives” (Comack 1999, 67).

As this study looks at discourses that have been used to discuss violence against women over the past two decades, herein I address discourse that is both political and legal in nature. These forms of discourse – legal and political – often overlap in the United States, and legal and political scholars who study this area often note, “legal ideas and concepts are an important source of cultural schemas and frames” (Marshall 2003, 661). However, institutional location is important for framing, and to avoid unexpected institutional effects on the adoption and use of frames, the majority of this study will focus on the discourse on sexual violence against women as it exists within a single group of actors: the American judiciary. As Ehrlich notes,

“[w]hat accounts for the power of...discursive practices in ‘form[ing] the objects of which they speak’ is their embodiment in particular institutional settings. That is, it is only to the extent that these discursive practices are embedded in institutions and subject to institutional constraints that they come to be constitutive of ‘the social.’” (Ehrlich 2001, 2)

Thus, this project will address the evolution of the discursive frames related to sexual violence against women within a particular group of political and legal elites.

*Frames relating to sexual violence against women: The “Rape Myth” frame*

Both within and across political institutions, a number of issue frames exist and circulate – each with differing levels of discursive power – in the discussions and policy outcomes related to a single issue (Wedeking 2010). In the area of sexual violence against women, this is clearly

the case. In particular, the rape myth frame is both hegemonic and problematic among the general population and political elites. This frame has dominated the public discourse on violence against women for several decades and is clearly used by contemporary political actors, as the Akin and Mourdock examples, mentioned above, make evident. Simultaneously, many preeminent feminist scholars have forcefully challenged the use and embrace of these myths (Brownmiller 1975; Berger 1977; MacKinnon 1987; Lonsway and Fitzgerald 1994; Lees 1997; Ptacek 1999), social movements have organized in opposition to their usage (for example with “Slutwalk” and “HollaBack”-related activism), and executive reports have explicitly used the term to note how, though progress has been made since VAWA’s initial passage, more work needs to be done to halt the epidemic of sexual assault, and that “In particular, evidence shows that rape myths have remained resistant to change” (1 is 2 Many 2014, 15).

As it is quite broad, and can accurately be considered a “master frame,” the “rape myth” frame includes several “subframes.” These subframes were identified using Chong and Druckman’s (2007) procedure, and their disaggregation from the rape myth master frame will be discussed below.<sup>18</sup> Because of its cross-situational power, the key frame that will be examined throughout the course of this study is that of “rape myths.”<sup>19</sup> Discussed at length in sociolegal and feminist literatures, this frame has predominated the public discourse about rape culture and on violence against women for several decades. On one hand, rape myths have both persisted in the public and political discourse about sexual violence. Contemporaneously, many predominant

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<sup>18</sup> Further description of each of these subframes, and how they are each operationalized for this project’s content analyses is included in Chapter 2.

<sup>19</sup> Called “myths” in the literature, this label does not imply that none of the events described as myths could never happen, or do not sometimes occur. Franiuk et al. (2008) eloquently make this point, noting that “[a]lthough it is possible that for any specific case the above beliefs may not actually be myths (i.e., the “she is lying” allegation is accurate if a woman has made a false report), these are “myths” in the sense that data do not generally support these popular beliefs about sexual assault” (Franiuk et al. 2008, 289).

feminist scholars and organizations have vocally challenged these myths (Brownmiller 1975; Berger 1977; MacKinnon 1987; Lonsway and Fitzgerald 1994; Lees 1997; Ptacek 1999).

Rape myths are “defined as prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists” (Burt 1980, 217). In her seminal article on “rape myths,” Burt (1980) enumerated seven of these myths: “(a) she’s lying,<sup>20</sup> (b) she asked for it, (c) she wanted it, (d) rape is trivial, (e) he didn’t mean to, (f) he’s not the kind of guy who would do this, and (g) it only happens to “certain” women” (Burt 1980, cited in Franiuk et al. 2008, 292). These beliefs are widely held throughout society, and are deeply problematic because they “trivialize the sexual assault or suggest that a sexual assault did not actually occur” (Franiuk et al. 2008, 288).

In addition to these myths, Coates et al. (1994) listed two further rape myths. Firstly, they identified instances where “sexual assault was often attributed to a sexual rather than violent impetus” (Coates et al. 1994, 193) as the “erotic or affectionate characterization of sexual assault” myth. They point out that this can accurately be described as a myth because this inaccurately places acts that are violent and coercive “into a framework of normal sexual

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<sup>20</sup> The “she’s lying” myth is one of the most hotly contested discourses within the area of rape and rape myths. It has been circulating in legal, political, and social discourses for centuries. Famously, and deeply problematically, “Sir Matthew Hale, a chief justice of the court of the King’s bench of England, expressed the view [that women often lie about having been raped] in a form that became the basis for special jury instructions that would be used late into the 20th century... Hale (1847) wrote, ‘It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it 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’” (Lisak 2010, 1318-1319). Despite how commonly this myth emerges and reemerges in society, the statistics gathered by researchers in this field – including those provided by the Federal Bureau of Investigations and the U.S. Justice Department not bear this myth out: “Although false allegations are 5% of all rapes reported to the police, the fact that at least 90% of rapes are never reported to the police (not just including college samples, and this is a conservative estimate) suggests that of all rapes (those reported and not reported to the police), 0.005% are false allegations. And importantly, although false rape claims are reprehensible, it is important to acknowledge that they are also incredibly rare. Clearly, as a group, victims are very unlikely to report rapes to the police, and even less likely to make false claims” (Belknap 2010, 1335).

activity...[and that using this] inappropriate and inaccurate terminology to describe sexual assaults create[s] a misleading description of events” (Coates et al. 1994, 193-194). Secondly, Coates et al. identify the myth that sexual assault is not violence.<sup>21</sup> They argue that even when sexual assault or rape is depicted as violent it is also explicitly identified as distinct from other forms of violence, and of a lesser degree of violence as other crimes or assaults (Coates et al. 1994). Included in this subframe is discourse differentiating “forcible” from “non forcible” rape, and distinguishing rapes that are not extremely violent in nature from other types of rapes. MacKinnon (1987) effectively highlights a key issue with this artificial binary, noting that it reflects how

“Rape is defined by distinction from intercourse – not nonviolence, intercourse. They ask, does this event look more like fucking or like rape? But what is their standard for sex, and is this question asked from the *woman’s point of view*? The level of force is not adjudicated at her point of violation; it is adjudicated at the standard of the normal level of force. Who sets this standard?” (MacKinnon 1987, 88, emphasis in original)

The debate between gradations of “forcible” versus “nonforcible rape” is reflected not only in popular discourse about rape, but in many legal statutes as well. Indeed, as Kim, 2012, notes, “sentences for rape and sexual assault depend on the level of force, threat of force, or a force proxy, that accompanies the rape crime” (268). Despite the preponderance of this type of language in criminal statutes, however, the differentiation between “forcible” and “nonforcible” rape properly qualifies as a myth because “the requirement of force and proxies for force are redundant in the definition of rape, which also includes an element of non-consent, as where force is present, consent is absent” (Kim 2012, 268).<sup>22</sup> Though some legal theorists argue “not all

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<sup>21</sup> As Coates et al. (1994) effectively note, “Calling rape ‘intercourse’ is like describing someone’s punching another as ‘mutual touching’ or ‘caressing’” (Coates et al. 1994, 193)

<sup>22</sup> Kim (2012) goes on to argue that “Rationales for the grading of rape fester in the archaic and entrenched belief that ‘rape was not real unless the victim fought back’ as it was thought that the victim’s physical response determined consent... [and that t]he continued grading of rape

rapes are the same” (Baker 1997, 566) and that much of this variance is related to the amount of force that occur in the specific violent event, the application of the “forcible” modifier to crimes that necessarily include a lack of consent is deeply problematic, and can be correctly described as myth because, “the grading of rape negates the force inherent in the act of rape itself. The grading of rape demonstrates that the law continues to struggle with the distinction between rape and sex, thus requiring an accompaniment to sex to transform it into a legitimate rape” (Kim 2012, 271).

Beyond the specific myths identified by Burt (1980) and Coates et al. (1994), two further subframes comprise the “rape myth” master frame: the framing and description of rape as a crime with uniquely “moral” implications, and the myth of the “proper” emotional reaction of a rape/sexual assault victim.

A rape myth subframe in addition to the nine identified by Burt (1980) and Coates et al. (1994) explicitly frames rape as a crime of morality – for instance, describing how rape is “morally” degrading for the victim, or “indecent,” which when applied to another crime would be an unlikely and odd descriptor. Scholars studying judicial discourse in this area have noted that historically “[c]ourts have had trouble shifting their focus from morality to violence” (Ruebsaat 1985, 107; in Coates et al., 1994, 190), despite feminists’ explicit challenge to this framing.<sup>23</sup> This is a problematic subframe within the larger “rape myth” frame for several

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through force and force proxies demonstrates that such entrenched beliefs prevail. Physical protest or resistance by the victim is assumed to produce the use of force or threat of force by the perpetrator in order to effectively commit the crime of rape” (269).

<sup>23</sup> Indeed, feminist legal scholars have noted that this challenge to the framing of rape as a “moral” crime is a key contribution of feminist social movements on this issue, and has profound implications not only for legal outcomes and discourses, but for women’s citizenship itself. As Hirshman argues, “In modern society, the feminists’ attempt to change the moral content of rape is arguably the most radical manifestation of women’s claim to citizenship. This is because the ability to protect one’s self from rape is a uniquely female claim to security of the person, and an

reasons. Firstly, when the judiciary uses this morality-based terminology it can have the effect of “trivializ[ing] the violent nature of sexual assault” (Coates et al. 1994, 190). Secondly, while issues of morality are generally tangential to a case of rape, judicial comment on them is reified because of the elite and powerful status that members of the judiciary hold, especially in the courtroom and among other legal actors. As Smart explains, this is a part of

“how law extends itself beyond uttering the truth of law, to making such claims about other areas of social life. What is important about this tendency is that the framework for such utterances remains legal – and hence retains the mantle of legal power. To put it figuratively, the judge does not remove his wig when he passes comment on, for example, issues of sexual morality in rape cases. He retains the authority drawn from legal scholarship and the ‘truth’ of law, but he applies it to non-legal issues. This is a form of legal imperialism in which the legitimacy law claims in the field of law extends to every issue in social life.” (Smart 1989, 13)

Thirdly, in discussions about rape and sexual violence “moral” language is problematically gendered both in the courtroom, as well as in society. In legal and social discourse men’s sexuality is frequently separated from “the evaluation of moral behavior and regarded as private and incidental” (Lees 1997, 30), whereas women’s sexuality and victimization is pulled into the sphere of morality. It is used to evaluate her worth, honesty, and to judge the crimes committed against her, and to frame her as a (rare) “good victim” or an “unworthy victim.”

The final rape myth included in this project’s analyses explicitly depicts or describes the emotional reaction of the victim/survivor as relevant to the case or the claim made by the victim/survivor. Psychological research indicates that, “variations in a victim’s emotional display do appear to impact people’s perceptions of the victim and her claim” (Schuller et al. 2010, 768). In particular, women who behaved in a way that is perceived to be more gender stereotypic are

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intact physical self qualifies a person to become a player in the social contract game that is the foundation of modern social and political theory. If one cannot enforce such security, one has nothing to gain or bargain; one cannot be a player, so one cannot be a citizen” (Hirshman 1994, 103).



more likely to be believed than those that behave in a less stereotypical manner. In a laboratory setting, Schuller et al. found that a complainant's claims were "viewed as more valid when she was portrayed as tearful/upset as opposed to calm/controlled" (Schuller et al. 2010, 776). Their study found that the gender normativity of a complainant's behavior had a strong impact on observers' judgments about the validity of sexual assault claims – the more gender normative (and emotional) a victim was, the more frequently that victim was believed because it comported with people's beliefs about rape, but not because it was an accurate representation of a crime. This is included as a "rape myth" because these stereotypical judgments contradict the proven reality that victims' responses to sexual assault vary, and this variability is not "a behavioral cue to deception" (Schuller et al. 2010, 768). Indeed, there is no "correct" way to behave emotionally after being victimized by a sexual assault. Thus the idea that there *is* a "correct" way to behave emotionally after being victimized by a sexual assault is not an accurate representation of reality, and can be correctly identified as a "myth." Further, the "correct" way to behave after being victimized often varies, and whichever reaction a victim has, it can be portrayed as "wrong" or used to indicate that they are being untruthful, or reinforce that unless a victim behaves, post-assault, in a certain way, they are unlikely to be believed.

Taken together, these subframes can be divided into three categories: The first includes myths related to the victim (for instance that the victim is lying. This category of myth also includes the emotional reaction of the victim, and the assumption that the way they display emotion is reflective of their honesty or whether or not they had been victimized), the second includes myths about sexual violence itself (such as rape being trivial or something other than

violence), and the third includes myths related to the offender (for instance, including discourse asserting that the rapist didn't mean to do it)<sup>24</sup>.

As explained by Martha Burt, people – including the powerful actors in the legal system examined herein – do not believe these myths in order to be malicious or intentionally insensitive. Instead they are useful on an individual level, as they help people to deal with the disconnect between the reality of sexual assault, which can be deeply unjust and violate our sense of personal integrity, and the reality that sexual assault is widespread, often goes unpunished, and is frequently committed by those with close ties to the victims. Ultimately, and perhaps unsurprisingly, this reality is profoundly troubling for many men and women. Belief in rape myths can function as a self-protective mechanism to deal with this disjuncture. Thus, believing in these myths “protects the believer from sensing his or her own vulnerability to similar coerced events” (Burt 1980, 218).

While these beliefs can be useful by helping people cope on an individual level with the cognitively dissonant ideas that American culture is generally just in punishing sexual offenders and that women are actually sexually assaulted quite frequently and those that assault them frequently go unpunished, these myths are highly damaging because of their broader implications. As Franiuk et al. argue, “[b]y using rape myths to explain away the majority of sexual assaults that occur, a culture maintains that sexual assault is a serious violation that should be punished harshly (in the rare instances) when it does occur” (Franiuk et al. 2008, 289). In effect, it means that we, as a culture, are pretending that many sexual assaults do not happen, and in doing so denying rape victims justice. Further, holding these attitudes is correlated with other

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<sup>24</sup> See Appendix 1 for full list of frames, each of which is operationalized in Chapter 2.

pervasive and problematic attitudes, “like sex role stereotyping, adversarial sexual beliefs, and acceptance of interpersonal violence” (Burt 1980, 225).

## **Theory and Hypotheses**

### *Incidence (Chapter 2)*

This project examines how the rape myth frame is employed within a single body of political and elite actors: the American judiciary. As such, the initial question is whether the contemporary American judiciary actually uses the discourse of rape myths. This question is troublingly unsettled, as the literature addressing the continuing utilization of discourse grounds in rape myths by the judiciary is divided. Chapter 2 begins by assessing *if* members of the American judiciary use the rape myth frame and will then disaggregate these results to determine *how* they are deployed – in ways that reinforce or in ways that challenge these myths? Included here is a nuanced exploration of the usage of each subframe and the common directionality (reinforcing vs. challenging) of that subframe’s usage. I hypothesize that rape myths continue to be used by the judiciary across the states, and that language reinforcing these myths will outnumber rape myth challenges significantly. Ultimately I find that rape myths do appear to be a common and widely used discourse in sexual assault cases. And this is the case for both rape myth challenges and rape myths that were used in a way that reinforced the myth (“upheld”).

### *Demographic Correlates (Chapter 3)*

While Chapter 2 examines how and when the judiciary employs the rape myth frame, Chapter 3 begins to explore the issue of *why* these myths are still found in American jurisprudence. Chapter 3 examines how descriptive representation in the state judicial system interacts with the discourse of rape myths. Is explaining the variation in the usage of rape myths across states as simple as examining the differences in who sits on the bench in these state

courts? This part of the project evaluates this question, as well as the role of other demographic variables.

Based on the extant literature, I hypothesize that demographic variables do not have a strong impact on the use of rape myths, but that those associated with decreased rape myth usage and increased specific challenges to rape myths are a) that a decision is written by a woman, b) that the decision is written by an older woman (compared to the average judicial age), c) that the decision is not written by a Republican woman, and d) that the author of the decision's biography mentions gender-related experience. In analyzing the role of these demographic variables I find that as predicted, judicial demographics explain little of the variation in judicial rape myth usage. While an interaction effect is found for judges who have an expressed interest in gender and gender-related issues, race, age, the interaction of age and gender, and critically, gender, do not have particularly significant effects. As such, the first components of the hypothesis appear to have been incorrect – gender does not seem to explain much of the variation of rape myth usage. Similarly older women are not more likely to substantively represent women by challenging rape myths more frequently than their younger or male colleagues. However, Democratic women *do* seem to be more likely to challenge rape myths than either their independent or Republican colleagues.

#### *Geographic correlates (Chapter 4)*

The fourth chapter moves beyond looking exclusively at the judges that write the opinions, to an assessment of how these variables interact with broader institutional and political factors. Is it not just who is writing the decisions that matters, but the context within which they are writing them? Here, state political opinion (both generally and including public attitudes towards violence against women and other gendered issues), variance in judicial selection

method, as well as other salient state factors (such as women's representation in the state's judiciary) could all influence judicial behavior and, ultimately, the discourse on sexual violence displayed by the American judiciary. I hypothesize that the state-level institutional variables that decrease rape myth usage and increase specific challenges to rape myths are a) the presence of government agencies focused on women, b) the presence of judicial training programs, c) a critical mass of women on the state's bench. While I find that the presence of judicial training programs generally does not predict this outcome, and the presence of gendered and judicially-focused government agencies behaves only partially as expected,<sup>25</sup> the presence of a critical mass of women on a state's bench is associated with less rape myth usage.

I also hypothesize that public opinion will play a role and that states that are more conservative have more rape myth usage than states that are less conservative, and this difference is even greater where state public opinion is conservative on women's issues specifically. But in assessing this hypothesis, it appears, interestingly, that this relationship does not exist in any sort of significant way. Finally, I hypothesize that the state-level variables assessed herein interact with the gender variable from Chapter 3, so that where there is a critical mass of women, women will challenge rape myths more/reinforce rape myths less. In relation to the *reinforcing* of myths this is correct. But women do not *challenge* all rape myths more when there is a critical mass of women on the bench. Rather this is true only when the "not violence" myth is challenged. A striking finding here is that the effect of having a critical mass of women on the bench is not only true for women, it is also true for men.

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<sup>25</sup> These are associated with lower levels of rape myth usage, but this was both overall and in both directions, as these policy agencies were not associated with an increase in challenges to rape myths, rather they were associated with decreases in rape myth challenges and reinforcements.

*A Way Forward? (Chapter 5)*

This project concludes with an exploration of the positive and normative implications of these results and an assessment of possible ways forward in studying this issue, as well as for those interested in working towards achieving more justice in the courts on the issue of sexual violence. In relation to future studies of this issue I consider how the use of rape myths in the discourse of other political elites – specifically, legislators – impacts judicial use of these same myths. Thus, Chapter 5 begins to explore how legislatures have framed sexual assault legislation, and whether it impacts judicial usage of rape myths. Do legislatures that codify statutes based in the rape myths<sup>26</sup> explored herein make judges more likely to use these myths when deciding cases? While a full assessment of this question is beyond the scope of this project, preliminary analyses indicate this might be a promising avenue for future research. Further, if this influence *can* be seen, this has important implications for reformers seeking to make the criminal justice system one that is more hospitable to rape victims, less dismissive of their claims, and more challenging of rape mythologies.

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<sup>26</sup> For example, states that use the term “sexual assault” – which underlines that this is a sexually violent crime – rather than “indecent assault” – which minimizes the violent nature of the crime, and instead focuses on the crime being one that is not “decent.”

## CHAPTER 2

### **Prevalence of Rape Myth-Based Language in State Appellate Decisions**

*“It could reasonably be inferred...that the molestation was a response to stress caused by these circumstances.”<sup>27</sup>*

Currently, there are no comprehensive studies of how the discourses used to describe and understand sexual violence against women vary. We do not know whether legal actors, in particular judges, reinforce, challenge, or altogether ignore rape myth-based language in their jurisprudence; though in the limited studies that do exist there is evidence from both sides of the equation. As such, the preliminary analyses in this project are assessments of the current state of this discourse. Here, I examine the question of whether American judges use rape myths in their written opinions, and if so, how frequently.

### **A Brief History of VAWA and Related Efforts to Curb Judicial Use of Rape Myths**

These initial studies originate from Kibble’s observation that “the impact of legislative change depends to a great extent on how those directly charged with the implementation of changes view them, and on whether they are willing to operate within the spirit, as well as the letter, of the law” (Kibble 2008, 95-96). That the question is so contested is largely due to the huge volume of legislation, task forces, and funding that have been passed, developed, and distributed in order to try and remedy problematic judicial myth usage. Though it remains an unsettled question as to whether the rape myth frame is hegemonic in judicial discourse, what is

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<sup>27</sup> California Case: *In re: Alvin C.* This sentence is an example of the myth that “he didn’t intend or mean to do it,” and problematically absolves the convicted rapist in this case of blame for his actions by saying that they are attributable to “stress” and “circumstances.”

indisputable is that in the past quarter century Congress, many state legislatures, and other actors undertook significant legislative efforts to challenge the use of this problematic discourse in the judicial system. Proponents of the transformative effects of legislative change point to these substantial endeavors – in particular, those spurred by VAWA – as a reason to believe that judges have been sufficiently trained to avoid rape myth-based discourse. These proponents argue that recent high profile examples of judges using rape myth-based phrases are anomalous, if headline-catching, moments. Because they represent the most high profile push to eliminate rape myth discourse from the judiciary, it is crucial to understand these legislative efforts as they apply to jurisprudence about sexual assault, but also to recognize that other actors were also involved in this push for reform, in order to understand why it could be plausible that judicial use of rape myths could have largely been eliminated while these myths are still used in social discourse more broadly.

A key component of the 1994 Crime Bill, the Violence Against Women Act was part of a comprehensive attempt to address a number of issues related to crime in the United States, and is – for good reason – probably the best known legislative effort to challenge this type of violence and to improve the legal system’s response to it. As such, though a few state level VAWAs and city ordinances related to sexual violence predated the passage of VAWA, it makes sense to begin an exploration of the high-profile pushes for judicial reform with a discussion of this crucial piece of legislation. The Crime Bill itself included a wide variety of provisions, including those that focused on prisons, general crime prevention, drug courts, the death penalty, firearm control, and drunk driving (H.R. 3355, 1994), and, notably, Title IV (the Violence Against Women Act). This part of H.R. 3355 focuses specifically on violence against women (VAW), and though the current project focuses on judicial discourse, it should be underlined that the



scope of Title IV is much broader than legal discourse related to VAW. As VAWA was intended to “change attitudes toward domestic violence, foster awareness of domestic violence, improve services and provisions for victims, and revise the manner in which the criminal justice system responds to domestic violence and sex crimes” (Sacco, 2015, i), the programs it ushered in were equally diverse and numerous. In addition to Title IV’s provisions related to controlling problematic legal discourse are provisions related to safety for women in public transit and public parks, assistance for victims of sexual assault, shelter grants, and protections for battered immigrant women and children.

Reformers who have worked to challenge the use of rape myths in the legal system, and who argue that rape myth usage among the American judiciary has decreased, seem largely to base their arguments about these supposed discursive shifts upon the anticipated effects, in particular, of Subtitle D of H.R. 3355 – “Equal Justice for Women in the Courts Act of 1994,” Chapter 1 (“Education and Training for Judges and Court Personnel in State Courts,” Sec. 40411 and 40412), and subsequent appropriations added to VAWA reauthorizations which occurred in 2000 and 2005. In the original VAWA of 1994, these sections of the much larger legislative package stipulate that grants may be awarded for training court personnel in the laws on “rape, sexual assault, domestic violence, and other crimes of violence motivated by the victim’s gender” (HR 3355, 148). Applicable training can include data and information on 19 different issues related to the implementation of these laws (please see Appendix 2A for the list of training provided by VAWA grants). Importantly for both the purposes of this research project and for altering problematic judicial discourse reliant upon rape myths, many of these grants relate directly to challenging rape myths and their use by the judiciary – including providing training on “the nature and incidence of rape and sexual assault by strangers and nonstrangers, marital

rape, and incest” (which directly relates to the “real rape” myth), and training about “sex stereotyping of female and male victims of rape and sexual assault, racial stereotyping of rape victims and defendants, and the impact of such stereotypes on credibility of witnesses, sentencing, and other aspects of the administration of justice” (H.R. 3355 1994, 148). As was stipulated in Sec. 40414 of H.R. 3355 (“Authorization of Appropriations”), no less than 40 percent of the \$600,000 appropriated for this chapter for fiscal year 1996 was to be spent on “model programs regarding rape and sexual assault”<sup>28</sup> (H.R. 3355 149 – the majority of the rest of these funds were to be spent on model programs regarding domestic violence). Though specific Congressional appropriations for judicial gender-bias related training began relatively modestly, support in the form of Congressional Appropriations for the development of model programs continued – and grew – with VAWA’s reauthorizations. Importantly, in FY2001 Equal Justice for Women in Courts/Training Grants received 1.5 million dollars (this was authorized in the Violence Against Women Act 2000), and the program received this funding in FY 2001-2004.<sup>29</sup> Funding for judicial training continued as part of the regular STOP formula grant program, and in the 2013 Reauthorization of VAWA (S.47 2013) these grants are listed under

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<sup>28</sup> These funds were distributed through grant programs placed within the purview of the Department of Justice and the Department of Health and Human Services, and administered by the states. There are many STOP-grant related issues that can be funded by the states with money left over from their required appropriations (like that outlined in Sec. 40414), and because the amount given to states was quite high (by FY 1998 the Justice Department gave a total of \$135.9 million in grants under the Violence Against Women Act’s STOP formula grant program; OJP Press Release 1998), it is impossible to determine exactly how much money went specifically to model programs for judicial and court training on the issue of sexual assault.

<sup>29</sup> However, in FY 2005, though 1.5 million was authorized in VAWA for the Equal Justice for Women in the Courts/Training Grants, when enacted this funding was not distributed, and funding for the program was not even requested in FY2006. This pause in the disbursement of funding was largely due to new purpose areas and other requirements that were created as a result of the 2005 reauthorization of VAWA. Reflecting these changes, many states either decided, or had to, take different approaches to the development of their STOP implementation plans. For many states, including California, STOP funding continued in 2007 (California OES 2007).

Title I and described as “Enhancing Judicial and Law Enforcement Tools to Combat Violence Against Women.” Though the specific programs included in Congressional appropriations related to judicial and court education related to violence against women have varied across the different iterations of VAWA, it is notable that this kind of funding has persisted, in some form, in all VAWA legislation that has become law between 1994-2013. This continuing commitment reflects the Office of Violence Against Women’s avowal of crucial nature of these types of programs, noting that “The Court Training and Improvements Program (Courts Program)...recognizes that judicial education and specialized court processes play an integral role in creating an effective response to the crimes of sexual assault, domestic violence, dating violence, and stalking” (OVW 2013, 3). Following in the footsteps of the original VAWA, and the 2005 reauthorization of VAWA, \$450,000 in awards for the Courts Program were allocated for FY 2013. While this funding is important, it is only part of the volume of the larger pool of funding which broader VAW-related programs have received from the first VAWA through today. These STOP (Services-Training-Officers-Prosecutors) formula grants, which can go to a variety of programs, occasionally including judicial training<sup>30</sup> began as the largest funded VAWA program, and they continue to be relatively well funded today, as for instance, this program received \$210.00 million of the total \$625.91 million federal dollars that went towards combating violence against women in 2010 (Laney 2010).

Among the changes ushered in by these provisions in VAWA that specifically impact the judiciary and judicial discourse are task forces on gender bias, judicial benchbooks – which at several hundred pages long for some states, mark significant judicial education programs related

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<sup>30</sup> These “may be used to provide personnel, training, technical assistance, data collection, and other equipment to increase the apprehension, prosecution, and adjudication of persons committing violent crimes against women” (Laney 2010).

to sexual assault,<sup>31</sup> and other programs aimed at educating justices about rape, rape laws and their implementation, and rape myths. The writing of bench books, in particular, was often supported by grants from VAWA, for instance New Mexico's bench book notes that their "project was supported by Grant No. 2005-WF-AX-0020 awarded by the Office on Violence Against Women, U.S. Department of Justice" (published March 2008). However, this was not the exclusive purview of the federal government. Some states financed the development of benchbooks using state funds. Michigan's very extensive benchbook was financed by grants from the Michigan Domestic Violence Prevention and Treatment Board (Michigan Judicial Institute 2010), highlighting that while federal legislation was crucial, it was not the only legislative push for reform. Beyond their financing, another interesting aspect related to the introduction and diffusion of these benchbooks is that it is an excellent example of one jurisdiction adopting models developed by another; basically, of policy diffusion. For instance, in developing their own program of judicial education in the form of benchbooks, New Mexico relied heavily and explicitly upon Michigan's previously written benchbooks, as the New Mexico bench book clearly states: "The New Mexico Sexual Assault Benchbook was authored by the New Mexico Judicial Education Center, primarily on-call Senior Attorney Laura Bassein. This benchbook is modeled on, and partially draws from, a sexual assault benchbook published by the Michigan Judicial Institute, which graciously permitted this use" (New Mexico JEC 2008, Preface 1).

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<sup>31</sup> For instance, the development of the relatively recently published "New Mexico Sexual Assault Benchbook" was supported by a grant (Grant No. 2005-WF-AX-0020) from the Office on Violence Against Women, U.S. Department of Justice, and spans 242 pages. It covers such topics as "Is Rape a Crime of Sex or Violence," Recognizing the Traumatic Effects of Court Proceedings," and the "Context for Development of Rape Shield Laws" (New Mexico JEC 2008).

While the development of benchbooks drew in actors from groups other than the federal government, the development of task forces related to gender bias widens this circle of relevant actors working for judicial change even further. The National Association of Women Judges<sup>32</sup> undertook the project of establishing task forces on gender bias in the courts – beginning with the National Task Force on Gender Bias in the Courts – before the passage of VAWA. This enterprise specifically reflected “the fact that although progressive legislation in many areas affecting women’s rights had been passed in numerous states, these remedial laws have turned out to be only as effective as the judges who interpret and enforce them” (Schafran and Wikler 1986, 1). Similarly, the National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP) was established in 1980 to “eliminate gender bias in judicial decision making and courtroom interaction” (Schafran and Wikler 1986, 127), and throughout the 1980s offered judicial and legal education courses that were designed to “help judges understand how stereotypes, myths and biases about the nature and role of women and men affect fact finding, decision making, sentencing, communication and courtroom behavior” (Schafran and Wikler 1986, 127). While these courses and task forces provided crucial training and assistance to a number of colleges, law schools, judicial organizations, and bar associations, before the promulgation of VAWA they had relatively limited diffusion (Schafran and Wikler 1986) and were focused on a range of issues related to gender bias as opposed to problematic jurisprudential language specifically related to sexual assault and rape. Ultimately, programs such as the NJEP marked an important step forward in challenging rape myth discourse and

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<sup>32</sup> The National Association of Women Judges (NAWJ) is an organization that is primarily composed of judges from across the levels of state and federal courts in the United States. Included in its’ goals are, “to promote the fair administration of justice; to discuss and formulate solutions to legal, educational, social and ethical problems encountered by women judges; and to increase the number of women judges so that the judiciary more appropriately reflects the role of women in democratic society” (Schafran and Wikler 1986, introduction)

beliefs in the American legal community. Indeed, changing this problematic discourse as it existed in the American judiciary and supporting pre-existing efforts like those of NJEP was a major impetus of the VAWA legislation, and was one of the central reasons that Congress included a federal civil remedy that allowed survivors of rape to sue those that had attacked them in federal civil court in the VAWA of 1994 (Kim 2012).<sup>33</sup>

As the extant literature argues, before the passage of VAWA and the development and implementation of VAWA-funded judicial training programs related to sexual assault, the predominantly male judicial understanding of rape contrasted sharply and problematically with women's experiences of rape (Lees 1997). Reflecting this,

“In 1994, Congress passed VAWA to combat local rape tolerance. Identifying the impetus and grave need for federal action against rape, the Senate cited seventeen studies commissioned by various state court task forces and bar associations to conclude that state and local remedies for crimes against women were grossly inadequate. Congress thus acknowledged the benefits of federal law in combating violence against women. Enacted under Congress's Commerce Clause Power, VAWA included a federal civil remedy...that enabled rape survivors to sue their attackers in federal civil court after finding that state law enforcement officials, including police and prosecutors, could not be counted on to press charges in many rape cases.” (Kim 2012, 278)

With the promulgation of VAWA, the effort to eliminate gender bias in American courts – which had begun before VAWA, but received renewed interest and funding with VAWA, continued. Indeed, these strengthened efforts became “one of the most significant twentieth century judicial reform movements in the country” (Schafran, Wikler, and Crawford 1998, 2) and resulted in the creation of forty state and eight federal circuit task forces. Though they had begun before 1994, it was not until the passage of VAWA that the NJEP developed training curriculum specifically relating to rape and sexual assault, with “Understanding Sexual Violence: The Judicial Response to Stranger and Non-stranger Rape and Sexual Assault,” which was made

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<sup>33</sup> While the Court eventually overturned the civil remedy in *United States v. Morrison* (2000), other changes that were ushered in by VAWA, as well as some that predate VAWA, remain.

possible by a grant from the newly established U.S. Department of Justice Violence Against Women Grants Office (Schafran, Wikler, and Crawford 1998). This model judicial education curriculum was presented to approximately twenty states within the first four years of its publication (Schafran, Wikler, and Crawford 1998). Similarly, since VAWA's passage, a number of state court systems established bench books specifically related to cases of sexual assault and rape. Frequently, these have specifically addressed myths related to sexual violence and rape. For example, Pennsylvania's bench book notes that "Although much research has been done on the nature of rape and sexual assault, many myths still permeate our culture" (Panella and Kahng-Sofer 2007, 6). The benchbook goes on to specifically refute the myths that women are most likely to be raped by someone they do not know, and that if women dress a certain way or are under the influence of alcohol they are inviting rape.

When VAWA was reauthorized in 2000 and 2005 the focus on addressing problematic judicial discourse remained as a key part of the broader VAWA mandate and legislation. For instance, the reauthorization of VAWA that occurred in 2005 again focused on awarding grants to efforts undertaken to improve court responses. This is evident in H.R. 3402's amendments to the 1994 VAWA legislation in Subtitle J. This section, the Violence Against Women Act Court Training and Improvements Act of 1995, specifically dedicates funds to programs that address court training programs related to "adult and youth domestic violence, dating violence, sexual assault, and stalking" (H.R. 3402 2005, 20; for a complete description of the purposes of these grants, which were added to the 1994 VAWA funding grants, please see Appendix 2B). Further, the 2005 reauthorization went beyond the 1994 legislation with its inclusion of Sec. 41004 ("National Education Curricula"), which stipulated that,

"The Attorney General, through the Director of the Office on Violence Against Women, shall fund efforts to develop a national education curriculum for use by State and national

judicial educators to ensure that all courts and court personnel have access to information about relevant Federal, State, territorial, or local law, promising practices, procedures, and policies regarding court responses to adult and youth domestic violence, dating violence, sexual assault, and stalking.” (H.R. 3402 2005, 21-22)

Ultimately, if the substantial programs that were included in the original VAWA (as well as in reauthorizations of VAWA legislation), state level VAWAs, and that have also been pushed by state task forces to eliminate gender bias in the judiciary are working as intended, we should see fewer invocations of rape myths in recent jurisprudence as programs designed to deal with this problematic discourse were developed and implemented, or – as in the case of the programs that predate VAWA – supplied with more funding and support, and as judges have had decades to adopt these new norms.

The extensive legislative history of VAWA – more specifically, its support for programs related to reforming problematic discourses around sexual assault and rape – are important as a counterpoint to those that argue that the rape myth frame is hegemonic and that little has been done to challenge its usage. For these reasons, a reasonable argument could be made for the likelihood that judicial reliance on rape myths is largely a thing of the past. In addition to this substantial program history, scholars also find that VAWA has made an appreciable difference in eliminating this type of discourse (Boba and Lilley 2009). In particular, the Office on Violence Against Women has found that “descriptive and anecdotal reports indicate that VAWA had profoundly altered the national response to violence against women, [though they acknowledge that] documenting overall impact has been difficult” (Boba and Lilley 2009, 170). These latter findings are mirrored by a widespread belief among many in the legal community that efforts at eliminating various types of gender bias in the judiciary have been quite successful (Schafran and Wikler 2001). However, the preponderance of studies from both of these bodies of literature acknowledge that research documenting this type of impact is minimal, and ultimately that more



systematic studies have to be undertaken in order to make a more conclusive determination. This project begins by filling this gap in the extant literature.

### **Evidence to the Contrary: Were VAWA and Related Efforts to Curb Judicial Use of Rape Myths Enough?**

Providing balance to benchbook authors, legislative reformers, and some legal scholars who are optimistic that decades of legislation and VAWA-supported training across the legal system have mostly eradicated the use of rape myths, sociolegal scholars argue that this frame is still prevalent among these elites, and that its continued deployment is deeply problematic (Estrich 1987; Lees 1997; Comack 1999; Ehrlich 2001; Schafran and Wikler 2001; Kim 2012). There is also evidence that members of the judiciary in other countries, including Canada and the United Kingdom, continue to employ these myths (Ehrlich 2001; Temkin and Krahe 2008). Further, despite this lengthy legislative history, and the significant funding that has gone directly to judicial training programs (such as those funded under Subtitle J, Violence Against Women Act Court Training and Improvements, part of 2005's Reauthorization of VAWA) systematic evidence is rare but mixed on whether this framing actually remains a problem in American judicial discourse. For instance, rape shield laws rely on the premise of assuring victims that irrelevant and untrue information about them will not be admitted (Haddad 2005), were implemented "to deprive the jury of precisely the type of information that promotes rape myths" (Orenstein 2007, 1599), and have been existed in many states for decades (allowing judges ample opportunity to take advantage of VAWA-funded training programs on these statutes' proper application). But, anecdotal studies suggest that these laws are routinely ignored with judges levying few if any consequences on the lawyers who violate them (see Orenstein 2007; Spohn & Horney 1992), thus rendering their purpose somewhat moot – not because of statutory

problems, but because judges are failing to enforce rape shield statutes to the fullest extent of the law. This indicates that judges are not always willing to implement the spirit as well as the letter of the VAWA legislation.

Out of this continued debate emerges the key question of this chapter: 25 years after the introduction of VAWA, is the discourse of rape myths is still used in American jurisprudence? Based on the research that exists on this conceptual problem that lies at the heart of this study, I hypothesize that members of the American judiciary do currently employ the “rape myth” frame in judicial decisions in state-level courts. While it would be ideal that rape myths are *never* used, given their prevalence and endurance in society, a hypothesis that considers zero rape myth usage as a possibility would be overly optimistic and unrealistic. Further, it would not necessarily indicate much about possible programs that aim to eradicate rape myth usage – even reformers confident that judicial training has effectively dealt with rape myth usage would likely call these trainings a success if rape myth usage was reduced to being very rare mistakes that are unusual. Thus more specifically, I expect to find that the “rape myth” frame is used in opinions across jurisdictions, and is more than an occasional aberration.<sup>34</sup>

### **Hypothesis**

H<sub>1</sub>: Members of the American judiciary currently employ the “rape myth” frame in judicial opinions in state appellate courts and these myths are present in at least five percent of opinions evaluated herein.

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<sup>34</sup> In this chapter, jurisdictions are states. In later parts of this project, however, where possible, these jurisdictions will be disaggregated to allow for an examination of the rural/urban divide which is present in some states’ appellate systems, and the impact it has (or does not have) on rape myth usage.

## Data

To test this hypothesis, I examine published and unpublished decisions from American state courts from the year 2012. This year was chosen for several reasons, which cumulatively pulled violence against women back into the national spotlight as a heated political topic in a way it perhaps had not been since VAWA's initial passage in 1994 and make it an especially interesting year to study. Firstly, while the 2000 and 2005 reauthorizations of VAWA had occurred relatively smoothly, to the surprise of many, efforts to reauthorize VAWA in 2012 hit stiff partisan opposition. This opposition<sup>35</sup> was significant enough that efforts to pass the 2012 version in failed in the House, and VAWA was not reauthorized until 2013. Secondly, as was previously noted, the 2012 campaign season was particularly rife with rape myth embracing public statements from candidates, notably Akin and Mourdock. Thirdly, in this year the Justice Department updated their definition of rape, to – for the first time – include male victims, as well as to more closely align federal with state definitions of this crime. According to Susan Carbon, a representative of the Justice Department, this change was explicitly made to send “an important message to the broad range of rape victims that they are supported and to perpetrators that they will be held accountable” (Sclamberg 2012).

While violence against women is always a pressing political problem, examining the discourse at this point in time, when its political underpinnings were particularly visible is useful. This is because it reflects feminist empirical research's commitment to connecting issues in

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<sup>35</sup> Opposition to the 2012 reauthorization came largely from Republicans who particularly opposed extending VAWA protections to same sex couples, allowing Indian Tribal Courts more authority over incidents of violence against women involving non-Indian that happened on reservations, as well as provisions that were to allow battered undocumented immigrants to claim U-Visas, allowing them to stay, at least temporarily, in the United States (NY Times 2012)

women's lives to current politics and ultimately to the exploration of possibilities for reform. As Bowman and Schneider underline,

“feminist practice and theory concern issues of daily life-how women and men live, work, and relate. These real-life issues engage and galvanize public attention and then generate law reform efforts, such as the effort to educate Congress about sexual harassment in the Clarence Thomas confirmation hearings, which in turn generate more theory. And the spiral continues, as, for example, the tremendous amount of sexual harassment litigation that arose after the Hill-Thomas hearings led to the Supreme Court's series of decisions in 1998<sup>29</sup> and resulted in richer and more nuanced theoretical exploration among feminist legal scholars.” (Bowman and Schneider 1998, 255)

Similarly, predating 1994's VAWA, public and interest group attention focused upon reforming laws related to sexual assault, domestic violence, and other types of VAW. Would the politicized events of 2012 lead to a similarly galvanized public pushing for law reform? In some ways, the answer may be yes, so it is useful to examine 2012, when this galvanization was sparked.

Perhaps more usefully from the perspective of data collection, because of the highly publicized criticism of Akin and Mourdock, in particular, 2012 marks a year where if ever those likely to use rape-myths were going to shy away from using them, in order to prevent similar negative coverage this would have been that time. Thus, sampling from 2012 reduces the possibility that the year selected contains an unusually and unrepresentatively high number of rape-myth mentions from judges.

Scholars of discourse studies note that institutional factors such as “orientation towards relevant institutional roles and identities, and the particular responsibilities and duties associated with those roles, and through their production and management of institutionally relevant tasks and activities” (Drew and Sorjonen 2011, 194) profoundly shape the discourses that exist within institutions. These findings demonstrate that “language and word use have been shown to vary tremendously from topic to topic and from one social context to another” (Pennebaker and King 1999, 1296). In the context of judging, these contextual effects – how jurisdictional differences

including legal statutes, culture (of the legal and social communities), employment environment (presiding over jury trials as compared to appeals), etc. – have the ability to shape judicial writing and discourse across locations and levels. Examining the presence of the “rape myth” frame as it exists in a single level of the American court system – state courts of appeals – mitigates the impact that differential institutional prerogatives might have on the frames in question, and controls for some of the many possible variables that would be potential influences on judicial behavior if all levels of the court system were examined herein.

Similarly, this focus on the analysis of situated discourse, instead of relying on other data such as interviews, acknowledges the findings of legal scholars that “[c]riminological research has demonstrated a divide between the expressed attitudes of criminal justice personnel and what they do in practice” (Kibble 2008, 97). Focusing on these discourses specifically as they occur in the institutional contexts themselves reflects findings that indicate “the same individuals articulate talk...differently as they move from one activity to another” (Goodwin 1990, 9 in Ehrlich 2001, 6), and mitigates this effect.

Though there are a number of outputs from state court systems, the discourse examined in this analysis will be limited to judicial opinions. These opinions are the most powerful forms of discourse that emerge from court proceedings for several reasons. Firstly, judicial decisions “constitute a primary source of case law [as they] provide a judge’s rationale for the decision, the facts of a case, legal issues, and dispositions (such as a sentence)” (Crocker 2005, 201). Secondly, “since judges are the ultimate and most powerful interpreters of trial talk, their rulings” (Ehrlich 2007, 455) powerfully shape precedent. Indeed, the power to shape relevant precedent is one of the key reasons that many judicial decisions are written, as “[a] judge will write a judicial decision if he or she believes that the case was significant or will contribute in an

important way to case law” (Crocker 2005, 201). Because these decisions are produced contemporaneously with the decision being made, these are clear examples of situated discourse. Further, because “judicial decisions do not reflect a judge’s personal opinion; rather, they are his or her interpretation of the law given the facts of the case” (Crocker 2005, 201), they are effective demonstrations of the “law as practice” – which is being studied herein.<sup>36</sup>

The data used to evaluate the above hypothesis consists of a sample of state appellate court opinions from the 44 states that have intermediate courts of appeals.<sup>37</sup> The data used in this analysis was generated using keyword searches of LexisNexis. Firstly, a preliminary search of all cases from the Courts of Appeals of all 44 states with intermediate appeals courts between 01/01/2012 and 12/31/2012 was conducted in LexisNexis, (results for each state were searched for independently). For each state the search terms “rape” and “sexual assault” were used, and the relevant statutory descriptions of sexual offenses were included.<sup>38</sup>

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<sup>36</sup> The use of this particular data does have important limits, however. As Gatowski et al. (2001) note, “an empirical analysis of published case law is, by its very nature, restricted to an analysis of post hoc justifications of those writing a decision in a particular case and does not fully capture the judicial decision-making process. Although an empirical analysis of case law provides important data about judges’ normative, case specific reasoning, research has demonstrated that there may be significant differences between published and unpublished cases, and that these differences may be dependent upon the case characteristics analyzed and the legal questions involved” (Gatowski et al. 2001, 434-435). Since data about judges’ normative case-specific reasoning is a key focus of this study, and because this study is focused on this discourse itself, rather than the larger decision-making process behind it, these limits are not particularly problematic.

<sup>37</sup> The states that only have supreme courts, and not appellate courts were not included for analysis because of the differing nature of Supreme Court incentives and the attention the highest courts receive compared to that received by lower level appellate courts. These states include Montana, Nevada, North Dakota, South Dakota, Vermont, West Virginia, and Wyoming.

<sup>38</sup> In lieu of searching for a single term or group of terms to determine the set of cases to be coded (just searching for “rape” terms, for instance, or for “rape” or “sexual assault”) searching for the most contextually relevant cases reflects how a “rape case” cannot be solely defined by that single term of “rape.” Rather, determining which cases can be accurately classified as “rape trials” requires that the varying terminology that exists in relation to cases of rape and sexual assault be accounted for. Currently, in some states, the charges pressed in cases of what is

Rape, in particular, poses a definitional challenge for researchers because different terms “(such as *rape and sexual assault*) have also been used to describe identical acts” (Saltzman, 2004, 1236). The definitional variation across American states and across the international community more broadly reflects the evolution of the concept of rape over time and space. Under English common law, charges of rape were understood to require three components: intercourse,<sup>39</sup> force, and lack of consent (Lyon 2004). This common law conceptualization was also at the heart of traditional American legal definitions of rape. However, “rape” has been redefined over the past several decades in American law. More specifically, marital rape exceptions have largely been abolished<sup>40</sup>, and any force used by the attacker is no longer the primary or exclusive emphasis of criminal codes and trials. Instead the nonconsent of the victim

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generally understood to be “rape” are termed “sexual assault” instead of “rape,” whereas other states continue to lay charges of “rape” for the same types of offence, and some states use terminology that does not include either of these terms. This statutory heterogeneity reflects Kilpatrick’s observation that, “[e]xamination of criminal code definitions in the United States is complicated by the fact that we operate under a complex set of overlapping federal, state, military, and tribal laws that often differ in how specific crimes are defined” (Kilpatrick 2004, 1211). Indeed, this ambiguity is part of a larger problem of definitional slippage with the concept of “Violence Against Women,” which, as Crowell and Burgess note, has been used to refer to a very “wide range of acts, including murder, rape and sexual assault, physical assault, emotional abuse, battering, staling, prostitution, genital mutilation, sexual harassment, and pornography” (Crowell and Burgess, 1996, 9 in Saltzman 2004, 1236). Although there is broad agreement at home and abroad that uniformity in both terminology and measurement of VAW is of vital importance, what remains lacking “is a formal mechanism to help us select one of several proposed terminological or methodological strategies” (Saltzman 2004, 1241).

<sup>39</sup> Though, as will be discussed later, describing “rape” as “intercourse” is deeply problematic, and reinforces the myth that rape is distinct from violence. Instead, this framing underlines the common belief that exists along a continuum of sex acts (rather than is a violent crime, even if that crime were sexual in nature).

<sup>40</sup> Though the majority of states have abolished marital rape exemptions, these exemptions do still exist – either partially, by having lesser punishment for marital rape than other types of rape or requiring that more force be used for marital rape to be prosecuted, or fully – in several states (Lyon 2004).

is frequently prioritized<sup>41</sup> (Lyon 2004). With this redefinition has come significant variance in rape laws from state to state. For instance, California is one of only seven states where “the courts have expanded the definition of rape to include the withdrawal of consent after penetration” (Lyon 2004, 279). A determination of which of the components of rape laws across the states should most properly be termed “rape” – for example, whether California was correct to adopt this expanded definition – is beyond the scope of this analysis, though statutory language used by states as well as legislative intent will be discussed in Chapter 5. Instead, the cases that are tried as “rape” within any state court system are included as cases of rape in the analysis undertaken herein.

Where “sexual assault,” or other terms are used by state courts and the legislation they apply (rather than “rape”) the category of rape charges that hew most closely to the National Incident-Based Reporting System (NIBRS) definition of rape is used. The NIBRS definition is: “The carnal knowledge of a person, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity” (NIBRS 2000, 33).<sup>42</sup>

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<sup>41</sup> Under the legal definition, nonconsent is prioritized. However, force is still an important and problematic issue that can be referenced at trial, and that this analysis will examine the dimensions of those references.

<sup>42</sup> Using a federal standard such as the NIBRS definition is advantageous because “the criminal code definitions of violent crimes in most states are similar to those in the federal criminal code, and the FBI (2001) uses federal criminal code definitions of violent crimes to compile its annual estimates of reported crimes throughout the United States” (Kilpatrick 2004, 1211). However, there are two commonly used federal definitions of rape – that used by the FBI for the Uniform Crime Report and the NIBRS definition. The UCR definition will not be used, because it is problematically narrow, and fails to capture a significant portion of cases defined as rape across the states. As Kilpatrick notes, “the UCR excludes cases involving forced oral sex, anal sex, or penetration with fingers or objects. Likewise, the UCR does not include other acts of rape because of the victims’ being incapable of giving consent because of temporary or permanent mental or physical incapacity. The FBI NIBRS definition does include these other types of rape” (Kilpatrick 2004, 1226). Reflecting the modern redefinition of the concept of rape, a rape need



Reflecting these terminological challenges, the search terms ultimately used to find appropriate cases for analysis were generated from a single source: the “Sexual Assault Statutes in the United States” (NCVLI 2012). This publication was a joint project of the National Crime Victim Law Institute and the National Women’s Law Center, and reflects state laws about sexual assault that meet the NIBRS definition. This method of using jurisdictionally-relevant terminology rather than a single search was used to ensure that the searches of LexisNexis were appropriate for each state’s laws (see Table 2A for list of terms searched for every state) and accurately captured what would colloquially be understood as “rape cases” from each state.

For instance in the case of Iowa, the term “sex abuse” was added to the initial search for “rape” and “sexual assault” as the Iowa Criminal Code and Statutes use this term to describe crimes that most other states call “rape” or “sexual assault.” Similarly, California’s Criminal Code includes “rape,” “sexual battery,” “sodomy,” “unlawful sexual intercourse,” “unlawful sexual penetration,” “unlawful oral copulation,” and “unlawful sodomy.” These terms were all

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not be “forceful” to be included under the NIBRS definition or in this analysis, nor will the extent to which the victim “resisted”<sup>42</sup> be considered (Lyon 2004). In comparing the UCR and NIBRS definitions, Kilpatrick goes on to note that the “FBI UCR uses an antiquated definition of rape that is inconsistent with the criminal codes in most jurisdictions throughout the United States” (Kilpatrick 2004, 1230). Particularly problematic is that the UCR’s definition of rape only includes “the carnal knowledge of a *female*” (emphasis added), and erroneously eliminates the possibility that men can be raped. For these reasons, the UCR definition is not used herein, and the NIBRS definition will be the one used to evaluate differing terminology of criminal charges across states and to determine which cases should be included in this analysis. In addition to its superiority to the UCR definition, the NIBRS definition is also appropriate for use in this analysis because it is based in the criminal justice system. For instance, it is more useful than comparatively expansive public health definitions, because public health definitions of sexual violence include acts other than rape that are not classified as sexually violent crimes, or sex crimes at all, in many if not most American jurisdictions (Kilpatrick 2004, 1215). Finally, the NIBRS definition is appropriate because the present study is of actors’ usage of frames within one branch of the criminal justice system – the courts – that are clearly part of the criminal justice system. Were the discourse circulating within actors inside of a public health institution the focus of this analysis, the broader public health definition might be a more appropriate one to use.

included in the LexisNexis search for cases in California. In this way, the universe of cases dealing with these issues in each state's Appellate Courts in 2012 was collected.

Because of the variance in state population and geographic size, the former each state's respective appellate court caseload tended to mirror, the search procedure described above returned a highly variable number of results for each search; between 2 (New Hampshire) and 790 (California) cases were found for each state, respectively. The search results are summarized in Table 2B.

The universe of cases for the states where fewer than 45 cases were returned was analyzed using hand coding. For states that returned more cases than this, a sample of 30 cases was drawn from the larger states to allow a comparable number of cases per state to be analyzed and coded.<sup>43</sup> For states that returned more cases than this, a sample was drawn from the larger states to allow a comparable number of cases per state to be analyzed and coded so that the opinions of larger states were not overrepresented in this study. When possible, this sample was stratified according to rural/urban Appellate Court Districts in order for the many more urban cases that were pulled up by LexisNexis to not be over-represented. Thus, 15 cases from primarily urban circuits within the state were randomly drawn for states such as California<sup>44</sup> and Illinois, and this procedure was repeated for majority rural state appeals circuits. However, not all states divide their middle appeals court circuits in a way where jurisdictions that are urban can be separated from those that are rural. Instead, some states' appellate courts travel, and are not

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<sup>43</sup> Occasionally Supreme Court decisions were returned alongside mid-level appellate decisions, but these were not included for analysis, and were discarded during the coding procedure.

<sup>44</sup> For example, in the case of California, the "urban" Appellate Districts include the First, Second, and Fourth Districts, which contain San Francisco, Los Angeles, and San Diego, respectively (this search resulted in 552 "hits," or cases from 2012). Conversely, the "rural" districts include the Third, Fifth, and Sixth Districts (this search resulted in 208 "hits"). A random sample of 10 cases from the "urban" districts and of 10 cases from the "rural" districts was included in the final analysis. This procedure was repeated for the Appellate Districts of Illinois.

assigned to territorially-bound units (apart from being limited to the state's jurisdiction), while some appellate courts, particularly in the geographically smaller states, had appellate courts located in one central location. For these states, where an urban/rural divide in cases could not be made, and therefore stratified sampling was impossible, 30 cases were sampled from those returned in their LexisNexis searches.

The number of total cases selected for coding was 1291, and this dataset of cases was then read and coded by hand (as described below). However, the unit of analysis in the following analyses is not the case, but the opinion, and the final dataset includes more than 1291 opinions. This is because a number of cases included not only the Court's opinion, but also dissenting and/or concurring opinions. These concurrences and/or dissenting opinions were coded as unique observations. Including each opinion, concurrence, and dissent, the total dataset includes 1332 observations from 44 state intermediate appellate courts.

## **Methods**

### *Coding Procedures*

The data collected using the methods described above was examined using content analysis methods. While content analytical methods were initially minimally used in studies of legal discourse (Kort 1965), over the past several decades this type of methodology has been increasingly used in legal studies and the political science literature focusing on courts and the judiciary.<sup>45</sup>

Initially, computer-coding methods were considered for this analysis, because they allow researchers to examine far larger samples than is possible when only coding by hand and they

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<sup>45</sup> Though studies of framing have not caught on in legal research to the extent that they have become popularized in other disciplines.

can ensure higher reliability. However, automated or computer coding methods can be problematically limited, because they are unable to capture context or linguistic devices such as irony and sarcasm, or the multiple meanings words often have. While research has found that they can be reliable and fast when used for appropriate projects, and further, that the use of these methods has produced promising results across several fields (Pennebaker and King 1999; Pennebaker and Lay 2002), because of the vital importance of context to this analysis, computer-coding methods were unable to accurately assess myth usage in judicial opinions, and hand coding had to be used.

As Chong and Druckman (2007) point out, benefits of the hand coding approach include flexibility and detail, at the cost of lower reliability and smaller samples. This approach is appropriate for a detailed examination of the data, and proved necessary for the overall project because determining directionality of myth usage was a vital part of the analysis.<sup>46</sup> The hypotheses evaluated herein address this division and directionality. They are based upon two possible outcomes for the dependent variables: decisions using language reinforcing rape myths, and decisions using language challenging rape myths. These are related, but importantly, not two

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<sup>46</sup> In studying the frame of “rape myths,” whether they are still employed by the judiciary, which individual judges are using this frame, and how and where this discourse varies, it is not only important to determine whether these myths are referenced at all, but also how they are used. The hypotheses evaluated herein are based upon differentiating between two possible outcomes for the dependent variables: where rape myths are used, some decisions use language reinforcing rape myths while other decisions use language challenging rape myths. Determining directionality of myth usage was a vital part of the analysis. In studying the frame of “rape myths,” whether they are still employed by the judiciary, which individual judges are using this frame, and how and where this discourse varies, it is not only important to determine *whether* these myths are referenced, but also *how* they are used. For instance, a judge saying that a woman “had it coming” would be very different than a judge saying that a woman “did not have it coming, and that such assertions are problematic” or “saying a woman had it coming is no longer acceptable.” Both of these hypothetical scenarios would include a mention of a rape myth, and two of these examples even include identical phrasing. But, one is deploying that myth in a way that indicates that the speaker agrees with the myth, and the other is explicitly challenging it.

sides of the same coin. Because it involves the explicit challenge of a culturally hegemonic frame, the latter likely requires a more intentional and conscious framing by a judge, while it could be argued that the former could be subconscious and responding to common framings of sexual assault and violence. This difference could only be captured using hand-coding methods.

A further benefit of hand coding is that it allows the researcher to differentiate between when judges are using rape myths because they are contained in a state's statutory language from when they are using myth-based discourse unprompted by legislative framing of the crimes of sexual assault and rape. This linguistic variation among sexual assault statutes is important, especially when considering why judges use rape myths (are they influenced by language used by legislators? Or are they introducing this discourse when it is absent from that state's statutes) how to potentially challenge rape myths (if they are still used by members of the judiciary) and will be the focus of Chapter 5.

#### *Operationalizing the Rape Myth Frame and Subframes*

As was indicated in Chapter 1, the key frame related to rape and sexual violence against women – that of rape myths – was inductively identified following the recommendations of Chong and Druckman (2007).<sup>47</sup> In order to gather the appropriate and relevant frame(s) (or in this case, “subframes”) for analysis they suggest turning to the extant literature and that “prior work in the academic and popular literatures serves as a good starting point” (Chong and Druckman 2007, 107). They also suggest that frames for analysis come from outside of the

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<sup>47</sup> In the political science literature related to framing there are several differing ways that scholars have identified as useful methods for identifying and studying the key frames in a given issue area. This paper follows the method proposed by Chong and Druckman (2007), which argues that researchers should identify the initial set of frames for their study inductively. The next steps they suggest are selecting sources for content analysis and specifying how any particular frame can be identified. This paper also follows these steps, which are discussed in greater detail in the methods section of this paper.

academy as well as from scholarly works on a given issue, and that researchers should follow Gamson and Modigliani (1987) by “examining the frames produced by various elite actors and organizations on both sides of the issue” (Chong and Druckman 2007, 107) – essentially tapping into the set of “culturally available frames” (Gamson and Modigliani 1987) on the issue at hand. Chong and Druckman’s method was the method initially followed in this study in order to determine the set of subframes that should to be explored in the analysis undertaken herein.

Looking to the literature on culturally available frames, Burt (1980)’s initial set of 7 myths was the first set of “subframes” included in the rape myth framework.<sup>48</sup> These include the following myths: she’s lying, she asked for it, she wanted it, rape is trivial, he didn’t mean to, he’s not the kind of guy that would do this, and it only happens to “certain women.” Coates et al. (1994)’s additional two subframes were also included; the “sexual assault distinct from violence” myth, and the “erotic affectionate characterization of rape” myth. Once selected, these nine frames were tested to determine whether they were appropriate for further analysis using a limited selection of cases from Federal Appellate Courts<sup>49</sup> (so state appellate cases were not

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<sup>48</sup> In their meta-analysis, Lonsway and Fitzgerald (1994) note that frameworks employing rape myth acceptance-related scales based on Burt (1980)’s initial structure can problematically overlap with scales assessing hostility towards women. However, this overlap is not a problem for this analysis for 2 reasons. Firstly, because this is not a psychological study, and while it would indeed be interesting if hostility towards women covaried with whether or not judges believed in rape myths or not, the psychological processes are not a focus of this study – the use of these terms and myths in judicial discourse is. More importantly, the use of Burt (1980) is continuous with the majority of the literature examining rape myths (Suarez and Gadalla 2010), which continue to employ Burt (1980)’s structure as this “concept of rape myths contribute[s] in a significant way to the understanding of rape and its consequences to victims (Suarez and Gadalla 2010, 2013; see also Lonsway and Fitzgerald 1994).

<sup>49</sup> Opinions from the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, and 10<sup>th</sup> Circuit Courts were selected for analysis herein. These Circuits were chosen because they include Circuits from both the northern (the First and Second Circuit) and the southern states (the Fifth Circuit), as well as western states (the Tenth Circuit). Also included were circuits that included very urban areas (the Second Circuit includes New York City, and the Fifth Circuit includes Dallas, Houston, and San Antonio) as well as very rural areas (the Tenth Circuit includes Wyoming, for instance). They also represent politically diverse

coded twice) that were hand-coded for the presence, absence, and directionality (supportive of the myth or challenging the myth) of each subframe. During this limited coding trial, the list of subframes was further developed using an iterative process: these nine frames, which were identified based on the literature alone, were confirmed as appropriate sub-frames for inclusion based on their repeated presence in this initial sample. Concurrently, subframes that appeared in the initial sample of Federal Appellate cases, but that were not initially identified through an examination of the extant literature were added for inclusion in subsequent hypotheses and analysis. As the sample of Federal Appellate cases were read, it became clear that problematic, myth-bound language was being used which the initial nine subframes did not capture.

The subframes that were not initially identified but that were being repeatedly referenced in these opinions were the “morality” and “emotional reaction of the victim/survivor as relevant” frames. Described in detail in Chapter 1, these subframes fit the “rape myth” description provided by Burt (1980), but were not included in the extant literature that details the rape myth subframes. However, because they clearly met the definition of rape myths, they were included as subframes to be evaluated in the overall analysis of the universe of cases. Ultimately, the rape myths included in this project’s analysis are the 11 discussed in Chapter 1 and listed in Appendix 1A.

Following the identification of these myths, each state’s sampled opinions were coded by hand, and where language referencing rape myths was used, this was noted, and the example of the specific phrasing used was also noted.

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areas: the states in these jurisdictions include states that tend to be strongly Democratic, those that are strongly Republican, and those that are commonly identified as swing states (such as Colorado and New Hampshire). Findings from this analysis were presented at the 2013 Midwestern Political Science Association’s Annual Conference (April 2013, Chicago, IL)

## Results

This project's first hypothesis – that members of the American judiciary currently employ the “rape myth” frame in judicial opinions in state appellate courts – was tested using content analytic methods. An opinion-level analysis was conducted, where each of the cases sampled was hand-coded for the presence or absence of the myths described above. The results of this analysis are summarized in Table 2C and depicted in Figure 2A (below).

Of the 1332 cases that were coded in this analysis, 53% included at least one reference to rape myths. This supports the first hypothesis; rape myths are referenced commonly in state appellate opinions. Further, this far exceeds the 5% threshold above which reference to rape myths can be considered scattered and occasional aberrations. Rape myths related to the victim, the rapist, and the crime itself were all found in the decisions examined, and in a way that does not suggest these are just occasional and rare judicial errors, but rather they are enduring frames that circle in judicial considerations and writing about sexual violence.

However, the frequency of these references is highly variable depending on the type of myth used. As Table 2C indicates (as it is ordered by frequency of usage) nine of the rape myths analyzed herein are used in over 5% of the opinions assessed. These include the “not violence” myth, the “morality” myth, the “rape is trivial” myth, the myth that rape victims are “lying”, the myth that rapists “didn’t mean to rape their victim,” that only “certain women” are rape victims, the “erotic description” myth, the myth the men charged with rape “aren’t the kind of guys” to commit sex offenses, and the myth that the “emotional reaction” of the victim is relevant to the case. However, a couple of the specific myths did not meet the five percent threshold (given the number of opinions included in the study, this threshold is met if the rape myth is discussed in at least 67 opinions analyzed herein). The myths that are not present at the five percent threshold



include the myth that the victim “wanted it,” and the myth that the victim “asked for it.” The rape myths that are not present at the five percent threshold are also listed in the first row of Table 2D (below). These two rape myths are those discussed least frequently, across all opinions examined and they are only in, respectively, 2% and 3% of all cases examined herein (20 opinions include the “asked for it” myth, and 41 include the “wanted it” myth).

While the “she wanted it” and “she asked for it” myths were referenced relatively rarely in the cases read for this analysis, other myths were referenced far more frequently. In particular, one myth about rape was commonly found in the opinions examined: that which distances rape/sexual assault from violence. This was repeatedly brought up across jurisdictions, and includes rape being described as “intercourse.” Indeed, even statutory rape was often described as “intercourse” in these decisions. Conversely, the myth that rape is somehow distinct from violence was found to be present – either reinforced, or challenged, or both – in 29% of the decisions examined in this analysis (384 opinions). It, alongside eight of the other rape myths evaluated herein was present at the five percent threshold. These findings are depicted in Table 2E, which includes that rape myths that are not present at the five percent threshold (please note that this table is basically the converse of Table 2D).

However, just because these rape myths were mentioned at all, does not mean that the judges who wrote these opinions (or supervised their writing) always *reinforced* the myths in question. On the contrary, there were many occasions where judges explicitly challenged prevailing norms about rape myths, arguing that they were outdated and have no place in the contemporary political system, or that victims who had challenged commonly held myths in their testimony were to be believed upon appeal. The disaggregated findings – that differentiate between rape myth usage, language that is supportive of rape myths, and language that is

explicitly challenging to rape myths can be seen in Figure 2B. As can be seen in Figure 2B, directionality of rape myth usage varied significantly from myth to myth. The rape myths that were reinforced in at least five percent of the cases coded included only five out of the 11 myths: the myth about the emotionality of victims, the myth that rape is distinct from violence, and the myth that rape is a uniquely moral crime.

### **Discussion**

Ultimately, based on a content analysis of 1332 state appellate court opinions, rape myths do appear to be a common and widely used discourse in sexual assault cases. And this is the case for both rape myth challenges and rape myths that were used in a way that reinforced the myth (“upheld”). Out of the 1332 cases that were coded, 518 upheld rape myths and 438 challenged them – sometimes doing both in a single opinion<sup>50</sup>. These results have critical ramifications for researchers hoping to understand rape myth usage by the American judiciary, for future research into this area, and for reformers hoping to challenge the hegemony of rape myth discourse.

For reformers hoping that rape myth usage might have been completely eliminated several decades after VAWA was first promulgated, several of the results highlighted above are unfortunate. In Table 2D it is clear that many of these myths are, unfortunately, still present in contemporary jurisprudence, and that campaigns to eliminate their usage have not successfully rendered the mentioning of rape myths into the occasional aberration. However, looking more closely at these results, it could be argued that perhaps there is room for cautious optimism in relation to the use of some of the rape myths. This is, in particular, in relation to the analysis of

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<sup>50</sup> For instance, a judge could say “women who are the victims of sexual violence do not ask for it” in one part of the opinion, but elsewhere describe the sexual assault that had occurred as “sexual intercourse.” In this case, rape myths would have been both challenged and reinforced in the opinion.

when rape myths are present at the 5% threshold. Looking again at Table 2E, it is clear that there are several of these myths that promisingly seem to have dropped out of judicial discussion for the most part. For instance, the 2 myths about the rapist (“he’s not the kind of guy” and “he didn’t mean to”) are reinforced in fewer than 5% of the cases analyzed herein. The fact that judges are willing to ever consider excusing a convicted rapist because of his character – and all the rapists being discussed in these opinions are convicted, because these are appellate cases – is disheartening. One particularly jarring example of the use of this type of myth that highlights why the idea that rapists are “otherwise good people” (which is part of the “not the kind of guy” myth) is particularly problematic is the Alabama case *RER v. State*. Here, the Court describes two parents who had repeatedly sexually assaulted their children over a period of years “otherwise took good care of [the victim] while she was growing up” (*RER v. State*). This information is irrelevant to the case and its inclusion serves only to shine a positive light on convicted rapists by putting their illegal sexual assault into some broader picture of apparent good behavior. Ultimately the bifurcation of these parents’ behavior into sexual offenses (not taking good care of their children) and other behavior (taking good care of their children) has the effect of minimizing the grievous and sustained nature of their offenses, and builds an artificial discursive wall between their “regular” behavior and the raping of their children.

While the above example of this rape myth is egregious, on the plus side the use of the rapist-excusing myths do appear to be unusual and infrequent. The finding that generally judges do not endorse myths about rapists in their opinions could be interpreted a promising one. However, it is not entirely clear what is underlying this finding, because certainly from a societal perspective these myths are alive and well. Certainly legal impunity for most rapists also endures, as the vast majority of those who rape are never charged with any sort of sexual

violence offense. Reflecting this judicial discourse-societal discourse disjuncture, any optimism about this should be cautious, because the reduced usage of *these* myths in particular, and the challenging of the myths noted below, could well be a by-product of the unique nature of the institutional context being assessed herein.

As can also be seen in Table 2E, there are three myths that are actively challenged by the judiciary in over 5% of the opinions. For those who are confident that judicial training and education, or an increase of women on the bench, has ushered more feminist voices into the judiciary this would perhaps be a welcome finding. These three myths are the “she’s lying” myth, the “he’s not the kind of guy” myth, and the “rape is distinct from violence” myth. While the latter is very frequently mentioned in both directions (it is frequently supported and challenged), and thus will be discussed further in chapters 3 and 4, it is noteworthy that the other two myths, which are among the most hegemonic rape myths in society, are being challenged by the judiciary relatively frequently. Indeed, not only is the “he’s not the kind of guy” myth seldom reinforced, as was noted in the previous paragraph, as Table 2E highlights, it is also frequently challenged.

The reason that I argue that optimism about the patterns of myth usage for these particular myths should be tempered, is because of the context within which these opinions are being written. For instance, we see that in these opinions, victims are seldom accused of being liars, and are generally believed. This does not reflect how the average rape victim is perceived. However, the “believed” (or, not lying) rape victims that are discussed in the opinions examined herein are distinct from the broader universe of rape victims in a critical way. *These* victims are the ones who have had their cases pursued by law enforcement (which means that at least some members of the police believed them enough to investigate), then had their cases go to trial

(which means that prosecutors believed their story enough to move forward with charges), and at trial, a jury of their peers convicted their rapist. This is not the case for the vast majority of the victims of sexual assault, who never get justice from the criminal justice system due to one of these actors disbelieving them. Given this, perhaps the challenging of the “she’s lying” myth that is evident from these results is less reflective of a sympathetic and well-informed judiciary, and more reflective of the fact that these rape victims are those that have already been (legally) judged as “not lying” by the criminal justice system. Similarly, the high frequency with which the “he’s not the type of guy” myth is challenged could also be due to the same institutional realities. *These* guys have already been proven in a court of law to be exactly the kind of guys who would be rapists, indeed at this stage in the process other actors in the criminal system have investigated, tried, and convicted them of a sexual offense, so legally they have been proven to be the kind of guys who do this. Were other myths – for instance, myths in relation to the victim’s emotional reaction, or about the seriousness or moral implications of rape – the ones most frequently challenged, this caution would not be necessary. The decisions of police, prosecutors, and juries about whether this is a uniquely moral crime are not necessarily tied to appellate judges being persuaded of the same thing, but when it comes to the “he’s not the type of guy” or the “she’s lying” myths, these actors’ decisions are logically connected to the reduction in usage of these myths.

Despite this, several other findings from these analyses do indicate that there are reasons for optimism about the trajectory of rape myth usage – in ways that are more plausible than the findings discussed above. Although these results did not reach the five percent threshold, comparisons of the challenges to and supports of the “she asked for it myth” and the “she wanted it” myth reveal a promising (though limited) pattern. Ultimately, the “she asked for it myth” was

rarely used; in the overall sample coded for analysis there were only 20 opinions that referenced this myth. This is far below the 5% threshold. However, judges who *did* make reference to this myth generally did so in a way that criticized the myth to indicate that no, the woman who had been raped did not “ask for it” (though they still only asserted this in 1.2% of the cases analyzed herein, so this is a modest comparison). One such instance was when the Connecticut Court of Appeals judge writing the opinion in *State v. White* specifically refuted the defendant in the case’s claim that his victim had “asked for it.” Here, the judge noted that the “complainant’s testimony was sufficient for the court to reasonably conclude that the complainant did not consent to having sexual contact with the defendant.” Judges in state courts across the country also used similar language to challenge allegations that victims had “wanted it.” Overall, only 41 opinions of those sampled included mention of this myth at all, however, like the “asked for it” myth, overwhelmingly these usages were examples of judges challenging the “she wanted it” myth. One notable example of this occurred in *Commonwealth v. Velez* (Pennsylvania), which involved the victimization of an underage girl by an older man. In the Court’s opinion in this case, the judge writing the opinion stated that the underage “victim indicated that Appellant’s acts were bad, did not feel right, and that she was afraid and angry at Appellant. This evidence is sufficient to establish the victim did not consent to Appellant’s acts.” Rather than supporting the problematic idea that the victim had in some way “wanted it,” here we see the judiciary challenge this myth. Rather than using victim-blaming discourse, the Court in Pennsylvania upheld the victim’s testimony and experiences to the contrary. Ultimately, though challenges to rape myths are relatively infrequent, the fact that some judges are making the effort to clearly highlight how rape myths are not correct and should not be reinforced by the criminal justice system should provide some reassurance to reformers that the judiciary has not uniformly

embraced rape culture. It is unsurprising that if there would be one type of myth that is more frequently been challenged rather than reinforced it is the myth that victims implicitly wanted it or asked for it, as the “No means no” campaign, which makes the cases for the crucial nature of consent, has been around for over 25 years, and even predates VAWA. One of the germinal feminist theoretical writings on this topic, Lois Pineau’s “Date Rape: A Feminist Analysis,” made the (at the time) revolutionary argument that “to engage in sex without consent is rape” (Pineau 1989, 217), and in the intervening years, major public awareness and education campaigns have advanced this idea and foregrounded the idea of “consent.” More than any other rape myths, these campaigns challenge the myths that victims “wanted it” or “asked for it,” because usually these claims are made to excuse the absence of explicit consent. Given the ubiquitous campaigns driving home the point that “no means no” (and more recently, “yes means yes” which highlights affirmative models of consent), and any beliefs to the contrary are indeed myth-based, there is no reason to think that the judiciary was uniquely unaware of these campaigns.

A particularly noteworthy finding from these results – both for feminist and legal reformers, and for sociolegal scholars – is that the “rape as distinct from violence” myth is, by far, the myth most frequently used *and* challenged. From a normative perspective, the use of this frame is highly problematic considering the actual meaning of “intercourse” or “sexual intercourse” – the latter of which is commonly defined as sexual activity between two people. Yet, only the offender experiences this violent crime as sexual, and the use of “intercourse” implicitly includes the victim as a participant in the crime being committed against her (she being one of the two people this “intercourse” is supposedly between). Particularly given that the opinions read were appeals, describing rape and sexual assault as “intercourse” is incorrect

because rape is not sex, it is violence, and at this point in the legal process lower courts have already ruled that the behavior in question was a sexual offense. A particularly egregious example of this type of rape myth being used can be seen in the Connecticut Court of Appeals' Opinion in *State v. Angel C.*, where the opinion reads that “the defendant engaged in penile-vaginal intercourse with the victim on nearly a daily basis.” In this case, the victim was a ten-year-old girl. By asserting that they engaged in “intercourse” the Court undermines the violence committed against this child, and instead makes her complicit in her victimization. The Georgia Court of Appeals used similar language in *Ewell v. State* – a case where an adult (Ewell) had raped numerous children (including N.S. and J.L.) over a lengthy period of time – when it said “[w]hen N. S. was thirteen years old, Ewell began talking to him about sex. The two had oral sex about 20 times. Ewell also had J. L., at the age of nine or ten, perform anal sex on him while N. S. watched, and had anal sex with N. S. while J. L. watched.” The Court of Appeals of Indiana also engaged in this framing of sexual assault as sexual intercourse, when they noted in *Rostochak v. State* that “Ronald Rostochak had an ongoing sexual relationship with his live-in girlfriend's daughter that began when the daughter was twelve years old and continued until she was fourteen years old.” Repeatedly, we see children who were victims of sexual assault described as active participants in the crimes committed against them, which are depicted as sexual *encounters*, rather than violent rapes and sexual *assaults*.

The problematic nature of this particular myth has previously been theorized in feminist and legal theory. Certainly, its use is widespread in society more generally, so it is perhaps unsurprising that it also endures in the judiciary. Indeed, there have not been “rape is violence, not sex” public awareness campaigns in the same way that there have been “no means no” campaigns, so the endurance of this myth in the popular imagination has gone comparatively



unchallenged. This myth is so prevalent that statutory language continues to reflect it. Boyle, for instance criticizes statutes that include the language “sexual intercourse” in sexual offences rather than “rape,” and notes that “[i]f sex is stolen rather than willingly shared, then in a world in which sex was understood to be a truly consensual activity [stolen sex] would not be sex. Yet the law obliges us to label what has been stolen as sexual” (1985, 104; in Coates et al. 1994, 190). Indeed, a number of states currently obligate judges to “label what has been stolen as sexual.” For instance, California includes “unlawful sexual intercourse” as a type of sexual offense. Montana similarly includes “sexual intercourse without consent” in their criminal code. Pennsylvania too criminalizes what they term “involuntary deviant sexual intercourse.” Alabama, Kentucky, New York, and Oregon, are among the states that criminalize “sodomy.” In practice, these statutes describe what could more accurately be described as “anal rape.” However, these jurisdictions persist in using this euphemistic term that distances the crime from violence.

Boyle is not the only theorist critical of the use of this myth as it occurs political discourse. Coates similarly notes that the use of sexual intercourse or similar terms incorrectly “put the violent acts that were at issue into a framework of normal sexual activity, rather than into a framework of assault on parts of the body that, on other occasions, might be sexual. Using inappropriate and inaccurate terminology to describe sexual assaults created a misleading description of events” (Coates et al. 1994, 193-194). The use of this particular frame outside of the judiciary is an issue that has garnered recent media and public attention – notably, when a newspaper reported the story of former Subway pitchman Jared Fogle’s numerous sexual crimes against young girls (crimes to which he pled guilty) by describing him as “having [had] sex with underage girls” (see Appendix 2C). However, the judicial use of this frame is particularly

problematic, given the institutionalized and elite nature of judicial discourse, which has the ability to set the tone for other actors on this issue. And it is also critical to note because while judges frequently challenged some of the 11 myths analyzed herein, as can be seen in Figure 2B, they reinforced the “distinct from violence” frame almost three times as often as they challenged it.

In the opinions studied herein the prevalence of the 11 subframes significantly varies, with several of these myths not meeting the five percent threshold and several far exceeding it. But ultimately, the question of whether or not rape myths are still used by the American judiciary, and in a way that is not merely anecdotal, can be firmly answered in the affirmative. Although members of the state judiciary did not frequently support the “she’s lying,” “she wanted it,” and rapist-related myths, many others – particularly the “rape is distinct from violence” myth – were often referenced. Clearly, many rape myths are common in judicial decisions. However the above results do not illuminate how, when, where, and importantly, why these myths are used. As such, these findings lay open the door for further analysis. Based on these findings that rape myths are a discourse still in use in American jurisprudence, the next hypotheses begin to evaluate the individual & institutional influences that shape this sexual assault jurisprudence. While these findings only mark the start of the process of reaching an understanding of the use of these myths in state courts across the United States they mark a critical first step and an important extension of the extant feminist and sociolegal literature. While other studies have argued that rape myths are still used by American judges, they have done so using anecdotal evidence. No other studies have assessed rape myth usage among the American judiciary across states, or by assessing more than a handful of cases. This study’s assessment of rape myth usage in 1332 cases therefore marks an important step forward in our

understanding of how rape culture continues to permeate a critical body of actors within the criminal system: judges. How this discourse varies across individual judges and jurisdictions is the subject of this projects next analyses.

## Tables and Figures

**Table 2A: Sampling Procedure – Sexual Assault Statutes**

<b>State</b>	<b>Search terms</b> (sexual assault and rape added where not present in statutory language)
Alabama	Rape, sodomy, sexual misconduct, sexual torture, sexual abuse
Alaska	Sexual assault
Arkansas	Rape, sexual assault
Arizona	Sexual assault, sexual abuse
California	Rape, sexual battery, sodomy, unlawful sexual intercourse, unlawful sexual penetration, unlawful oral copulation, unlawful sodomy
Colorado	Sex assault, unlawful sexual contact
Connecticut	Aggravated sexual assault, sexual assault
Delaware	Rape
D.C.	Sexual abuse
Florida	Sexual battery
Georgia	Rape, sexual battery, aggravated sexual battery
Hawaii	Sex assault
Idaho	Rape
Illinois	Criminal sexual assault, aggravated sexual assault, criminal sexual abuse, aggravated criminal sexual abuse
Indiana	Rape, criminal deviate conduct, sexual battery
Iowa	Sex abuse
Kansas	Rape, sexual battery, aggravated sexual battery, aggravated criminal sodomy
Kentucky	Rape, sodomy, sexual abuse
Louisiana	Aggravated rape, forcible rape, simple rape, aggravated sexual battery, sexual battery
Maine	Gross sexual assault, unlawful sexual assault
Maryland	Rape, sex offense
Massachusetts	Rape
Michigan	Criminal sexual conduct
Minnesota	Criminal sexual conduct
Mississippi	Sexual battery
Missouri	Rape, sexual assault, forcible sodomy, deviate sexual assault, sexual misconduct, sexual abuse
Nebraska	Sexual assault
New Hampshire	Aggravated felonious sexual assault, felonious sexual assault, sexual assault
New Jersey	Aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact
New Mexico	Criminal sexual penetration, criminal sexual contact
New York	Sexual misconduct, rape, sodomy, forcible touching, sexual abuse, aggravated sexual abuse

<b>State</b>	<b>Search terms</b> (sexual assault and rape added where not present in statutory language)
North Carolina	Rape, sexual offense
Ohio	Rape, sexual battery, gross sexual imposition, sexual imposition
Oklahoma	Rape
Oregon	Rape, sodomy, unlawful sexual penetration
Pennsylvania	Rape, involuntary deviant sexual intercourse, sexual assault, aggravated indecent assault
Rhode Island	Sexual assault
South Carolina	Criminal sexual conduct
Tennessee	Aggravated rape, rape, aggravated sexual battery, sexual battery
Texas	Aggravated sexual assault, sexual assault
Utah	Rape, object rape, sodomy, forcible sodomy, forcible sexual abuse, aggravated sexual assault
Virginia	Rape, forcible sodomy, object sexual penetration, aggravated sexual battery, sexual battery
Washington	Rape
Wisconsin	Sex assault

Note: states not sampled due to lack of intermediate appeals court not included in table

**Table 2B: Sampled Cases**

State	Appeals Court	Total cases returned (#)	Sampled/coded cases (#)	Stratified sample	% coded (of total)	Pages coded
Alabama	Yes	39	39	no	100.00%	388
Alaska	Yes	33	33	no	100.00%	294
Arkansas	Yes	111	25	yes	22.52%	71
Arizona	Yes	113	37	no	32.74%	154
California	Yes	790	30	yes	3.80%	221
Colorado	Yes	33	33	no	100.00%	266
Connecticut	Yes	35	30	no	85.71%	222
Delaware	Yes	29	29	no	100.00%	184
D.C.	Yes	29	21	no	72.41%	188
Florida	Yes	117	30	yes	25.64%	95
Georgia	Yes	79	40	no	50.63%	157
Hawaii	Yes	16	16	no	100.00%	89
Idaho	Yes	34	34	no	100.00%	138
Illinois	Yes	404	30	yes	7.43%	190
Indiana	Yes	121	30	no	24.79%	173
Iowa	Yes	51	41	no	80.39%	187
Kansas	Yes	128	32	no	25.00%	175
Kentucky	Yes	46	46	no	100.00%	170
Louisiana	Yes	158	30	yes	18.99%	192
Maine	Yes	17	17	no	100.00%	84
Maryland	Yes	15	15	no	100.00%	177
Massachusetts	Yes	149	30	no	20.13%	117
Michigan	Yes	235	30	no	12.77%	137
Minnesota	Yes	181	30	no	16.57%	135
Mississippi	Yes	38	38	no	100.00%	221
Missouri	Yes	118	30	yes	25.42%	126
Montana	No	--	--	--	--	--
Nebraska	Yes	17	17	no	100.00%	92
Nevada	No	58	29	no	50.00%	--
New Hampshire	Yes	19	2	no	10.53%	10
New Jersey	Yes	207	30	no	14.49%	145
New Mexico	Yes	33	32	no	96.97%	201
New York	Yes	386	30	yes	7.77%	77
North Carolina	Yes	101	30	no	29.70%	133
North Dakota	No	--	--	--	--	--
Ohio	Yes	536	30	yes	5.60%	150
Oklahoma	Yes	7	5	no	71.43%	49
Oregon	Yes	43	30	no	69.77%	138
Pennsylvania	Yes	76	30	no	39.47%	257

<b>State</b>	<b>Appeals Court</b>	<b>Total cases returned (#)</b>	<b>Sampled/coded cases (#)</b>	<b>Stratified sample</b>	<b>% coded (of total)</b>	<b>Pages coded</b>
Rhode Island	Yes	9	9	no	100.00%	82
South Carolina	Yes	43	43	no	100.00%	101
South Dakota	No	--	--	--	--	--
Tennessee	Yes	240	30	no	12.50%	229
Texas	Yes	703	29	yes	4.13%	132
Utah	Yes	31	31	no	100.00%	181
Vermont	No	--	--	--	--	--
Virginia	Yes	28	28	no	100.00%	160
Washington	Yes	198	30	yes	15.15%	179
West Virginia	No	--	--	no	--	--
Wisconsin	Yes	119	30	yes	25.21%	120
Wyoming	No	--	--	--	--	--
<b>Total</b>	<b>44 states</b>	<b>5973</b>	<b>1291</b>			<b>6987</b>

Note: states not sampled due to lack of intermediate appeals court are included in table, but because cases were not sampled, no case data is included in the totals visible above.

**Table 2C: Incidence of Myth Usage in State Appellate Opinions, by frequency of use** <sup>51</sup>

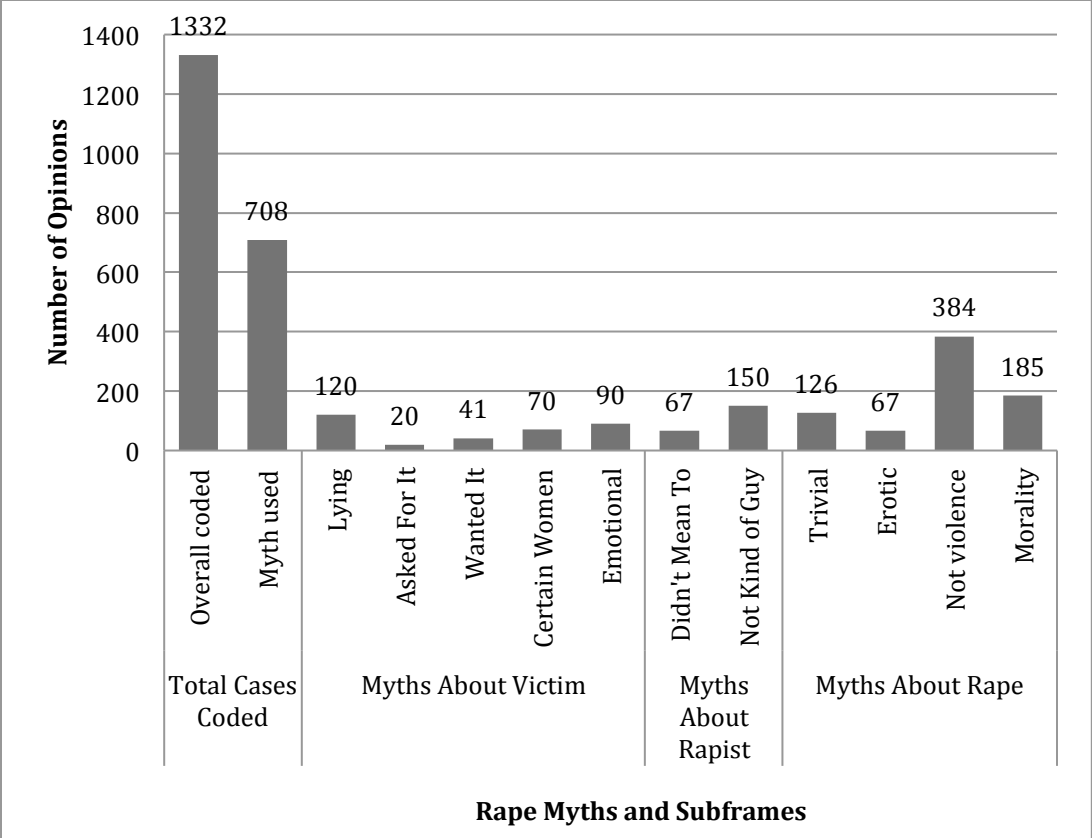
	Opinions (N)	Proportion of Coded Cases with Rape Myth Reference
Total Cases Coded	1332	
Total Cases With Myths	709	0.53
Rape: Not violence	384	0.29
Rape: Morality	185	0.14
Rapist: Not Kind of Guy	20	0.11
Rape: Trivial	127	0.10
Victim: Lying	120	0.09
Victim: Emotional	90	0.07
Victim: Certain Women	70	0.05
Rape: Erotic	67	0.05
Rapist: Didn't mean to	67	0.05
Victim: Wanted It	41	0.03*
Victim: Asked For It	20	0.02*

\* Neither of these myths meet the 5% cut-off for anecdotal vs. non-anecdotal usage.

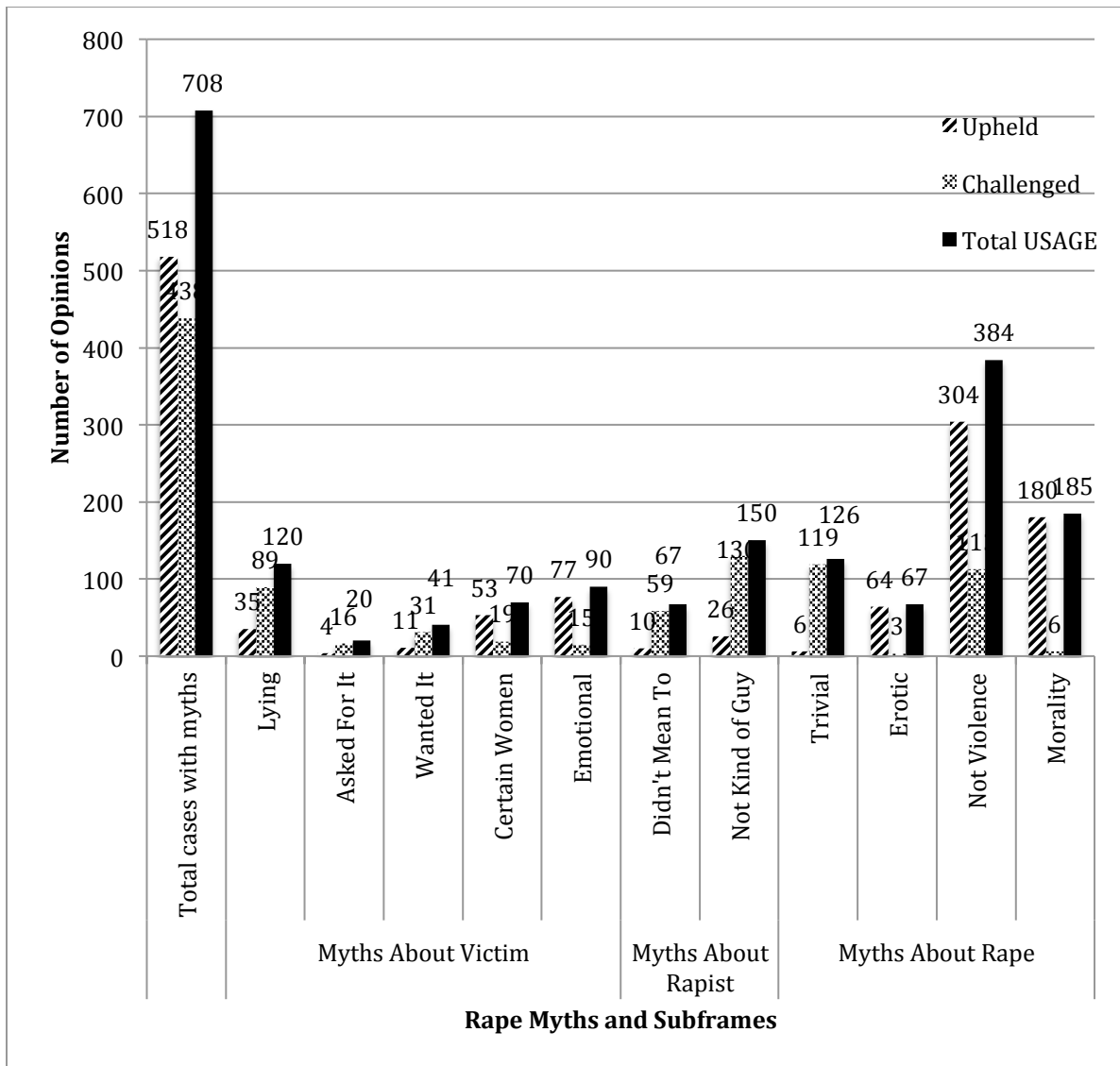
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<sup>51</sup> Note: “Victim” labeled myths (such as “lying” and “asked for it”) are myths that relate to a rape or sexual assault victim. “Rapist” are myths that relate to the perpetrators of sexual violence. Finally, “Rape” entitled myths are those that concern the crime itself.





**Figure 2A: Rape Myth Presence in State Appellate Opinions (2012)**



**Figure 2B: Directionality of Rape Myth Usage in State Appellate Opinions (2012)**

**Table 2D: Rape Myths Not Present at Five Percent Threshold**

	<b>Myths about victim</b>	<b>Myths about rapist</b>	<b>Myths about rape</b>
<b>Rape myths that are NOT present in at least 5% of cases</b>	<ol style="list-style-type: none"> <li>1. she asked for it</li> <li>2. she wanted it</li> </ol>		
<b>Rape myths that are NOT reinforced in at least 5% of cases</b>	<ol style="list-style-type: none"> <li>1. she's lying</li> <li>2. she asked for it</li> <li>3. she wanted it</li> <li>4. certain women</li> </ol>	<ol style="list-style-type: none"> <li>1. he didn't mean to</li> <li>2. he's not he kind of guy</li> </ol>	<ol style="list-style-type: none"> <li>1. rape is trivial</li> <li>2. rape described erotically</li> </ol>
<b>Rape myths that are NOT challenged in at least 5% of cases</b>	<ol style="list-style-type: none"> <li>1. she asked for it</li> <li>2. she wanted it</li> <li>3. certain women</li> <li>4. emotional reaction relevant</li> </ol>	<ol style="list-style-type: none"> <li>1. he didn't mean to</li> </ol>	<ol style="list-style-type: none"> <li>1. rape as uniquely moral crime</li> </ol>

**Table 2E: Rape Myths Present at Five Percent Threshold**

	<b>Myths about victim</b>	<b>Myths about rapist</b>	<b>Myths about rape</b>
<b>Rape myths present in at least 5% of cases</b>	<ol style="list-style-type: none"> <li>1. she's lying</li> <li>2. certain women</li> <li>3. emotional reaction relevant</li> </ol>	<ol style="list-style-type: none"> <li>1. he didn't mean to</li> <li>2. he's not the kind of guy</li> </ol>	<ol style="list-style-type: none"> <li>1. rape is trivial</li> <li>2. rape described erotically</li> <li>3. rape distinct from violence</li> <li>4. rape as uniquely moral crime</li> </ol>
<b>Rape myths reinforced in at least 5% of cases</b>	<ol style="list-style-type: none"> <li>1. emotional reaction relevant</li> </ol>		<ol style="list-style-type: none"> <li>1. rape distinct from violence</li> <li>2. rape as uniquely moral crime</li> </ol>
<b>Rape myths challenged in at least 5% of cases</b>	<ol style="list-style-type: none"> <li>1. she's lying</li> </ol>	<ol style="list-style-type: none"> <li>1. he's not the kind of guy</li> </ol>	<ol style="list-style-type: none"> <li>1. rape distinct from violence</li> </ol>

## CHAPTER 3

### Judicial Demographics and Rape Myth Usage

*“I believe that it is time to consider whether we should require corroborating evidence when these type of offenses are supported only by the testimony of a single witness. Sir Matthew Hale, Lord Chief Justice of the Court of King's Bench from 1671 to 1676 wrote at length regarding rape and famously stated: ‘It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it 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.’”<sup>52</sup>*

Ultimately, the results of Chapter 2 indicate that rape myths do appear to be a common and widely used discourse in sexual assault cases. This is the case for both rape myth challenges and rape myths that were used in a way that reinforced the myth (“upheld”). Out of the 1332 cases that were coded, 518 upheld rape myths and 438 challenged them – sometimes doing both in a single opinion. Though the prevalence of the 11 subframes significantly varies, these findings open the door for further analysis. Clearly, rape myths are common in judicial decisions, however the previously discussed results do not illuminate how, when, where, and importantly, why these myths are used. Based on these findings that rape myths are a discourse still in use in American jurisprudence, the following two chapters begin to evaluate the individual & institutional influences that shape this sexual assault jurisprudence.

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<sup>52</sup> Indiana Case: *Leyva v. State* (2012). This reference to Lord Hale’s famous admonition that rape accusations are easy to make and hard to prove, indicates that the (incorrect) belief that many victims lie about their victimization, that these cases make it to court, and the implication that it is easy and relatively pain-free to make such accusations, is alive and well among some members of the state bench.

## **Individual Influences on Sexual Assault Jurisprudence**

While it is evident from the results of Chapter 2 that the judiciary continues to employ rape myths in ways that both challenge and reinforce these problematic beliefs and misconceptions about sexual violence, which justices are employing these myths, and where those justices are, remains unclear. The former will be addressed in this chapter. In particular, the main questions evaluated in this chapter connect the findings of Chapter 2 to broader questions related to the descriptive and substantive representation of women. Have women on the bench supported women's full participation in society by challenging and eschewing rape myths? Or, is this an area of the law where a gendered effect is not evident? For those hoping to ensure greater justice and equality for victims of sexual violence, and for those who campaign on behalf of getting more women onto the bench, the answers to these questions are critical. Can we expect that more women on the bench will mean more challenges to rape myths?

The individual and political correlates of judicial rape myth usage are not only important for questions of representation, they are also critical to study because if more effective and better-targeted judicial training programs are to be developed, we need to know which judges to tailor them towards, and in which jurisdictions they work. Or, if judges with certain characteristics are less likely to use rape myths, activists who strive to reduce judicial rape myth usage can support their campaigns for election or their appointments to state appellate courts. For instance, if women are using rape myths less than their male colleagues, training programs targeting men might make sense. Indeed, if these analyses point to a gender effect, it would inform larger debates about the importance and benefits of having a representative judiciary. Certainly, gender-related policies such as abortion, divorce and custody, discrimination, and the

issue at the heart of this study, gender-based violence, have all been heavily judicialized (Kenney 2013), but is the judiciary also acting in a way that is gendered?

The questions of which judges are using rape myths and whether gender is playing a role in the continued prevalence of the rape myth frame are nested within critical debates about diversity and representation on the bench, and, more generally, about the role of gender in influencing political actors' behavior in legal and political institutions. In the literature on gender and representation and in the political and legal communities these debates about representation are ongoing from both the empirical and normative perspective. Interestingly, however, these debates tend to be muted in relation to the judiciary, as compared to their prevalence regarding other institutions. As Sally J. Kenney highlights, "both women and politics scholars and activists seeking to increase the numbers of women in decision-making largely ignore women judges" (Kenney 2013, xi). Thus to effectively contextualize the current study within these debates, how representation has been explored in institutions other than the legal system must be assessed.

From an empirical standpoint, two of this chapter's questions are connected to key current debates about diversity and representation of women in politics: is judicial gender shaping frame usage in this very gendered area of the law? Or, conversely, is it not gender that is important, but rather does selecting into career experiences related to gendered issues drive rape myth usage? These questions are at the heart of debates about minority and gender representation both inside and outside of the judiciary. Hanna Pitkin's (1967) seminal theory of representation has been particularly central to both research and praxis on this issue as political and academic discussions assessing the importance and effects of representation revolve around evaluating two of the dimensions of representation that she pioneered: substantive, as opposed to descriptive representation of minorities or women. In the context of legislative representation, where perhaps

discussions about representation have been most well widespread in the political science literature, scholars have focused upon determining whether legislators (particularly women) are speaking and acting for the groups whose characteristics they share (fellow women), and thus not only descriptively representing them, but substantively representing them as well. Generally, descriptive representation is understood as the *compositional similarity* between representatives and those they represent, whereas substantive representation, refers to the congruence between representatives' *actions* and the interests of those that they are charged with representing (Schwindt-Bayer and Mishler 2005). Outside of the legislative environment these two forms of representation can also be assessed, for instance, with judges. When it comes to the judges in this study, women who are judges would be descriptively representing women just by being on the bench. However they would be acting to substantively represent women if and when they were acting in a way that supports the interests of women – for instance if they were challenging rape myths (and relatedly, if they are doing so to a greater extent than their male colleagues), or if they were avoiding reinforcing rape myths (and doing so less than their male colleagues). By acting in either of these ways, female judges would be speaking for the group by challenging or refusing to reinforce myths that are particularly harmful to women.<sup>53</sup>

While a substantive body of research is dedicated to assessing the issue, thus far, political scientists have not conclusively answered the question of whether women in political positions – inside or outside of the Courts – substantively represent women in any sort of consistent way. Rather, the extant research has found mixed results as to whether women substantively represent women in legislatures, the legal system, and in other institutional locations. In some institutional

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<sup>53</sup> These myths are harmful to all victims of gendered violence. However this type of action would still constitute gendered substantive representation because (as was discussed in Chapter 1) the vast majority of victims of domestic violence, sexual violence, and gender-based violence are women.



settings women *have* acted to substantively represent women in their relative spheres of influence as legislators, bureaucrats, and candidates for political office. For instance, one way that women have been found to substantively represent women is by focusing more time and attention on “women’s issues” than their male colleagues (Berkman and O’Connor 1993; Kahn 1993; Swers 2002; Meier and Nicholson-Crotty 2006; Kittilson 2008). This effect has been found across a diverse range topics that are traditionally viewed as “women’s issues,” including abortion, sexual assault, and maternity leave/child care provisions, as well as across a variety of institutional locations. For instance, Berkman and O’Connor (1993) found that women legislators do play an outsized role in state legislatures when it comes to influencing abortion policies. Meier and Nicholson-Crotty (2006) found a similar effect in metropolitan police departments when they found that the percentage of women police officers is positively associated with the number of reports of sexual assault as well as with the number of arrests for sexual assault. Similarly, Swers (2002) and Swers and Larson (2005) also found this effect in Congress, as female members of Congress were more likely than men to advocate on behalf of women’s issues bills, and particularly bills that can be described as “feminist.” Though this effect is mediated both by a female legislator’s institutional position as well as by party membership, these factors do not stamp out women in Congress’ commitment to substantive action on behalf of their gender (Swers and Larson 2005). Ultimately, this research highlights that the presence of women sometimes *does* matter for achieving substantive representation, and that this is particularly, though not exclusively, the case when legislative behavior is studied.<sup>54</sup>

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<sup>54</sup> Indeed, this has been found around the world, and is not just true of American women in politics. As Kittilson notes, “across postindustrial democracies over the past three decades, women’s heightened presence in parliament significantly influences the adoption and scope of maternity and childcare leave policies. Women’s political presence proves more important than the ideology of the party in power” (Kittilson 2008, 323).

Despite these robust findings, in other settings and on other issues, more limited substantial representation has been found. For instance, looking internationally, in “Beyond Bodies: Institutional Sources of Representation for Women in Democratic Policymaking” (2002a), S. Laurel Weldon emphasizes that, contrary to much of the empirical work that has been done in relation to substantive representation “there is no reason to assume that the greater bodily inclusion of members of marginalized groups, in itself, should *significantly* increase their substantive representation” (2002a, 1157) – even in legislative bodies. Weldon finds, rather, that descriptive representation is not enough to ensure substantive representation, and that other factors can mediate these effects. In other institutions, substantive representation has been even harder to detect, as women have not been found to advance or speak on behalf of women’s concerns to a greater extent than their male colleagues. Of particular note to the current analysis, are findings that indicate that when it comes to the judiciary, women are not substantively representing – or at least not consistently substantively representing – women. This does not mean that no differences between men and women on the bench can be found. To the contrary, Jensen and Martinek (2009) found that female justices, as well as nonwhite justices, both exhibit a “greater desire to move up in a judicial career than do their white male counterparts” (379). But, beyond this finding, studies that find gendered differences among the judiciary have been few and far between. Rather than the substantive representation of gendered interests, which would be an expected finding if women in the legal community was substantively representing women the way the women in the legislative community seems to be, scholars of politics and the law have generally not found this effect when they have sought it. Reviewing the extant literature assessing whether women as judges use some sort of “different voice” (Gilligan 1982) in their jurisprudence, Kenney summarized political science’s findings thusly:

“As soon as enough women ascended to the bench to make quantitative analysis possible, scholars asked whether women decided cases differently than men. They found few striking or consistent differences, with the exception of a greater propensity of women appellate judges to find more often for the plaintiff in sex discrimination cases and to persuade men colleagues on panels to vote with them.” (Kenney 2013, 3)

However, and as is alluded to by Kenny, this research has not pointed to a definitive yes or no – that substantive representation either is or is *entirely* not occurring. The research analyzing how this type of representation is (or is not) evident on the bench paints a more complicated picture. The seminal study in this area to which Kenney refers in the above paragraph is “A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Court of Appeals” (Songer et al. 1994). This article elegantly highlights both the presence and limits of substantive representation on the bench. Therein, Donald A. Songer, Sue Davis, and Susan Haire look at the impact of gender in judicial decision-making in three specific areas of legal proceedings: search and seizure cases, obscenity cases, and job discrimination cases. They find that *sometimes* a gendered impact is visible – women do act substantively, but not on all cases. In their analysis, a gendered effect is not evident even on *most* cases. But a gendered difference *is* sometimes visible. More specifically, they do not see a gender effect in obscenity cases or search and seizure cases. However, they do find that “the gender of the judge is strongly related to the probability of a liberal vote in job discrimination cases” (Songer et al. 1994, 434). More recently, in *Diversity Matters: Judicial Policy Making in the U.S. Courts of Appeals* (2015) Susan B. Haire and Laura P. Moyer reevaluated the questions asked by Songer et al., and determined that 20 years after the seminal Songer et al. paper was published, the same limited patterns of

substantive representation can be found in appellate judges' jurisprudence.<sup>55</sup> Replicating Songer et al.'s (1994) conclusions, Haire and Moyer found that,

“women judges [are] substantially more likely to empathize with plaintiffs in sex discrimination cases. In other issue areas, however, judicial voting by women and men was quite similar.” (Haire and Moyer 2015, 128)

In relation to the current study, these findings are important for two key reasons. Firstly, they indicate that while the presence of female justices can have an impact on the final decisions reached in legal proceedings, ultimately “the effect of gender on judicial behavior varies with the context of the decision-making process” (Songer et al. 1994, 436). Frequently, as judges, women are not judging “in a different voice.” Rather than assuming that women who are judges will always, or even usually, act to represent other women, Songer et al. (1994) and Haire and Moyer (2015)'s findings indicate that it is important to keep in mind that this has not been found to be the case in most contexts. The second reason that Songer et al. (1994) and Haire and Moyer (2015)'s findings are particularly critical is because of *when* they found that substantive representation did occur: namely, on a very gendered legal issue. In Songer et al.'s conclusion they assert that this finding can be extended to cases involving forms of discrimination other than gender,<sup>56</sup> while Haire and Moyer are not so optimistic about these findings more general applicability. Yet, whether this finding is indeed more generalizable or not, as far as the current project is concerned, it is particularly critical that both analyses found this effect in relation to gender-based discrimination cases, as the current study is also focuses on a very gendered legal issue (sexual violence). Thus, based on these findings, and findings that women in other institutional contexts are particularly likely to represent women in highly gender salient issues, it

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<sup>55</sup> In this book, Haire and Moyer examine the federal appellate courts, rather than state appellate courts – the latter of which is the focus of the current analysis.

<sup>56</sup> More specifically, they note that “whether the case involves gender discrimination or some other type of discrimination does not affect the greater propensity of female than male judges to cast a liberal vote” (Songer et al., 436).

would make sense to hypothesize that judicial gender may have an effect in this area in particular, because it is such a gender-salient one.

But will the gendered representation found by Songer et al. (1994) and Haire and Moyer (2015) in sexual discrimination cases also hold true for sexual violence-related cases? Or will Kenney (2013)'s arguments – that while having more women on the bench is important, gender differences in judging between men and women are uncommon – more accurately reflect sexual violence-related jurisprudence? There is reason for cautious – though not, as of yet, evidence-based – optimism that the former might be the case. Arguments that when it comes to judging cases related to gendered violence, a representative judiciary will deliver better, more just outcomes, have repeatedly come from notable women actually serving as members of the judiciary. For instance, writing about the possible role for women when it comes to women's equality, former-Supreme Court Justice Sandra Day O'Connor argued that "women judges can play a critical function in strengthening the rule of law both through their contributions to an impartial judiciary as well as through their role in the implementation and enforcement of laws, particularly those that provide access to justice for women and girls" (O'Connor and Azzarelli 2011, 3). She and her coauthor go on to note that in the area of the law with which this project is particularly concerned, this may be particularly true. They argue,

"Women's participation in the judiciary may be of particular importance in the implementation and enforcement of laws that allow for women's full participation in society...Recently, women judges are emerging on the world stage as leaders in the efforts to effectuate rule of law and the implementation of law, particularly as it relates to eradicating violence against women and providing women and girls with access to justice. In 2008, the U.S. Department of State began hosting women judges from around the world to discuss issues of women's access to justice and combating violence against women. There, judges and judicial actors from over twenty countries convened to discuss issues of law and implementation relating to women and girls and to share success stories and lessons learned." (O'Connor and Azzarelli 2011, 6)

This chapter tests whether O'Connor and Azzarelli's assertions are true in the American context. Have women on the bench supported women's full participation in society by challenging and eschewing rape myths? For those hoping to ensure greater justice and equality for victims of sexual violence, the answers to these questions are critical. Can we expect that more women on the bench will mean fewer occasions where rape myths are reinforced? If so, it would make sense for reformers and those striving for equality of process and outcome in the courts to focus on ensuring that women are appointed or elected to the bench in greater numbers. But if this is not the case, and women on the bench *are* using rape myths at the same levels as their male colleagues, reformers should look elsewhere in order to ensure greater justice for the victims of these crimes.

### **Literature Review: Demographic Correlates**

In addition to examining the effects of gender on judicial decision-making and outcomes, the extant research that explores the influence of demographic variables on legal outcomes commonly includes several key variables, all of which will be discussed below: prior employment of judges, age, and race of judges, and attitudinal variables (including partisanship, issue-specific experience, and opinions). However, of all these variables, the ones most closely related to gender are expected to be particularly salient for the current study: gender and gender-related experience.<sup>57</sup>

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<sup>57</sup> While the current study does not focus on the determinants of individual decision-making, looking instead at the outcomes of these decisions (in this case, the outcomes in question are the types of discourse used) the research exploring judicial decision-making is nonetheless instructive, and thus will be explored herein. In recognition of the importance of this discourse being "situated," this analysis will then turn to an examination of the influence of several state level measures in Chapter 4.

## *Gender*

As was noted above, looking at the universe of cases that are included on a judge's docket, evidence about the influence of gender upon judicial decision-making is mixed. Some studies have found that sex is not a significant variable when it comes to judicial decision-making (e.g. Sisk et al. 1998, Kenney 2013). However, and of particular importance to the current analysis, other studies have found that especially when it comes to gender-coded cases such as those involving claims of sexual harassment or sexual discrimination, a significant correlation exists between gender and judges' decisions (Peresie 2005; Songer et al. 1994; Haire and Moyer 2015). Indeed, context seems to be particularly relevant in determining the impact of gender on judicial decision-making. While many analyses have found that women judges do not differ from their male counterparts when it comes to judicial decision-making, to reiterate the above made point this effect (or, lack of effect) is profoundly dependent on which area of the law is being examined. As Songer et al. found,

“in sharp contrast to the results in obscenity and search and seizure cases, the coefficient for gender is positive, robust, and statistically significant. Thus, it appears that the gender of the judge is strongly related to the probability of a liberal vote in job discrimination cases.” (Songer et al. 1994, 434; see also Peresie 2005, Haire and Moyer 2015)

Ultimately, as Boyd, Epstein, and Martin (2010) eloquently note, “the presence of women in the federal appellate judiciary *rarely* has an appreciable empirical effect on judicial outcomes. Rarely, though, is not never” (406).<sup>58</sup> Thus, the extant literature indicates that while overall, the effect of gender on judicial decision-making is negligible, in gender-coded areas of the law gender effects are often visible (Palmer 2001). Women on the bench themselves also voice

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<sup>58</sup> More specifically, they found that “On average, the probability of female judges voting in favor of the plaintiff in a sex discrimination case is around 0.10 higher than it is for male judges” (Boyd, Epstein, and Martin 2010, 401). However, this does not extend to all sex-coded cases, as they also found that “judges' sex has no bearing on the direction of their votes in sexual harassment, affirmative action, or abortion litigation” (401).

differing opinions about whether or not gender impacts judging – some judges do make arguments that women judges are in some way different than their male colleagues, while many are hostile to an essential difference frame of reference (Kenney 2013). Based on such findings, and balancing the strength of the legal socialization process with the reality that rape and sexual assault are profoundly gender-coded areas of the law, a weak but gendered effect is expected to be evident in this analysis.

*Subject-specific attitudes and preferences: Emphasis on gender-related experience and focus*

A judge or justice's gender is not the only way that representation may play a role in jurisprudence. To return to Pitkin's distinctions between descriptive and substantive representation, it is again useful to consider the former as "standing for," and the latter as "acting for" (Pitkin 1967; Haire and Moyer 2015) when considering how those not in the group in being represented can nevertheless act to represent the minority group (for instance, male justices representing women's interests). While women may substantively represent women by "speaking for" or "acting for" them in the way they consider and decide cases, men too can "act for" women by representing women's interests – even though these men clearly would not be descriptively representing women. Beyond descriptive representation translating into substantive representation, representation of women's interests could be found to occur through men, especially through men who are particularly sensitized to the needs of the constituency being represented (in this case, women). Again turning to legislative studies, similar effects – where the majority group speaks for the minority – have been seen not with gender, but with race. For instance, in studying cross-group representation, and the circumstances in which it occurs, David T. Cannon (1999a) asks "can white politicians adequately represent African American interests?" (343). In his book, *Race, Redistricting, and Representation*, (1999b) he answers this question and



finds that majority (white) representation of minority (Black) interests occurs less frequently than the converse. African-American members of Congress do represent their white constituents, and they do so more frequently than white representatives represent their Black constituents (Cannon, 1999b). While cross-group substantive representation is occurring, in Cannon's results it is generally those in the minority that are "acting for" others, rather than the opposite.

The above discussed variable (gender) assesses the question of whether men do not represent women's interests as well as their female colleagues do, but – building upon Cannon's study, that in general those in the majority only minimally represent minority interests – what about men that are not part of this "general" group, but are outliers? What about men who may be particularly sensitized to gendered issues, either in general, or relating to sexual assault in particular? Might previous involvement or experience with legal issues related to gender mean that men are more likely to represent women's interests? Because the measures of partisanship and career experience included in this analysis are unfortunately but unavoidably relatively blunt (as is noted below), a more specific attitudinal measure related to judges' attitudes on gender issues is also included herein, which is connected to how a judge might be sensitized to gender issues (apart from being a woman, which obviously could have a similarly, if not significantly more powerful, sensitizing effect). To this end, whether judges' explicit prioritization of gender-, sexual violence-, or violence against women-related issues is related to the discourse they employ on these issues will also be tested. More specifically, judges' focus on gender-related issues will be measured by looking at the biographies that the judges and Appellate Courts studied in this project have provided on their respective Appellate Courts websites. A dummy variable was constructed from these biographies: if the judge's biography mentioned a) gender as an area in which they are interested, b) that they had worked (or continue to work) in an area of

the law that is explicitly gender related or related to sexual violence, or VAW, or c) served (or are currently serving) with a professional committee that deals with gender, sexual violence, or VAW issues, that judge was determined to have emphasized gender issues and was coded as a “1.”<sup>59</sup> If none of these were mentioned, the judge was coded as a “0” for this variable. These biographies are compiled by Judges and staff of the Appellate Courts across the states,<sup>60</sup> and give a more specific window into the judges’ experiences with gender and/or sexual violence issues in the court system, and whether they choose to dedicate their limited time to addressing these issues specifically. Interestingly – and for the purposes of this study, particularly useful – both positive and negative conditions included male and female justices, respectively. Captured in this variable are judges, in their institutional roles, going out of their way to be involved with issues related to gender *and* to publically signal that this is a focus of their legal and jurisprudential career by including it in their publically available biography. Thus, I hypothesize that an effect is likely to be found here, where judges that do emphasize their experience with gender or sexual violence related issues and the law are less likely to use rape myths, and are more likely to challenge these myths in their decisions. And, I hypothesize that this will be the case for both men and women on the bench.

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<sup>59</sup> For instance, the following – all of which were provided as part of the judicial biographies posted on the Court of Appeals of the state of Indiana website would be coded as “1”: “Judge Robb was Founding Chair of Governor Bowen’s Commission on the Status of Women”; “Judge Friedlander is former co-chairman of the Indiana Supreme Court’s Commission on Race and Gender Fairness”; “Judge Barnes also created a domestic and family violence unit in the Prosecutor’s office and launched a pretrial diversion program for nonviolent misdemeanor offenders that served as a model for successful state legislation. The domestic and family violence unit focused solely on crimes against women and children, including abuse and neglect.” (Indiana Judicial Branch 2012).

<sup>60</sup> From correspondence with the media relations contact at the Indiana Appellate Courts and website of the Iowa Appellate Court.

## *Age*

Early attempts to quantify the effects of demographic variables on judicial decision-making identified age as a very significant factor in accounting for variance in case outcomes. However, “more recent empirical studies have seldom found age to be of value in explaining judicial behavior” (Sisk et al. 1998, 1459). Current research confirms that age or generational cohort generally does not have a statistically significant impact on judicial decisions (Peresie 2005). That said, Haire and Moyer (2015) find for women, in particular, and in gendered areas of the law, age – and in particular being part of an older cohort – matters. Rather than age having no influence on decision-making, they found that “women judges who entered the profession during a period of time marked by overt discrimination are also more likely to support the claim of a plaintiff in a sex discrimination case” (Haire and Moyer 2015, 49-50). In assessing younger women’s experiences compared to older women’s experiences with sexism, and how this might impact their current and future jurisprudence, they describe the gender and age interaction in their results thusly:

“Our analysis of judge gender and decision making found that the more senior cohort of women on the circuit bench offered more support for plaintiffs in sex discrimination cases than their younger female colleagues who were appointed by more recent presidents. Women judges appointed by Obama have not had to deal with formal barriers to legal employment faced by those who entered the profession in the 1950s and 1960s. As a result, we would not be surprised if women and men appointed by Obama to the circuit bench are more alike than different in their decision making across all issue areas, including sex discrimination.” (Haire and Moyer 2015, 135)”

Reflecting this, it is not expected that any significant cohort-related effects will be found in this analysis for men, but that the older cohort of women (defined below) will be less likely to reinforce rape myths than their male colleagues *and* than younger women.

## *Race*

As Sisk et al. point out, despite findings indicating that race generally does not appear to affect judicial outcomes, “[e]xamination of the possible influence of racial background on judicial behavior remains a standard in empirical research” (Sisk et al. 1998, 1454). And, several studies have found that on specific issues, race can matter. For instance, when looking at domestic violence cases in Ohio, Belknap et al. (2000) found that “[w]hen the judge was African American, the defendant received lesser fines and fewer days sentenced to incarceration” (Belknap et al. 2000, 25). Further, empirical evidence does indicate that race can influence the *method* of decision making, however, as this study is concerned with outcomes – specifically, the judicial opinions that are eventually published – the method of decision making is less relevant than this eventual *product*. Again, Peresie’s findings bear this out: like past research has indicated, she found that race had no statistically significant effect in her study of judicial decisions (Peresie 2005). A few studies have found that “racial factors *do* have a dramatic impact on voting on cases involving the rights of the accused and prisoners” (Gottschall 1983, 172). And, further, that Black justices supported sex discrimination claimants more frequently (65 per cent) than did white males (57 per cent) (Goelzhauser 2001). But, based on recent research indicating that race only rarely impacts the decisions judges make, and because there is very little racial diversity on state courts race is expected not to be significant in this area of the law.<sup>61</sup>

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<sup>61</sup> While race itself is generally not found to have a significant effect, this changes when the intersection of race and gender is considered. Haire and Moyer (2015) found that for African-American women, in particular, intersectionality played a role in their jurisprudence and, “minority women are especially active in “representing” both women’s interests and the interests of their racial group...African American female judges are especially likely to support the position of female plaintiffs in sex discrimination cases, suggesting that they view these claims differently than do African American men, Hispanic men and women, and white men. On the other hand, no sex difference appears in cases dealing with racial discrimination. One interpretation of these results is that black judges may engage in substantive representation for

### *Attitudes and Preferences*

Like age, race, and gender, another variable that is generally included in studies exploring the influence of demographic variables on judicial decision-making, judicial opinions, and case outcomes is partisanship (which is often included in the broader category of attitudes and preferences). In both legal and political science scholarship, a large literature exists which assesses the ways that ideological attitudes and demographic variables shape judicial decision-making and trial outcomes. Even a quick glance at the extant literature underlines that there is a particularly long history of evaluating the question, “to what extent is a judge a creature or a captive of personal values and attributes?” (Grossman 1966, 1552). When it comes to personal values, despite this long research tradition, this question remains unsettled. Instructive here is Segal and Spaeth’s (2002) “attitudinal model” of judicial decision making, where judges decide disputes in light of the facts of the case but through the lens of ideology. As they describe, “Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal” (Segal and Spaeth 2002, 86).<sup>62</sup> As Segal and Spaeth argue, judicial attitudes, partisanship, and preferences are important influences on judicial

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the issues most salient for them personally: for black women, this may be sex discrimination, while for black men, it may be discrimination based on race. More broadly, this underscores arguments made by intersectionality theorists that representation by minority women is not necessarily the sum of racism plus sexism, but rather a more nuanced and contextual process” (Haire and Moyer 2015, 77). Unfortunately, beyond Haire and Moyer’s (2015) analysis, not much is known about how intersectionality impacts the behavior of judges, because there are relatively few nonwhite women on the bench. This lack of representation impacts this study as well, and because of the few minority women on state appellate benches, determining how gender and race interact is not possible.

<sup>62</sup> While political scientists and judicial scholars largely agree with Segal and Spaeth’s model key finding – that judicial attitudes powerfully shape judicial opinions – the legal community often criticizes this model, instead arguing for the “legal model” of decision making, where judicial decisions are “substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers and/or precedent” (2002, 48).

decision-making, and it would make sense that they were also influential when it comes to judicial discourse.

However, this model is problematic when it comes to conceptualizing decision making at lower levels of the American judiciary since, unlike the nine Justices of the Supreme Court, judges at state- and county- levels are not as free to implement their attitudes and values because they are generally either elected, or are appointed and then must stand for election (and reelection) to maintain their seat. Unlike Supreme Court Justices, they are therefore beholden to public opinion or the opinion of the politicians that appoint them. Indeed, legal research provides empirical evidence that “state Supreme Court judges are influenced by the political environments of the states in which they serve” (Savchak and Bargothi 2007, 398). Relatedly, empirical findings indicate that judges are not only influenced by the environments in which they practice, but that judges are closely tied to their communities and that they remain closely connected to their states through birth and education (Glick and Emmert 1987). Indeed, some researchers go so far as to assert that we should “expect political environments to directly affect the ideological direction of judicial decisions” (Savchak and Bargothi 2007, 398). Though it can be argued that at the level of the Supreme Court, Rehnquist’s or Marshall’s votes can be explained by each Justices’ personal ideology, it is not this simple when it comes to lower courts where judicial elections and closer community ties can also influence these votes and ideologies.

Since the party-affiliation of many of the judges examined herein is unknown (most of the reelections they stand for are nonpartisan by statute), a partisanship variable cannot be included in the analysis like it could be in a study of legislative behavior. However, many of the judges studied herein are subject to gubernatorial appointment. Therefore, a proxy variable will be used as the measure of general attitudes and partisanship: the party-identification of the

governor that appointed the judge in question, if they were appointed. Other research into the determinants of judicial decision making have followed a similar method to get around the problem of accounting for unknown partisanship (e.g.: Kestel 2011 used “Democratic” and “Republican” judges as a shorthand for judges that were appointed by Democratic and Republican governors, respectively), and thus this analysis will use this method. For judges that were elected, if it was in a partisan election, their party affiliation was used in the construction of this variable. If they were appointed or elected using nonpartisan means, or if their affiliation is “Independent,” these justices were assigned to a third category: independent. Because sexual assault is not an overly partisan issue, no partisan effect is expected for partisanship.

In addition to an analysis of partisanship, an interaction between partisanship and gender will also be explored below. While the interaction between partisanship and gender has not been studied in the judiciary, legislative studies examining this interaction indicate there is good reason to consider it, as it has demonstrated useful in understanding both gendered and partisan behavior in other institutions. For instance, in her analysis of gendered behavior in the Senate, Swers’ observes that “women’s issues are not Republican issues” (2013, 51). Rather, it is the Democratic Party that tends to be more active on, and associated with, “women’s issues.” For Republican appointees to the bench, it would be reasonable to expect that they too would be less likely to focus on “women’s issues,” and this could impact their jurisprudence by making them less likely to challenge rape myths, largely because they are simply not as attuned to them as their Democratic colleagues because their most salient policy concerns are elsewhere. As such, in these analyses Republican women are expected to challenge rape myths less than Republican men and Democratic men and women, and more likely than their Democratic men, women, and Republican men to reinforce these myths.

Ultimately, based on the extant literature related to demographic variables' influence on judicial decision-making, two particular variables are expected to be significant in this analysis: subject-specific attitudes on gender-related issues and judicial gender. Other personal characteristics, including race and age are not expected to be significant, while the interactions of "age and gender" and "gender and partisanship" are expected to be of moderate explanatory value.<sup>63</sup>

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<sup>63</sup> Another variable occasionally included in analyses such as these is legal career path. Several studies have determined that past types of legal employment do, in some cases, affect case outcomes and judicial decision-making. As homogeneity has been increasing among judges appointed to the federal Supreme Court, and a norm of prior judicial experience has emerged over the past several decades (Epstein et al. 2003) at the state level, career diversity still exists and observers argue that this has important jurisprudential effects. Normatively, Epstein et al. (2003) emphasize that diversity in legal decision-making, as well as in other institutional settings, is a positive. And as their meta-analysis demonstrates, "virtually all analyses show career path to be an important factor in explaining judicial decision making" (Epstein et al. 2003, 908; Peresie 2005, Sisk et al. 1998). Looking at the variables affecting decision-making in federal Appellate Courts, Peresie (2005) similarly found that past employment in private practice influenced judicial decision-making in a statistically significant way (see also Sisk et al. 1998). Because of the unique nature of sexual assault cases and trials, past employment in private practice could be relevant as it was in Sisk et al. (1998) and Peresie (2005)'s analyses. One could expect that judges who have entered the judiciary after having been in private practice for a significant amount of time will have increased rape myth mentions, and that this may intersect with the gender composition of a state's judiciary as well. Conversely, former prosecutors could be expected to have fewer instances where their language is supportive of rape myths because in their work as prosecutors they are likely to have worked with many rape victims and survivors, and because of the increased likelihood that in their role as prosecutor, they would have undergone gender-bias related training, or VAWA-funded training that is similar to what judges can take. However, the sensitivity to victims of sexual assault among former prosecutors should not be overstated. Temkin found rape myths were widely believed by this population and her interviews with UK barristers involved in rape cases revealed that not all prosecutors are friendly to rape victims. For instance, one prosecutor noted about cases where the victim had a previous relationship with the accused: "[i]f somebody has been having a sexual relationship with somebody before, whether it's because juries feel the same way I do, that it's really not a terrible offence..." (Temkin 2000, 226). Because of Temkin (2000)'s findings of prosecutorial belief in rape myths, and the reality that many of the judges on state courts of appeal have been on the bench for a long time and could have missed recent training prosecutors have been mandated to take, if included in the analysis I would expect to find no significant correlation between rape myth usage and a predominately private legal career. Further complicating this issue is the breadth and variety of experiences in the private legal profession. Dividing the legal profession



## **Hypothesis 2: Demographic correlates**

H2: The demographic variables that will decrease rape myth usage and increase specific challenges to rape myths are a) that a decision was written by a woman, b) that the decision was written by an older woman, c) that the decision was not written by a Republican woman, and d) that the author of the decision's biography will mention gender-related experience.

## **Data and Methods**

### *Data*

This chapter examines the above hypothesis by focusing on the judiciary in eight states and the demographic and societal correlates that shape the discourse in these jurisdictions. The states included herein include Alaska, Connecticut, Georgia, Iowa, Indiana, Pennsylvania, Utah, and South Carolina. Unfortunately, not all states have readily accessible judicial demographic information, so picking a sample of states, rather than examining all 44 was necessary. Further, sampling eight states allowed for the universe of cases in all eight states to be coded, rather than having to rely upon the samples of approximately 30 cases per state used in Chapter 2, which, for the larger states, is not sufficient to be representative.<sup>64</sup> The states selected include a geographic

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into public vs. private experience assumes enough homogeneity that either side of the variable might be different from one value to another. But, is it reasonable to assume that attorneys who primarily focused on tax-related law would be likely to have had similar enough experiences as those who focused on defending accused (including actual) rapists that they would discuss sexual assault in similar ways once they are on the bench? This does not seem like a valid assumption. Because more detailed analyses of legal histories for judges studied herein are (for some states) non-existent, no variable related to whether a judge's career was predominately private or public will be included.

<sup>64</sup> Because the universe of cases from these states was included in this chapter's analyses, further case coding was required. In addition to the cases already coded, new cases had to be coded from Georgia (53 new cases were coded for inclusion in the analyses in this chapter), Pennsylvania (20), Connecticut (5), and Indiana (90). The cases from these states number 475, though as will

and politically varied group of states, with states that have large cities and rural areas both incorporated. While this was not the reason these states were selected, as can be seen in Figure 3A, the pattern of myth usage in these sample states roughly approximate national patterns. Taken together these states are not outliers to national jurisprudential discursive trends. As was discussed in Chapter 2, 53% of the cases from all states included at least one reference to rape myths. For the universe of relevant opinions from the eight sample states, this figure is slightly higher, at 64%. Similarly, in these eight sample states, the rape myth discussed least often, across the opinions examined was the myth that victims “ask for it” (the “it” in this myth being “to be victimized by rape, or to have sexual intercourse though later they allege that they did not”). This myth was only found in 2% of cases from all 44 states, and was also found in 2% of the cases from the eight sample states. Finally, the myth that rape is somehow distinct from violence was found to be present – either reinforced, or challenged, or both – in 29% of the decisions examined in all 44 states, while the comparable figure from the eight states is, again, slightly higher at 37%.

The independent variables for this analysis include the following:

1. Gender
2. Age
3. Race
4. Whether the judge emphasizes gender or sexual violence in their biography
5. Partisanship of appointing governor
6. Age\*gender
7. Gender\*partisanship

In order to test the above hypotheses, data was collected on the independent variables related to judicial demographics and features outlined above. Conveniently, much of the

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be discussed later, several of these cases had to be dropped from the analyses in this chapter because the opinions were *per curiam*.

necessary demographic data for this analysis is available from a variety of publically available sources. Many states publish data on the relevant judicial demographics. The American Judicature Society (AJS 2012) also provides information about the diversity of the bench in state court systems. Their reports include information about the number of women, African American/Black Judges, Latino/Hispanic Judges, Native American Judges, and Asian/Pacific Island judges at both the state appeals and state Supreme Court levels. Race and ethnicity figures can be derived from the ABA's *Directory of Minority Judges of the United States* (the fourth edition of which was published in 2008). And finally, in many states, each sitting judge has a webpage on their respective appellate court's website that outlines their work experience, the appointing governor, and other details of their personal legal and jurisprudential history.<sup>65</sup> The data included herein was gathered from all of these sources, and no disagreement between the details of judges in this study was found. These variables were then scored thusly: on the gender variable, if the opinion writer was a woman the case was scored as a 1 on this variable, and the opinion writer was a man, it was scored as a 0. The other demographic variables were similarly scored on a binary scale. Race (white opinion writer = 0; minority opinion writer = 1), whether their online biography emphasized gender experience and/or interests (no = 0, yes = 1), and the partisanship of the Governor that appointed the judge (Democrat = 3; Republican = 2; Independent/nonpartisan selection method = 1), were all coded and analyzed using the methods below. A proxy variable was used for age as not all of the judges' ages could be determined: the year they obtained their BA. Twenty years was subtracted from the year in which a judge obtained their bachelor's degree, and this was the number used as a stand-in for the judge's age.

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<sup>65</sup> Where this proved inadequate as a data source was for retired judges who still adjudicate appellate cases as "Senior Judges," which happens in several states, including in Connecticut. For several of these retired judges, who are still active but over Connecticut's mandatory judicial retirement age of 70, all demographic data could not be found.

For instance, Judge Bradford earned his BA in 1982, so his age was estimated at 50 years old. Because of the cohort effects found by Haire and Moyer (2015), age was converted from a continuous to an indicator variable – those over 59 were separated into one group, and those 59 and under into the other. This age was selected because as the ABA Report on gender discrimination within the legal profession highlights, “it was not until the 1970s that all accredited law schools eliminated sex-based restrictions” (Rhode 2001, 13). Thus, women entering the profession before this time would have encountered a legal environment where they faced significant discrimination based on their gender, and, as Haire and Moyer argued, this could have sensitized them to gendered issues – particularly related to sexual harassment, but possibly in other gendered areas of the law – such as sexual violence and gender-based violence – as well. A breakdown of opinion by demographic variable representation can be seen in Table 3A.

The results of the analyses in Chapter 2 were used as the dependent variable to evaluate the hypothesis. For all cases the dependent variable was available, but there were a number of cases from the eight case study states selected that did not have complete demographic variable information available. This is because the opinions were written *per curiam*. All 36 *per curiam* opinions from these eight states were removed from the analysis, and overall, for this analysis 439 opinions were included from the eight states noted above. The frequency of rape myth usage within these opinions can be seen in Table 3B.

### *Methods*

Using an ordered probit analysis, the degree to which of these demographic variables influence the use of these rape myths was examined. In particular, overall rape myth usage and the usage of the “not violence” myth were assessed. This follows much of the extant literature

that has used probit analyses to evaluate the influence of judicial demographics. For instance, Boyd, Epstein, Martin (2010) note that many of the studies in this area use dichotomous regression models (logit or probit), “with the judge’s vote (e.g., for or against the plaintiff in sex discrimination cases) serving as the dependent variable” (392). While the current study uses the presence or absence (and directionality) of myths in the decision as the dependent variable, as opposed to the way in which a judge voted on a case, a probit analysis is nevertheless appropriate here because the dependent variable is binary: rape myths are either used or not, and in the second analysis, they are either challenged or not<sup>1</sup>. These studies require probit analyses because the dependent variables in both cases are dichotomous variables – as is the case in many of the studies described in the literature review (Sisk 1998; Peresie 2005).<sup>66</sup>

## Results

In this chapter, I hypothesized that any demographic effect would be weak, but that the demographic variables that will decrease rape myth usage and increase specific challenges to rape myths are the following four variables. That, a) that a decision was written by a woman, b) that the decision was written by an older woman, c) that the decision was not written by a Republican woman, and d) that the author of the decision chose to emphasize gender in their legal careers (either through service on gender related committees, in gender-related associations – such as Associations of Women Judges – or by making it explicit that they focus on gendered issues, including but not limited to sexual violence or gender-based violence in their work). The results of the ordered probit analyses, which assess how individual demographic factors

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<sup>66</sup> For instance, Peresie notes that she “used probit regression analyses instead of ordinary least squares regression analyses because the dependent variable (the judges’ decision) was discrete, not continuous” (2005, 1770).

influence the use of rape myths by state appellate judges can be seen in Tables 3C-3H. Herein, a weak effect will be described as those where there is less than a .10 increase or decrease in predicted probabilities, whereas a strong effect is when the predicted probability is over .25.

Tables 3C, 3D, and 3F assess overall rape myth usage (usage of all 11 rape myths) and the impact demographic variables have on the use of this discourse by looking at the first difference effects of judicial rape myth usage. As described by King (1989) “these statistics are estimates of how much  $\Theta$  would change given a particular change in a single explanatory variable, while statistically holding constant the other variables in the equation” (107). The results of these probit analyses indicate that, as expected and with only a few exceptions, the demographic variables contained in the model explain little of the variation in overall rape myth usage (regardless of directionality). In Table 3C, where the dependent variable is rape myth usage, there is a less than .10 increase or decrease as a result of a change from zero to one when the independent variable is gender, race, age, career emphasis, nominated party, or the interaction of gender and age (with the other variables held constant at their means). These do not meet the .10 threshold for a “weak” effect.

When the dependent variable is rape myths being explicitly challenged (Table 3D), these independent variables again cause less than a 0.10 increase or decrease when they are increased from zero to one (when the other variables are held constant at their means). This is similarly the case when the dependent variable is the reinforcing of rape myths (Table 3E), with the exception of the interaction of gender and age, which is only of slightly more explanatory value: when the probability of a justice is a man who is 59 years old or older using a reinforcing a rape myth is compared to a woman in this age cohort, the probability of a rape myth being reinforced

increases by 0.16. Interestingly, this does not provide support for the hypotheses that gender or a career emphasis on gendered issues is significantly associated with rape myth usage.

While these individual level variables do not seem to explain much of the variation in overall rape myth usage, the interaction between gender and party is moderately more useful – but in a way that was unexpected, and indicates that further analyses that move past individual level variables are necessary and could be revealing. Moving to an examination of the interaction between gender and party upon directional<sup>67</sup> rape myth usage<sup>68</sup>, the interaction between gender and party provides interesting results that merit further explanation. As can be seen in Table 3D, the predicted probability that an opinion explicitly challenges rape myths increases by 0.13 when the writer is a Republican man, rather than one who is an independent man. This is also the case (with the increase being 0.17) when the writer is a Democratic woman compared to a woman who is an independent, and when a woman is a Democrat compared to a Republican (where the increase in probability is 0.23). This finding is evident in Figure 3B, where it is clear that women who are Democrats challenge rape myths more frequently than their colleagues. Examining rape myths that are reinforced (Table 3E), again, the probability that an opinion explicitly reinforces rape myths increases by over 0.10 – in this case, 0.14 – when the writer is a Republican man, rather than one who is an independent, and the same amount when the writer is an independent woman compared to an independent man. While these numbers are still relatively modest, as they are all below 0.25 and thus are not “strong” effects, they do indicate that perhaps an interesting interaction is occurring between gender and partisanship – though one that is not fully captured using the analyses of demographic and individual variables in this chapter. That there is

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<sup>67</sup> Rape myth usage independent of direction is depicted in Table 3C.

<sup>68</sup> Rather than looking at whether rape myths are generally discussed (the results of that study are depicted in Table 3C), “directional” usage assesses whether the myths in question were reinforced or challenged in the opinion.

more underlying these results than simply gendered partisanship is particularly evident when the effect of being an independent on the predicted probabilities of rape myth usage is considered. It seems, from these results, that an opinion written by an independent, is less likely to challenge, and more likely to reinforce rape myths than when an opinion is written by a Republican or a Democrat, and this is a gendered effect which is not evident when partisanship is considered outside the interaction. But, why might this pattern be occurring? And why aren't more predictable and stable gendered partisan results visible? The answer may lie in the way that independents in this analysis are categorized: Out of necessity, the "independents" in this analysis are not all true "independents" – if true "independents" are understood to be judges without partisan affiliation. These true independents are included herein, but the "independent" category also includes judges who make it onto the bench using non-partisan methods (for example, nonpartisan state elections). Perhaps the curious results of this interaction between gender and partisanship are being driven not by individual partisan attitudes or affiliations, rather, they might be affected more by methods of judicial selection and how these can have a gendered impact. Because method of judicial appointment was not included in this chapter, as it is a state-level, rather than individual-level variable (it changes from state to state, rather than judge to judge) it will be discussed further in Chapter 4.

While the above analyses assessed usage of all rape myths, a second series of probit analyses was run to more specifically assess whether judicial demographic factors are relevant to the most commonly used rape myth: that which distinguishes rape and sexual assault from violence (the "not violence" myth). The results of this analysis can be seen in Tables 3F, 3G, and 3H.



As when looking at rape myth usage more generally, when it comes to the judicial usage of the “not violence” myth, the individual variables explored in this analysis explained little of the variation in the discourse. However, there were several results in these analyses that are worthy of mention. When assessing the overall usage of the not violence myth (independent of direction), the above discussed analyses found that a change in the race of the opinion writer from a white judge to a minority judge caused a 0.12 decrease in the probability the not violence myth would be discussed in the opinion (Table 3F). This figure was -0.11 when the challenging of the not violence myth was examined (Table 3G), but was less than 0.10 for reinforcing this myth (Table 3H). Similarly, the presence of a judge who did emphasize gender in their career, compared to one who did not, predicts a 0.11 decrease in the probability that this myth will be discussed. An opposite effect, a 0.11 increase in probability was predicted when a woman older than 59 was the opinion writer, compared to a man of the same age. This interaction caused the same change in predicted probability when the reinforcing of the not violence myth was examined (Table 3H), as both older and younger women were associated with an increase in probability by 0.11 that the not violence myth would be reinforced. Ultimately, in assessing both overall rape myth usage and the use of the not violence myth specifically, while these individual variables do explain some of the variation seen in Chapter 2, this is only a very small amount.

As with overall rape myth usage, again the interaction between gender and party provides results that indicate that further explanation of the role of judicial selection could provide a useful window into the variation in question. This interaction is associated with high predicted probabilities when the explicit challenging<sup>69</sup> of the not violence myth is considered (Table 3G). The opinion author being a Democratic woman, rather than an independent woman is associated

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<sup>69</sup> Rape myth usage, for the “not violence” myth independent of direction is depicted in Table 3F.

with a predicted 0.22 increase in the likelihood of this myth being challenged in the opinion, and when the writer is a Democratic woman rather than a Republican woman, the equivalent figure is 0.20. The higher frequency of Democratic women's challenges to the "not violence" myth are depicted in Figure 3C. Compare these to the findings in Table 3H, which considers how these individual level variables are associated with the reinforcing of the not violence myth. Here, the predicted effect of having a Republican male judge rather than an independent male judge as the opinion writer is an increase probability of 0.12 that a rape myth will be reinforced in the decision. For Democratic men as compared to independent men this figure is an increase 0.15, for Republican women compared to independent women this is associated with a decrease in probability of 0.21, while for Democratic women compared to independent women this is again associated in a decrease in probability that the not violence myth will be reinforced in the opinion (-0.16). Finally, the probability of the not violence myth being reinforced in an opinion increases by 0.36 when the writer is a female independent, compared to a male independent judge. With the other variables held constant at their means, this interaction again provided comparatively large predicted probabilities when these variables were increased from zero to one, though in very unstable patterns which indicate that perhaps a third variable (such as method of judicial appointment, or another state-level factor) is driving this variation.

These analyses point to the first components of the hypothesis being incorrect – gender does not seem to explain much of the variation of rape myth usage, and it certainly does not do so consistently, similarly older women are not more likely to substantively represent women in this area of the law. Democratic women are at times less likely to reinforce rape myths than their colleagues – but the predicted probabilities associated with this substantive representation indicate that this is compared to women who are independents rather than those that are

Republican. However, an interesting finding is that Democratic women do seem to be more likely to challenge rape myths than either their independent or Republican colleagues. However, the final part of the hypothesis has not been considered as of yet. Does a judge's choice to emphasize gender in their legal career (and highlight this in their biography) explain this variation? And further, does the interaction of career emphasis and gender explain the variation found in Chapter 2 while other individual level variables do not?

Based on the analyses above (see Figures 3C-3H), the answer to the former question appears to be no. The predicted probabilities for a career where gender has been emphasized are very small – ranging from zero (0.00) to -0.11 (the latter figure is in Table 3F, where it can be seen that a judge who has emphasized gender in their career is associated with a 0.11 reduction in the predicted probability that the not violence myth will be used compared to a judge who has not had a gender focus). All other “first differences” were between -0.10 and 0.10 – thus, not of particular use in explaining the fluctuation in the dependent variable. However, this does not get at the interaction between gender and a gendered career emphasis. In order to assess whether this interaction is significantly explanatory, to the model discussed above, a third interaction was added: the interaction between gender and career emphasis. As with the above analysis, a probit was run for each dependent variable (rape myth usage overall and use of the not violence myth, specifically) and the first difference effects were calculated. The results of the directional myth usage (myths challenged and reinforced) are depicted in Table 3I.

From these results it is clear that while this interaction is not particularly illuminating when it comes to the *challenging* of rape myths (either overall or in relation to the not violence myth), it does usefully explain some of the variation that occurs when these myths are *reinforced* (and who is more and less likely to reinforce both rape myths generally, and the not violence

myth in particular). Looking first at the reinforcing of “all myths,” female judges who do have a gender focus in their career are associated with a 0.16 decrease in the predicted probability that these myths will be reinforced, compared to women who do not have a gender focus in their careers. Interestingly, this prediction sits alongside a predicted increase of 0.13 for women with no gender focus compared to men with no gender focus – women who choose not to focus on gender, or to highlight that experience for a public audience are more likely to reinforce rape myths than their male colleagues who also choose not to focus on gendered issues. When it comes to predicting which judges are more or less likely to reinforce the not violence myth, the results are similar: when the jurisprudence of a woman who has a gender focus in her career is compared to that of a woman who has not focused on gender in her career, the predicted probability is -0.13. For male judges, the comparable predicted probability is -0.23. The probability that a male judges opinions will reinforce the not violence myth decreases by 0.23 when a man who does focus on gender in his career is compared to one who does not. Of particular note is the predicted increase by 0.18 for women with a gender focus compared to men with a gender focus. For men who focus on gender, they are even less likely to reinforce this myth than their female colleagues who also have focused on gender in their careers. This dramatic result is visible in Figure 3D.

This provides partial support for the second half of the hypothesis – while the interaction of gender and career is not particularly useful as a way to understand the variation in the challenging of rape myths, it is illuminating when the very problematic reinforcing of rape myths is considered. And, the way that this effect is gendered is of particular interest: men who do choose to address gendered issues in their legal careers, and highlight that in their biographies, are particularly likely to *not* engage in the reinforcing of rape myths. This is not only compared

to other men (those who do not focus on gender), but women who do focus on gender. When women who do not focus on gender are considered in comparison with these gender-focused men, the predicted probability that the not violence myth will be present decreases by 0.30 when moving from the former's jurisprudence to the latter's.

Taken together, these analyses indicate that ultimately these demographic variables do not explain much of the variation in overall myth usage or the usage of the "not violence" myth, with the exception of the interaction between gender and a gender-focus in a judge's legal career. From a normative or a judicial education perspective these findings are critical, as they indicate that waiting for more women to get on the bench and improve the discourse is not likely to resolve this issue. However, encouraging judges to take a professional interest in gender or gender-related issues might be beneficial. While this is not evidence demonstrating the efficacy of judicial or legal training, it is not dispositive of these effects either, as a strong demographic variable-related explanation could be.

## **Discussion**

The analyses in this chapter assess individual level variables and their ability to explain the variation in rape myth usage found in Chapter 2. In particular, the hypothesis assessed herein was that the presence of the following demographic variables would be associated with decreases in discourse reinforcing rape myths, and increases in challenges to rape myths: a) that a decision was written by a woman, b) that the decision was written by an older woman, c) that the decision was not written by a Republican woman, and d) that the author of the decision's biography will mention gender-related experience. The results of evaluating variables a, b, and c are as follows: The above analyses found that as predicted, judicial demographics do not generally provide

strong explanations for the variation of rape myth usage among the American state level judiciary. While an interaction effect was found for judges who have an expressed interest in gender and gender-related issues, quite a few variables were not found to have particularly significant effects, including race, age, the interaction of age and gender, and most interestingly, gender. As such, the first couple of components of the hypothesis appear to have been incorrect – gender does not seem to explain much of the variation of rape myth usage. Similarly older women are not more likely to substantively represent women by challenging rape myths more frequently than their younger or male colleagues. However, an interesting finding is that Democratic women *do* seem to be more likely to challenge rape myths than either their independent or Republican colleagues. Thus rather than gender being irrelevant to judicial discourse on this issue, it seems that certain women are more likely to challenge rape myths.

The lack of a consistent finding of a gendered voice is important when placed in the context with the wider debates about the value of the descriptive representation of women are considered. If overall women are not using rape myths less than their male colleagues, and thus descriptive representation is not translating into substantive representation (as was the case in the results found herein) should reformers interested in reducing rape myth usage abandon campaigns directed at increasing women's numerical representation on the bench? This question of the utility of a descriptively representative bench is still a critical one tied to larger debates about the importance and benefits of having a representative judiciary, not just in the American context, but abroad as well.

While Songer et al. (1994) usefully highlight the complex nature of substantive representation for the American judiciary, actors within American and foreign legal systems have also grappled with gendered judicial representation, discussing it not only in empirical

terms, but rather describing judicial diversity as a normative good<sup>70</sup> – largely because of the representational benefits this diversity can (or is assumed to) bring. However, these desired representational benefits are not always assumed to be substantive. As substantive representation was not found in this study, these discussions are critical for considering why descriptive representation of women on the bench might nevertheless be important. For instance, some who are dubious that women judge in “a different voice” still argue that increasing the number of women in the judiciary would still be a boon to the judicial system, women, and to society more generally because of the normatively desirable effects of doing so. In her book, *Gender and Justice* (2013), Sally J. Kenney persuasively makes this argument – that women may not be judging in “a different voice,” but that nevertheless having more women on the bench is desirable. Kenney’s core argument unlinks the key forms of representation pioneered by Pitkin (descriptive from substantive). Rather than descriptive representation being normatively valuable because it will (theoretically) bring substantive representational benefits, for Kenney, the normative project of getting more women on the bench is largely centered around the argument that viewing women as having one monolithic way of judging that is different from men’s way of judging is too essentializing. Kenney instead asserts that we should consider gender to be a larger process, and that “feminists need not rest claims to equality on evidence of difference” (Kenney 2013, 21). She argues that this type of essentialism should be something that feminist scholars focused on the judiciary (and elsewhere in the discipline) should move beyond, and instead advances a nonessentialist argument for greater equality for women throughout the legal system, including in judicial robes (Kenney 2013). Ultimately, she highlights that the desirability of having more women on the bench should not be connected to their supposedly judging in a

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<sup>70</sup> In her 2013 book, Sally J. Kenney also discusses the role of women in the judiciary outside of the American context.

particular and gendered way. As the current analysis did not find evidence of difference, Kenney's work is critical as a way to interpret these findings in a way that preserves the value of normative arguments for, and feminist campaigns about, increasing women's descriptive representation on the bench.

Internationally, Kenney's arguments for the desirability of descriptive representation for women in the courts – even if it does not consistently bring with it substantive benefits – have been echoed in the United Kingdom. There, an even greater emphasis has been placed on the normative benefits of increasing the number of women judges for traditional substantive reasons, but also because of descriptive representational benefits. For instance, Karon Monaghan QC and Geoffrey Bindman QC, recently prepared a report on judicial diversity for the UK Labour Party in which they highlight the problems associated with a lack of judicial diversity. Namely, that

“[t]he near absence of women and Black, Asian and minority ethnic judges in the senior judiciary, is no longer tolerable. It undermines the democratic legitimacy of our legal system; it demonstrates a denial of fair and equal opportunities to members of underrepresented groups, and the diversity deficit weakens the quality of justice” (Bindman and Monaghan 2014, 5).<sup>71</sup>

Indeed, as Bindman and Monaghan suggest, there is more than one reason that this type of descriptive diversity is normatively desirable. Examining judicial diversity within the American context, which is particularly critical for the current study, the American Judicature Society similarly highlights that there are a range of benefits of this type of diversity. They argue that,

“[w]hether judicial diversity is valued because it increases public confidence in the courts, provides decision-making power to formerly disenfranchised populations, or is essential to ensuring equal justice for all, citizens seem to prefer a judiciary that is diverse in its

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<sup>71</sup> They go on to argue that “a judiciary that is comprised almost exclusively of members of a small class – White, male, heterosexual and with a socially and economically advantaged background – cannot command the broad community respect which acceptance of its decisions demands. As equality is increasingly recognized as a fundamental component of a well-functioning and modern, liberal democracy, a wholly unrepresentative judiciary is no longer acceptable” (Bindman and Monaghan 2014, 7).



makeup.” (Reddick, Nelson, and Caufield 2009, 1)

Taken together, even though in this area of the law it does not appear that women as a group are speaking with “a different voice,” the above discussion highlights how this null-finding does not mean that gender diversity and more representation of underrepresented groups on the bench is not normatively important. Indeed, for a persuasive argument about why this type of diversity is important, we can return to the situated perspective of Lady Justice Hale, who, in speaking about diversity on the bench expressed the following opinion;

“I take the view that ‘difference’ is important in judging and that gender diversity, along with many other dimensions of diversity, is a good, indeed a necessary, thing. However, the principal reason for this is not our different voice, but democratic legitimacy. In a democracy governed by the people and not by an absolute monarch or even an aristocratic ruling class, the judiciary should reflect the whole community, not just a small section of it. The public should be able to feel that the courts are their courts; that their cases are being decided and the law is being made by people like them, and not by some alien beings from another planet. In the modern world, where social deference has largely disappeared, this should enhance rather than undermine the public’s confidence in the law and the legal system.” (Hale 2014)

Despite these normative and democratic benefits, the results of this chapter’s analyses do underline the limits that gender diversity has on the outputs of the court. Based on the findings above, arguments that more women on the bench will necessarily result in less usage of rape myths, and ultimately more justice for victims of sexual assault are not borne out. Reformers with this broad goal in mind would likely be well advised to look to other strategies to reform the usage of this problematic discourse at the state appellate level. But, what other strategies should they try? The results above indicate that seeking to elect women, as a general strategy would not be particularly effective, they do not indicate that gender is irrelevant. These findings do not indicate that gender never matters. Rather, they indicate that it matters for certain women in particular. Thus, electing certain women – those that are Democrats and women who have experience with gender and sexual violence in their career backgrounds – could be a more

promising strategy. Such a strategy is akin to a judicial version of the project of EMILY's List. EMILY's List does not fund all female candidates for (legislative) office, rather they focus on supporting pro-choice Democratic women. For activists who seek a judiciary more willing to challenge and less willing to enforce, a modified version of this strategy could be useful to ensure that not just women, but women who are likely to challenge (and not reinforce) rape myths are appointed to the bench. Those women would be Democrats and they would be those who have focused on issues related to gender and/or sexual violence in their legal careers.

The question – what other strategies could be tried to bring a judiciary less supportive of rape myths onto the bench? – is partially answered by looking to Democratic women, in particular. But this is not the only time that issues of gendered representation are important in the above discussed findings. As was previously noted above there is support for the final variable in the hypothesis having a significant explanatory value, but only for one type of the dependent variable. That independent variable is the interaction of gender and career, and was particularly important in light of the directionality of rape myth usage. That is, though the interaction of gender and career is not especially useful as a way to understand the variation in the *challenging* of rape myths, when the *reinforcing* of rape myths was considered, its explanatory power is much greater. Curiously, this is particularly the case for male judges. Male judges who choose to address gendered issues in their legal careers and that highlight this focus in their public biographies, are particularly likely to *avoid* reinforcing the “not violence” rape myth compared to their colleagues on the bench. This is not only true when these men are compared to men who do not focus on gender (or who choose not to highlight this for the public), but it is also true compared to women who *do* focus on gender. When women who do not focus on gender are considered in comparison with these gender-attentive men, the predicted probability that the not

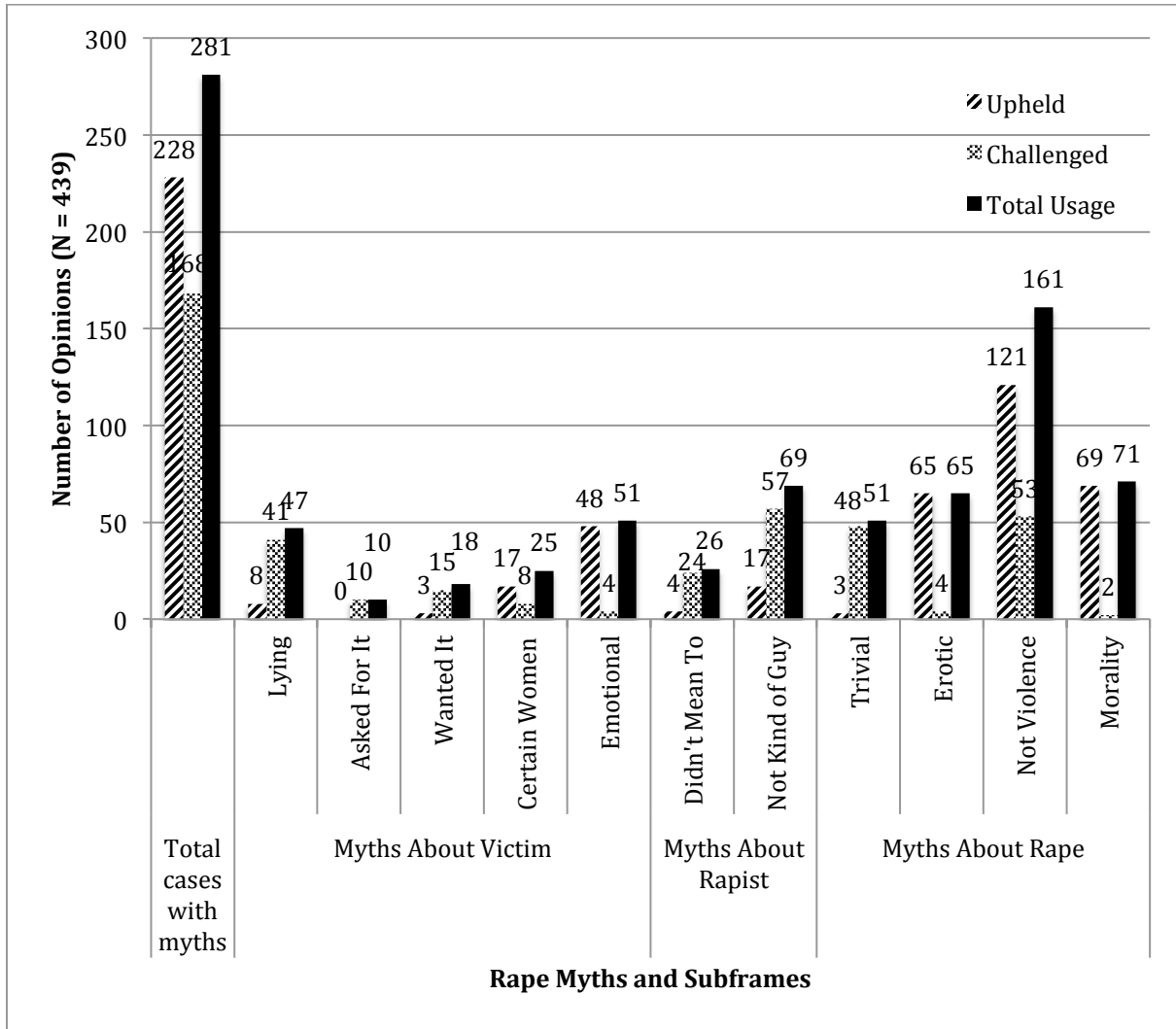
violence myth will be present decreases by 0.30 when moving from the former's jurisprudence to the latter's. This finding indicates that it may be self-depiction and self-selection that may be more of a driving factor in rape myth usage than gender. In this very gendered area of the law judicial gender appears to be less important than selecting into career experiences related to gendered issues. These results could indicate either that these men are feminist and thus unlikely to use rape myths because they are anti-feminist, or perhaps that the judicial training these men encountered when they were working in these gendered or sexual violence-focused areas of legal practice worked and discouraged their use of these myths. What is not clear from these results is whether the men who focus on gender are particularly feminist, and thus would be less likely to reinforce rape myths independent of this legal experience (but might have selected into this legal experience because of their feminist leanings), or if these gendered legal experiences primed them to be more conscientious when ruling on this highly-gendered area of the law. Either way, this result is an interesting example of people other than women being able to act in a way that protects and advances women's interests.

Looking forward, what remains unexplained in this chapter is how variables beyond individual level variables might be driving the variation in rape myth usage explored herein. For instance, state level variables remain largely unexplored by this project. However, this chapter's results do indicate that an examination of these broader variables could prove useful. The next chapter addresses this issue by moving past an examination of the judge writing opinions, and to an examination of the venue within which they are writing: the state.

Ultimately, this chapter is a critical middle piece of the larger study that undertakes a comprehensive examination of judicial use of the rape myth frame at the state appeals court level. Overall, the effects of individual demographic variables provide a relatively weak

explanation for the variance of rape myth usage among the state appellate judiciary, and the analyses that follow and build upon those from this chapter are focused upon broader (in particular, state-level) explanations for the patterns found in Chapter 2. If variations in rape myth usage cannot be adequately explained by focusing on judicial demographics – basically by asking *who* is using these myths – chapter 4 examines if we can more successfully explain the variations in this discourse by focusing in *where* it occurs. However, the results of Chapter 3 do also add to our knowledge about when gender seems to influence the behavior of judges. It is not that gender is irrelevant, rather, these findings indicate that judicial gender does not impact all women (or all men) on the bench in precisely the same way. For reformers seeking to reduce rape myth usage, treating all female candidates for judgeships might not be a productive strategy, but promoting the election or appointment of Democratic judges might move them closer to this goal. Similarly, focusing on the election or appointment of women with gendered career experiences in their past could have a similar effect – as could the election or appointment of male judges with similar legal histories. Ultimately, the above findings indicate not that descriptive representation is not relevant for substantive representation to occur, rather, it is critical that we look past the men/women dichotomy to look at *which* men and women are substantively representing women’s issues, because there a gendered effect can still be found.

## Tables and Figures



**Figure 3A: Directionality of Rape Myth Usage in Case Study States**

**Table 3A: Opinions by Judicial Demographics (Independent Variables)**

<b>Independent Variables</b>	<b>Number of opinions written by each category (total = 439)</b>		
Gender	Men: 287 opinions written		Women: 152 opinions written
Race	Non-white: 50		White: 389
Gender-related experience emphasized	Gender emphasized: 115		Gender not emphasized: 324
Graduation date	Mean: 1974		SD: 7.91
Age	Mean: 57.72 Over 59: 198 opinions		SD: 7.91 Under 59: 241
Partisanship (proxy: nominating governor)	Democrat: 113	Republican: 223	Nonpartisan/ Independent: 103

**Table 3B: Sample Opinion Myth Usage in Case Study State Cases**

<b>Myth use</b>	<b>Frequency</b>	<b>Percent</b>
All cases in 8 state sample	439	100%
All myths (both directions)	268	61.05%
All myths (upheld)	215	48.97%
All myths (challenged)	168	38.27%
Not violence (both directions)	158	35.99%
Not violence (upheld)	121	27.56%
Not violence (challenged)	52	11.85%

(note: numbers are slightly lower than Figure 3A because the above table does not include the 36 cases that were removed from the probit analysis because of missing demographic data)

**Table 3C: Demographic Correlates and Judicial Use of Rape Myths (Rape Myth Used)**

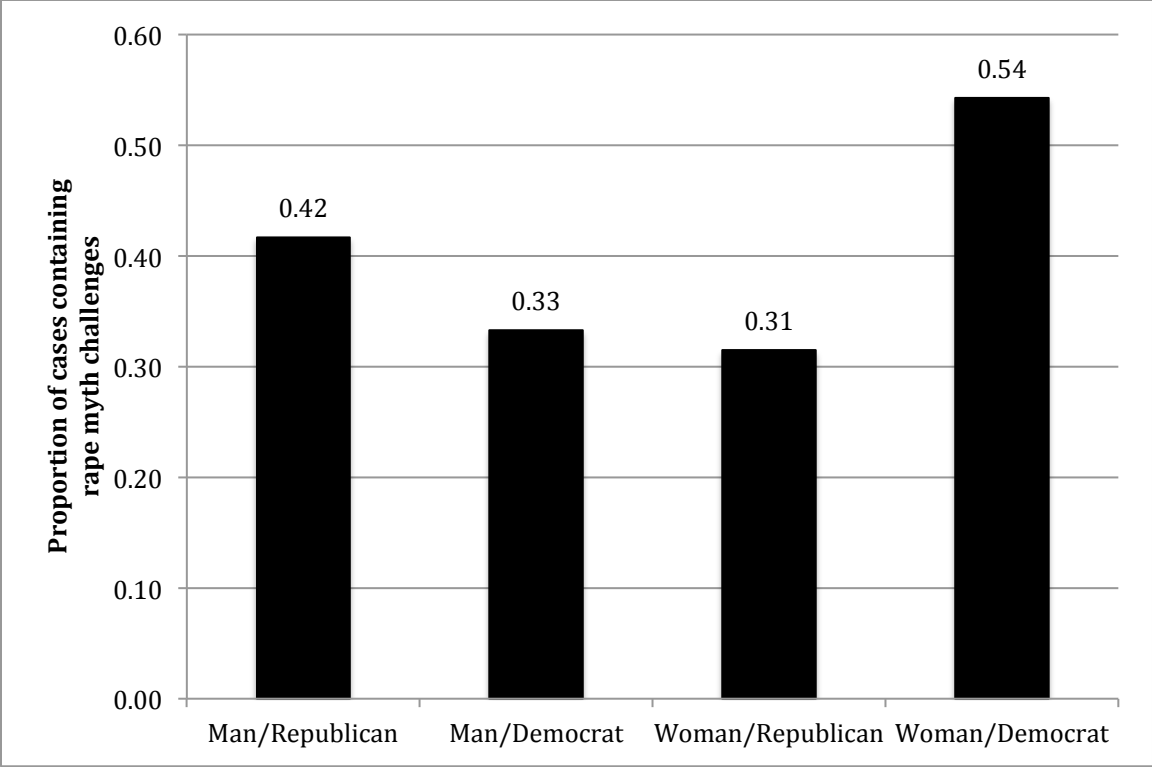
Variable	Estimate	Change in X (from, to)	First difference
Gender	0.30	(0,1)	0.03
Race	-0.15	(0,1)	-0.06
Age (cohort)	-0.26	(0,1)	-0.05
Career emphasis	-0.14	(0,1)	-0.06
Nominated party (estimates: Republican, Democrat)	0.45, 0.20	(1,2)	0.08
		(2,3)	-0.02
		(1,3)	0.06
Gender*Party (estimates: Republican man, Democratic man)	-0.71; -0.12	(01,02) (man/indep., man/Republican)	0.18
		(01,03) (man/indep., man/Democrat)	0.08
		(02,03) (man/Republican, man/Democrat)	-0.09
		(11, 12) (man/indep., man/Republican)	-0.10
		(11, 13) (woman/indep., woman/Democrat)	0.03
		(12, 13) (woman/Republican, woman/Democrat)	0.13
		(01,11) (man/indep., woman/indep)	0.18
		(02,12) (man/Republican, woman/Republican)	-0.09
		(03,13) (man/Democrat, woman/Democrat)	0.13
Gender*Age (estimate: Man 59+)	0.36	(00,01)	-0.10
		(10,11)	0.04
		(00,10)	-0.03
		(01,11)	0.10
Constant	0.12		
N	439		

Note: The dependent variable is the usage of rape myths. Entries are marginal effects at means with robust standard errors clustered by state in parentheses.



**Table 3D: Demographic Correlates and Judicial Use of Rape Myths (Rape Myth Challenged)**

Variable	Estimate	Change in X (from, to)	First difference
Gender	0.11	(0,1)	0.02
Race	-0.27	(0,1)	-0.10
Age (cohort)	-0.20	(0,1)	-0.04
Career emphasis	-0.01	(0,1)	0.00
Nominated party (estimates: Republican, Democrat)	0.35, 0.13	(1,2)	0.07
		(2,3)	0.02
		(1,3)	0.09
Gender*Party (estimates: Republican man, Democratic man)	-0.51, 0.30	(01,02) (man/indep., man/Republican)	0.13
		(01,03) (man/indep., man/Democrat)	0.05
		(02,03) (man/Republican, man/Democrat)	-0.08
		(11, 12) (man/indep., man/Republican)	-0.06
		(11, 13) (woman/indep., woman/Democrat)	0.17
		(12, 13) (woman/Republican, woman/Democrat)	0.23
		(01,11) (man/indep., woman/indep)	0.09
		(02,12) (man/Republican, woman/Republican)	-0.10
		(03,13) (man/Democrat, woman/Democrat)	0.21
Gender*Age (estimate: Man 59+)		(00,01)	-0.08
		(10,11)	0.03
		(00,10)	-0.03
		(01,11)	0.08
Constant	-0.43		
N	439		



**Figure 3B: Rape Myth Challenges (Gender and Party Interaction)**

**Table 3E: Demographic Correlates and Judicial Use of Rape Myths (Rape Myth Reinforced)**

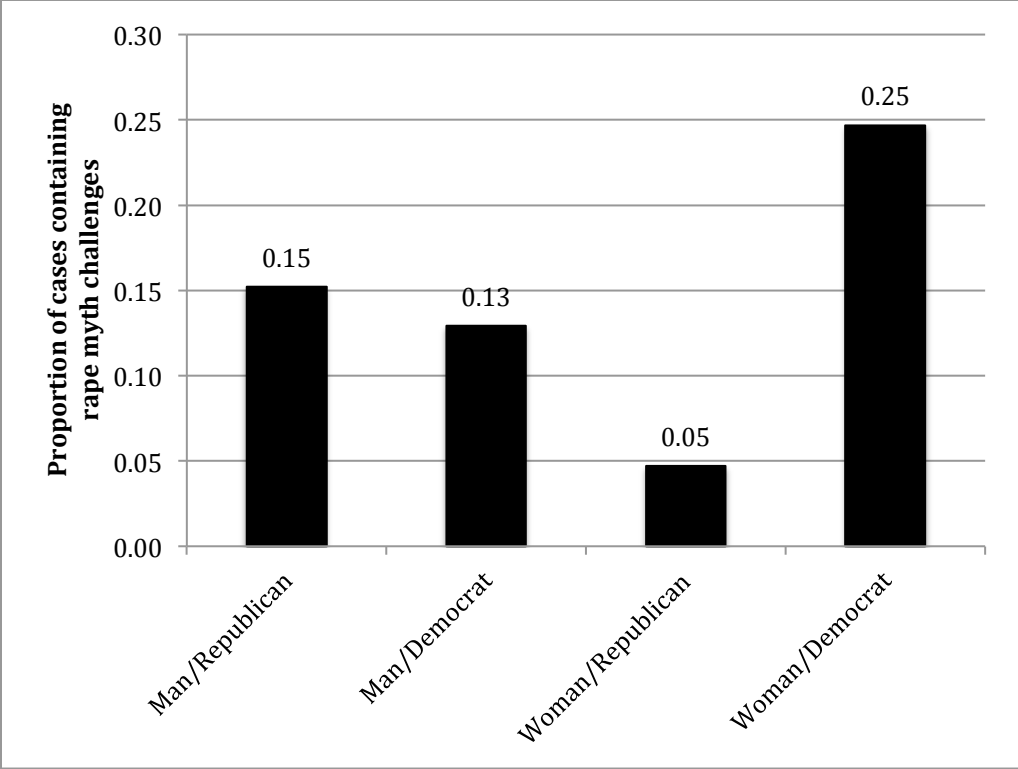
Variable	Estimate	Change in X (from, to)	First difference
Gender	0.19	(0,1)	0.08
Race	-0.20	(0,1)	-0.08
Age (cohort)	-0.25	(0,1)	-0.04
Career emphasis	-0.22	(0,1)	-0.09
Nominated party (estimates: Republican, Democrat)	0.35, 0.21	(1,2)	0.10
		(2,3)	-0.04
		(1,3)	0.06
Gender*Party (estimates: Republican man, Democratic man)	-0.27, -0.15	(01,02) (man/indep., man/Republican)	0.14
		(01,03) (man/indep., man/Democrat)	0.08
		(02,03) (man/Republican, man/Democrat)	-0.06
		(11, 12) (man/indep., man/Republican)	0.03
		(11, 13) (woman/indep., woman/Democrat)	0.02
		(12, 13) (woman/Republican, woman/Democrat)	-0.01
		(01,11) (man/indep., woman/indep)	0.14
		(02,12) (man/Republican, woman/Republican)	0.04
		(03,13) (man/Democrat, woman/Democrat)	0.09
Gender*Age (estimate: Man 59+)	0.40	(00,01)	-0.10
		(10,11)	0.06
		(00,10)	0.01
		(01,11)	0.16
Constant	-0.13		
N	439		

**Table 3F: Demographic Correlates and Judicial Use of Rape Myths (NV Myth Used)**

Variable	Estimate	Change in X (from, to)	First difference
Gender	0.78	(0,1)	0.08
Race	-0.34	(0,1)	-0.12
Age (cohort)	-0.30	(0,1)	-0.09
Career emphasis	-0.31	(0,1)	-0.11
Nominated party (estimates: Republican, Democrat)	0.56, 0.65	(1,2)	0.07
		(2,3)	0.10
		(1,3)	0.17
Gender*Party (estimates: Republican man, Democratic man)	-1.00, -0.50	(01,02) (man/indep., man/Republican)	0.18
		(01,03) (man/indep., man/Democrat)	0.21
		(02,03) (man/Republican, man/Democrat)	0.04
		(11, 12) (man/indep., man/Republican)	-0.16
		(11, 13) (woman/indep., woman/Democrat)	0.06
		(12, 13) (woman/Republican, woman/Democrat)	0.23
		(01,11) (man/indep., woman/indep)	0.29
		(02,12) (man/Republican, woman/Republican)	-0.05
		(03,13) (man/Democrat, woman/Democrat)	0.14
Gender*Age (estimate: Man 59+)	0.17	(00,01)	-0.10
		(10,11)	-0.05
		(00,10)	0.05
		(01,11)	0.11
Constant	-0.71		
N	439		

**Table 3G: Demographic Correlates and Judicial Use of Rape Myths (NV Myth Challenged)**

Variable	Estimate	Change in X (from, to)	First difference
Gender	-0.67	(0,1)	-0.05
Race	-1.09	(0,1)	-0.11
Age (cohort)	-0.31	(0,1)	-0.02
Career emphasis	0.39	(0,1)	0.08
Nominated party (estimates: Republican, Democrat)	0.47, 0.36	(1,2)	0.06
		(2,3)	0.06
		(1,3)	0.11
Gender*Party (estimates: Republican man, Democratic man)	-0.21, 0.88	(01,02) (man/indep., man/Republican)	0.08
		(01,03) (man/indep., man/Democrat)	0.06
		(02,03) (man/Republican, man/Democrat)	-0.02
		(11, 12) (man/indep., man/Republican)	0.02
		(11, 13) (woman/indep., woman/Democrat)	0.22
		(12, 13) (woman/Republican, woman/Democrat)	0.20
		(01,11) (man/indep., woman/indep)	-0.04
		(02,12) (man/Republican, woman/Republican)	-0.10
		(03,13) (man/Democrat, woman/Democrat)	0.12
Gender*Age (estimate: Man 59+)	0.51	(00,01)	-0.06
		(10,11)	0.03
		(00,10)	-0.10
		(01,11)	-0.01
Constant	-1.33		
N	439		



**Figure 3C: Challenges to NV Myth (Gender and Party Interaction)**

**Table 3H: Demographic Correlates and Judicial Use of Rape Myths (NV Myth Reinforced)**

Variable	Estimate	Change in X (from, to)	First difference
Gender	1.09	(0,1)	0.11
Race	-0.02	(0,1)	-0.01
Age (cohort)	-0.31	(0,1)	-0.09
Career emphasis	-0.58	(0,1)	-0.16
Nominated party (estimates: Republican, Democrat)	0.46, 0.57	(1,2)	0.03
		(2,3)	0.04
		(1,3)	0.07
Gender*Party (estimates: Republican man, Democratic man)	-1.02, -1.00	(01,02) (man/indep., man/Republican)	0.12
		(01,03) (man/indep., man/Democrat)	0.15
		(02,03) (man/Republican, man/Democrat)	0.04
		(11, 12) (man/indep., man/Republican)	-0.21
		(11, 13) (woman/indep., woman/Democrat)	-0.16
		(12, 13) (woman/Republican, woman/Democrat)	0.05
		(01,11) (man/indep., woman/indep)	0.36
		(02,12) (man/Republican, woman/Republican)	0.03
		(03,13) (man/Democrat, woman/Democrat)	0.04
Gender*Age (estimate: Man 59+)	0.07	(00,01)	-0.09
		(10,11)	-0.08
		(00,10)	0.11
		(01,11)	0.11
Constant	-0.90		
N	439		

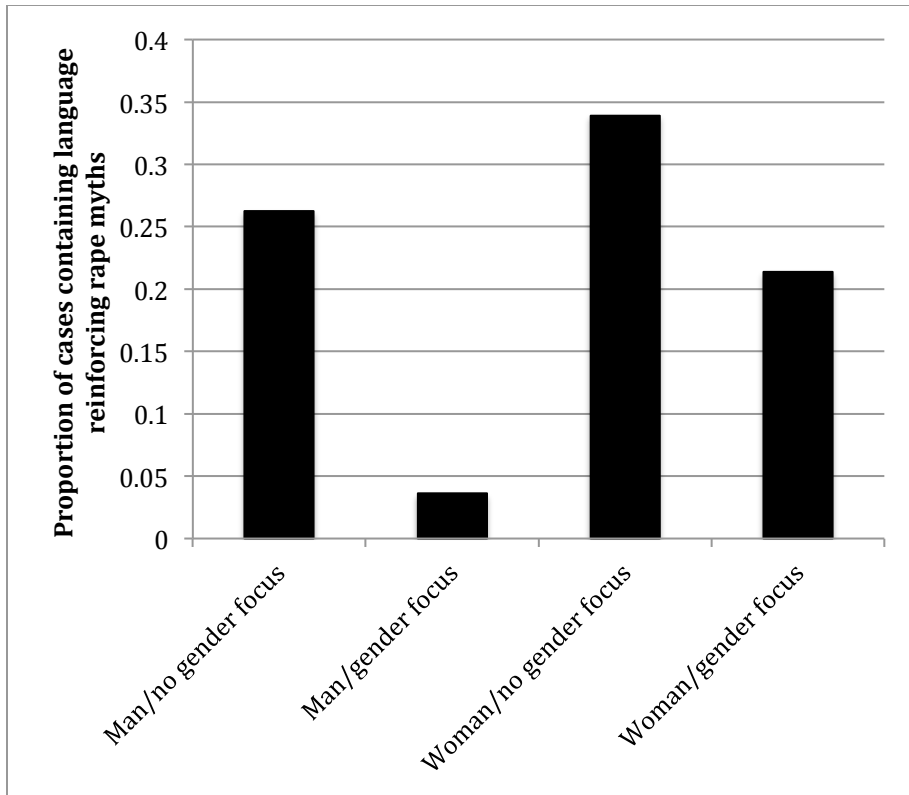
**Table 3I: Demographic Correlates and Judicial Use of Rape Myths (Gender\*Career)**

Variable	Constant	Estimate	Change in X (from, to)	First difference
All myths (challenge)	-0.45	-0.41	(00,01)	0.09
			(10,11)	-0.07
			(00,10)	0.07
			(01,11)	-0.09
All myths (reinforced)	-0.15	-0.47	(00,01)	0.02
			(10,11)	-0.16
			(00,10)	0.13
			(01,11)	-0.06
Not violence (challenge)	-1.33	0.52	(00,01)	0.08
			(10,11)	0.06
			(00,10)	-0.05
			(01,11)	-0.07
Not violence (reinforced)	-0.88	0.78	(00,01)	-0.23
			(10,11)	-0.13
			(00,10)	0.08
			(01,11)	0.18
N	439			

Model includes independent variables gender, race, age, career emphasis, nominated party, and interactions gender\*party and gender\*age

All estimates are X at 1,1 (women who emphasize women in their legal careers)





**Figure 3D: Language Reinforcing NV Myth (Gender\*Gender/Work Focus)**

## CHAPTER 4

### **State-Level and Institutional Factors and Rape Myth Usage**

*“If you wouldn't have been there that night, none of this would have happened to you”<sup>72</sup>*

This chapter looks to combine the key individual factor discussed and analyzed in Chapter 3 – gender – with the influence of more systemic, state-level factors. The analyses herein are inspired by and grounded in Lees’ admonition that, when it comes to the continuing problems with gender and the law, “[t]he problem is not so much with the individual behavior of judges as with the system” (1997, 169). Indeed, as the analyses in Chapter 3 determined, it is not one specific demographic of judge that can be to blame for the pervasive and enduring presence of rape myths among the American judiciary described in Chapter 2. Both male and female judges use and, to a lesser degree, challenge rape myths. This is similarly the case with judges who are old and those who are young, with judges from across the political spectrum, and is also the case for judges who are white and those that identify as racial minorities. Driven by these findings, the current examination looks at, but also beyond demographics and judicial identities in order to determine what *does* explain the variation found and described in Chapter 2 and analyzed in Chapter 3. This chapter addresses how institutional and political factors shape the judicial discourse on violence against women, and whether these factors interact with the judicial demographics that were evaluated in Chapter 3 – in particular those related to gender. Thus, Chapter 4 seeks answers to the following questions: If it is not individual level factors that explain where and when the rape myth frame is deployed, what does explain this variance? Would a more useful or more complete explanation be found at the institutional or state level?

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<sup>72</sup> Coconino County Superior Court Judge Jacqueline Hatch, as told to the victim of a sexual assault. From “Unbelievable: Judge lectures abuse victim, *The Arizona Republic*, September 8, 2012 (Roberts 2012).

## **Political and Structural Influences on Sexual Assault Jurisprudence**

A significant body of research indicates that the answer to the latter question is quite possibly “yes,” and emphasizes that institutional location is important for framing. As Ehrlich notes,

“What accounts for the power of...discursive practices in ‘form[ing] the objects of which they speak’ is their embodiment in particular institutional settings. That is, it is only to the extent that these discursive practices are embedded in institutions and subject to institutional constraints that they come to be constitutive of ‘the social’” (Ehrlich 2001, 2).

Reflecting this, this chapter questions whether rape myth usage is tied to a particular type of political culture, public opinion, institutional structure, or institutional response to violence against women. This expanded analysis examines the institutional and political variance of these variables across states – for instance how different institutional arrangements at the state level might affect VAW legislation’s implementation; or, similarly, how variance in political culture when it comes to issues related to violence against women is tied to judicial discourse on the issue.

Both empirical research into the social bases of law and feminist legal analyses of the gendered implications of institutional power and discourse highlight that the law, in practice and effect, is profoundly contextually dependent. Thus it is reasonable to try and determine how location and context might influence rape myth usage among members of the American state-level judiciary. In relation to sexual violence laws and their application, and more generally as well, an individual – in this case a judge – is likely to use legal language very differently depending on where they are when they are discussing it. As Goodwin highlights, “the same individuals articulate talk and gender differently as they move from one activity to another. The relevant unit for the analysis of cultural phenomena, including gender, is thus not the group as a

whole, or the individual, but rather situated activities” (Goodwin 1990, 9 in Ehrlich 2001, 6). In both Chapters 2 and 3 of this project the situated nature of the activities studied herein was taken for granted and treated as uniform (the location being “state level appellate courts”). But in this chapter, the site for these discourses is made explicit and interrogated, treating “state level appellate courts” not as a single institution or location, but rather as multiple institutions that can be highly varied. As Goodwin’s observation indicates, because of the located nature of identities and behavior, an investigation into the institutional locations where the rape myths studied in the previous chapters are being used might provide a more powerful explanation than the investigation into personal attributes alone did.

The situated nature of political and legal discourse and behavior is not a new area of study for political scientists and legal scholars. Rather, it builds upon a well-developed body of literature, as “scholars within the fields of international law, history, anthropology, and sociology have always known that social realities influence behavior” (Finnemore 1996, 325). Within the field of International Relations, an entire literature – institutionalism – has been based around the (at this point, very well supported) argument “that the individual as autonomous social actor is a product, not a producer, of society and culture” (Finnemore 1996, 333).<sup>73</sup> In recent years, and in a development very relevant to the current project, this study of institutionalism has begun to look explicitly at discourse as a type of institution, with this nascent field being termed “discursive institutionalism.” Discursive institutionalists focus on explaining “why some ideas become the policies, programs, and philosophies that dominate political reality while others do not” (Schmidt 2008, 307). This is a goal shared by this study, which seeks to explain why one

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<sup>73</sup> This is in juxtaposition to the more traditional view of individuals that social science takes, which generally treats “individuals as unproblematic, irreducible, autonomous actors who know what they want independent of social or cultural contest and, indeed, who create the social context.” (Finnemore 1996, 333)

particular idea (rape myths) has continued to dominate political reality, while challenges to this frame have not. Reflecting discursive institutionalist arguments, this chapter begins from the foundational idea that institutions frame and shape the discourse used within them (Schmidt 2008).<sup>74</sup> Using a similar understanding of how institutions powerfully shape the discourse used within them, this chapter examines how the context of a given state (basically, the state's institutional context) frames and influences the discourse of rape myths.

The examination of contextually- and institutionally-located discourse is not solely the purview of the field of International Relations. Within the American context scholars have also focused not only on discourse as it occurs within a single institution<sup>75</sup> but upon how the institutions profoundly influence the discourse that occurs within them. In one example of the latter, in studying Congressional discourse, Schonhardt-Bailey (2008) argued that “a strong case [can be made for] for moving beyond the analysis of the roll-call vote to examine the arguments, deliberations and rhetoric that shaped the content of the bill and the outcome” (Schonhardt-Bailey 2008, 384). Much like the current project, her work highlights the importance of studying what is said by political actors, how institutions shape what is said, and underlines how “[t]o ignore the content of the [Congressional] debates by focusing solely on the final roll-call vote is to miss much of what concerned senators about this particular bill” (Schonhardt-Bailey 2008, 402).

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<sup>74</sup> Discussed as a “frame” in previous chapters, in the context of institutionalism the dependent variable – judicial reinforcing or challenging of rape myths – can also be considered a discursive institution. The independent variables being explored for their impact on this frame/institution of rape myths are also institutional in nature, but they are what is considered to be more traditional institutions – including institutional structure and influence of political opinion.

<sup>75</sup> This, obviously, is a common type of analysis and is at the center of many projects that focus on explaining and understanding congressional, presidential, judicial, and bureaucratic politics.

Looking specifically at the literature examining location and the law, sociolegal scholars and institutionalists focused on the American political system have also made a case for moving beyond analyzing only the final decisions reached by courts to examine the rhetoric that shapes and is contained within those opinions, and how this relates to the context within which these opinions are written. Kahney et al. (2008), have highlighted why in the context of law paying attention to language *and* institutional location is especially promising program of research, as “the decision-making process of circuit judges is best understood to be a function of law, policy preferences, and institutional factors relating to the unique contexts in which these judges make decisions” (Kahney et al. 2008, 498). In relation to judicial decision-making about sentencing, Lawrence similarly found that

“sentencing is a complex cognitive process that is located within a system of interacting micro and macro factors and influences. The macro forces are summarized as social/cultural attitudes and values, legislative and legal factors, and institutional and bureaucratic arrangements. When dealing with specific offences and offenders, however, these broad structural influences are mediated through individual judges’ interpretation and understanding.” (Lawrence, as cited in Hunter et al. 2008, 89)

As is indicated by these conclusions, the judiciary is not an island; judges are influenced by discourse from elsewhere in their communities and by those with whom they interact. This has the potential to shape the discourse that emanates from the legal system in ways that are profoundly location-dependent (when the location is the judge’s community, state, or institutional context). This shared construction of discourse – between members of the judiciary and those with whom they interact within a state’s legal and political system – has been observed by Stewart et al. (1996), who found that this is an effect that occurs in relation to sexual violence. As they note, “[b]oth the victim and those officials they encounter in the justice system draw upon shared cultural myths and stereotypes to justify decisions made in the processing of rape cases” (Stewart et al. 1996, 172). They go on to argue that “even though victims, police, and

district attorneys, have a different relationship with the rape, they may all draw upon, and are influenced by, the same cultural myths and stereotypes about rape” (Stewart et al. 1996, 172). That Stewart et al. highlight shared culture and stereotypes and how they can influence the legal system’s treatment of rape in particular is important, because political cultures and stereotypes vary widely across the American states, and though they may be treated as taken-for-granted even among members of the judiciary, this can be normatively problematic as, critically, “they may or may not be consistent with the actual event the woman has experienced” (Stewart et al. 1996, 173).

The importance of institutional and political location is particularly crucial to consider in the context of the legal system and the judiciary because it seems to fly in the face of the idealized legal model of decision-making, wherein the influence of community (as well as individual factors) is minimized. According to the legal model’s understanding of the legal process, “law sets itself above other knowledges like psychology, sociology, or common sense. It claims to have the method to establish the truth of events” (Smart 1989, 10) by neutrally applying the letter of the law without personal preferences, public opinion, or strategic considerations intruding on this process.<sup>76</sup> In this model, it is not only the outcome of the legal process that is idealized – judging, and judges themselves, are also set upon a pedestal. Smart effectively describes this understanding with her observation that “there are those who would say that ‘law is what the judges say it is’. The judge is held to be a man of wisdom, a man of knowledge, not a mere technician who can ply his trade” (Smart 1989, 11). According to the “legal model” explanation of the legal process and judging, law is not particularly shaped by the

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<sup>76</sup> From a normative perspective, and as Stewart et al.’s findings indicate, this “truth” is a problematic claim, because it is not always reflective of the reality of sexual assault experienced by victims of these crimes

society in which it operates, rather the practice of law and of judging in particular is influenced only by precedent, reason, and the statutes being applied.

Contrary to the idealist practice of law that is described by the legal model, scholars of language, as well as others, have highlighted that language is not separable from context and that “[I]anguage, belief systems and social relations are all interrelated. Language reflects a type of power which limits and constrains modes of expression and belief” (Lees 1997, 2). These arguments are echoed by scholars of legal discourse, in particular those that identify themselves as drawing upon institutionalist arguments and theories to study legal decision-making. Drawing on seminal works in the study of judicial decision-making<sup>77</sup> they argue that institutions profoundly influence legal decision-making and they “see formal and informal legal structures – such as constitutions, statutes, judicial doctrines, or shared conceptions of equality or liberty – as independent variables and the justices’ decisions as dependent ones” (Clayton and Gillman 1999, 15).<sup>78</sup> Clayton and Gillman make it clear that their model of judicial decision-making is focused

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<sup>77</sup> See, in particular, *Elements of Judicial Strategy*, Walter Murphy (1964).

<sup>78</sup> Clayton and Gillman (1999) and others who make similar institutionalism-grounded arguments about judicial decision-making are not the only political scientists and legal scholars who assert that the legal model is flawed and of limited explanatory power. Attitudinalists also criticize the legal model as an inaccurate representation of legal decision-making. Most well known are Segal and Spaeth’s (1993, 1996, 2002) arguments on behalf of their attitudinal model, wherein they argue that – contrary to what the legal model would predict – “[o]verwhelmingly, Supreme Court justices are not influenced by landmark precedents with which they disagree” (Segal and Spaeth 1996, 971). Rather, Segal and Spaeth make the case that judges are free to make decisions based on their personal policy preferences (Segal and Spaeth 1993). It should be noted that the attitudinal model of judicial decision-making is an understanding that is dismissive of the influence of institutional context (such as the role of public opinion in influencing judicial decision-making) as well as the influence of *stare decisis*. However, attitudinalists largely make and test this argument in relation to the U.S. Supreme Court. For judges who are not on the Supreme Court, the possibility that context matters remains to a far greater degree than it would on the Supreme Court because of the unique institutional prerogatives of that court in comparison to state-level courts of appeal. For instance, those that sit on the Supreme Court are at the top of the judicial hierarchy and are thus not checked by the possibility of reversal from a higher court. State appellate judges are not safe from having their decisions overturned in this



upon contextualizing judicial decision-making as a political activity, and critically highlight “the importance of viewing legal institutions as part of the broader political system, as being given their individual meaning by their context within the existing pattern of institutional relationships that make up the political regime” (Clayton 1999, 16). In particular, the current analysis builds upon this literature by drawing on the contributions made by the historical-interpretive institutionalists, who “seek to explain judicial decision-making as a process in which judicial values and attitudes are shaped by judges’ distinct professional roles, their sense of obligation, and salient institutional perspectives” (Clayton and Gillman 1999, 32). Usefully, in the approach of historical-interpretive institutionalists, institutions are “not only fairly concrete organizations, such as governmental agencies, but also cognitive structures, such as patterns of rhetorical legitimation characteristic of certain traditions of political discourse, or the sorts of associated values found in popular belief systems (Smith 1988, 91 as cited in Clayton and Gillmann 1999, 32). Based on the observations about the importance of context for discourse and in particular for judicial decision-making, such as those made by Clayton and Gillman (1999), this chapter builds on the extant literature by assessing the role of these varied institutions.<sup>79</sup> In this analysis the institutions being explored are, firstly, the discursive institution (or frame) of rape myths. The presence/absence of these myths is the dependent variable in this analysis. The independent variables in this chapter are institutional in nature, and include governmental agencies (such as

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manner. Similarly, state appellate judges are often not appointed to their positions for life, and thus the argument that public or political opinion might influence their decision-making is more plausible than for Supreme Court justices who do not have the same job-retention considerations to attend to when making decisions.

<sup>79</sup> As was noted above in the discussion of International Relations’ treatment of institutionalism, and in particular its innovative exploration of discursive institutionalism, the discourse of rape myths can also be considered institutions using this “porous” (Clayton and Gillman 1999, 33) understanding of what counts as an “institution.” The discourse of rape myths (the rape myth frame) would qualify because rape myths are patterns of rhetorical legitimation characteristic of certain (in this case, hegemonic) traditions of political discourse.

those focused on women's issues), governmental structure (such as method of judicial retention), and values found in popular belief systems (such as public opinion on feminist issues, as well as public opinion and political culture more generally).

Institutionalists are not the only legally focused scholars who assert that when it comes to the application of the law, context matters. The substantial literature published by sociolegal scholars – whose area of study is conventionally described as “law and society” or “law in society” (Cotterrell 2002)<sup>80</sup> makes a similar claim. Elegantly distilled by Comack, one of their key conclusions is “that law has a distinctly *social* basis; it both shapes – and is shaped by the society in which it operates” (Comack 1999, 11). In studying how law both influences and is influenced by society, feminist scholars in this tradition have noted how this law/society connection can be normatively problematic. Smart, in particular makes the case that law is influenced by society and vice versa, but because of the coercive power of the law and problematic myths about gender and sexual violence, when they combine, the outcome can be unfortunate. More specifically, she argues that

“law extends itself beyond uttering the truth of law, to making such claims about other areas of social life. What is important about this tendency is that the framework for such utterances remains legal – and hence retains the mantle of legal power. To put it figuratively, the judge does not remove his wig when he passes comment on, for example, issues of sexual morality in rape cases. He retains the authority drawn from legal scholarship and the ‘truth’ of law, but he applies it to non-legal issues. This is a form of legal imperialism in which the legitimacy law claims in the field of law extends to every issue in social life” (Smart 1989, 13)

This observation, that because of the way they are currently structured the intersection of law and society can lead to deleterious legal and social consequences, is echoed by Lacey. She argues

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<sup>80</sup> In arriving at this definition of the boundaries of the sociolegal field, Cotterrell notes that it is not an ideal one – being both somewhat vague as well as tautological. Rather, Cotterrell describes this common understanding of the sociolegal field's area of study as “inadequate” (Cotterrell 2002, 636).

that this is an outcome that must be challenged. Connecting this project of studying the social bases of law to the broader project of developing feminist theory more generally, Lacey argues:

“Feminist theory seeks to reveal the ways in which law reflects, reproduces, expresses, constructs and reinforces power relations along sexually-patterned lines. In doing so, it questions law’s claims to autonomy and represents it as a practice which is continuous with deeper social, political and economic forces which constantly seep through its supposed boundaries” (Lacey 1998, 7)

Based on the above-discussed literature’s conclusions about the contextual nature of legal discourse and decision-making, and feminist sociolegal theory’s underlining of why this is a particularly critical issue to understand, the question that arises is *which* institutions or aspects of society should be expected to impact rape myth usage?

### **Literature review: State-Level Correlates of Judicial Discourse**

The literature addressing the impact of institutions, broadly understood, on political behavior (including that of judges as well as other political actors) highlights several features of social and political institutions that have been influential in this way. At the state level – which is the context explored herein – these include traditional institutional features (including judicial selection methods, government agencies focused on women and judicial training, as well as women’s presence within these institutions) and the influence of the public (including public opinion and the presence, absence, and relative strength and independence of women’s movement organizations at the state-level).<sup>81</sup>

#### *Institutional incentives*

As was noted above, institutionalists have considerably broadened the category of “institution.” In addition to including governmental structures and features as “institutions,” they

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<sup>81</sup> These variables will be operationalized in the data and methods section of this chapter, discussed below. Also discussed below is the possibility that these variables interact with the individual-level assessed in Chapter 3.

also include more nebulous institutions such as hegemonic discursive structures and evolving norms (for some this could include evolving norms that are captured by public opinion measurements) in this category. Though the latter (public opinion) will also be considered in this chapter, the extant literature assessing the influence of institutions and institutional structure on judicial and political discourse, as well as campaigners who focus on trying to achieve change in the way that sexual assault cases are dealt with by the judiciary, has largely focused upon more traditional versions of “institutions.” In particular, judicial training programs, the presence of government agencies focused on women, the presence or absence of women in the institutions being assessed, and methods of judicial selection have commonly been used to explain or attempt to change either judicial behavior or institutional responses to gender based violence.

#### *Institutional incentive 1: Judicial Training*

One of the key strategies that reformers looking to improve judicial discourse in relation to sexual assault have pursued is the creation and implementation of judicial training programs related to these issues. If these trainings were widely available to the judiciary, if members of the judiciary then took advantage of them, and if the programs successfully taught judges not to reinforce myths about sexual and gendered violence, the presence of such programs within a state could be reasonably believed to be associated with relatively low levels of rape myth usage, and with relatively elevated levels of rape myth challenges (compared to states without these programs). Judicial training programs are, generally,

“intended to improve judicial performance by carrying out the following functions: To prepare newly appointed judges for their duties; To guarantee greater uniformity and predictability of decisions and to ensure that the seated bench has an adequate command of laws and procedures to carry out their jobs; [and] To up-date judges in new methods, laws, and related areas of knowledge required in their work.” (Hammergren 1998, 8)

While unified in intention, structurally, these programs vary significantly. Indeed, judicial training programs can vary along a wide variety of axes. These include: a) course and program length (some programs last for merely hours, while others can last for months or years), b) program commitment (full-time versus part time), c) systematized sequences of courses or “cafeteria” offerings, d) voluntary or compulsory participation, e) the qualifications and professions of the trainers teaching the programs, f) on-site versus remote (for instance, internet) training locations, and g) in-house programs versus the use of another educational institution (such as a university or interest group) to deliver the training (Hammergren 1998).

Across the American states, judicial training in relation to violence against women and sexual violence varies along all of these axes. Some programs are short, voluntary, offered across state jurisdictions and are available online. One example of this type of program is offered by the American Judges Association (AJA). The AJA offers a free online domestic violence education program (which also discusses sexual violence) geared at judges and entitled “Effective Adjudication of Domestic Abuse Cases.” They describe their program thusly:

“Using adult-learning instruction tools and interactive exercises, separate training modules on key issues allow new and experienced judges to learn at their own pace from leading national experts they might not otherwise have the time, opportunity or funding to see. The AJA offers this timely, engaging and convenient resource at no cost to judges who want to apply this state of the art learning to make our communities safer.” (American Judges Association 2013).

This program is broadly targeted at being useful to all judges across the United States who might encounter gender-based or interpersonal violence in their work with a wide variety of communities and legal issues.

Using very different modalities to teach judges about similar issues as are the focus of the AJA program, the National Judicial Education Program (NJEPP) provides trainings to judges across the nation. They educate “judges, attorneys, and justice system professionals about the

ways in which gender bias can undermine fairness in criminal, civil, family, and juvenile law. NJEP has a particular focus on sexual assault cases and cases involving the intersection of sexual assault and domestic violence” (Legal Momentum 2015). While NJEP offers a variety of courses related to gender bias in the courts, critically, they have a number of specific programs targeted at educating judges about the fair adjudication of sexual assault cases. NJEP receives funding from the Department of Justice Office on Violence Against Women under VAWA to run and develop these programs, and using these funds NJEP educators “travel across the country educating judges about the realities of sexual assault” (Legal Momentum 2013, 9). Rather than providing a single online resource, as the AJA program does, NJEP generally takes a more targeted approach to judicial education on issues of sexual violence, which includes NJEP educators giving in-person presentations and courses to judges, often based on NJEP publications including *Judges Tell: What I Wish I had Known Before I Presided in an Adult Victim Sexual Assault Case* or *The Challenges of Adult Victim Sexual Assault Cases: Raped or ‘Seduced’? How Language Helps Shape Our Response to Sexual Violence* (Legal Momentum 2013). While a full list of jurisdictions that have received these trainings is not available, in 2013 alone, NJEP gave presentations at the Philadelphia Municipal Court Judges Conference, the Delaware Superior Court Judges Retreat, and the Arizona Judicial Conference (Legal Momentum 2013).<sup>82</sup>

Ultimately, there is a plethora of overlapping programs at the local, state, and national level that are geared at training judges to more effectively and accurately preside over sexual assault cases. While the AJA and NJEP programs are important, and some of the most high

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<sup>82</sup> NJEP has also provided sexual assault-related courses to non-judicial audiences (both in person and via webinars), including college students, sexual assault nurse examiners, college administrators, rape crisis centers, mental health professionals, and provided their training DVDs to institutions including the U.S. Navy (Legal Momentum 2013).

profile training programs currently available in relation to sexual violence, because these programs are voluntary, often online, and there is no way to track who has and who has not enrolled or completed them, they are not likely to be closely tied to jurisdictional variation in rape myth usage. But, what is arguably more likely to impact judges within a specific state are the programs that many states develop and administer themselves (and sometimes with the help of NJEP or AJA). States often fund these judicial training programs with part of their federally-funded VAWA STOP grants (NCSC 2015). These programs can include the development of judicial bench books as well as the provision of short courses. These are generally developed and run by the Office of the Attorney General and the STOP program of the state in conjunction with women's legal organizations. Usually such resources are available to members of the state judiciary, as well as members of the bar association, law enforcement communities, and other state actors that may work with victims of sexual assault.

While judicial training programs abound, as “the provision of training for judges has become an accepted feature of the judicial process and in recent years the demand for training from the judges has increased significantly” (Malleon 1997, 655), unfortunately empirical evaluations of the successes and failures of these training programs are minimal. There is a long history of detailed evaluations of judicial training *needs*, both within the United States and abroad (see for instance, Smith 1974; Ratliff and Buscaglia 1997). As Shapiro (2000) observes, “almost every task force that has studied the problem of gender bias in the courts has concluded that educational programs for judges on this issue is of paramount importance in addressing the problem” (684-5). Indeed, as was noted above in relation to sexual assault and gender-based violence, institutional responses to the demonstrated need for judicial education in this area have been plentiful and ongoing. This process is not new – for instance, over the past 40 years,

“Congress has established the Federal Judicial Center, which is responsible for educational programs for federal judges, and also the State Justice Institute, which has the same responsibility for state court judges” (Shapiro 2000, 685). But, once that training is in place, evaluations of how well the established training programs succeed in altering the jurisprudential problems they were set up to address fall by the wayside. For instance, in Shapiro’s 2000 article, which explicitly discusses the importance of judicial education in the context of attempting “to survey the various factors that influence the fairness, independence, and competence of state and federal judges” (Shapiro 2000, 686), program evaluation is not ever mentioned. Education, Shapiro notes, is important, but the efficacy of that education is not ever considered. Shapiro is not the only scholar whose work is silent on this issue – this is a curiously common absence, particularly in light of the significant amount of effort that goes into developing judicial training programs. In the area of gendered violence in particular, this involves STOP grants as well as decades of legal and feminist expertise, both of which have gone into developing these training programs. Certainly, these programs – if effective – would be hugely beneficial, as “without training which fundamentally challenges existing attitudes of both female and male barristers, it is unlikely that the experience of vulnerable witnesses in rape trials will be substantially improved” (Temkin 2000, 248). Yet, if they are not effective they could do more harm than good, perhaps by reinforcing rape myths rather than challenging them, and by teaching members of the judiciary that this is an acceptable way to discuss sexual violence.

The literature’s silence on the rigorous evaluation of judicial training programs is partly because of judicial resistance to such evaluations. As Malleson observes, “despite the growing support for the use of performance appraisal, the fear that it would undermine judicial independence remains a strong one amongst senior members of the judiciary” (Malleson 1997,



656). Further complicating program evaluation is the fact that judges and judicial organizations have been reticent to make these types of programs compulsory – partially because of the independence-related concerns observed by Malleson (1997), and also because of concerns related to impartiality and neutrality, and the “defense bar[s] concern that judicial education may create an *anti-perpetrator* bias” (Epstein 1999, 6). On the rare occasions where the efficacy of judicial training *is* evaluated, it is generally done by evaluating judges’ opinions about training, rather than more neutral (and less opinion-based) outcomes – such as attempting to detect a change in language used by judges before and after training programs. One example of these types of evaluations was done by Gatowski et al. (2014), who undertook an evaluation of judicial education on scientific evidence and found that judges were “divided in their opinion of whether their education had adequately prepared them to deal with the range of scientific evidence proffered in their courtrooms” (Gatowski et al. 2001, 442). Whether these judicial opinions translated into differences in the way that judges ruled or discussed scientific related matters remains unknown from Gatowski’s (2014) findings. In relation to judicial training on sexual assault in particular, this lack of empirical analysis of sexual assault training programs means that currently, the literature is silent on the critical question: where states provide judicial training, is this training connected to lower rates of rape myth usage? As the answer is unknown, this project importantly begins to connect the provision of judicial training – which is widely available, as was noted above – to an assessment of its efficacy.

*Institutional incentive 2: The presence of government agencies focused on women*

In addition to state-level judicial education programs, another institutional feature that has been associated with relatively positive institutional treatment of violence against women-related issues is the presence of government agencies focused on women and dedicated to

dealing with gender-related issues. While these judicial education programs are largely assumed to produce positive outcomes, there is also empirical research that more concretely connects the presence of these government agencies to VAW-related outcomes. In evaluating government responsiveness to violence against women more generally, Htun and Weldon (2012) found that that a critical institutional determinant of this responsiveness was the presence of women's policy agencies (or "machineries") within the state. As Htun and Weldon note,

"these agencies tend to add to, rather than replace, the work of autonomous women's movements...this institutional momentum furthers feminist policy making. Policy agencies can help feminist movements put the issue of VAW on the public agenda by providing research and other institutional supports that assist movements in their efforts to influence government."<sup>83</sup> (Htun and Weldon 2012, 555)

However, Weldon's findings about the importance of this variable are complicated by her observation that "[t]he mere presence of a women's policy machinery may not be as important as having an *effective* women's policy machinery" (Weldon 2002, 126). This policy machinery needs to "have a high degree of independence, some of its own resources, and positional authority in order to be consistently effective" (Weldon 2002, 129). Thus it is not merely the presence or absence of a women's policy machinery within the government that might be relevant to their impact on gender-violence policies, but rather it is their overall structure, power, and autonomy that might be the driving causal factors.

Though Htun and Weldon's analyses are focused on country-wide and legislative responses (rather than judicial responses) to violence against women, the relevance of women's policy machinery to the judiciary's responses to VAW and sexual should be considered when

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<sup>83</sup> The role of women's movements will be addressed in a later section of this chapter. They also found that "[d]emocracy, GDP, and government effectiveness are strongly correlated with good VAW policy and [were] highly significant" (Htun and Weldon 2008, 20), however, these are more appropriate measures for international analyses than state-level, and thus are not considered in the current project.

assessing the institutional determinants of judicial rape myth usage, as this chapter does. At the state level, legal systems often have legally-focused policy machinery (such as a State Department of Law). More importantly, many states have a gender-based violence point of contact at the Administrative Office of the Courts (AOC). Within these specific institutional structures the presence or absence of policy machinery focused on gendered issues, or on issues related specifically to sexual assault could have an analogous impact on the judiciary as Htun and Weldon found that legislative policy machinery had on legislative responsiveness to VAW. That is, the presence of judicial/legal women's policy agencies/machineries (particularly if they have independence, resources, and authority) could push political actors (in this case, the judiciary) to implement feminist goals and views in their work. Htun and Weldon found that this was true at the national level – that the presence of a women's policy machinery supported and furthered feminist goals. While this is a possibility, the presence or absence of legally-focused women's policy machinery in a state would be unlikely to have a direct impact on what judges say in their opinions. As such, even if there is a gender-based violence point of contact at the AOC, and if that position is well-funded (which would be an example of women's policy machinery), I hypothesize that this will not make it more likely that the state's judiciary would eschew rape myths or challenge them.

### *Institutional incentive 3: Women's representation*

Another feature of the state's institutional political structure that could influence rape myth usage among members of the judiciary is the composition of the judiciary itself. In particular, the presence or absence of a significant number of women in this institution. While the effects of gender on an individual basis were evaluated in the previous chapter, and found not to be strongly explanatory of judicial rape myth usage, the effects of having a large number of

women on the bench within the entire appellate court system of a state were not considered in Chapter 3. However, the extant research on the influence of women's descriptive representation indicates that this alternate conceptualization of the impact of women on the bench – at the institutional, rather than the individual level – should be evaluated.

The idea that the gender should not only be analyzed at the individual level, but should also be considered at the institutional level is an idea emerging most clearly from “critical mass theory” (Kanter 1977a, 1977b; Dahlerup 1988). Most basically, the “critical mass” argument about gendered representation is that

“women are not likely to have a major impact on legislative outcomes until they grow from a few token individuals into a considerable minority of all legislators: only as their numbers increase will women be able to work more effectively together to promote women-friendly policy change and to influence their male colleagues to accept and approve legislation promoting women's concerns” (Childs and Krook 2008, 725)

More generally, “critical mass theory asserts that the presence (or absence) of significant numbers of members of a minority group can have an important influence upon the behavior of that group” (Collins, Manning, and Carp 2010, 274). The effects of critical mass have been studied most frequently in legislative contexts (Dahlerup 1988; Carroll 2001). However, in the past several years critical mass theory has been criticized as an either inaccurate or incomplete explanation of the impact of gender, in aggregate, on legislative behavior. This criticism is largely the result of the mounting number of cases where policy change does not occur as critical mass theory would predict, “even as the percentages of women in the legislature reach ‘critical mass’ proportions, identified at levels ranging from 10 per cent to 40 per cent” (Childs and Krook 2008, 733; see also Norrander and Wilcox 1998, Childs 2004).

Despite these criticisms, arguments and explanations based on the insights from “critical mass theory” continue to be powerful among activists who seek to get women into legislatures in

greater numbers as well as for those who assess the impact of women in institutions other than legislatures. These other institutional locations were the location of some of the original work on critical mass theory, such as Kanter's (1977a; 1977b) evaluations of women's token status in American corporations during the 1970s. The analyses that seek to understand women in corporate governance structures using critical mass theory have persisted, with researchers finding, on one hand, that "a critical mass of three or more women can cause a fundamental change in the boardroom and enhance corporate governance" (Kramer, Konrad, and Erkut 2006, 2). On the other hand – and reflecting the arguments made by Childs and Krook (2008) about the limited utility of the critical mass explanation – recent research into the utility of critical mass in the boardroom has also revealed more limited support for critical mass theory, with findings that

“[t]hough some female respondents expressed the view, consistent with critical mass theory, that having more women on the board increased their comfort level and eased some of the stresses associated with being the first and only female, this narrative is in tension with our respondents' apparent embrace of their first and only status. Moreover, with the possible exception of employee relations, our interviews largely fail to support the theory that a critical mass of female directors will produce different, and distinctly feminine, boardroom outcomes.” (Broome, Conley, and Krawiec 2011, 1049)

Legal scholars and advocates for a more representative bench have also turned to critical mass theory to explain how a (relatively)<sup>84</sup> large proportion of women can have an impact in the judiciary. Many of the normative implications of these arguments were discussed in Chapter 3, however, it should be noted that they are not based just in the positive impact individual women would have as solitary actors making change independent of what other, similarly placed women may be doing. Rather, they are expressed in a way that makes it clear that those seeking to

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<sup>84</sup> “Relatively” because critical mass theory generally predicts that the “critical mass” of women is reached around 25-30%. Here, “relatively” is in comparison to women's usual levels of underrepresentation, rather than in relation to men, where women are still “relatively” underrepresented, when compared to the proportion of women in the population (either the population of women in a citizenry overall, or the population of law students and lawyers, where women either have reached parity or are approaching it, depending on the measure (NWLC 2016)).

increase women's representation in the judiciary are basically seeking a critical mass effect. For instance, the National Women's Law Center argues that "[s]ince 1992, women's representation in law school classes has approached 50%. Despite record numbers of female judicial nominees and confirmations, the percentage of female federal judges, however, is far lower." (NWLC 2016) Thus, their argument is based in the idea that desirable change will come when women make up an increasingly large percentage of those on the bench.

From a less normative perspective, in recent years sociolegal scholars have also assessed the explanatory value of critical mass theory when it comes to the judiciary. Studying the theory's applicability in the U.S. federal district courts, Collins, Manning, and Carp (2010) found critical mass theory to be useful in explaining judicial behavior. More specifically they found that this effect was gendered and that women judges, in particular, responded to there being a critical mass of women (whereas men did not). When a critical mass was present, women decided cases differently from men. This gendered distinction was not present when the "critical mass" of women was not there – absent a critical mass of women, there was no gendered distinction in judicial decision-making. Interestingly, Collins, Manning, and Carp determined that this effect was dependent on the subject of the cases being decided, and that the critical mass impact was not uniform across all policy areas. As they conclude,

“Without a doubt, gender differences appear to be greatest in criminal justice cases, where women were significantly more likely to hand down a liberal decision than their male counterparts once a critical mass was achieved. In addition, we also find that gender plays a role in cases concerning civil liberties and rights, although support for critical mass theory in this issue area is modest. When it comes to labor and economic regulation, however, our results indicate that gender is not a predictor regardless of the decision-making environment.” (Collins, Manning, and Carp 2011, 274-5)

While these findings do not address any change in discourse (they focus on how the outcome of the case was impacted by having a critical mass of women present), they nevertheless have important implications for the current project. There is no reason to expect that the presence of a

critical mass of women would *only* alter the outcome of a case, and not the way the judges discussed the case (in this context, that discussion would be in relation to the presence or absence of the rape myth frame). Ultimately, the literature is so divided on the utility of critical mass theory. And, sexual violence is an area of the law that can either be termed criminal justice or civil rights-related (depending on the specific case at hand). Thus, I expect only a limited critical mass effect. More specifically, I expect to find that in states with a critical mass of women on the bench – and following the literature I expect the “critical mass” to be at about 25% of an institution’s members<sup>85</sup> – there will be more language that challenges of rape myths, and less reinforcing of the rape myth frame.

#### *Institutional incentive 4: Methods of Judicial Selection*

While the sociolegal and political science literature is relatively silent on some of the variables discussed above, including measures of effectiveness for judicial education programs (and their impact on judicial behavior) and on whether women’s policy machinery might influence judicial behavior, that is not the case when it comes to the impact of method of judicial selection on judicial outcomes. Conversely, and like the many studies evaluating critical mass theory, political science and sociolegal scholars have devoted considerable attention to assessing the implications of methods of judicial selection on state court judges. Critically, this research begins by distinguishing the impact of methods of judicial selection between the federal and state courts, and highlights how unique the state court environments are compared to the federal courts. Brace, Hall, and Langer (2001) observe the impact of this difference, noting that “[u]nlike

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<sup>85</sup> Researchers use a wide range of quotas to define critical mass (Colling, Manning, Carp 2010). These include a critical mass being present at a relatively modest 15% (which is the cutoff point established by Scheurer 2014), to a much higher 30% threshold (which is the cutoff established by Dahlerup 1988). In their review of the literature, Childs and Krook (2008) argue that in the overall extant literature, “critical mass” proportions vary from 10 to 40%. The 25% figure selected in this study is chosen as an approximate average of those used in the literature.

federal judges, most state [court judges] must face re-election or some form of retention process. Consequently, a theory of judicial behavior applicable at the state level must incorporate the electoral incentive...it seems reasonable to view elected justices as balancing policy goals against re-election or career needs” (Brace, Hall, and Langer 2001, 93; see also Hall 1987, 1992, 1995). Brace, Hall, and Langer also note the converse implication of this unique way that state court judges get into office – that “judges appointed by the legislature or governor should be freer from electoral pressures and more inclined to focus on policy goals” (Brace, Hall, and Langer, 2001, 93; see also Brace, Hall, and Langer, 1999).

If Brace, Hall, and Langer’s (1999) assertions are indeed accurate (as the data they convincingly present indicates), the judicial selection process can be considered an institutional factor that is expected to shape judicial discourse (related to rape myths, in the case of the current study) and judicial decision-making (more generally). For the purposes of this study, states with the same type of judicial selection process could be expected to have the same pattern of rape myth usage – judges in states that require that they stand for reelection would be likely to be more sensitive to criticism that has resulted from high profile rape myth usage among their colleagues, and dissuaded from using similar language themselves. In the years surrounding 2012, there were several high profile examples of judicial use of rape myths backfiring on judges. For instance, when a Nebraska district judge banned the usage of the words “rape, sexual assault, victim, and assailant” from his court in 2007, the resulting firestorm of criticism from the media that derided his decision, which forced the victim to testify about her assault using the word “sex” to describe what was done to her, was published in well known outlets such as *Slate* (Lithwick 2007). Several years later, there were even more high profile criticisms of a judge from Montana (District Judge G. Todd Baugh) who described a 14-year-old student who had



been sexually assaulted by her teacher as “as much in control of the situation as was the defendant,” and subsequently sentenced her rapist to a very controversial 30-day sentence (McGlensey 2013). Baugh’s conduct was widely publicized, hundreds of Montanans gathered outside his offices to protest, and the National Organization for Women delivered a misconduct complaint – accompanied by 144,000 signatures – that asked Montana’s Judicial Standards Commission to disrobe him. While no judge would welcome such criticism, either locally or, certainly, on the national stage, because of the electoral incentive, those that are elected would be likely to be most sensitive to the blowback their colleagues received, and to moderate their behavior accordingly by using fewer rape myths.

### *Influence of the public*

The above-discussed variables are largely institutional in nature. But, they are not the only state-level variables related to variation in rape myth usage from state to state (as the discussion of methods of judicial selection notes). Also critically important is the public’s influence on the judiciary. When assessing the role of the public on political actors, it is well established that this is a variable that generally does have influence over political behavior. Indeed “[f]ew political scientists would claim that citizens do not exercise at least a modicum of influence over public policy in the United States” (Arceneaux 2002, 372). Among legislators, the electoral incentive (Mayhew 1974) clearly explains why these actors are critically concerned about acting in a way that does not alienate the public. Most clearly, because doing so would run the high risk of costing legislators their jobs.<sup>86</sup> But, it is not clear that the influence of public opinion would be as strong an influence on the judiciary as it is on legislators.

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<sup>86</sup> Arceneaux goes on to explain that this electoral connection can reveal itself even in more indirect ways, as “legislators may even take into account public opinion when drafting legislation

Does public opinion influence the state judiciary? If so, how? And, might it impact the discourse that judges use in writing opinions? As was noted above these questions interact with the effect of judicial selection methods, as public opinion is more closely tied to judicial behavior where judges are elected rather than appointed (Brace, Hall, and Langer 2001). As Brace and Boyea (2008) note, the fact that this is occurring brings up normative questions about balancing majority rule with individual rights in the legal system. Since courts are “the primary guarantors of the civil and constitutional rights of American citizens” (Shapiro 2000, 667), should judges – either federal or state – be influenced by majoritarian whims? Members of the judiciary have been vocally dubious about public opinion playing much of a role influencing their behavior, and frequently challenge the desirability of such influence. Famously, Justice Antonin Scalia opposed this very notion, from both an empirical and a normative perspective, in his dissent to *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) when he wrote,

“In truth, I am as distressed as the Court is--and expressed my distress several years ago, see *Webster*, 492 U. S., at 535--about the “political pressure” directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus.” (1992).

Informing the normative debates about the influence of public opinion on the judiciary, sociolegal scholars find that the public’s view does influence the judicial branch. For instance, studying Pennsylvania judges, Huber and Gordon found that criminal trial judges become more punitive, indicating that they have an eye towards appeasing voters (2004). Thus, it at least

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in anticipation of future initiatives, indirectly resulting in more representative policy” (Arceneaux 2002, 373).

appears that judges are mindful of public opinion's view of their workings.<sup>87</sup> In particular, Brace and Boyea (2008) find that public opinion influences the judiciary in a couple of very specific ways. Firstly, in states where judges are elected, public opinion is connected to who is elected to the bench. Secondly, public opinion influences the way that judges vote. Brace and Boyea (2008) term these effects "indirect" and "direct" (the former and the latter, respectively). In studying public opinion's influence in relation to capital punishment cases, their results reflect this twofold role for public opinion as they find evidence of both direct and indirect effects of public

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<sup>87</sup> The literature studying social movements' influence on the judiciary has found similar support for the influence of social movements on the judiciary. For instance, in her primarily theoretical article connecting the study of law to the study of humanities, sociolegal scholar Melanie L. Williams made the case for this perspective, arguing that "the work of pressure groups and NGOs often has more impact and influence upon an unjust practice or legal norm than practitioners or academic lawyers working in the same field" (Williams 2009, 248). Similarly, writing in the *University of Pennsylvania Law Review*, William Eskridge strongly argues for a critical role of social movements in today's constitutional system, asserting that "[t]he modern meaning of the Equal Protection Clause owes much more to the power and norms of the civil rights and women's liberation movements than to the original intent of the Fourteenth Amendment's framers" (Eskridge 2001, 419). Williams and Eskridge are not alone in their assessments of civil society organizations as critically important influences on the judiciary and American civil rights. For instance, Rosenberg (1991, 2008) also makes the case that courts – and the courts' efficacy at producing social change – are powerfully influenced by the political movements that were occurring at the same time and supporting that change. Balkin (2005) also argues that while judges do often ignore the arguments of social movements, they also sometimes take up the arguments made by these groups, and that social movements do influence not only the individual judge's jurisprudence, but further judge-made law more generally (Balkin 2005, 28). Moreover, Balkin argues that over time, many social movement interpretations of the constitution are "filtered, reshaped, and recharacterized by judges and legal professionals" (2005, 28) and that it is only after this process that they become part of the constitutional doctrine, which indicates that social movements *are* at least sometimes influencing judicial discourse (and not only judicial decision-making). However, there is also evidence that the judiciary will always be so influenced, nor that all legal scholars will agree when this influence has occurred. For instance, Brown-Nagin (2005) provides a counter example where she argues that social movements failed to influence the judiciary, by highlighting that the *Grutter v. Bollinger* "mass movement" failed to significantly impact the constitutional order on the issue of affirmative action. As she notes however, other sociolegal scholars would likely disagree with this interpretation, including Robert C. Post, who wrote about the decision, that the "beliefs and values of non-judicial actors' heavily influenced the Court's result in *Grutter*." (Post 2003, 8 as cited in Brown-Nagin 2005, 1438)

opinion on judges. In relation to direct effects, they find that (as the above discussion would predict) institutional context matters: “death penalty support does not attain significance in non-elective states. The impact of death penalty opinion is contingent on judicial elections” (Brace and Boyea 2008, 367). Further, they find that an indirect effect of public opinion on the judicial branch also exists, both in relation to public opinion generally, and in relation to public opinion on this specific issue. That is, it was not just conservatism (as in, a state’s public opinion being generally liberal or conservative, compared to other states) that influenced judicial behavior. Rather, Brace and Boyea found that “strong public support for the death penalty produced significantly more conservative courts than would be predicted by state ideology alone” (2008, 370).<sup>88</sup>

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<sup>88</sup> Brace and Boyea (2008) do not address the role that organized interests may play in influencing the judiciary. Similarly, the current project also will not examine the influence women’s organizations may have on state-level judicial behavior, largely because it is not likely that they have either a substantial or a direct impact on judicial behavior. Theoretically, aggregated and organized interests – interest or activist groups – could play a role in influencing judicial rape myth usage. Certainly in other institutional contexts, “[s]ocial movements comprise critical avenues of policy influence for women and other marginalized groups” (Weldon 2006, 65). Htun and Weldon elsewhere note the breadth of this finding, and observe that women’s organizations, “particularly those advocating feminism, are key players in gender policy. Women’s groups have grown in every country over the twentieth century, particularly after 1975. Their role advocating change is emphasized in most studies on gender politics” (Htun and Weldon 2007, 10). Yet, Weldon did not assess the influence of women’s movements on the judiciary, and I do not include a comparable measure a) because there is a dearth of data comparing the strength of women’s organizations focused on sexual assault across the American states, and b) because I do not think that a strong women’s movement would have a direct measurable connection to judicial rape myth usage. The latter is for two key reasons. Firstly, there is far less lobbying of judges than there is of legislators. This includes the direct lobbying of judges (which can be normatively frowned-upon, especially compared to the frequent and overt lobbying of legislators yet is nevertheless a “visible force in the judicial arena (Collins, 2007)) and more indirect methods of lobbying, including persuasive writing in law reviews, and the most common method of interest group participation in the courts: the filing of amicus curiae briefs (Caldeira and Wright 1988; Collins 2007). While some judges are subject to significant lobbying, the judges in middle appeals courts are not those judges. If social movement organizations are not focused on persuading middle-level appeals court judges, there is no reason to think that these groups’ influence would be nearly as strong as it is with the actors that they

While the direct and indirect effects of public opinion seem most relevant to the states where judges are popularly elected, it should be noted that failing to be reelected is not the only way that a state judge can lose their position and as such, indirect effects of public opinion can also affect state judges in states that appoint their judges. Other political actors – such as the governors or legislators who appoint judges – can remove a judge if public opinion (or the legislators’ or governor’s preferences) strongly demands it (Baum 2003).<sup>89</sup> Conversely, the role of public opinion should not be overstated. For instance, in states where judges are elected by partisan, rather than non-partisan elections, the fact that they are elected may actually insulate them from public opinion compared to judges who run in states that hold non-partisan elections. This is because, as Baum notes, “[i]n judicial contests conducted with a partisan ballot, attitudes toward the parties are almost surely the chief determinant of the vote” (Baum 2003, 4). Since the average voter is more likely to understand and vote according to party labels rather than remember how a judge voted on a given case and then reward or punish them at the ballot box

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heavily target. Further, interest group or social movement influence is often measured through campaign finance. But, here too social movement influence is weaker as far less campaign donations flow into the coffers of the judges studied herein (especially from gender-focused interest groups) compared to legislators or judges in the final courts of appeal. Overall, state judicial candidates receive a significant amount of their funding from lawyers (for instance, 37% of all funds raised in state supreme court races across the country in 2002 were from lawyers) and insurance companies as well as other PACs, rather than solely from social movement groups (Cann 2007). While there is data indicating that these campaign donations do influence judicial rulings, as judges are more favorable to attorney donors (Cann 2007; Hazelton, Montgomery, and Nyhan 2015), there is no indication that this influences the *discourse* used by judges when they decide cases (though this would make for an interesting area for future analysis). Because of the tenuous connections between women’s social movement organizations and the judiciary, the influence of the former upon the latter will not be evaluated herein.

<sup>89</sup> Baum describes several situations where this has been the case, noting that, “[s]tate judges have been denied reappointment by the governor because of their decisions, although the reasons for the denial are not always clear. Some observers perceived that Delaware’s governor denied a new term to a supreme court justice in 1994 because the justice had taken positions favorable to stockholders in conflicts with corporate management. In 1997, New York Governor George Pataki reportedly decided not to reappoint an appellate judge on the ground that the judge had shown excessive liberalism in criminal cases. (Baum 2003, 1)

for their treatment of the case, this partisan form of election can insulate a partisan judge from the electoral consequences of their judicial behavior in a way that a non-partisan judge is not insulated.<sup>90</sup> That said, judges up for retention elections may not take the effect of voter ignorance into account and adjust their behavior to take advantage of this insulation that party labels can provide at the ballot box. Rather, Baum argues that “judges’ fears of losing their positions may be exaggerated, as is often the case for legislators...[and, s]uch exaggerated fears can have a direct impact on judges’ behavior” (Baum 2003, 1). It is this impact that Huber and Gordon (2004) detected, and thus a judge elected in a partisan system might be more influenced by partisan preferences and attitudes among the electorate than a perfectly rational actor who takes the limits of voter knowledge into account would.

Following the above literature, I hypothesize that public opinion is likely to shape the state appellate courts’ reinforcing and challenging of rape myths, both directly and indirectly. While being tough on rapists could be considered a conservative “tough on crime” position, and therefore that challenging myths rape myths such as “he’s not the kind of guy” would be likely to be associated with public conservatism, I hypothesize the opposite. That is, challenging the traditional and hegemonic understandings of sexual violence that are expressed through the use of rape myths requires the repudiation of many more conservative views on sexuality and gender, and thus can more accurately be understood as a liberal position. Therefore, in states that are “conservative” (according to public opinion measures), I expect fewer challenges of rape myths, and more reinforcing of these myths. Further, and building on Brace and Boyea’s (2008) findings that issue-specific public opinion matters, I expect states where public opinion is conservative specifically on issues related to gender (rather than just on traditional and more general measures

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<sup>90</sup> For these reasons, an interaction term between public opinion and judicial selection is not included in this model.

of liberal vs. conservative public opinion), there will be even more rape myth usage, and comparatively less rape myth challenges, than in less-conservative states.

Overall, based on the extant literature, I expect to find that where there are fewer incentives for judges to *avoid* reinforcing and explicitly using rape-myths, there are more examples of this type of discourse being used. Included in these incentives are institutional incentives such as established programs for judicial training on this issue (such as bench books that focus on how judges should deal with cases that involve violence against women, and in particular sexual violence and institutional structures including women's policy machinery. Finally, I expect that state level public opinion that is favorable to women and gender coded-issues will discourage the use of rape myths.

### **Hypotheses 3a, 3b, and 3c: Legislative correlates**

H3a: The state-level institutional variables that will decrease rape myth usage and increase specific challenges to rape myths are a) the presence of government agencies focused on women, b) the presence of judicial training programs, c) a critical mass of women on the state's bench, d) that the judiciary in the state is elected rather than appointed.

H3b: States that are more conservative will have more rape myth usage than states that are less conservative, and this difference will be even greater where state public opinion is conservative on women's issues specifically.

H3c: Where there is a critical mass of women on a state court of appeals, women will challenge rape myths more/reinforce rape myths less.

## Data and Methods

### *Data*

This chapter examines the above hypotheses by focusing on the judiciary in the same eight states that were assessed in Chapter 3,<sup>91</sup> and the state-level correlates that shape the discourse in these institutional contexts. As with the previous chapters, the myth usage focused on herein includes comparing the variation in overall myth usage as well as comparing variation in the usage of the “not violence” rape myth. The variance in overall rape myth usage from state to state can be seen in Figure 4A. As was noted in Chapter 3 (see Figure 3A), the pattern of myth usage in these states roughly approximates the national patterns, however, as can be seen in Figure 4A there is significant variation in the overall pattern of rape myth use when these states’ opinions are disaggregated. It is this type of variation that this chapter strives to explain. However, variation in overall myth usage is not the only relevant state-to-state difference in judicial rape myth usage. As can be seen in Tables 4A and Tables 4B, there are wide differences between how frequently the judiciary of one state reinforces or challenges specific myths compared to their colleagues in different jurisdictions.

While Table 4A highlights the differences in overall number of opinions that contain rape myths across these eight states, Table 4B lists the proportions (rather than absolute numbers) of opinions that use each type of myth. It is here that some of the biggest differences between how rape myths are differentially used between states emerge, and where some of the consistencies across states also become clear. For instance, and in regard to the latter, the proportion of judicial opinions that reinforce the “ask for it myth is 0.00 across the board (as can be seen in Table 4B). There are also very few opinions that reinforce the “she wanted it” myth (the only states with

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<sup>91</sup> These states are: Alaska, Connecticut, Georgia, Iowa, Indiana, Pennsylvania, Utah, and South Carolina.



scores higher than zero for the reinforcing of this myth are Utah (0.03) and Indiana (0.02)) or the “he didn’t mean to” myth. Similarly, there are several myths that were almost never challenged across the jurisdictions studied. In none of these states was the “certain women” myth challenged in more than 5% of the appeals’ court cases from 2012, and this number is a similarly low 8% when the challenging of the “victim’s emotional reaction is relevant” myth is examined.

However, some notable differences between states also emerge from the data in Tables 4A and 4B which this chapter seeks to explain. One of the most obvious differences is that when it comes to the overall challenging of myths<sup>92</sup>, South Carolina’s scores are significantly lower than the other seven states. While all the other state’s scores for “Myths Challenged (all myths)” are between 0.28 and 0.47 (meaning that in between 28% and 47% of the cases examined, challenges to rape myths were found), South Carolina’s score in this category is a paltry 0.02 (meaning that challenges to rape myths were only found in 2% of South Carolina’s appellate opinions involving rape from 2012). Similarly, there are wide differences in the frequency with which the state judiciary uses (including reinforcing and challenging) the “he’s not the kind of guy” myth. While this is challenged in 19% of the opinions read from Indiana, it is not challenged at all in South Carolina (which is perhaps unsurprising given their overall low challenge rate) and it is only challenged in 3% of the opinions from Utah, 7% of those from Connecticut, and 8% of those from Georgia. An even larger bifurcation between how state courts use rape myths can be found with the “rape as a particularly moral offence” and “rape as distinct from violence” myths. With the former, while this is reinforced in Pennsylvania and South Carolina (proportions of 0.31 and 0.23, respectively), it is seldom discussed in Iowa, Alaska, and Connecticut (0.00, 0.03, and 0.07). The “rape as distinct from violence” myth is, by far, the myth

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<sup>92</sup> Table 4B, row 4

most used (relative to all of the myths analyzed herein), and as can be seen in Table 4A it was referenced in 163 opinions out of the total 495 considered in this part of the analysis. While 123 of those opinions included language reinforcing this myth, 53 included language that challenged it. However, from state-to-state there were large differences in how, specifically, that state's judiciary incorporated this myth into their jurisprudence. This variance in the use of the "not violence" myth can be seen in Figure 4B.

Again, when the data for these 8 states are combined (as they were in Chapter 3) they reflect the overall patterns of rape myth usage by state courts of appeal across the country. However, when these data are disaggregated by state there is significant variance in how each state's judiciary uses, reinforces, and challenges this specific myth. This variance will be examined herein.

The independent variables for this analysis include the following:

1. Method of judicial selection
2. The presence of women's policy agencies/machinery
3. Methods of judicial training
4. Women's representation on the bench
5. State-level public opinion (overall, and in relation to gender)

In order to test the hypotheses listed above, data was collected on these independent variables. This material was drawn from a variety of sources, including state sexual assault statutes, data published by the Center for Women in Government and Civil Society detailing the number of women in state-level judgeships (Refki, Eshete, and Hajiani 2013), judicial education information from each state judicial colleges or continuing legal education programs, and the National Center for State Courts' surveys of state court VAW points of contact (NCSC 2012).

Once gathered, the variables above were operationalized and scored according to the method detailed below.

#### *Method of judicial selection*

The American Judicature Society details the method each state uses to select the members of their judicial branch in their report “Methods of Judicial Selection” (AJS 2012). These methods are very diverse and include partisan election and reelection, nonpartisan elections and retention elections (some of which – like Arkansas – include runoff elections, and some of which do not), gubernatorial appointment, gubernatorial appointment from a nominating commission, and gubernatorial nomination followed by legislative appointment and reappointment (the latter of which occurs in Connecticut). The method of judicial selection variable used in this study was constructed as a dichotomous variable – if voters have any kind of direct control over the retention of judges in the form of election (either partisan or nonpartisan elections) the state was scored as 1. If judges are retained by the legislature or the governor, rather than being subject to popular election, the state was scored as 0.

#### *The presence of women’s policy agencies/machinery*

Because this study is focused on judicial discourse, rather than legislative, only policy agencies that interact with the judiciary or have a direct influence on them were considered herein. This is not the universe of women’s policy machinery in the states – women’s legislative commissions, for instance, are not included herein. These types of policy agencies are excluded because the judiciary is relatively insulated from the workings of these actors, and thus they are not expected to exert an influence on the dependent variable examined herein (judicial rape myth usage). The policy agencies that are considered in this analysis, because they deal directly with both violence against women and the judiciary, are designated violence against women points of

contact within each state's Administrative Office of the Courts (AOC). The presence or absence of these contacts was determined through use of the National Center for State Courts (NCSC)'s survey of the Use of Violence Against Women Act STOP Funds to Courts (NCSC 2012, 2015). State court representatives were asked, "Does your state AOC have a designated point of contact on violence against women (VAW) issues (e.g., domestic violence, sexual assault, stalking and dating violence)?" For the purposes of this analysis they responded yes to this question on the NCSC's 2012 survey the state was scored as 1, and if they said no they were scored as 0.

While the above variable demonstrates the presence/absence of this policy agency, as Weldon notes, "[t]he mere presence of a women's policy machinery may not be as important as having an *effective* women's policy machinery" (Weldon 2002, 126). To be effective, this policy machinery needs to "have a high degree of independence, some of its own resources, and positional authority in order to be consistently effective" (Weldon 2002, 129). While positional authority of the VAW points of contact could not be determined because respondents were not specific about the formality of their position, their resources could be assessed as the presence of VAWA STOP funding was evaluated by the NCSC survey. Respondents "were asked if they were receiving all of the five percent set-aside designated for the courts" (NCSC 2015, 4; see also NCSC 2012). If a state's representative answered affirmatively to this question when it was asked in the NCSC's 2012 survey, the state was scored as 1. If they were not receiving these funds (or if they answered that they did not know) they were scored as 0.

Ultimately the two above variables were combined into a single evaluation of women's policy machinery, where states score either 0 (no designated AOC point of contact in the state and state courts do not get the full 5% of STOP grants allocated to them by VAWA), 1 (the state either has a designated AOC point of contact *or* state courts get the full 5% of STOP grants

allocated to them by VAWA), or 2 (there is a designated AOC point of contact in the state and state courts receive the full 5% of STOP grants allocated to them by VAWA).

### *Methods of judicial training*

As was discussed above, there is a plethora of judicial training programs available for judges that are interested in learning about sexual assault and the courts. However, in constructing this variable, a number of data limitations were encountered. Firstly, these training programs are all voluntary – no state studied herein *requires* that judges take training on sexual violence, specifically.<sup>93</sup> While states do have continuing education requirements for judges (and other members of the bar), for most states the only annually required legal education subject is legal ethics (the rest of their continued education programs can be selected from a variety of courses). Further, there are no evaluations of these programs, so this analysis cannot control for the efficacy of judicial training materials and programs, only their presence or absence.

While sexual assault-specific training is not required by any states, there are states that do require mandatory domestic violence training. These include Alaska, Connecticut, Georgia, and South Carolina (RCDV 2013). Further, several states publish benchbooks specifically geared at gender-based violence (sometimes focusing exclusively on sexual violence, sometimes also addressing domestic violence) or that include significant discussions of sexual violence in the more general bench books of their state. The states that have these resources include Georgia, Pennsylvania, South Carolina, and Utah (their benchbooks are all published online and available via a simple google search). Using both of these data, the judicial education variable was constructed. States with neither required domestic violence training for judges or gendered violence benchbooks were scored as 0 (Iowa and Indiana), states with only one of these scored 1

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<sup>93</sup> This is according to each state's continuing legal education website – some of which are run by the state's bar association, and some of which are focused on judicial education specifically.

(Alaska, Connecticut, and Utah), and states with both scored 2 (Georgia, Pennsylvania, and Utah).

*Women's representation on the bench*

The variable to assess whether or not there is a critical mass of women on a state's bench, is drawn from the Center for Women in Government and Civil Society's report "Women in Federal and State-Level Judgeships" (Refki, Eshete, and Hajiani 2013). They determined that in 2012, women held 27.5% of the 17,462 state court judgeships, but they also observed that from state to state women's representation varies from a high of 40.3% in Montana to a low of 11.3% in Idaho. The variable included for analysis herein is the percentage of women that are on the state's bench, and the states included vary from a low of 18.1% women to a high of 32.1%. Following the extant literature on critical mass, a critical mass of women will be considered to be present at 25 percent, and states are separated into two categories in this variable: those that have a critical mass of women on the bench, and those that do not.

*State-level public opinion (overall, and in relation to gender)*

When examining state-level public opinion, though state-level data are nowhere near as easily available as national-level data, as Tan and Weaver note, good data about state-level public opinion do now exist (Tan and Weaver 2009). For instance, one commonly used measure of state public opinion is Norrander (2001)'s, which uses the Senate National Election Study to aggregate and measure state public opinion. More recently, polling organizations including Gallup and Pew have also begun to rigorously measure state public opinion. Gallup's 2009 "state of the states" measure of state-level liberalism and conservatism will be used herein. This is a measure of political ideology by state, from January through June of 2009. Those surveyed were asked, "How would you describe your political views – [very conservative, conservative,

moderate, liberal, (or) very liberal]?”<sup>94</sup> and their responses were aggregated into 3 categories: conservative, moderate, and liberal.<sup>95</sup> For this analysis, the measure that will be used is relative conservatism, which for the states within this study ranges between 30% and 50% and the variable used within breaks this measurement into two categories: states with 40 percent or higher reported conservatism are “high conservative” and those with less than 40% are “low conservative.”

State-level public opinion is operationalized herein with two measures: with one that measures state public opinion more generally along the liberal vs. conservative spectrum (described above), and also with a measure focused on state level public opinion on women’s issue specifically. It is important that public opinion both on women’s issues and more broadly is used in light of findings that indicate that, “gender role attitudes...are domain specific. Rather than being a general orientation toward politics (like ideology), they reflect specific belief regarding women’s and men’s proper roles in society” (Arceneaux 2001, 147). Unfortunately, though unsurprisingly, there are far fewer measures of state-level public opinion on gender specific issues. Certainly, “there is little published research regarding what the public thinks about domestic violence” (Carlson and Worden 2002, 4). While Gallup’s “state of the states” series usefully provides measures of state level public opinion in relation to presidential

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<sup>94</sup> These data are based on telephone interviews (both land line and cellular phones) with 160,236 adults nationwide, which were conducted between January 2 and June 30, 2009. The margin of sampling error for the states included in the current analysis is  $\pm 3$  percentage points (in some of the smaller states, including Wyoming and North Dakota, for instance, the margin of sampling error rises to  $\pm 7$  percentage points, however none of these smaller states were selected for analysis in this chapter). (Gallup 2009).

<sup>95</sup> On measures of conservatism, overall states varied between 29% and 49% (this excludes D.C.). The states studied herein include one of the states at the bottom of that range (Connecticut, where of those surveyed 31% identified as conservative) and at the top of this range (Utah and South Carolina, where 47% and 46% of those surveyed identified as conservative).

approval, the economy, religion, and well-being, it does not provide gender-related information. Norrander (2001) does include some measures of public opinion on gender-salient issues, including abortion (she provides data measuring state public opinion regarding abortion legality, parental consent for abortions, and government funding for abortions) and affirmative action. Another example is Brace et al.'s (1999) state-level measures of gender role attitudes, which evaluate how feminist a state is. Brace et al. (1999) score each state on how feminist (or not) it is, and they base this score on the attitudes that each state's citizens have toward some of the most salient issues related to gender. Though both Brace et al. and Norrander's measures assess public opinion at least a decade before the dependent variable included herein, they do continue to be used as measures of gender-related attitudes in the states (see for example, Camobreco and Barnello 2008) because other high-quality measures are lacking. I follow the extant literature and use Norrander (2001)'s measure derived from SNES questions about the legality of abortion<sup>96</sup>. The question asked to SNES survey respondents was "Do you think abortion should be legal under all circumstances, only legal under certain circumstances, or never legal under any circumstances?" (Miller et al. 2000). Norrander's variable is constructed based on a 1, 3, 5 scale where 1 represents the "legal under all circumstances" response, 3 represents "legal under certain circumstances," and 5 represents "never legal." In Norrander's work, each state's value on this measure is the average response from those surveyed within that state. However, the state scores on this measure are not varied between one and five. Rather, they are tightly clustered between two and three. For the states in this study, the scores range between 2.37 and 2.85. Thus, based on Norrander's findings, the states in this study were divided into two sections – the states that

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<sup>96</sup> These data are from a three part series of Senate studies from 1988, 1990, and 1992, where voters were interviewed in each of the 50 states. Topics included evaluations of Senate and House members, issues discussed in the campaigns, as well as a limited set of issue questions including several on abortion (Miller et al. 2000).



had a score of 2.36/2.37 (Alaska and Connecticut), and the others states, which all scored between 2.66 and 2.85. A breakdown of opinions by these institutional and political variables can be see in Table 4C, below.

As in Chapter 3, in order to evaluate this chapter's hypotheses, the results of the analyses in Chapter 2 were used as the dependent variable.<sup>97</sup> For all cases the independent variables discussed above as well as the dependent variable were available. However, as occurred in Chapter 3, the cases that did not have the full demographic variables were dropped from the analysis so that interactions between institutional and demographic variables can be assessed.

### *Methods*

Again, an ordered probit analysis was used to assess which institutional and political variables influence the use of rape myths by members of state appellate courts, and to test how these independent variables interact with gender. Because of their frequency as well as significant variation, overall rape myth usage and the usage of the "not violence" myth were again assessed.

## **Results**

In this chapter, I hypothesized that the state level variables associated with a low frequency of rape myth reinforcing and a high frequency of rape myth challenges are institutional (including the presence of government agencies focused on women, the presence of judicial training programs, a critical mass of women on the state's bench, an elected judiciary) and political in nature (public opinion generally and related to women's issues specifically), and that in the impact of the critical mass variable in particular, would strongly influence women's

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<sup>97</sup> The frequency of rape myth usage within these opinions was presented in Table 3B.

behavior on the bench, making them less likely to reinforce rape myths/more likely to challenge them. The results of the ordered probit analyses, which assess how these factors influence the use of rape myths by state appellate judges can be seen in Tables 4D-4I.

The first three of these six tables (Tables 4D, 4E, and 4F) depict the overall usage of rape myths by the judges studied herein. The dependent variables are combined measures of the usage of all 11 rape myths studied in this project. Following the analyses in Chapter 3 as well as the extant literature (King 1989) they do so by looking at the first difference effects of judicial rape myth usage.<sup>98</sup> The results of these probit analyses indicate that, contrary to the findings in Chapter 3, quite a lot of the variation in rape myth usage found in the 439 opinions included for analysis can be explained by some – but not all – of these variables. Here, the threshold that will be considered as a relatively powerful explanation will be 0.25. Across these three tables, the variables that are not very explanatory, using this 0.25 cut-off are: public opinion (especially related to broad measures of liberalism/conservatism), public opinion about abortion, and, reiterating the findings of chapter 3, gender. Here, the hypothesis that public opinion influences rape myth usage seems to be disproved.

Looking at Table 4E,<sup>99</sup> many of the variables operate in a way counter to expectation. Women's policy machinery is a powerful explanation for the variance found earlier in this project, however, it does not increase the likelihood that judges with this type of influence and support will explicitly challenge these myths. Rather, the presence of strong women's policy machinery predicts that *less* challenging of rape myths will occur. This is similarly the case for the impact of a critical mass of women on the bench – having a critical mass significantly

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<sup>98</sup> The strengths and weaknesses of this approach are discussed in greater detail in the “Results” section of Chapter 3.

<sup>99</sup> Table 4D includes overall, but non-directional, rape myth usage.

reduces the probability of rape myth challenges in the opinions coming from the state appellate bench (and again, this is particularly the case for male judges). Here, the presence of some judicial training (either a bench book or a required training program – interestingly, not both) also decreased the likelihood that an opinion would contain a rape myth challenge. While this finding seems counterintuitive at first blush, what this could indicate is that where there are forces that are hypothesized to decrease rape myth reinforcing, such as women’s policy machinery or some judicial training, judges are being cautioned away from discussing rape myths *at all*. This is a plausible explanation, given the findings in Table 4D, which detail overall rape myth reinforcing.

Many of the variables discussed above continue to be strongly related to rape myth usage, here when the probability of the *reinforcing* of rape myths among members of the state appellate bench is considered. Again, the probability of rape myth usage in an opinion written where women’s policy machinery is strong is significantly less than where women’s policy agencies are lacking in presence and funding (or both). This is also the case for the presence of judicial education programs – but as with the above finding, this is only true for when *either* a required domestic violence training program is present *or* a judicial bench book on gender-based violence is published within the state. When both are present, the result is reversed, and training seems to be related to the outcome counter to its purpose.<sup>100</sup> As was also found above, when it comes to

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<sup>100</sup> There are a couple of reasonable explanations for this finding. The first could be judicial backlash: given judicial reticence to being forced to undergo issue-specific training when it is mandated (especially by non-judicial actors), perhaps a backlash would not be surprising. Those forced to undergo training are exposed to rape myths, but if the training is ineffective at debunking these myths, or hostile judges do not accept that they are myths, the usage of these myths could increase. A better explanation for this result is that many of these trainings themselves are simply ineffective at altering problematic discourse, and do more harm than good by reminding judges of the discourse of rape myths without effectively or sufficiently teaching them why it is problematic to use it. Because of the problematic lack of program evaluation in

the impact of “critical mass,” this theory provides a powerful explanation of the cross-state and between-judge variation in when rape myths are reinforced. Having a critical mass of women on the bench is associated with a 0.37 drop in the likelihood that an opinion will reinforce a rape myth (compared to when opinions are written in a non-critical mass context). While the difference between men and women on this measure is smaller than was found above, again, men are more powerfully influenced by working on a state bench with a critical mass of women than their female colleagues.

Interestingly, some previously weak explanations also are more relevant in this particular context. For instance, while judicial selection methods were not very powerful explanations for the variance in rape myth usage among the state judiciary when it came to the challenging of rape myths, the difference is more striking when the reinforcing of rape myths is considered. The probability of a rape myth being reinforced increases by 0.28 when a judge who is appointed, rather than elected, writes the opinion. Similarly, while public opinion was not closely related to rape myth use overall or challenging of rape myths, when it comes to the *reinforcing* of rape

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this area, it is impossible to determine whether either of these two options are truly the case as baseline judicial behavior was not evaluated before these training programs began. Either way, this is an indication that more rigorous programs of evaluation are warranted in order to improve these outcomes. A final possibility is that these programs *have* made a difference, and that rape myth usage was even more common in these particular states than it is now, which is why a rather rigorous judicial education was begun in the state, and these programs have reduced rape myth usage – just not to the level of lower education states. This final option could make sense if these programs were recently developed and perhaps not had time to bring rape myth usage down to a level comparable with other states, however, that does not appear to be the case. Pennsylvania for instance, has had a judicial bench book focusing specifically on sexual violence since at least 2004, and Georgia is on its’ eighth version of the domestic violence bench book (which also addresses rape, especially in the context of domestic violence). Perhaps indicating that these training manuals themselves are reinforcing rape myths, rather than just not having had enough time to transform judicial hearts and minds is South Carolina’s bench book, which includes a lengthy discussion of sexual violence under the category “Offenses Against Morality and Decency” (where obscenity is also nested) rather than included in the section entitled “Offenses Against the Person” (which includes assault and murder) (SCBB 2012).

myths it is a much more powerful explanation of variance in the usage of these myths. The probability that opinions written in states where public opinion is more favorable to legal abortion will reinforce a rape myth is 0.33 *more* than in states where public opinion views abortion legality less favorably. This is a curious finding, made even more curious by the conservative public opinion variable predicting so little change in this dependent variable (0.05). This is the only assessment of the dependent variables where public opinion about abortion is associated with such a large rise or fall, and as such it might be reflective of a limitation with this particular measurement, rather than a reliable conclusion that states with more open abortion attitudes cause judges within them to heavily reinforce rape myths.<sup>101</sup>

While Tables 4D, 4E, and 4F (above) depict the overall usage of rape myths by the judges studied herein, the next three tables (Tables 4G, 4H, and 4I) focus on explaining variation in the “not violence” myth specifically. When individual variables were explored for their influence upon this dependent variable in Chapter 3, little variation was explained, however, as with the explanation of overall rape myth usage, institutional variables (and their interaction with gender) provide us with a more useful understanding of the variation in judicial rape myth usage. This is not to the same degree as was noted above however, and this is especially the case when non-directional usage of this myth and the reinforcing of the “not violence” myth are considered,

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<sup>101</sup> That is – the only 2 states that have scores on Norranders’ scale low enough to put them into this category are Alaska and Connecticut. But, their relative liberalism on this measure could be driven by very different forces, essentially the socially moderate ideology of Connecticut vs. the libertarianism of Alaska. Indeed, Alaska’s former lieutenant governor, Mead Treadwell (who served in this role from 2010-2014) observed in 2012 that, “Alaska has a fairly strong libertarian streak, a strong limited-government streak” (fivethirtyeight.com 2012), and the state has a history of sometimes electing Republican candidates who support abortion rights, such as Lisa Murkowski. These same forces could well mean that the states feel very differently about sexual violence, however, no measures could be found that assess state level attitudes toward sexual or gender-based violence across states (whereas there is – unsurprisingly – a preponderance of research into abortion attitudes).

as it is in Table 4G and 4H, respectively. In Table 4G, non-directional usage of the “not violence” rape myth usage is the dependent variable. Only one of the independent variables included in the analysis crosses the 0.25 threshold – that is, judicial education. However, due to the unpredictable nature of this variable, as there are no assessments of the *efficacy* of these programs, this result tells us little about what is related to the variation in rape myth usage explored herein. The results of the reinforcing of the “not-violence” myth are similarly weak (see Table 4H) when it comes to explanatory power, as none of the independent variables cross the 0.25 threshold.

Where the discussion of the “not violence” myth *is* useful, however, is in the consideration of the challenging of this myth. As can be seen in Table 4I, below, several of the independent variables discussed in the context of overall rape myth usage are again of interest here. The presence of judicial training and education does not seem to produce a judiciary willing to explicitly challenge rape myths. It is also useful to mention that although it did not reach the 0.25 threshold, when it comes to the impact of judicial education programs on the reinforcing of the not violence myth (Table 4H), the presence of judicial education (with either one or both of the measures included herein), was associated with an increased probability that those opinions would include rape myths. In relation to the challenging of the “not violence” myth, as with rape myth use more generally, what seems to provide the largest explanation for the variance found herein is critical mass theory. Having more women on the bench – and having a critical mass of women – is associated with an increased probability (0.54) that the opinion written in this context will challenge the “not violence” myth. In this case, the results are roughly similar for men and women on the bench (0.54 and 0.55 respectively), but ultimately this variable seems to provide the most compelling explanation for variation in rape myth usage.

## Discussion

The analyses in this chapter assess political and institutional variables, and, in conjunction with the critical representational variable from Chapter 3 – gender – their ability to explain the variation in rape myth usage found in Chapter 2. There were three main hypotheses tested herein. Based on the extant literature the first hypothesis tested was that the state-level institutional variables that will be associated with comparatively low levels of rape myth usage and with high levels of challenges to rape myths are a) the presence of government agencies focused on women, b) the presence of judicial training programs, c) a critical mass of women on the state’s bench, d) an elected judiciary. In assessing these three variables I found firstly, that the presence of judicial training programs generally did not predict this outcome – rather it was sometimes found to be associated with higher levels of rape myth reinforcing. Secondly, the presence of gendered and judicially-focused government agencies behaved only partially as expected: it was associated with lower levels of rape myth usage, but this was both overall and in both directions, as these policy agencies were not associated with an increase in challenges to rape myths, rather they were associated with decreases in rape myth challenges and reinforcements. Thirdly, the presence of a critical mass of women on a state’s bench was associated with less rape myth usage, as was an elected judiciary (though this was not true for the “not violence” myth). Interestingly, having more women on the bench predicted less challenging of rape myths and less reinforcing of rape myths, except when it came to the challenging of the “not violence” myth, where having a critical mass of women was strongly associated with explicit challenges to this myth.

The second hypothesis was that public opinion would be tied to rape myth usage among the state judiciary – both public opinion generally (measured with reported relative conservatism), and specifically related to gender-issues (measured by abortion attitudes). While it was hypothesized that states that are more conservative will have more rape myth usage than states that are less conservative, and that this difference would be even greater where state public opinion is conservative on women’s issues specifically, neither of these was found to be the case.

Finally, the third hypothesis tested in this chapter was that the state-level variables assessed herein would interact with the gender variable from Chapter 3 in the following way: where there is a critical mass of women, women will challenge rape myths more/reinforce rape myths less. In relation to the *reinforcing* of myths this was found to be correct, but women did not *challenge* all rape myths more when there was a critical mass of women on the bench, rather this was only the case for the challenging of the “not violence” myth. A striking finding here was that this effect was not only true for women, it was also true for men. Indeed, it appeared to have an even more powerful effect upon men. The same patterns of the influence of critical mass were found for men as were for women, but with larger predicted probabilities for both the use and reinforcing of overall rape myths (the estimates were similar for the challenging of the “not violence” frame, and were very small for the overall use and the reinforcing of the “not myth” frame).

The results of the above studies importantly support Ehrlich’s contention about judging that among judges, “[c]ultural norms are neither homogeneous...nor are they static” (Ehrlich 2007, 454). Rather, when it comes to the expression of the cultural norms of rape myths, context matters. Indeed, the results discussed above are critically important for two reasons. Firstly, because they expand our understanding of how judicial discourse is shaped by the broader



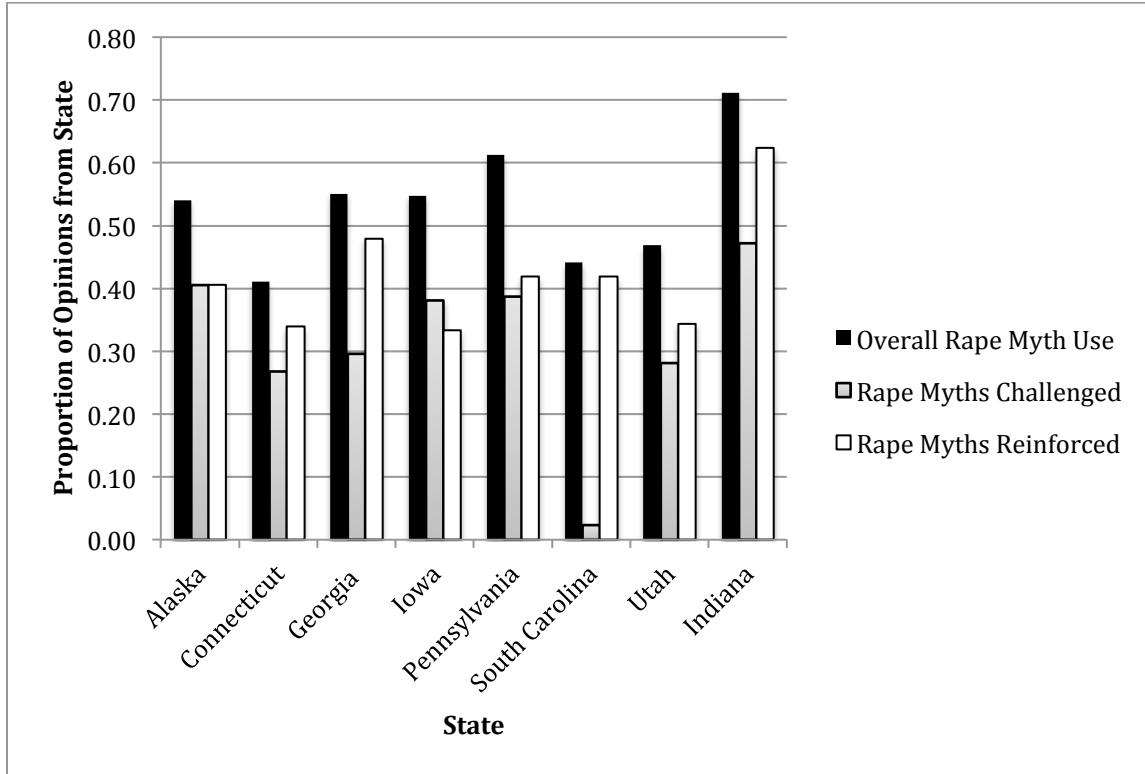
culture in which judges operate. In the area of sexual assault jurisprudence, judicial discourse appears to be impacted and shaped powerfully by context – by the education judges are mandated to take, by their fellow justices on the bench (especially when they are women), and sometimes by other instruments of the state, such as by the presence and strength (in terms of funding) of women’s policy agencies. These findings also depict a judiciary that, at least in this area, seems relatively insulated from the effects of public opinion.

Secondly, these answers are vital for social movements interested in social justice and in shifting the problematic discourse in this area by reducing rape myth usage in the judiciary. If a key goal of feminist legal scholars is to “seek to track and expose law’s implication in women’s disadvantage with a view to bringing about transformative social and political change” (Conaghan 2000, 359), the limited success that social and political campaigns to effect change and to be transformative of the judiciary is evident in these findings. With the creation of women’s policy machinery within state Administrative Offices of the Court (AOCs) these campaigns have sometimes had the desired effect. However, reflecting Smart’s warning that “[i]n resorting to law, especially law structured on patriarchal precedents, women risk invoking a power that will work against them rather than for them” (Smart 1989, 138), the impact of judicial training cannot be said to have been successful, at least not if the end measure is having a relatively low level of rape myth usage among members of the judiciary. Here law’s “patriarchal precedents” seem unfortunately alive, well, and impervious to these particular efforts to change them.

However, if “[f]eminist scholarship, particularly in law [is] fuelled by an idea that things *ought not to be* as they currently are and that feminist theoretical engagement can play a role in envisioning how they *might be*” (Conaghan 2000, 375, emphasis in original), the question

remains – how might we not only envision feminist change in this area (that is, the reduction in the judicial use of rape myths), but actually arrive there? The current regime of training state level judges does not seem to have worked (at least not yet). Arriving at substantial change in this area might require the development and adoption of rigorous, evidence-based state-level sexual assault education programs. Further, getting not just individual women on the bench, but a *critical mass* of women on the bench seems to be a promising strategy. But are there other alternatives and avenues for change that were not captured herein? In the concluding chapter I will argue yes, More specifically that alternatives which appear to move us closer to the changes desired include a) high-level pushes for broad sexual assault-related reforms, and b) the adoption of feminist sexual assault laws that themselves challenge rape myths and equally importantly, do not use language that reinforces these myths.

## Tables and Figures



**Figure 4A: Rape Myth Usage in Case Study State Opinions (All Myths)**

**Table 4A: Number of Opinions with Each Myth, by Case Study State**

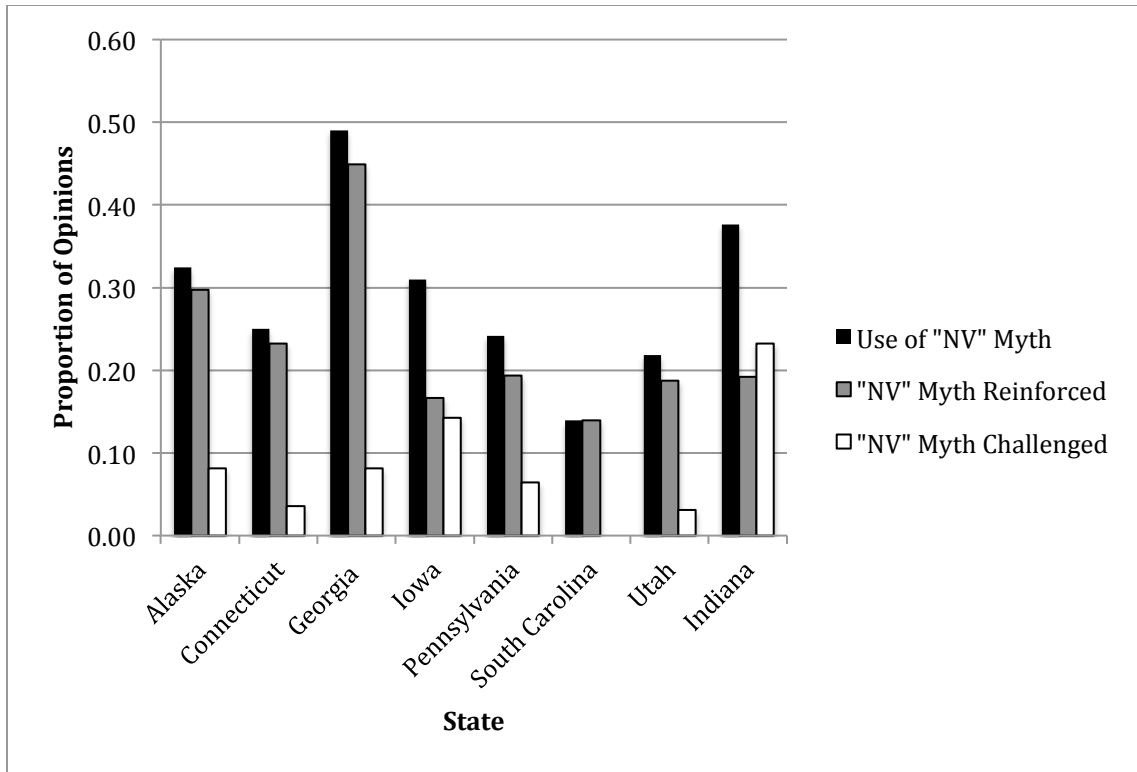
	AK	CT	GA	IA	IN	PA	SC	UT	Total
<b>Opinions with Rape Myths (all myths)</b>	20	23	54	23	89	38	19	15	281
Myths Reinforced (all myths)	15	19	47	14	78	26	18	11	228
Myths Challenged (all myths)	15	15	29	16	59	24	1	9	168
<b>“She’s lying” myth</b>	2	7	12	5	14	3	0	4	47
Lying (reinforced)	0	1	1	0	15	0	0	1	18
Lying (challenged)	2	6	11	5	11	3	0	3	41
<b>“She asked for it” myth</b>	0	1	2	1	4	2	0	0	10
Asked (reinforced)	0	0	0	0	0	0	0	0	0
Asked (challenged)	0	1	2	1	4	2	0	0	10
<b>“She wanted it” myth</b>	2	5	1	1	6	1	0	2	18
Wanted (reinforced)	0	0	0	0	2	0	0	1	3
Wanted (challenged)	2	5	1	1	4	1	0	1	15
<b>“Certain women” myth</b>	2	3	3	3	7	3	3	1	25
CW (reinforced)	0	1	2	3	6	2	2	1	17
CW (challenged)	2	2	1	0	1	1	1	0	8
<b>“Emotional reaction” myth</b>	3	6	11	6	23	2	0	0	51
ER myth (reinforced)	0	6	11	6	23	2	0	0	48
ER myth (challenged)	3	0	0	1	0	0	0	0	4
<b>“He didn’t mean to” myth</b>	2	2	3	4	9	2	0	4	26
HDM (reinforced)	0	0	0	1	3	0	0	0	4
HDM (challenged)	2	2	3	3	8	2	0	4	24
<b>“He’s not the kind of guy” myth</b>	9	6	8	6	27	11	0	2	69
NKG (reinforced)	5	2	0	0	6	3	0	1	17
NKG (challenged)	5	4	8	6	24	9	0	1	57
<b>“Rape is trivial” myth</b>	8	1	0	0	26	11	1	4	51
RT (reinforced)	1	0	0	0	1	0	1	0	3
RT (challenged)	7	1	0	0	25	11	1	4	49
<b>“Rape as erotic” myth</b>	0	1	1	1	57	1	1	3	65
Erotic (reinforced)	0	1	1	1	57	1	1	3	65
Erotic (challenged)	0	0	0	0	4	0	0	0	4
<b>“Rape ≠ violence” myth</b>	12	14	48	13	47	15	6	7	162
NV (reinforced)	11	13	44	7	24	12	6	6	123
NV (challenged)	3	2	8	6	29	4	0	1	53
<b>“Rape as moral offense” myth</b>	1	4	11	0	21	21	10	2	70
Morality (reinforced)	1	4	11	0	21	19	10	2	68
Morality (challenged)	0	0	0	0	0	2	0	0	2
<b>Total # opinions</b>	37	56	98	42	125	62	43	32	495

Note: Values are absolute numbers of cases, not percentages.

**Table 4B: Proportion of State Opinions with Each Myth, by Case Study State**

	AK	CT	GA	IA	IN	PA	SC	UT	Ave.*
<b>Proportion of Opinions with Rape Myths (all myths)</b>	0.54	0.41	0.55	0.55	0.71	0.61	0.44	0.47	0.54
Myths Reinforced (all myths)	0.41	0.34	0.48	0.33	0.62	0.42	0.42	0.34	0.42
Myths Challenged (all myths)	0.41	0.27	0.30	0.38	0.47	0.39	0.02	0.28	0.31
<b>“She’s lying” myth</b>	0.05	0.13	0.12	0.12	0.11	0.05	0.00	0.13	0.09
Lying (reinforced)	0.00	0.02	0.01	0.00	0.12	0.00	0.00	0.03	0.02
Lying (challenged)	0.05	0.11	0.11	0.12	0.09	0.05	0.00	0.09	0.08
<b>“She asked for it” myth</b>	0.00	0.02	0.02	0.02	0.03	0.03	0.00	0.00	0.02
Asked (reinforced)	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Asked (challenged)	0.00	0.02	0.02	0.02	0.03	0.03	0.00	0.00	0.02
<b>“She wanted it” myth</b>	0.05	0.09	0.01	0.02	0.05	0.02	0.00	0.06	0.04
Wanted (reinforced)	0.00	0.00	0.00	0.00	0.02	0.00	0.00	0.03	0.01
Wanted (challenged)	0.05	0.09	0.01	0.02	0.03	0.02	0.00	0.03	0.03
<b>“Certain women” myth</b>	0.05	0.05	0.03	0.07	0.06	0.05	0.07	0.03	0.05
CW (reinforced)	0.00	0.02	0.02	0.07	0.05	0.03	0.05	0.03	0.03
CW (challenged)	0.05	0.04	0.01	0.00	0.01	0.02	0.02	0.00	0.02
<b>“Emotional reaction” myth</b>	0.08	0.11	0.11	0.14	0.18	0.03	0.00	0.00	0.08
ER myth (reinforced)	0.00	0.11	0.11	0.14	0.18	0.03	0.00	0.00	0.07
ER myth (challenged)	0.08	0.00	0.00	0.02	0.00	0.00	0.00	0.00	0.01
<b>“He didn’t mean to” myth</b>	0.05	0.04	0.03	0.10	0.07	0.03	0.00	0.13	0.06
HDM (reinforced)	0.00	0.00	0.00	0.02	0.02	0.00	0.00	0.00	0.01
HDM (challenged)	0.05	0.04	0.03	0.07	0.06	0.03	0.00	0.13	0.05
<b>“He’s not the kind of guy” myth</b>	0.24	0.11	0.08	0.14	0.22	0.18	0.00	0.06	0.13
NKG (reinforced)	0.14	0.04	0.00	0.00	0.05	0.05	0.00	0.03	0.04
NKG (challenged)	0.14	0.07	0.08	0.14	0.19	0.15	0.00	0.03	0.10
<b>“Rape is trivial” myth</b>	0.22	0.02	0.00	0.00	0.21	0.18	0.02	0.13	0.10
RT (reinforced)	0.03	0.00	0.00	0.00	0.20	0.00	0.02	0.00	0.09
RT (challenged)	0.19	0.02	0.00	0.00	0.20	0.18	0.02	0.13	0.09
<b>“Rape as erotic” myth</b>	0.00	0.02	0.01	0.02	0.46	0.02	0.02	0.09	0.08
Erotic (reinforced)	0.00	0.02	0.01	0.02	0.46	0.02	0.02	0.09	0.08
Erotic (challenged)	0.00	0.00	0.00	0.00	0.03	0.00	0.00	0.00	0.00
<b>“Rape ≠ violence” myth</b>	0.32	0.25	0.49	0.31	0.38	0.24	0.14	0.22	0.29
NV (reinforced)	0.30	0.23	0.45	0.17	0.19	0.19	0.14	0.19	0.23
NV (challenged)	0.08	0.04	0.08	0.14	0.23	0.06	0.00	0.03	0.08
<b>“Rape as moral offense” myth</b>	0.03	0.07	0.11	0.00	0.17	0.34	0.23	0.06	0.13
Morality (reinforced)	0.03	0.07	0.11	0.00	0.17	0.31	0.23	0.06	0.12
Morality (challenged)	0.00	0.00	0.00	0.00	0.00	0.03	0.00	0.00	0.00
<b>Total # opinions</b>	37	56	98	42	125	62	43	32	495

\*average proportion of rape myth usage across all 8 states for each myth



**Figure 4B: Rape Myth Usage in Case Study State Opinions (NV Myth)**

**Table 4C: Opinions by Institutional and Political Variables (Independent Variables)**

<b>Independent Variables</b>	<b>Number of opinions written by each category (total = 439)</b>		
Method of judicial selection	Appointment: 46 opinions (2 states)		Election: 393 opinions (6 states)
Women's policy machinery (presence + funding)	No AOC/no funding: 61	AOC or funding: 288	Both: 90
<i>Presence of women's policy agency</i>	<i>No designated DV point of contact in AOC: 186</i>		<i>Designated DV point of contact in AOC: 253</i>
<i>Funding of women's policy agency</i>	<i>Do not receive 5% of STOP grant: 224</i>		<i>Do receive 5% of STOP grant: 215</i>
Methods of judicial training	None: 166	Book or required DV course: 103	Both: 170
Women's representation on the bench (critical mass = 25%)	Without critical mass: 235 <i>Mean: 23.75</i>		With critical mass: 204 <i>SD: 4.23</i>
State-level public opinion (conservative-liberal)	Below 40% Conservative: 220 <i>Mean: 39.35 (conservative)</i> <i>Mean: 37.56 (moderate)</i> <i>Mean: 19.17 (liberal)</i>		Above 40% Conservative: 219 <i>SD: 3.56 (conservative)</i> <i>SD: 2.18 (moderate)</i> <i>SD: 1.83 (liberal)</i>
State-level public opinion (abortion legality)	More support for legal: 70 <i>Mean: 2.71</i>		Less support for legal: 369 <i>SD: 0.16</i>

**Table 4D: State/Gender Correlates and Judicial Use of Rape Myths (All Myths, All Usage)**

Variable	Estimate	Change in X (from, to)	First difference
Judicial selection	-0.98	(0,1)	-0.31
Public opinion (% conservative)	-0.12	(0,1)	-0.05
Public opinion (abortion legality)	-0.52	(0,1)	-0.18
Women's policy agency (estimate: AOC + funding)	-0.71	(0,1)	-0.07
		(0,2)	-0.27
		(1,2)	-0.20
Judicial education (estimate: book+class)	0.56	(0,1)	-0.26
		(0,2)	0.19
		(1,2)	0.46
Critical mass of women judges	-1.25	(0,1)	-0.41
Judicial gender	-0.22	(0,1)	-0.01
Gender*Critical Mass (estimate: woman with critical mass of women)	0.41	00,01	-0.46
		10,11	-0.32
		00,10	-0.07
		01,11	0.07
Constant	2.45		
N	439		



**Table 4E: State/Gender Correlates and Judicial Use of Rape Myths (All Myths, Challenged)**

Variable	Estimate	Change in X (from, to)	First difference
Judicial selection	-0.4	(0,1)	-0.16
Public opinion (% conservative)	-0.51	(0,1)	-0.19
Public opinion (abortion legality)	-0.5	(0,1)	-0.19
Women's policy agency (estimate: AOC + funding)	-1.3	(0,1)	-0.24
		(0,2)	-0.46
		(1,2)	-0.23
Judicial education (estimate: book+class)	0.06	(0,1)	-0.19
		(0,2)	0.02
		(1,2)	0.21
Critical mass of women judges	-1.14	(0,1)	-0.36
Judicial gender	-0.16	(0,1)	0.01
Gender*Critical Mass (estimate: woman with critical mass of women)	0.4	00,01	-0.41
		10,11	-0.28
		00,10	-0.06
		01,11	0.07
Constant	1.99		
N	439		

**Table 4F: State/Gender Correlates and Judicial Use of Rape Myths (All Myths, Reinforced)**

Variable	Estimate	Change in X (from, to)	First difference
Judicial selection	-0.73	(0,1)	-0.28
Public opinion (% conservative)	0.13	(0,1)	0.05
Public opinion (abortion legality)	-0.87	(0,1)	-0.33
Women's policy agency (estimate: AOC + funding)	-0.27	(0,1)	0.13
		(0,2)	-0.10
		(1,2)	-0.23
Judicial education (estimate: book+class)	0.75	(0,1)	-0.25
		(0,2)	0.29
		(1,2)	0.53
Critical mass of women judges	-1.02	(0,1)	-0.37
Judicial gender	-0.04	(0,1)	0.01
Gender*Critical Mass (estimate: woman with critical mass of women)	0.14	00,01	-0.39
		10,11	-0.34
		00,10	-0.02
		01,11	0.03
Constant	1.48		
N	439		

**Table 4G: State/Gender Correlates and Judicial Use of Rape Myths (NV Myth, All Usage)**

Variable	Estimate	Change in X (from, to)	First difference
Judicial selection	-0.15	(0,1)	-0.06
Public opinion (% conservative)	-0.14	(0,1)	-0.05
Public opinion (abortion legality)	-0.45	(0,1)	-0.17
Women's policy agency (estimate: AOC + funding)	0.31	(0,1)	0.20
		(0,2)	0.10
		(1,2)	-0.11
Judicial education (estimate: book+class)	0.34	(0,1)	-0.15
		(0,2)	0.13
		(1,2)	0.28
Critical mass of women judges	-0.38	(0,1)	-0.08
Judicial gender	-0.11	(0,1)	0.04
Gender*Critical Mass (estimate: woman with critical mass of women)	0.47	00,01	-0.14
		10,11	0.03
		00,10	-0.04
		01,11	0.13
Constant	-0.14		
N	439		

**Table 4H: State/Gender Correlates and Judicial Use of Rape Myths (NV Myth, Reinforced)**

Variable	Estimate	Change in X (from, to)	First difference
Judicial selection	0.12	(0,1)	0.04
Public opinion (% conservative)	0.05	(0,1)	0.02
Public opinion (abortion legality)	-0.51	(0,1)	-0.18
Women's policy agency (estimate: AOC + funding)	0.73	(0,1)	0.22
		(0,2)	0.18
		(1,2)	-0.03
Judicial education (estimate: book+class)	0.5	(0,1)	-0.02
		(0,2)	0.17
		(1,2)	0.19
Critical mass of women judges	0.1	(0,1)	0.07
Judicial gender	0.04	(0,1)	0.06
Gender*Critical Mass (estimate: woman with critical mass of women)	0.31	00,01	0.03
		10,11	0.14
		00,10	0.01
		01,11	0.12
Constant	-1.32		
N	439		

**Table 4I: State/Gender Correlates and Judicial Use of Rape Myths (NV Myth, Challenged)**

Variable	Estimate	Change in X (from, to)	First difference
Judicial selection	3.27	(0,1)	0.15
Public opinion (% conservative)	-0.22	(0,1)	-0.03
Public opinion (abortion legality)	-0.65	(0,1)	-0.13
Women's policy agency (estimate: AOC + funding)		(0,1)	-0.01
		(0,2)	-0.07
		(1,2)	-0.06
Judicial education (estimate: book+class)		(0,1)	-0.43
		(0,2)	-0.62
		(1,2)	-0.19
Critical mass of women judges	2.63	(0,1)	0.54
Judicial gender	-0.45	(0,1)	-0.03
Gender*Critical Mass (estimate: woman with critical mass of women)	0.46	00,01	0.54
		10,11	0.55
		00,10	0.00
		01,11	0.00
Constant	-2.97		
N	439		

## CHAPTER 5

### **Conclusion and Ways Forward for Research and for Praxis**

*‘[T]he prosecutor’s reference to the rape and subsequent investigation as a ‘nightmare’ for the victim was not ‘unfairly inflammatory language,’ but rather reflected a fair assessment of the victim’s experience.’<sup>102</sup>”*

The key questions explored in this project were twofold. Firstly, do we see the “rape myth” frame used by American judges even though several decades have passed since legislation began to prominently address this issue? And if this is still the case, where and when do we see this problematic discourse reinforced, and where do we see it challenged? In the extant literature, which relies largely on anecdotal studies these questions remain unanswered. As such, this project, which for the first time explores rape myth use by judges in a comprehensive and systematic way, is a critical step forward in understanding how arguably the most powerful actors in the legal system – judges – are both complicit in, and challenging of, rape culture. In assessing these questions I concluded that the judiciary still uses rape myths frequently; sometimes reinforcing and sometimes challenging these myths. Further, I found that an interaction between gender and partisanship, having career experience with gendered areas of the law, and having a critical mass of women on a state’s bench all powerfully impacted the way the discourse of rape myths was used. In particular, judges who are Democratic women challenged rape myths more than their colleagues (compared to Republican men and women, and Democratic men). Further, judges who had gendered career experiences were less likely to

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<sup>102</sup> Quotation from *Commonwealth v. Fernandez* (2012), a Massachusetts case included in the analyses in Chapter 2 of the current project. This is an example of a challenge to the “she’s lying” rape myth, and an indication of a judge also not dismissing rape as trivial.

reinforce rape myths. Importantly, the latter finding was true for both men and women, but was particularly powerful when considering judges reinforcing the “not violence” myth, where men who had a gendered career focus were far less likely to reinforce this myth than their colleagues. In addition to these ways that gender had an impact at the individual level, gender also had a more institutional influence. That is, when there was a critical mass of women judges on the bench in a state, it was more likely that both male and female judges in the state would challenge rape myths rather than reinforce them.

In order to begin to develop this understanding and fill a critical gap in the sociolegal and feminist literatures, this project began by assessing *if* members of the American judiciary use rape myths at all, and if so, how frequently? Are these just occasional slip-ups made by a judiciary that has largely moved away from using rape myths, or has this discourse remained hegemonic in the judiciary as it is in society more generally? In Chapter 2 I hypothesized that rape myths continue to be used by the judiciary across the states, and not rarely. This hypothesis was confirmed. Based on a content analysis of 1332 state appellate court opinions, I found that rape myths do appear to be a common and widely used discourse in sexual assault cases. Previously, assessments of judicial rape myth usage have relied on case studies to assess the usage of these myths, and thus a key contribution of this project is that the assessment of this large data set of cases allows this hypothesis to be confirmed conclusively. Indeed, the analysis of these cases uncovered that rape myths are both being reinforced (“upheld”) and challenged in state appellate across the nation. However, the usage pattern of each of the 11 myths assessed herein varied significantly. The “she wanted it” and “she asked for it” myths were absent from over 95% of the opinions coded in this study. Further, most of these rape myths were not *reinforced* in most of these cases. Rather, the only rape myths that were reinforced in more than

five percent of the cases coded included the following three myths: the myth about the emotionality of victims, the myth that rape is a uniquely moral crime, and the myth that rape is distinct from violence. Conversely, the myth distancing rape and sexual assault from violence was frequently used, and was present in a surprising 29% of the opinions coded.

While Chapter 2 established that indeed, rape myths are commonly used frames within the American state appellate judiciary (though this is not true for all rape myths), Chapters 3 and 4 explored which judges and which political and institutional climates are associated with the variance found in Chapter 2. In order to assess the individual correlates of judicial discourse, Chapter 3 focused upon how the use of rape myths by members of the judiciary connects to key questions and gendered assumptions about descriptive and substantive representation of women and asked, have women on the bench supported women's full participation in society by challenging and eschewing rape myths? Or, is this an area of the law where a gendered effect is not evident? For those working towards greater justice and equality for victims of sexual violence, and for those who campaign on behalf of getting more women onto the bench, the answers to these questions are critical. Can we expect that more women on the bench will mean more challenges to rape myths? By exploring the role of judicial gender as well as gendered career experiences, race, age, and partisanship, the effect of judicial identity upon judicial rape myth usage was assessed. I hypothesized that overall, these variables would explain little of the variation found in Chapter 2, but that modest decreases in the likelihood of rape myth usage would accompany opinions a) that were written by a woman, b) that were written by a woman in an older cohort, c) that were not written by a Republican woman, and d) that were written by a judge with gender-focused career experience. As predicted, for the most part judicial demographics did not provide strong explanations for the variation of rape myth usage among



the American state level judiciary. However there were notable exceptions to this, and these largely revolved around gender's interaction with several of the other independent variables. Most critically, while being a woman did not make a judge more or less likely to use rape myths, being a Democratic woman was associated with being more likely to challenge rape myths. Thus, it is not that gender is irrelevant, per se, but rather it appears that gender does not influence all women (or all men) in the same way, as partisanship interacts with gender. Similarly, these analyses found that women – and, notably, men – on the bench who had gendered career experiences in their past were less likely to reinforce rape myths than their colleagues.

The finding that gender does sometimes matter was then built upon in Chapter 4. There I assessed how this critical variable interacted with the institutional and political factors of the systems within which these judges work, and whether or not these variables could explain much of the variation that remained unexplained by the analyses in Chapter 3. Herein, I sought to answer the following two questions: if it is not individual level factors that explain where and when the rape myth frame is deployed, is it the institutional political context that shapes judicial discourse on this issue? And, how does this intersect with judicial gender? To answer these questions I hypothesized three things. Firstly, that the state-level institutional variables associated with comparatively low levels of rape myth usage and with high levels of challenges to rape myths were a) government agencies focused on women, b) judicial training programs, c) a critical mass of women on the state's bench, and d) elected judges. I found only partial support for this hypothesis. The presence of judicial training programs generally did not predict this outcome. The presence of gendered and judicially-focused government agencies was more explanatory, as it was associated with lower levels of rape myth usage, but these policy agencies were not associated with an increase in challenges to rape myths, rather they were associated

with decreases in rape myth challenges and reinforcements. However, having a critical mass of women on a state's bench was associated with less rape myth usage, as was having an elected judiciary. Interestingly, having more women on the bench predicted less challenging of rape myths and less reinforcing of rape myths, except when it came to the challenging of the "not violence" myth, where having a critical mass of women was strongly associated with explicit challenges to this myth. I also hypothesized that public opinion would be tied to rape myth usage, among the state judiciary, but neither public opinion generally nor public opinion on gender-related issues proved useful in explaining judicial rape myth usage as found in Chapter 2.

The final hypothesis tested in this project was that the state-level variables evaluated in Chapter 4 would interact with the gender variable from Chapter 3. More specifically, I predicted that where there is a critical mass of women, women will challenge rape myths more, and they will also reinforce rape myths less. In relation to the *reinforcing* of myths this was found to be correct – when there is a critical mass of women on a state's bench, women within that state are predicted to reinforce fewer myths. Similarly, women *challenged* the "not violence" myth more when there was a critical mass of women on the bench (though they did not challenge all rape myths more when there was a critical mass of women present). One of the most striking findings of this study was revealed in this final chapter, and that is that the critical mass effect was not only true for women, but it also appeared to be true for men who work where there is a critical mass of women on the bench. Indeed, the presence of a critical mass of women appeared to have an even more powerful effect upon men. The same patterns of the influence of critical mass were present for both genders, but with larger predicted probabilities for the use and reinforcing of overall rape myths.

Ultimately, the above findings add critically to political science and sociolegal scholarship's shared goal of learning more about the nexus of law and society and about the legal system as a political institution. The foundational questions of whether rape myths are used by the judiciary anymore, and if so, when, can now be answered with the responses: frequently, but variably, depending on the myth in question. Similarly, these analyses highlight that while women, as a monolithic group, do not seem to be judging in a "different voice," though Democratic women possibly are, and both men and women who choose to focus on gendered issues in their legal careers also have different rape myth usage patterns compared to those who do not. Finally, this gendered effect is also connected to the presence of a critical mass of women on the bench – where a critical mass of women can be found, rape myth usage among men and women on the bench is lowered, and rape myth challenges increase.

### **Future Directions for Research and Praxis**

While these are important findings that contribute to our knowledge of the extent and dimensions of rape culture in legal institutions, they are also essential for those engaged in the project of feminist praxis. To achieve the goal of having a judiciary less likely to challenge rape myths, it could behoove activists to focus on supporting candidates for judicial office who have gendered legal experience, or who are Democratic women, rather than the election or appointment of all women who seek judicial office. Further, those seeking more justice for the victims of sexual violence might consider focusing on the appointment or election of a cohort of female judges in order to achieve the critical mass effect noted above. Another suggestion for activists as well as practitioners in this area that is derived from the current study is to more effectively evaluate judicial training programs. Due in part to judicial reticence towards

mandated training and evaluation, there have not been any rigorous studies done of which of the many judicial training programs are most effective, nor is it known exactly which judges have undergone which trainings within a given jurisdiction and how this has impacted their jurisprudence. Yet, establishing best practices in this area would be a potentially huge step forward in improving court responses to sexual assault. Currently, state-level judicial training resources on this issue are not having the desired effect. As such, conducting rigorous program evaluations of the judicial training programs currently supported by state court systems would be an important next step for both researchers interested in understanding how the judiciary responds to the trainings currently in place, and for activists both within and outside the court system who are interested in ensuring these programs achieve their goals of educating judges about gender based violence and improving court outputs.

Another direction for future research that builds on the current project's findings would be to look at how the legislation judges are using – the way that sexual assault laws are structured – influences what judges are saying on this issue. While a full assessment of the legislative process involved in shaping, passing, and structuring sexual assault related statutes is beyond the scope of the current analysis, the possibility that reforming the tools that the judiciary uses in these cases – the state laws about sexual violence – could also reform judicial discourse is an intriguing one, with potentially wide reaching effects. Such reforms would involve rephrasing sexual assault legislation with the goal of eliminating rape myth usage within the legislation itself. These effects could be widespread because compared to many other countries, in the United States the constitutional structure of federalism grants the states an opportunity to be creative with their legislation. With the police powers broadly granted to them, states have the power to promulgate and enforce their own laws on a wide range of issues. In specific relation to

rape and sexual assault, this is not an area of the law where some states have legislated and others have not - these are crimes that are illegal and are included in the criminal codes of all the American states. Therefore they are a common focus for the judiciary, regardless of the state in which a judge is working. However, from state to state the way the legislation is phrased is often very different. For instance, behavior that is legally defined as “aggravated sexual assault”<sup>103</sup> in one state is described as “involuntary deviant sexual intercourse”<sup>104</sup> in another jurisdiction. The former emphasizes violence with terms “aggravated” and “assault,” while the latter frames this crime as a moral one by terming such crimes “deviant” rather than violent. Conceivably, this might have an influence on judicial decision-making and discourse.

The structuring of rape laws themselves is critically related to the discourse used to discuss sexual offense, and a study assessing the role of legislation in shaping judicial discourse would be a logical next step in building on the current project. As Rose (1977) observed,

“The argument of many observers, including feminists, is that rape legislation in the United States is primarily based on traditional notions concerning sex roles and sexual standards as well as myths and assumptions about rape, the rapist and the victim” (Rose 1977, 79)

If this is the case, what happens when state sexual assault legislation is remedied, and is no longer based on these myths and assumptions? When the legislation applied by judges is not explicitly based in the rape myth frame, and when judges are well aware of the intentions and goals of these legislative changes, does judicial rape myth usage decrease? If so, the answer to the question of “how do we decrease rape myth usage among members of the judiciary?” might not be getting more women on the court, or by developing and assessing better judicial training programs. Rather, it would somewhat unexpectedly be: through feminist legislative change.

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<sup>103</sup> Illinois’ statutes include this term.

<sup>104</sup> Pennsylvania’s statutes include this term.

Certainly this is an area that has seen significant feminist activism and legislative action. Since the feminist movement began to pursue a campaign to change sexual violence legislation in the 1960s, the laws on this issue have profoundly changed. Corroboration requirements have been radically altered, degrees of rape have been defined, and rape has been established as a “sexually neutral” criminal offence<sup>105</sup> (Rose 1977). In a particularly critical development for the legal reimagining of rape, “[t]he first state rape shield law was passed by Michigan in 1974 and, since then, state rape shield laws have garnered national attention. In 1978, Congress amended the Federal Rules of Evidence, creating Rule 412, commonly known as the rape shield law” (Walters 2008, 719-720).<sup>106</sup> Yet, these changes did not immediately produce observable changes in judicial discourse, so there is reason to be cautious about the effect legislative change alone could have. Though empirical studies on the effect of these laws are lacking, looking at some particularly notable cases in the 1980s, Estrich relayed her observations:

“When I first read cases like *Rusk, Alston, and Mlinarich*, or *Goldberg and Gonzales*... I was surprised to say the least. I was not so surprised that judges in the 1980s continued to think about women and rape in the same way as the law-review writers of the 1950s and 1960s... What was surprising was that, somehow, law reform had not changed all of that.” (Estrich 1987, 80)

Writing several years after Estrich (1987), in 1991 Horney and Spohn undertook a similar project – assessing the differences made by changing rape legislation. Horney and Spohn relied on a

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<sup>105</sup> “Sexually neutral” means that where in the past only women victims of sexual violence were recognized under the law as victims of this crime, now rapes committed against men can also be prosecuted and legally termed “rape.”

<sup>106</sup> As Walters notes, “Rape shield laws are intended to limit the use of a victim’s prior sexual history and address the types of prior conduct that are admissible in court” (Walters 2008, 720). She goes on to observe that, “[r]ape shield laws may not always protect victims by limiting evidence from a victim’s sexual history. Regulations on a state level are still evolving and lead to fluctuating degrees of efficacy. Reasons why the statutes may not always be as effective include the skill level of defense attorneys and the effects of judicial discretion or practitioner error. This ineffectiveness could lead a victim to have less confidence that this or her personal history will be protected, and as a result, may increase reluctance to report crimes or demand justice” (Walters 2008, 745)

broad dataset of rape cases and studied the impact of rape reform legislation on reports of rape and the outcome of rape cases by assessing these outcomes across 20,000 cases in six major urban jurisdictions<sup>107</sup> (Horney and Spohn 1991, 118). While noting reformers were optimistic about the changes this new legislation would bring, Horney and Spohn were more cautious in their predictions based on findings from the extant literature that emphasized “the remarkable capacity of criminal courts to adjust to and effectively thwart reforms” (Eisenstein, Flemming and Narduli, 1988, 296 as cited in Horney and Spohn, 1991, 120). Ultimately, their findings support the previous literature, and Horney and Spohn found that “contrary to reformers’ expectations, the reforms had little effect on reports of rape or the processing of rape cases. The only clear impact of the laws was in Detroit [which had the most complete rape legislation overhaul] and even there the effects were limited” (1991, 129).

While Horney and Spohn’s findings are not a source for optimism about the impact that legislative change can bring to how rape and sexual assault cases are treated by the judicial system, it should be noted that their findings are limited in a few important ways. Firstly, and as they note themselves, they fail to account for method of judicial selection, which is particularly problematic as the reforms they were studying “reflected public demands that rape be treated as a very serious offense” (Horney and Spohn 1991, 147). Had they accounted for this variable, they may have seen results in jurisdictions where the judiciary is elected especially because public opinion on this issue was clear and loud. Secondly, Horney and Spohn measure outcomes that are not discursive, rather, they measured two specific markers of change: a) the average sentence given to those found guilty of sexual assault/rape and compared these sentencing rates before and

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<sup>107</sup> These jurisdictions were as follows: Detroit, Michigan; Cook County (Chicago), Illinois; Philadelphia County (Philadelphia), Pennsylvania; Harris County (Houston), Texas; Fulton County (Atlanta), Georgia; and Washington, D.C. They were selected by Horney and Spohn (1991) because each had enacted a different type of rape law reform.

after reform, and b) reports of rape. In choosing these measures, they noted that here, “reforms may have limited impact because their passage was primarily symbolic” (Horney and Spohn 1991, 121). However, language too is deeply symbolic. Combined with public energy and support for reform, a linguistic shift might have been a more plausible outcome than specific shifts in sentencing or shifts in the amount of rapes reported by the public. The latter – while critically important from the perspective of those seeking justice for victims of rape and sexual assault – seems like a particularly poor measure of legislative reforms<sup>108</sup> because it assumes a very high level of knowledge of the specifics of legislative change among those victimized by sexual violence, and a high degree of trust from these same victims that the changes being studied would have ameliorated the criminal justice system’s treatment of rape victims/survivors.

Interestingly, having relatively feminist legislation in relation to sexual violence itself does not seem to be enough to encourage a state’s judiciary to use significantly fewer rape myths. This can be seen in Table 5A. The results presented in this table represent the addition of a variable measuring the relative feminism of a state’s sexual assault statutes<sup>109</sup> into a probit

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<sup>108</sup> The most common reforms enacted in the jurisdictions assessed by Horney and Spohn include: changes in the definition of rape, elimination of the resistance requirement, elimination of the corroboration requirement, and enactment of a rape shield law (1991, 118).

<sup>109</sup> The violence against women legislation for the sample states was evaluated using Berger, Searles, and Neuman’s (1988) method for evaluating and classifying this type of legislation. Berger et al. based their evaluation of 1985 state violence against women legislation on 5 dimensions of legislation related to violence against women. These include the definition of rape, the spousal-penalty, consent, age, and evidentiary laws. To select the appropriate cases for this analysis, the legislation that was in force in 2012 of all 50 states was ranked according to the first dimension of the Berger et al. ranking system. Berger et al.’s overall ranking of sexual offense statutes involved ranking each state’s legislation along 5 dimensions: how legislation defined major sexual offenses (whether rape versus sexual assault was used, and whether vaginal penetration, penetration, or touching and/or penetration was sufficient for the offense to be applicable), whether the statute defined a single continuum of sexual assault or not (and if not, whether a ranking system of some sort was in place), whether acts other than penetration were criminalized, whether the theoretical victim and/or offender in the statutes were gendered, and whether spousal exemptions for rape or sexual assault are present in the legislation. The first



model similar to those used in Chapters 3 and 4, including the variables found to be significant therein.<sup>110</sup>

The relative feminism of a state's sexual violence statutes is not associated with relatively low levels of judicial rape myth usage in the states studied. Though a consistent effect was found where the more feminist a state's legislation, the less likely that there were rape myth mentions in that state (overall, as well as both reinforcing and challenging), these effects were small, ranging between 0.02 and 0.14. Thus, advocating for and researching the impact of more feminist legislation alone would likely not be the most productive future direction for either research or praxis (although it might create change on a small scale). Rather, what might be required for legislative changes to strongly impact the judiciary is legislative reform coupled with a high profile effort aimed at publicizing these reforms and ensuring their adoption across

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dimension is the one included in the current analysis. This dimension assesses how the offense is defined in the state's legislation, and ranges from "the most traditional statutes, which call the offense 'rape' and limit the crime to vaginal penetration, to the statutes most consistent with feminist goals, which call the offense 'sexual assault' and define the crime more broadly to include sexual penetration generally (i.e., vaginal, oral, and anal) as well as the touching of intimate body parts" (Berger et al., 1988, 338). This feminist push to define rape specifically as "sexual assault" was directly intended to challenge rape myths, as assault is something that by definition, something to which a victim does not consent (see also Bienen, 1980). Using these criteria, Iowa tied with several other states for the highest ("most feminist" legislation) score. The other states ranked "most feminist" – with the highest scores on the above criteria – were Alaska, Connecticut, the District of Columbia, Michigan, Nevada, New Hampshire, Wisconsin, and Wyoming. These are not necessarily the most feminist states in *application* of their sexual violence statutes, but since the focus of this analysis is the discourse used to discuss sexual violence, the phrasing of these statutes is especially relevant regardless of implementation. Indiana ranked among the bottom 5 states. Maryland's legislation ranked as "least feminist." Idaho, Kansas, and Missouri tied with Indiana as the next "least feminist" states when it comes to the language of their VAW statutes. Interestingly, though these two states are very different along this one axis, they have similar levels of incidences of crime and sexual assault, similar scores on political opinion variables, are geographically proximate, and have the same judicial selection methods.

<sup>110</sup> The independent variables included for analysis were critical mass, gender, the interaction of critical mass and gender, nominated party, the intersection of party and gender, and the new sexual assault legislation variable.

state institutions. While the extant research is silent on whether or not this would necessarily be the case, one researcher's observation indicates that this possibility is a reasonable one. As Horney and Spohn note,

“Marsh et al. (1982) quoted a judge who described the Michigan reform: ‘The law was so different from the previous statute, it was so much more comprehensive and complex that it required a total administrative change. It became important for every person in the system to attend seminars and training sessions to determine what the new law would mean for him or her’” (1991, 148)

Ultimately, a full assessment of the potential impact of such a reform is beyond the scope of the current project because it would require time series analyses that the data does not allow. But, a limited plausibility probe into this question indicates there is room for optimism that this could be a productive future direction for research into the variables that impact judicial rape myth usage, and the ways that the use of these discourses can be discouraged. This can be seen by looking at judicial myth usage in a single state: Alaska.

While this was not discussed earlier because it is not an example of rape myth usage, the opinions written in 2012 in the Alaskan context frequently included something notable apart from rape myths: they referenced recent Alaskan legislative reforms to sexual assault statutes. This was unusual, as most opinions coded herein did not mention any sort of relevant legislative action. However here, judges discussed recent legislative reforms that had occurred in relation to this issue as influential upon their jurisprudence. The changes they were referencing included Attorney General Dan Sullivan and Governor Parnell's “Strategic Plan to End the Epidemic of Sexual Assault and Domestic Violence” (Strategic Plan 2010; called the “Choose Respect” Initiative), and the Alaskan Senate Judiciary Committee's recommendations to reduce sexual assault in Alaska. At the time the opinions assessed herein were written, this campaign had been underway for four years, and during that time (and since) it is one that the Governor repeatedly

publicized. Indeed, the high profile nature of this campaign survived Parnell's tenure in office and has continued to be a priority under Governor Bill Walker, who for instance dedicated the entire month of March to be "Sexual Assault Awareness Month" in Alaska (Walker, 2015). Further, between 2012 and 2015 the Alaskan Courts and legislature engaged in an ongoing conversation about these statutes, with the legislature refining these laws in 2013 in response to the courts' treatment<sup>111</sup> of their previous modifications (ASL 2013). In order to test whether this sustained activism has had an effect, the latter half of Alaska's appellate cases relating to sexual assault was coded, using the same methods described in Chapter 2. Comparing the overall use of rape myths in 2012 in Alaska to the universe of opinions written in Alaskan appeals courts in the second half of 2015<sup>112</sup>, it appears that perhaps this legislative impact that was felt in 2012 continued to be influential several years later. This is visible in Figure 5A.

Compared to 2012, in 2015 there were fewer rape myths mentioned by the Alaskan appellate judiciary. This comparatively low rape myth usage also includes a decline in challenges to rape myths and less reinforcing of rape myths, perhaps indicating that judges who are "activated" or "primed" to think that the use of rape myth-based discourse is inappropriate just stay away from using these frames as much as possible (rather than overtly challenging them). This is by no means a conclusive finding that the legislation in question and the political push behind it caused these changes. Rather, the 2015 figures could reflect an overall national trend away from rape myth usage on the part of the judiciary (although based on some notable high profile examples of rape myths being used in state courts, there is not a lot of reason to be optimistic that this is the case). Or, it could be that Alaskan trends 2012 were unusual, and the

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<sup>111</sup> This was to alter judicial interpretation of "legislative intent regarding standards for referring sex offenders to a three-judge sentencing panel" (Geraghty 2013).

<sup>112</sup> Cases were from July 1, 2015 until December 31, 2015.

2015 figures are more representative of the norm. However, these findings indicate that more research into the potential for legislative reform to drive down judicial rape myth usage is warranted. Developing this understanding is not only important to building an even more nuanced understanding of rape myth usage, but if this influence *can* be seen, this has important implications for reformers seeking to make the criminal justice system one that is more hospitable to rape victims, less dismissive of their claims, and more challenging of rape mythologies.

### **Conclusion**

This study emerged out of a question about whether or not over 20 years after the passage of the Violence Against Women Act, feminist sociolegal criticisms about rape trials still rang true. For decades, criticisms abounded, alleging that the rape trial embodies

“all that is problematic about the legal system for women. From the revictimization of rape victims to the legitimization of normative views of female and male sexuality, the discriminatory qualities of rape trials have led some feminist legal theorists to conclude that ‘judicial rape’ can be more damaging than actual rape, ‘masquerading ‘ as it does ‘under the name of justice’” (Ehrlich 2001, 1)

While Ehrlich’s assessment is damning, there was little in the extant literature that proved this remained the case. Rather, many reformers argue that it is not, and scholars occasionally supported this contention, indicating “judges are, and have been, taking intimate violence against women seriously” (Crocker 2005, 218). However, these studies were limited in scope, and were largely centered around the study of several cases, rather than a more comprehensive assessment of judicial language which is included herein. As such, this study marks a critical step forward in our understanding of the impact of rape culture on judicial outputs, when and why this discourse is more or less prevalent and how some of the most powerful actors in the legal system – judges

– have been challenging and sometimes embracing a more feminist understanding of sexual violence. Clearly, these problematic discourses have not dropped out of the judiciary’s lexicon, though encouragingly there are some rape myths that have largely disappeared from judicial speech.

Possible ways to challenge the continued hegemony of these myths also emerge from these studies. The election or appointment of Democratic women and men and women who focus in their legal careers on gendered issues, as they are associated with lower myth use could be a promising group of judges for reformers to recruit and support. Further, the achieving of a critical mass of women on the bench would another evidence-based path forward for reformers to pursue.

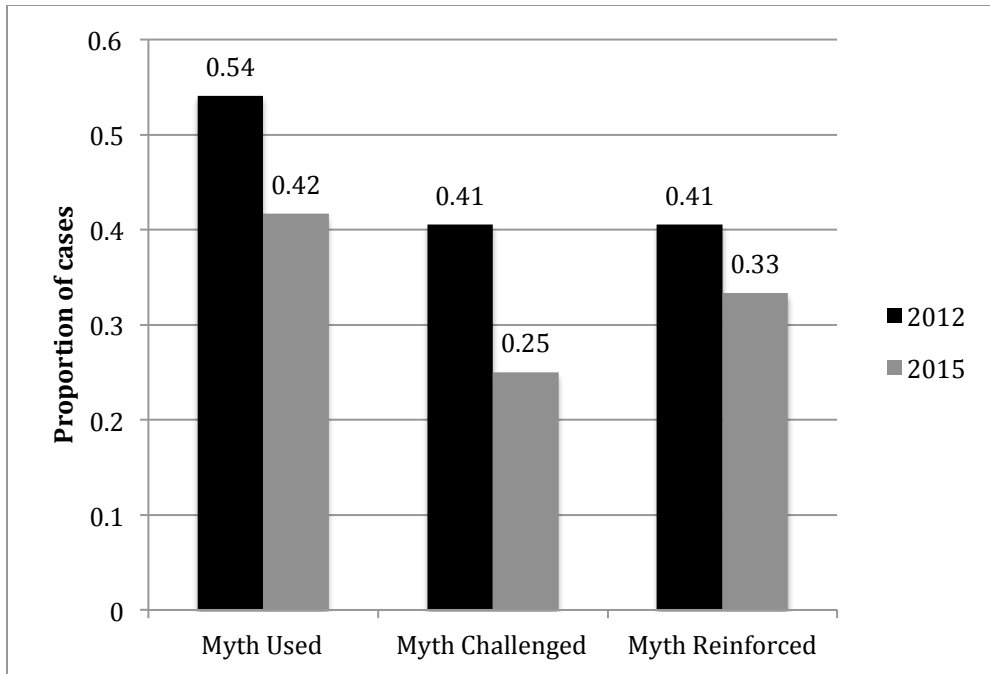
## Tables and Figures

**Table 5A: Relative Feminism of Sexual Violence Laws**

Variable	Constant	Estimate	Change in X (from, to)	First difference
All myths (both)	0.17	-0.19	(1,7)	-0.07
All myths (reinforced)	0.04	-0.36	(1,7)	-0.14
All myths (challenged)	-0.28	-0.04	(1,7)	-0.02
Not vioence (both)	-0.72	-0.24	(1,7)	-0.09
Not violence (reinforced)	-1.33	-0.07	(1,7)	-0.02
Not violence (challenged)	-0.45	-0.42	(1,7)	-0.08
N	439			

Model includes independent variables critical mass, gender, critical mass\*gender, nominated party, party\*gender, and the new sexual assault legislation variable.

All estimates are X at 7 (most feminist legislation)



**Figure 5A: Rape Myth Usage in Alaska Appellate Court 2012 and 2015**

## APPENDIX

### **Appendix 1: Rape Myth Subframes (disaggregated by subject)**

#### *Victim-centered myths*

1. The victim is lying
2. The victim asked for it
3. The victim wanted it
4. Rape only happens to certain types of women
5. The victim's emotional reaction is relevant to her victimization/truthfulness

#### *Rapist-centered myths*

6. He didn't mean to
7. He is not the kind of guy to commit such an offence

#### *Myths about rape/sexual assault in general*

8. Rape is trivial
9. Rape is characterized as erotic or affectionate
10. Rape is distinct from violence
11. Rape as a crime with uniquely moral implications



**Appendix 2A: Sec. 40412 of VAWA – Categories of Training Provided by VAWA Grants**  
(source: H.R. 3355, 1994, 148-149)

- (1) the nature and incidence of rape and sexual assault by strangers and nonstrangers, marital rape, and incest;
- (2) the underreporting of rape, sexual assault, and child sexual abuse;
- (3) the physical, psychological, and economic impact of rape and sexual assault on the victim, the costs to society, and the implications for sentencing;
- (4) the psychology of sex offenders, their high rate of recidivism, and the implications for sentencing;
- (5) the historical evolution of laws and attitudes on rape and sexual assault;
- (6) sex stereotyping of female and male victims of rape and sexual assault, racial stereotyping of rape victims and defendants, and the impact of such stereotypes on credibility of witnesses, sentencing, and other aspects of the administration of justice;
- (7) application of rape shield laws and other limits on introduction of evidence that may subject victims to improper sex stereotyping and harassment in both rape and nonrape cases, including the need for sua sponte judicial intervention in inappropriate cross-examination;
- (8) the use of expert witness testimony on rape trauma syndrome, child sexual abuse accommodation syndrome, post-traumatic stress syndrome, and similar issues;
- (9) the legitimate reasons why victims of rape, sexual assault, and incest may refuse to testify against a defendant;
- (10) the nature and incidence of domestic violence;
- (11) the physical, psychological, and economic impact of domestic violence on the victim, the costs to society, and the implications for court procedures and sentencing;
- (12) the psychology and self-presentation of batterers and victims and the implications for court proceedings and credibility of witnesses;
- (13) sex stereotyping of female and male victims of domestic violence, myths about presence or absence of domestic violence in certain racial, ethnic, religious, or socioeconomic groups, and their impact on the administration of justice;
- (14) historical evolution of laws and attitudes on domestic violence;
- (15) proper and improper interpretations of the defenses of self-defense and provocation, and the use of expert witness testimony on battered woman syndrome;

(16) the likelihood of retaliation, recidivism, and escalation of violence by batterers, and the potential impact of incarceration and other meaningful sanctions for acts of domestic violence including violations of orders of protection;

(17) economic, psychological, social and institutional reasons for victims' inability to leave the batterer, to report domestic violence or to follow through on complaints, including the influence of lack of support from police, judges, and court personnel, and the legitimate reasons why victims of domestic violence may refuse to testify against a defendant;

(18) the need for orders of protection, and the implications of mutual orders of protection, dual arrest policies, and mediation in domestic violence cases; and

(19) recognition of and response to gender-motivated crimes of violence other than rape, sexual assault and domestic violence, such as mass or serial murder motivated by the gender of the victims.

**Appendix 2B: Amendments Related to Court Training and Improvement Made to the Violence Against Women Act of 1994 made in H.R. 3402** (The 2005 Reauthorization of The Violence Against Women Act) (From H.R. 3402, 2005, 20-21)

“Subtitle J—Violence Against Women Act Court Training and Improvements

“SEC. 41001. SHORT TITLE.

“This subtitle may be cited as the ‘Violence Against Women Act Court Training and Improvements Act of 2005’.

“SEC. 41002. PURPOSE.

“The purpose of this subtitle is to enable the Attorney General, through the Director of the Office on Violence Against Women, to award grants to improve court responses to adult and youth domestic violence, dating violence, sexual assault, and stalking to be used for—

“(1) improved internal civil and criminal court functions, responses, practices, and procedures;

“(2) education for court-based and court-related personnel on issues relating to victims’ needs, including safety, security, privacy, confidentiality, and economic independence, as well as information about perpetrator behavior and best practices for holding perpetrators accountable;

“(3) collaboration and training with Federal, State, tribal, territorial, and local public agencies and officials and nonprofit, nongovernmental organizations to improve implementation and H. R. 3402—21 enforcement of relevant Federal, State, tribal, territorial, and local law;

“(4) enabling courts or court-based or court-related programs to develop new or enhance current—

“(A) court infrastructure (such as specialized courts, dockets, intake centers, or interpreter services);

“(B) community-based initiatives within the court system (such as court watch programs, victim assistants, or community-based supplementary services);

“(C) offender management, monitoring, and accountability programs;

“(D) safe and confidential information-storage and-sharing databases within and between court systems;

“(E) education and outreach programs to improve community access, including enhanced access for underserved populations; and

“(F) other projects likely to improve court responses to domestic violence, dating violence, sexual assault, and stalking; and

“(5) providing technical assistance to Federal, State, tribal, territorial, or local courts wishing to improve their practices and procedures or to develop new programs.

Appendix 2C: Recent Media Use of the “Rape Distinct from Violence” frame

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# Ex-Subway pitchman admits to child porn, ~~underage sex~~ STATUTORY RAPE

BY DREW HARWELL AND ABBY PHILLIP **RAPING**

Jared Fogle, the fat-shedding “Subway guy” and former face of the world’s largest restaurant chain, agreed Wednesday to a plea deal for possessing child pornography and ~~having sex with~~ **RAPING** underage girls, a precipitous fall for an American everyman held up as a model for healthy living.

Between 2007 and this summer, prosecutors said, Fogle paid for and planned his business travel around repeated ~~sexual encounters with~~ **RAPING** underage girls. With his partner in the Jared Foundation, a childhood-obesity charity, Fogle also traded lurid pictures and videos of nude children as young as 6; they said.

Fogle, 37, agreed to a deal Wednesday morning at an Indianapolis courthouse ringed by lawyers and federal marshals. As part of the deal, Fogle agreed to serve at least five years in prison and pay



MICHAEL CONROY/ASSOCIATED PRESS

**Jared Fogle leaves the federal courthouse in Indianapolis. In a statement, Subway called its ex-spokesman’s acts “inexcusable.”**

\$100,000 to each of 14 victims to fund counseling, treatment and other assistance.

The charges marked a stunning end for the surprise-star role model and suburban family man, whose affable tale of achievable weight loss touched a nerve in a nation growing increasingly overweight.

In his prime, Fogle spoke about

SUBWAY CONTINUED ON A4  
**GRAPES OF**

Note: image above was edited by Erin Matson, who then posted it on Facebook on August 20, 2015. This image was shared over 32 thousand times within 3 days. (Matson, 2015).

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