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# CONFINED TO A NARRATIVE: APPROACHING RAPE SHIELD LAWS THROUGH LEGAL NARRATOLOGY

KATHRYN C. SWISS\*

## INTRODUCTION

The law is immersed in narrative. This is particularly true within the space of trials, where participants share in the forming of narratives that are then judged by juries.<sup>1</sup> Yet the jury functions in a way no audience of literature ever could: the jury determines what is and is not the “true” narration of events.<sup>2</sup> Juries determine believability, and in doing so, inevitably privilege one narrative over another. In this way, legal narratives are distinguishable from literary fictions because the law presents itself as a self-enclosed system where truth (or at least truth beyond a reasonable doubt) is obtainable.<sup>3</sup> Rather than acting as an audience that suspends disbelief in order to submerge the mind in a fictitious realm, the purpose of the jury is to judge analytically which presented combination of facts comprises the “true” narrative of the events being adjudicated.

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1. See W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981) (introducing the notion that the criminal trial is organized around storytelling); see also J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53, 58 (2008) (describing narratives as “innate” to our “understanding and structuring of human experience,” and therefore persuasive and integral to the trial setting).

2. This is not to say that juries determine any sort of absolute “Truth” of events. Rather, it is to emphasize that the law requires that juries meet an extremely high threshold of human certainty when adjudging a trial. In a criminal trial, the burden of proof imposed on the prosecutor is to persuade the factfinder “beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged.” *In re Winship*, 397 U.S. 358, 364 (1970). Jurors are required to “reach a ‘subjective state of near certitude’” of guilt. *McCullough v. State*, 657 P.2d 1157, 1158 (Nev. 1983) (per curiam) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)). The burden implied by the reasonable doubt standard is “the highest burden recognized in the law.” JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 76 (5th ed., 2009).

3. Much philosophical debate exists over whether the law is, or could ever be, completely “self-enclosed.” Yet I argue that the law endeavors to control its own language and construct rules that determine specific outcomes because it builds a lexicon of terms and then structures the narrative capacity for story-telling through rules of evidence and procedure. Similarly, the law may not purport to find the absolute “Truth” outside a legal realm, but it does claim to establish truth—beyond a reasonable doubt—within its own framework.

Yet while the structure and purpose of the legal system necessarily separate law from what most would deem “literature,” the law is inherently literary. As Robert Cover noted in the seminal essay *Nomos and Narrative*, “no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”<sup>4</sup> Law’s meaning is tied to the narratives that convey it. Since the entire framework of the law, from the codification of laws to the medium of judicial opinions and everything in between, comingles with literature and specifically with narrative, those who study the judicial process should not undervalue the capabilities of narrative.

Narratology, the field of study that analyzes the structure of narratives, understands narratives as inherently comprised of a finite set of linguistic formulations.<sup>5</sup> Because narratives are finite, all details within a story are significant to the audience’s perception of events.<sup>6</sup> At its core, narratology is concerned with the way in which specific structural elements of a story are utilized and ordered to construct meaning. How the structure of story-telling shapes a person’s epistemological understanding of events is an important legal question because the judicial process hinges on the adjudication of narratives. To elucidate the power of narrative, this paper will consider the ways in which rape shield laws “shape” the narrative space, and thus the narrative capacity, of rape victims.

Initially, rape shield laws were enacted<sup>7</sup> by the federal government and individual states with the intent of protecting any rape victim from having her<sup>8</sup> testimony scrutinized and her credibility as a witness called into

4. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (footnote omitted).

5. Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1, 2 (2006).

6. In trials, given the rules of evidence, there is an implicit understanding that all the information being introduced is relevant to the story being narrated. Like the famous example of Chekhov’s gun, “[I]f in the first chapter you say that a gun hung on the wall, in the second or third chapter it must without fail be discharged,” all evidence introduced in trials is relevant to the events being narrated and adjudicated. See Alan M. Dershowitz, *Life Is Not a Dramatic Narrative*, in *Law’s Stories: Narrative and Rhetoric in the Law* (Peter Brooks & Paul Gerwitz eds., 1996) citing to ANTON TCHEKHOV: LITERARY AND THEATRICAL REMINISCENCES 23 (S.S. Kotlianky ed. & trans., 1974).

7. For a history of rape shield laws in the United States from the late 1970s into the 1980s see Thomas Mitchell, *We’re Only Fooling Ourselves: A Critical Analysis of the Biases Inherent in the Legal System’s Treatment of Rape Victims*, 18 BUFF. J. GENDER, L. & SOC. POL’Y 73 (2009).

8. While recognizing that rape is not a specifically gendered crime, this paper will only consider how rape shield laws confine women to certain narratives by constraining them to characterizations that conform to the notion that only some types of women are truly “rapeable.” This paper will only deal with the way the law confines female rape victims’ access to justice.

question based on her past sexual history.<sup>9</sup> The purpose underlying the creation of these laws was to counter the historically entrenched societal belief that (female) chastity correlated with female veracity.<sup>10</sup> For example, in an 1895 opinion, the Missouri Supreme Court claimed that it was a matter of “common knowledge” that a woman’s capacity for truthfulness (but not a man’s capacity for truthfulness) was inherently linked to chastity:

It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman. It is no compliment to a woman to measure her character for truth by the same standard that you do that of a man’s predicated upon character for chastity. What destroys the standing of the one in all the walks of life has no effect whatever on the standing for the truth of the other.<sup>11</sup>

Rape shield laws sought to correct the ingrained association between a woman’s credibility and her chastity by shielding a victim from inquiries into her sexual history when she took the witness stand.

Prior to the enactment of rape shield laws, victims of sexual crimes consistently had their credibility impeached through evidence of prior sexual conduct.<sup>12</sup> The Federal Rules of Evidence indicate that “[a]ny party, including the party that called the witness, may attack the witness’s credibility,”<sup>13</sup> As such, a defendant in a rape case would often challenge the credibility of the victim’s testimony at trial in cross-examination via the insinuation that because of her previous sexual activity, the victim was lying in her assertions of rape.<sup>14</sup> Reacting to this prevalent impeachment tactic, feminist activists, legislatures, and lawyers alike pushed for the enactment of rape shield laws in order to “shield” a woman’s sexual history from being considered relevant to her credibility in a rape trial. By the early 1980s almost every jurisdiction in the United States had enacted these laws.<sup>15</sup>

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9. See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002) [hereinafter Anderson, *Sexual Consent*].

10. See Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461 (2012).

11. *State v. Sibley*, 33 S.W. 167, 171 (Mo. 1895).

12. Anderson, *Sexual Consent*, *supra* note 9, at 69.

13. Fed. R. Evid. 607

14. Anderson, *Sexual Consent*, *supra* note 9, at 69.

15. Shawn Wallach, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant’s Constitutional Rights*, 13 N.Y.L. SCH. J. HUM. RTS. 485, 488 (1997).

My argument is that while these laws served a much-needed function in the evolution of rape law, the time has come to abandon rape shield laws and adopt a separate framework altogether. Rape shield laws contribute to society's stereotyping of rape into a single story—a story that reifies “racist and sexist mythology” and ignores the much more pervasive narrative of acquaintance rape.<sup>16</sup> In shielding past sexual experiences from the view of the courtroom, the law essentially denies that such experiences exist, rather than enforcing the notion that such an inquiry is simply not *relevant* to the events being adjudicated.<sup>17</sup> These laws are harmful to most victims of rape<sup>18</sup> because rape shield laws reify a framework that ignores the narrative of consent. The question presented in trial is hence turned away from a factual inquiry into the incident and instead towards the stereotyping of a victim's narrative into two characterizations: a narrative about a victim or a narrative about a woman that, by virtue of her sexual experiences, lacks the credibility to claim rape.<sup>19</sup>

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16. Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 645 (2010) [hereinafter Anderson, *Negative Social Attitudes*].

17. Whether this is intentional is not an important inquiry. I do not argue that the rape shield laws were ever intended to imply that only chaste women have protection from the law. Yet I do think that such is their effect, and that therefore an analysis of the way in which they shape and value certain narratives is an important inquiry into whether they indeed serve the purposes of justice.

18. Additionally, another area in which narratology could be an avenue of study is the intersection between psychology and narrative in rape survivors. For a consideration of persons who survive abusive encounters and how in turn have their “sexual script” is shaped by those encounters, see Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703 (2000). Oberman notes that “abusive encounters may develop [into] a ‘sexual script’” wherein the victim may come to “model future sexual interactions based on their early, exploitative experiences.” *Id.* at 730 (citation omitted). The author notes that this modeling affects the victim, who “may come to eroticize the power differentials inherent in the exploitative relationship she survived.” *Id.* Oberman's argument here relies on the study conducted by Diana Russell that found that amongst a study group of women who had survived child sexual abuse, “between 38% and 48% of the survivors . . . had physically abusive husbands, compared with 17% of women who were not child sexual abuse victims.” *Id.* (citation omitted). The research also indicated that:

[A] startlingly high percentage of adult female prostitutes are survivors of childhood sexual abuse. One study of 136 prostitutes found that 55% had their first sexual encounter as children, with someone ten or more years their senior. Sixty-five percent of these women reported having been forced into sexual activity before age sixteen.

Inherent in the foregoing data is the problem of revictimization. Survivors of early and exploitative sexual relations are at increased risk for further abuse as they move through adolescence and into adulthood.

*Id.* (citations omitted). See also DIANA E. H. RUSSELL, *THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN* (1999).

19. This argument is predicated on the belief that the law not only reflects but also influences the stereotypes that are prevalent in social thought. See Catharine A. MacKinnon, *Law's Stories as Reality and Politics*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 232, 235 (Peter Brooks & Paul Gewirtz eds., 1996) (recognizing that “[s]tories break stereotypes, but stereotypes are also

In order to argue that rape shield laws reinforce stereotypical characterizations of women and confine women to certain narratives so that those narratives may be believed by their audience, this paper first examines what narratology is and how narratology can be a useful lens through which to analyze the law. The second section then turns to the history of rape shield laws and the theoretical justifications for their implementation. In this section I will also consider what rape shield laws do not cover—namely sexual history between the victim and the accused in any case of acquaintance rape. The third section offers a narrative analysis of how rape shield laws limit women to narrate an archetypal “story” in order to be believed in a courtroom. The fourth section will consider how the biases of juries, who act as the “audience,” shape the narrative of rape trials. In the final section I contend that the law needs to recognize that rape shield laws reinforce the traditional rape narrative. In turn, rape shield laws should give way to a legal definition of rape that is centered on the isolated event of consent. This recentering would draw character stereotypes and traditional narratives out of the rape framework, and open a space for the law to finally grapple with the idea that rape is not confined to an archetypal narrative.

## I. NARRATOLOGY

### A. *What is Narratology?*

A key figure in the field of narratology is the French literary scholar Roland Barthes.<sup>20</sup> Barthes, drawing from a variety of literary, sociological, and philosophical movements, introduced narratology as a theoretical approach to studying how literature imparts meaning. Barthes contended that the foundation for the underlying questions narratology seeks to address was formed by “the Russian formalists, Propp, and Levi-Strauss” who identified “the following dilemma: either narrative is a random assemblage of events, in which case one can only speak of it in terms of the narrator’s (the author’s) art, talent, or genius—all mythical embodiments of chance; or else it shares with other narratives a common

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stories”) [hereinafter MacKinnon, *Law’s Stories as Reality*]. If the law can emerge from its current stereotypical understanding of rape and recognize that other narratives define rape, then such a shift could lead to change in social thought as well.

20. For a summary of Roland Barthes’ literary theories and the subsequent influence of his body of work, see the introduction by Susan Sontag, *Writing Itself: On Roland Barthes*, in *A BARTHES READER* vii (Susan Sontag ed., 1982).

structure open to analysis . . . .”<sup>21</sup> Rather than a random collage of linguistic patterns and events, Barthes concluded that narrative is an incredibly structured and complex system. Barthes recognized that this system is fundamentally necessary to any author’s creation of narrative and that “no one can produce a narrative without referring himself to an implicit system of units and rules.”<sup>22</sup>

At the base of an understanding of narratology is the principle that narrative is a means by which we both collectively as a society, and independently as individuals, construct reality.<sup>23</sup> If we understand narratology to be derived from the endeavors of structuralism, we can see that the project of narratology seeks to extend structuralism’s aim of searching for the implicit system of rules and components within a sentence to finding those same rules beyond that sentence. Thus those that engage with narratology attempt to analyze the structure of the different linguistic forms that underlie a narrative text as a whole.<sup>24</sup> The intent is that by isolating certain narrative functions, we may be able to understand how those functions affect interpretation and the conveyance of meaning. In this way, narratology seeks to better understand how meaning is both imparted by the text and constructed by the reader via the vehicle that is narrative.

Narratology thus takes the project of structuralism and applies it on a larger scale to the study of an entire narrative account.<sup>25</sup> The structuralist influence on narratology is reflected in Peter Brooks’ definition of the project of narratology as an analysis of the

minimal units of narrative and how they combine in a plot; to how we understand the initiation and completion of an action; to standard narrative sequences (stock stories); to the movement of a narrative through a state of disequilibrium to a final outcome that

21. Roland Barthes & Lionel Duisit, *An Introduction to the Structural Analysis of Narrative*, 6 NEW LITERARY HIST. 237, 238 (1975) (footnote omitted).

22. *Id.*

23. Peter Brooks, *Narrativity of the Law*, 14 L. & LITERATURE 1, 1 (2002).

24. For a summary of the history of the field of law and literature, see Debora L. Threedy, *The Madness of a Seduced Woman: Gender, Law, and Literature*, 6 TEX. J. WOMEN & L. 1 (1996).

25. Barthes & Duisit, *supra* note 21, at 238. Barthes and Duisit note that one of “structuralism’s main preoccupations” is to control

the infinite variety of speech acts by attempting to describe the language or *langue* from which they originate, and from which they can be derived[.] Faced with an infinite number of narratives and the many standpoints from which they can be considered . . . the analyst is roughly in the same situation as Saussure, who was faced with desultory fragments of language, seeking to extract, from the apparent anarchy of messages, a classifying principle and a central vantage point for his description.*Id.*

re-establishes order. Narratology also considers perspectives of telling: who sees and who tells; the explicit or implicit relation of the teller to what is told; the varying temporal modalities between the told and its telling.

Most important, perhaps, narratology postulates a fundamental distinction between events in the world and the ways in which they are presented in a narrative discourse, demonstrating that storytelling always attempts to give some shape and significance to life.<sup>26</sup>

Narrative recognizes a shared code between audience and author. Rather than approach literature through, say, aesthetics, narratology endeavors to comprehend how both the author and audience construct meaning out of a finite set of linguistic functions.<sup>27</sup>

Barthes noted that since “narrative is made up solely of functions: everything, in one way or another, is significant. It is not so much a matter of art (on the part of the narrator) as it is a matter of structure.”<sup>28</sup> Thus, because narrative is finite, all things within narrative, even if they seem trivial (accessory to the development of the plot), are considered significant to the whole. This is an important concept to remember as we apply narratology to the law: because law reinforces the notion that the structuring of events within a finite space in which we tell a story, all details introduced in that story are integral to the narrative. Thus everything introduced in a trial is “relevant” to the story being told.

It is crucial for the law to consider the power of narratives, especially “dominant” narratives. I use “dominant” to describe the narratives that are embedded in definitions of individual words. For example, the definition of the word “theft” can be conceived of in the abstract, but is generally defined and thought of through a narrative of events. Thus if certain narratives constitute our understanding of certain crimes, how can the law utilize narratology to counteract expectations and broaden the space available for victims?

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26. Brooks, *Narrative Transactions*, *supra* note 5, at 24 (citations omitted).

27. See Rideout, *supra* note 1. See also DAVID RAY PAPKE, *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* (1991).

28. Barthes & Duisuit, *supra* note 21, at 244.



*B. Why Use Narratology to Analyze the Law?*

Debate over if and how narratology should relate to the study of law is prevalent.<sup>29</sup> Many legal scholars hold diametrically opposing beliefs as to how the study of narrative should factor into legal theory. This conflict may have to do with the law's apprehension of being associated with a realm of thought that deals primarily with fictitious storytelling and not with actuality or truth. Unlike the law, literature makes no attempt to locate a standard of truth, nor to impart to its readers with a sense of certainty beyond a reasonable doubt. Thus, the intersection between the two fields is not without its tensions. Brooks has described the legal community's apprehension with regard to narratology as a fear concerned with authenticity of narrative.<sup>30</sup> Brooks writes:

The legal storytelling movement has tended to valorize narrative as more authentic, concrete, and embodied than traditional legal syllogism. But as many of the contributors here point out, storytelling is a moral chameleon, capable of promoting the worse as well as the better cause every bit as much as legal sophistry. It can make no superior ethical claim. It is not, to be sure, morally neutral, for it always seeks to induce a point of view. Storytelling, one can conclude, is never innocent. If you listen with attention to a story well told, you are implicated by and in it.<sup>31</sup>

Though many may view narrative's capacity to act as a vehicle for storytelling as a positive quality and as a route of "dissent from traditional forms of legal reasoning and syllogism," the study of narratives' important message is that *how* you tell a story will invariably affect the imparting of meaning, and thus, truthfulness.<sup>32</sup> As Catharine MacKinnon notes, the "ultimate risk of storytelling as method" is lying.<sup>33</sup> While I make no

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29. With regards to the question of whether narratology should be applied to the law, Peter Brooks has stated that "narratology—the analytic study of the phenomenon of narrativity and its various discursive manifestations—has developed some hypotheses, distinctions, and analytic methods that could be useful to legal scholars, if they were to pay attention." Peter Brooks, *The Law as Narrative and Rhetoric*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 14, 17 (Peter Brooks & Paul Gewirtz eds., 1996) [hereinafter Brooks, *Law as Narrative*]. For further reading on the debate over the proper role of narrative, see generally *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (Peter Brooks & Paul Gewirtz eds., 1996). See also Brooks, *Narrative Transactions*, *supra* note 5; MacKinnon, *Law's Stories as Reality*, *supra* note 19, at 232; Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737 (1997).

30. See Brooks, *Narrative Transactions*, *supra* note 5.

31. Brooks, *Law as Narrative*, *supra* note 29, at 16.

32. *Id.*

33. MacKinnon, *Law's Stories as Reality*, *supra* note 19, at 235.

claims to the capacity for veracity that narrative holds as compared to any other forms of discourse, I do believe that narratology offers a unique vantage point from which traditionally excluded “voices” or “stories” can find a foothold in a legal framework that might otherwise exclude them.

Another issue underpinning the debate on whether and in what way the study of narrative should relate to the law is how narrative structures relate to epistemology. As Christopher Rideout notes, a fundamental inquiry underlying the study of narratology is whether narrative structures are merely forms of language that are “congruent with reality, or . . . some type of Kantian category, a structure of the mind that pre-exists and shapes our understanding of experience[.]”<sup>34</sup> The central question in the literature surrounding the psychologically fundamental nature of narrative is whether narrative structures are “endogenous,” or inherent to the structure of the mind and/or language, or whether they are “exogenous” and thus “lie outside linguistic or psychological structures . . . .”<sup>35</sup>

In coming to the conclusion that narratology can help us isolate narrative fidelity, Rideout draws on the work of Robert Burns.<sup>36</sup> Burns emphasized the importance of narrative, arguing that it:

[F]orms the deep structure of human action. In other words, the bedrock of human events is not a mere sequence upon which narrative is imposed but a configured sequence that has narrative character all the way down. To act at all is to hold an immediate past in memory, to anticipate a goal, and to organize means to achieve that goal—analogously, the “beginning, middle, and end” of a well-constructed story. Both action and storytelling are intrinsically chronological and logical . . . .<sup>37</sup>

Rideout’s emphasis on distinguishing the epistemological foundation of narrative in human psychology may not be completely necessary for those who endeavor to use narratology as a lens to view the law. While this may be an important distinction generally, and especially to the nexus that exists between literature and psychology, whether narrative structure is innate or external may be unnecessary for the purposes of a narratological analysis of the law. At the utmost, this is a question of how we perceive and conceive of ideas, and what role narrative plays in that understanding.

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34. Rideout, *supra* note 1, at 58. Rideout spends the first portion of his article summarizing the various theories regarding the epistemological underpinnings of narrative.

35. *Id.*

36. *See generally id.*

37. ROBERT P. BURNS, A THEORY OF THE TRIAL 222 (1999) (footnotes omitted).

On a more pragmatic level however, the epistemological distinction could be helpful, but not required, to use narratology to approach how jury bias and the structure of trials affect the outcome of cases.<sup>38</sup>

Another much debated question surrounding the application of narratology is whether narratives inform law or vice versa. For example, Jonathan H. Grossman claims that “novels were shaped by the complementary and competing storytelling structure of law courts” through the “presentations of conflicting narratives . . . .”<sup>39</sup> Still others argue that, particularly in our current media culture, literature has shaped how we approach the law, the implicit roles we expect the legal system to play, and our definitions of crime.<sup>40</sup> Many conceive of this relationship as mutually informing, while others contend that the law strives to be hermetic from literature.<sup>41</sup> Thus for many, the role the study of narrative should play in the law depends deeply on the answer to the question: which influences which—the law or narrative?

Perhaps there are answers to these fundamental questions regarding the intersection of disciplines and the epistemology of narratives, but although I think it is important to acknowledge their existence, I do not believe that one theoretical formulation or the other would ever obviate the utility of a narratological analysis of the law. While the foundational philosophic questions may be how narrative operates within the mind and between disciplines, the question most applicable to the project of this paper is whether narratology, in its current form as an analytical tool, *should* be used to approach law.

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38. See Paul Gewirtz, *Narrative and Rhetoric in the Law*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 7, 9 (Peter Brooks & Paul Gewirtz eds., 1996). Gewirtz differentiates legal narratives from other forms of narrative in that the stakes are different for legal rhetoric. Gewirtz writes:

The goal of storytelling in law is to persuade an official decisionmaker that one’s story is true, to win the case, and thus to invoke the coercive force of the state on one’s own behalf. . . . Robert Cover . . . was right to underscore that the words of court decisions have a force that differentiates them from most other utterances. However provocative and generative it may be to treat law as literature, we must never forget that law is not literature.

*Id.* at 5.

39. Deborah B. Luyster, *English Law Courts and the Novel*, 14 *L. & LITERATURE* 595, 595 (2002) (citing arguments presented by Jonathan H. Grossman in *THE ART OF ALIBI: ENGLISH LAW COURTS AND THE NOVEL* (2002)). Luyster argues that Grossman’s understanding of narrativity in the law is somewhat flawed in that it “does not discuss the expectations accompanying all storytelling and the inherent risks of marshaling trial evidence into the framework of a story.” *Id.* at 596.

40. See Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 *WIS. L. REV.* 527 (1986); see also David Ray Papke, *Conventional Wisdom: The Courtroom Trial in American Popular Culture*, 82 *MARQ. L. REV.* 471 (1999).

41. See *supra* note 29.

Many scholars, including Peter Brooks, have argued that narratology is not only applicable but also crucial to the study of law.<sup>42</sup> This contention is met with opposition, as others have argued that the two fields of study should remain wholly separate. For example, Alan Dershowitz considers narrative as a field in opposition to the aims of justice and claims that when we “import the narrative form of storytelling into our legal system, we confuse fiction with fact and endanger the truth-finding function of the adjudication process.”<sup>43</sup>

Though the law may idealize itself as insular and may strive for complete autonomy from other disciplines, we should not forget that as long as human actors (whose thoughts and expectations are shaped by narratives) continue to involve themselves in the process of justice, complete isolation will remain a goal that the law will never be able to fully attain. This impossibility is especially true with regard to the legal system’s fundamental belief that adjudication should involve judgment by society through the mechanism of juries. People compose juries, and people are greatly influenced by the empathy evoked through storytelling. For example, in her article on victim impact statements, Erin Sheley draws from the famous study conducted by Pennington and Hastie that considered the “story model” inherent in trials and found that juries, when

deciding upon the guilt or innocence of a defendant, make these decision by selecting the more appealing of the two narratives placed before them by the prosecution and the defense, rather than simply deciding whether the prosecution has in fact established individual elements of a crime beyond a reasonable doubt.<sup>44</sup>

If such is the case, we cannot ignore narratives or narratology, even if we wish to banish both from the legal realm. Narrative is of fundamental importance to understanding the law.

The Supreme Court has recognized narrative’s importance. In *Old Chief v. United States*, Justice Souter, writing for the majority regarding about the rules under which evidence can be admitted, wrote that

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42. Brooks, *Narrative Transactions*, *supra* note 5, at 28. For the argument that the study of narrative has helped recognize the stories ignored by the legal system and “has been particularly attractive to those looking at how traditional legal discourse tends to silence the marginalized, such as women and minorities,” see Threedy, *supra* note 24, at 17.

43. Dershowitz, *supra* note 6, at 99, 101.

44. Erin Sheley, *Reverberations of the Victim’s “Voice”: Victim Impact Statements and the Cultural Project of Punishment*, 87 IND. L.J. 1247, 1258 (2012) (citing a study by Nancy Pennington and Reid Hastie found in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 192 (Reid Hastie ed., 1993)).

“persuasion needs evidentiary depth to tell a continuous story . . . .”<sup>45</sup> The need for certain evidence to be included in trials is based in part on the need to tell a complete story:

A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story’s truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.<sup>46</sup>

Souter recognizes that narratives have their place in any trial and that “making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness.”<sup>47</sup> This “descriptive richness” is desirable to any attorney or advocate because of its capacity to persuade a jury.<sup>48</sup>

If storytelling is a mechanism by which we convince juries of veracity, then the stories themselves must be analyzed. Particularly, in the case of rape, how does our expectation of the narrative that constitutes “rape” shape the law, and how does that expectation affect persons whose stories do not fit within the narrative structure that is expected? Do rape shield laws enforce the stereotype of a certain type of victim? If so, does this open an even greater space for jury bias, since individual stories must conform to a preconceived narrative?

## II. HISTORY OF RAPE SHIELD LAWS

Before these questions can be considered, a brief summary of rape shield laws should be addressed. Prior to the enactment of rape shield laws, a great discrepancy existed between how a rape victim deemed “chaste” was treated when compared to those who were deemed

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45. *Old Chief v. United States*, 519 U.S. 172, 190 (1997).

46. *Id.* at 189.

47. *Id.* at 187.

48. *Id.*

“unchaste.”<sup>49</sup> Lack of chastity was used as an indicator that a woman had a propensity for dishonesty.<sup>50</sup> Prior to enacting rape shield laws, questioning victims in an attempt to perform a “character assassination based on their sexual histories” was a perfectly accepted method of defense.<sup>51</sup> Courts warned juries in these cases to exercise caution when examining a victim’s motive and credibility, and courts were allowed to examine the sexual history of the victim in extremely public detail.<sup>52</sup>

Common law allowed defendants to cross-examine a rape victim about her sexual history, as well as testimony concerning the victim’s sexual reputation, including in some cases, testimony provided by prior sexual partners as witnesses.<sup>53</sup> Thus at common law the veracity of certain narratives was attacked not by an analysis of the actions that actually comprised the narratives, but by dismantling the character of the narrator. By casting women into either chaste or unchaste roles, and using chastity as a proxy for honesty, common law made the narrative of rape accessible to only certain women that were able to conform to normative character expectations. While rape laws have attempted to shield women from a trial of their character when reporting rape, the laws have also shielded the character binaries that predicated the need for rape shield laws in the first place.

Between the years 1960 and 1975 the number of reported rapes increased by 378%.<sup>54</sup> Perhaps due to this dramatic increase in the incidence of reported rapes, during the mid-1970s Congress and state legislatures began to pass rape shield laws.<sup>55</sup> Frank Tuerkheimer describes the justification for rape shield laws in the mid-1970s as fourfold. In enacting rape shield legislation, law-makers were attempting to address:

- (1) [T]he harassment and humiliation of the victim,
- (2) the exclusion of irrelevant evidence,
- (3) the need to keep the jury focused on relevant issues, and
- (4) the furtherance of effective law

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49. Tuerkheimer, *supra* note 10, at 1462. “In the past, behavior deemed unchaste was thought to suggest a greater likelihood that a rape victim willingly engaged in sex with the defendant.” *Id.* (footnote omitted).

50. See Sakthi Murthy, *Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim’s Sexual History to Show the Defendant’s Mistaken Belief in Consent*, 79 CALIF. L. REV. 541 (1991).

51. *Id.* at 550.

52. *Id.*

53. *Id.*

54. Hubert S. Feild, *Rape Trial and Jurors’ Decisions: A Psychological Analysis of the Effects of Victim, Defendant, and Case Characteristics*, 3 L. & HUM. BEHAV. 261 (1979) [hereinafter Feild, *Rape Trial*].

55. Wallach, *supra* note 15, at 494.

enforcement by insuring that victims are not discouraged from cooperating with the police for fear of the trial.<sup>56</sup>

The logic underpinning this Congressional initiative to address the problem of rape was eventually picked up and adopted by the individual states.

All states have enacted their own rape shield laws and Federal Rule of Evidence 412 codified the rape shield on the federal level. Rule 412 prohibits introducing a rape victim's sexual history as reputation or opinion evidence at trial. Shawn Wallach describes this approach as having three major features: "(1) a general prohibition of any evidence regarding a victim's past sexual conduct; (2) several exceptions allowing evidence considered relevant; and (3) a 'catch-all' provision authorizing the trial court to review any sexual behavior evidence for which there is no exception."<sup>57</sup>

The exceptions included in Rule 412 are also three-fold.<sup>58</sup> The first exception allows the defendant to introduce evidence that the victim has had sexual encounters with persons other than the defendant, but only if that evidence is used in order to indicate that the defendant was not the source of semen or injury. The second exception allows past sexual behavior of the victim with the defendant himself to be introduced, "if offered by the defendant to prove consent, or if offered by the prosecutor."<sup>59</sup> The third exception permits a defendant in a rape case to introduce the evidence that he has the constitutional right to introduce. A final possible exception, although never expressly stated within the law, is that of mistake.<sup>60</sup> The concept of mistake relies heavily on narrative in that mistake can be argued when "[t]he victim was reputed to be sexually experienced; the defendant knew of this reputation; sexually experienced

56. Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245, 1250–51 (1989) (citations omitted).

57. Wallach, *supra* note 15, at 495 (citations omitted).

58. FED. R. EVID. 412.

59. The Rule states that "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor" is admissible. *Id.* This exception is extremely problematic given that of the women raped in the United States, "half are raped by their intimate partner, and forty percent by an acquaintance." Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1453 (2014) (citing the findings in CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNERS AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT 18 (2011)). This figure indicates that half of the women raped in the United States cannot be protected by the rape shield law because they have had prior sexual contact with their rapist, and therefore their prior sexual history with that person will be admissible at trial.

60. For an explanation of this unstated exception, see Murthy, *supra* note 50.

women are widely seen as being more likely to consent in a given situation; thus, the defendant thought the victim was sexually available although she did not explicitly indicate consent.”<sup>61</sup> Thus the defense of mistake preserves an avenue of inquiry that rape shield laws were designed to prevent.

These exceptions have caused many to argue that the rape shield laws are ineffective at blocking prior sexual history from finding its way into trials and inappropriately influencing the jury.<sup>62</sup> Generally, the argument aimed at rape shield laws is that “history evidence” is admitted “when the complainant has been intimate with the defendant before, when the defendant claims that he held a reasonable but mistaken belief as to her consent, or when the complainant has previously engaged in a pattern of sexual conduct, prostitution, or other promiscuity,” which essentially opens the door to sexual history evidence in most cases of acquaintance rape.<sup>63</sup> Given the prevalence of acquaintance rapes occurring in the United States, it is not difficult to conclude that rape shield laws are inadequate because they are limited to protect a victim of a certain type of rape.<sup>64</sup>

While rape shield laws have been an effective means of alleviating some of the scrutiny common law applied to victims of rape, it is undeniable that much that the rape shield laws attempt to prevent persists within the legal system. For example, the Model Penal Code has preserved the scrutiny that prevailed at common law regarding rape trials. With regards to rape cases, the Model Penal Code recommends the following jury instruction:

In any prosecution before a jury for [a sexual offense], the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.<sup>65</sup>

The Model Penal Code does not apply this type of caution to any other crime.<sup>66</sup> Yet many legal theorists, after recognizing the flaws in rape shield

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61. *Id.* at 557 (citation omitted).

62. See Tuerkheimer, *Reassessment*, *supra* note 56; Murthy, *supra* note 50; Heather D. Flowe et al., *Rape Shield Laws and Sexual Behavior Evidence: Effects of Consent Level and Women’s Sexual History on Rape Allegations*, 31 L. & HUM. BEHAV. 159 (2007). For the view that rape shield laws are too pervasive and unfair to defendants, see Wallach, *supra* note 15.

63. Anderson, *Sexual Consent*, *supra* note 9, at 1.

64. *Supra* note 59.

65. MODEL PENAL CODE § 213.6(5).

66. Anderson, *Negative Social Attitudes*, *supra* note 16, at 649.



laws, contend that the solution to the problem lies in strengthening and expanding the scope of these laws.

Rather than attempting to block information from being admissible, we should abandon the rape shield laws altogether and attempt a new model. While I believe that rape shield laws were a crucial step towards justice at a time of incredibly unjust law regarding rape, it is time to move forward and recognize that prior sexual history should not be shielded because of privacy, but because it is irrelevant to the inquiry. The Advisory Committee that adopted Rule 412 issued the following statement: “[t]he rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo from the fact-finding process.”<sup>67</sup> This type of thinking moved the law away from the belief that an inquiry into a woman’s sexual history was appropriate during rape cases. But it did not open space for rape to be considered outside of the stereotypical narrative. Rule 412 did not introduce the concept of consent as the relevant inquiry, nor did it dismiss past sexual experiences as irrelevant.

Thus I find that the current rape shield laws are not only ineffective, but also are counterproductive in that they conceptualize rape as an occurrence that can only be described through a single narrative involving certain character norms. This narrative limits rape victims to a framework where success will be measured against the backdrop of a social belief that only certain types of women can be raped.

### III. NARRATIVES OF RAPE

Studies have shown that “the success of rape prosecutions often depends on how closely an alleged rape hews to certain accepted rape narratives.”<sup>68</sup> The stereotypical rape narrative generally envisions a “young woman who is walking home alone at night” when suddenly she is approached by a man who “drags her into an alley” and, following a beating where the woman struggles for her life until the man threatens to kill her, the woman is raped and afterwards “she immediately calls the police to report the offense.”<sup>69</sup> As Anderson notes, “[d]espite generations of repeated storytelling, this type of rape is, in terms of actual incidence, a

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67. FED. R. EVID. 412. Advisory Note.

68. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 831–32 (2013).

69. This “archetypal narrative” as opposed to the acquaintance rape narrative is described by Anderson at length. See Anderson, *Negative Social Attitudes*, *supra* note 16, at 645.

statistical outlier . . . .”<sup>70</sup> And even though it is by far the more prevalent occurrence, rape by an acquaintance plays no part in this stereotypical story. Why then does this narrative persist within the law? Narratology is well suited to answer this question.

Narratology recognizes that narratives exist beyond individual descriptions of characters, beyond the intention of authors, and beyond particular stories themselves. Barthes contended that “participation in a sphere of actions” defined characters, while the sphere of actions itself belonged to the structure of the narrative.<sup>71</sup> This pattern of action—the composition of which makes the narrative—not the details that forge a particular story, is what persists. Those who engage in the study of narratives tend to consider characters as secondary to the narrative itself.<sup>72</sup> Some scholars have even gone so far as to say that a plot of a story can become so entrenched in our understanding that the linear progression of events can exist without any character development at all.<sup>73</sup>

Furthermore, narratology recognizes that the author can (and, it is often argued, should) be completely removed from the audience’s perception of the text.<sup>74</sup> In this way, we can understand narratives as having shaped us to expect certain actions to take place in stories regardless of the individual descriptions of the character or the variation of author. Thus, perhaps our understanding of the word “rape” is entrenched in a narrative so fundamentally dependent on a certain set of actions, that even when acquaintance rape becomes the predominant reality in society, we persistently cling to an understanding of what constitutes “rape” as the more traditional narrative.

What space does that leave for individual story-telling in rape trials? When testifying, a rape victim navigates both the realm of narrator and character in a story. If there is dissonance between the expected narrative and the story as portrayed, then a jury is less likely to believe the allegations. In a recent study, it was shown that “[w]omen were less likely to say that they would take legal action in response to . . . rape scenarios if

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70. *Id.*

71. Barthes & Duisit, *supra* note 21, at 258.

72. *Id.* at 260.

73. *Id.*

74. *Id.* at 261. Barthes and Duisit write:

Now, at least from our viewpoint, both narrator and characters are essentially “paper beings.” The living author of a narrative can in no way be mistaken for the narrator of that narrative . . . . The one *who speaks* (in the narrative) is not the one *who writes* (in real life) and the one *who writes* is not the one *who is*.

*Id.*

they had extensive sexual histories, or if they had consented to an extensive amount of intimate contact before the rape.”<sup>75</sup> Thus, as a narrator, the victim must attempt to bring her story and the portrayal of her character to conform with an archetype in order to succeed at trial. Breaking from the expected story model—where the characters are interchangeable and the events are always the same—is dangerous, because it deprives the audience (the jury) of an archetypal story they believe evokes guilt. The negative effects of having a dissonant and individualized portrayal of the author and narrator in the face of the expected archetypal sequence of events that comprises a story is clearly evidenced in the studies of jury bias in the context of rape cases.

#### IV. JURY BIAS AND NARRATOLOGY

At the crux of the nexus between narrative structures and trials is the understanding of the jury as an audience. Because the jury functions to determine whether a story is “true beyond a reasonable doubt” for the purposes of law, jurors are unlike a body that reads literature purely for intellectual enjoyment or entertainment.<sup>76</sup> Although one’s first reaction might be to think that juries should be an easier audience to convince because they are individually selected by counsel to listen to the stories of the parties, this does not seem to be able to overcome the power that the traditional rape narrative holds over social thought. For example, in a study on jury decisions in rape trials, Sally Ellis Mathiasen noted that “traditional moral and social attitudes about rape and rape victims, from which the law developed and which it reinforces, are brought to bear on the believability of the victim.”<sup>77</sup> What is interesting to note is Mathiasen’s consideration that the law not only develops but also reinforces social attitudes. Such an understanding supports the contention that rape shield laws reinforce an archetypal narrative that is no longer a reality for most rape victims, and as such, should be reevaluated.

Further, from a variety of studies of juries, it appears that juries’ narrative expectations in rape cases are generally consistent with traditional social mores and a shared societal understanding of what linear story constitutes rape.<sup>78</sup> In fact, the pattern of events that juries expect to

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75. Flowe et al., *supra* note 62, at 159.

76. DRESSLER, *supra* note 2, at 1.

77. Hubert S. Feild, *Juror Background Characteristics and Attitudes toward Rape: Correlates of Jurors’ Decisions in Rape Trials*, 2 L. & HUM. BEHAV. 73, 76 (1978) (citing a study by Mathiasen) [hereinafter Feild, *Juror Background*].

78. See Feild, *Rape Trial*, *supra* note 54; Hubert Feild, *Juror Background*, *supra* note 77.

hear when adjudicating a rape case are so well recognized that certain non-traditional narratives are often foreclosed from ever making it into the trial setting because of the discretion of the prosecuting attorney.<sup>79</sup> In her analysis of various empirical studies of rape prosecution, Amanda Konradi concludes that “that, under pressure to conserve institutional resources, legal personnel rely on stereotypes in making decisions to prosecute rape and that a persistent bias remains against women whose rape experiences do not conform to the classic stranger stereotype.”<sup>80</sup>

Hence, prior to even getting their stories to the courtroom, victims’ narratives are selected on the basis of their likelihood to be believed by hypothetical juries. The probability of obtaining success at trial is measured by how closely each victim’s story conforms to the anticipated jury’s archetype-based expectations. If the story does not conform to the expected narrative, the victim is unlikely to ever achieve getting her day in court. Furthermore, even if the victim does get to trial, it is less likely that a jury will find her non-archetypal narration of events as compelling as a story that conforms to the archetypal/socially-expected narrative model.

Even for the narratives that make it past the “weeding out” stage of the criminal process, victims that go to court must attempt, through the performance of appearance and story-telling, to “characterize” themselves to fit expected stereotypes to better their chances of success.<sup>81</sup> Konradi notes that prosecutors advise rape survivors taking the stand that they must dress in ways that conform to the normative visual standards separating real victims from women “who asked for it.”<sup>82</sup> This need to conform to a stereotypical and expected image is predicated on the fact that studies have shown that jurors are greatly influenced by their perception of a victim’s “character.”<sup>83</sup>

Rape victims were also coached in “emotion work” so that through rehearsal they could deliver their testimony and utilize their body language to evoke certain sympathetic emotions within the jury.<sup>84</sup> While this paper does not endeavor to address the performative functioning of narratives, this prosecutorial strategy demonstrates an interesting nexus between narrative and performance. While preparing a witness for trial does not seem at all insidious, coaching a witness to align her performance to a

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79. See Feild, *Juror Background*, *supra* note 77, at 90.

80. Amanda Konradi, *Preparing to Testify: Rape Survivors Negotiating the Criminal Justice Process*, 10 GENDER & SOC’Y 404, 406 (1996).

81. *Id.*

82. *Id.* at 411.

83. *Id.* at 411–12.

84. *Id.* at 415.

particular model certainly emphasizes the idea that only one story is believable in the courtroom. If rape victims are foreclosed from the courtroom because their experiences do not match an archetypal expectation and those who make it to trial are coached to conform to these expectations, there is little room left for the recounting of individual experience. The space in which to narrate the reality of personal experience is thus extremely limited if the narrative is to succeed at trial. I believe that a consent-based framework could address this problem.

## V. CONSIDERING A CONSENT-BASED FRAMEWORK

If juries as audiences are prone to only find the “truth” in a society-accepted archetypal narratives, and the law reinforces those narratives, the question remains: How do we create the needed space for victims whose narratives do not fit the expected paradigm? I suggest a two-part model: one that first introduces a consent-based<sup>85</sup> definition of rape and then, second, supports this concept with jury instructions.<sup>86</sup> If rape shield laws were abolished and in their place a consent framework was adopted, the law would necessarily have to consider individual narratives rather than make individuals force their characters and narratives into compliance with a single narrative model to succeed in the courtroom.

### A. *The Legal Nature of Consent*

In this model, the first question that must be addressed is—what is consent? Consent necessarily requires that we consider the epistemology of the “self” and how that “self” can acquiesce to certain events prior to their happening. Pragmatically, in a consent-based framework, I would have the law consider consent to be a fixed event. Yet many scholars hold that consent falls outside of the context of simply a discrete event. For example, Judith Butler’s understanding of consent derives from an understanding of the self as something that is not immutable and instead is constantly shifting—even in its retrospective understanding of past

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85. This idea is not aligned with an understanding of consent as a non-static entity that cannot be isolated. See Judith Butler, *Sexual Consent: Some Thoughts on Psychoanalysis and Law* 21.2 COLUM. J. GENDER & L. 3 (2012).

86. Capers, *supra* note 68, at 862, 872–75.

events.<sup>87</sup> This indeterminate concept would be a nearly impossible definition of consent for the law to apply. Butler asks:

Although consent is often conceived as a discrete act that an individual performs and so draws upon the presumption of a stable individual, what happens to this framework if we maintain the view that the “I” who consents does not necessarily stay the same in the course of its consent? In other words, does the “I” give itself over to a certain transformation, not fully knowable in advance, through its act of consent? And if consent is given to another, or before another, it is then a way of organizing a social relation rather than a merely individual act? Moreover, if the “I” enters into a social relationship by virtue of its consent, is it also sometimes transformed precisely by what happens by virtue of its consent? How do we explain the fact that sometimes the “I” who consents undergoes a change in the course of its consenting?<sup>88</sup>

While I agree that, in terms of the psychology of the self, consent may not be a truly discrete act because the self is never truly stable, I find that following this line of thought would not in any way help the law’s endeavor to ensure justice in the realm of human actions. The law has to posit some intentions and *mens rea* elements as fixed, or else it could not function.

Thus while I agree that no human experience predicated on the relation between a person’s internal thoughts and external actions can be truly understood independently and out of context of time, experience, and social influence, I cannot see how this definition could or why it should be applied to the law. Yet perhaps the legal system could utilize the concept of relation that consent implies. Butler argues that consent is not “a singular act of a subject” and that instead consent is

more or less [an] organized way of entering into relationship. There always seems to be someone else, or some other set of persons to whom one gives consent, or before him consent is offered. Of course, our ordinary language suggests that we consent to entering relationships, and sometimes that is, in fact, the case. But following from a consideration of consent within a broadly “relational” framework, we might ask whether consent needs to be redescribed in such a way that it both presupposes and orchestrates some

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87. Butler, *supra* note 85, at 4.

88. *Id.*

relation to another. Is there always someone else there for consent to be possible, someone to whom or before whom I consent, and in what sense can we see this “act” as a relational and social form?<sup>89</sup>

This focus on relation is an excellent inquiry for law. The law should recognize consent as an isolated occasion. Yet understanding consent as a relationship could provide an avenue to approaching accusations of rape—and codifying consent as the inquiry for rape would open up space for those whose stories are silenced by the trial system because of the predominance of a single narratological understanding of rape.

I would propose defining consent statutorily in the negative. If consent were so defined, the inquiry into whether a rape had occurred would hinge on whether consent was not given—essentially whether someone expressed “no.” The major difficulties with this system would be when there was no verbal consent or lack of consent—namely when there is silence or implied consent.<sup>90</sup> Yet I think the law could be tailored to address these issues. For example if consent was not expressly given or denied, a totality of the circumstances test (only taking into account contextual history between plaintiff and defendant) could be used to determine if a reasonable person would have thought consent had been granted. In the “classic” cases of stranger rape, consent would be almost a non-issue, and the current rape laws could be applied to those situations.<sup>91</sup>

A consent-based structure would not need to operate like a rape shield in that the consent-based structure would block evidence of past experiences because a consent-based definition of rape would inherently foreclose much evidence of past experiences as irrelevant since the basic

89. *Id.*

90. Silence is an issue in any consent based framework but law could allow for a fairly large gradation in sentencing to account for the “grey area” that silence creates within this legal inquiry. *See* Oberman, *supra* note 18. Oberman acknowledges that a person’s “passivity” once someone initiates physical contact does not necessarily indicate consent. *Id.* at 728. Citing multiple psychological studies, Oberman discusses the problem of silence in the context of consent because during an unwanted physical encounter it is “quite possible for women to ‘freeze’ out of fear.” *Id.* Indeed, in one study of acquaintance rape, author Eugene Kanin identified five cases in which the women were “actually immobilized with fear,” and therefore could not even communicate their nonconsent. For a study of the psychological “freezing” effect of rape victims, see Eugene Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY 95, 97 (1984). While silence is problematic in a consent based system, my argument here is that once the word “no” or nonconsent is recognized as the inquiry for whether rape has occurred, and perhaps persons who are subject to unwanted physical contact will be empowered to communicate their nonconsent.

91. This suggests a bifurcated model—one where acquaintance rape and stranger rape are dealt with differently. Since the current laws seem to adequately address non-acquaintance rape, the model I suggest could be readily applied to cases of acquaintance rape, leaving the current instructions intact for cases of stranger rape.

inquiry would center on an isolated set of events and the relationship between the parties in question. And while context may be needed to frame different events, this context should be limited to situations involving both the plaintiff and defendant.

### *B. Jury Instructions*

Jury instructions would be a useful mechanism to counter the subconsciously entrenched archetypal story model of rape. In a consent-based framework, jury instructions need only act as a reminder that the proper inquiry of rape is consent—and that this is a legal “event” that should be considered both in the abstract and in context. For example, in his article on rape shield laws, Bennett Capers suggests an instruction that among other things would relate to jurors that “[e]ngaging in sexual behavior, whether it be once or innumerable times, does not render a person outside of the law’s protection.”<sup>92</sup> Something similar could be worded to reinforce the consent-based inquiry.

This instruction would need to reaffirm that rape cases should be considered on a consent-based model and inquiry. It would also be prudent to include in this instruction some mention of the fact that if consent is expressly denied, that denial is enough to constitute rape. In this way the jury would be reminded prior to deliberation that the model that should frame its analysis of the facts is not the archetypal rape scenario, but rather whether consent was given in this individual set of circumstances. This refocusing may not completely curb the effects of expected narratives, but would be a starting point at the very least. In this way, the laws regarding rape would allow for a change in the narrative space available to victims. A focus on consent would allow for the articulation of individual experience.

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92. Capers, *supra* note 68, at 872. Capers’ suggested jury instruction reads:

Everyone deserves to have the criminal law vindicate them when they have been raped, regardless of their sexual history. Engaging in sexual behavior, whether it be once or innumerable times, does not render a person outside of the law’s protection. Everyone is entitled to sexual autonomy, and no one, by merely engaging in sex, assumes the risk of subsequent rape. Put differently, before the law, it does not matter whether a complainant is a virgin or sexually active. Before the law, everyone is entitled to legal respect, regardless of his or her sexual past. Accordingly, bear in mind that in this case and in all rape cases, all rape victims are entitled to the law’s protection.

*Id.* (citation omitted).



### CONCLUSION

Rape shield laws played an important function by protecting victims from unfair prying by the defense into their past sexual history in an effort to devalue their account of events. Yet that shield, though well intended, when approached through narratology, may be understood now as reaffirming an archetypal story of rape that does violence to those victims whose stories do not align with the stereotypical narrative. The protection that rape shield laws offer needs to be reconfigured into a consent framework and reinforced by jury instruction. By making the inquiry rest on consent, the law would afford victims the opportunity to provide their own narratives, rather than obligate them to attempt to conform their stories and character to a separate “believable” account of events.

Many scholars have criticized rape shield laws. Yet very little has been said on the subject of narratology and rape law. Legal narratology allows us to question how stories are told, and if there is justice in those tellings. By approaching rape law through narratology, we begin to see the injustice of the current system. The law endorses a structure where truth beyond a reasonable doubt can be located, yet in the cases of rape, the victims must conform their “real” experiences to a dominant and fictitious narrative in order to be believed. This is a narrative problem the law must endeavor to address. Through narratology, it becomes apparent that a new model needs to be established. This model would not only subsume the protection that rape shields were created to provide, but would also open up space so that individual narratives can succeed in the courtroom, thereby creating a framework that offers respect and justice to victims of rape.