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**The Reconceptualization of Consent in Europe; a Feminist Discussion of the
Limitations and Possibilities of Consent Laws in Scandinavia**

Diploma Thesis

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Declaration of Honour

“I declare that I wrote the thesis independently using the sources dutifully cited and listed in the bibliography. The thesis was not used to obtain a different or the same title.”

“I agree the diploma thesis will be published in the electronic library of the Faculty of Humanities of Charles University and can be used as a study text.”

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Abstract

This research aims to investigate how the consent-based rape legislation of Denmark has been implemented and interpreted within court cases. Furthermore, this paper will shed a light on the complexities inherent to the process of consent negotiation within sex, sexual assault and rape. The objective is to challenge the gender-neutral and neo-liberal perception of consent of Denmark, and in turn reveal and challenge the heteronormative structures that persist in our societal comprehension of gender, sex and sexualities. A further discussion will be had on the re-imagining of sex culture and in which ways consent proves to be a limited concept for envisioning an equal and feminist sex culture. A final point will be made regarding the other structural inequalities that are concealed due to the Danish approach to consent, and how this affects the court cases at hand. This research ultimately strives for a re-conceptualization of consent as a gendered concept, one that if not considered as such, will reproduce the same harmful unequal structures that it aims to mitigate. It is, although at last important to emphasize that consent does seem to at least have one powerful tool, which is that it symbolizes to some degree a change in narrative. Despite the gendered assumptions that are associated with the discourse surrounding consent, it symbolizes that sex is when all people involved consent to the sexual encounter. That is a dramatic change, compared to the prior law that was based on violence, force or threats. This paper thus illuminates the limitations and dangers of the concept of consent, and how narrow it is for a feminist vision of equal sex. While simultaneously, valuing that for now, it is what we have, which is why we should strive to expand the concept itself.

Keywords:

Consent, Sexual Assault, Rape, Sex, Denmark, Europe, Legislation, Rape Scripts, Gendered Scripts

1. Introduction	6
1.2 Context:	7
1.2.1 Europe and Consent Laws	7
1.2.2 The Consent-based Rape Legislation in Denmark	7
1.2.3 Statistics of Rape and Sexual Assault in Denmark	11
2. Literature Review and Research Field	13
2.1 Feminist Critiques of Contemporary Sex Culture	14
2.2 Feminist Conceptualisations around Consent Laws	22
2.3 Feminist Philosophies on Law	35
3. Positionality	43
4. Methodology	45
4.1 Qualitative Method	45
4.2 Feminist Content Analysis	45
4.2.1 The Production of Data	47
4.2.2 Content Chosen	47
4.2.3 Ethical Considerations	50
5. Analysis	51
5.1 The Legal Definition of Consent	52
5.2. The Gender Scripts of Normative Sex Culture	53
5.2.1 Gender Scripts of Heterosexual Men	54
5.2.2 Gender Scripts of Heterosexual Women	57
5.3 Negotiation of Consent from a Gendered Perspective	62
5.3.1 Passivity as Compliance with Gender Scripts	62
5.3.2 Sexual Participation as Sexual promiscuity	65
5.3.2.1 When Participation Means Something Else	71
5.3.3 The Real Rape Myth Persist	74
5.3.4 Consent as a Neo-liberal Feminist Tool	76
5.4 Re-imagining a Feminist Perspective on Sex	78
5.4.1 The Ambiguities of Sex: Where Consent Does Not Reach	78
5.4.2 Desire as an Alternative Framework?	81
5.4.3 Queering Consent: Expanding the Concept	84
5.4.3.1 Structural Racism within Court Cases	87
5.4.4 Consent as a Symbol Law	92
6. Conclusion	95
7. Bibliography	97

1. Introduction

The implementation of consent-based rape legislation has been met with feminist cheers in various countries around Europe. The same was the case in Denmark, when it was introduced in 2021. It was seen as a feminist victory. This thesis aims to challenge this common perception. This paper questions what limitations consent as a concept pose for a feminist vision of sex in the context of Denmark? Moreover, it intends to answer how consent can be seen as a gendered concept? and ultimately in which ways the consent-based rape legislation of Denmark proves to be insufficient in mitigating sexual violence ?

This thesis aims to answer the aforementioned research questions through first locating consent within the context of Denmark, how the legislation was introduced and through statistics accounting the severity of sexual violence. Following will be the literature review, which will first discuss feminist critiques of sex culture, as the foundation, followed by feminist conceptualisations of consent and at last feminist philosophies of law as this thesis deals with court cases where the consent-based rape legislation has been implemented. Then is the positionality and the methodology. Qualitative content analysis was chosen as the methodology, to do an in-depth analysis of the court cases. At last the analysis will with the theoretical basis of the literature review and the methodology aim to answer the aforementioned research questions.

The initial intention for this research was to have an extensive discussion of the implementation of consent-based rape legislation within Europe. Moreover, the research would explore the possibilities and limitations within a European context, to compare and contrast. This framework changed when the investigation of various countries in Europe and even solely in a Scandinavian context, proved to be too broad and would compromise a deeper discussion of the complexities at hand. I narrowed it down instead, to focus on the consent-based rape legislation in a Danish context. The title of this research is thus a demonstration of the progression this particular research has taken.

1.2 Context:

In order to begin this discussion, it is important to first briefly contextualize the current state of consent within Europe. This is to demonstrate how the change to a consent-based rape legislation within a Danish context, is connected to a broader and more complex debate in Europe regarding consent. This will thus be followed by an account of how the topic of consent particularly has emerged within Denmark. The final section of the context, will through statistics surrounding rape and sexual assault in Denmark illuminate the presence and occurrence of sexual assault and rape within a Danish context.

1.2.1 Europe and Consent Laws

In Europe, 15 out of 31 countries, now have rape laws that define rape as sex without consent (Amnesty, 2020). These countries are: Sweden, Germany, Finland, Luxembourg, Croatia, Cyprus, Greece, Iceland, Ireland, Belgium, Denmark, Malta, Slovenia, Spain and the UK (Ibid.). The Netherlands and Switzerland also are in debate in regards to changing their rape laws to be consent-based (Ibid.). Most of the countries mentioned, reformed their rape laws around or after the height of the #MeToo Movement, which was in 2017 when the #metoo went viral (me too, n.d.). The #MeToo movement illuminated the pervasiveness of sexual violence in many countries, sparking new debates (Ibid.).

Spain and Sweden, each reformed their rape laws to be defined by consent, in 2022 and 2018 respectively (Amnesty, 2020). That happened after public uproar over particular rape cases where the public felt the victims had been failed by the legal system (Ibid.). In both countries national demonstrations and campaigns, and the arrival of the #MeToo Movement, were ultimately what culminated in them achieving their renewed rape legislation (Ibid.). The case of Denmark is quite similar in various ways.

1.2.2 The Consent-based Rape Legislation in Denmark

The consent-based rape law was implemented into Danish legislation the first of January 2021 (Justitsministeriet, 2020). This law is section § 216 of the Criminal Code, which states:

“For rape, anyone who has intercourse with a person that has not consented to it, is punishable by imprisonment for up to 8 years” (Kvinfo, n.d.). (Danske Love, n.d.).

In Danish criminal law, section § 225 is connected to § 216 as well, and was changed accordingly when the new consent-based rape legislation was implemented, it states:

“The regulations in §§ 216-224 can be applied similarly in regards to other sexual contact that does not include sex” (Danske Love, n.d.).

Before the implementation of the new legislation, rape and other sexual contact was legally understood as based in force, threats, coercion or violence of some sort, or if the person was unable to resist the sexual contact (Kvinfo, n.d.). A change in the rape legislation in Denmark has been advocated for, tremendously, years prior to its implementation, by various non-governmental organizations in Denmark, such as Everyday Sexism Project Denmark, Amnesty Denmark, Danner and Dansk Kvindesamfund (Meinecke, 2018; Petersen, 2020). Although, as Helle Jacobsen, programme leader at Amnesty for gender, women and LGBT rights, has stated, it has been surprising to see the resistance against consent in Denmark, from the public and the government (Cramon, 2020). This resistance has come in various ways, such as myths surrounding consent and rape, misconceptions and polemic discussions of how to give consent, and the fear that it would criminalize “normal” sex behavior (Ibid.). Jacobsen mentions that the resistance has even come from the juridical system, who feared that consent could switch the burden of proof, so it would break away from the traditional legal principle that one is innocent until proven guilty (Ibid.).

The national debate concerning consent within Denmark started around 2016, partially due to the rape case known as “Herfølge” (Cramon, 2020). Where a 17 year-old girl was raped by three men while she was drunk and lacked her insulin, therefore unable to resist the act herself (Ibid.). All of the three perpetrators were first acquitted, which sparked the debate surrounding the need for a consent-based rape law, then later found guilty due to the media attention (Ibid.). The same year, 2016, Danish women on social media started to share their personal accounts of rape and sexual assault and the treatment they got from the police and the juridical system (Ibid.). This sparked yet another debate regarding the failure of the at that time, current rape legislation (Ibid.). We can thus see how the beginning of the debate surrounding consent in Denmark, is similar to other European countries. As previously mentioned in this section, the cases of Spain and Sweden also started with public uproar due to specific court cases regarding rape/sexual assault and the subsequent sharing of personal accounts from the public. The debate and later implementation of a consent-based rape

legislation in Denmark, thus belongs within a common context of other European countries. Where court cases, personal accounts and the #Me too movement, played a central role.

Later the same year, 2016, the leftist political party “Enhedslisten” proposed to renew the legislation on rape, to include consent, but it was rejected by the government at the time (Ibid.). A common misconception was that the right-wing wished to criminalize normal sexual behavior and on social media various contracts were circling around where people could sign consent “contracts”, ridiculing the proposal (Ibid.). Enhedslisten tried their luck again in 2018, and proposed a consent-based rape law, as promised by the government in 2013 when they signed the Istanbul Convention (Ibid.). Again, it was rejected. Women Rights organizations in Denmark unanimously agree that there is a common and widespread misconception that gender equality has been achieved In Denmark (Amnesty, 2019, p. 13). There has also been a gradual but progressive shift of gender neutrality in the construction of policies within Denmark, this was captured by GREVIO’s 2017 Baseline report about Denmark (Amnesty, 2019, p. 14). Before the shift to gender neutrality, Denmark for example addressed in policies of domestic or sexual violence the gendered nature of the violence, now the gender neutral approach has abandoned the gendered analysis (Ibid.). Sexual violence is also now perceived through a gender neutral lens (Ibid.). GREVIO warns against this approach as it potentially could render gender-based violence invisible, which makes it harder to address (Ibid.). Issues that are gender based, such as sexism or rape, are ultimately rendered ridiculous in Denmark (Ibid.). This could also explain, Denmark's initial reluctance to address or renew the rape legislation.

In December 2017, only 28 percent of the public supported a rape legislation based on consent, in 2019 this number was 51 percent (Cramon, 2020). This illustrates how the national campaigns and demonstrations that the aforementioned organizations held, were in a matter of years, able to mobilize a national change in public opinion (Ibid.). The national campaigns and demonstrations educated the public about sexual assault and rape and what was understood as consent (Ibid.). This ultimately brought the change, despite the initial majority that believed it to be unnecessary (Ibid.).

In 2019, Denmark elected a social democratic government, which had on their agenda, to implement consent into rape legislation (Cramon, 2020). The first year no change happened. The majority in the Criminal Code Council (Straffelovrådet), did not recommend a rape

legislation that was based on consent, but rather one that was based on voluntariness (free will) (Andersen, 2020). A rape legislation based on consent was perceived for the council to be too restrictive and one that could risk criminalize “normal” sexual behavior (Ibid.). Because as they asserted, sex between adults is not to be comprehended in regards to agreements which a legislation built on consent would be understood as (Petersen, 2020). The association of judges (Dommerforeningen), similarly, asserted that a consent-based rape law could risk unjust convictions (Ibid.). Consent activists started to do what they called consent guard (samtykkevagt), where everyday they would stand outside of Christiansborg holding signs with the number of rape/sexual assault victims the minister of justice, Nick Hækkerup, was failing everyday (Cramon, 2020). Not long after, on the 1st of September 2020, Nick Hækkerup held a press conference introducing the cross party agreement of the new rape legislation, that now would be based on consent (Ibid.).

The non-governmental organizations mobilized, in part, this change through various national demonstrations and their campaigns. In 2018, Amnesty Denmark, and other non-governmental organizations, held a demonstration in multiple cities of Denmark, titled “Let’s Talk about Yes”(Amnesty Denmark, 2018). Another demonstration was held in 2020 by the organization Everyday Sexism Project Denmark, that utilized the hashtag #ConsentLawNow (#SamtykkelovNu) (Petersen, 2020). This demonstration specifically asserted the need to make no exceptions for classifying consent, emphasizing that passivity and flirting never should be considered as consent (Ibid.). Therefore rejecting voluntariness as a substitute for consent (Ibid.). The various organizations such as Amnesty Denmark and Everyday Sexism Project Denmark, have although emphasized that sex should always be viewed as voluntary, otherwise it should be classified as rape (Amnesty Denmark, 2018). The aforementioned organizations, believe that the first step towards a rape free society is a consent-based rape legislation (Meinecke, 2018). The organizations, however, also emphasize that it is a step amongst many, towards a changed perception of sex and consent (Göttler, 2020). The consent-based rape legislation should according to them, therefore not stand alone but be accompanied by better sexual education (Ibid.). Zen Donen, lawyer, and spokesperson for Everyday Sexism Project Denmark similarly believes that the consent-based rape law is a step in the right direction (Cramon, 2020). She states, that there are people that do not believe in the utility of the consent based rape law, and view it solely as a symbolic law (Ibid.). In regards to this, she argues that all laws are symbolic laws, a symbol

of what we as a society believe to be right and wrong (Ibid.). Which is why the consent-based rape legislation is necessary (Ibid.).

1.2.3 Statistics of Rape and Sexual Assault in Denmark

The University of Southern Denmark did a study in 2018, based on the numbers from the Danish National Health Survey, that estimated that 24,000 women in 2017 were victims of rape or attempted rape in Denmark (Amnesty, 2019, p. 12). The estimates in the same study for women that have experienced sexual assault in 2017, were 68.000 (Deen, Johansen, Møller & Laursen, 2018, p. 52). The Criminal Preventative Council of Denmark estimated that on average 11,800 women were yearly subjected to rape or attempted rape in the time period of 2018-2020 (Mannov, n.d.). Out of these numbers, 49 percent of the assaults resulted in a completed forced rape (Ibid.), furthermore 67 percent of the assaults happened in private homes (Ibid.). It is also estimated that in a lifetime perspective, women are more likely to be victims of rape, an estimate is that women are 84 percent more likely to be victims of rape than men (Ibid.). More than half of the women subjected to rape, were 24 years old or younger at the time of the crime (Justitsministeriets Forskningskontor, 2020, pp. 105-6). There is also a clear indication from the statistics, that there is a high probability that the victim and the perpetrator know each other (Mannov, n.d.). Only 28 percent of the rapes are perpetrated by a stranger (Justitsministeriets Forskningskontor, 2020, p. 107). This is important to highlight as there are many misconceptions regarding rape and sexual assaults.

According to the Ministry of Justice, after the consent-based rape legislation was introduced, numbers from the national police, show an increase of reports and convictions of rape (Justitsministeriet, 2021). In 2020 there were 1.392 reports of rape and 1.078 charges of rape (Ibid.). In the period from 1. January until the 23 of November 2021, it had already overtaken the numbers from the prior year, before the consent legislation, in this period they registered 1.720 reports and 1.315 charges of rape (Ibid.). At the end, in 2021 the national police received 2.306 reports of rape or attempted rape in 2021 (Mannov, n.d.). A report from the Ministry of Justice indicates that this increase could be due to a changed public perception of what constitutes rape, due to the consent-based rape legislation (Justitsministeriet, 2022). Since the implementation of the new consent-law there has also been an increase in convictions of rape, in 2019 79 people were convicted of rape in Denmark, in 2020 the

number was 109 (Danmarks Statistik, n.d.). In 2021 the number of convictions were 124 and last year in 2022 the number was 138 (Ibid.).

In the yearly report from Center for Rape Victims 2021 (Center for Voldtægtsofre), they reported that 46 percent of the 386 inquiries they received in 2021 were from people that never reported the rape to the police (Center for Voldtægtsofre, 2021, p. 55). As The Criminal Preventative Council of Denmark also has accounted for, rape is rarely reported to the police, they estimate that it is every fourth rape that is reported to the police (Justitsministeriets Forskningskontor, 2020, p. 118). Their numbers also demonstrate that there is a higher probability of a rape being reported to the police, depending on if the victim knows the perpetrator (Justitsministeriets Forskningskontor, 2020, p. 119). Approximately 32 percent of victims report their rape if their perpetrator is unknown, in comparison to 16 percent of victims who know their perpetrator (Ibid.).

In most data collections of rape and sexual assault in Denmark it is divided by age and sex (Amnesty, 2019, p. 15). Although, data is not disaggregated in other forms, such as by disability, sexual orientation, migrant status, and other gender identities (intersex, transgender or non-binary) (Ibid.). Which ignores an intersectional perspective on sexual violence. An exception to the rule is the data collection of the ethnicity and nationality of perpetrators of charged and convicted rapes, which is publicly available. They most recently were published by the Ministry of Justice (Justitsministeriet, 2021). The numbers made available by the Ministry of Justice, have been utilized by the far-right political party “Nye Borgerlige”, to emphasize how the men with other ethnicity background than Western are more prone to rape, as they are disproportionately convicted (Nye Borgerlige, 2021)¹. The statistics show that in 2020, 217 people were convicted of rape and out of those 53 were from other background than Western (Justitsministeriet, 2020), (Nye Borgerlige, 2021).

There are also statistics available in Denmark regarding the situational and behavioral circumstances in regards to rape and sexual assault. The Center for Rape Victims explains in their report from 2021 that common reactions towards rape or sexual assault are the three; fight, flee or freeze (tonic immobility) (Center for voldtægtsofre, 2021, p. 49). Their numbers showcase that 42 percent of victims freeze to some degree during the assault

¹The problematic nature of this statement will be elaborated on in the analysis

(Center for voldtægtsofre, 2021, p. 48). The Criminal Preventative Council of Denmark lists tonic immobility or freezing, as common during a rape or sexual assault (Jensen, n.d.). Another research from Sweden, estimated that approximately 70 percent of rape victims froze in response to the rape (Kvinno, n.d.), (Möller, Söndergaard, Helström, 2017, p. 935). The understanding of freezing (passivity) as defense mechanism to sexual violence, is important for the analysis of this thesis.

This section, the context, has thus illuminated how consent still is a recent discussion in Europe, with still the majority of European countries not having implemented a consent-based rape legislation. Furthermore, it has been established how the emergence of the discussion of consent came about in Denmark. Which resulted in resistance from the public, juridical system and the government. This although changed through campaigning and demonstrations that highlighted the necessity for consent by demonstrating the failure of the former rape legislation. This was done through educational measures, that utilized personal accounts of rape and sexual assault, as similarly done in other European countries. The statistics of rape and sexual assault in Denmark were at last important, to emphasize the severity of the issue. The following section, the literature review, will delve deeper into discussions that broadens and questions our sole use of consent to re-imagine sex as feminists. This is done through feminists discussions concerning consent, but also through feminists conversations regarding sex culture and legislation.

2. Literature Review and Research Field

The conversation regarding consent can often be very polarizing, as demonstrated in the context. Divided between the people that advocate for consent as a concept for reconceptualizing sex and reformatting rape legislations and the ones that are against it. Although, within academic feminist discussions there have, almost since the initiation of the concept of consent, been debates regarding its inefficiency as a concept. To extend on this and to comprehend the possible limitations for consent as a concept within Denmark, it is important to first delve into the feminist critiques of sex culture, as this is the foundation that consent is built on. Feminist critiques of sex culture aim to understand the underlying gendered patterns within sex, rape and sexual assault, and the inherent sexism. Followed will be a section on feminist conceptualizations regarding consent laws, to showcase the

various ways in which feminists have rethought the use of the concept of consent. The last section of feminist philosophies of law will contribute through demonstrating a feminist lens on legislation and the juridical system. This part is relevant for this paper, as the data utilized within this research paper are court cases of rape and sexual assault after the implementation of the consent-based rape legislation in Denmark.

It is important to emphasize that although this research paper is focused on Denmark, the academic literature available on feminist perceptions of consent, sex culture and law are lacking. Since there is no relevant academic literature available, the following literature review will not include any academic literature from Denmark.

2.1 Feminist Critiques of Contemporary Sex Culture

In the article *From “Ladies First” to “Asking for it”: Benevolent Sexism in the Maintenance of Rape Culture* written by legal scholar Courtney Fraser, she examines the role of sexism in the upholding of rape culture. Fraser first and foremost accounts for what she claims is the underlying mechanism of rape culture; ambivalent sexism (Fraser, 2015, p. 147). Ambivalent sexism is divided into two parts; benevolent sexism and hostile sexism (Ibid.). Fraser explains benevolent sexism as: viewing women as innocent beings that should be protected and loved, and particularly their love is what completes a man (Ibid.). Hostile sexism is explained as: the view that women are desiring to dominate men, this could be through feminist ideology or their sexuality (Ibid.). Fraser mentions that as explained by Peter Glicke and Susan Fiske, who coined the terms benevolent and hostile sexism, the two terms are constituted from the same sources: gender differentiation, paternalism, and heterosexuality (Ibid.). Ultimately, Fraser contends that although benevolent sexism and hostile sexism appear like opposing terms, they are derived from the same sexist sources (Fraser, 2015, p. 149). This, she argues, is the face of ambivalent sexism (Ibid.). This is also the danger of benevolent sexism, as it appears innocent it is able to reinforce, without outcry, pervasive structures of gender inequality (Ibid.). She reiterates, that benevolent sexism is thus a crucial component for hostile sexism in upholding rape culture (Fraser, 2015, p. 150).

Fraser elaborates that high-agency traits, such as protection, are commonly associated with men and deemed natural, while low-agency traits are associated with women, (Fraser, 2015, p. 152). Fraser argues, that viewing women as having less agency, justifies men’s protection

of women, and thus plays into benevolent sexism and therefore inherently reinforces rape culture (Ibid.). This is illustrated through a study that showed that men who affiliated women with animals, were more prone to sexually assault or rape a woman (Ibid.). Furthermore, Fraser claims that benevolent sexism serves to belittle women's agency by encouraging men to act for women instead, like paying for them or choosing when to have sex (Fraser, 2015, p. 158).

Fraser further contends that contemporary legal frameworks are harming women by routinely assuming that women welcome their perpetrators actions (Ibid.) This is commonly seen in cases where women report sexual assault or rape whose evidence is jeopardized or not believed as they expressed sexual agency or other untraditional feminine behavior (Ibid.). Fraser argues that in cases of sexual harassment, sexual assault and rape it is on the burden of the woman to prove that it was unwelcomed or nonconsensual (Fraser, 2015, p. 164). The women who are most likely to be questioned are those assaulted by an acquaintance, deemed sexually promiscuous, or other traits defying traditional femininity which would upset benevolent sexism and turn into hostile sexism (Ibid.). Fraser claims that hostile sexism easily accounts for our mainstream perception of rape cases as the "violent stranger", although benevolent sexism seems to be the perpetrator in acquaintance rapes (Fraser, 2015, p. 165).

Furthermore Fraser argues, that the norms of traditional femininity present in benevolent sexism, that devalues women's agency and teaches them to underprioritize their needs, inhibit them in cases of sexual assault and rape to speak up both before, during and after (Ibid.). Rape myths on the other hand, requires a woman to prove that the sexual conduct was unwanted (Ibid.). Fraser postulates that passive socialization teaches women to accommodate, be unproblematic and polite, this makes verbal, let alone physical refusals in sexual assault or rape cases, in direct conflict with what women have been taught to do (Fraser, 2015, p. 169). The law thus ends up ignoring the resistance of the women, by ceasing to understand the pervasiveness of gender norms (Ibid.). Fraser ultimately contends, that to overcome the permeating ambivalent sexism that reproduce rape culture, we must challenge gender norms and the gender binary (Fraser, 2015, p. 201). She does not believe that legal reforms are enough for abolishing rape culture (Fraser, 2015, p. 203).

In the article “The Relationship Between Rape Myths and Sexual Scripts: The Social Construction of Rape” by Kathryn M. Ryan, she examines how our sexual scripts are influenced by rape myths (Ryan, 2012, p. 4). Ryan posits that myths should be understood as misguided beliefs, and secondly as stories that are attached to culture and history and which often influence how we as humans behave (Ibid.). She further contends that sexual scripts produce desire and sexual meaning for people, and is culturally dependent (Ryan, 2011, p. 5). Sexual scripts describe a pattern of normative behavior in sex, such as male persistence or consent as direct and clear (Ibid.). Ryan thus explains that rape scripts are normative beliefs surrounding the nature of rape, such as who the perpetrator is and the gendered dispositions in regards to rape (Ibid.). Ryan argues that the real rape script, how people commonly perceive rape, is of a strange and violent perpetrator and the resisting woman (Ryan, 2011, p. 6). This is similarly noted by Fraser as constituting hostile sexism within rape culture.

Research shows, that rape victims that were unaware of their sexual assault constituting rape, were more likely to believe in real rape scripts (Ibid.). Ryan claims, this could make the women at more risk for sexual predation or sexual assault, as they have a harder time identifying rape outside the scripts (Ibid.). Ryan argues that there are gendered differences in some of the scripts such as the date rape script, where men view consent as more in the form of yes/no, while women see it more as an negotiating process (Ryan, 2011, p. 7). She contends that both men and women seem to assume that women should be mindful in their refusal to men, so the man is not embarrassed (Ibid.). Fraser would describe this as benevolent sexism, where women are seen as having less agency and men have more. As Fraser mentioned, women are thus not taught by traditional femininity to strictly affirm their refusals.

Ryan further mentions that since rape myths and rape scripts shapes us, when a woman has a nonconsensual sexual encounter that does not align with the real rape script, she might not ever believe it to be rape or sexual assault (Ibid.). Ryan also argues that convicted rapists and acquaintance rapists share a similar belief system that consists of rape-supportive beliefs, rape myths and sexual scripts (Ibid.). These kinds of beliefs are fostering victim blaming, sexual narcissism, and disregard of rape (Ibid.). Ryan claims that convicted serial rapists seemed to follow a real rape script, and mentions that it could be possible that them following the real rape script made them more at chance for conviction and punishment

(Ryan, 2011, p. 8). Ryan further mentions a research of non convicted sexually aggressive men, where the men described how their sexual aggression and ignoring of victim's refusals often happened after a consensual foreplay (Ibid.). Multiple of the men also referred to rape myths such as women promiscuity and provocation, indicating reasons for the sexual aggression (Ibid.). Ryan posits that some men even believed that sexually provocative women (teasing, high number of sex partners, revealing clothes ect.), deserved sexual aggression, which implies a rape script (Ryan, 2011, pp. 8-9). Ryan contends that the media helps construct our sexual scripts, such as objectification of women by straight men, and straight men as sexually needy (Ibid.). Women in comparison are judged for their sexual promiscuity and as withholding sex from men (Ibid.). The media, Ryan argues, might be supporting and reinforcing rape myths and rape through the sexual scripts that they utilize, a great example of this is through the media of pornography (Ibid.).

Continuing within the discussion of rape scripts that were elaborated on by Fraser and Ryan, the article "Excuse Me, But Are You Raping Me Now? Discourse and Experience in (the Grey Areas of) Sexual Violence", by Swedish Gender Studies scholar Lena Gunnarsson, examines the grey areas of sex and sexual violence (Gunnarsson, 2018, p. 5). Gunnarsson particularly focuses on how mainstream rape scripts, what Ryan names real rape scripts, does not represent gray areas of sex and sexual violence. She states that the purpose of this article is to create a dialectical relationship between mainstream discourses on sexual violence and sex and the experiences that people have reported regarding sex and sexual violence (Ibid.). The dialectical relationship that Gunnarsson argues for in this article is one where discourse and experiences constitute a relationship of reciprocal separability and inseparability (Ibid.). She further contends that a dialectical relationship should acknowledge that experiences are not solely created through discourses and discourses that are non-discursive also help constitute experiences (Ibid.). For Gunnarsson to illustrate the dialectic relationship between discourse and experience, specifically in the case of the grey areas in between sex and sexual violence, she has chosen autobiographical stories from the Swedish campaign #prataomdet (#talkaboutit) (Gunnarsson, 2018, pp. 5-6). She further states that the experiences of the grey area between sex and sexual violence, can be seen as an experimental reality, one that is forgotten within mainstream discourses on sexual violence and sex (Gunnarsson, 2018, p. 7).

The experiences from the campaign #prataomdet, illuminate the tensions between discourse and experience (Ibid.). Gunnarsson contends that the campaign came about, as a need for a new language about sex and sexual violence that includes the grey area, which often is excluded in the hegemonic discourses on sexual violence (Gunnarsson, 2018, p. 8). She argues that the dominant discourses surrounding rape and sexual violence, the “rape scripts”, often depict rape and rapists as monstrous, which is unrecognizable for many people that experience sexual violence (Ibid.). The unrealistic discourses perpetuate a culture in which sexual violence is normalized, as victim’s experiences of sexual violence are not recognized in dominant discourses rendering it hard for them to decipher their experiences (Ibid.). Gunnarsson explains that hegemonic discourses on what constitutes a rapist and a victim, makes it hard to properly identify oneself within either category (Gunnarsson, 2018, pp. 9-10). Ryan similarly explains the difficulty for women to decipher what constitutes sexual assault and rape when they primarily only know of the real rape script. Gunnarsson describes, that the connotation of a victim² as helpless and without agency, makes it difficult for people that have experienced sexual violence to relate to the label, as it renders them in a state of no agency (Ibid.). Gunnarsson explains, that most of the #prataomdet narratives were about heterosexual women, however, there were also some narratives about men in unwanted sex, both from a heterosexual and same-sex perspective (Gunnarsson, 2018, p. 11). These narratives are often centered around the expectations for men’s sexual willingness, which makes it hard for them to imagine themselves as victims of sexual violence (Gunnarsson, 2018, p. 13). She argues that when men are always seen as sexually ready and willing, deciphering unwanted sex for them can be difficult, because in a heteronormative script sex should be seen as a gift (Gunnarsson, 2018, p. 14).

Moving from sexual scripts and rape scripts to the aspect of gendered scripts in sex elaborated on by gender scholar Cathrine M. Roach, in the book *Good Sex: Transforming America through the New Gender and Sexual Revolution*. Here she questions how gendered scripts are affecting and limiting our sex lives. Roach explains that the reason why most people still are embodying the gendered scripts, is due to risks associated with refusing them (Roach, 2022, p. 190). Shame and ostracization are often the consequences of not performing one's gender or sexuality correctly (Ibid.). Roach thus postulates that for achieving equal access to pleasure, we must challenge the gender scripts, where men are sexually aggressive

²Due to this, sexual violence literature now prefers the term *survivor* over *victim* (Gunnarsson, 2018, p. 11).

go-getters and women are either the virgin or the whore gatekeeper (Ibid.). Furthermore, masculinity is largely connected to power-over, which constitutes being forceful and in control over others (Roach, 2022, p. 182). Roach claims that these gender scripts of masculinity are what makes rape, sexual assault and rape culture extremely pervasive (Ibid.).

Roach further contends that more than ever are we aware of the limitations and injustices realized by the gendered scripts (Roach, 2022, p. 190). Through a broader understanding of sexual diversity and gender fluidity in contemporary times, she argues, that many are able to re-write or re-invent new scripts (Ibid.). Roach further posits that the gender scripts for women, have although always presented a double-bind, that makes it hard to escape (Roach, 2022, p. 194). She claims that women are stuck in a no-win situation, women must be sexy but not sexual (Ibid.). Roach argues that women learn that their own sexuality and desire is not valued and shameful, if they do emphasize and practice their sexual agency they are perceived as a whore (Ibid.). Simultaneously, they are still expected to look and act sexy for others, otherwise you can be perceived as a prude (Ibid.). Roach postulates that women are more sexual objects, than sexual subjects (Ibid.). She claims that this inhibits women's development of their sexual selves (Roach, 2022, p. 195). Roach argues that in order to consent to a sexual encounter, you need to be aware and know how to express your sexual pleasures and needs, this can be difficult for women to identify, as they are accustomed socially to attend to the needs of others first (Roach, 2022, p. 196). They are taught to please, not to be pleased (Ibid.). Roach emphasizes that these scripts of feminine sexuality, that under prioritize women's pleasure and sexual agency (Roach, 2022, p. 197), makes it unrealistic to assume that women can easily communicate their sexual needs in sex (Roach, 2022, p. 198). This argument has also been made by Fraser and Ryan, who both emphasize the contradictory nature of expecting women to refuse in sex. Roach thus advocates for women to embrace and learn about their own pleasure and sexuality to overcome the pervasiveness of the gender scripts (Ibid.).

In the chapter of the same name as the book, *The Right to Sex*, philosopher Amia Srinivasan utilizes the case of the mass shooting back in 2014 by Elliot Rodger, a twenty-two year old incel³, to discuss the political aspects of our desires. Srinivasan explains that Rodger

³ The term incel is short for "involuntary celibate", Srinivasan argues that it is generally being used to describe sexless men who are convinced they are owed sex, and blame women for the lack thereof (Srinivasan, 2021, p. 73).

committed his mass shooting to target women as punishment for robbing him of sex (Srinivasan, 2021, p. 74). Particularly, he wanted to target “hot, beautiful blonde girls” as these women represented what he hated the most, even though as Srinivasan points out Rodger was mostly bullied by other boys and men (Srinivasan, 2021, pp. 74-75). Srinivasan utilizes this example of Rodger to expand into a discussion of the desire of women and men and how they are ideologically shaped (Srinivasan, 2021, p. 76). Srinivasan contends that since the rise of pro-sex or sex-positive feminism in the 1980’s, largely inspired by Ellen Willis, we take a woman’s word, and trust her, when she talks about her desires (Srinivasan, 2021, pp. 81-82). We don’t, as the anti-sex feminism did, assume that her desires or fantasies, whatever they may be, are due to internalized patriarchy (Ibid). As Srinivasan states, we no longer see sex as morally problematic or unproblematic, but solely through the eyes of consent, there is wanted or unwanted sex (Ibid.). She continues her argument by stating that our norms around sex are like that of capitalist free exchange, we do not concern ourselves with the conditions for supply and demand but merely that each person involved has agreed to transfer (Ibid.). Srinivasan therefore further contends that viewing consent as the only constraint for moral and ethical sex, entails a naturalization of sexual preferences (Srinivasan, 2021, p. 84).

She vouches for questioning why some bodies are fuckable, like hot blonde women, and others, like black women, disabled women and trans women are not (Ibid). The sex-positivity feminism risks, by perceiving personal preferences as pre-political givens, disguising misogyny, racism and transphobia and so forth (Ibid.). Srinivasan does acknowledge the dangers in re-politicising our desires, such as the rise of sexual entitlement and shameful discourse regarding sex (Srinivasan, 2021, p. 86). Lastly, she posits that there is no right to sex, but sexual preferences as fixed should be questioned and politically understood (Srinivasan, 2021, p. 90). Because as she notes, why do men generally respond to sexual marginalization with entitlement, as Elliot Rodger, when women respond with empowerment (Ibid.). As illuminated by Roach the gendered scripts shape how we have sex, men are taught to be sexually aggressive and women are pleasers. This is illustrated by Srinivasan through the example of Elliot Rodger and other incels who are entitled to sex, although she further complicates this by considering other factors such as race and class.

In the book *Unsafe Words: Queering Consent in the #MeToo Era* in the chapter “The Straight Rules Don’t Apply: Lesbian Sexual Ethics” by scholar Jane Ward, she discusses the

inequality of heterosex. Ward argues that patriarchy is the detriment for heterosexuality, it normalizes the sexual entitlement of men, and prioritizes their sexual pleasure (Ward, 2023, p. 3). Furthermore, she claims that within heterosexuality, it is common for straight women to consent to unwanted and undesired sex, and their pleasure is often seen as optional (Ibid.). She therefore deems consent insufficient for bringing forth the changes of creating non-oppressive heterosex (Ibid.). Ward explains that within patriarchy, the cultural meanings that are prescribed to different genders within sex are inherently gendered and must be understood within their structural context (Ward, 2023, p. 5). Ward further contends that within a gender-binary erotic system, receiving and asking for pleasure is inherently for men, and passively giving is inherently for women to do (Ibid.). This is in line with the argument from Roach, that discusses how gendered scripts shape how we have sex.

Although, as Ward further argues, queers and lesbians have for the longest time fought for re-coding and re-gendering nonreciprocal sex (Ibid.). A clear example of this is the femme-butcht sexual dynamic (Ibid.). Ward describes the femme-butcht sexual dynamic to be hetero norms turned upside down, although critics view it as an imitation of heterosexual gender roles (Ward, 2023, p. 6). Ward explains that the term “stone butcht” is a term used to describe a very masculine woman that does not want to be touched sexually themselves, but wants to sexually pleasure femmes instead (Ibid.). This, Ward proposes, is an interesting and telling difference between lesbian sex and heterosex; no term for such a masculinity exists within straight sex culture (Ibid.). She posits that lesbian sex culture has always been intertwined with antipatriarchal rebellion, and this is particularly evident in their approach to the sexual pleasure of women (Ward, 2023, p. 7). Ward explains how giving pleasure to a woman, despite a lack of enthusiasm, but instead as a gift, in a society where her pleasure is disvalued, is for some lesbians viewed as a feminist act of solidarity (Ibid.). She thus claims that providing a universal standard for ethical and feminist sex is complicated, as it needs to be evaluated based on the heteropatriarchal influence we are under, when we have sex (Ibid.). Ward proposes that under the constraints of heterosexuality, enthusiastic consent and egalitarianism might be the best answers for straight women, despite its limitations (Ibid.).

2.2 Feminist Conceptualisations around Consent Laws

In the article “Rape Redefined” Cathrine Mackinnon, known for her radical feminism and her dominance theory in feminist legal theory, which will be elaborated on later on, critiques

rape and consent laws and proposes her ideas for change. Mackinnon argues that rape is a crime of gender inequality and that this is lost in our academic discourses surrounding rape and sexual assault and our approach to law making (Mackinnon, 2016, p. 431). She explains that in both law and scholarship the focus on lack of consent as constituting rape neglects the inequality of the sexes as a factor in sexual relations (Mackinnon, 2016, pp. 439-440). Mackinnon further contends that consent being present does not make an interaction equal (Ibid.). She claims that the consent theory is scrutinizing how submission and subordination can occur to the person that has experienced rape and/or sexual assault (Mackinnon, 2016, p. 442).

An equality perspective, one that she vouches for, would examine the sexual interactions alleged to be rape in the context of historically unequal power relations (Ibid.). Mackinnon thus views consent as an unequal concept, and one that routinely fails to legally pursue sex equality (Ibid.). She backs up this argument by accounting for how legally, consent to sex or the failure to prove nonconsent, is often found in cases of frozen fright, socially situated vulnerability or terror, all which are well-documented examples of conditions of inequality (Mackinnon, 2016, p. 447). Furthermore, Mackinnon posits that there are legal problems in regards to consent laws, including that the burden of proof lies with the victim and whether the sex is deemed nonconsensual is based on how the victim felt and thought about it, thereby assuming that the same action and aggression could have happened and been assumed sex all depending on the feelings and thoughts of the victim (Mackinnon, 2016, pp. 452-453). It also implies that what the victim says about the incident will determine the legal outcome, which Mackinnon argues in reality is untrue (Mackinnon, 2016, p. 464). She views this as problematic as it makes a systemic problem, that of sex inequality and gender hierarchy, one of an individual interaction (Mackinnon, 2016, p. 453). Fraser also highlights the responsibility on the victim to report, but instead extends her argument into a discussion of how women are taught by benevolent sexism to have less agency which is contradictory. Mackinnon instead addresses how the burden to report assumes individual responsibility rather than societal responsibility.

Mackinnon does although explain that there have been attempts at addressing inequalities within sex, such as statutory rape, and in power instances such as teacher/student or lawyer/client. Although they don't explicitly say so, what these laws are attempting to say is that: once power is unequal, consent to sex can become meaningless or impossible to give

(Mackinnon, 2016, pp. 462-463). Ultimately, Mackinnon proposes that the basic rules of rape and sexual assault should stem from the idea of taking advantage of circumstances of inequality (Mackinnon, 2016, p. 469). She states that when sexual interaction is equal, consent is not needed and simply does not happen as no transgression occurs (Mackinnon, 2016, p. 476). When a sexual interaction is not equal no amount of consent can make it so, its sexual assault (Ibid.).

In the essay by Janet Halley, “The Move to Affirmative Consent”, she, quite opposite Mackinnon, believes consent laws, particularly affirmative consent, have gone too far. She focuses on the laws of affirmative consent that have been introduced in the sexual conduct codes of universities in the US, particularly in California (Halley, 2016, p. 257). Halley argues that the move for public colleges and universities in the US to implement affirmative consent into their sexual assault policies will cause harm in form of social control and instill traditional social norms, such as male responsibility and female helplessness (Halley, 2016, p. 259). The affirmative consent policies implemented by colleges state that any sexual contact or action not affirmatively consent to, should be punished (Halley, 2016, p. 265). Affirmative consent should be understood here, as all people involved giving voluntary agreement to sexual contact (Halley, 2016, p. 268). Passivity does not constitute consent (Halley, 2016, p. 269).

She claims that affirmative consent and what it stands for, has been pushed forward by dominance feminists, especially Mackinnon and her beliefs regarding sexual assault constituting any sexual conduct that is not wanted or desired (Halley, 2016, p. 260). She believes dominance feminism started as radical leftist, but that due to their aim at social control through punishment they could now be regarded more as socially conservative (Halley, 2016, p. 259). Halley further explains, that the new affirmative consent policies in colleges and universities can charge sexual assault to any sexual conduct that is not affirmatively consented to, this falls into dominance feminism as it emphasizes the unwantedness of the sexual encounter (Halley, 2016 p. 265). Halley questions if we as feminists want to go there, where women can convict a man of sexual assault based on social compliance or moral ambivalence, whether or not it was positive or performative consent (Halley, 2016, pp. 267-268).

Halley argues that affirmative consent can be regarded as subjective, the person accusing is therefore the only one that can testify for their own intent, making them have the authority (Halley, 2016, p. 275). She notes that the accuser can have been in ambivalence or changed their mind and we would never know, comparatively the accused can never have evidence of the accuser's subjective consent and only rarely of the performative consent (Halley, 2016, pp. 275-276). This, Halley believes, gives women the leverage to convict men and does not create a safer sex environment, but further instills societal norms of women as passive and men as active, and women with feelings and men with reason (Ibid.). Affirmative consent will as she postulates foster a sex-negative culture that reinforces gender norms (Halley, 2016, p. 259). She claims that it is a protective legislation, and does as protective legislation does, which is keep the protected group in their weakness and will through social discrimination and punishment unfairly convict men of color and of lower class (Halley, 2016, pp. 277-278).

Continuing with the question of, for whom consent will protect? The chapter “The Conspiracy against Men” in the book *The Right to Sex* by philosophical scholar Amia Srinivasan, questions how we have sex and for whom there are consequences. She does this through real life accounts of sexual assault, rape and murder cases around the world and the subsequent consequences for the accused and the victims. First and foremost, Srinivasan agrees that there are men who are falsely accused of rape, but that these statistically are very rare (Srinivasan, 2021, p. 2). There is thus no conspiracy generally against men, but there is against certain kinds of men, such as men of color and of lower class who are disproportionately falsely accused and convicted of sexual assault (Srinivasan, 2021, p.4). Srinivasan claims that it is not surprising when analyzed, why rape accusations are a concern for white wealthy men, because it symbolizes for them a perceived vulnerability to injustices, although in reality they are often shielded from these injustices due to their position of power (Srinivasan, 2021, pp. 5-6). Srinivasan further elaborates, that mainstream feminist methods such as #IBelieveHer, are too simplified and do not consider the complexities of race, class, immigration status, religion or sexuality in the rape allegations (Srinivasan, 2021, pp. 9-11). Continuing with her intersectional analysis, she posits that women of color in white spaces are often deemed unrapeable due to their hypersexualization (Srinivasan, 2021, p. 12). Although they are actually statistically more susceptible to some forms of interpersonal violence (Srinivasan, 2021, p. 13). Srinivasan, thereby argues that the feminist trope of “Believe women” actually leaves many women and their struggles behind,

because when we as feminists only serve cases of pure patriarchal oppression it will end up erasing other stories of intersectional marginalization that is present for women of color (Srinivasan, 2021, p. 17).

Another argument that Srinivasan tackles within this chapter, is that of rules suddenly having been changed on men, that they now get punished where before it was accepted (Srinivasan, 2021, p. 20). Srinivasan claims that this has never been the case, that women have always contested injustices, the difference now is that it is more public and men cannot rest assured that there is no punishment for their actions (Srinivasan, 2021, pp. 21-22). She complicates this further, by questioning if we as feminist really should support a carceral approach that systematically harms people of color and lower-class (Srinivasan, 2021, p. 24). Is this really the best way to achieve sexual justice? (Ibid.).

Srinivasan contends that affirmative consent laws are effective if you believe the problem lies in men not securing a yes before sex, but that if you believe the problem to be deeper and lie in why men want to have sex with women who do not really want it, the affirmative consent laws come up short and disproportionately target people of color and lower class (Srinivasan, 2021, p. 29). Ultimately, Srinivasan questions if laws could be the wrong tool for the job, as feminism should strive to avoid re-enacting the old crime and punishment that has the aforementioned predictable costs (Srinivasan, 2021, pp. 29-30).

Following in the discussion of the limits of the concept of consent is Linda Martín Alcoff in her book *Rape and Resistance: Understanding the Complexities of Sexual Violation*. This literature review will look at the chapter in her book titled “Sexual Subjectivity”. In this chapter Alcoff utilizes the concept of sexual subjectivity, inspired by psychological literature, to sufficiently explain the harm that sexual violations do to a person (Alcoff, 2018, p. 111). Alcoff contends that when a sexual violation occurs, what is harmed is our sexual subjectivity which impacts our ability for sexual agency, this she views as both occurring on a collective and individual level (Ibid). She proposes sexual subjectivity as an alternative to understanding sexual violations and their harm, instead of the usual focus on consent, desire, will or capacity for pleasure (Ibid). She further states that to comprehend the epidemic of sexual violations, we need to discern the construction of sexual subjectivities (Alcoff, 2018, p. 115). This implies looking at what we as a society account as normative and morally blameless sex, and normative gender identities and sexualities (Alcoff, 2018, p.

113). This is what both Ryan and Roach have centered their analysis on in the former section of the literature review.

Alcoff views sexuality as socially constructed, and believes that to understand a situation, material conditions and discursive contexts must be considered (Alcoff, 2018, p. 123). She therefore emphasizes the importance of victims' voices being included in the meaning-making and production of new concepts, and the detriment it can cause to someone's construction of their sexual subjectivity if not included in the conversation (Alcoff, 2018, p. 124). Alcoff goes further to question our reliance on consent, stating that consent was a liberal reform to emphasize women's need for sexual autonomy (Alcoff, 2018, p. 126). She argues that consent grants a low bar for sexual agency, and as inspired by Ann Cahill, Alcoff does not view consent itself to be ungendered (Alcoff, 2018, p. 128). Consent relies on problematic gender norms, where men ask, as a contract, and women answer, relying on men being active and women passive (Ibid). This is the same argument that was formulated by Halley, although their discussions leading from this argument are quite different. Alcoff essentially views consent as a tool for liberal societies in the Global North, but as a concept it lacks focus on structural conditions and injustices, and emphasizes solely individual rights (Alcoff, 2018, p. 130).

In regards to desire and pleasure, Alcoff believes they provide a better description of what we need to know about a sexual encounter (Alcoff, 2018, p. 133). Although, here the problem of cultural and social constructions of our desires represent itself, which often is intertwined with structural inequalities such as heterosexism, racism and male dominance (Alcoff, 2018, pp. 134-135). Alcoff further states, with inspiration from Foucault, that our sexual subjectivities are formed through political and historical contexts, desires and pleasures are subject to social conditions and therefore not innately our own (Alcoff, 2018, pp. 136-137). The politics of our desires and the socio-cultural consequences, as mentioned by Alcoff here, is elaborated on by Srinivasan in the former section. In the last matter of will, Alcoff wants us to consider how our will is subject to a will-formation affected by systems of power, what we understand as coercive hence might be harder to decipher than we anticipate (Alcoff, 2018, pp. 140-141). At last, she points to the limits of the concepts of consent, desire/pleasure and will; she believes a universal language for handling sexual violations will silence victims rather than help (Alcoff, 2018, p. 147). Consequently, she

also proposes to not be limited to her more open concepts such as sexual subjectivity and sexual violations as well (Ibid).

Feminist philosopher, Ann J. Cahill, in her article “Recognition, Desire, and Unjust Sex”, similarly to Alcoff, questions the efficiency of consent and instead proposes a focus on desire. Although Alcoff has emphasized that desire is still a limited concept with its conceptual dangers. Cahill postulates, that ethical and morally acceptable heterosexual encounters are politically, ethically and conceptually related with cases of sexual violence (Cahill, 2014, pp. 303-304). This as a term she titles continuum of heteronormative sexual interactions (Ibid.). Cahill utilizes in this article the scholars Mackinnon and Nicola Gavey, to answer the question of what is unjust sex. Mackinnon views normative heterosexual and sexual violence to be understood in their similarities (Cahill, 2014, p. 305). Gavey views normative sexual experiences under heterosexuality to be upheld by rape culture, while still making a clear distinction between rape and unjust sex (Cahill, 2014, pp. 307-308). Cahill departs from this by rejecting Mackinnon’s approach that views all heterosexual desire to be ethically questionable (Cahill, 2014, p. 317). While using Gavey’s theory to question what unjust sex in our normative sexual experiences have in common with sexual violations (Ibid.). Cahill proposes that how Gavey investigates unjust sex or sex within the “gray area” to be similar yet different from sexual violations, is on the account that both rape and sex in the “gray area” are ethical violations (Cahill, 2014, p. 310). Cahill contends that this is despite their clear differences (Ibid.). Instead of focusing on consent, Cahill contends that to make an ethical analysis of sex and sexual contact, it is paramount to investigate sexual desire (Cahill, 2014, p. 304). She rejects the possibility of substituting sexual desire in the role that consent now has, this is similarly stated by Alcoff (Ibid.). Cahill therefore does not believe it would prove useful to determine the absence or presence of sexual desire before a sexual encounter, as often done with consent (Ibid.).

Cahill believes that there are obvious benefits from moving from a conceptual framework of consent to desire (Cahill, 2014, p. 310). She argues that consent tends to indicate something that men do and women respond to, with desire it instead emphasizes all the partners involved (Ibid.). Especially asserting the desire of the woman, which often is neglected in the discussion of consent (Ibid.). Roach mentions how this is related to the gender scripts assigned to women, where they are taught to undervalue their own pleasure. Cahill continues in line with this, by highlighting how our approach to desire, which often

is centered on residing before the sexual engagement could be with a male bias (Ibid.). Cahill, quotes Rosemary Basson's research that indicates that women mainly experience responsive sexual desire, than spontaneous (Cahill, 2014, p. 311). The focus that is on spontaneous desire, indicates for Basson but one of more in an androcentric view of sexual desire, for example, women seem to have less coherence between genital arousal and want for sex or subjective arousal (Cahill, 2014, pp. 311-312). Cahill recognizes the essentializing or generalizing aspects of these studies, but still considers the responsive/spontaneous dichotomy worth noticing, as it tells us how little we might know about our sexual desires (Cahill, 2014, pp. 312-313). Ultimately, she views that neither the lack of desire nor consent is enough to qualify sex as unjust (Cahill, 2014, p. 315). Cahill then posits a question of what desire can do in an intersubjective encounter (Ibid.).

Cahill's main argument, inspired by the discussion of unjust sex by Gavey, is her postulation that normative heterosex is cemented in an inefficiency to recognize the intersubjectivity, which is essential for ethical sexual interactions (Cahill, 2014, p. 315). This is especially clear within sexual violence cases (Ibid.). Cahill views rape as attempts to erase the intersubjectivity⁴ of the sexual encounter, where the perpetrator only recognizes their own desires (Ibid.). What is meant by erasing the intersubjectivity of the sexual encounter, is that you neglect to account for the desires of the person you are with, you thereby reduce the interaction to a subjective one, even in cases of rape, a tyrannical one (Cahill, 2014, pp. 315-16). Ward has a similar analysis on how heterosex is deeply connected to heteropatriarchy and that most hetero women are accustomed to sex that disregards their pleasure.

Discarding, or the attempt to discard the intersubjectivity of the sexual encounter, Cahill claims is an ethical harm, regardless whether it can be categorized as rape or not (Ibid.). What she deems ethically acceptable for any interaction, is thus not in essence the absence or presence of desire, but instead the act of recognizing and being aware of the people involved by knowing the relevance or process of their desire (Ibid.). Concludingly, Cahill states that our current cultural norms regarding sexual encounters are not compatible with what we should view as ethical sexual encounters (Ibid.). This is due to the heteronormative and phallogentric sexual norms, where it can be difficult to become aware of others and your

⁴ For Cahill, intersubjectivity within desire is understood as a phenomenological experience that appears in the context of an encounter (Cahill, 2014, p. 313).

own sexual desires (Ibid.). In this culture, we are also not taught to articulate them, even if we are aware of them (Ibid.). We particularly lack sexual encounters that feature the sexual intersubjectivity of women, and how their desires go unnoticed (Ibid.). For Cahill an ethical approach to sexual desires, or to become an ethical sexual subject, would constitute communication and self-awareness about sexuality (Ibid.). While understanding the limits one has in the access and articulation of your own and others desires (Ibid.).

The article “Postfeminist sexual agency: Young women’s negotiations of sexual consent” by Australian scholars Melissa Burkett and Karine Hamilton, tackles the ambiguities of unwanted sex and how consent fails to account for them. Their discussion is centered in a postfeminist analysis, to examine the contrary ways that young women consider themselves sexually liberated and empowered while simultaneously giving consent to unpleasant and unwanted sex (Burkett & Hamilton, 2012, p. 816). Burkett and Hamilton particularly look at how young women consent to sex in casual relationships and intimate relationships (Ibid.). They state that sexual violence prevention campaigns often advise women to “just say no” to unwanted sexual encounters, this follows a risk avoidance approach that endorse the neoliberal idea of individual responsibility, that ignores gender inequalities and sociocultural constraints (Burkett & Hamilton, 2012, p. 817). This, they claim, basically projects the responsibility on women to adequately express their willingness or unwillingness for a sexual encounter (Ibid.). The burden of proof that is tied to the women in sexual assault and rape cases is highlighted by the analysis of Mackinnon as well. They all agree that this assumes individual responsibility on behalf of the victim which ignores structural inequalities.

For the research for this article, Burkett and Hamilton conducted eight interviews with young women regarding how they negotiate consent in both intimate relationships and casual sexual encounters (Burkett & Hamilton, 2012, p. 818). They argue that the interviews showcase, as much sexual consent literature as well, that their (hetero) sexual encounters are formed through gender norms and discourses (Burkett & Hamilton, 2012, p. 817). This can implicitly affect their negotiations of consent (Ibid.). This is more extensively analyzed by Roach in the former section. Burkitt and Hamilton further claim that the postfeminist and neoliberal view on autonomy and sexual liberation are covering over the complexities inherent in the process of consent (Ibid.). They claim that for their interlocutors the “just say no” neoliberal approach of risk- avoidance clearly influenced their perspective on sexual

consent (Burkett & Hamilton, 2012, p. 819). Such as believing that women need to clearly say no, as a man will assume consent, this implies implicit consent for the man and puts the responsibility on the woman for establishing sexual boundaries (Burkitt & Hamilton, 2012, pp. 819-20). They claim this stems from a postfeminist framework of differences between the sexes that makes them misunderstand each other, this renders existing gender inequalities unavoidable (Burkett & Hamilton, 2012, p. 821).

Burkitt and Hamilton also argue that their interlocutors, contrary to their postfeminist views of sexual liberation, felt that once they started a sexual encounter it had to be followed through (Burkitt & Hamilton, 2012, p. 822). The women felt they had already implicitly consented, by for example going home with someone (Ibid.). They contend that this reflects the sexual norms internalized by young women as men as naturally aggressive and women as passive pleasers (Burkitt & Hamilton, 2012, p. 823). They further claim that the postfeminist sensibility extends this, by viewing women as empowered for submitting (Ibid.). This they argue is the compulsory sexual agency of postfeminism (Burkitt & Hamilton, 2012, p. 824). Burkitt and Hamilton posit that how women negotiated consent in intimate relationships also indicated sexual compliance (Burkitt & Hamilton, 2012, p. 825). They postulate that their research showcase how the interlocutors embrace the “just say no” approach to sexual violence while simultaneously describing experiences of unwanted sex where they felt unable to say no (Burkitt & Hamilton, 2012, p. 828). Burkitt and Hamilton believe that this contradiction is inherent in postfeminist sensibility; a combination of anti-feminist and feminist aspects, that make the women feel sexually empowered while simultaneously embracing restrictive heteronormative norms of sexuality (Ibid.). They advocate for challenging gender, power relations and sociocultural norms as prevention for sexual violence instead (Burkitt & Hamilton, 2012, p. 830). Gunnarsson does in her article discuss how women have difficulties identifying what constitutes as rape and sexual assault, as they are influenced by rape scripts and myths. This is tied to the discussion of Burkitt and Hamilton, through their discussion of why women participate in unwanted sex. Both articles delve into the ambiguities of sex and sexual assault and how hard it is to decipher when we are guided by rape and sex scripts.

Following on the same topic of ambiguities within sex, feminist psychologist scholar Nicola Gavey examines the grey area between rape, sexual coercion and consenting sex (Gavey, 2005/2018, p.128). This is done through the chapter “Unsexy Sex: Unwanted Sex, Sexual

Coercion, and Rape” in the book *Just Sex? The Cultural Scaffolding of Rape*, and will not be the same excerpt utilized in the analysis by Cahill. Gavey utilizes in this chapter, interviews she has conducted with women, that demonstrate the various conditions that occur for women to have unwanted sex with men (Ibid.). With unwanted sex, Gavey particularly focuses on situations where women felt they had no choice due to pressures and obligations (Ibid.). She states that various of the women in the interviews, described instances of obligatory unpleasurable sex, she claims that this is due to dominant discourses of (hetero) sex (Gavey, 2005/2018, p. 131). She elaborates that the dominant discourses of (hetero) sex create normative scripts of what is categorized as normal sex (Ibid.). In this kind of discourse men are aggressive and sexually needy, the male sexual drive discourse, and women give sex to men in exchange for the desired relationship, the have-hold discourse, ultimately creating an unjust sex environment (Ibid.). Gavey argues that these experiences of the women imply experiences of sex that are contrary to current mainstream portrayals of women as active and with agency in sex (Gavey, 2005/2018, p. 132). She postulates the experiences of the women give another side of the story, but that both should be kept in mind (Ibid.). This dichotomy women are posed with, of being sexually autonomous and empowered while simultaneously and continuously consenting to undesired sex is explored in the former article by Burkitt and Hamilton.

Gavey contends that many women claimed to have no language for saying no or were unable to say it (Gavey, 2005/2018, p. 135). Gavey references the conversation analysis done by Kitinger and Frith (1999), that concluded that saying a direct no as a refusal, is incompatible with everyday life conversations where refusals often are done non verbally or indirect (Gavey, 2005/2018, p. 136). Gavey argues that this inability to say no in a sexual encounter with a man could then stem from the fear of him not backing off and the woman having to assert herself in a way that disrupts norms of femininity and everyday conversations (Ibid.). As elaborated on by Fraser women are socialized to be polite and unproblematic making refusals hard to assert. Ryan also mentioned that research has shown that both men and women believe women should be gentle in their let down to men so they are not embarrassed. All asserting the complexities in the “refuse narrative”.

Gavey continues to explain that in the accounts of the women, some of them situated themselves within a male sexual drive discourse, or permissive one, to obtain a desired positive sexual identity, such as a good lover or sexually available (Gavey, 2005/2018, p.

141). Gavey, explains that through a Foucauldian discursive approach we can understand how dominant discourses of heterosex can help create women's sexual subjectivity in various ways that could make them comply with unwanted sex (Ibid.). Gavey further posits that through the interviews, it was clear that some women "gave" sex to their partners through a logic of pragmatism or nurturance (Gavey, 2005/2018, p. 142). In the face of sexual pressure from their partners, the women would sometimes consent to sex without sexual desire, as it was easier or because they wanted to take care of them and/or felt bad for resisting (Ibid.). A final point Gavey mentions among the social processes of why women will go along with unwanted sex, although they don't want or desire it, is for the fear of possible consequences (Gavey, 2005/2018, p. 148). She contends that when a man ignores the woman's lack of interest, they can not be sure of how far he is willing to go, and the fear of potential rape becomes a reality, going along with it then might feel like a safer option for some (Ibid.). Gavey postulates that the inability to verbally refuse or resist for the women, becomes a form of strategic agency, which protects them from being raped (Ibid.).

Sexuality scholar Joseph Fischel addresses, in the chapter "Crippling Consent: Autonomy and Access" in the book *Screw Consent: a Better Politics of Sexual Justice*, why we need to expand beyond the concept of consent for achieving sexual justice. Most of the chapter is theorized from the perspective of a sexual assault case in Connecticut in the US, where a disabled woman, L.K, was sexually assaulted by her mother's boyfriend (Fischel, 2019, p. 135). Fischel does, with this case, question how we can reform our sexual assault laws to better accommodate people with disabilities, in a way that does not deem them legally unable to consent to desired/wanted sexual contact or render them without legal protection from unwanted sexual contact (Fischel, 2019, pp. 139-140). Fischel argues for a reconstruction of sexual autonomy, through inspiration from both Schulhofer and Nedelsky's definition of sexual autonomy, he wants to reconstruct sexual autonomy as the capability to co-determine sexual relations (Fischel, 2019, p. 146). Viewing sexual autonomy through the lens of a central human capability also means that the sexuality of people with and without disabilities cannot be minimized in regards to other human rights and needs (Fischel, 2019, p. 148). Fischel wishes to foster a relational approach to sexual autonomy, one where co-determination is seen as a possibility (Fischel, 2019, pp.148-149). Although their concepts and how they are used are different, Fischel and Cahill each value and advocate for an approach to sex that highlights the connectivity of the people involved.

Furthermore, Fischel contends that affirmative consent is the better option in dealing with sexual assault, in comparison to force or desire (Fischel, 2019, p. 151). Although, he emphasizes the importance of not equating sexual autonomy with consent, as established, sexual autonomy is reconceived relationally and considers social contexts in regards to your capability to make sexual choices (Ibid.). Applying affirmative consent into sexual assault laws is therefore merely one possible reform for securing sexual autonomy for people with or without disabilities (Ibid.).

Another reform that is proposed by Fischel is that of criminalizing or regulating sexual interactions in relationships of dependence not already accounted for legally (Ibid.). It should not be a general prohibition or one that further restricts disabled peoples sexual autonomy, but could instead be status restrictions with possibility of applying an affirmative consent defense (Fischel, 2019, p. 154). Fischel further argues for a social model of disability that promotes access, reforming and redesigning cultural institutions and so forth to accommodate people across the spectrum of ability (Fischel, 2019, p. 156). Specifically the sexual access that Fischel proposes is democratically hedonic, one that collectively fosters a sexual culture where everybody is considered (Fischel, 2019, pp. 157-158). Ultimately, Fischel postulates that comprehensive and reformed sexual education programs that teach about sexual safety and pleasure can democratize sexual access and promote sexual autonomy as a capability for everybody (Fischel, 2019, p. 169). When Fischel then says screw consent, he means we should demand more from sexual justice politics than solely consent (Fischel, 2019, p. 171).

Similarly as Fischel, the book *Unsafe Words: Queering Consent in the #MeToo Era* by scholars Trevor Hoppe and Shantel Gabriel Buggs, challenge dominant conceptions of consent and sex by viewing it through a queer lens, essentially reimagining our possibilities of ethical sex beyond the boundaries of heterosex. In the specific chapter "Lost in the Dark - Or How I learned to Queer Consent" Hoppe describes how "enthusiastic" consent is not sufficient as a concept for identifying assault or unethical sex (Buggs & Hoppe, 2023, p. 3). Enthusiastic consent as a concept is used sometimes instead of consent, to accentuate how consent should be a continuous and active dialogue within sex, and is not a passive agreement (Buggs & Hoppe, 2023, p. 2). Hoppe agrees that as an aspirational goal in sex education, enthusiastic consent can be helpful for young people to learn about sex (Buggs & Hoppe, 2023, p. 3). Although, he finds it too limiting and detached from reality, in regards

to determining harmful or unethical sex (Ibid.). He postulates, that if everything can be categorized as sexual assault, it can harm the people that have experienced rape or sexual assault (Ibid.).

In this chapter, Hoppe theorizes about consent, especially “enthusiastic” consent through his experiences as a white cisgendered gay man (Ibid.). He contends that consent in real life does not always align with “enthusiastic” consent (Buggs & Hoppe, 2023, pp. 3-4). Consent is not always done verbally, but through more subtle actions, consent, especially in the gay world can also be prearranged, and lastly he claims that consent can also be unenthusiastic, such as in long-term relationships (Ibid.). Hoppe further explains that the lack of dialogue is often what is wanted in these sexual encounters for gay men, and that the communication that is present in the moment is often nonverbal and subtle (Buggs & Hoppe, 2023, pp. 8-10). He believes that the discussion of consent can be enriched by including expertise and experiences from queer communities (Buggs & Hoppe, 2023, p. 5). Hoppe contends that the way that queer people have negotiated consent, have often included darkness or silence, the community have created various radical sex cultures where consent is negotiated differently (Ibid.). He explains that the absence of dialogue in the hook-up scene for gay men is often the appeal (Buggs & Hoppe, 2023, p. 8). Hoppe goes on to describe a sexual encounter he had, that played out as a rape fantasy, they had communicated about it online beforehand but it turned more aggressive than he expected, nonetheless he describes it as a great and thrilling experience (Buggs & Hoppe, 2023, p. 13). Hoppe explains that the communication and consent given was all with nonverbal cues, such as eye contact (Buggs & Hoppe, 2023, pp. 12-13). He claims that sex is always about power and that many people share his dominant/submissive fantasies, which there should be space for when discussing consent (Ibid.). Hoppe postulates that a practical concept of consent should be broad enough to encompass spontaneous and boundary pushing sex for those who desire it, while simultaneously offering stricter lines for those who desire or need that (Buggs & Hoppe, 2023, p. 14).

2.3 Feminist Philosophies on Law

In the book *“Postmodern Legal Movements: Law and Jurisprudence at Century’s End”* in the chapter *“Feminist Legal Theory”*, the author Gary Minda accounts for how feminist

jurisprudence came about in the 1970's. Minda describes that before feminist jurisprudence, American judges had relied on assumptions about gender that stemmed from the patriarchal values of society and this was reflected in their legal decision-making (Minda, 1995, p. 128). The new theory of feminist jurisprudence was powerful, as it offered a feminist approach and understanding of law that valued women's perspective, that often was ignored within traditional law (Minda, 1995, p. 128). Minda argues that feminist legal theory can be seen as a reaction to the jurisprudence of modern legal scholars that primarily saw law as a way to interpret a universal and gender-neutral morality (Minda, 1995, pp. 128-130). Furthermore, Minda accounts how within modern feminist jurisprudence different legal schools sprung forward in the 1980's. Although all the different legal schools challenge in their own way the traditional beliefs of gender and gender hierarchy that seem to be inherent in professional legal discourse, they have different approaches, methods and perspectives on how this should be done (Ibid.). The three schools that Minda accounts for are; liberal, cultural and radical feminism (Minda, 1995, p. 137). These different legal schools have collaborated in their work to expose the position of women in the patriarchal legal system and how law reinforces the gender hierarchy (Minda, 1995, p. 134). Although, as Minda argues, debates such as sameness/difference debate, whether women should be seen as different or the same to men in law, has caused feminists to differ tremendously in their approach (Minda, 1995, p. 130). Some feminists, particularly cultural feminist (Minda, 1995, p. 135), have argued that women are inherently different from men and we should not seek equal treatment in law but instead strive for laws that are specific to women (Minda, 1995, p. 130). Other feminists, particularly liberal feminists (Minda, 1995, p. 135), seek to gain equal treatment in law as they regard a difference-approach patronizing (Minda, 1995, p. 130). A final point in his chapter is the switch to Postmodern legal feminism. Postmodern feminists started to question and deconstruct notions of essentialism and objectivity within modern feminist scholarship (Minda, 1995, pp. 141/142). The aim of postmodern feminists is to illuminate how the modern idea of reason and objective truth is flawed, that legal modernism and their understanding of individuality is ignoring feminine values (Minda, 1995, p. 143). A postmodern feminist critique would therefore, as explained by Minda, understand the self as socially constructed through discourses surrounding gender, and thus reject essentializing women's experiences, as often done by radical and cultural feminist (Ibid.).

One of the schools of feminist law mentioned in the other article by Minda, was that of radical feminist legal theory. This is elaborated on by Cathrine Mackinnon, a prominent radical feminist legal scholar. In her text *“Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence”* she argues that there is no space that is spared from an ungendered perspective and that this applies to law as well (Mackinnon, 1983, p. 636). She claims that the law is male, and that therefore the law treats and views women how men do (Mackinnon, 1983, p. 644). She posits that law is built on the foundation of objectivist epistemology, which means that the law is reinforcing existing power distributions of society (Mackinnon, 1983, p. 645). Therefore, laws such as the rape law, assumes a single universal reality, and not a reality that is constituted on divergent meanings, which is precisely what inequality produces (Mackinnon, 1983, p. 652). Mackinnon illustrates this through an example: when a rape case is lost on a defense based on lack of consent, the woman has not only not succeeded in proving absence of consent, she also is regarded as not having been harmed at all (Mackinnon, 1983, p. 653). The single universal reality is thus that it was sex and nothing more. Mackinnon further claims that too often when reforming and enforcing rape laws we emphasize on the deviant perpetrator and the crime, not accounting for why women get raped in the first place and where the state’s role is in that (Mackinnon, 1983, p. 643). Mackinnon contends that whether or not something constitutes as rape, depends on whose meaning is regarded as more valid, and that this negotiation is done under conditions of sex inequality (Mackinnon, 1983, p. 652). Thereby, she proposes that if sexuality is relational, consent is a conversation that is always had under conditions of sex inequality (Ibid.). Mackinnon argues that the absence of force within sex or the presence of consent, does not automatically entail presence of control for women when having sex (Mackinnon, 1983, p. 650). Ultimately, Mackinnon’s analysis of the law and state is centered on a methodological post-marxist feminism that challenges the relation between society and state through a theory of social determination based on sex (Mackinnon, 1983, p. 642).

Another school of feminist jurisprudence early on, was that of cultural feminism. This one especially stemmed from the feminist psychology scholar Carol Gilligan, in her book *In a Different Voice* (1982). In this book, she investigates through interviews of women and their experiences of abortion in the US, their sense of morality, responsibility, and justice. In chapter 5: “Women’s Rights and Women’s Judgment”, Gilligan argues that women grow up with their sense of morality centered on self-sacrifice which complicates women’s development (Gilligan, 1982, p. 132). Furthermore, Gilligan contends that the ethic of self-

sacrifice that women possess is in direct conflict with their rights, and their claim to social justice (Ibid.). For women, there seems to be an opposition between selfishness and responsibility which ultimately makes individual choices and exercising of their rights hard to do (Gilligan, 1982, p. 138). Women are caught between choosing their needs and agency or being selfless and taking care of others (Ibid). For understanding women, Gilligan thus expresses that women's responsibility for others, their ethics of care, and the responsibility they have for themselves and their own rights and choices need to be understood simultaneously (Gilligan, 1982, p. 147). The changes we have seen in women's rights have thus helped change women's moral judgments, making women able to envision mercy and justice as interconnected, that it is moral to care for others, but certainly also moral to take care of themselves (Gilligan, 1982, p. 149).

A cultural feminist outlook on feminist jurisprudence, is thus particularly interested in acknowledging and accounting for how women's development and their experiences of life are neglected in law. It examines how in order for us to account for women in law we need to understand how they view their own morality and responsibility to others, and how this impacts their own conception of their rights and how they exercise them.

Carol Gilligan is not a legal scholar herself, although she has been highly influential for cultural feminist jurisprudence, which situates her within the discipline herself. This is illuminated through Carrie Menkel-Meadow, a legal scholar within cultural feminism, who continues in line with Gilligan's theories. Menkel-Meadow does in the essay "Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change" develop on the same theories initiated by Gilligan. Menkel-Meadow does in this essay elaborate on her earlier argument, that women in jurisprudence can make important contributions within law (Menkel-Meadow, 1989, p. 292). Although, this essay expands on this further by claiming that different historical and social conditions impact how gender differences matter in certain situations (Ibid.). With inspiration from Gilligan and others, she postulates that women in the context of ethics of care and justice, and their consideration of relationships and context could potentially reconstruct our legal systems (Menkel-Meadow, 1989, p. 312). Menkel-Meadow clarifies that her theoretical construct of difference is not biologically determined, she instead views the difference as socially constructed (Ibid.). Concludingly, she argues that the entrance of some new women into legal practice will inspire some change (Menkel-Meadow, 1989, p. 318). Through their

experiences as women, considering different racial and gendered experiences as well, they have the potential for transforming the legal system and its practices (Ibid.).

The third and last of the schools of feminist jurisprudence early on, were that of liberal feminism. This literature review will illustrate the perspective of liberal feminism in feminist legal theory, through the liberal scholar Susan Moller Okin in her article "Feminism, Women's Human Rights, and Cultural Differences". Okin begins the text by clarifying that women are holders of human rights, but that they still are discriminated against all over the world and that these discriminations are oftentimes made in certain cultures (Okin, 1998, p. 33). She, Okin, justifies her arguments through cultural descriptions of treatments of women, such as in the case of Afghanistan, which she deems to be sex discrimination (Okin, 1998, p. 38). She further argues that there are various international declarations and conventions that should protect women from sex discrimination which stems from cultural practices such as dowry and child marriage, but unfortunately they are not being properly reinforced (Ibid.). Okin believes we need to rethink human rights, because human rights neglected to talk about the domestic or private sphere before, which is where most gender-based violations are present, and where the vast majority of women in the world are based (Okin, 1998, p. 36). She argues that the government thus needs to account for these areas and restructure human rights laws accordingly (Ibid.).

Okin's main argument throughout the article, is that there is an urgent need to view women's rights as human rights, due to the fact that many inequalities between men and women are still understood as invisible, natural or culturally appropriate (Okin, 1998, p. 37). Okin believes we need to examine private and domestic life in light of human rights as it is here that many violations are being made and have been justified further due to religion or culture (Okin, 1998, p. 39). She proclaims that despite the clear evidence by white middle-class feminists of sex discrimination occurring within certain cultures, that evidence is seen as offensive cultural imperialism (Okin, 1998, p. 43). Okin believes that we need to look beyond this and focus on the tremendous change we can achieve if we counteract these oppressive laws and customs around the world and uphold the international conventions and declarations that go against cultural practices, customs and traditions that discriminate against women (Okin, 1998, p. 45). Okin believes such achievements and changes are possible to make, such as the one in the Beijing Conference, where there was a strong rejection of violations of women's human rights on the basis of cultural rationalization

(Ibid.). Lastly, Okin argues that categorizing what constitutes good feminist criticism for tackling women rights issues globally is hard to do (Okin, 1998, p. 48). Although listening to “silent voices” does play an important role (Ibid.).

Continuing on from the traditional schools of feminist jurisprudence, the legal scholar Mary Becker questions in her article *Prince Charming: Abstract Equality* the concept of a standard equality applicable by judges. Becker complicates our understanding of one singular standard of equality and instead proposes to view the particular situations and advocate for change in the appropriate forums (Becker, 1987, p. 202). Although, she does emphasize that the appropriate forums are often in the form of legislature (Ibid.). She argues for this, as she deems an abstract or standard approach for reaching equality highly unlikely to aspire real change without damaging the situation for many ordinary women in the process (Ibid.). She illustrates these arguments in the article by demonstrating the damage a standard equality can cause through particular cases, such as the case of *Johnson v. Transportation Agency* (Ibid.). Becker argues that formal equality has many limitations, as formal equality does not adequately account for the different situatedness of people (Becker, 1987, p. 206). Formal equality defines equality as tending to similarly situated people in the same way, but this is what is questioned by Becker. How can we do this properly if many factors of difference are being neglected (Becker, 1987, p. 208) ? As Becker further postulates, formal equality assumes that it is viable to neglect a person’s sex, when accounting for their difference or sameness, which much data suggests we cannot (Becker, 1987, p. 209). Becker ultimately believes that formal equality is not optimal for finding solutions for women’s problems, as women do not constitute a homogenous group (Becker, 1987, p. 237). According to Becker, we need to be aware not to implement a standard for equality that works for one subgroup but jeopardizes and silences another (Ibid.).

Extending further into the landscape of feminist jurisprudence, many feminist legal scholars have criticized the essentialism found in much of feminist legal theory. One such criticism is from the legal scholar Angela P. Harris in her article “*Race and Essentialism in Feminist Legal Theory*”. In this article Harris argues that legal thinkers have often spoken from the idea of “we the people”, a voice that speaks of objectivity and abandons its bias (Harris, 1990, p. 583). She extends this argument further to refer to how feminist legal scholars often move from the idea of “we the people” to “we the women” (Harris, 1990, p. 588). There is the belief of a monolithic woman experience, which ultimately is based on the experience

of a white woman (Ibid.). Harris analyzes the ideas of the white feminist legal scholars Mackinnon and Robin West, as they both end up utilizing essentialism to support their theoretical claims (Harris, 1990, p. 585). Harris posits that the voice of the black woman is often neglected or silenced due to essentialism in feminist legal theory (Ibid.). She contends that when the voice of the black woman is used, it is often only used to describe a more extreme version of a white woman's experience, it doesn't acknowledge the multiple consciousness of being a woman and black (Harris, 1990, p. 596). Harris ultimately proposes that a post-essentialist feminist jurisprudence needs to include the voices and experiences of silenced women, which includes black women (Harris, 1990, p. 608). She argues, that the voices of black women can ultimately help us understand the self as having a multiple consciousness, viewing differences as relational rather than inherent, and lastly that commonality and collectivity should be an act of will and creativity rather than from a shared understanding of passive victimization (Ibid.). Harris argues that a methodology of feminist legal theory needs to also account for how we tend to prioritize the universal female voice, which is the voice of the white woman (Harris, 1990, p. 585).

Another feminist legal scholar, who also focuses a lot on the essentialism within feminist legal thought and legal thought in general, is the legal scholar Kimberlé Crenshaw. Crenshaw, is a prominent figure within feminist jurisprudence Especially, her coined term "intersectionality" is relevant for understanding the influence she has in feminist legal theory. In the article "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color", Crenshaw intends to explore the intersectional identities of race and gender in the violence committed against women of color (Crenshaw, 1991, pp. 1242-43). She specifically focuses on two aspects of male violence committed against women; rape and battering, and how the experiences of women of color often are rooted in both racism and sexism (Ibid.). Crenshaw also argues that experiences of women of color are often forgotten both in antiracism and feminism agendas (Crenshaw, 1991, p. 1244). Crenshaw clarifies that her use of intersectionality is not being proposed as a new totalizing theory of identity (Ibid.). She continues, by stating that her use of the intersections of race and gender is being used to showcase the need for accounting for multiple axes of identities when examining the social world and its construction, but stresses the fact that other intersections are valid as well (Crenshaw, 1991, p. 1244-45).

Crenshaw first accounts for the structural intersectionality in the experiences of women of color. Women of color are positioned differently economically, socially and politically (Crenshaw, 1991, p. 1250). Therefore, when reforms are made by or for women, and this fact is abandoned, women of color's needs are disproportionately not met (Ibid.). Secondly, political intersectionality is a concept made by Crenshaw to account for how women of color often are located in at least two subordinated groups, that often follow political agendas that are conflicting (Crenshaw, 1991, p. 1252). The danger is frequently that one analysis of identity denies or neglects the other (Ibid.). Through the example of rape, Crenshaw postulates that both sexism and racism have been implemented into our social construction of rape (Crenshaw, 1991, p. 1268). She further claims that we devalue and diminish black women's sexual victimizations (Ibid.). Historically, there has also been a dominant perception of rape as the black offender/white victim, which has caused more control of neighbourhoods of people of color (Crenshaw, 1991, p. 1266). Crenshaw also mentions that studies have also shown that African-American women are less likely to be believed in cases of rape (Crenshaw, 1991, p. 1269). Rape law reforms that will benefit black women, thus need to account for the narratives and cultural beliefs regarding black women and women of color (Crenshaw, 1991, p. 1271). Crenshaw claims that when one discourse does not recognize the importance of the other, the power relations that each of them object against are strengthened (Crenshaw, 1991, p. 1282). Thirdly, Crenshaw argues for the dangers of not recognizing representational intersectionality. This is how cultural images are produced due to mainstream narratives of race and gender, but also how these critiques of sexist and racist representations are again marginalizing women of color (Crenshaw, 1991, pp. 1282-83). Crenshaw postulates that the intersectional identities of women of color are forgotten in the critiques, and this erases their experience in how they specifically are represented in cultural images (Ibid.). Crenshaw posits that acknowledging how the intersectional experiences of women of color are diminished or erased in mainstream ideas of identity politics, does not mean that people of color should abandon the organizing of communities (Crenshaw, 1991, p. 1299). Crenshaw, instead proposes that we should view the potential that intersectionality presents for a reconceptualization of race that brings women and men of color together (Ibid.).

Another important aspect of Crenshaw's theories regarding law is that of critical race theory. In her chapter "Lessons from the formation of Critical Race Theory" in the book *Unmasking Colorblindness in Law*, she delves into the history of critical race theory (CRT) and how

it emerged within law as an intellectual response to the colorblindness⁵ found in the institutional struggles over race equality within elite legal education (Crenshaw, 2019, p. 52). Crenshaw begins by first and foremost clarifying that colorblindness within law can be found in radical, liberal and conservative conceptions of law, therefore not belonging to one singular axis (Crenshaw, 2019, p. 53). Within all these spaces there have been people that have questioned the legitimacy of race in intellectual projects (Ibid.). Crenshaw then further accounts for the origin of CRT and how it came to originate within law. She explains that CRT is not only a product of philosophical critique of racial power, but also a product of activists' engagement and literal resistance to the material manifestations of the liberal reform in the elite educational institutions (Crenshaw, 2019, p. 56). Furthermore, CRT can be seen as emerging from post-civil rights institutional activism, created by an oppositionalist orientation in regards to racial power, in this case specifically colorblind laws and regulations in elite legal education (Ibid.). The particular point of departure for the beginning of CRT was the institutional struggle that occurred in the 1980's over race, pedagogy and affirmative action at elite Law Schools in the US (Crenshaw, 2019, p. 59). Crenshaw elaborates that Harvard Law School lost their only tenured professor of color and also canceled their only class on race and minority issues on the curriculum, this angered students and they demanded change (Crenshaw, 2019, pp. 60-61). The dean and Harvard Law School resisted the affirmative action from the students and held onto the claim that there were no qualified professors of color available (Crenshaw, 2019, p. 63). Crenshaw argues that the colorblind merit that professors had to live up to were perceived as race neutral, and the students' need for professors of color was seen as discriminatory (Crenshaw, 2019, pp. 66-67). This ultimately created a great foundation for CRT to emerge; the colorblind merit exposed by the students was concealing the patterns of racial power in seemingly race neutral institutions (Crenshaw, 2019, p. 67). Crenshaw points out that it is important to note that critiques of racial power outside of law have been happening for nearly a century (Crenshaw, 2019, p. 74). Although, the difference and why CRT happened to originate within the discipline of law, is actually due to the conservative character of law that made interdisciplinary projects possible and ultimately made for the emergence of CRT (Ibid.).

⁵ This is the concept Crenshaw herself utilizes in the chapter (Crenshaw, 2019, p. 52).

3. Positionality

It matters who speaks and to whom, it shapes the meaning of a message, moreover, it is de facto that the meaning of the message is changed depending on who speaks and who listens (Alcoff, 1991, p. 12). Because the former belief of the neutrality of the theorizer is, as mentioned by Alcoff, now commonly discarded by most researchers (Ibid.). Furthermore, it is also not simply the comprehension and what is emphasized by the speaker and listener that is affected by their positionality, the epistemic status is also affected (Alcoff, 1991, pp. 12-13). This ultimately means that location or positionality determines whether a message is perceived as true, reasonable or significant (Ibid.). This is similarly explained by Donna Haraway, who accounts for how we all have situated knowledges. Haraway accounts for how our knowledge claims are partial, due to our location and positionality, and recognizing this and accepting accountability is what makes our knowledge claims credible (Haraway, 1988, p. 589).

Understanding that my positionality and my location inevitably shapes my research, it is important for the readers of this paper, and myself, to have an account of how my knowledge is situated. I am a twenty-five year old white queer Danish woman, who was born and raised in the Copenhagen area of Denmark. I grew up in a part Danish, part Spanish working class household, that consisted of my younger sister, my dad and me. My ontological position of the world is one that believes in relativism and subjectivity in human experiences of reality. Epistemologically, how I perceive knowledge to be generated and how I myself conduct my research, is from a social constructivist perspective. Therefore, I also recognize how my own belief systems are constructing my idea of knowledge and truth. Deriving from a social constructivist perspective, makes me acknowledge how important my location is for the shaping of my research, and for how others understand it. Politically I identify as both a feminist and a leftist, which both have shaped my research tremendously.

The topic of consent, has as mentioned in the context, been publicly debated in Denmark for quite some years before it's implementation in the rape legislation in 2021. I had myself, participated in one of the demonstrations held in 2018, and supported the feminist organizations of Denmark that were demanding a consent-based rape legislation. I followed the debates that were present in the media and were as other feminists in Denmark puzzled over the backlash. It became a polarizing debate, between supporting consent in legislation

or not. At that moment in time, I completely supported the consent-based rape legislation. When the consent-based rape legislation was introduced, I did not think about it much further before I, in 2022, wrote a small article about consent, on the Danish sex education website Peech. Here I spoke about the importance of understanding consent and incorporating it in how we have sex, and that sex should always be voluntary and because both desire it. I emphasized that it should never be understood as a contract, but instead a continuous dialogue of either partner's limits and desires. I did not reflect more about my position of consent, before I myself experienced being sexually assaulted, and realized firsthand the nuances that the situation can entail. My experience, and listening to others experiences of sexual assault and and/or rape, both strangers and people close to me, made me regain another perspective on the topic of consent. One that for the first time made me question how consent could be a limited concept for understanding unwanted sex in its complexities. My own and others experiences have inevitably affected my research in various ways.

4. Methodology

This section will introduce the methodological approach to this paper and the subsequent empirical data that has been gathered and how it benefits the further analysis.

4.1 Qualitative Method

The qualitative research method is a broad research framework that encompasses various methodologies and cannot be attributed to one single discipline (Yilmaz, 2013, p. 312). The qualitative research method thus covers various different methodologies, theoretical paradigms and research traditions (Ibid.). Yilmaz (2013) defines it as an interpretive and naturalistic approach, one that intends to research phenomena, people, cases and social processes through their natural settings to uncover in descriptive terms the symbolisms in which people have attributed to their experiences of their surroundings (Ibid.). Qualitative research has an ontological understanding of knowledge as socially constructed (Yilmaz, 2013, p. 316). Various social groups construct their own realities based on their belief systems, which also means that in any given situation there are always different interpretations (Ibid.). Qualitative research intends to answer “how”, “why” and “what” questions through “thick description”, which entails a thorough understanding of a small number of cases, and is therefore not focused on numbers or quantity (Yilmaz, 2013, p. 317).

At last, it emphasizes the need to understand cases and individuals in detail and as context-dependent (Ibid.).

4.2 Feminist Content Analysis

Content analysis is the study of objects or cultural artifacts (Reinharz, 1992, p. 146). What can be categorized as a cultural artifact/object and thus read as a text for research has no limits (Ibid). Feminists have especially expanded the notion of what can be studied as texts in content analysis, by analyzing music, various cards, textiles and behavioral residues such as prints from walking (Reinharz, 1992, p. 147). A qualitative content analysis frequently uses a small sample of content for analysis, due to the time-consuming nature of this type of method (Macnamara, 2015, p. 5). This is due to the analysis being focused on research findings and the interpretation of the chosen content, which requires an extensive in-depth analysis of each text (Ibid.). This research paper will therefore look at ten texts to analyze extensively, nine court cases and one report from the prosecuting authority. Each case and the report are analyzed thoroughly and utilized in various aspects of the analysis, both analyzing the text itself to answer “how”, “why” and “what” questions stemming from the research question, but also to interpret the text through its contextual factors, such as the Danish patriarchal society.

A content analysis is mainly centered on the audience, the media and the contextual circumstances (Ibid.). When making a qualitative content analysis one should also understand the polysemic nature of texts, which ultimately means that the content chosen, can be understood differently depending on the researcher analyzing the text (Ibid.). Which in this case means to acknowledge the feminist lens that the research is done through. For qualitative content analysis there are multiple methods, it changes in each discipline and depending on the use of framework (Reinharz, 1992, p. 148). Other methods are: narrative analysis, discourse analysis, semiotic analysis or rhetorical analysis (Macnamara, 2015, p. 15). Regardless of the method used, qualitative content analysis is an in-depth analysis that aims to understand the meaning and possible effects of the texts (Macnamara, 2015, p. 14).

The specific method chosen for a feminist methodology does not matter, as there are no intrinsically feminist methods (Ramazanoglu, 2004, p. 155). Feminists have often used qualitative or interactive methods with an emphasis on the personal, but all methods can be

done within a feminist framework, it merely depends on your research project and being reflexive on why a particular method was chosen (Ibid.). Content analysis was specifically chosen as a method for this research paper to investigate how the application of consent as a concept in legal practice in Denmark falls short. Qualitative content analysis was chosen as the method to be able to investigate how consent in the new rape legislation is limited in its interpretations of sex and the contextual factors involved. For qualitative content analysis power and gender is researched on an institutional level and experiential level (Ramazanoglu, 2004, p. 154). The empirical data, includes the victim and perpetrators accounts in form of statements and the judges and prosecutorial perspective, this gives an in-depth understanding of how consent is understood and implemented in the context of Denmark. Which is why this form of content has been chosen for this research. Content analysis is mainly centered on the audience, the media and the contextual circumstances (Macnamara, 2015, p. 5). Which gives a multifaceted perspective, as the content chosen demonstrates.

4.2.1 The Production of Data

In qualitative research sampling is based on a conceptual question, and not through “representativeness” (Macnamara, 2015, p. 18). When selecting the data used for the analysis of this research, I choose to use a governmental analysis provided by the prosecuting authority, and cases found within this report. Each of the nine cases were first analyzed individually and then in comparison to what was stated in the report regarding the specific case. This was not done to obtain a “representativeness” on the overall cases but instead to get a “thick description” of the cases at hand. The report from the prosecuting authority was an analysis by them, while the cases were an analysis of the cases by the judges and with individual statements from the perpetrators and the victims. With the research question in mind, common themes were at last detected. Throughout the cases and in the report from the prosecuting authority themes of sexual participation and passivity were common and are thus major components of the following analysis.

4.2.2 Content Chosen

The content chosen for this research paper are public documents available online. The first document is from the attorney general (Rigsadvokaten), who was appointed by the

prosecuting authority (Anklagemyndigheden) to conduct an investigation of penal codes § 216 and § 225 after the implementation of the new consent-based rape legislation (Anklagemyndighedens Vidensbase, 2023, p. 2). The prosecuting authority appoints prosecutorial focus areas each year to be studied in its legal practice (Ibid). After the completion of a focal area, a collection of the most important conclusions within the focus area and the legal practice is published (Ibid.). This is primarily based on the legal practice regarding these focus areas that are published routinely in this process on the website of the prosecuting authority named “*Anklagemyndighedens Vidensbase*” (Ibid.). This one, which will be analyzed in this paper, was available publicly in March, 2023. The court cases span from 2021-2022.

Besides the collection published from the prosecuting authority, nine cases that have been utilized and are present in this collection from the prosecuting authority will be analyzed as well. Only cases available in the collection have been chosen, as then the analysis of the cases are able to be compared to the analysis from the attorney general and the prosecuting authority. The report from the prosecuting authority concluded that the consent-based rape legislation, according to the cases analyzed, functions as it should and is utilized accordingly (Anklagemyndighedens Vidensbase, 2023, p. 14). The inclusion of the report as the tenth content analyzed is thus to demonstrate how these cases could be analyzed differently through a feminist lens of what constitutes sex and consent. All the cases are publicly available through the report by the prosecuting authority, on the website of “*Anklagemyndighedens Vidensbase*”. All the cases occurred after the implementation of the new consent-based rape legislation the first of January 2021 (Ibid.). Moreover, the cases chosen involve heterosexual sex, and fall within the common public perception of the woman as the victim and the man as the perpetrator (Ibid.). Within the report only one case could be categorized as a queer case, but in this case the victim was underage (Anklagemyndighedens Vidensbase, 2023, p. 5). This case was therefore not included, as will be elaborated on later in the following section of Ethical Considerations. Consent is thus only looked at in this report and in these cases through the lens of heterosexual sex, a queer perspective on consent is not considered in the cases or in the report.

The nine cases that have been chosen for this research paper, were as former mentioned all included in the report by the prosecuting authority. In the report from the prosecuting authority they utilized 18 cases (Anklagemyndighedens Vidensbase, 2023). Out of these,

four were in another database and therefore could not be accessed and the information included in the report was not enough to analyze. Three of the cases were of victims under the age of 18 (Ibid.). This left eleven cases in the report to analyze, although as qualitative content analysis is the method, and a thick description and in-depth understanding of the content is wanted, a smaller sample is desired. The two cases not utilized out of the eleven available, were thus two cases that were very similar to other cases. The nine cases chosen from the report were ultimately all beneficial and needed for an extensive analysis of the limitations of consent.

AM2022.12.20Ø - A 37- year old man of Pakistan heritage and citizenship, was working as a taxi driver when he picked up a girl that was drunk and on her way home, he drove her to a secluded area and told her to get in the backseat where he completed a penetrative rape and other accounts of sexual assault (Anklagemyndighedens Vidensbase, 2023, p. 6). He was charged on both accounts, penal code § 216 and § 225 and sentenced to two years and six months in jail without the possibility of parole. The perpetrator was also sentenced to be deported to Pakistan.

AM2021.11.19Ø2 - A former couple decides to meet up at one of their apartments. The woman and the man are spooning, which both agree to. The man then proceeds to touch her and later insert his penis in her vagina, all the while she is passive. The woman quickly stands up and proclaims to him that he raped her. The man first denies three times to the police that he had sex with the woman that night, but later in court admits that they had sex but that he had asked for her consent. He was charged on both accounts of § 216 and § 225 and sentenced to a year and six months in jail.

AM2021.11.10V - A woman is accusing a man of rape, that occurred in a summer house. Here she was originally having sex with one man, but as she went to smoke, the men switched rooms. By her account, as the room was dark and she had her back turned towards him, she did not realize it was not the same man. He proceeded to touch her, and he claims penetrative sex was tried but not completed, she claims that he did enter her. The man was charged with the penal code § 225 and to some degree § 221, when a person sneaks their way to sex by confusing the perpetrator as someone else. The charge of rape, by penal code § 216, was dismissed, as the court determined that the sex was with consent.

AM2022.12.21Ø - A man is accused of having raped two different women at different times. In the first, the court agreed that the woman, due to alcohol, was in no capacity to consent. The court also unanimously agreed that it was uncertain if the man was aware of this. He was therefore acquitted of the crime. In the second case, the court determined that the evidence and the victim's account was insufficient, and therefore acquitted him of this crime as well.

AM2022.03.24H - Woman was raped two times in the same night, at the apartment of the accused. He claims that the sex was consensual and that she was actively participating. The woman claims that she had blackouts under the influence of weed and alcohol and various times asked him to stop. He was found guilty of the penal code § 216 and sentenced to two years in prison.

AM2022.05.25Ø - A man had sex with a woman without consent, as she was sleeping at the time and could therefore not resist or consent to the act. The account of the man is that the woman was awake and consented to the act. He was found guilty according to penal code § 216 and § 225, and thereby sentenced to a year and two months in prison.

AM2022.11.09H - A 46 year old man of Lebanese heritage and citizenship, approached an unknown girl in a parking lot and by threats of violence and of force the sexual assault happened. He was charged on accounts of § 216 and § 225 in the penal code, and was sentenced to two years in prison, with later deportation to Lebanon.

U.2022.3585Ø - Two people were acquitted of raping a woman. The city court determined that the woman had participated in the act on multiple accounts, which demonstrated her consent.

AM2021.10.21V2 - A man completed sex and other sexual acts against a woman without her consent. She was unable to resist as she was sleeping and had been consuming alcohol. The accused were charged with § 216 and § 225 in the penal code and sentenced to a year and two months in prison.

4.2.3 Ethical Considerations

As a researcher, I am acknowledging that the words and the analysis I make are not only an individual act, they have the possibility of affecting others and their meaning making (Alcoff, 1991, p. 21). Researchers speaking for others, with others or about others should thus always be aware of their accountability and responsibility in regards to what they say (Alcoff, 1991, p. 25). We need to evaluate the effects of our words, or possible ones, to our material context (Alcoff, 1991, p. 26). A feminist methodology that involves people as sources, as the content of this research paper does, should consider the ethical issues (Ramazanoglu, 2004, p. 156). This is a reflexive approach, one that values and accounts for the connection between the researcher and the ones researched (Ibid.).

As a researcher, who is analyzing a sensitive topic, such as consent within sex, rape and sexual assault, I knew I had to be considerate about the content I use. I was at first hesitant to utilize the publicly available legal documents of people who have experienced rape and sexual assault. Although they are publicly available, I find that as a researcher, especially a feminist researcher, I need to consider how it can affect the people involved. Valuing them as people and not simply data, I evaluated how I can justify using these cases for the purpose of an analysis. In the end, recognizing the accountability and responsibility of this choice, I decided to use them for analysis. Although I took some measures, by excluding cases involving people under the age of 18, they are underage and I decided they should not be involved in a public research paper regarding consent. I also am aware of only including information and details of the assault or rape, if it is relevant for the analysis.

5. Analysis

The analysis is divided into four major sections, that each have their subsections within. The first section of analysis is focused on defining consent within the context of Denmark, this will be a starting point for the rest of the analysis to follow. In the following section the gender scripts inherent in the formulation and implementation of the consent-based rape legislation will be accounted for. The third part of the analysis elaborates on how the legal definition of consent is gendered and is reproducing through the concepts of passivity and participation patriarchal notions of sex and gender. The fourth section of the analysis is

focused on the re-imagining of a feminist perspective on sex and consent, considering the ambiguities and gray areas within sex and sexual violence, what role desire has, and how the white heteronormative approach to consent and sex is concealing other structural inequalities. The last part will focus on how consent as a symbolic law, could have feminist potential.

5.1 The Legal Definition of Consent

The Criminal Preventative Council of Denmark estimate that women are more likely to be victims of rape, they approximate that in a lifetime perspective women are 84 percent more likely to be victims of rape than men are (Mannov, n.d.). It should be remembered that the numbers we have regarding rape and sexual assault are only mere approximates, as they estimate that it is only every fourth rape that is reported to the police (Justitsministeriets Forskningskontor, 2020, p. 118). Similar results were gathered from Center for Rape Victims (Center for Voldtægtsofre, 2021, p. 55). Men are also through gender scripts socialized to be sexually aggressive and assert sexual agency (Roach, 2022, p. 190), this could therefore also be a reason for the lower number of cases of sexual assaults and rapes where men are the victims. Gunnarsson also emphasize the expectation of sexual willingness, that is associated to men which can make it difficult to recognize themselves as victims of sexual assault and rape (Gunnarsson, 2018, p. 14). Roach points out that there is shame and ostracization associated with not performing your sexual or gender scripts correctly (Roach, 2022, p. 190). For the reasons mentioned there could thus be a much higher number of men who are victims. Because their gender script does not align with the narrative of a victim of sexual assault or rape. This although still does not erase the evidence that makes it clear that rape and sexual assault in large part are gendered crimes, that encompass tremendous amount of gendered meaning making.

In the collection report that was published by the prosecuting authority of Denmark, they highlight the ways in which consent should be understood and interpreted by the judges within the legal cases;

“It then appears, among other things, that consent must be given voluntarily and be an expression of the person’s free will, judged on the basis of the circumstances of the specific

situation. Consent can be expressed through words or actions and in different ways and various forms. As a starting point, there must be a presumption that the person who consents to sexual intercourse is not just completely passive, but participates to one extent or another. Actions, that could be perceived as an expression of consent to intercourse e.g. could be kisses, touches, pleasurable sounds or relevant movements, e.g. that one turns towards the other person, helps to take off one's underwear, performs intercourse movements or similar things” (Anklagemyndighedens Vidensbase, 2023, pp. 3-4).

There is thus an emphasis on consent in the Danish context through participation through actions and words, which is also why passivity generally is not viewed as not constituting consent. It states;

“In the situations where there is expressed total passivity on the part of one person, there is a presumption that that person does not consent, and there the person who wants intercourse completed, must do something to make sure that the other person consents” (Ibid.).

It is also stated in the cases where consent is expressed at some point, but later there is passivity on behalf of one of the partners, that the presence of consent should be reevaluated (Ibid.). It is also emphasized that actions earlier in the night or if one has gone home with somebody does not constitute consent (Ibid.). Moreover, it is stated that consent must be assessed objectively according to the information that is presented regarding actions and participation and cannot be determined based on the subjective feeling or conviction of a person (Ibid.). This thus means that if you decide to participate in the sexual encounter although you do not wish to do it, it will be regarded as consent (ibid.). This is problematic because as will be elaborated on in the following section, gender and sexual scripts shape how we engage in sexual contact with other people. A gender neutral approach to consent as is proposed within the Danish legislation, thus erases gendered notions within sex and consent negotiation.

5.2. The Gender Scripts of Normative Sex Culture

As illustrated in the context, it took a while for the various feminist organizations, and the political parties supporting them, to convince the rest of Denmark of the urgency of a consent-based rape law (Cramon, 2020), (Meinecke, 2018). One of the major reasons for this, has been the overarching belief that Denmark is a country where gender equality has been achieved (Amnesty, 2019, pp. 13-14). The increase of gender neutrality that has been

introduced into Danish policy making, is then in large part failing to account for issues related to gender-based violence (Ibid.). Sexual violence is in a Danish context viewed as a gender-neutral problem (Ibid.). Although, when we further analyze the cases of rape and sexual assault and the report from the prosecuting authority, a pattern can be detected, one which emphasizes the gendered nature of consent negotiation.

5.2.1 Gender Scripts of Heterosexual Men

Fraser claims that ambivalent sexism, which is constituted by benevolent and hostile sexism, is at the root of rape culture (Fraser, 2015, p. 147). As also explained by Fraser, high-agency traits are commonly associated with men and low-agency associated with women (Fraser, 2015, p. 152). Men are alternatively to women taught to demonstrate agency in situations such as initiating meeting up, paying for a dinner and sex (Fraser, 2015, p. 158). This is as Fraser states all under the guise of benevolent sexism (Ibid). This does at first seem harmless, but is ultimately what can be seen at the root of the majority of the rape and sexual assault cases in Denmark. What lies at the core of the cases is the belief, by the male perpetrators, that they are entitled to sexual contact. First and foremost to initiate this analysis it is important to emphasize that the gender scripts that will be analyzed in this part of the analysis are heavily focused on the white heterosexual experience. A critique of this and a further analysis of other categories than gender, such as race, sexuality and class will be had later in this thesis, in the section of the analysis titled: Queering Consent: Expanding the Concept.

In case AM2021.11.19Ø2 a former couple are lying in the same bed, without prior agreement the man starts to touch her, the woman pushes the man's hand away, but he continues to touch her (AM2021.11.19Ø2). The man chooses to later insert his penis into the woman's vagina. She was passive during the act and had fallen asleep, and woke up due to the penetration. In the case of AM2021.10.21V2, a man lies down in bed at a party next to a girl he does not know, she is sleeping and he proceeds to insert his penis into her vagina (AM201.10.21V2). The guy that was convicted of rape in this case stated in this account of the events "*A⁶ had not shown interest in him during the evening prior to the act, or declared*

⁶ An abbreviation of "Aggrieved" which is the direct translation of the Danish word "Forurettede", which is used in this legal context

that she wanted to have sex with him” (AM2021.10.21V2). He further states his thought process before the act *“He caressed her to give her a possibility of saying no, but there came no reaction from her”* (AM2021.10.21V2). In the third case of AM2022. 05.25Ø, a man and a woman met on Tinder and have been watching movies at the man’s place. The man accounted to the court a story of consensual sex and the woman told a story of rape that happened while she was asleep (AM2022.05.25Ø). These accounts all have the commonality that the perpetrator was a man and the victim was a woman. All of the men also seemed to assume that although they had had no prior agreement of sex or had been told no, sex was still an option. Another common denominator is how all the perpetrators in these cases seem to be convinced of their innocence. It might be quickly assumed that they are lying about their accounts, since all the cases resulted in convictions. Although I would propose an alternative perspective, one that also illuminates the invisibility of a gendered perspective within these cases.

Understanding that our assumptions about gender shape how we have sex, this is described by Roach as gendered scripts (Roach, 2022, p. 182). Fraser states as well, that masculinity and men are associated with men's power over others, sexually aggressive/assertive and dominant (Ibid.). What seems to be the case for these men, who were convicted in these cases, is that they feel unfairly convicted as they were participating in what they thought to be “normal sex”.

In the case of AM2022. 05.25Ø, the case of the Tinder encounter. The man’s account of the story was very different from the woman. He gave an account of the events were she was the initiator of the sexual contact, she was moving on him and she said to him “fuck me” (AM2022.05.25Ø). He states that it was only after they woke up in the morning that the events took a turn.

“They woke up at about 6:30 in the morning. A said to herself “what have I done?”, whereafter she started to put on her clothes. The defendant asked her if she was ok, but she just left the apartment. He wrote her a message on Tinder, which she answered. When she wrote to him that she had been sleeping, he went into a panic as he started to think about the whole Metoo-movement. He thought that he would not allow her to do that to him.” (AM2022.05.25Ø)

His account of the events are in juxtaposition to what she stated happened. Regardless of whether he is making up this account of the events or if he felt that this is truly what

happened, it gives us an indicator of ambivalent sexism. Especially the case of when benevolent sexism turns into hostile sexism. He was first sexually assertive and had sexual agency in the situation, he also took charge of the situation and tried to mend the situation by writing to her. When he was confronted by how the woman felt about the night and what he did, he assumed immediately that this must be a woman trying to ruin him. That this was related to the Metoo-movement, thus as Fraser described as the root of hostile sexism, where men think women are desiring to dominate them through feminist ideology (Fraser, 2015, p. 147).

In the other cases of AM2021.11.19Ø2 and AM2021.10.21V2 there are not as clear instances of benevolent sexism turned hostile sexism. Although there is still a pattern of how the men as sexually assertive and dominant feel entitled to having sex with a woman. Within benevolent sexism men are also highly encouraged to act on behalf of women, this is as stated by Fraser in the literature review (Fraser, 2015, p. 1) As mentioned prior in the case of AM2021.10.21V2, the man did not even know the woman; they were simply at the same party. He got no signals or participation from her side, but still assumes that it must have been a misunderstanding, *“He doesn't know how A feels about the situation. There must have been a misunderstanding between them”* (AM2021.10.21V2). These examples showcase a clear and consistent pattern of men taking sex or sexual contact without ensuring their partner's consent. Because as the definition of consent states one must participate actively in the sexual encounter for there to be consent (Anklagemyndighedens Vidensbase, 2023, p. 4). If the other partner is unsure of whether their partner is consenting, they should also per legal definition of consent ensure that they are consenting (Ibid.). In these examples of AM2021.10.21V2, AM2021.11.19Ø2 and AM2022.05.25Ø the men should have reached out and ensured the consent, as their partners were all passive during the encounter. These examples demonstrate how men assume that their gendered scripts of being sexually dominant, aggressive and assertive are normal aspects of sex and pleasure. They do not question, as in these aforementioned cases, if the other person wishes to have sex.

When understanding that we are performing gendered scripts when having sex, and that the gendered scripts that men are primarily taught are feeding into ambivalent sexism, we are suddenly presented with a quite different dilemma. One where the sex men are initiating, as demonstrated in the examples, where women are predominantly passive, is in line with the “normal” sex behavior we teach men. As elaborated on in the literature review by Ryan,

sexual scripts are teaching us what is classified as normal sex behavior in sex (Ryan, 2011, p. 5). As mentioned also by Gavey, dominant discourses surrounding heterosex are creating sex scripts which ultimately determine what normative sex is (Gavey, 2005/2018, p. 131). The discourse of heterosex is as similarly described by Fraser, Ryan and Roach men as sexually needy and aggressive and women as the ones that give sex as a gift for a relationship in return (Ibid.). These are the normative sexual scripts for both men and women, what we see in these cases are not exceptions to sex culture, but the very root of it. Where men are sexually assertive and dominant and women are sexually passive. The following section of the thesis will elaborate on the gendered scripts women are under within patriarchal society. It is again important to highlight that the analysis will focus on white heterosexual women as when gender scripts of women are analyzed, it is often as a homogenous group. This is problematic and will be elaborated later on in the thesis.

5.2.2 Gender Scripts of Heterosexual Women

Women within patriarchal society have learned to underprioritize their needs and to undervalue their own agency (Fraser, 2015, p. 165). This is also frequently the case within sexual encounters. Women are also socialized to be kind and polite in their refusals, this is also the case in their refusals to men (Ryan, 2011, p. 7). Sexual scripts also contribute to the objectification of women by heterosexual men (Ryan, 2011, pp. 8-9). Women are also usually caught in a double-bind in their gender scripts, where they are either perceived as a virgin or a whore (Roach, 2022, p. 190). Women are essentially taught to please others and abandon themselves (Roach, 2022, p. 196). This is also evident when analyzing the nine court cases from the report of the prosecuting authority.

In the first example of case AM2022.05.25Ø, the account of the woman is that she was sleeping when the man began to have penetrative sex with her (AM2022.05.25Ø). She woke up in the morning in the middle of the act. She states in her account that when she confronted him and said “*what have you done?*”, he replied by saying “*What do you mean?*” in a manner that indicated that he did not know what he had done (AM2022.05.25Ø). Moreover, after she had put her clothes on, and was putting on her shoes and went out of the apartment, he yelled from the entry hallway “*Hope you arrive home well*” after her (AM2022.05.25Ø). All this stated by her, further indicates as I argued before, that the man that did the rape and that decided to touch her and have penetrative sex with her without her participation, was

asserting himself sexually in a way that he himself deemed appropriate. By her account she was passive, as she was sleeping, and she confronted him when she woke up and went immediately to the police station to report it (AM2022.05.25Ø). The way she confronted him by standing up and saying “*What have you done?*” (AM2022.05.25Ø), is a common indirect way of refusing or confronting unwanted sex. Gavey makes this point, she states that especially for women who are socially conditioned to be polite, indirect or nonverbal confrontation is common (Gavey, 2005/2018, p. 136). Later when she answered his message on Tinder and said “You know what you have done” (AM2022.05.25Ø), it was in a similar manner.

Reporting the rape and confronting her perpetrator about the situation as she did, is in defiance with traditional ideas of femininity as passive and unproblematic (Fraser, 2015, p. 164), (Ryan, 2011, p. 7). The women who are more prone to be questioned when sexually assaulted are the women who are in defiance with traditional ideas of femininity, such as being sexually promiscuous (Ibid.). The way the perpetrator described the encounter that night, is thus one that feeds into the sexual promiscuity, the defiance of the gender and sexual script for women as stated by Roach. The events that he described taking place that night is one where the defendant was the initiator of the sexual encounter. One where she is moaning when they started kissing and “*A moved her butt to his crotch, which made him excited*” (AM2022.05.25Ø). He proceeded to touch her vagina and after a few minutes she said to him “*fuck me*” (AM2022.05.25Ø). In the morning she woke up and said to herself “*What have I done?*” (AM2022.05.25Ø). This account that he gives of the events are in sharp contrast to her own statement of the event, where she stated she said “*What have you done?*”(Ibid.). It is an account that directly serves to make her account of the event untrustworthy, as women who are sexually promiscuous and showcase sexual agency are less likely to be believed, as she is not performing the expected gender script associated with femininity, which often results in shame or ostracization (Roach, 2022, p. 190). At the first trial he was acquitted of the crime, as the majority of the judges believed there was not enough evidence that the perpetrator had sex with the defendant while she was sleeping (AM2022.05.25Ø). It was only in the second trial, when it was appealed, that the man was convicted of the crimes (Ibid.). This was primarily due to a witness statement from her friend who she called after the event and due to her immediately seeking out the police to file an arrest (AM2022.05.25Ø). Thus not her own statement specifically, but because she had witnesses that made her story more trustworthy.

In the case of AM2022.05.25Ø, the accused gave a counter statement that went against the defendant's account of being passive during the act, as she was sleeping. Being passive because of sleep or intoxication during a rape/sexual assault, or being passive as a defense mechanism, is quite common. Numbers from the Center For Rape Victims, estimate that 42 % of victims freeze or remain passive during the attack (Center for Voldtægtsofre, 2021, p. 48). Freezing as a defense mechanism is seen from numbers, to be the most common of the reactions to sexual assault or rape (Jensen, n.d; Kvinfor, n.d.; Möller, Söndergaard, Helström, 2017, p. 935). In the case of AM2022.12.21Ø a man was accused of rape by two different women, at two different times. In the first case it was a woman that went home with him, who was badly affected by alcohol and was deemed unable to consent. The second case was of a woman that also was affected by alcohol and was sleeping, she woke up during the act and froze, she described her account that she was scared (AM2022.12.21Ø). She was also deemed unable to consent. At first the man was convicted of both crimes, but he appealed and won both cases as they deemed they could not be sure the man accused was aware of their inability to consent (AM2022.12.21Ø). This demonstrates how even when the woman is in the act frozen or sleeping, she still can be expected to refuse. As the burden of proof, for demonstrating that she did not consent to the sexual encounter will still be on her regardless of the circumstances. Although, the cases of AM2021.11.19Ø and AM2021.10.21V2⁷ do showcase that convictions in these cases are possible.

The case of U.2022.3585Ø, illuminates what happens when a woman is defying the traditional gender script, and does not remain passive during the encounter, but participates. In this case two people were accused of rape, but were not found guilty of the crime as the court found that the woman was participating in the sexual encounter and thus demonstrating her consent (U.2022.3585Ø). They determined that she voluntarily had sex with the first man accused and she also agreed to have the other man accused lie in the bed next to her during the sexual encounter (Ibid.). She also received a kiss and actively participated in a blowjob to the second man accused. When she later said took her consent back from the second man accused he listened. It was therefore concluded that she had given her consent with her participation in the act (Ibid.). There is no statement of the events publicly available,

⁷ AM2021.11.19Ø is the case where a couple meets up and the man rapes her as she is passively lying in the bed. AM2021.10.21V2 is the case where a man raped a woman while she was asleep and drunk.

this case is only mentioned in the collection of the prosecuting authority. Therefore it is only described to us briefly as a case where consent was present. The intricacies and complexities as to why the sexual encounter happened is not delved into.

In a society that strives to better their sex culture by liberating themselves from the epidemic of rape and sexual assault, should also question gray areas of sex. Women are socialized to consistently underprioritize and minimize their pleasure, there are then multiple reasons, as mentioned by various scholars in the literature review, why women could be participating in unwanted sex. Hamilton and Burkitt emphasize how women in postfeminist society are caught between feeling sexually liberated while simultaneously consenting or participating in unwanted sex (Hamilton & Burkitt, 2012, p. 816). This contrast and ambivalence in the contemporary sexual script for women could possibly be the reason why the women in case U.2022.3585Ø ended up participating in the sexual encounter. Through an analysis of postfeminism, an analysis that Denmark can be categorized in as well due to their gender-neutral approaches and by believing that they have achieved gender equality. Burkitt and Hamilton believe that the “just say no” neoliberal approach of risk-avoidance reinforces this postfeminist ideology of individual responsibility which ignores structural inequalities (Burkitt & Hamilton, 2012, p. 817). A postfeminist neoliberal society such as Denmark, abandons a gendered perspective of sexual behaviors which ultimately renders invisible the gendered inequalities within sex.

In a postfeminist neoliberal society women are expected to effectively communicate their consent or refuse it (Ibid), while they also simultaneously are encouraged to feel empowered by submitting sexually (Burkitt & Hamilton, 2012, p. 823). This is tremendous pressure, and for women who are socialized to please others sexually and be unproblematic, it creates a contradictory dynamic that punishes women regardless. Burkitt and Hamilton also concluded from their research that a lot of women felt that they had implicitly consented to sex by initiating a sexual encounter with someone (Burkitt & Hamilton, 2012, p. 822). Participating or complying with sexual actions that are unwanted for women is also as mentioned by Gavey, a way to assimilate or obtain a positive sexual identity (Gavey, 2005/2018, p. 14). Complying and participating in a sexual act is also directly related to the gender and sexual scripts women are socialized into. The aspect of fear, as expressed by the

victim in the second case in the case of AM2022.12.21Ø⁸, is also a reason for women to comply, participate or be passive during a sexual encounter. In the case of U.2022.3585Ø there are two men with her in the same room. We are not aware of the relationships that she has to these two men, but it is not hard to imagine the pressure she potentially could have felt in this scenario. Gavey states that often when a man ignores the woman's signs for her lack of interest, they "willingly" go along with the the act and participate, it becomes a form of strategic agency, that prevents them from rape (Gavey, 2005/2018, p. 148). This could possibly be the case for the woman in this case. Although the information is limited, we are provided with a phrase of the events described in the report from the prosecuting authority that states "*The majority of the district court determined that the aggrieved party "accepted" a kiss from accused 1 and that this could be interpreted as consent for him to participate in the sexual act*" (Anklagemyndighedens Vidensbase, 2023, p. 7). The other participation in the sexual act that is described by the prosecuting authority, is how the woman "helped" in the blowjob by moving her head and hand herself (Ibid.). This information, does tell us that she technically participated in the sexual act, but consent as a tool, does not seem in this instance of participation to allude us as to why she did what she did and how it can be categorized as a sexual assault and rape in her eyes. The woman must have reported the rape and sexual assault for a reason, because as Srinivasan points out, it is statistically quite rare for a man to be falsely accused of a rape (Srinivasan, 2022, p. 2). Therefore we should strive to try to comprehend how the sex was undesired and unwanted in this scenario.

This is what an account of gendered and sexual scripts can point to. It illuminates the gendered scripts that ultimately shape how we have sex, which far from reinforce a just and equal sexual experience. The neo-liberal and postfeminist approach of Denmark that highlights the necessity of gender-neutral policies and frameworks, are essentially what makes the gendered pattern of sex, sexual assault and rape extremely difficult to decipher. The pervasive sexism, both in its benevolent and hostile forms through ambivalent sexism, are thus able to prosper and are never challenged. How the consent-based rape legislation is implemented and reinforced in each of these cases of sexual assault, is thus per its definition

⁸ A man raped two different women at different times, both women were passive for different reasons during the rape

objective (Anklagemyndighedens Vidensbase, 2023, p. 4) and not accounting for how gender shapes our negotiation of consent.

There is a last note that is significant to emphasize before the analysis of the following section can start. Which is, that although it is paramount to account for gendered aspects of the cases at hand to make an extensive and in-depth analysis. It is also important to highlight how there are re-descriptions of gender and sexual scripts happening. As Roach points out, we are increasingly in contemporary times starting to be more aware of the limitations that are posed by the gendered scripts (Roach, 2022, p. 190). Furthermore, we tend now to have a broader understanding of sexual diversity and fluidity which eventually makes us able to reinvent our gendered scripts (Ibid.). Even so, the traditional gender scripts of white heterosexual men and women are incredibly pervasive and still present in our socialization of men and women. It is therefore important to still emphasize their existence, so they are not invisibilized in a gender-neutral context. This does not insinuate that these are the only gendered scripts existing or that there are no deviations from the scripts.

5.3 Negotiation of Consent from a Gendered Perspective

The first section of the thesis has highlighted how consent in legal practice within Denmark is viewed as objectively measured (Anklagemyndighedens Vidensbase, 2023, pp. 3-4). Moreover, the legal definition of consent is also understood as constituting active participation, therefore passivity in a sexual encounter is generally regarded as a nonconsensual state (Ibid.). The legal definition of consent and how it is implemented in the court cases is thus void of any gendered analysis. Although, the former part of the thesis emphasized how the gendered scripts are shaping the ways in which we have sex and what is constituted as normative sex culture. Following the argument of the former section, this part will showcase how the seemingly gender-neutral concepts of passivity and sexual participation, utilized in the Danish legal definition of consent, are of gendered nature. Highlighting how negotiation of consent within sex must be understood through a lens of gender scripts.

5.3.1 Passivity as Compliance with Gender Scripts

The legal approach to consent that is utilized in Denmark, encompasses two major aspects that were advocated for by the feminist organizations of Denmark. They emphasized that in a consent-based rape legislation it is necessary that passivity and flirtatious behaviour never should be regarded as constituting consent (Petersen, 2020). These two aspects are present in the explanation of consent (Anklagemyndighedens Vidensbase, 2023, pp. 3-4). Especially the aspect of passivity is interesting to analyze further. Most rapes and sexual assaults seem to constitute a passive victim in some capacity (Center for Voldtægtsofre, 2021, p. 48), as we have seen, a large part of the cases utilized in the report from the prosecuting authority are similar in this respect. It then seems to be quite important, that this has been highlighted in this manner within the description of the law.

Although as stated by the report from the prosecuting authority, the majority of the cases of rape and sexual assault include circumstances or conditions, that also would result in convictions based on the former rape legislation (Anklagemyndighedens Vidensbase, 2023, p. 6). The old legislation constituted rape and sexual assault through force, threats, coercion, or violence, or if the person was unable to resist the sexual contact (Kvinfo, n.d.). This would technically also include cases of passivity, where the person was sleeping or affected by alcohol. Although, with the aspect of consent included, they do not have to prove they were unable to resist but instead that they did not participate. The burden of proof seems to simply have shifted. Whether this is a better option or complicates the case further is difficult to decipher.

In the cases of AM2021.10.21V2, AM2022.05.25Ø, AM2022.12.21Ø and AM2021.11.19Ø2 all involve passivity to some degree or another, most were a mixture of alcohol and due to the person sleeping (Anklagemyndighedens Vidensbase, 2023, pp. 12-13). Three out of four of these cases ended up in convictions. Because as prior mentioned the legal definition of consent is through active participation, and it specifically underlines how passivity in sex is viewed as a nonconsensual state (Anklagemyndighedens Vidensbase, 2023, pp. 3-4). Which could insinuate that the consent legislation is working how it should. Viewing passivity through a lens of gender, could tell us a different story. Passivity itself could seem to stem from the same sexual and gender scripts that are prescribed to women, where they are expected to be unproblematic and without much agency. This is precisely

what the role of passivity insinuates. It alludes to an unproblematic, helpless woman without any agency; which I would argue could be categorized as another version of the “perfect victim”. As traditionally the “perfect victim” in cases of sexual assault and rape are of a resisting woman with the perpetrator being a strange violent man (Ryan, 2011, p. 6). There is thus an expectation implicit in rape and sexual assaults, that the victims should resist their perpetrators. This understanding of the real rape script as described by Ryan, is still pervasive. The public opinion has although shifted to were passivity, tonic immobility and the victim in a frozen state has been more and more recognized as a normal reaction to rape and sexual assault. This is evident in the context where both the Criminal Preventative Council of Denmark and Center for Rape Victims are recognizing tonic immobility and the frozen state as normal and valid reactions in a situation of rape and sexual assault (Center for voldtægtsofre, 2021, p. 49; Jensen, n.d.).

The reason passivity now is widely recognized as a valid reaction, could be as mentioned briefly above, that passivity still to a large degree fits within the gender script of a woman. As we can see with the cases at hand, participation is in direct conflict with how consent is theorized. When consent is something given through actions, such as a kiss, taking of your clothes or pleasurable sounds, any part of the victim participating within the act, can question their claim of rape. As the majority of rape victims are women there is a direct connotation between the word victim and woman. Moreover, both victims and women are generally theorized as having less sexual agency. Extending consent to particularly include passivity, is thus a tiny progress in recognizing how victims of rape and sexual assaults can react. Although, ultimately, passivity becomes a great addition to the already pervasive gender scripts that women are under, where the message is that as long as the woman is accommodating to their gender scripts as passive and without sexual agency, they are most likely believed to have been raped or sexually assaulted. This entails that for women to prove a sexual encounter to be nonconsensual, it is necessary to adhere to their gender scripts. If they do not, and participate to some degree in the unwanted sex, or initially wanted to and then later did not they are not per legal definition of consent in Denmark likely to be believed. This essentially villainizes women that participate in sex, unwanted or not. Because it seems to directly punish women that showcase sexual agency and sexual promiscuity.

In the report from the prosecuting authority it is directly stated that there is a milder conviction for the perpetrator, if the sexual assault/rape first constituted consensual sex and then became a sexual assault or rape (Anklagemyndighedens Vidensbase, 2023, p. 10). This is quite problematic, as it promotes victim blaming behavior, because it insinuates that once there is participation involved it is the victim's fault. The division between sexual participation and sexual passivity within the legal definition of consent in Denmark, also does not account for the nuances of sexual negotiation and expression. Burkitt & Hamilton have pointed to how women in neoliberal and postfeminist societies are stuck between being sexually liberated while still “consenting” to unwanted or unpleasant sex (Burkitt & Hamilton, 2012, p. 816). Passivity is thus not enough for describing nonconsensual or unwanted sex. Passivity as a concept for categorizing consensual or nonconsensual sex is flawed. It implicitly reinforces the gendered scripts already in place for women, which are invisibilized through the gender-neutral comprehension and implementation of consent within sex. Sexual participation for constituting consensual sex also has its flaws.

5.3.2 Sexual Participation as Sexual promiscuity

In the explanation of how consent is understood in the legislation, it becomes clear that the foundation of consent in the Danish context is constituted in participation. Such as sexual movements, kisses and removing your own clothes (Anklagemyndighedens Vidensbase, 2023, p 4). Consent cannot be understood as something that is pre-given, if you have previously touched or kissed in the night, it must be participation in the moment (Ibid.). In the case of U.2022.3585Ø, where a woman accused two men of raping her, but she had been determined to have “helped” in the sexual encounter herself, the court deemed that the sexual encounter was based in consent (Ibid.). This outcome seems inevitable, as participation is the main determination strategy for consent in a Danish context. Another example that illuminates the severity and the dangers of determining consent through participation is in case AM2021.11.10V.

In this case a woman, A, and three others were in a summer house. The woman was in one room with W2⁹, where they were having sex (AM2021.11.10V). While she was out smoking the defendant that was sharing a room with another girl, W1, went and switched rooms with W2 that was originally in the room with A. Both women, both A and W1, had earlier in the night declined to switch partners. When A went into the room after smoking, the room was dark. In the account of the defendant she is playing with his hair, and they are talking face to face before they try having sex (AM2021.11.10V). In the account of the Aggrieved, she was lying with her back against the defendant, so she could not see that it was the defendant in the bed and not W2 (AM2021.11.10V). They did not talk according to her and it was only after the sexual intercourse that she realized it was not W2, where she then exclaimed “*What the fuck, is it you?*” (Ibid.). The court determined that based on the evidence and accounts, the aggrieved did consent to the sexual intercourse; “*According to the evidence, the district court determines that A has consented to sexual intercourse by, among other things, participating in taking the clothes off*” (AM2021.11.10V). The court instead found the defendant guilty of violating section § 225 and § 221 of the Criminal Code (AM2021.11.10V). Section § 221 of the Criminal Code states “*Anyone who sneaks themselves to intercourse with a person who mistakes the perpetrator for someone else is punished with imprisonment of up to four years*” (Danske Love, n.d.).

This particular case caused much uproar in Denmark, which led to the Minister of Justice in Denmark presented a proposal for a renewal of the legislation, that requires section § 221 of the Criminal Code to be categorized as rape as well, this was proposed February 22nd, 2023 and is estimated to enter into force 1st of July, 2023 (Anklagemyndighedens Vidensbase, 2023). If this proposal is accepted and implemented it would mean that in the future, these cases would be deemed as nonconsensual. This will solve the specificity that this case was centered around, although in regards to other cases where participation is involved to some degree, like case U.2022.3585Ø, it would not. How consent is understood in the Danish context is thus very limiting, and reinforces the notion that when a woman participates, thus asserting sexual agency, she is the one to blame.

⁹ W stands for witness, and is a translation of the Danish word “vidne” that is originally used in the case. Originally, he is V1.

In the case of AM2021.11.10V, she ended up blaming herself for the situation. In her account of how her life is now, it was stated; *“She has had many thoughts about what she could have done differently and whether she herself is to blame for what happened”* (AM2021.11.10V). These thoughts of self-blame are instilled in victims of sexual assault in various ways. One of them that is mentioned by Burkitt and Hamilton, is how the responsibility for clearly communicating no is on the victim, which often is a woman (Burkitt & Hamilton, 2012, pp. 819-20). Women are thus expected to clearly communicate their sexual boundaries, since men will assume consent (Ibid.). This is also highlighted by Mackinnon, where she claims that regarding consent laws the burden of proof is on the woman (Mackinnon, 2016, pp. 452-53). The extent to which the victim in this case blames herself also seems to be related to how she at first did not realize what had occurred to her could be recognized as rape (AM2021.11.10V). In her statement of the events, it is mentioned *“When she dove away from the summer house, she didn’t think it was rape, as she perceives rape as something else. She does not feel that she has consented to intercourse with the defendant”* (AM2021.11.10V). This is what Gunnarsson claims in their analysis of the grey area of sex, sexual assault and rapes in Sweden. She claims that with our presupposed ideas of what rape is, such as a scary monstrous thing, we are not prepared to identify our own experiences of sexual violence (Gunnarsson, 2018, p. 8). Because it is not what we have been taught that rape should look like (Ibid.). This is the real rape script that is mentioned by Ryan, which for most of us is the dominant perception we have of rape (Ibid.). The word victim also has a connotation of somebody that is helpless and with no agency, and if that does not resonate with the victim, then it can seem impossible to identify their experience as sexual violence (Gunnarsson, 2018, pp. 9-10). This state of confusion of their own experience of sexual violence, can also contribute to them blaming themselves, as they do not have the tools to label what happened.

When participation is directly correlated to consent, it ultimately deems any situation constituting sexual participation as sex that involves consent and therefore is just and fair. There are no ambiguities to the discussion, either one consented and the sex is good, or you did not and the sex is bad. In both the case AM2021.11.10V and U.2022.3585Ø their sexual assaults and rapes were essentially deemed to be morally fine.

In the case of AM2021.11.10V, there was a conviction but it was not of rape, and it did not align with what the victim ultimately felt the situation was (AM2021.11.10V). These cases

were thus due their participation deemed to be participating in consensual sex, despite their own objections. Moreover, W2, from the case of AM2021.11.10V, did in his account display victim-blaming language as well. He stated;

“From what F had said earlier about the number of guys she'd been with, and that she'd also been with several in one night, he thinks it might be an invitation to be with more this evening , but he doesn't remember that it was something they talked about (AM2021.11.10V).”

He describes how, due to the amount of sexual partners she has had and that she has been with more than one partner in a night before, it must be an invitation to do it again. This feeds into the idea of women as sexually promiscuous, and as mentioned by Roach, the whore gate-keeper (Roach, 2022, p. 190). Furthermore, it showcases what can happen when women lean into their sexuality and desires, how easily one can be deemed a whore (Roach, 2022, p. 194). Ryan also mentioned how some men believed that sexually provocative or promiscuous women deserved sexual aggression (Ryan, 2011, pp. 8-9). This is directly correlated, as stated by Ryan, to the rape myths (Ibid.). Because as Ryan claims, rapists, whether they are acquaintance rapists or convicted rapists, seem to share similar sexual scripts, rape myths and rape-supportive beliefs (Ryan, 2011, p. 7). Which are reinforcing sexual narcissism, victim-blaming and disregard of rape (Ibid.). W2 was not the one accused of the rape, but seem to be sharing these same rape-surpportive beliefs and rape myths that conclude that publically displaying their sexuality are “inviting” themselves to be raped. It becomes a victim-blaming discourse that seems to try to negate the sexual agency that the women displayed in the first place. One that tries to keep women within their traditional gender and sexual scripts. When consent is solely defined through participation and is neglecting to account for the gendered aspects and power relations, it does as W2 reinforce gender and sexual scripts. Moreover, it crystalizes rape myths, rape-surpportive beliefs and victim-blaming.

Alcoff particularly claims that what happens after a sexual violation has occurred, is that it harms our sexual subjectivity, which is linked to our capacity for sexual agency (Alcoff, 2018, p. 111). Through this lens made available by Alcoff, we could thus argue that in cases of sexual violence where participation has occurred in Denmark, it seems they are punishing the display of sexual agency. Following this line of Alcoff, if our sexual subjectivity and henceforth our sexual agency are jeopardized after a sexual violation, and the court also is generally abandoning cases of where participation occurred. Would this not entail that we

disproportionately are harming and punishing the demonstration of sexual agency of women who in the first place are socialized to neglect their own agency. Because it seems that regardless, sexual agency of women are jeopardized or punished, when women do showcase sexual agency they stand alone since they cannot expect to receive legal recognition of their sexual assaults and rapes. A gendered lens on how we define and implement consent is not utilized in Denmark, but I would argue, as also done by Alcoff and Cahill, that consent in itself is gendered (Alcoff, 2018, p. 128) How sexual agency or participation for women is comprehended in legal practices under the consent-based rape legislation is a vivid example of that.

In the explanation of how to utilize and categorize consent within the cases, consent is described as voluntary, an act of free will and actions that could constitute consent could be kisses or movements (Anklagemyndighedens Vidensbase, 2023, pp. 3-4). Although, as mentioned by Alcoff, consent is also gendered, and is based on problematic gendered assumptions of men asking and women answering (Alcoff, 2018, p. 128). Where men are actively asserting themselves (agency) and women are passive (no agency) (Ibid.). This aligns with what we know about gender and sexual scripts of heterosexual men and women. The way we are able to see how consent is gendered, is blatantly exposed to us in these cases time and time again. We can see this in the way passivity and tonic immobility has been accepted within the understanding of consent without much resistance. Most of these cases also resulted in convictions. This showcases how passivity that is associated with the gender script of women is more easily adapted into the consent legislation. The emphasis on how participation equals consent within the Danish definition of consent in the legislation, showcases how people that have sexual agency cannot be victims. It lacks a gendered understanding of how different genders are socialized to have sex, as per sexual scripts. Because when viewing consent in its gendered forms, it becomes obvious how there seems to be patterns of traditional gender and sexual scripts reinforced. Especially as demonstrated in this section and the former through passivity and participation.

In the explanation of consent, it is stated that if your partner expresses total passivity, one should presume that the person is not consenting and therefore if you wish to continue you must do something to obtain it. It specifically states “(...) *and there the person who wants intercourse completed, must do something to make sure that the other person consents*” (Anklagemyndighedens Vidensbase, 2023, p. 4). The words chosen, “*must do something*”

indicates that it is the responsibility of the person that wants the sexual encounter to make sure that the other partner is consenting as well. This I would argue is with the intention of assuring that all partners are consenting, and to emphasize the importance of obtaining consent. Although in practice, it seems to be utilized quite differently. Referring back to how Cahill and Alcoff view consent itself to be gendered, this explanation of how to obtain consent, yet again reinforces hegemonic gender expectations and assumptions. As we know, the victim is often a woman, and the perpetrator is often a man. This then seems to instill the same heterosexual sexual scripts of consent, where women are passive and should answer and men dominant are the ones asking.

Another aspect that is illuminated through this except for the explanation of consent, is how it seems that the legislation is not concerned with whether the sex is desired, wanted or if it is fairly agreed upon. The “*must do something*” does not care as to how the sexual contact/sexual encounter came to be, which I would argue is crucial. Moreover, I would postulate that how we are defining consent in Denmark currently, as participation, does not emphasize desire or want within sex at all. Nor does it tell us anything in regards to how we can challenge our sexual and gender norms. It to a large extent, merely reinforces and instills these same pillars that are the upkeep of rape culture in the first place. This is because of the gender-neutral approach that Denmark has as a society, also in regards to their legislation and policies. Because although we disaggregate statistics about rape by gender (Amnesty, 2019, p. 15), the research, policies and approach to sexual violence does not consider gender as an important component. Sexism and gender norms are thus able to thrive in the normative sex culture of Denmark without anybody questioning it.

The circumstances surrounding consent do not seem to matter as much. This we see in both cases mentioned in this section, AM2021.11.10V and U.2022.3585Ø. It is even emphasized in the explanation as well, how consent has to be objectively assessed “*Consent must - for reasons of legal certainty - be assessed objectively based on the information about the person’s participation in the intercourse, including the person’s words and actions, and not on the basis of the person’s inner conviction*” (Anklagemyndighedens Vidensbase, 2023, pp. 3-4).

This alludes first of all, to that there can be assessed and determined an objective account of the event, due to the information collected. This aligns with the Danish gender-neutral view on society. An objective truth of an account of the events, is in direct conflict with how we

believe gender and sexuality to be socially constructed. As mentioned by Alcoff, I agree that the concept of consent lacks in its comprehension and consideration of structural inequalities and other injustices (Alcoff, 2018, p. 130). Scholars, Minda and Mackinnon both emphasize how law traditionally has been focused on an objective truth. Minda (1995), mentions how in modern jurisprudence they primarily see law as a way to interpret a universal and gender-neutral morality (pp. 128-130). Feminist jurisprudence and feminist legal scholars have thus offered a different perspective that valued women's experiences (Minda, 1995, p. 128). Especially, postmodern feminists have illuminated how the modern idea of law as constituting an objective truth is flawed (Minda, 1995, p. 143). Mackinnon similarly claims that law is built on an objectivist epistemology, one that assumes a single universal reality and ultimately reinforces existing power distributions in society (Mackinnon, 1983, p. 645), (Mackinnon, 1983, p. 652).

I would argue that the explanations and definitions illustrated in the Danish legislation on consent, insinuate that there can be assessed a universal truth. It highlights consent, as an objective, unbiased and gender-neutral tool, one which fails to count for gender inequalities and other structural injustices. It is conceptually and in its practice not aligned within a social constructivist paradigm. Which means that as a feminist tool, it does not recognize gender and sexuality as mediated and constructed through context and discourse. Although two cases, AM2022.12.20Ø and AM2022.11.09H do seem to recognize power distributions within sexual relations. It is only implicitly implied within the court records and never explicitly understood as such, but nonetheless important to delve into.

5.3.2.1 When Participation Means Something Else

In the cases of AM2022.12. 20Ø and AM2022.11.09H, "participation" by the victims who both were women were not regarded the same as in the other two cases. There is a specific reasons for this: their account were clear examples of our perception of a real rape script. They resonate with us, through the version of the rape myth that we all have grown up hearing about. Both cases were women that got taken into cars, by older and foreign men, and where they were either coerced or pressured to perform sexual favors for the men (AM2022.12.20Ø), (AM2022.11.09H). None of them were physically forced, and none of them physically resisted the sexual violence. Although, they are still examples of what we

count as a real rape scripts, because their perpetrators were unknown to them and they were both fearing for their lives (Ryan, 2011, p. 6).

In the case of AM2022.11.09H the woman was forced to “participate” in the act, as the man’s hands were holding her head and he was threatening with violence (AM2022.11.09H). This was therefore determined by the court to be “participation” out of fear due to the threats of violence and he was found guilty (Ibid.). In the case of AM2022.12.20Ø it was also out of fear, but there were no specific threats of violence (AM2022.12.20Ø). The court statement is as followed;

“The court also finds it proven that the defendant, in order to obtain intercourse against the will of the aggrieved, took her to a place which was deserted, which she did not know, where she could not get help, and from which she assessed that she could not escape. He has thus induced fear in her, which meant that she obeyed him (AM2022.12.20Ø)”

The “participation” that happened in these cases were thus both assessed to be due to either coercion, threats of force or induced by fear. The court could then determine that “participation” in these cases were not understood as consent, as they were not “participating” voluntarily (AM2022.12.20Ø), (AM2022.11.09H). Moreover, in case AM2022.12.20Ø the perpetrator was also a taxi driver, and it was determined by the court that he exploited his role as taxi driver for this act of sexual violence (AM2022.12.20Ø).

These two cases where “participation” were able to be understood differently by the court, was due to the recognition of the rape myth. As these two cases are hegemonically comprehended as rapes in our societies, they become easy to identify. Because as mentioned by Ryan, rape scripts are normative beliefs we have surrounding rape (Ryan, 2011, p. 5). It does seem to be possible, as long as the cases fit within the rape script, to view “participation”, thereby consent, as happening under unequal power dynamics. This is implicitly implied in the cases, through fear and exploitative use of one’s position, but never explicitly mentioned in the court records (AM2022.12.20Ø; AM2022.11.09H).

Mackinnon claims that when we only focus on consent we neglect the role gender inequality has in sexual relations (Mackinnon, 2016, pp. 439-440). Mackinnon views consent as an inherently unequal concept, as it fails to legally pursue sex equality (Mackinnon, 2016, p. 442). I would argue, similarly to Mackinnon, that sexual relations are negotiated under the circumstances of power relations and structural inequalities. Although, I would distance

myself conceptually from the idea by Mackinnon, that all sex is inherently unequal (Mackinnon, 1983, p. 650). Instead I would conceptually align myself with Cahill and her understanding of how morally acceptable heterosexual encounters are politically, ethically and conceptually related with sexual violence cases (Cahill, 2014, pp. 303-304). This is mentioned and elaborated on in various ways by multiple feminist scholars discussing consent. Alcoff also points to exploring what we count as blameless and “normal sex”, and normative gender and sexual identities to be able to comprehend the epidemic of sexual violence (Alcoff, 2018, pp. 113-115). Burkitt and Hamilton similarly advocate for challenging gender norms to prevent sexual violence (Burkitt & Hamilton, 2012, p. 830). Gavey also points to how dominant discourses of (hetero) sex are creating normative scripts surrounding sex (Gavey, 2005/2018, p. 131). I will then argue that our gender and sexual scripts created under heteronormativity, are reproducing and reinforcing unequal conditions for sex. This does not entail that all sex is unequal, like Mackinnon would propose, instead, it means that the circumstances and foundation for ethical sex are not commonly in place.

The two cases of AM2022.12.20Ø and AM2022.11.09H¹⁰ were rightly so, determined to have been sexual assault and rape. Which entails that both cases were understood as constituting unequal conditions. Mackinnon claims that statutory rape, is an attempt that has been made to address inequalities within sex, where positions of power are exploited (Mackinnon, 2016, pp. 462-63). Even though the laws do not explicitly address this, their aim is to say: when power is unequal, consent to sex can become impossible to give (Ibid.). This is the same as the court ruling did with the cases of AM2022.12.20Ø and AM2022.11.09H, it is not explicitly mentioned, but what is intended is to say that the consent performed through “participation” in these cases were not fairly and equally given. Even though it is not explicitly recognized by the court, what ultimately was done was invalidating the consent given on the basis of unequal circumstances. Could this not be similar in other cases as well, if Denmark recognized the gendered and sexual scripts that innately influence our sexual behaviors ? Or accounted for the prevalence of ambivalent sexism in the cases at hand? In case U.2022.3585Ø, where two men were charged with rape, but later acquitted, we do not have much information available regarding the circumstances. We do not know where it took place or if they knew each other or not. Despite the lack of information, I

¹⁰ AM2022.12.20Ø is the case of the Pakistani taxi driver that raped and sexually assaulted an unknown woman in his car. AM2022.11.09H is the case of a Lebanese man that sexually assaulted an unknown woman in his car.

would argue that this could potentially be considered an unequal dynamic, if viewed through a lens of gender.

We are already aware of how women generally are socialized in their gender and sexual scripts to be passive, unproblematic and polite. That men are taught to be sexually aggressive and dominant in their gender and sexual scripts. We have also delved into how refusals are normally said indirectly and non-verbally and that especially women through their gender script are taught to “let down” gently. It can then not be too implausible to theorize that she “participated” in the rape and sexual assault for reasons of necessity, either due to fear or pressure. As postulated by Gavey, going along with it and “participating” might sometimes feel like a safer option for some (Gavey, 2005/2018, p. 148). It can be a form of strategic agency (Ibid.). An analysis of the cases through a lens of gender, can thus reveal a lot that is otherwise hidden in a discussion solely of consent.

5.3.3 The Real Rape Myth Persist

The two prior sections pointed out the gendered notions of passivity and participation in the understanding of consent. This section will delve into how passivity, participation and other circumstantial reactions to rape and sexual assault are perceived to be either mild or severe. Moreover, this part of the analysis will demonstrate how the real rape myth and script still persist.

The penalty levels, which means the degree of severity of the rape and/or sexual assault is still determined based on the same measurements as in the previous rape legislation (Anklagemyndighedens Vidensbase, 2023, p. 6). These are the two ways in which severe and mild cases are respectively described in the collection from the prosecuting authority. First the severe cases:

“The most serious cases of sexual intercourse without consent, which can be equated with consummated sexual intercourse in cases of rape by violence or threat of violence, which is not assault based rape, are generally expected to be punished with imprisonment from 2 years and 6 months up to 3 years.” (Ibid.).

Here, what is described as the most severe cases of rape and sexual assault are the cases that we commonly can associate to the real rape script. This real rape script is generally understood as a perpetrator that is unknown and violent (Ryan, 2011, p. 6). That these cases

are receiving higher sentences, should not be that surprising unfortunately, as we know this is the hegemonic societal perception of what a “real” rape is.

This is how the categorization of milder cases are described:

“According to the processors, in milder cases, e.g. in certain situations of passivity, there could be the foundation for starting from a penalty level of imprisonment for 1 year and 2 months, as such situations can, depending on the circumstances, be equated with situations where the victim is in a state where they are unable to oppose the action. In other milder cases, there may be grounds for imposing a sentence below this level. An example of this is where the parties have initiated voluntary intercourse or intercourse with consent, and where one party later regrets it and says no, after which the perpetrator continues the intercourse anyway” (Anklagemyndighedens Vidensbase, 2023, p. 6).

The milder cases, which should receive less sentences, are all in all cases where the victim is in a state of passivity, or as the last part emphasizes, when there was initial consent. This is first and foremost reproducing the perception of the real rape script as the more legitimate rape. Furthermore, it completely disregards how research has shown that the state of tonic immobility is a common, if not the most common, reaction to rape and sexual assault. Center for Rape Victims identify that 42 percent of victims freeze in some shape or form during a sexual violence (Center for Voldtægtsofre, 2021, p. 48). The Criminal Preventative Council has tonic immobility listed as one of the most common reactions to rape and sexual assault (Jensen, n.d.). This categorization is thus reinforcing and reproducing the real rape script, by undermining experiences that do not align with that. What is problematic is thus that rapes that constitute threats or physical violence by a stranger are seen as more valid rapes, than the rapes constituted in passivity. Passivity as a reaction to rape and/or sexual assault is seen as the milder case of rape. Sexual participation is not accounted for in this case, because under the consent-based rape legislation it is directly understood as consensual sex.

Probably the most concerning of all, is that by categorizing these cases of passivity and initial consent as milder cases of rape and sexual assault it is implicitly and explicitly condoning victim-blaming discourse. It is reinforcing the societal perception of rape where the victim is passive or participating as less than; as less valid and less harmful rape. This is extremely problematic. It subconsciously reinforces the idea that the victim should have done more to avoid the situation, as the perpetrators sentence is measured depending on how the victim acted in the situation. It showcases how the circumstances in which you consent

or do not consent, can affect how others perceive your experience. Also how you perceive your experience yourself. As Gunnarsson explains, these unrealistic discourses surrounding rape, that only focuses on the real rape script perpetuate a culture where sexual violence is normalized (Gunnarsson, 2018, p. 8). It can in turn become hard for the victims to decipher their experiences of sexual assault and rape as such (Ibid.).

This is evident immediately when viewing the cases at hand, we see how cases associated to the real rape script are given the stricter, more severe sentences, such as AM2022.11.09H, AM2022.03.24H and AM2022.12.20Ø. While the cases that are deemed to be milder are AM2021.11.19Ø, AM2021.11.10V, AM2022.12.21Ø, AM2022.05.25Ø, U.2022.3585Ø and AM2021.10.21V2. In the cases that were similar to real rape scripts and thus categorized as severe cases, were given at minimum two years of imprisonment. In the cases that included passivity or participation of some sort, they were either acquitted or given a maximum prison sentence of a year and six months. From this section we can thus conclude that the real rape myth is still categorized, even in the context of a consent-based rape legislation, as more valid and severe rape. The milder cases symbolize aspects of rape culture, where victim-blaming still is pervasive and reproducing the neo-liberal idea of individual responsibility, which frequently is placed on the victim.

5.3.4 Consent as a Neo-liberal Feminist Tool

The concept of consent, as Alcoff claims, is a tool for liberal societies in the Global North (Alcoff, 2018, p. 130). Specifically, she points to consent being a liberal reform that emphasized women's need for sexual autonomy (Alcoff, 2018, p. 126). Although, as a concept it lacks a perception of structural conditions and injustices, it solely emphasizes on individual rights and responsibility (Alcoff, 2018, p. 130). Similarly, Burkitt and Hamilton, illuminate how the sexual violence prevention campaigns that advise women to "just say no" to undesired sexual encounters, are following a risk avoidance approach that endorse the neo-liberal idea of individual responsibility, and ignores socio-cultural constraints and gender inequalities (Burkitt & Hamilton, 2012, p. 817). This, Burkitt and Hamilton claim, projects sole responsibility on women to clearly express unwillingness or willingness for sexual contact (Burkitt (Ibid.)). Moreover, Burkitt and Hamilton believe that the neo-liberal and postfeminist views on sexual autonomy and sexual liberation are covering over the

inherent complexities in the process of consent (Burkitt & Hamilton, 2012, p. 817). The Danish implementation and definition of how consent is obtained, is in line with these neoliberal and postfeminist values. They assume in their gender-neutral approaches that there is an objective truth, while simultaneously prioritizing and emphasizing as mentioned by both Alcoff and Burkitt and Hamilton, the individual responsibility of the person to navigate their own sexual autonomy.

This becomes especially clear, when as prior mentioned, consent only can be objectively measured through actions in the Danish context (Anklagemyndighedens Vidensbase, 2023, pp. 3-4). Moreover, how when somebody is passive, the other person “*must do something*” to make sure they consent (Ibid.). It emphasizes two individuals that exist void of structural and socio-cultural inequalities. Furthermore, what is highlighted in the explanations of how to comprehend consent in legal cases, are words such as free will, voluntary and participation (Ibid.). Which all feed into the neo-liberal ideas of individual responsibility.

In the cases of U.2022.3585Ø and AM2021.11.10V their “participation” was the major reason for the accused being acquitted in the cases (U.2022.3585Ø), (AM2021. 11.10V). It aligns with the neo-liberal “just say no” approach to sexual violence, where responsibility is on the one that reports the rape and sexual assault, as they participated. They, the women in these cases, had the responsibility of demonstrating their unwillingness to the sexual violences, which they failed to do. How consent is conceptualized within Danish legislation, total passivity and resistance are the only correct ways to demonstrate unwillingness. In the case of AM2022.12.21Ø, this can be similarly theorized. In this case a man was accused of raping two different women at two different times, who were deemed unable to consent, but he was acquitted of the sexual assaults and rapes, as the court concluded that he could not have been aware of this (AM2022.12.21Ø). Here even though the women were passive during the sexual violence, the court still decided that their unwillingness were not sufficiently demonstrated (AM2022.12.21Ø). Highlighting instead how the man could not have known, again emphasizes the sole responsibility on the woman on expressing her unwillingness in the sexual encounter. Which also further privileges male sexual scripts within patriarchy.

The Danish gender-neutral approach to consent, is thus one that reflects neo-liberal ideas of individual responsibility and one that neglects to account for structural inequalities. The sole

responsibility for proving their rape and sexual assaults end up on the victims in the cases, who most often are women. The burden of proof is then as Mackinnon claims as well on the victim (Mackinnon, 2016, pp. 452-53). This burden of proof, emphasized by Mackinnon also essentially views the sexual violence as a singular case, and not as a systemic problem (Ibid.). Consent as a concept within legislation in Denmark, is then still utilized to punish individual cases objectively, and then inevitably fails to acknowledge the epidemic of sexual violence. Consent becomes a one of solution to individual cases, but cannot be a feminist preventative tool. Because the neo-liberal, gender-neutral and objective approach of Denmark fails to account for what we envision as a feminist, ethical, just and diverse sexual culture.

5.4 Re-imagining a Feminist Perspective on Sex

In the former section, it was established that the gender-neutral approach that Denmark applies to their consent implementation and interpretation. Invisibilizes the gendered assumptions that are present in our ideas about rape, sexual assault and sex. It also negates how different genders are expected to behave differently. Consent as a gender-neutral concept is essentially reproducing the same gendered structures that are producing the rape culture in the first place. Is consent then the right tool for feminists legally and conceptually to use, when trying to create a safer and more just sex culture ? I propose that consent, at least how it is currently utilized now in Denmark, is a limited conceptual tool both in and out of legislation, in this section I will explain why.

5.4.1 The Ambiguities of Sex: Where Consent Does Not Reach

If we make an overview of the cases utilized in this paper, and thus the majority of the cases that were used in the collection from the prosecuting authority. We can quickly identify patterns and commonalities, in terms of the cases' structures and contents. It can roughly be categorized into cases of passivity, cases of participation and cases where violence/threats or force were involved. This is the overview identified:

- **Passivity:** Four cases are of a victim that was passive, due to sleep or alcohol or in some of the cases both (AM2021.11.19Ø), (AM2022.12.21Ø), (AM2022.05.25Ø), (AM2021.10.21V2).

- **Participation:** Four cases are of a victim that were to some extent “participating” in the sexual violence (U.2022.3585Ø), (AM2022.11.09H), (AM2021.11.10V), (AM2022.12.20Ø).
- **Violence/threats or force:** Three cases are of a victim that were subjected to threats, force and violence in relation to the sexual assault and rape. Two of these cases are already mentioned in the “participation” part, as they belong in both (AM2022.12.20Ø), (AM2022.03.24H).

In the former sections of the analysis it has been suggested how the categories of passivity, participation and threats/violence and force are reproducing heteronormative gender scripts and reinforcing sexism. Moreover, it has been mentioned how the category of violence/threats and force is also reinforcing hegemonic rape myths and rape scripts. Comprehending this, we thus value how these categories, as demonstrated above, are too limiting when trying to understand how rape, sexual assault and sex functions. Consent in a Danish context is viewed as ungendered, and consent is often seen in a dichotomy of passivity and participation. The more complexities of the experience reported, makes the likelihood of a conviction diminish. This, as prior mentioned, we can especially see showcased in the cases where the definition of how to consent, did not fit the sexual assault or rape reported. This happened in both of the cases of AM2021.11.10V and U.2022.3585Ø where the first case a woman was tricked into “participating”, and the second where a woman was “participating” in the encounter with two men but described it as rape (AM2021.11.10V), (U.2022.3585Ø).

In case AM2022.12.21Ø, the cases where a man was acquitted of raping two different women and two different times, the women were passive (AM2022.12.21Ø). The man was convicted at first, but later appealed and was acquitted for both cases (Ibid.). In these three cases of AM2021.11.10V, U.2022.3585Ø and AM2022.12.21Ø they were all acquitted. In the case of AM2022.12.21Ø there are two cases in one, for the last woman that reported rape, they deemed her statement of events to be untrustworthy;

“(…) just as there were circumstances that spoke against the aggrieved person’s explanation, which is why, on the basis of the overall assessment of the evidence, it had to be considered questionable to state that intercourse had taken place without consent and that the defendant had that intent” (Anklagemyndighedens Vidensbase, 2023, p 8).

This statement of the explanation is from the collection from the prosecuting authority and indicates that when a rape and sexual assault is acquitted, no harm had ever taken place. This is emphasized by Mackinnon as well. Mackinnon argues that when a rape case is lost that was based on a lack of consent, the women did not only not succeed in proving her case, she is categorized by law as not having been hurt at all (Mackinnon, 1983, p. 653). Similarly, I would postulate that legal practice in regards to sexual assault and rape in Denmark, is failing to adequately acknowledge the ambiguities involved in rape, sexual assault and sex. As within the dichotomy of participation/passive, which is heavily gendered, and through their belief of an objective reality; diverse and contradictory experiences regarding sexual violence are discarded.

In these three cases of AM2021.11.10V, U.2022.3585Ø and AM2022.12.21Ø they were all acquitted. The rape and sexual assaults reported by the four women in these cases are thus erased, and seen as consensual. This is a major flaw of how consent is conceptually understood and implemented. Because even though the court has assessed these cases as consensual, and the defendants believe so as well, they will never in the experiences of the victims be considered consensual or wanted. What do we then do with the absence left behind by consent? How can we sufficiently and thoroughly view the complexities that consent does not illuminate?

Gunnarsson explores the gray areas of sexual violence through a dialectical relationship between discourses and experiences (Gunnarsson, 2018, p. 5). It is one that acknowledges the dialectical loop of influence between experiences and discourses (Ibid.). Gunnarsson claims that hegemonic discourses around sexual violence (rape scripts), are not recognizable for most people that have experienced sexual violence of some sort (Gunnarsson, 2018, p. 8). This is due to the hegemonic discourses not emphasizing the gray areas of sexual violence and sex (Ibid.). An example of this discrepancy between experiences and hegemonic discourse surrounding sexual violence, can be seen in the case of AM2022.12.21Ø. This case involves two cases, and this is in regards to the second one. This is the aggrieved's statement of the events given to the court;

“The Aggrieved has explained to the district court that she woke up because the defendant was having intercourse with her, that she froze in her body and that it was a shock. She also explained that she pretended to be asleep because she was scared and felt that she could not move. This explanation is neither supported by the photo presented nor by W2’ repeated

account before the district court that A has said no so many times that she finally gave up and it was then that the defendant had had intercourse with her” (AM2022.12.21Ø).

This statement showcases how the hegemonic discourses surrounding rape, does not represent the experiences at hand. Ryan claims that the rape script, has gendered differences, men tend to see consent negotiated as yes/no, while women see it more as a negotiation (Ryan, 2011, p. 7). We have concluded that consent in a Danish context is categorized through sexual participation and passivity/resistance is seen as non-consensual sex, these categorizations still remain within the distinction of a sex or no. The legal definition of consent then appears to have its influence from a male tendency at categorizing consent. This statement from the aggrieved was also what apparently made her explanation of the events untrustworthy (AM2022.12.21Ø). Because she described two experiences, but why is it that they cannot coexist in conjunction? It appears to be the complexities of the account, that ultimately makes it untrustworthy, because it is too divorced from the hegemonic idea of rape.

In Denmark, the Criminal Preventative Council of Denmark estimates that 11,800 women are yearly subjected to rape or attempted rape, this is a study from the years 2018-2020 (Mannov, n.d.). In a study from University of Southern Denmark, in 2018, they instead estimated this number could be 24,000 (Amnesty, 2019, p. 12). Out of this very few are reported to the police, The Criminal Preventative Council of Denmark estimates that it is one in every fourth rape that is reported (Justitsministeriets Forskningskontor, 2020, p. 118). Furthermore, research show that acquaintance rape or somebody that you know to some extent is more likely (Justitsministeriets Forskningskontor, 2020, p. 107). Only 28 percent of rapes are by a stranger (Ibid.). Although, numbers indicate that there is less probability of a rape being reported to the police if the victim knows their perpetrator (Justitsministeriets Forskningskontor, 2020, p. 119). I would argue that the reason for rapes or sexual assaults committed by a known perpetrator are reported less, is because they encompass more ambiguities. Because they are the furthest from the rape myths and rape scripts. They typically, as demonstrated with the cases analyzed here, involve no force threats and violence and are not physically or verbally resisting the sexual violence (AM2021.11.19Ø), (AM2021.11.10V), (AM2022.12.21Ø), (AM2022.05.25Ø). In the case of U.2022.3585Ø we are not aware of the relationship between the people involved, but through the explanation it sounds like they knew each other (Anklagemyndighedens Vidensbase, 2023, p. 5). I would postulate that many instances of sexual violences are not reported due to its ambiguities,

which consent in legal practice often fails to acknowledge and consider. Not recognizing the ambiguities or gray areas of sexual violence, ends up reproducing rape myths and rape scripts and invisibilizes most other experiences of sexual violence not in the hegemonic discourse. If consent is limited in its understanding of sexual ambiguities, could desire possibly be a better tool instead?

5.4.2 Desire as an Alternative Framework?

Could desire be an alternative framework to consent? Commonalities between various scholars theorizing consent is how they tend to prefer the concept of desire over consent, Cahill is one of those scholars. Cahill claims that to make an ethical analysis of sex, it is necessary to investigate sexual desire (Cahill, 2014, p. 304). She believes consent to be gendered, and that it emphasizes something men ask for and women answer (Cahill, 2014, p. 310). She claims that desire instead focuses on all partners (Ibid.). She does not wish to determine absence or presence of sexual desire before or during the sexual encounter, as done with consent (Cahill, 2014, p. 304). She instead wants to focus on how desire can be understood in an intersubjective encounter (Cahill, 2014, p. 315). She argues that intersubjectivity is necessary for an ethical sexual encounter, which normative hetero sex fails to recognize (Ibid.). When you erase the intersubjectivity of the sexual encounter, as especially done in cases of sexual violence, you do not account for the other person's desires and make the encounter solely a subjective one (Cahill, 2014, pp. 315-16).

In the explanation of how consent is given, it is stated that consent will be assessed objectively based on the information present regarding the words and actions of each person (Anklagemyndighedens Vidensbase, 2023, pp. 3-4). The inner subjectivity of the person is not considered, it states; *“This implies, for example, that a person who, according to their inner conviction, does not want intercourse, but who nevertheless chooses to agree to intercourse, will be considered to have consented to intercourse”* (Ibid.).

This first of all implies that both people are individually making their choices regarding consent and that this must be deciphered for each person, by asking or through their actions. This again highlights the neo-liberal emphasis on sole responsibility and individuality. Similarly to Cahill, I would argue that normative hetero sex, the foundation which consent is built on despite the attempt at erasing it, is not viewing the sexual encounter as intersubjective. Consent as a concept also does not care whether the sex was unpleasant or

unwanted, it merely looks at sex as consensual or non consensual. It is even stated, as showcased through the quote from the collection from the prosecuting authority, that the inner conviction of the person does not matter.

The part of the explanation that emphasizes that a partner “*must do something*” if the other partner is totally passive, to make them consent (Ibid.), also implies that consent can be obtained through what you get the other person to do (Ibid.). Which only focuses on one person’s desires and needs, and reinforces the gendered dynamic of consent where men ask, “*must do something*”, and women answer. Yet again, highlighting as Cahill points to, that hetero sex does not care about the inner conviction and desires of the other person, and that this is the root of the problem (Cahill, 2014, pp. 315-16). Furthermore, Cahill states that we lack sex that features women’s sexual intersubjectivity, as through phallogentric sexual norms, their desires are often neglected (Ibid.). I would then argue that consent in Danish legal practice is through its neo-liberal emphasis on individual responsibility, erasing the aspect of desire and pleasure in sex. Especially that of women. Consent is instead focusing on whether consent is obtained or denied, in an individualistic manner, which erases the relational aspect of sex. I propose that, similar to Cahill, we should focus on the intersubjectivity of the sexual encounter, which strives to acknowledge the feelings, desires and wants of one's partner (Cahill, 2014, p. 315). Instead of simply through the Danish legal practice account for whether a sexual encounter is passive or active. The intersubjectivity of the sexual encounter, that desire as a concept possibly better could demonstrate, is also one I would argue that a feminist vision of sex could benefit from. As it could abandon the strict boundaries of consent in a Danish context, which focuses on highly gendered parameters. Although at last, desire would also be conditioned to a certain extent by gendered parameters. Srinivasan points to this, by emphasizing how our sexual preferences and desires also are conditioned by sexism, racism, transphobia and so forth (Srinivasan, 2021, p. 84). Although valuing the other’s intersubjectivity in a sexual encounter, whether or not their desires are socially conditioned, still could potentially ensure that more people are heard and listened to in sexual encounters.

The focus on sexual desire, can also reveal to us why women consent to unwanted and unpleasurable sex. Gavey mentions that heteronormative discourses shape the sexual subjectivity of women in multiple ways that can make them comply with unwanted sex

(Gavey, 2005/2018, p. 141-42). Through the interviews that Gavey conducted, she realized that various women consented to unwanted or undesired sex because they felt bad resisting, out of nurturance, or because it was easier than saying no (Ibid.). It then seems that women would altogether ignore their sexual desire sometimes (Ibid.). Sexual desire is then as consent not void of a gendered perspective, which must be applied to the situation to properly understand the situation at hand.

In the cases such as U.2022.3585Ø and AM2021.11.10V their participation were inherently seen as consensual, but also as we generally assume that consent automatically means desire as well. Although, viewing through the interviews conducted by Gavey, it is clear how sexual desire is not equal to participation. It is common, especially for hetero women to participate in unwanted or undesired sex, due to various reasons, often associated with their gender and sexual scripts. Alcoff, would emphasize that our desires are subject to social conditions (Alcoff, 2018, p. 136-37). Sexual desire thus tells us more of the want and relational aspect of a sexual encounter, but it still cannot singlehandedly signify that a sexual encounter is wanted. Moreover, how would sexual desire even be measured in legal cases? Sexual desire is thus important when analyzing a sexual encounter or a sexual violence, but does not appear to be an adequate substitute for the concept of consent. What does seem instead to be present in all discussions of consent, is the pervasiveness of the structures of heterosexual norms surrounding sex. What is needed, as highlighted by various scholars, is to challenge what we theorize as normal sex, normative gender identities and sexualities, power relations and sociocultural norms (Burkitt and Hamilton, 2012, p. 830), (Alcoff, 2018, p. 113). This will happen through a reinvention of these categories, which entails expanding beyond the white heteronormative ideas of gender and sexualities.

5.4.3 Queering Consent: Expanding the Concept

The concept of consent has through this analysis been centered on a heteronormative comprehension of gender and sexuality. This has been a deliberate choice, because sex, rape and sexual assaults are commonly viewed through this lens. Furthermore, the way gender scripts and sexual scripts are conceptualized is also on the foundation of a heteronormative society. The cases that were chosen were all within a heterosexual context, this is assumed from pronouns, as gender is not specifically mentioned. In the gender-neutral context of Denmark, sexualities and gender identities are simply ignored in the court accounts.

Moreover, there is no analysis or consideration within the cases of socio-economic constraints, ethnicity or nationality background. This is not surprising, in a neo-liberal approach to consent, it is only the individual responsible for one's actions. Structural inequalities of any kind are thereby not even considered in the discussion, due to the ideological perspective that has the individual in focus.

There is thus an attempt to ignore power relations and structural inequalities in how consent is analyzed and implemented in the court cases. This is verified by the lack of diverse data collection of rape and sexual assault in Denmark (Amnesty, 2019, p. 15). The data that is available, mentions gender and age (Ibid.). There is also as mentioned prior data available on the relationship between perpetrator and victim (Ibid.). Data collection of disability, sexual orientations, gender identities, and migrant statuses are although not available (Ibid.). Not collecting this data on structural inequalities is similar to the gender-neutral approach, rendering them invisible and reproducing them (Ibid.).

Gender and sexual scripts have been scrutinized throughout this whole analysis. What has also been emphasized is how both gender and sexual scripts are derived from heteronormativity. This also indicates that they do not account for the construction of gender, sexualities and sex from outside these parameters. I would argue that expanding our knowledge of sex, sexualities and gender by viewing it through a queer lens, could potentially offer us possibilities of what good and ethical feminist sex could mean. Moreover, if that should include consent, as we have it now.

Ward claims that within heterosexuality straight women's pleasure is secondary, and they often consent to unwanted and unpleasurable sex (Ward, 2023, p. 3). She therefore does not believe that consent is sufficient for creating the changes necessary to end non-oppressive hetero sex (Ibid.). She further mentions how queers and lesbians have fought for a long time to re-invent and re-gender non-reciprocal sex (Ward, 2023, p. 5). This is similarly mentioned by Hoppe, as he re-imagines consent and ethical sex through a queer lens. He mentions how "enthusiastic" consent is not sufficient for identifying unethical sex (Buggs & Hoppe, 2023, p. 3). He explains that much queer sex, especially for gay men, happens without verbal communication, and can be very subtle (Buggs & Hoppe, 2023, pp. 8-10). He believes we should strive for a practical concept of consent that is broad enough to encompass boundary pushing sex, while also accommodating the people who desire stricter lines (Buggs &

Hoppe, 2023, p. 14). This would mean expanding beyond the strict limits of how we categorize consent now (Ibid.). How consent is legally defined in Denmark, limits our perception of sex to the strict heterosexual categories of gender found within the gender and sex scripts. Queer sex is then not acknowledged, which is especially problematic when sexual assaults or rape happens to a queer person. Moreover, it harms any person that does not adhere to the heteronormative idea of sex, this also entails as we have established prior in the thesis, men and women that do not follow the traditional gender and sex scripts. A feminist vision of sex should challenge the heteronormative sex culture at large that reproduces these gender and sex scripts. The legal definition of consent is similarly reproducing gender and sex scripts which uphold rape culture. Therefore, consent in its gendered nature is currently preventing a feminist vision of sex to prosper.

Both scholars, Hoppe and Ward, essentially identify the limitations of consent we have within a heteronormative framework, and that there needs to be space to imagine queer alternatives. Ward specifically mentions that patriarchy is the detriment for heterosexuality (Ward, 2023, p. 3). This is because it normalizes sexual entitlement of men, and disregards the pleasure of women (Ibid). She further claims that due to the constraints of heterosexuality, “enthusiastic” consent might be the best option for straight women at the moment (Ward, 2023, p. 7). To ensure that women are What seems to be concluded both from Ward and Hoppe is that they recognize the conditions in which consent is negotiated within patriarchy. While simultaneously, they are vouching for how queer people can have different parameters for identifying non-consensual or non-reciprocal sex. They also both emphasize how queer sex inherently challenges how normative heterosex is negotiated, thus presenting a possibility of queering our understanding of sex in general (Ward, 2023; Buggs & Hoppe, 2023).

To reiterate, all the cases of sexual assault and rape in this analysis are within a heterosexual context. Furthermore, the way the cases are analyzed by the court is through a heteronormative lens. The way consent is gendered is essentially only through heterosexuality. The perspective we have of queer sex and queer sexual violence is thus non-existent, as the data is also not even collected. Even if a case was included, it would be interesting how it would be analyzed, as the language in itself within consent implementation is phallogentric and heteronormative. The severity of the cases, and what determines the sentence, is based on heteronormative and phallogentric ideas regarding sex. The most

severe cases are judged to be of “*a completed intercourse*” with violence or threats of violence (Anklagemyndighedens Vidensbase, 2023, p. 10). It is demonstrated in the cases how if the cases include penetration of some form, the perpetrators are given higher sentences. The two cases of AM2022.11.09H and AM2022.12.20Ø are very similar in circumstances, but one included more penetration than the other and therefore got a higher sentence (AM2022.12.20Ø), (AM2022.11.09H). In the case of AM2022.03.24H, the victim was penetratively raped two times in the same night, which resulted in a higher sentence (AM2022.03.24H). This phallogentric view on the severity of crimes presents a problem for the judgment of cases that involve queer sex. Even the law is divided into two Criminal Codes, where one accounts for sexual intercourse § 216 and one for sexual contact without intercourse § 225 (Danske Love, n.d.).

I will thus argue that the conceptual exclusion of queerness in regards to consent within sex, can help us imagine other ways of conceptualizing consent. Ward and Hoppe, both discussed the limitations of consent for imagining queer sex, but they also imagined it in regards to other forms of non-reciprocal sex and how consent can be negotiated differently. I thus postulate that queering the concept of consent, while also queering the understanding of how we have and negotiate sex, could help us re-imagine a feminist vision of sex culture that is void from gender and sex scripts that limit us. Queering the gender and sex scripts, thereby how we have sex, have the potential for challenging the gender scripts that are at the core of the reproduction of rape culture. I propose that good feminist sex entails a sex culture that is void of gendered expectations through scripts. A sex culture which promotes reciprocity and encompasses all forms of sex and sexual expression. Consent can currently not live up to the needs of a feminist vision of sex, but neither can desire or other alternatives as long as they are rooted in patriarchal notions of gender.

5.4.3.1 Structural Racism within Court Cases

The only data that is specifically emphasized and utilized in the court decisions of rape and sexual assaults in Denmark, are ethnicity and nationality. Besides gender, it is also the only other data collection of structural inequalities collected. The ethnicity and nationality of accused perpetrators of rape and sexual assaults were most recently published by the Ministry of Justice (Justitsministeriet, 2021). Here the statistics show that in 2020, 217 people were convicted of rape and 53 of those people were from other background than

Western (Justitsministeriet, 2020). In the court cases we analyzed in this research, it has been highlighted various times, that the pervasiveness of the gender-neutral approach to policies and legislation, has invisibilized gender in the court cases. Genders can only be disaggregated from the statements and accounts due to pronouns in the Danish language, and the descriptions of the rapes and sexual assaults which utilize the language of penis and vagina, which we know in a heteronormative society equals man and woman. This is not the case in regards to ethnicity or nationality. If the perpetrator is a non-ethnic Danish man, it will be highlighted within the case and his family background and connection to his ethnicity and/or other nationality will be emphasized.

In both of the cases that most prominently illustrated our perception of a real rape script, were of perpetrators with other ethnicity and nationality than Western. In the case of AM2022.11.09H a 46 years old man of Lebanese ethnicity and nationality forced and threatened an unknown woman into his car where he made her perform sexual acts for him (AM2022.11.09H). He was sentenced to two years in prison and later deportation to Libanon (Ibid). He came to Denmark when he was 14 years old, has a son here and multiple siblings, his connection to Lebanon is through a sister he has there and he speaks the arabic but cannot write it (AM2022.11.09H). There were multiple court rulings, as the defendant appealed his conviction and tried to lessen the sentence, especially the deportation (Ibid.). The court instead increased the initial one year sentence, to two years instead, still with subsequent deportation (Ibid.). The court clarifies their decision for deportation by;

“Due to the nature and gravity of the crime committed, the Supreme Court finds, after an overall assessment, that the considerations in favor of the defendants’ deportation are so significant that they have greater weight than the considerations that, as a result of his strong connection to Denmark, speaks against deportation” (AM2022.11.09H).

The perpetrator requested for parole, when he had served two thirds of his sentence, it was denied for various reasons, such as the severity and content of the crime, and that he was deemed likely to repeat the crime as the victim was a stranger and he used force (Ibid.).

The other case, AM2022.12.20Ø, has a similar pattern. In this case a 37 year old man from Pakistan ethnicity and nationality, sexually assaulted and raped a woman while he was working as a taxi driver (AM2022.12.20Ø). He was sentenced to two years and six months without the possibility of parole, and to later be deported to Pakistan (Ibid.). He came to Denmark three years ago and is married and has three kids (Ibid.). He has a close relationship

with his kids, and no longer has family in Pakistan, but still speaks Urdu (Ibid.). The same statement as mentioned in the other case was given here as well.

Within both descriptions of the two cases, it becomes clear that they are prime examples of the real rape script. They embody the image of an older, foreign man that takes a woman away in the dark. Crenshaw postulates that there is a dominant perception of rape as black perpetrator/white victim (Crenshaw, 1991, p. 1266). Which then essentially entails, that these two cases are perfect examples of the hegemonic rape script that is prevalent in society. It is very important to emphasize that this does not under any circumstance mean that the perpetrators did not do what they were reported or convicted of. Although, scholar Srinivasan does illustrate an important point by addressing how men of color and lower class are disproportionately falsely accused and convicted of rape and sexual assault (Srinivasan, 2021, p. 4). In the context of Denmark we see how men of color are disproportionately convicted of rape as well, where 53 out of 217 were of other ethnicity background than Western (Justitsministeriet, 2020). This has been utilized by the far-right party “Nye Borgerlige” to showcase how men from other ethnicity background than Danish are more prone to rape (Nye Borgerlige, 2021). The numbers do seem to showcase that if they are not understood within a social and cultural context. Although this would not be an appropriate analysis.

We prior identified, that when rape and rape culture is not acknowledged as rooted within sexism, the gender-based violence is invisibilized and can continue to reproduce the same structures. The same is applicable to ethnicity/race within rape culture. Crenshaw posits that sexism and racism have been implemented into our social construction of rape (Crenshaw, 1991, p. 1268) When rape culture is not acknowledged as rooted within racism, a race-neutral approach is implemented. This is happening in the Danish context, here racism is able to be seamlessly reproduced in a legal setting. The disproportionately large amount of men from other ethnicities than Danish, especially non-Western, whom are charged and convicted of rape tells us a story of racism. One where race/ethnicity is mentioned only due to the aspect of deportation in the case, which they have to account for in the court cases. Other than that, the race/ethnicity is invisible in these cases. Crenshaw explains specifically how critical race theory emerged because of the colorblindness found within law (Crenshaw, 2019, pp. 52-53). Which ends up covering for racial inequalities.

The two cases showcased here ended up in convictions, and there is nothing within the cases suggesting that they should not have. This is not the argument I want to make. Instead I wish to challenge how consent is implemented not solely with a gender-neutral approach, but with a race-neutral approach as well. Except for when we want to emphasize that most perpetrators of rape and sexual assault are men with an ethnicity background other than Danish. It strategically tries to push a narrative that tells us that the perpetrator, the root of the problem, is foreign. Which again, is an approach that tries to ignore addressing the sexist and racist culture that is responsible for the rape culture in the first place. These two cases were justifiably convicted, but we should question as a society why do we do deportation in these cases? I would argue that it becomes a symbolic act, a racist one, that yet again blames the man of color as the ultimate perpetrator in a predominantly white society? 217 men were convicted of rape in 2020, 53 of them were men from other ethnicity than Western (Justitsministeriet, 2020). In 2020 there were 1.392 reports of rape in Denmark (Justitsministeriet, 2021), why were they not followed through, what made them not lead to a conviction? Moreover, what happened to the 24,000 other estimated rape or attempted rapes? (Amnesty, 2019, p. 12).

We need more disaggregated data, that can reveal to us the complexities within rape reports and convictions. We need more data that accounts for the ethnicity/race of the victims of sexual assault and rape as well. In regards to this, Harris mentions how when we just refer to women as a monolithic category, we are implicitly referring to the experience of a white woman (Harris, 1990, p. 588). Harris explains that a feminist jurisprudence then often silences and ignores the experiences of women of color (Harris, 1990, p. 585). This is also why it is important to collect more data that reflects various lived experiences. The coined term of intersectionality by Crenshaw could be useful in this regard, to identify the intersectional identities of race and gender (Crenshaw, 1991, pp. 1242-43). Crenshaw highlights how rape for women of color often is rooted in both racism and sexism (Ibid.). Other intersectional factors could also be relevant here such as class and/or sexuality (Ibid.). There is thus a huge gap left in our understanding of the implementation of consent, when race is not considered. Furthermore, research shows that African-American women are less likely to be believed in cases of rape (Crenshaw, 1991, p. 1269). Srinivasan similarly mentions that women of color are disproportionately subjected to some forms of interpersonal violence (Srinivasan, 2021, p. 13). This is in large part due to the racial scripts surrounding women of color, they are for example commonly in white spaces deemed

unrapeable due to hypersexualization (Srinivasan, 2021, p. 12). This can only be changed if we acknowledge the pervasiveness of these racial scripts and challenge them, which first means addressing the race and ethnicity in cases of rape and sexual assault in the first place.

We have accounted for how ethnicity and race are not addressed in court cases of rape and sexual assault, what this ultimately entails for the negotiation of consent is that it is not as straight-forward as neo-liberal approach to it would have you think. Having an understanding of the dynamics of power relations and the privileges or disadvantages it can render you, will complicate the negotiation of consent. Why are we convicting some men out of the thousands reported? In the case of U.2022.3585Ø where two men were acquitted of raping a woman, as it was concluded by the court that her “participation” was consent, other data might have complicated the narrative (U.2022.3585Ø). Participation is seen in the current consent law as aligned with consent, but could there have been other factors that might have revealed more? In the case of AM2022.12.21Ø a description of the perpetrator suddenly complicates the narrative. In this case a man was accused of having raped two different women at two different times, he was first sentenced to both cases, but then later in a high court he was acquitted of both charges (AM2022.12.21Ø). This is an excerpt of a description of him in the appealed trial:

“The defendant has explained about his personal circumstances, that among other things, he had released his first song and was days away from releasing his second when he was arrested in November 2021. His record contract has now been terminated by the record label, as due to the case and the mention of it in the media, did not think he had an image they could stand by. He has lost several other contracts, including with a number of clothing brands” (AM2022.12.21Ø).

It indicates from the personal information regarding his life, that he is a man that has acquired a high status. This we can assume from the mentioning of the media, clothing and record label contract. In the first case he was accused, the woman was deemed unable to consent, but the court concluded that it was uncertain he was aware of this (AM2022.12.21Ø). This is although contradictory, as in the explanation of how consent is given, it is stated that if there is total passivity from one’s partner, the one that wishes to have sex “*must do something*” to make sure they are consenting (Anklagemyndighedens Vidensbase, 2023, pp. 3-4). This entails that by law he should have made sure of her consent in this case, but he did not, and was still acquitted. In the second case, the woman’s account

was simply deemed untrustworthy (AM2022.12.21Ø). From an analysis of power dynamics, I would argue that his power and influence seemed to dramatically change the outcome of the trial. The measure of consent in the appealed trial, I would argue, had little significance.

5.4.4 Consent as a Symbol Law

Most of this analysis has been scrutinizing how the concealed white and heteronormative gender and sexual scripts incorporated into our understanding of consent, and reproduced in society, is harming and detrimental for our vision of sex and consent. I would although argue that despite the limitations of the consent-based rape legislation in Denmark, the implementation of this law still has a certain purpose that should be acknowledged. A purpose that also is significant when imagining a feminist vision of sex.

Zen Donen, who is a lawyer and spokesperson for Everyday Sexism Project Denmark (Cramon, 2020), stated that there are people who have questioned the utility of consent within a legal framework of rape, and view it merely as a symbol law (Ibid.). In response to this, she has stated that all laws are symbol laws, a symbol of what we believe is right and wrong (Ibid.). In agreement to this statement, I propose that the consent-based rape legislation as a symbol law is the greatest contribution this law has. When the consent debate started in Denmark various myths and misconceptions regarding consent and rape were present (Ibid.). A common misconception was that it would criminalize normal sexual behavior (Ibid.). This was not simply the public opinion, but also one shared by the Criminal Code Council and The Association of Judges (Andersen, 2020). The demonstrations and campaigns from the organizations in Denmark fighting for consent to be implemented into law changed this public opinion (Cramon, 2020). In December 2017 only 28 percent of the public supported a consent-based rape legislation, in 2019 it had already increased to 51 percent (Ibid.). This is a tremendous change, one that inevitably has brought about changes. This we can see showcased through the increase of convictions of rape, which have seen a steady increase since 2019, even before the implementation of the consent law (Danmarks Statistik, n.d.). This argument is not made to necessarily agree with the carceral approach, as Srinivasan mentions the carceral approach is one that disproportionately punishes people of color and working class (Srinivasan, 2021, p. 24). The example of the increase of

convictions is instead made to highlight how it supports the notion that there has been a public change of opinion in regards to consent.

The report from the prosecuting authority states that the majority of the court cases include circumstances that also would have been considered punishable under the previous rape legislation (Anklagemyndighedens Vidensbase, 2023, p. 6). Although accounts of previous kissing or flirtatious behavior is categorized under the renewed rape legislation to not constitute consent (Ibid.). This is an important change that tries to change the narrative of how women through their actions owe men sex. This narrative is still reproduced in how the consent law is ruled, this has been particularly the case in the cases of AM2021.11.10V and U.2022.3585Ø¹¹. A simple change such as how the consent-based rape legislation emphasizes a need to have the consent and voluntary agreement in a sexual encounter is a huge step. The previous rape legislation emphasized force, threats and violence which then reinforce how men are entitled to sex. Although the sexual entitlement still is there, as all the cases are of men that deny the rape/sexual assault or simply has no remorse (Anklagemyndighedens Vidensbase, 2023), the circumstances in which they can do it has changed. Srinivasan comes with a similar take, she mentions how white men often feel rules suddenly have been changed on them (Srinivasan, 2021, 20). She clarifies, that this is not the case, that women have always resisted these injustices, although now men cannot rest assured that they will not be punished for it (Srinivasan, 2021, pp. 21-22). This is an important argument, which I wish to highlight more in-depth. This point from Srinivasan is precisely the strength of the consent-based rape law; now men cannot rest assured that their actions will not have consequences. Specifically, they are forced to ruminate over whether consent has been given or not, which is the first time in Danish history. Even though, as has been analyzed in this analysis, there are various obstacles and limitations to the consent-based rape legislation.

I postulate that if used consciously, consent as a concept could be used as a strategic tool. A tool that could be utilized to educate the public about how to have better sex, that constitutes enjoyment from all the people involved. Because consent is a new concept introduced into Danish discourse surrounding sex, it has the potential to reframe the way we talk about sex.

¹¹ AM2022.11.10V is the case of the woman that was raped in a summer house by a man under the disguise of being somebody else. Case U.2022.3585Ø is the case of a woman that was raped by two men, they were acquitted as she was sexually participating.

It would be strategic essentialism, as we should be aware of the limitations of consent as a concept and the way that the concept has disproportionately targeted and harmed already marginalized people. I would also argue that we need to distance ourselves from the idea that a re-invention of the heteronormative sex culture has to happen in one singular way, be that consent, desire or education. The feminist vision of sex is first of all bound in the liberation of patriarchal notions of gender within sex, how this is done and with what concept depends on the situation.

This is an approach that has been highlighted by Becker as well. She proposes that we reject abstract or standard approaches at reaching gender equality (Becker, 1987, p. 202). This is due to, as she claims, the unlikelihood that this will bring forth real change (Ibid.). She further states that formal equality often does not account for the different situatedness of people (Becker, 1987, p. 206). She emphasizes how we need to be aware of having a standard of equality that works for one group but harms or silences another (Becker, 1987, p. 237). She instead proposes to have the particular situations in mind and advocate for change in the appropriate forums (Becker, 1987, p. 202). This I argue, we should implement for dealing with the epidemic of sexual violence as well. Consent can be a necessary strategic tool in some cases, but in others not. For most of the cases where passivity was involved, consent was a sufficient tool to sentence the perpetrators (Anklagemyndighedens Vidensbase, 2023). While in others, such as in case U.2022.3585Ø¹² it was not. We should then not be so preoccupied with whether consent works or not, as it will never work solely by itself. Instead, we should substitute the consent-based rape legislation with other measures as well. It has been stated by various organizations of Denmark, that the consent law should be a step amongst many towards changing our perception of sex (Göttler, 2020). This is the manner in which I would argue that we should envision consent being within the solution. We do not have to completely disregard consent in our feminist visions of sex. Instead we should question and challenge the traditional heteronormative gender scripts encompassed into our legal definition of consent. This will enable us to imagine a feminist vision of sex void of patriarchal norms regarding sex.

¹² The case where a woman was raped by two men, they were acquitted due to her sexual participation.

6. Conclusion

The aim of this thesis was to investigate how consent as a concept could have limitations for a feminist reimagining of sex. Particularly Denmark, and the newly introduced consent-based rape legislation is the focus of this thesis. Through court cases and a report from the prosecuting authority the limitations of consent for a feminist vision of sex has been analyzed. The main limitation that this thesis can conclude from the implementation of the consent-based rape legislation is the gendered nature of the concept. Specifically how this gendered nature stems from patriarchal notions of gender. Consent as a concept is reproducing the same gender scripts and sexism which upholds rape culture in the first place. In the legal definition of consent, sexual participation is seen as constituting consent, while passivity is seen as non-consensual. The concept of consent in this context is limiting our perception of sex, sexual assault and rape into strict understandings of gender scripts found in heteronormative society. It reinforces the gender script that women who are participating sexually should be blamed for their sexual agency and that passivity thus is the proper reaction for a sexual assault and rape. The exception to this is the normative idea of rape, the rape myth/script, which still is the most pervasive one when we imagine the script of a rape or sexual assault. These cases of rape are thus the ones which elicit higher penalties for the perpetrators. The gender scripts and sex scripts have thus become, as they always have been, enmeshed with the rape scripts. The concept of consent, simply reinforces the harmful patriarchal notions of gender and sex, which already are there. The concept is therefore too flawed and not enough when imagining a feminist vision of sex.

The concept of consent, as it follows the heteronormative gender and sex scripts, also does not sufficiently account for the ambiguities and gray areas found within sex. If the sexual assault or rape cases are found within gray areas, such as unwanted sex where consent was given, unpleasant sex, or simply rape/sexual assault where it did not follow the gender scripts, consent was not sufficient. In these cases of ambiguity, as we have seen in the analysis of the cases, it usually resulted in the perpetrator being acquitted which ultimately means that the sex was deemed consensual. A feminist vision of sex is one that would be able to encompass such complexities within sex, sexual assault and rape. Here desire has been proposed as a potential concept for encompassing such complexities. Desire could instead of consent look into the reciprocity of the sexual encounter, emphasizing the need to know your partners desires and feelings. Although desire can similarly to consent not be the

only solution. A feminist vision of consent should expand beyond the heteronormative and racist gender scripts that consent is reproducing, here the queering of consent could be beneficial. I proposed that through a queering of the concept of consent there is a possibility to reimagine other ways of reconceptualizing both consent and sex. This is essential for a feminist vision of sex. A feminist vision of sex should not only be consensual it should also be equal, wanted and pleasurable. The dismantling of patriarchal and heteronormative notions of sex is therefore the first step.

Consent as a concept does have many limitations, although a huge potential that it encompasses, is its possibility as a symbolic law. Having a consent-based rape legislation as a society, does by law, whether or not the application is sufficient, indicate to the public that sex should be consented to by both partners. This was not the case in the former rape legislation and for this, consent within law has a potential to evoke change. For matters of education it can thus be a valuable strategic tool for feminists. Until we are able to find a concept or a way that is better for we envision a feminist sex culture to be.

Desire and the queering of consent were both within this thesis deemed as possible feminist reimaginings of sex. The two topics were although solely briefly discussed in the analysis. Desire as an alternative to consent, has been proposed by various feminists as emphasized in the literature review. Therefore if I were to expand on the analysis within this thesis I believe that researching further on desire as a concept for a feminist vision of sex, would be the next step to take. Queering consent would also be essential for future research. This thesis was only able to briefly discuss it, as the court cases that were available all were sexual assault and rape that involved heterosexual sex. Despite the brief discussion on both themes within this thesis I found that they were essential and necessary for the analysis, as they expanded the idea of what feminist sex should involve, and illuminated the limitations that consent poses as a concept.

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