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THE BURDEN OF CONSENT

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ABSTRACT

How has contemporary rape legislation in both the federal and state jurisdiction evolved with the changing awareness of consent since 1960? The question of the definition of consent is important in two respects. The first is to highlight the importance of definitions in a legal sense. Because of a lack of definitional consistency in the crime of rape, different jurisdictions have criminalized different acts under different names. This causes problems within legal proceedings as will be discussed in the literature review. The second reason is because the definition of consent – the line between acceptable intercourse and a felony – is largely a social concept and thus has evolved with the anti-rape movement and second-wave feminist philosophy. Few other legal concept have gone through the same level of social evolution as rape and consent, so the purpose of this research is to understand how this social attention toward this topic has uniquely affected the penal code of a given jurisdiction.

As the philosophical/social definition of consent changes through feminist activism to limit what may be considered consent, the legislative treatment of rape will reflect this same narrowing of the definition of consent. With the change in the understanding of consent, crimes such as statutory rape and date rape have moved to being considered more severe because they are seen as non-consensual acts. This will be reflected through variables such as increases in minimum/maximum years incarcerated pursuant to each jurisdiction's penalty matrix and average penalties assigned in various rape cases.

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Chapter 1

Introduction

Feminism and legal scholarship have often revolved around the apex of examining violence against women and specifically gendered crimes (Kulwicki, Mackinnon, Miller), however they focus on either the theoretical (Mackinnon) or empirical (Crabtree) aspect of legislation. Most research also review legislation as it presented in a snapshot of time (Subotnik). Instead it is my intention to combine the theoretical and empirical in a review of over 50 years of legislative history. This will evaluate the role of consent in contemporary Federal and State rape legislation in the United States from a feminist perspective. The frame of contemporary will cover from 1960 to 2013, spanning the second-wave feminist movement, the anti-rape campaigns, and modern third-wave feminism. Some statistics and feminist theory and history will draw from earlier to understand framework for the laws at the start of the time frame, but the societal actions and outlooks focused on will be modern. The paper will look at how rape culture has influenced the societal perception of different situations of consent and the significance of United States culture's view of consent as being given by a lack of refusal rather than embracing the “enthusiastic yes” approach.

To look at how rape culture has influence society's view of consent situations, the paper will start with explaining what rape culture is and how it manifests itself in United Sates' culture. The manifestation has led to something called rape myths, falsehoods perpetuated about rape and

sexual assault that have historically distorted rape legislation and attempts to understand and discuss consent.

With an understanding of how rape culture has twisted understandings of consent, the next step will be to examine how the perceptions of consent and rape actually interact with the legislation itself. By understanding the cyclical nature of a cultural outlook feeding into laws which then feed back into that culture, it will be possible to see the United State's failure to treat consent as an active decision rather than passive.

In examining this failure, the Enthusiastic Yes approach will also present itself as a feminist alternative to use for framing consent. With this alternative a legal shift can be made to allow the cycle to start turning the society away from rape culture.

Definitions

Before the complex topics of rape and consent can be tackled, the terminology often associated with these discussions must be outlined. For the context of this paper, there are two uses of the word rape. The first is referring to the abstract concept. This will focus on the penetration of any orifice in a sexual manner without the consent of both parties. This definition can apply equally to offenders and victims of any gender, however this paper will focus on males as the offender with women survivors. The shortcoming of this definition is that is does not account for non-penetrative sex. This failure must be kept in mind when rape is discussed, but most legislation separates rape from “sexual touching” – which does cover non-penetrative sex. The second use of the word rape is the crime specifically titled Rape. Some legislative penal

codes such as Alabama and California have specific statutes titled Rape (AL Pen. Code § 13A-6-63, CA Pen. Code § 261), but may not be inclusive enough to cover the abstract definition of rape. Some of the legislation examined will not use the word rape, but will fit the definition provided above. For example, in Arizona statutory rape is identified as "sexual conduct with a minor" (AZ Pen. Code § 13-1405).

As the integral element in distinguishing rape from acceptable intercourse, a definition for consent is also necessary. Most legislation will not explicitly define what consent is or refer to it in any manner beyond stating an act to be "without consent" or a party as "unable to consent" (NY Pen. Code § 130). Again there are two forms of the definition of the word consent. The first is the societal concept that draws from feminist philosophy.

The second is a legal definition, but this will have two manifestations. The first is the definition of what legal consent it. This that will be used to play a contrasting role by measuring it to what a feminist philosophical definition is and to the second manifestation of legal consent – what it should be.

Consent, in its current legal definition, is an "act of reason and deliberation" (Hunter, p 47) and a "voluntary agreement to another's proposition" (Hunter, p 48). Consent as a submission due to apprehension or terror is not real consent. It must be a choice between resistance and acquiescence. There is a legal concept of implied consent as well. This is consent when surrounding circumstances exist which would lead a reasonable person to believe that this consent had been given (*The Ethics of Consent*). This means there is no direct, express or explicit words of agreement had been uttered. Implied consent comes under particular scrutiny in cases of date rape, which will be discussed later in the paper.

Consent as a feminist philosophical definition can be described through two schools of through. The first is attitudinal. This promotes consent as a mental state of affirmation or willingness (Ehrlich). This is problematic because certain behaviors may be claimed by perpetrators to constitute evidence that a woman was in a mental state of willingness to have intercourse. In the situation of implied consent, framing the act as a mental one gives a rapist a lot of latitude to claim he thought she was in the same mindset as him.

The other lens to view feminist consent through is performative. This means a certain kind of action or utterance such as saying “yes” or nodding (Ehrlich). In this situation a defendant can be challenged to articulate exactly what the woman said or did that constituted her consent. This suggests that sexual consent is not a woman's implied default state because she needs to actively and affirmatively grant it. The definition however, does not take into account context of affirmation. 'No' always means no, but sometimes 'yes' also means no, and a performative approach fails to address the context and a woman's mental state when she performs an affirmation.

For the purpose to this paper, the definition of a feminist philosophical consent will be a combination of performative and attitudinal. This will be referred to as the “normative definition of consent.” What consent should be. A combination of look at the situation and how it affect's a woman's behavior, while also expecting an enthusiastic and active performance of consent as well.

Chapter 2

How has rape culture influenced the societal perception of different situations of consent?

The treatment of consent by legislation is directly dependent on the perception of that consent by the general public. Legislation that is meant to regulate any action does so primarily by drawing from public perceptions of the act. Most behaviors or acts are criminalized because our society at large views the practice as unacceptable from a moral standpoint. The severity of that act is then judged by the public and punished to whatever degree is deemed necessary. Rape is treated a crime because our society considers it one. Our society considered the act of intercourse without consent to be immoral and thus criminal. That much may be simple, but once the question of severity is approached, hard lines start to disappear.

Because consent is a crucial element in determining if an act was rape, society's perception and judgment of consent or a lack thereof becomes as important as their condemnation of rape as an abstract concept. The masses are expected to be able to determine whether any number of nuanced situations and acts may be considered consent. The problem is that to the public the idea of consent is not black-and-white at first glance. There are many situations that can be characterized by their absence-of-consent and some are seen as less severe than others. From here on the term absence-of-consent simply means that a yes either has not been given or cannot be given prior to intercourse. The perceived variation in levels of consent in turn characterizes certain kind of rape as worse than others. This stems directly from a lack of

understanding around the nature of these absence-of-consent situations. Because the public is uneducated on consent and its nuances, the ambiguity is turned into the gray area of the law.

The reason the public is so uneducated is that it exists in a rape supportive culture. This phenomena is generally referred to by the term “rape culture”. Rape culture is a societal outlook that normalizes rape and marginalizes its victims by viewing women as objects for the purpose of sexual pleasure (Dillon). Because rape culture presents a barrier against the public being educated about consent, it leads to the idea that there are certain 'types of rape' and absence-of-consent situations are more acceptable than others. This in turns leads to some 'types of rape' being more heavily punished than others.

To see this phenomena manifest, it is first important have a more in depth understanding of what rape culture is and how it is ingrained in everyday society. Using that understanding as framework, the next step will be to consider several different situation of absence-of-consent. These will include the absence of consent due to age, intoxication, knowledge, lack of authority, and lack of physical ability to resist. These will each be addressed and explained extensively. Each situation will examine why consent is lacking, how rape culture interacts with this perception of consent, and how severely it is treated. Finally once the different situations are reviewed, the relationship between rape culture and the penalization of the crime of rape will be more clear. Because rape culture influences how each absence-of-consent is seen, it also influences how that situation is treated and punished.

Rape as a Societal Problem

Rape has historically been framed as a crime “easy to accuse someone of and difficult to defend against” (Gavey, p 17). Historically rape has been depicted as a violent attack from a stranger. It was seen as a rare occurrence and not a serious threat. The only type of rape accusation likely to be taken seriously was that of a white wealthy woman against a working class black man (Gavey).

Psychologists who focused on theorizing about sexual tendencies explained that rape accusations surfaced from“the masochistic yearns” held by these women as an innate part of their femininity (Brownmiller, p 229-30). This frames sexual passivity or even resistance as a front to hide existing consent.

In California in the 1970's jury instructions in the US Legal System advised that the woman making the rape accusation should be believed with caution and was more likely than other testimonies to be falsified (Gavey).

Despite all this, rape was not treated as a feminist issue until 1970's anti-rape movement. Initially liberal activists saw rape as a false accusation made by a white woman against a black man in an act of racism rather than as a violent crime toward women (Gavey). The later discovery of rape as a serious and real threat does not dismiss that race politics did play a role in rape trials. Between 1930 and the late 1960's 455 men were legally executed for rape in the US. 405 of them were black men. No man was executed in that time frame for the rape of a black woman (Gavey). Race was clearly an intersecting issue, but the fact that black men were punished more harshly for something white men got away with every day does not discount the fact that rape was not seen

as a woman's or feminist issue. Rape was viewed in a way that the accusation was the real crime and the whole construct was treated as a political tool.

Rape Culture

The culture of the United State can be described as a culture of rape. It normalized sexual violence and even viewed such acts as inevitable. Rape culture shifts blame onto the survivors of sexual violence and away from the perpetrator. Sometimes it even shifts the sympathy onto the rapist. This is done by placing the responsibility of the attack on the survivor rather than the rapist (Young).

When people are surrounded by images, words, and behaviors that validate and perpetuate rape, they are in a rape supportive culture. For example, a 1970's judge at the end of a rape trial told the jurors, “as the gentlemen of the jury will understand, when a woman says 'No' she doesn't always mean 'No'” (Lees, p 20). This represents the 'she was asking for it' line of thinking. It assumes the woman either lied about not wanting to have sex or that her actions indicated a consent that overrode her words, resistance, or silence.

Rape culture can be perpetuated through rape myths, and sexualizing violence and female passivity. A prominent rape myth is that sexual assaults are committed by anonymous, amorphous "evil people" (Fox). In fact, sixty to eighty percent of all sexual assaults are committed by someone the victim knows and typically trusts. The rapists, mostly men, who commit rape are our colleagues, acquaintances, friends and family. Thirty-five percent of young college men, when anonymously surveyed, admitted that, under certain circumstances, they would commit rape if they believed they could get away with it (Malamuth).One in twelve of

these men admitted to committing acts that met the legal definitions of rape, and 84% of men who committed rape did not label it as rape (Koss et al.).

Describing rapists and rape as "evil" individualizes a social problem, effectively transforming the societal pandemic of sexual violence into a narrative of individual pathology. The isolation dismisses the cultural context in which rape takes place.

This leads into another myths, that rape culture believes all men are evil rapists (Fox). This is a mischaracterization of the stance rape culture takes. Feminists believe men are better than that. To reduce men to savages who cannot control their own sexual urges is insulting and debases them to little more than savage animals. Feminists believe that men have the capacity for empathy and transformation. The actual source of rape is the cultural teachings rather than from an uncontrollable evil or the nature of man (Anderson).

Another perpetuation of rape culture is placing the blame for rape on the survivors of an attack. It is a cultural response to rape in the U.S. is to protect rapists (White). The evidence of this behavior can be seen in the questions typically asked to women survivors following their rape. "What were you wearing?" "Were you drinking?" "Why did you go back to his house?" The only determinant of whether someone will experience rape is the presence of a rapist. Regardless of this fact, the culture that places responsibilities of rape prevention on women, instead of the people doing the raping, typically men (Fox). Even the language use to discuss rape embodies rape culture. Accounts of the rape describe victims as "accusers" and rapists as the “accused” (Ehrlich). This frames the victim as wronging the rapist by "accusing" him, while the rapist, the "accused," is the real victim.

A silencing myth of rape culture is that women make "false rape accusations" (Fox). Instead fewer than 5 percent of reported sexual assaults are false accusations (Schwartz). The myth is meant to silences and stigmatizes survivors of rape by branding them as possible liars. And that shaming works. Only 5 percent of undergraduate women report their sexual assault out of fear that people will blame them for their own rape or accuse them of making “false accusations” (Schwartz).

Rape culture is believing rape is inevitable and anti-rape education is futile. It promotes the argument that rape should be accepted as a natural part of our cultural landscape. It asserts that people cannot be taught not to rape. Once again this is rooted in the idea that rape is a natural act rather than a learned one.

In respect to sexualizing violence and female passivity, rape is about dominance and power. It draws from ideas of masculinity and frames dominance as the primary sex act (Geisinger). By doings this rape culture brings forth the idea that women are sexual objects rather than actors. They are objects meant to be used and dominated rather than human beings ready to enter and balanced and reciprocal relationship. This can be seen in the concept of emasculation and “whipped” (Chakravarti et al., p 3). When a man is placed on equal footing with his female partner, he is considered less-than and inferior (Brownmiller). Masculinity feeds into rape culture by asserting that idea that it is through violence and uneven power dynamics that a man can be a “real man” (Anderson, p 630) and maintain his authority. It promotes rape as a method of control for a man to maintain his status (Brownmiller).

Absence of Consent

Rape culture and consent become at odds in situations where there is a contention over whether a woman gave her consent. These will be referred to as absence-of-consent situations. There are several different situation of absence-of-consent to consider when reviewing how rape culture interacts with consent. There is age in the case of statutory rape, intoxication via drugs or alcohol, knowledge that caused intimacy through fabrication of material facts, uneven power dynamics or lack of authority such as during sexual assault in the work place, prisons, or schools, and a lack of physical ability to resist in cases of a revocation of initial consent and forcible attack. Each of these situations are considered lacking of consent for different reasons and each interact with rape culture in their own nuanced way. The way rape culture intersects with each of the these situations then influences the perceived severity of these forms of rape. That severity is expressed through the legal avenue of minimum and maximum sentencing laws in federal and state penalty matrices.

Age

Although it varies state to state, there is always a legal age of consent. The lowest age of consent is 14 in Arkansas (AR Pen. Code § 5-14-101 - § 5-14-127) and the highest is 18 years old in Wisconsin (WI Pen. Code § 948.01). Many states have a sliding scale within a certain age range to account for relationships between two people very close in age (CA Pen. Code § 261.5, VA Pen. Code § 18.2-63) When an individual is under the age of consent as dictated by any particular jurisdiction they are considered unable to consent. This means even if the person

verbally agrees to intercourse or even initiates it, they have still not given consent in the eyes of the law ("Statutory Rape").

The reason this age of consent is drawn is to protect minors from exploitation before they are mentally ready to make autonomous decisions such as consent. Often young women in their teenage years and under the age of consent are sexualized and viewed as "jail bait" (Philadelphoff-Puren). The term "jail bait" is actually an extension of rape culture. It indicated that these girl tempt men into having sex with them when they cannot consent, thus driving the man to commit an illegal act and go to jail for statutory rape (Sielke). It places all of the responsibility and blame on the girl rather than on the rapist. Young women and girls around the age of consent are often experimenting with presenting themselves as adults. Rape culture frames these self-expressions as an invitation and excuse for adult men to exploit these girls for their own pleasure.

The statutory rape of a girl in her teenage years is not treated as very severe, although once the law ventures into the question of children younger that twelve, that changes. The statutory rape of a girl old than twelve but under the age of consent, is considered a Base Level 18 offense. (USC Pen. Code §2A3.2) Base Offense Level 18 means the offender will be sentenced to anywhere from 27 to 71 months depending on his criminal history (USC Pen. Code §2A3). This means in the federal jurisdiction anyone convicted of statutory rape is not likely to receive more than six years in prison and will most likely receive far less.

A notable case in Montana represents how girls under the age of consent are held to a higher bar of responsibility than their adult rapist. The age of consent in Montana is sixteen years old. "If the victim is less than 16 years old and the offender is 4 or more years older than the

victim" (MO Pen. Code § 45-5-503.3.a), any sexual intercourse is rape. In Montana a forty-nine year old teacher was sentenced to thirty-one days for statutory rape of a fourteen year old girl. The judge reasoning that the girl acted older than her years. The teacher served the rest of his sentence on probation rather than in jail. (Lithwick)

Intoxication

Frequently known as date rape, this absence-of-consent situation is one of the most common. This occurs when an individual is placed under the influence of a mind-altering substance such as alcohol or drugs. This substance may be self-administered or ingested unwittingly. Regardless of whether the consumption of the substance was voluntary, once the individual is intoxicated or otherwise unable to render a mentally competent decision, she cannot consent.

There are two primary ways this absence-of-consent situation occurs. The first is through the use of alcohol. In this case the impairment and substance consumption is usually voluntary. A woman may have gone out to a bar or party and be drinking enough alcohol to become impaired. She may have bought the drinks herself or someone else may have bought the drinks with the intention of getting her drunk. However the situation came to be, once the woman is intoxicated to the point of impairment, she can no longer consent.

The second common narrative of intoxication impairment is through the use of involuntary methods. This is commonly known as date rape or acquaintance rape. An offender will use consciousness impairing drugs such as hydroxybutyrate – also referred to as GHB – to

purposefully try to lower a woman's ability to resist. This robs her of her ability to consent despite any affirmations that she may voice.

Implied consent becomes a common defense in cases of date rape with a claim of assumed consent due to absence of protest or a belief that "no" really meant "yes," "maybe" or "later". Often in date rape legal proceeding, if the man can tell the court he thought consent was given, this is accepted as enough (Philadelphoff-Puren). This frames consent as the man's to control, taking away the autonomy of a woman to give her own consent.

Date rape is so pervasive because the impairment of a woman's consent is not taken seriously. The justification is that she probably wanted to have sex anyway, so the consent is just a formality. This time rape culture is manifesting itself in the idea that men feel entitled to sex and are willing to resort to trickery and drugs to fulfill their own sexual pleasure (Geisinger). Women in this situation are treated as objects and prizes to be bought through drinks. Once the man has paid for the drinks of committed some level of effort into courting the woman, he treats sex as his winnings. Fifty-one percent of the boys and forty-one percent of the girls said forced sex was acceptable if the boy, "spent a lot of money" on the girl (White).

Date rape is treated as one of the most severe acts of rape through the legal system – on par with rape through violent attack. It is classified as a Base Level Offense 34 (USC Pen. Code §2A3.1) which means a sentence may range between 151 months to 327 months (USC Pen. Code §2A3).

Knowledge

An absence of consent due to an absence of knowledge is one of the less social recognized forms of rape. This situation can best be explained as prompting intimacy through the fabrication of material facts (Feinberg). A material fact means information that significant changes a situation in some way (Avery). When a person lies about their age by a few years, they are not fabricating a material fact. It is not a piece of information notably significant to affect consent. However, if a person were to lie about their identity such as claiming to be the woman's significant other, this would be a material fact. The test for this asks if "the consent was not genuine because its expression was … the consequence of fraudulently created, defective belief" (Feinberg, p 330). A woman generally does not consent to intercourse based on an exact numerical age, but the identity of a person and his relationship to her is an important enough fact that it can alter whether she would give consent in a specific intimate situation.

Such a situation sounds absurd at first, but the idea that a man should do whatever necessary to get sex is a powerful one in United States' culture. Television shows and romantic comedy movies are often constructed around elaborate lies told by a man to get a woman to sleep with him. This can range anywhere from Barney Stinson in *How I Met Your Mother* who carries around a "playbook" with tricks and schemes to get women into bed to Mark Bellison in *The Invention of Lying* who is able to convince a woman that the world will end if they do not have sex (Horeck). Both are examples of men lying about situation-altering facts for sex and they are played off as jokes. Although they may not use the word rape or have an appearance of force or mental incapacitation, by robbing the woman of her awareness of the situation at hand, the man has deprive her of being able to truly consent.

The legal severity of rape by fraud in terms of the sentencing laws is hard to gauge because many states do no explicitly criminalize it (Isaacson). The only jurisdictions that have clear language making rape by fraud illegal are Tennessee and California.

In California this only covers the impersonation of a spouse. If a person obtains consent by allowing or creating the belief that they are the victim's spouse, then they may be convicted of rape (CA Pen. Code § 261). As far as sentencing is concerned, rape by fraud is covered under the umbrella crime of rape. This means the sentencing rules are the same for date rape, violent attack, and rape by fraud. California allows incarceration of three, six, or eight years for the crime of rape (CA Pen. Code § 264).

The only other state to criminalize rape by fraud is Tennessee. Tennessee has the most straight forward explanation of the crime. Under the statute rape includes “the sexual penetration is accomplished by fraud” (TN Pen. Code § 39-13-503). This can be sentenced as a Class B Felony which means imprisonment anywhere from eight to a maximum of thirty years (TN Pen. Code § 40-35-111). This is contrasted to the crime of Aggravated Rape which includes use of force or mental impairment (TN Pen. Code § 39-13-502). This is a Class A Felony and holds a sentence of fifteen to a maximum of sixty years (TN Pen. Code § 40-35-111).

So, while the states that do address rape by fraud hold it to be of similar in severity to a violent attack or date rape, this does not nullify that fact that no other states criminalize the act at all. Most of the United States does not consider rape by fraud to be rape, so it is neither legislated or punished. Instead it is the newest plot to yet another comical story about a man pursuing his woman through any means necessary.

Lack of Authority

This situation of an absence-of-consent can occur is many different situations, but they are all for the same basic reason. Once an individual is put into a situation that hold an uneven power dynamic, they cannot consent. This includes relations between an inmate at a penitentiary and her guard, between a student and her teacher, an employee and her boss or supervisor and any other situation in which one actor holds an ever present threat over the head of the other.

This threat does not need to be voiced or directly issued to still be present. The idea is that as long as the woman is aware that an individual holds power over her, she may not feel she has a completely free alternative to consent. As soon as the alternative to consent seems like it will be a risk to pursue, true consent cannot be given (Cowan).

The problem rape culture poses in this situation is that the man's frustration that he cannot pursue a point of sexual pleasure frequently outweighs the woman's feeling of insecurity or unbalance. Because rape and sexual harassment are often treated as a joke or even flattery, a man's sexual advances toward a woman somehow under his control are less likely to be rebuked and thus are condoned and even encouraged (Davis). In prisons the idea is perpetuated that the women incarcerated are already morally bankrupt therefore more deserving of the harassment and violence (DeBraux). In both situations the men frequently do not see what they are doing as wrong because they does not appreciate the unbalanced power dynamic. They do not appreciate this dynamic because rape culture teachers them to be blind to it (Davis).

Rape of a ward is defined as “a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant” (USC Pen. Code §2A3.3). This can include foster parents, doctors in psychiatric hospital, prison guards, and probation officer. It,

however, does not cover advances outside of official detention such as those made by a professor or employer, however it is the only explicit federal statute that address rape as a product of a lack of authority. However, this form of rape is also considered far less severe. It is only Base Offense Level 14 which means the minimum amount of time a person can be sentenced fifteen months to a maximum of forty-six months. This is the lowest level of punishment for a sexual felony in the first degree covered by the federal penal code (USC Pen. Code §2A3).

Lack of Physical Ability to Resist

Finally the most well known and discussed situations of an absence-of-consent: the violent or forcible attack. This occurs when the woman is mentally capable of resisting but physically over powered. This can occur between any two people or any relation – whether it be a complete stranger, a spouse, a significant other, or an acquaintance. Sometimes these attacks are by surprise with no intimate initiation from the woman (Horeck). Other times the woman initiated or consented to certain activities but did not consent to full intercourse. This is what's called a revocation of initial consent (Kyker, Bohn). However the situation initiated, if the rapist does not have a freely given affirmation of consent at the time of and through the duration of intercourse, it is still rape.

This is the kind of rape most people think of when it's discussed. It's the action that is specified as “forcible rape” (Gibbons). Now this form of rape is positioned in the same code as absence-of-consent do to mental incapacitation or lack of consciousness.

Initial consent and the revocation of that consent does pose some very problematic views of our culture. There is very little way to prosecute these rapists because our legal system relies more heavily on forensic evidence than on the word of the survivor. This means that it is impossible to separate the forensic evidence of a consensual relation to the non-consensual one because they both occurred within the same act (Kyker). The failure of court systems to feel they can place their case's burden of proof on the evidence that intercourse did occur and the survivor asserts that she revoked consent simply continues to emphasize the perception that the woman is lying. There is also an underlying sentiment that once a woman has consented to the act, her revocation later was just regret and not sincere (Estrich). It once more places the sexual desires of the rapist over those of the survivor.

Violent or physically coercive rape is treated as the most severe acts of rape through the legal system. Like date rape, it is classified as a Base Level Offense 34 (USC Pen. Code §2A3.1) which means a sentence may range between 151 months to 327 months (USC Pen. Code §2A3). The sentencing minimums and maximums may also be extended depending on the amount of physical harm suffered by the survivor (USC Pen. Code §2A3).

Different Forms of Severity

Different absence-of-consent situations are treated as more or less severe because consent is not seen as the most crucial element of intercourse. Instead laws tend to focus on the physical harm inflicted on the survivor and the larger social context of rape is ignored. When only physical harm in individual circumstances is emphasized, it delivers a message that there are one-off

instances rather than a systemic problem. When the sentencing matrices paint a story that a woman's consent is not as important as cuts and bruises, it tells us that rape should not be viewed as a gendered issue but instead as some mundane and unavoidable.

The sentencing guidelines and understanding of absence-of-consent situations are in and of themselves a perpetuation of rape culture. They are rooted in the myths that a woman probably wanted to have sex anyway. That her consent can be assumed. That a man's sexual pleasure in the face of a woman's passivity is acceptable. Each of these myths was clear in treatment of rape by the federal and state legislatures. Society shapes laws as much as it is shaped by them (Gavey). With rape culture still playing such a pervasive and unaddressed role in the United States' society, it will only continue to reenforce itself in the justice system of that society.

Chapter 3

What is the significance of United States culture seeing consent as given by a lack of refusal rather than embracing the sex-positive "enthusiastic yes" approach?

Consent is both a legal and social concept. Because law and culture intersect so complexly, the two forms of the definition cannot be wholly separated. Through the lens of sentencing laws, consent may not appear to be viewed as the most important element, but in a crime so vaguely defined as rape, this is to be expected. Within the United States justice system there is no consistent definition of rape. This deviates from the norm of criminal definitions, which tend to be fairly uniform across jurisdiction in any other area of the law. This deviation is because of the history behind rape. Because it has been developed on such a shaky foundation and rooted in a polluted history, there is a basic failure to understand what rape is.

If the legal system cannot even settle on what rape is, it's no wonder there is such difficulty in understanding the interactions between rape legislation and the legal system. Only through a resolution of what rape is can the idea of consent be explored and emphasized. With a more firm definition of rape, the legal approach to consent can be changed as well. Consent can take what is known as an affirmative defense approach. This means it will be up to the attack to assert there was consent rather than the survivor first having the insist she was in an absence-of-consent situation. This legal shift will then be able to lead to a cultural shift toward the enthusiastic yes.

The enthusiastic yes is the concept that intercourse should be engaged in only when both parties fully and happily consent to each action. It disbars assumptions of consent or the idea that silence or reluctance is a yes. If the turning point in the legality of an action is placed on receiving consent rather than giving it, it can lead to a dismantling of rape culture and an evening of the power dynamics within intercourse. It will put the burden of consent on the actor instead of the survivor.

Definitions of the Crime of Rape

Rape is an ambiguous word. When a layperson says rape, the image called to mind is a stranger hiding in an alley ready to attack. Or maybe some people will discuss rape in the context of college parties where the survivor was too drunk to consent. Others say rape to mean the survivor was too young to consent. In a discussion, whether informal or academic, the definition of rape fails to sufficient detail absence-of-consent situations and because of this it does not carry the proper weight with it. So when a sexual act is criminalized through legislation sometime it is called rape (AL Pen. Code § 13A-6-61). This is not always the case. In Texas the act is called unwanted sexual contact (TX Pen. Code § 22). Another name in Alabama is Sexual deviancy (AL Pen. Code § 13A-6-63). From state to state the meaning of the word rape varies – if the word is used at all. There is a failure in the understanding of what is rape, both in a cultural and subsequent legal manner. This failure stems from rape culture.

The evidence of rape culture in legislation can be seen when the crime of rape is contrasted with most other common crimes. A crime such as murder has a solidified meaning. A

consistent definition. If you asked one hundred people to explain what murder is, the answers would be mostly consistent. It's unlikely someone would suggest murder be called “physical violence resulting in death” or “fatal action against another.” Between the fifty states as well as federal jurisdiction, the definition of murder remains more or less the same. Each has a law specifically calling that crime murder (AL Pen. Code, NB Pen. Code, NY Pen. Code, TX Pen. Code). This is because there is not the same complex history surrounding the concept and crime of murder.

Some specific example go further into showing how consistent the definition of murder remains between states. Alabama's penal code criminalizes murder under the explanation that “with intent to cause the death of another person, he or she causes the death of that person or of another person” (AL Pen. Code § 13A-6-2). In Texas a person commits murder if “he [or she] intentionally or knowingly causes the death of an individual” (TX Pen. Code § 19.02). California called murder “the unlawful killing of a human being” (CA Pen. Code § 187). New York State's penal code asserts murder is an act “with intent to cause the death of another person, [the actor] causes the death of such person or of a third person” (NY Pen. Code § 125.27). Murder is definite, not ambiguous. After all, it is a heinous crime generally condemned throughout society. It is considered one of the worst acts a person can commit. But when it comes to rape, that level of clarity disappears.

The same four states do not retain the same level of consistency with the crime of rape that they did for murder. In Alabama Penal Code § 13A-6-61 defines Rape in the first degree as sexual intercourse perpetrated by either party without consent of the other, but only between two members of the opposite sex. This is called a heteronormative approach. It assumes intercourse is

automatically heterosexual – between a penis and a vagina (Mardorossian). Then there is a separate statute for Sodomy in the first degree, its distinction that this one addresses " deviate sexual intercourse" (AL Pen. Code § 13A-6-63). This statute also implied only a man can commit the crime, but does not restrict it to a heteronormative frame.

A contrasting example to that is Texas. In the Texas Penal Code there isn't even a single statute that mentions the word rape. Instead the closest to the definition of rape is Texas Penal Code 22.011. Sexual Assault. This statute covers other manners of sexual contact as well as rape rather than separating the act of rape from the act of unwanted sexual touching. The relevant portion of the statute for this discussion criminalizes "the penetration of the anus or sexual organ of another person by any means, without that person's consent; the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor" (TX Pen. Code § 22.011). Then, unlike Alabama's statute, Texas goes in depth to explain what constitutes a lack of consent. This includes but is not limited to use or threat of physical force, survivor's impairment, or the offender's use of a position of authority over the survivor.

California, like Alabama, does have a law actually containing the word rape. Rape in the first degree is "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator" (CA Pen. Code § 261). The statute goes on to clarify what constitutes a lack of consent similar to the Texan code, but fails to qualify that marriage is not automatic and constant consent. Instead there is a separate statute for Spousal Rape (CA Pen. Code § 262). While all the

same requisites of consent are present in this separate statute, it means there are two entirely separate rape laws on the books within the same state.

Finally, in New York rape in the first degree is when the offender "engages in sexual intercourse with another person" who is either incapable of consent or faced with forcible compulsion (NY Pen. Code § 130). In New York there is an additional clarification that the prosecution of any crime involving a sexual act automatically obligates the prosecution and thus the survivor to prove a lack of consent on the part of the survivor.

Between the four states, there seems to at least be the agreement that some kind of sexual act with another person in specific situations is condemnable. However, what sexual act that is, between whom, and what it is called, all vary between jurisdictions.

The failure to consistently define the word rape within legislature is not simply a legal oversight. It has very real consequences on trial proceedings. Sometimes the courts will even intentionally avoid using the word rape at all, victimizing the person attacked in favor in the name of protecting the one being charged with rape. Because, without a consistent definition within the legislature, the judge can make the argument that rape is an emotive word not fit for the jury to hear. A judge in Nebraska – the Honorable Jeffre Cheuvront – ruled in 2007 that the words rape, sexual assault, victim, assailant, and sexual assault kit were all banned from the trial proceedings (Lithwick). This means when the survivor took the stand she was not allowed to call the attack on her a rape. She was forced to describe it as "sex." The grounds on which the judge banned these words was using a bar call more prejudicial than probative (*State v. Carter*). If a fact is probative, or relevant, it makes some element in the charged crime more or less likely (*State v Rowland*). This means that any fact presented in a trial must be considered relevant to proving the charges

before the court without raising the risk of the jury or judge wanting to punish an offender out of emotions such as anger or revenge. Because the word rape did not have a legislative definition, it did not have a sufficient probative value to outweigh the likelihood that it would "inflame the passions of the jury" (Avery, p 1147).

The confusion between the statutes is understandable – though not excusable – when you look at the context in which they were created. Rape laws were originally a crime against men because the man's wife or daughter had been violated and "lessened in worth" (Burgess Jackson, p 49). These views can be found the Ancient Roman Empire when raping a man's slave was charged as destruction of property (McGinn) all the way up to English Common Law when a woman's reproductive ability was regulated via her chastity because it was property and essential to establish patriarchal inheritance rights (Burgess Jackson). This frames women as the object of the crime, but not the subject. A woman or girl who had been raped was considered less valuable as property, and as such penalties for rape often involved fines or other compensation for "compromised goods" (Burgess Jackson, p 68). The origins of rape laws are rooted in the dehumanization of the very people they are now expected to protect.

This is not only an occurrence of the long forgotten past, either. The legal status of enslaved African women gave their owners "unrestricted sexual use of their property" (*Encyclopedia of Rape*). A prostitute was considered "unrapeable" for a while because she was seen as a public good rather than the private property of any individual man (Dworkin, 196-202). In certain parts of the united states marital rape was legal into the 1990's (Whisnant). Even after criminalization of marital rape, states continued to treat marriage as a form of at least partial consent. In 2005 Tennessee changed their law to stop requiring a higher level of violence in

marital rape than non-marital rape (TN Pen. Code § 39-13-503), leaving South Carolina as the only state with a different bar for the violence required to prosecution rape in the case of marriage (SC Pen. Code § 16-3-615). With such a problematic history, it's no surprise that each state has drastically different rape laws and definitions They started with flawed assumptions and never re-built the foundation.

How Should the Legal Approach to Consent Change?

The orthodox approach to rape is that lack of consent makes a sexual act "wrong" and "morally condemnable". This places in emphasis on the wrong part of the act. The act that should be primarily focused on the use of force – intercourse – rather than the survivor's actions – giving of consent. Consent is meant to serve as an affirmative defense to the act of penetration. This means the legal focus in on the perpetrator receiving consent rather than on the survivor giving it. This simple shift in whose responsibility it is to monitor consent takes on the idea of victim blaming. It never becomes the survivor's duty to make sure she has or has not given consent; all duty is placed at the feet of the perpetrator.

The first portion of that shift is to set penetration as an act that is *prima facie* wrong. This legal term means that at its most surface view, the first glance, the action is immoral and thus criminal. Within the orthodox approach to sex, penetration of some kind is a requirement (Herring). To be clear, this should not automatically be construed to only mean heterosexual relations. Penetration can be achieved by a penis, object, fingers, or tongue into a vagina, anus, or sometime mouth. This penetration is innately an act of force.

To test whether something is an act of force, it must risk harm to the recipient and bear the possibility of having a negative social meaning. The fact that penetrative intercourse bears the risk of harm is fairly straight forward. This harm can be the tearing of vaginal walls, bruising, or soreness, although this list is by no means dispositive. The second part of that definition is a little more complicated. The possibility of bearing a negative social meaning is not as easily understandable. For an act to have a social meaning is simply for it to have some significance beyond the act itself. That significance can be negative – in the form of emotional damage or shame – thus giving intercourse the ability to hold negative social meaning (Herring). This does not mean all penetration has the intention of negativity or even that it always results in negativity or harm, but rather that this is a possibility.

To understand how penetrative intercourse should be treated as an act of force, it is valuable to look at other acts of force and how they are treated from a legal stand point. Most acts that are innately based around force are considered wrong. Acts such as pushing, cutting, striking, tackling, or any myriad of events of physical contact fall under the umbrella of assault (NY Pen. Code § 120). In New York a person can be charge for assault simply by making contact with another person in a way that could be reasonably perceived to cause harm (NY Pen. Code § 120.00). Because a reasonable person can predict that pushing another may cause harm, it is criminalized as assault. The intent to cause harm is not necessary. Actual harm does not need to be shown. Because there is no relevant differentiation, there is no justification for the act of penetration not to be considered yet another act that may cause harm and treated similarly under the law.

However, the act of penetration is not treated as an act of force. If intercourse happened, there is an assumption that it has been consented to. This assumption once again comes from a concept embroiled in patriarchal assumptions. In the case of heterosexual rape, the assumption is that women owe men sex. Even if a woman refuses, this is not more important than the man's desire to collect on the debt. While the legal assumption of consent is not always explicitly stated in the statute, the inference is there. This is because one of the elements to prove rape is always to prove a lack of consent (AL Pen. Code § 13A-6-61, CA Pen. Code § 261, NY Pen. Code § 130, TX Pen. Code § 22.011). Thus is it the survivor's responsibility to assure she did not give consent rather than the defendant's duty to assert consent was given. It is a very simple yet harmful manifestation of rape culture. It says a woman's passivity is consent. If she does not specifically say she did not consent and if she did not actively resist, then she consent. The assumption that consent is there and sex is owed.

If there is a change to view intercourse as lacking consent until it is explicitly asserted, orthodox intercourse would be treated like any other act of force. This does not make all penetration illegal or even wrong, but without the assertion of consent it becomes rape.

To achieve this shift, the idea of consent as an affirmative defense should be introduced. An affirmative defense is when the defendant admits to the actions he is accused of but provides a reason why this action was justified (Jeffries and Stephan). In this context, the defendant admits to the penetrative intercourse he is accused of, but then provides the assertion that he received consent.

Because consent is not currently treated as an affirmative defense, it may be easier to understand the legal concept through a method it is already applied. One such application is the

idea of justified assault. Acts of force such as assault are automatically considered wrong. Without any context, if one person pushes another, it is considered wrong. But if an affirmative defense is invoked, context and consent come into play. A justification may be provided that the offender pushed the recipient because there was a car coming that would have struck them otherwise. Or maybe it's all part of a play and the offender has the recipient's full consent. With this added information these actions are justified (Goff and Bales). However, just because the context has lifted blame from the offender does not make the stand-alone action of pushing any less wrong.

Another example would be if one person uses a knife to cut another's skin. Against, this act is considered wrong. But after the act of force is conceded, the context is revealed. The context is that a doctor is cutting open a consenting patient for surgery. The doctor's actions are justified through the consent of the patient and context of medical training, but the act of cutting a person's skin in and of itself without context is not assumed to be less wrong.

A well-known example of affirmative defense is when a defendant claims self defense. In a self defense case at trial it is not the prosecution's burden to prove it wasn't self-defense until after the offender has asserted such. The act of causing a death is all the prosecution has to prove.

Currently consent is not treated as an affirmative defense (NY Pen. Code § 130.10). It is the role of the prosecution to prove there is an absence of consent, so there is not duty of the defendant to give context to his act of force. If consent were an affirmative defense, a person would charged with their act of force (penetrative intercourse) and that would be the entirety of the elements the prosecution is expected to prove. Then the defendant would take the affirmative and admit to the physical conduct. Then, and only then, context and consent are brought into

question and it is for the offender to bring these up. So the defendant would be the one expected to say he had consent and specify what that consent was.

Rape is not treated in the same manner as assault. Instead of just proving the force, the prosecutor must prove lack of consent before the offender even affirms that there was justification or consent at all. So, if a prosecutor goes in front of a jury and brings forth a video of a man walking into a room and having sex with the woman there, the state has not completed their case. Even if the offender admits he had sex with the woman and says nothing of her consenting, it is on the prosecution to refute this assertion before it is even raised. It is the only act of force the justice system requires not just the act to be proven but also the context (Goff and Bales).

A Cultural Shift to the Enthusiastic Yes

If the responsibility of monitoring consent is shifted from a legal standpoint, the feminist philosophical concept of the Enthusiastic Yes will flourish social as well. A enthusiastic yes is an affirmation of consent without fear of unbalanced power dynamics. It is genuine consent.

The ability to give genuine consent takes a very specific social situation and context, however. Genuine and enthusiastic consent requires sexual autonomy (Cowan). This means freedom from any of the absence-of-consent situations and freedom from any social or political structure or expectation that may pressure the individual's decision toward a particular inclination.

Legal autonomy also emphasizes a person's free choice to engage in such conduct, but legality only focuses on the individual (Larcombe). In the context of consent it is necessary to acknowledge the social context and barrier. Legal consent is a singular act devoid of any contextual meaning. Enthusiastic and genuine consent requires an appropriate range of options and a real opportunity to choose between them.

Similar to the normative definition of consent, an enthusiastic yes must be both performative and attitudinal (Cowan). It must be freely and affirmatively expressed in a clear manner though verbal or physical cues that may not be misinterpreted. These cues must be given in sync in the mind and desire. An enthusiastic yes is not pressure by expectations, shame, or fear. It is given for the sole reason that the woman want to give it.

The shift to genuine consent is important because it will assist in tearing down rape culture. Rape culture is built around the idea that women must be ashamed to give consent and remain passive. This allows men to chose how the interpret a woman's actions, the ambiguity giving the man the power to control their interactions. Enthusiasm for consent will combat the idea that passivity is consent and erase that ambiguity.

The idea of genuine consent is a idealistic one, of course. It will not happen over night through the changing of a few laws and legal practices. But, when laws shift, so to do the approaches to teaching them. Through the education and withdrawal of a taboo around women's sexuality, the necessary enthusiasm can be encouraged (Valenti). When the culture made the sexual activity of women a taboo, it created the idea of “playing hard to get.” This, once again, gives men the ability to control and interpret the interactions as they please. If they want to see a 'no' as a coy 'yes', the construction of these games allows them to.

To keep this culture in place and to stop women from being able to give clear and conscience consent and thus regain their control control, rape culture punishes by slut-shaming (Valenti). Women are told that to be enthusiastic or even interest in sex is wrong and should make them inferior and morally bankrupt. Making it shameful to be enthusiastic perpetuates a women's likelihood to act passive in the face of sex and allow the perception that silence is a yes.

The shift to enthusiasm will occur the combating of rape culture and in turn that shift will push rape culture out of society. Via the education that an enthusiasm for sex is permissible and acceptable a norm of enthusiastic consent becomes a reasonable proposition. Once enthusiastic consent becomes possible, the idea of forcing an individual to get a genuine and verbal affirmation before intercourse will not seem so radical. From the day we arrive on the planet And blinking, step into the sun. There's more to see than can ever be seen; more to do than can ever be done. You found the hidden text. Wow do you need a life.

Chapter 4

The Use of an Empirical Lens

So how effective is discussing societal change, as the first half of this paper proposes? Does discussion of a topic really have an influence on what laws are passed? To answer this question and create a road map for the next step toward pursuing further change to rape legislation, we turn to the political science lens.

An empirical analysis will demonstrate that discussing and pushing for theoretical changes to the understanding of consent may have real world results. Here we will be looking at the frequency with which the public has discussed rape, sexual consent, and sexual assault from 1960 to 2013. The data ends in 2013 because this is the last complete year available at the time of data collection.

I will be using two data sources to create a measure of "the societal attention to consent". These sources will sample the United State's Congress as well as public view. Once coded, these two sources will be run chronologically parallel to each other to show a trend in the discussion of rape and consent. These two variables will be combined into an aggregate score on a scale of 1-7 measuring how frequently society is discussing these topics. The expectation is that the more frequently issues surrounding rape and consent are discussed, the more narrow the definition of consent in legislation will become. The narrowness of legislation will be measured as a single value encompassing all changes in state and federal legislation on a yearly basis to determine the

"narrowness of the definition of consent". This scale runs from -2 to 4, taking into account variables already categorized to have a narrowing or widening effect on the definition of consent.

The first scale is being used to measure how frequently topics involving rape, sexual assault, or sexual consent are discussed within the data sources. To do this I started by recording the total number of *New York Times* articles and Congressional Hearings were published regarding these topics each month. This collection started with January 1960 and ended in December 2013. Both news articles and hearings were recorded separately then as an aggregate score to find the total frequency with which these topics were discussed each month. Then, to make the data a little more manageable and to smooth out a few outliers[1], I averaged all the months' data for each year to get a number that would indicate the median monthly frequency per year. Basically this new number answered how frequently rape and consent were discussed during a standard month of any given year within the time frame.

From there I had the median monthly frequency, but these numbers still ranged between zero and over three-hundred, making any visual representation more complicated than it had to be. So, from there I created the Societal Attention Scale. Using intervals of fifty, I split my larger spread of data along a seven point scale (table 1). Once this scale was created, it was much easier to break down the frequency data and see the general trends of increases and dips in frequency of discussion.

Societal Attention Scale	Median Monthly Frequency
1	0-50

1 For example, every August the Congressional Hearings would slow down, so that even in a year where most months consistently showed frequency numbers in the triple-digits, the August hearings numbers in the high-20's. This decrease was regular enough that it was clearly caused by procedural issues rather than a question of fact central to this analysis. Being able to average the months into a single median eliminated this problem without ignoring the data.

2	51-100
3	101-150
4	151-200
5	201-250
6	251-300
7	301-350

Table 1: The conversion from a count of hundreds of records per months to the seven-point Societal Attention Scale

The second scale I created is the Narrowness of Consent Scale. This one is used to determine whether the rape laws in question are becoming more broad in their definition of consent – "widening consent" – or if there are limiting it – "narrowing consent". This scale meant determining a few set variables that could remain consistent across all the jurisdictions I was examining. There were four variables that proved to be most common amongst all fifty states and that were almost all amended during time frame I was looking at. The first factor was fairly simple – age of consent. For many states the age of consent remained steady from 1960 until 2013, but there was considerable variation between states, and several states did in fact change their minimum age of consent. The minimum age of consent is the youngest age at which a person is considered legally capable of consenting. This become important because of what is know of the Romeo and Juliet Laws. These were laws created in several states to allow for teenagers having sex with each other without being convicted for statutory rape. They created provisions for acceptable or mitigating age gaps between victim and offender. Some Romeo Laws simply lessen the punishment the offender faces, such as the 1999 Kansas provision (K.S.A. 21-3522) which did not legalize sex with a minor, but did grant lee-way in punishment to persons only a few years older than the minor. Other Romeo laws, such as South Carolina's 2006

provision (§16-3-655(A)(2)) completely legalized sex between two minors within a set age gap with a minimum age cut off of 14, thus moving the minimum age of consent from 16 to 14. In South Carolina's example the Romeo law was removed two years later and the age of consent was returned to 16 (§16-3-655(A)(2)). The lowest age of consent anywhere in the country is 14 (Haw. §707-732(1)(b)) and the highest age of consent is set at 18 (CA Penal Code § 265.1). The average age of consent in the United States levels out to be around 16 (Tchen), so this would be considered a normal level of strictness when addressing questions of the broadness of consent.

The second variable to look at was whether the state allowed an affirmative defense regarding the offender's reasonable mistake regarding the victim's age in the case of a statutory rape charge. What this means is that the defendant can claim he reasonably believed the victim was of or above the age of consent (Myers). If the defendant can establish this fact, then he is found not guilty of statutory rape because he lacked the intent to have sex with a person under the age of consent. States are fairly split on this decision, even today. Many states have created specific provisions either allowing or barring a mistake-of-age defense (Tchen), while others allow their courts to deal with it (Myers), and a rare few just let the question be answered on a case-by-case basis (Tchen).

The third variable to consider in reviewing how consent's definition has changed is how these states have treated spousal rape. Originally most rape legislation had exemptions within their statutes that a married woman could not be raped by her husband because she could not refuse to fulfill her “wifely duties” (Eskow). As of 1993 every state has at least criminalized spousal rape, but many states still allow spousal rape to be either a separate statute and punished less harshly. Because the distinctions of what constitutes partial condemnation versus full

criminalization are gradient, for the purposes of this variable, spousal rape was considered criminalized once the spousal rape exemption was eliminated from the rape legislation reviewed.

The final variable used to measure a state's definition of consent is their implementation of rape shield laws. Only two states – Arizona and Utah – have never enacted Rape Shield laws, and the earliest law was passed in 1974 by Michigan's State Legislature (Mich. § 750.520j). This makes this final measure universally inclusive for the intents of coding within this time frame. A rape shield law in this context is an amendment to the criminal procedure and rules of evidence of the given jurisdiction. It bars exploring a victim's sexual history or past as a method of impeaching their character (Hazelton). The rules rises from the idea that the defendant is on trial, not the victim and is often considered a great protection afforded toward rape survivors who testify in court (Posner).

Using these four variables, I assigned a numerical value to each depending on whether it widened or narrowed the definition of consent. Because we are viewing the narrowing of consent as the primary goal, I set legislation that makes the definition of consent more strict as positive numbers, and broadening legislation as negative (table 2).

Variables	**Narrowing Score**
Mistake of Age is a Defense	-1
Mistake of Age is not a Defense	1
Spousal Rape Criminalized	1
Age of Consent >16	+.5/year[2]

2 Because the lowest age of consent and the highest age of consent are both evenly two years away from the median, a full narrowing score is given to legislation that adopts the highest age of consent. Similarly, the highest broadening score (or lowest narrowing score goes to the legislation that sets the age of consent as possible as possible. States that set their age of consent within the gray area are treated

Age of Consent <16	-.5/year
Rape Shield Law Passed	1

Table 2: The numerical values designating depending on a variables narrowing or broadening effect is called the Narrowing Score. These are used to create the Legislative Score.

Once the Narrowing Scores are determined and the variables to be used in this time frame are settled on, the final step in developing the Narrowness of Consent Scale was simply allowing the Narrowing Scores to accumulate to create the Legislative Score, which is what is measured as the dependent variable for today's analysis. The legislative score takes into account the Narrowing Scores interacting with each other. For example, if a state has an age of consent set at 18, but also allows for a mistake-of-age defense, then the two Narrowing Scores cancel each other out for a Legislative Score of zero.

Data Source

There are two primary sets of data in this analysis, the first manifesting as the "societal attention to consent" and the second as the "narrowness of the definition of consent". These two measures have been discussed briefly above, but before creating the scales and aggregate scores that comprise these data sets, it is important to understand where the data comes from. The "societal attention to consent" draws from two sources. A society has two major aspects, the social and the political (hooks). The first data source is the US Congress to account for a political view, specifically all Published Congressional Hearings from 1960 to 2013. The second source, to cover the social perspective, draws from the New York Times historical archive during the

with half points to make the gradient clear.

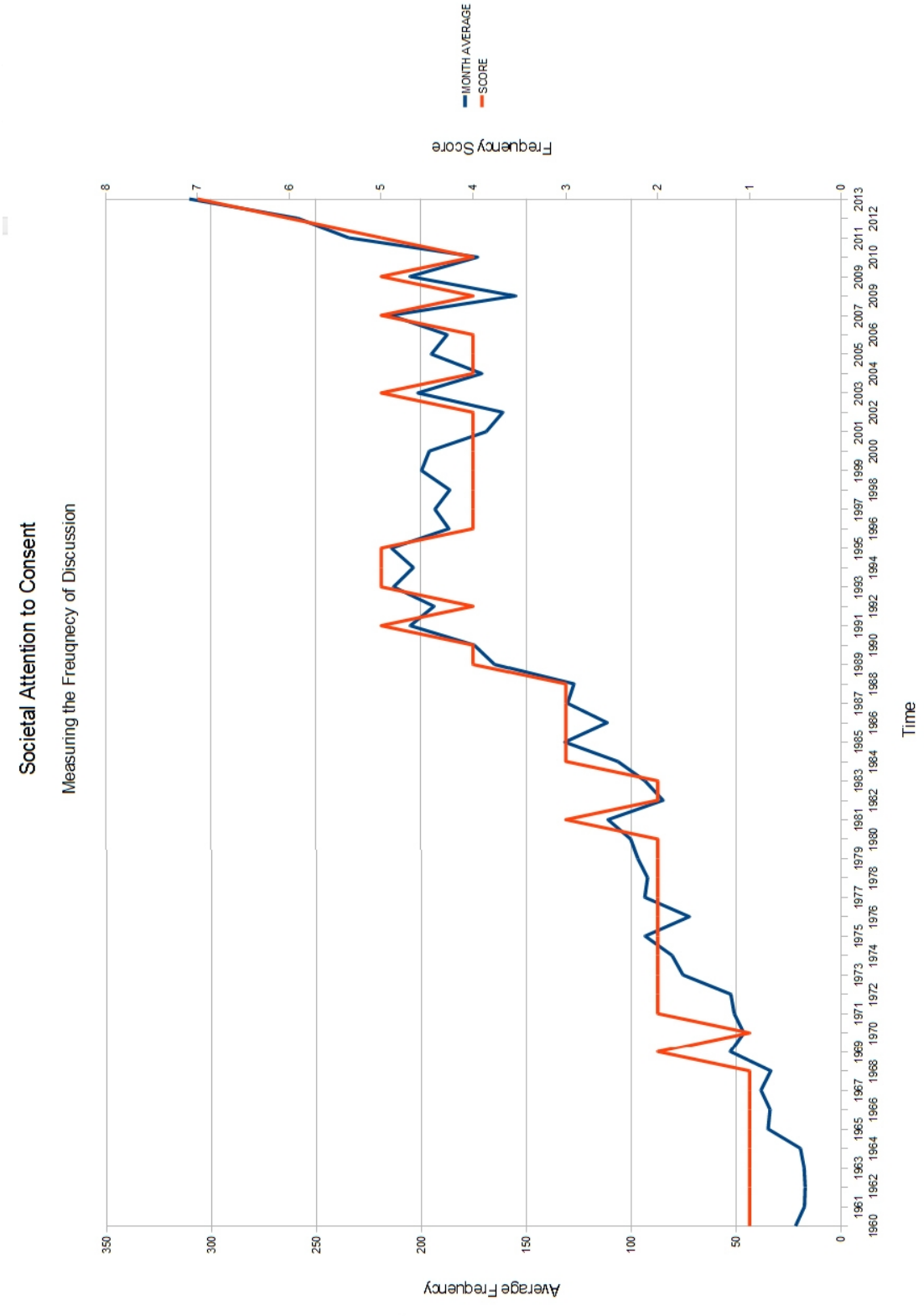
same time period. This allows society to be viewed through the lens of both laws and media, so each of these data sets will be indicative of one aspect.

To determine the "narrowness of the definition of consent", this will draw primarily from state and federal criminal codes as well as the courts, well appropriate. These are the appropriate sources to consider because they are the primary influences on enacted legislature.

Congressional Hearings

Congressional Hearings are a valuable data source because they are discussion by those elected to be representative of the public. The representatives leading the Hearings are from across the nation and can call witnesses from anywhere in the United States as well. This gives a national level of expertise and participation to the hearings. These are also the people who actually make the legislature in question, so it is important to analyze their awareness, thought, and definitions given to rape and consent.

Figure 1: This graph shows the attention given to topics of rape and consent by society during the time frame in questions. The blue line indicates the average number of time Rape, Sexual Assault, or Sexual Consent was mentioned in a New York Times article or Congressional hearing per month within a specific year. The red line shows the same trend but condensed into the seven point Societal Awareness Scale discussed earlier.



The Congressional Hearings will be accessed through ProQuest Congressional which has comprehensive transcripts of all United States Congressional Hearing during the time frame of 1960-2013. These hearings will be review to measure the frequency at which rape and consent are discussed. These topics will be measured by identifying whether the subject of the hearing is tagged as “rape” “sexual assault” or “sexual consent”. It is also necessary to eliminate document only tagged due to their bibliography citations. This is to make sure hearings that maybe hinge on similar sources – such as discussions of abortion or birth control (Helliwell) – do not skew the results. Hearings held over multiple months are counted in each month because this is a measure of the frequency with which these issues are addressed over time.

The New York Times

The New York Times is the second data source because it is considered to be a nationally representative paper. It discusses situations and events from all over the country and is consumed on a national level. The *The New York Times* is also very accessible because of its far reaching electronic records that are tagged in a manner that sorting through the subjects are articles to code will be easier. To be consistent, the subject tags used to separate these articles will be "rape" "sexual assault" or "sexual consent". This will also only take into account the following format types: article, front page article, letter to the editor, or opinion column. This is because those four categories are all the text-based forms of communications presented by the *New York Times* and saved in their archives. It eliminates formats such as advertisement and event announcements because these can be more heavily influenced by business-involvement and are not as accurate in reflecting a purely social view.

The content of local papers will not be considered for data purposed because they again risk the consequence of imbalance. State-level papers are going to vary greatly state-to-state both in comprehensiveness of content, availability to the public, and current availability through the appropriate time frame.

State and Federal Criminal Codes

Criminal Codes from all fifty states and the federal jurisdiction will be the primary source of the five variables that are used to determine narrowness of consent. Because narrowness of consent is a measure of a certain aspect of legislature, it follows very logically that the source of

its data be the legislature itself. The necessary data available through the Criminal Code will come from the sections of the Code corresponding most closely to the statute of Rape. In some situations a state may not have a statute referred to as Rape (TX Pen. Code § 22, AL Pen. Code § 13A-6-63), or may distinguish between Rape and Sodomy, so for the sake of consistency the statute used will be that which most closely matches the definition of Rape established earlier in this paper. Revisions made prior to 1960 may be considered when laying the context for the start of the time frame, but will not be directly used to measure a change over time with regards to that legislation.

Court Cases

Court Cases will only be used to measure "narrowness of consent when there has been a precedent set by the Federal or State Courts to directly address one of the variables used in the narrowness scale. Decisions reached prior to 1960 may be considered when laying the context for the start of the time frame, but will not be directly used to measure a change over time with regards to that legislation.

Data Reliability

The advantage of this data sets is that it creates a very comprehensive picture of public opinion throughout a time frame. There will be many data points because of the depth of the sources, which means the information will be more reliability extrapolated. It takes into account

the both the political and social view – legislature and media – which are also some of the most likely sources to influence a person's opinion on a legal concept (primary education would be another possibility, but it has less legal focus and is less access by the public than the primary two). Another advantage is that this approach takes into account times when people simply weren't talking about consent. Just coding when the definition of consent was narrowed or widened does not account for a lack of communication on the topic, but that silence is an important gauge to see people's valuing of consent.

Implications of Success

If the analysis of this data reveals a causal link between a change in the frequency of discussing consent and rape legislation's narrowing of consent, it means that an intentional cultural shift toward increased dialogue can be used to effect said legislation. This conclusion would set the stage for the feminist concept of the Enthusiastic Yes to be implemented as a social change. By pushing the concept that intercourse should be engaged in only when both parties fully and willingly consent to each action it increases the dialogue surrounding those issues. It disbars assumptions of consent or the idea that silence or reluctance is a yes. Essentially it pushes for a greater emphasis on getting consent rather than proving the survivor didn't give consent. It turns the responsibility of monitoring consent on the instigator rather than the recipient. Increased societal attention toward this concept under this successful analysis, will create a path to narrow consent further toward achieving this model.

Chapter 5

Empirical Analysis Results

Data Collected

The data from the *New York Time* and Congressional Hearings were collected on a monthly basis, then condensed to create each year's monthly average. This resulted in a total of 648 months coded for each source. After the data was averaged to be shown by the year it was then coded to the seven-point scale. Looking at both the Legislative Score and the Median Monthly Frequency, there a clear chronological increase, but this trend is most clear in a graph (figure 1).

These three trends take place over three distinct spans of time – the 1970's, the 1990's, and 2012 to 2013. The third frame of time is much more sudden increase than the other two and does not have the data available to determine its peak and when or it will level off. Because of this the data can only be a reliable representation of the first two peaks in societal attention toward questions of rape, sexual assault and sexual consent.

In the representation of the legislative changes over the same time frame, there is a similar distinctive increase during the late 1970's and throughout the 1990's. There is no obvious change for 2012-2013, which again indicates the data to analyze the most recent legislative decisions and their relationship to societal awareness is simply not there.

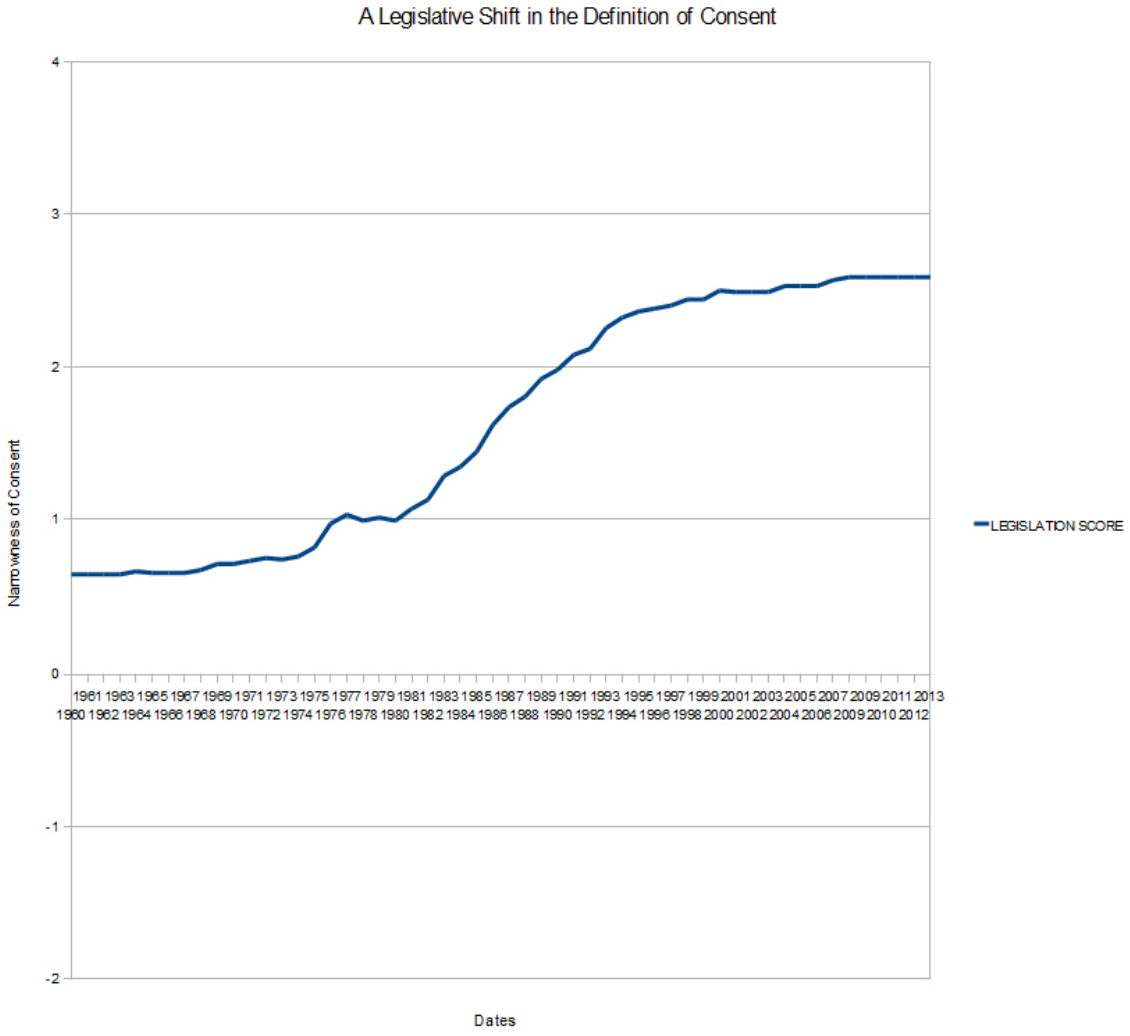


Figure 2: The six point Narrowness of Consent Scale shows a distinct upward trend during the time frame in question, indicating that the definition of consent from a legislative stand-point has become more narrow over time.

Data Analysis

There are three main points through the time frame where an obvious increase in societal attention is present. The first increase is during the 1970's which can be accounted for by anti-rape movement (Matthews). The second increase during 1990's is during the push against spousal rape (Eskow) and for rape shield laws (Matthews). The final increase is at the very end of the time frame starting in the presidential race and Steubenville during 2012 and 2013. Analyze the historical context of these. In one case a catalyst event sparked the conversation, but in the other two it was a conscious push for society to change that sparked the increased frequency

Looking at those same three time frames during increases for the societal attention to consent. During the first two, the larger societal pushes rather than a single startling event, legislators had a tendency to narrow the definition of consent within the space of a few years. The slight lag between two otherwise similar peaks suggests that an increase in discussion of these concepts is what lead to the narrowing of the definition of consent.

To further support the correlation, we can look at the societal pushes going on in those time frames and the legislative changes being enacted. Unfortunately the anti-rape movement of the 1970's, the spousal rape outrage, and the rape shield laws all blend together too much to separate the two upward trends, but we can still observe that these three movements correlate with the Societal Attention to Consent upward trends. Similarly, the legislative changes that these societal movements pushed for all occur within a few years of the increase in Societal Attention.

It is also very clear that the upward trend of Societal Attention to Consent is generally very similar to the Narrowing of the Definition of Consent. The Societal Attention trend starts a little earlier in the late 1960's, whereas the Narrowing of Consent trend starts in the early 1970's

and from there they both follow very similar paths. A time-lagged correlation is a strong indicator of a cause and effect relationship. Because the Societal Attention started increasing first, this tells us it was the not the legislation changes that cause the news media and Congress to discuss rape, sexual assault and sexual consent more closely. Instead it shows a story of people talking about the issue, deciding the definition of consent needed to change, and following that by changing legislature and narrowing the definition of consent.

Chapter 6

Conclusion

So what does all of this mean in regards to the Enthusiastic Yes and consent as an affirmative defense? Because we have affirmed that the more a topic is discussed, the more likely it is to be addressed through legislation, we now know that talk is anything but cheap. By pushing for a cultural or societal shift toward viewing consent as an affirmation rather than an assumption, it keeps the idea of consent as an important topic present in the current topic of conversation. If the past fifty years can tell us anything, it is that by keeping the topics on the top of social conversation, it allows them to flourish and spread.

Equally important, this data also shows us the power of social movements on a whole. The drastic increase of an entirely country barely mentioning rape or consent at all in their papers or government, to discussing it over a hundred times a months shows the power in people pushing their topic until everyone is talking about it. One important thing to keep in mind is that the data collected did not differentiate between favorable or dissatisfied discussion of the topic, but instead seems to have succumb to the philosophy that any press is good press.

So this calls up the questions of what next. It's easy enough to say that the data shows talking about a topic keeps it in people's minds and prompts change down the road, but feminists still have to determine a specific course of action to keep that momentum rolling.

Activism is more than just signs and picketing – although that within itself can yield plenty of admirable results. When the idea of protest is brought up though, it always

seems to be in relation to the more conventional practices. Sit ins during the civil right's era. Court cases and legislature in the United States and Great Britain. Pride parades and online blogs. These are all well and fine, but there is so much more to activism and initiative. When someone with a camera phone films police brutality in Tahrir Square, they are using their own creative outlet to be an activist. When a photographer intending to do a photo essay on the reintegration of a convict to society ends up putting herself in harms way to document domestic violence (Syreeta), she is using her voice to bring attention to feminist issues. When beat poets and young song writers scream about oppression and the struggles they face, this is just as much activism as the rallies of people that will stand in front of the Supreme Court next week during DOMA arguments.

The act of creativity is strongly tied with Lorde's concept of the Erotic in that they both rely on a person's inner most desires. Lorde's Erotic is to find what gives us passion, gives us peace. To find what drives our thoughts and actions and makes us whole. It is through the expression of the erotic that we find creativity. A poet will not be able to write a truly moving an effective piece if she does not feel some kind of connection with that outlet. A documentarian cannot make a film about a topic they know nothing of.

Look no further than activism of the past. Martin Luther King Jr found his passion in religion and speaking and used these platforms to become a recognized and respected voice in the civil right movement. Today the Femen – an activist group that

goes topless and paints messages on their bodies (Zychowicz) – find their power in reclaiming their sexuality and using their bodies as a tool of power, drawing the news outlets to their ideas without hesitation.

Speech is not always verbal. Nor does it only expand to written. Speech is expression of an idea. When students wore black armbands to school in the landmark Supreme Court Case in the United States, the government defined symbolic speech, but activism had already been so heavily based in this symbolism. Sometimes voices are silenced, but creativity can never be fully repressed. Slaves would sing about their road to freedom and subvert the practice of Christianity to give them a cultural outlet. Song. Dance. Prayer. The list only grows. Pictures. Movies. Blogs. Every possible aspect of creativity playing into the strive for equality. People don't really spend much effort on addressing the problems that have already been resolved.

The sheer creative effort placed into these fields should simply be all the more telling. Changing legislation is about more than making speeches and being optimistic. Keeping societal attention focused on one thing takes creativity. It takes stamina. By using the creativity of feminism to achieve legal goals, and supporting that creativity in empirical analysis, more links are drawn between different people in society every day. And with each link drawn, societal attention is kept just that much longer. Looking at a topic from an interdisciplinary lens isn't just some whim of ambition, it's what makes a force for change as powerful as possible.

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Pennsylvania State University
08/2011 – Present
BA in Philosophy: Law and Justice Focus
BA in Women's Studies
BA in Political Science
Minor in Sexuality and Gender Studies

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Examining the Role of Consent in Rape Legislation
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Honors Thesis

- An interdisciplinary paper drawing on legal theory and empirical data to examine the relationship between the societal understanding of sexual consent and contemporary rape legislation in the United States from a feminist perspective.

The Dickinson School of Law at Pennsylvania State
10/2012 – 12/2012
CRIM 953 - Advanced Criminal Procedure
Auditing Student

- Participated in 2L class which discussed major case law within Criminal Procedure

WORK EXPERIENCE

The Legal Aid Society ***Intern***
06/2013 – 08/2013 (46 hours/week)

- Worked full time at the Legal Aid Society, a public defenders office in New York City. Responsibilities included motion writing, legal research, interviewing witnesses and clients, attending arraignments and reviewing strategy for bench and jury trials.

Associate Dean of Liberal Arts Dr. Christopher Long ***Philosophy Research Assistant***
02/2012 – Present (3 hours/week as needed)

- Assists Dr Long with research mainly focusing on Greek philosophy. Locates and evaluates sources to recommend for use in journal articles and textbook chapters. Proofreads and edits final drafts.

Pennsylvania State University Office of Disability Services ***Note Taker***
01/2012 – Present (60 hours/course)

+ Takes course notes for students who cannot do so and provides them to the Office of Disability Services. This includes meeting with the professor outside of class to verify the notes are accurate and comprehensive.

Elting Memorial Library ***Volunteer***
09/2008 – 07/2011 (10 hours/week)

+ Assisted library patrons, shelved books, and cataloged research material for The Haviland-Heidgerd Historical Collection

HONORS AND AWARDS

+ Paterno Fellow Career Enrichment Sponsorship
  07/2013
+ Schreyer Honors College Summer Grant
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+ Dotterer Philosophy Award
  03/2013
+ American University Mock Attorney Award
  11/2012
+ Schreyer Honors College Scholar
  08/2012 – Present
+ National Society of Collegiate Scholars Member
  09/2012 – Present
+ Liberal Arts Paterno Fellow Scholar
  08/2011 – Present
+ Penn State College of Liberal Arts Superior Academic Achievement Award
  08/2011 – Present (every semester)
+ Thomas J Watson Scholarship Award
  06/2011 – Present
+ Kossover Law Scholarship Award
  06/2011

EXTRACURRICULAR EXPERIENCE

Pi Sigma Alpha ***Inducted Member***
09/2013 – Present (3 hours/week)

+ The National Political Science Honors Fraternity. Attended seminars in Harrisburg, PA and Washington DC as well as served on community service committees on campus.

TRIOTA ***Inducted Member***
04/2013 – Present (4 hours/week)

+ The National Women's Studies Honors Society. Committed to feminism and women's studies both as an academic and an activist. Contributed by lining up speakers, organizing demonstrations, and working with local politicians on policy reform and political action.

Pennsylvania State University Mock Trial ***Executive Board Member***
05/2012 – Present (15 hours/week)

+ Elected as the Secretary and a voting member of the Board for two years. Participates in weekly administrative meetings, wrote new equipment policies, founded the production and distribution of educational videos, archived four year of tournament records and implemented annual secretary report.

Pennsylvania State University Mock Trial ***Team Captain***
04/2012 – Present (25 hours/week)

+ In both intramural tournaments and a tournament located in Washington DC, coordinated team practices, travel and strategy as well as taught new organization members what Mock Trial is and how to excel at it. Competed in close to 50 trials each year as an active member of the organization.

Pennsylvania State University Adult Literacy Training Corps ***Awareness Committee Chair***
08/2011 – 04/2012 (2 hours/week)

+ Tutored adult learners struggling with literacy and organized events to raise funds for scholarships awarded to adult learners.

National Cancer Survivors' Night ***Volunteer***
2000 – Present (6 hours/annually)

+ Served as part of the staff running this annual event for 14 years. Started assisting with children's activities and room set up. Took on increasing responsibility in catering and hosting.