As It Is Written: Textualism and Its Impact on Rape Prosecution

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A Thesis submitted to the faculty of the University of North Carolina in partial fulfillment of the requirements of a degree with Honors in Political Science.

2017

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INTRODUCTION

It was a muggy August night like any other in Chapel Hill, NC. Masses of new students mobbed through the streets, homework-free as the first couple of weeks of classes had not yet overtaken their euphoric summer spirit. It was Jessica’s first fraternity mixer with her sorority since being inducted as a full member.¹ As a first year student, her night was filled with the mystery of unknown adventures and the promise of budding friendships, as she prepared for the party with her sorority sisters. A boy who lived down the hall from her, Sam, texted her asking if she would be there since he was pledging the fraternity that was hosting the event.² He texted her again a couple hours later telling her to come because the party was fun. Jessica did not know him very well, and in the crazy atmosphere of the night she never responded.

Jessica arrived at the party and was quickly handed drinks. She was warmly welcomed by her recent acquaintance Sam, a familiar face in a crowd of strangers. However, it became quickly evident that Jessica had drunk too much; she stumbled and slurred her speech. Her friends became concerned. She danced briefly with Sam and he pulled her aside to sit next to her on the couch. Her sorority sister, Diana, promptly sought out Jessica to take her home, realizing that she was blackout drunk. Diana walked over to the couch and told Jessica it was time to go, and that she was taking her home. Sam resisted and pulled Jessica closer to him on the couch. Diana, frustrated and tired, yelled at him to “back off” and successfully got Jessica to stumble home with her.

¹ Names and certain details about this story have been altered to make it anonymous
² Permission to use this story and fact checking was provided by the victim
Diana left Jessica in her dorm room, in her bed, under the care of her roommate Emily. Emily got her in pajamas and in her bed where Jessica promptly fell asleep. A few hours later, Jessica regained consciousness and vomited on herself in her own bed and went back to sleep immediately. Jessica’s phone buzzed with a text from Sam asking where she went and if she wanted to go out to bars with him. However, Jessica slept through the messages and never once replied. From every viewpoint, the night was supposed to be over.

A few hours after Jessica had been put to bed, Sam opened the door to her room, uninvited, without knocking, to greet Jessica’s surprised roommate.

“Do you need something?”

“Uh, I came to check on Jessica.”

“Um, okay then.”

Sam walked over to Jessica’s bed and slowly worked to clean up the vomit covering the sheets. Emily awkwardly walked over to her suitemates’ bedroom to wait out the uncomfortable encounter, assuming the best of intentions.

Promptly after Emily closed the door, Sam jumped on the bed, tore off his shorts, and pulled Jessica’s head to his crotch.

“C’mon baby it's right there.”

When Jessica, still regaining consciousness muttered “no”, Sam pulled her up on top of him, pulled off her shorts, and penetrated her. Jessica bursted awake and yelled “no” in defiance, but did not have the awareness or ability to physically protest. Sam, alarmed, jumped off the bed and ran out of the room. Emily swiftly returned, after hearing Jessica yell, to check and see what had
happened. Jessica was visibly shaken but could not verbalize what had happened. Emily managed to calm her down and get her to fall back asleep.

That night started what would forever change Jessica’s life and significantly alter how the rest of her college experience played out. The next morning Jessica reported the incident to her Resident Advisor. She could not sleep, her grades began to slip, and she would spend days without going into her room. For 6 months, she was tossed around University officials who would make her retell the story, but would never act upon it. Finally, exhausted with the process and fearful for her own safety on campus, she told her parents, hired a lawyer, and reported the incident to the police.

Three years later, I sat watching the District Attorney build evidence and attempt to prove that Sam was guilty of Second Degree Rape in the state of North Carolina. I watched Jessica cry on the stand explaining how the event has reshaped her college career. I watched the defense call forth evidence of her previous, entirely unrelated, sexual experiences. I watched the District Attorney argue that she was too “physically helpless”, to even lift herself out of her own vomit, let alone resist the assault. I watched as the issue of consent, and her undisputed “no”, was brushed aside as irrelevant to the criminal charges at hand. I watched her mother’s face as the jury brought back its verdict of not guilty. And I watched him walk out of the courtroom with no expulsion, no jail time, no fine, no penalty whatsoever.

Despite the fact that the victim had testified to screaming “no” to the act of penetration, was so drunk she could not lift her head to the trashcan next to her bed to vomit, and had substantive evidence that he had targeted her throughout the night - she has to walk past her assaulter on campus every day until she graduates. Why is that? When you strip this story of its
emotions and larger social structural history, you are left with the question: Why exactly did this outcome occur? Setting aside who is at fault or who did what exactly, when looking at the facts of the case, the question essentially boils down to - what is rape?

Overview

If you assemble a random sample of citizens and have them debate whether the facts of this case constitute rape, you will likely get a divided group. In fact, that is exactly what happened with this jury. When they were polled after the trial, the jury explained how initially they were divided about the defendant’s guilt. What proceeded was hours of discussion with the jury foreman pointing back to the legal definition of Second Degree Rape that they had been given by the judge. After lengthy debate, the jury decided that while some members personally believed that the defendant’s actions constituted rape, it was not considered rape under North Carolina law.

Every state has its own legal definition of rape and sexual assault, and each one can be drastically different from another. A single set of actions can be interpreted either as a felony or a legal affair, simply depending on which state you are in. The purpose of this thesis is to examine if and how the differences in these legal definitions of rape manifest themselves in criminal proceedings.

Ultimately, I show that the way a rape law is defined impacts how many perpetrators are arrested for this crime. Specifically, laws that include consent as the crux of the definition and intoxication as a mitigating factor to consent are associated with significant increases in arrest rates, while other aspects of the law do not impact the arrest rates. So, if a legislature wants to
implement rape laws that are victim friendly and based on feminist principles, adding legal stipulations about positive consent and intoxication as a mitigating factor are essential.

For the purposes of this essay, the term *rape* is used to encompass every act of nonconsensual sexual conduct. Although sexual assault might be a more fitting term to envelop this large general set of actions, rape is the more common term used in criminal law. While stereotypically, rape is conceived of as a strange man forcibly penetrating a female whom he does not know, herein, the definition is much broader. A person of any gender can be victim or perpetrator, the status of the relationship between the two parties can be any level of intimacy, and the action itself does not have to be penile to vaginal penetration. So, rape is used as the term that encompasses all of these actions for the purposes of convenience in this paper.

**BACKGROUND ON REFORM**

In 1976, Susan Brownmiller wrote *Against Our Will: Men, Women, and Rape*. At the time, Second Wave Feminism was on the rise and patriarchal norms were beginning to be seriously questioned. As one of the first studies to analyze law and the history of the female body, Brownmiller’s book sparked a reform movement to alter the legal proceedings of rape to be more victim friendly. She claimed that rape laws still were rife with antiquated ideals of male property ownership over women:

“Although these legal origins have been buried in the morass of forgotten history, as the laws of rape continued to evolve they never shook free of their initial concept--that the violation was first and foremost a violation of male rights of
In 1976, when Brownmiller’s work appeared, most states’ laws enforced victim blaming, female subordination, heteronormative behavior, and Christian ethics of sexual conduct. Brownmiller and other activists pushed and succeeded in reforming several states’ definitions of rape and sexual assault to use broader language and more victim friendly terms.

In the 1990s, this movement began to die down and the issue of rape law reform fell to the wayside. During this time, several researchers attempted to quantify the impact of these reforms. For example, a 1992 study conducted by Spohn and Horney analyzed six states before and after they passed comprehensive rape law reform; they determined that the states’ definitional change of rape had not affected their legal process directly. Still, Spohn and Horney (1992) argued that reform is possible with “incentives for compliance” and “public pressure on criminal justice officials” because of the cultural significance of changing sexual assault laws (174). Berger et al. (1991) also studied how rape law reform interacted with societal norms, finding that the higher the rate of rapes were in a state, the more likely it was to reform its law. While this research was important in attempting to quantify the impact of reform efforts, after the 1990s the solidification of these definitions seemed confirmed and research shifted elsewhere.

There have been few modern studies on how exactly rape law impacts the criminal justice system and the prosecution of the perpetrator. This is despite the fact that 1 in 6 American women have been the victim of an attempted or completed rape in their lifetime (RAINN 2016). While this number is astoundingly high for victims, the conviction rates for rapists are even more astounding: out of every 1,000 rapists, only 6 will be incarcerated. That is the lowest rate of
incarceration compared to every other violent crime (RAINN 2016). While there has been massive amounts of attention brought to this pervasive crime in recent decades, no research has been able to point out why the victimization rate is so high and incarceration rate is so low. The gap in convictions per crime drives this research because I attempt to determine if the way a rape law is written impacts this discrepancy.

CONTENT OF RAPE LAWS

Rape law is varied in its language and each state chooses to include or exclude various dimensions of this crime. To illuminate this discrepancy, I compare North Carolina and Vermont’s rape laws. In North Carolina, Rape in the Second Degree is defined as:

“A person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person:
(1) By force and against the will of the other person; or
(2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.”

Notice the specification of “vaginal intercourse”, requiring that a rape can only be performed by a man to a woman and that genital copulation is required for such an act to constitute rape. Also note, that consent and intoxication are left out of this definition. The woman must be taken “by force and against her will”-- simply being against her will is not enough--moreover, the victim must have been forcibly overcome. Therefore, for this act to be considered rape the female must either fight her perpetrator or be “mentally disabled, mentally incapacitated, or physically
helpless”. But, the example given in the Introduction shows how “physically helpless” is a loosely defined term that sets a high bar for how a victim is responsible for fighting her attacker no matter the circumstances.

Compare North Carolina’s Second Degree Rape law with Vermont’s Second Degree Sexual Assault law:

“(a) No person shall engage in a sexual act with another person and compel the other person to participate in a sexual act:
(1) without the consent of the other person; or
(2) by threatening or coercing the other person; or
(3) by placing the other person in fear that any person will suffer imminent bodily injury.
(b) No person shall engage in a sexual act with another person and impair substantially the ability of the other person to appraise or control conduct by administering or employing drugs or intoxicants without the knowledge or against the will of the other person.”

Vermont’s law is substantially different from North Carolina’s in several key ways. For one, Vermont does not have a law for “rape” but rather “sexual assault”. The term “rape” is loaded with cultural significance and legal history. Feminist theorists believe that titling these laws “sexual assault” help to shed stereotypical views (McGregor 2005, Bourque 1989). Vermont also has no gender stipulations, so any person can be the victim or perpetrator of the crime. Finally, one of the largest aspects of Vermont’s law that is praised by feminists is its requirement for “consent”.

The role of consent in a legal definition of rape has been subject to much debate. There has been a recent push, particularly among college campuses, for a “Yes Means Yes” standard
that requires that consensual sex has an “enthusiastic affirmation” (Chappell 2014). This consent standard shifts the onus of proof from victim to show that s/he fought back, to perpetrator having to prove the victim clearly agreed. Without this consent standard, the burden of proof for a victim to overcome is regularly insurmountable considering rape is a crime that often has no witnesses and is usually perpetrated by a person who knows the victim (RAINN 2016).

If an assault occurs, like the one detailed in the Introduction, where the victim says “no” but did not fight back, it depends on the state you are in whether this is a crime or not. The example in the Introduction did not constitute “rape” because in North Carolina there is no consent standard; perhaps at best a perpetrator in this scenario could be charged with a misdemeanor sexual assault and released on probation. However, in Vermont, because of its consent stipulation, the perpetrator could be charged with 2nd Degree Sexual Assault and potentially given jail time. Thus, the way a state defines “rape” illustrates how the exact same crime is treated with different degrees of severity.

Researchers are attuned to how multifaceted the nature of the crime of rape is and how the legal system varies in its treatment of this issue. In 2009, Harrell collected and summarized over 450 studies related to sexual assault and the systems that interact with this issue. Her overview illuminates that recent research has focused on a variety of factors that influence the prosecution outcome such as: intoxication, relationship to perpetrator, evidence, reporting time, present injuries, gender, and location. For example, Spohn (2014) focused on how police reporting affects the results of sexual assault cases by studying the Los Angeles Police Department’s perspective on sexual assault cases and how an officer determines if a crime should be charged as rape. As Harrell’s (2009) analysis and Spohn’s (2014) work show, modern
studies have analyzed the legal system around rape focusing on variables other than the legal
definition itself. These studies are helpful to provide a holistic view of how sexual assault is
treated in the legal system and what aspects are in need of reform. While such research is
important, it nonetheless fails to reveal how exactly the law impacts the prosecution of rape
cases.

HOW THE LAW MATTERS--THEORETICAL PERSPECTIVES

Feminist activists believe that reforming the legal definition of rape will result in
outcomes that are favorable to victims (Brownmiller 1976, McGregor 2005, Bourque 1989). This
idea, that changing the law will impact how the justice system operates, follows logically.
However, no research has shown if reforming rape laws has a tangible effect on the prosecution
of criminals. Hypothesis 1: So, I posit that differences in the language of rape laws will impact
perpetrator prosecution.

Returning to the example provided above, the linguistic differences between Vermont
and North Carolina’s laws are one representation as to how these changes drastically redefine
who is at fault during a rape case. Vermont’s use of broad language and the focus on consent
substantially shifts who can be charged with rape and what that act of violence looks like. In
contrast, North Carolina’s law spells out a specific act with a particular perpetrator and leaves
little room for variation. Berger et al.’s study (1991) examined multiple states’ rape laws and
determined factors that define how “progressive” or “feminist” these laws were. Berger et al.
(1991) points to eleven factors whose presence in a law places the definition on this spectrum of being “progressive” or not.

I draw on Berger et al. and identify four characteristics that are seen as “progressive” factors of a rape law. The first is that the act itself is not titled “rape”. The word rape is a culturally weighted word and when a law is titled something else, those stereotypes have the potential to fall aside. The second characteristic is that the crime is defined with varying degrees of severity. When a crime is defined with a scale of punishment that matches the intensity of violence, then any act of assault is punishable, not just the most severe version of that act. The third characteristic is that a rape law is gender neutral and does not stipulate that the victim must be female and the perpetrator must be male. This means that acts beyond penile to vaginal penetration are classified as rape, and thus such laws open the scope of the assault beyond gender identity to encompass acts of sex other than copulation. The fourth characteristic is that the spousal exemption is removed so that marital rape is possible. This moves the crime beyond patriarchal norms of the duties of marriage. Hypothesis 2: Thus, I hypothesize that when a law is not titled “rape”, there is a continuum of severity, the wording is gender neutral, and the spousal exemption is removed, the more likely it is that a perpetrator will be arrested.

There are two elements of the law that feminists cite as the most important to assisting victims during criminal rape proceedings. The first is that for an act of sexual intercourse not to be criminalized as rape: both parties must give affirmative consent. As previously explained, consent is at the heart of defining rape and feminist theorists believe that without an enthusiastic “yes”, an act of sexual intercourse can be deemed rape (McGregor 2005). The second element is that intoxication eliminates the ability of a party to give proper consent. The idea being that even
if actors give positive consent while they are drunk or high, their consent is not legally viable because their intoxication impaired their rational thinking. These two elements have been identified by feminist scholars as the most important to the equality and justice of a rape law (Brownmiller 1976, Berger 1991). Hypothesis 3: I further posit that states that incorporate the elements of positive consent and intoxication as a mitigating factor in their definition of rape will be more likely to have higher arrest rates of perpetrators.

METHODOLOGY

Independent Variables

To test my hypotheses, I coded every state’s legal definition of rape for certain factors identified as impactful to the meaning of the law. In so doing, I build on Berger, Neuman, and Searles’ 1991 study *The Social and Political Context of Rape Law Reform: An Aggregate Analysis*. Specifically, Berger et al. (1991) operationalized and measured eleven factors that feminists claimed were in need of reform to be more victim friendly.3

For my study I adopted six “progressive” factors from Berger et al. that are still relevant today. Specifically, I examined each state’s rape laws as to whether they:

1. Redefine the primary offense not as rape but as sexual assault, sexual battery, etc to dispel preconceived notions of “rape” and emphasize the violent nature of the crime
2. Define the assault on a continuum of severity, to encapsulate crimes that do not include physical violence

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3 Berger et al.’s (1991) eleven factors are listed in totality in the Appendix.
3. Redefine the assault in gender neutral terms so as to include male victims, female assaulters, or gender non-identifying victims and assaulters

4. Removes the spousal exemption, so as to provide criminal justice for those assaulted by a spouse

5. Defines the assault with lack of consent as the crux of the crime

6. Restricts the ability of the victim to give consent because they were intoxicated in some form during the assault

Factors one through four are encapsulated in my second hypothesis while factors five through six are most relevant to testing my third hypothesis. Feminists would ideally like a law to be composed of all six factors, but the factors are broken up accordingly for analytic purposes.

I did a close reading of every state’s laws and coded them for the presence of each of these characteristics. Specifically, for each state, I coded each factor as a dummy variable on a 0 to 1 basis, giving the variable a 1 if the characteristic is present in the law. However, for the spousal exemption characteristic, I coded it on a 0 to 2 scale, with “0” being that the law explicitly includes a spousal exemption; “1” being that spousal rape is not mentioned at all; and “2” being that the law explicitly eliminates the spousal exemption.4

The mitigating factors of positive consent and intoxication allowed mere discretion in coding. But, I coded these aspects of the law strictly, and only gave a 1 to laws that bluntly and clearly included these factors. Thus, a state received a “1” for positive consent only if its law had an unmistakable focus on consent as the crux. Likewise, it was coded “1” for intoxication only if

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4 Examples of my coding process are depicted in the Appendix
its law clearly prevents intoxicated victims from consent. Not many states met these stringent standards and so these characteristics are reserved for the most “progressive” laws.

In addition to these six independent variables, I coded each law for the presence of the phrases “physically helpless” and “mentally incapacitated”. “Physically helpless” is most commonly defined in law as:

“a person who is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.” (South Carolina criminal statute)

While consent is not at the heart of this definition - the lack of consent is. Generally, laws that do not include positive consent in their definition require the victim to fight back for it to be considered rape. But, if a law includes the exemption that the victim was “physically helpless”, that gives the victim a way to claim it was rape even if they did not fight back. While this opens up some laws to include rape that does not involve a physical struggle, it is still difficult to prove that a victim was “physically helpless”. Therefore, “physically helpless” is a step below a rape law that includes the requirement of positive consent; it is not a phrase praised by feminists, but it is a small step in that direction.

Additionally, the phrase “mentally incapacitated” is commonly defined as:

“a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other act committed upon him without his consent.” (New York criminal statute)

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5 I consulted with several lawyers to verify my methods
The essential function of the phrase “mentally incapacitated” is to protect victims who have been drugged against their will and therefore are unable to fight back against their attacker. While this phrase does protect victims who have been intoxicated against their will, it also can be understood that intoxication is *only an excuse if it was done against your will*. Being drunk of your own will is not an adequate excuse for not fighting back. In this way, “mentally incapacitated” has the opposite function as the intoxication as a mitigating factor variable.

“Mentally incapacitated” claims that intoxication is an excuse *only* if it was done *against* your will, while intoxication as a mitigating factor says that intoxication is *always* an excuse to not fighting back.

The sheer prevalence of the phrases “physically helpless” and “mentally incapacitated” were why they are included as independent variables. Twenty-two states had the phrase “physically helpless” in their definition of rape and twenty-two states had the phrase “mentally incapacitated” in their definition. The phrases did not always appear together. The number of states that use these terms makes them compelling variables as to whether they impact the arrest rates of perpetrators. Additionally, their presence in my study is to verify that they behave in ways theoretically consistent with the characteristics of positive consent and intoxication as a mitigating factor, which will be discussed later in this paper.

Overall, the independent variables in my study include when a definition is not titled “rape”, there is a continuum of severity, the wording is gender neutral, and the spousal exemption is removed, which I hypothesize that their presence will increase arrest rates. Positive consent and intoxication as a mitigating factor are two other independent variables that I posit will also increase arrest rates. Additionally, the phrases “physically helpless” and “mentally
incapacitated” are included as factors to verify the behavior of positive consent and intoxication as a mitigating factor.

**Dependent Variables**

For my study, the primary dependent variable was the arrest rate of alleged rapists per state for the years 2012 through 2015. These data sets were collected through the Federal Bureau of Investigation’s “Uniform Crime Reporting” program. There data sets were an annual collection that is composed of information on arrests, crime rates, officer employment, and hate crimes. These data sets are comprehensive, consistent, and creates a clean multi-year data collection. However, the arrest rates from the state of Alabama were not collected and therefore this state had to be removed from this study.

Arrest rates were chosen as the dependent variable because of the availability of the data and the implication of this data on the criminal justice system. Knowing how many perpetrators are being arrested for rape, in each state, allows inferences to be made about how rape laws are operating at the start of the prosecution process. Arresting a perpetrator is a major step in the criminal justice system and understanding how this action intersects with rape law is relevant for comprehending the conviction process as a whole.

The years 2012 through 2015 were chosen because they are more relevant to current policy and recent attempts to change legal diction. Additionally, since the majority of rape law reforms occurred several decades ago, these years have given adequate time for those reforms to be implemented (Spohn 1992). Only four years of data were pulled so as to attempt to mitigate
for changes in a state’s law that could have occurred during those years, while also getting a comprehensive sample size.

Additionally, the FBI’s Uniform Crime Reporting includes estimated data on how many crimes they believe occurred in each state. For 2012 to 2015 the FBI has estimated how many rapes they believe have happened in each state based on their statistical model. These data sets are utilized in this study to control arrest rates for variation based on population size. The dependent variable therefore was how many alleged perpetrators were arrested for their crime controlled by how many crimes occurred in each state.6

Arrest rates are a relevant metric for how rape law reforms operate. My multi-year analysis of this comprehensive data will help to give perspective as to what ways each reform of rape law is actually able to achieve change. Through the analysis of this arrest data a clearer correlation between rape law reform and systemic change should be evident.

**Modeling**

My analysis will rely on a simple linear regression model through STATA, a common statistical analysis program.7 Three different models were created to test my hypotheses. The first model tests all six progressive factors against arrest rates controlled by crime rates. This model grapples mostly with my second hypothesis and tests the significance of the factors of the law not being titled “rape”, a continuum of severity, the wording being gender neutral, and the

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6 Crime rate data is explained further in the Appendix
7 While the arrest data was slightly skewed left and a poisson or negative binomial regression could have been used, a linear regression was better suited. Since the arrest numbers were large and widely varying a poisson or negative binomial regression would have collapsed into a linear regression anyways.
spousal exemption being removed, against arrest rates. This model examines if these four progressive factors of the law have a significant impact on arrest rates.

My second model specifically examines whether positive consent and intoxication as a mitigating factor affects arrest rates. While consent and intoxication are analyzed in my first model, they are pulled out and examined separately so as to control for any impact of the other factors. This model was created to grapple specifically with my third hypothesis.

My final model ran a regression with the presence of the phrases “mentally incapacitated” and “physically helpless” against arrest rates. This model was run separately from the six progressive factors because these phrases were used to verify my methods and check the significance of positive consent and intoxication as a mitigating factor. Since, these phrases can act in some ways as substitutes for positive consent and intoxication as a mitigating factor, they must be analyzed separately.

Additionally, each model was clustered by year to account for the variation in each year. Since populations in each state rose per year, every preceding year had larger arrest rates. Clustering by year helps to mitigate for the difference each year possesses and tries to control for variable factors that could appear per year.⁸

FINDINGS

Overall, my findings show that the way a law is written affects the arrest rates of rapists, supporting my first hypothesis. Particularly, when a law includes consent and intoxication as a

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⁸ A model that is clustered by state, instead of year, is provided in the Appendix
mitigating factor as central tenets, arrest rates increase, supporting my third hypothesis.

Additionally, when a law explicitly removes the spousal exemption, arrests decrease. However, other factors like the focus of the law, gendered language, and the continuum of severity of the law, do not impact arrest rates, providing unsupported results for my second hypothesis.

**Progressive factors**

My first model ran a regression on the six “progressive” factors of the law. In this first model I focus on the results regarding the factors of the law not being titled “rape”, a continuum of severity, the wording being gender neutral, and the spousal exemption being removed, against arrest rates controlled by crime rates. The results of this test show a correlation with removing the spousal exemption and lower arrest rates. But, the other three factors bear no relation to arrest rates.

**Table 1: Regression of arrest rates on progressive factors of rape law**

| Arrests by Crime | Coefficient | Std. Error | t     | P>|t| |
|------------------|-------------|------------|-------|-----|
| Title not rape   | .0090723    | .0048941   | 1.85  | 0.161|
| Continuum        | -.0011285   | .0064282   | -0.18 | 0.872|
| Gender neutral   | .0136316    | .0105336   | 1.29  | 0.286|
| Removes spousal  |             |            |       |     |
| 1                | -.0105064   | .0109498   | -.096 | 0.408|
| 2                | -.0653197   | .0040882   | -15.98| 0.001*|
| Consent          | .0508295    | .0094388   | 5.39  | 0.013*|
| Intoxication     | .0153706    | .0050636   | 3.04  | 0.056*|
| Constant         | .1972495    | .015468    | 12.75 | 0.001|
Specifically, whether the crime is titled as rape or sexual assault, whether it has a continuum of severity, or whether it is written in gender neutral terms, none of these factors has a significant impact on arrest rates.

In regards to the spousal exemption, when a law made no mention of spousal rape (number 1), there was no correlation with arrest rates at a negative P value of .408. However, when the spousal exemption was explicitly removed (number 2), meaning that the law directly said that it is possible for spouses to rape each other, there was a statistically significant effect on arrest rates. At a negative P value of .001, explicitly removing the spousal exemption correlates to lower arrest rates.

Next, I model arrests as a function of the laws containing consent and intoxication clauses. In the first model, the consent and intoxication factors were statistically significant. However, I ran them independently to verify this conclusion. Both prove to have a significant effect:

**Table 2: Regression of arrest rates on the factors of consent and intoxication**

| Arrests by Crime | Coefficient | Std. Error | t    | P>|t| |
|------------------|-------------|------------|------|-----|
| Consent          | .0424791    | .0080031   | 5.31 | 0.013* |
| Intoxication     | .0219906    | .0026681   | 8.24 | 0.004* |
| Constant         | .1958984    | .0079137   | 24.75| 0.000  |

The consent factor has a positive P value of .013 while intoxication has a positive P value of .004. Thus, when a law includes a positive definition of consent or intoxication as a mitigating factor, there are more arrests. This is consistent with my third hypothesis, which posits that when
consent is the crux of the law it will increase arrest rates. This is also consistent with my third hypothesis because when a state’s law views intoxication as mitigating factor to a victim’s ability to give consent, then there will be more arrests. This correlation is intriguing and has many implications for how rape laws should be written and what effect they have on perpetrators of this crime.

**Physically Helpless and Mentally Incapacitated**

Next, I model the impact on arrests of the phrases “physically helpless” and “mentally incapacitated” in rape laws. The prevalence of these phrases in state laws was a primary reason for running this additional regression. But, their meaning in relation to consent and intoxication are also why these phrases were examined.

Coding for the dummy variables of the phrases “physically helpless” and “mentally incapacitated” returned marginal statistically significant results:

**Table 3: Regression of arrest rates on the presence of phrases**

<table>
<thead>
<tr>
<th>Arrests by Crime</th>
<th>Coefficient</th>
<th>Std. Error</th>
<th>t</th>
<th>P&gt;</th>
<th>t</th>
</tr>
</thead>
<tbody>
<tr>
<td>Physically Helpless</td>
<td>.0217514</td>
<td>.007006</td>
<td>3.10</td>
<td></td>
<td>0.053*</td>
</tr>
<tr>
<td>Mentally Incapacitated</td>
<td>-.023526</td>
<td>.0057405</td>
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</table>

(n = 195)

With a significance of .053, the factor of “physically helpless” has a marginally significant positive impact on arrest rates. States that use the phrase “physically helpless” are more likely to have higher arrest rates per criminal. Conversely, states that include the phrase “mentally incapacitated” in their rape laws are significantly likely to have lower arrest rates (p = -.026).
These findings are interesting and help to verify the overall conclusion of my thesis because these results are logically consistent with the results of the factors of consent and intoxication.

CONCLUSION

Discussion

My analysis shows that the way in which rape laws are written impacts how perpetrators are prosecuted (Hypothesis 1). This is in contrast to similar research. Specifically, Spohn and Horney (1992) found that rape laws in six states did not impact the way a case was processed. My research challenges their conclusion by finding that the way a law is written matters. So, reforming these laws is a potential way to effect change; however, like Spohn and Horney theorized, it might take time for that change to take effect.

In the United States, 1 in 6 women will be the victim of a completed or attempted rape in her lifetime. Of every 1,000 rapists, only 6 will be incarcerated for their crime (RAINN 2016). These numbers are astounding and a national dialogue has emerged around this problem. Reflecting this, President Obama signed the Bill of Rights for Sexual Assault Survivors in October of 2016 (Pauly 2016). People like Brock Turner have become household names for the national coverage of their crimes (Grinberg 2016). Campus sexual assault is being called an “epidemic” with full length documentaries being screened about it (Denby 2016). And sexual assault turned into an international dialogue after then Presidential Candidate Donald Trump was caught on tape talking about “grabbing” women (Farenthold 2016). Rape has become a regular conversation piece and efforts to end this problem have clearly not produced results.
The “feminist” theory of rape law posits that when these laws are written in ways that favor the victim, this will balance the overwhelming burdens that disadvantage the victim (Brownmiller 1976). With astounding statistics like only 6 in 1,000 rapists will spend any time in jail for their crime, the disadvantage to the victim seems insurmountable (RAINN 2016). However, the whole process of incarcerating a rapist begins with arrests. This research has shown that when rape laws are written in victim friendly ways, arrest rates go up. If, as a society, we decide that we want to end the “epidemic” of rapes and attempt to shift the power balance in favor of the victim, then rewriting our state definitions of rape is an excellent place to start.

When looking at the results of this research it is interesting as to why consent, intoxication, and the spousal exemption were the only factors to show statistically significant results. With consent and intoxication it is clearer that these legal stipulations would help victims and increase arrest rates. If a law is defined with consent as the crux of the crime, then proof that the victim fought back is no longer essential. The burden to prove a physical struggle is shifted to the burden to prove that the victim simply said no. When intoxication is included as a mitigating factor to consent, then if the victim is drunk or on drugs, then their ability to give consent is impaired. This also shifts the power balance in favor of the victim because if you are drunk then the need to prove that you fought your attacker is also reduced.

However, it is interesting to note that the spousal exemption stood out amongst titling the law not as rape, the crime being on a severity continuum, and putting the law in gender neutral terms, as correlated to decreased arrest rates. Particularly, it is counterintuitive that when you include marital rape as possible, there are lower arrest rates. Reasons for this disparity could be that when you explicitly call attention to the relationship of perpetrator to victim you are
claiming that this previous relationship is a factor that needs to be considered. Whereas, without mentioning this dynamic, the reader is free to cast aside the previous history of the victim and perpetrator. The reason as to why this factor stood out amongst the others is not clear, and these results counter feminist theorists belief that structuring rape laws with these four progressive factors helps victims. Ultimately, these four factors do not operate in ways that are consistent with feminist scholarship, and so should not be the focus of rape law reform.

Examining the results that the presence of “physically helpless” and “mentally incapacitated” produced, these phrases hold policy implications and help to verify the results of my hypotheses. When the phrase “physically helpless” is present in a law, arrest rates go up. If lawmakers want to increase arrest rates of perpetrators of rape and create more “victim friendly” laws, then including this phrase would help to produce those results. This correlation also helps to verify the results of the factor of positive consent because both had significant correlation in increasing arrest rates. As explained above, “physically helpless” is regarded as a “lighter” consent standard that is an avenue for victims who do not fight their attacker to secure justice. Since “physically helpless” and positive consent are both correlated with increased arrest rates, there is reason to assume that the mention of consent in a rape law is a significant factor in increasing arrest rates.

The phrase “mentally incapacitated” produced significant negative results, in that, when this phrase is present arrest rates go down. The policy implication here is if lawmakers would like arrest rates of alleged rapists to increase, they should avoid using this phrase. This result also helps to verify the conclusion drawn with the intoxication factor, since “mentally incapacitated” and the intoxication as a mitigating factor characteristic operate in opposite ways. The phrase
“mentally incapacitated”, as explained above, claims that if you are drunk against your will, then you do not have to fight your attacker for it to be considered rape. The intoxication as a mitigating factor, claims that if you are drunk of your own will then you do not have to fight your attacker for it to be considered rape. Since, these factors are in opposition with each other, it is logically sound that their results would return in opposition as well, and help to verify the conclusion drawn from my statistical models.

Limitations

There are some limitations to my analysis that must be considered. There are several factors that could not be controlled that might be influencing these results. First, the political leanings of a state could impact who gets arrested and who does not. Largely Democratic states might be more victim friendly and have more “feminist” rape laws, while largely Republican states might have the opposite. Thus, the populace of a state could lean more heavily to favor victims and that could impact policing and who is committing the crime. Being unable to control for political leanings of each state is a limitation.

Using arrest rates as the only dependent variable is a significant limitation. Ideally, this study would include conviction rates, but these data sets were much harder, if impossible, to obtain. Conviction rates in conjunction with arrest rates would give a more holistic conclusion to how rape laws affect perpetrators of this crime. Looking at conviction rates would widen the scope of this study to see if how a law is written affects court processes and conviction rates.

There are also limitations to this study that could never be controlled or even recognized. For example, how a police force acts on a county by county basis could be altering these data
sets in ways which we cannot tell. A national event could have increased or decreased the number of rapes one year in a disproportionate way. The weather in one state over another could have impacted the amount of arrest rates over another in ways we cannot tell. All to say that the limited observations per state and per year leave this study open to arbitrary shifts that are impossible to control.

Finally, my own preferences and interpretations leave this study open to variation. Some of the legal coding was based simply on if a word or phrase was present, which is an impartial observation. However, personal discretion was used when interpreting the presence of the positive definition of consent and intoxication as a mitigating factor. While advisors and lawyers were consulted the results of the coding were up to distinctions made based on my assessments. While I believe my methods are valid and my analysis was thorough, I am only a single coder. Ideally, in a more comprehensive study, a second person would have also coded the laws so that I could have calculated intercoder reliabilities to determine the reliability of my coding scheme.

The system of due process is useless if the scale of justice is not equal. Feminist scholars point to the statistics and overwhelming lack of punitive damages for rapists as a sign that this system is not fair. As a society if we believe that we would like to rid our culture of rape, then we must attempt to correct this imbalance. Reforming rape laws to be more victim friendly by including positive consent and intoxication as a mitigating factor as characteristics in the law is a way to increase the likelihood that these perpetrators will be punished. There are many other steps that must be taken to fully correct for this inequality, but this research shows that the ability for reform is possible, and we can begin by redefining rape.
APPENDIX

Berger et al.’s eleven factors

(1) defines the primary offense not as rape but as sexual assault, sexual battery, or the like in order to emphasize that the offense is a violent crime;

(2) defines the offense(s) on a continuum that specifies varying degrees of seriousness based on the amount of coercion, infliction of injury, and so on;

(3) redefines the offense in gender-neutral terms to protect victims from female offenders and to protect male victims; (4) criminalizes nonconsensual sexual contacts not involving force or other extreme circumstances;

(5) removes the spousal exemption from prosecution;

(6) includes exceptions or limitations on the spousal exemption (e.g., when spouses are separated), if such an exemption is present;

(7) exempts cohabitants and voluntary social companions;

(8) does not allow evidence regarding victims' past sexual conduct with defendants to be admitted in judicial proceedings;

(9) does not allow evidence regarding victims' past sexual conduct with persons other than defendants to be admitted in judicial proceedings;

(10) does not allow for a mistake-of-age defense as mitigating the guilt of the offender; and

(11) does not allow for a mistake-of-incapacity defense as mitigating the guilt of the offender.

Images of coding process
For the FBI’s collection of how many crimes of rape occur in each state, they use two different definitions to determine what constitutes rape and collect data for both:

Rape (revised definition): Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
Rape (legacy definition): The carnal knowledge of a female forcibly and against her will.

The legacy definition is a more traditional and restrictive definition of rape whereas the revised definition is more inclusive of gender, includes many acts, and uses consent as the crux. In my model, I control arrests primarily by the legacy version of these definitions, because only three years provide data for the revised definition and that is too small of a sample size. The legacy definition is also an appropriate control because it has a conservative estimate which created smaller crime rates and provide a more reserved estimate of criminals. Since all states at minimum have a legacy based definition of rape it is more logical to provide data that contorts to the bare minimum to provide a conservative estimate of perpetrators arrested per crime. Below, there are analyses provided that use the revised definition as the control variable. These models are mostly consistent with the findings using the legacy definition which help to further validate the conclusion of this paper.

**Table 4: Regression of arrest rates on progressive factors, clustered by state**

<p>| Arrests by Crime       | Coefficient | Std. Error | t  | P&gt;|t| |
|------------------------|-------------|------------|----|-----|
| Title not rape         | .0090723    | .0278656   | 0.33 | 0.746 |
| Continuum              | -.0011285   | .0275176   | -0.04 | 0.967 |
| Gender neutral         | .0136316    | .0299749   | 0.45 | 0.651 |
| Removes Spousal 1      | -.0105064   | .0344431   | -.31 | 0.762 |
| Removes Spousal 2      | -.0653197   | .0476173   | -1.37 | 0.176 |</p>
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</table>

(n = 195)

Table 5: Regression of arrest rates on the factors of consent and intoxication, controlled by Crime Revised

| Arrests by Crime | Coefficient | Std. Error | t      | P>|t| |
|------------------|-------------|------------|--------|-----|
| Consent          | .0301198    | .008158    | 3.42   | .0076*|
| Intoxication     | .0211475    | .0025488   | 8.30   | 0.014*|
| Constant         | .1457344    | .0053929   | 27.02  | 0.001|

(n = 195)

Significant results and trending in the same direction as when Arrests are controlled by Crime Legacy.

Table 6: Regression of arrest rates on the presence of phrases, controlled by Crime Revised

| Arrests by Crime          | Coefficient | Std. Error | t      | P>|t| |
|---------------------------|-------------|------------|--------|-----|
| Physically Helpless       | .0143274    | .0039276   | 3.65   | 0.068|
| Mentally Incapacitated    | -.0187713   | .0070574   | -2.66  | 0.117|
| Constant                  | .1568153    | .0048379   | 32.41  | 0.001|

(n = 195)

Not quite significant results but trending in the same direction as when Arrests are controlled by Crime Legacy.
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