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ABSTRACT

A simulated jury deliberation with experienced and inexperienced jurors sampled from the jury population of Hennepin County, Minnesota, was investigated. The purpose was to assess the impact of recent reforms in evidentiary rules pertaining to the admissibility of prior sexual history evidence in rape trials. Specific questions included: (1) whether the current types of legal reform eliminate or reduce the prejudice which reportedly inheres in the common law rules of evidence; (2) the extent to which empanelled adult jurors utilize such evidence without prejudice in a deliberated judgment context; and (3) the extent to which the different types of reform interact with varying degrees of victim consent. Preliminary findings suggest that the introduction of prior sexual history is prejuducial. (Author)

# Perception of Rape Victims: The Impact of Evidentiary Reform

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Over the past several years, a considerable amount of attention has focused on the fact that a rape victim is twice victimized--as a victim of sexual assault and as a victim when she testifies in court. Holmstrom and Burgess (1978) recently concluded that: "The court experience, for the rape victim, precipitates as much of a psychological crisis as the rape itself" (p. 229). In fact, on the basis of over 100 interviews with rape victims, Holmstrom and Burgess found that the primary reason for not pressing charges was the desire to avoid the ordeal of courtroom testimony. Traditional common law rules of evidence, which typically permit unrestricted admission of testimony about the victim's prior sexual history with persons other than the defendant, particularly have come under attack for contributing to this situation. They have been strenuously criticized on the ground that they distort the fact-finding process in a manner prejudicial to the rape victim. Rather than carefully weighing evidence against a standard of "reasonable doubt" to determine the guilt or innocence of the accused, jurors may be moved by prior sexual history evidence to blame the victim and thus to acquit the defendant. In order to redress this situation, 40 states have enacted "rape shield" reform statutes which limit, to varying degrees, the admissibility of the victim's prior sexual history with persons other than the defendant.

The rationale behind such reforms is basically twofold (Borgida, in press). First, by excluding evidence of the victim's prior sexual history, the victim is less likely to be subjected to humiliation in court. Legal reformers have not only expressed concern about unjust acquittals resulting from the admission of prior sexual history testimony, but also concern that the admissibility of such testimony inhibits a

victim's willingness to prosecute because of the strong possibility of exposure to humiliating cross-examination. The reforms, in this respect, are meant to alleviate the extent to which a victim is "on trial" along with the accused assailant. Second, the reforms should prevent potentially irrelevant, prejudicial testimony from being heard by the jury. The admissibility of such evidence according to the reformist position, is highly prejudicial and non-probative. Restricting its admissibility, therefore, presumably will reduce juror prejudice and in turn improve the rate of convictions in rape cases.

We have just completed the first phase of a research program which addresses three basic questions about the nature of these reforms. (a) whether the current types of legal reform eliminate or reduce the prejudice which purportedly inheres in the common law rules of evidence; (b) the extent to which experienced and inexperienced adult jurors prejudicially utilize prior sexual history evidence in a simulated jury deliberation context; and (c) the extent to which the different types of reform interact with the perception of victim consent that often characterize rape cases and affects their prosecution. In the remainder of this presentation, we first discuss our general classification of the evidentiary reforms and the social psychological assumptions underlying the types of legal reform. We will particularly focus on the extent to which the reforms may affect the perception of victim consent. Next, we will present an overview of a recently completed jury simulation experiment which was designed to address the three aforementioned questions. And, finally, we will discuss some of the preliminary findings and their implications for rape victims who become involved in the legal process.

As shown in Table 1, we have classified the laws governing the admission of prior sexual history with third parties into three categories based on the extent to which such evidence is excluded when a consent defense is raised. Thus, the Common Law category includes any state without an exclusionary statute and assumes the relatively unlimited admissibility of prior sexual history evidence.

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Insert Table 1 about here

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In contrast, both categories of reform statutes reflect the arguments put forth by critics of traditional rape laws. The major difference between the reform statutes categorized in Table 1 is the amount of discretion which is left to the trial judge in determining the admissibility of the offered evidence. In the 21 states governed by a Moderate Reform exclusionary rule, prior sexual history evidence is generally excluded unless a consent defense is raised, or unless the court determines the evidence to be material to a fact in issue. Laws of this type allow the trial judge considerable discretion in weighing the probative and prejudicial aspects of the evidence in question. But the effect of the statute is clearly to screen the admissibility of prior sexual history evidence as compared to the Common Law.

In contrast, 19 states have adopted statutes with a Radical Reform exclusionary rule which is considerably more restrictive of third-party prior sexual history offered on the issue of consent. The Radical Reform statutes require exclusion of such evidence because it is presumed to be

irrelevant, overly prejudicial, and confusing to the jury. In fact, some legal scholars have criticized the restrictiveness of these Radical Reform statutes because, in certain circumstances, the exclusion of prior sexual history may violate the due process clause of the Fourteenth Amendment and the Sixth Amendment rights of confrontation and cross-examination (e.g., Herman, 1977).

The assumption underlying both categories of reform statutes is essentially the same. That is, prior sexual history evidence will be regarded by jurors as informative and probative of the victim's moral character. Moreover, such information will be over-weighted and will have a prejudicial effect on the jury decision process. A number of studies in social psychology and law indeed suggest that evidence which evokes character may influence simulated juror judgments (cf. Stephan, 1975). Evidence of "good" character or "bad" character, as conveyed by manipulating personal characteristics such as perceived respectability of the victim or the defendant have been shown to influence the fact-finding process in hypothetical rape cases (e.g., Feldman-Summers & Lindner, 1976; Frederick & Luginbuhl, Note 1; Jones & Aronson, 1973; Smith, Keating, Hester & Mitchell, 1976). Evidence of prior criminal conviction, for example, which is suggestive of "bad" character, tends to increase the likelihood of criminal conviction even when mock jurors are informed that such evidence should only be used to evaluate the credibility of the witness (Doob & Kirshenbaum, 1972; Hans & Doob, 1976; Kalven & Zeisel, 1966; Landy & Aronson, 1969).

Recent research on intuitive judgment processes also suggests that evidence of prior sexual history may be influential (Nisbett, Borgida,

Crandall & Reed, 1976; Ross, 1977). Evidence that is specific and anecdotal in content (as evidence of prior sexual history can be) may be the sort of information that remains more available in memory and may be better recalled over time because of its greater emotional interest and vividness (e.g., Borgida & Nisbett, 1977). This is essentially what Thompson, Reyes and Bower (Note 2) found support for in a recent experiment. After a twenty-four hour post-trial delay, they found that when the defendant was of good character, judgments about the defendant's guilt shifted toward the verdict supported by the more vivid (i.e., concrete, intense, emotionally relevant) evidence. This vividness manipulation, however, had no impact on immediate judgments of the defendant's guilt. Specific, anecdotal information also may be more evocative of a person's character than, for example, general reputation testimony which, in contrast, seems bland, anonymous and generally uninformative (Borgida, Note 3).

Thus, knowledge of prior sexual history may not only contribute to re-structuring the perception of the rape victim as a credible, respectable, legitimate witness, but may adversely affect the likelihood of conviction as well. Defense counsel will try to use evidence of prior sexual history, as well as other case facts when possible, to imply that the victim consented to the sex. The strategy, of course, is to persuade the jury that, as the defendant contends, rape did <u>not</u> occur. The social definition of rape, therefore, which is "problematic at all stages of the victim's career. . .is especially problematic in the courtroom. It is here that one sees concerted and dramatic efforts made by the various parties to create different definitions of rape and different definitions of what

has occurred in the incident under consideration" (Holmstrom & Burgess, 1978, p. 166).

Some of the results from a pilot study to examine the impact of evidentiary reform on these assumptions about prior sexual history evidence (Borgida, in press) are presented in Table 2. We administered questionnaires to jurors serving their last day of jury duty in Minneapolis. Each juror read the condensed case facts of a hypothetical rape trial involving a consent defense and was asked to render a non-deliberated verdict. Evidence of the victim's prior sexual history and varying degrees of implied victim consent were experimentally manipulated within the set of case facts. For each juror, the admissibility of prior sexual history in the rape trial description was either governed by evidentiary restrictions under the Common Law, Moderate Reform, or Radical Reform exclusionary rule as defined in Table 1.

In addition, each juror also read a case fact pattern which had been pretested to convey either low, ambiguous, or high probability victim consent. Our assumption was that certain characteristics of the fact pattern (e.g., prior relationship between victim and offender, characteristics of the victim, medical evidence, etc.) may also convey the perception of victim consent and therefore increase the likelihood that jurors will make use of the victim's character, whether or not evidence of prior sexual history is introduced explicitly. In the absence of specific information about character, in other words, situations may be sufficiently informative about a person's character and behavior (cf. Price & Bouffard, 1974) that characteristics of the situation can affect assessments of blame and responsibility (e.g., Bulman & Wortman, 1977).

As shown in Table 2, the overall distribution of dichotomous juror verdicts as a function of Type of Exclusionary Rule and Probability of Consent was highly significant. Collapsing across Probability of Consent, the distribution of juror verdicts also varied significantly ($x^2(2) = 6.67$, $p = .04$). Whereas the proportion of non-deliberated guilty verdicts was 33% for both Common Law and Moderate Reform conditions, the proportion of guilty verdicts increased to 53% under the Radical Reform exclusionary rule. Moreover, the proportion of guilty verdicts decreased from the Low Probability Consent conditions ($\bar{x} = 57\%$) to the High Probability Consent conditions ($\bar{x} = 22\%$), [$x^2(2) = 15.42$, $p = .0004$]. This trend was the same for male and female jurors. Such data, however, do not address

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Insert Table 2 about here

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the substantive evidentiary questions raised by the reforms. It would be difficult to argue, for example, that the data address the truly important assumptions of the reformist position concerning how jurors actually utilize third party prior sexual history evidence and whether they could ever assess such evidence in a non-prejudicial way.

Therefore, we conducted a rather large-scale jury simulation experiment, aided and abetted by the National Center for the Prevention and Control of Rape and the University of Minnesota Law School. With the assistance of a professional theatre company and two veteran trial attorneys, we first edited the transcript of an actual rape trial involving a consent defense, and then filmed six two-hour videotaped variations of the trial. Three of the variations embodied a Low Probability of Consent

fact pattern and the other three embodied a High Probability of Consent fact pattern. Independent pretest ratings of these case fact patterns confirmed this differential probability of consent. An overview of these basic fact patterns is presented in Table 3.

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Insert Table 3 about here

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The videotaped variations of both fact patterns included opening remarks from the Judge, opening arguments from the prosecution and defense attorneys, the prosecutrix's testimony and cross-examination, four prosecution witnesses, all of whom were cross-examined, the defendant's testimony and cross-examination, closing arguments and the Judge's final charge to the jury. In accordance with our classification of the laws, the testimony of one prior sexual history defense witness was added to the Moderate Reform versions of both fact patterns. In the Common Law versions of both fact patterns the defense presented the testimony of a second prior sexual history witness as well. No prior sexual history evidence was added to either fact pattern in the two Radical Reform variations. It should be noted that the admissibility of prior sexual history testimony was determined by the legal criteria that define a given Exclusionary Rule category. In order to corroborate our discretionary judgments based on these criteria, we asked a District Court Judge from the Fourth Judicial District Court in Minneapolis and a prosecutor from the County Attorney's Office, both of whom have had extensive experience with sexual assault cases, to rule on the admissibility of our prior

sexual history witness testimony. Both rulings unequivocally corroborated our operationalization.

As shown in Table 4, the experiment involved two independent samples of prospective jurors from the Twin Cities metropolitan area. All participants were scheduled for four-hour experimental sessions in the courtrooms at the University of Minnesota's Law School. Half of the participants were Inexperienced Jurors who had not previously served jury duty with the Fourth Judicial District Court and who were eligible for jury duty at the time that we drew our random sample from the County voter registration file. The other half was drawn from a sample of jurors who had already served on a District Court jury in a criminal case (excluding those jurors who had served on cases involving sexual assault). Thus, we defined Experienced Jurors as those individuals who had served jury duty and who therefore had some familiarity with criminal procedure and rules. The interesting question here is whether the decision processes of Experienced Jurors would be less susceptible to the prejudicial effects associated with prior sexual history evidence than their judicially naive counterparts.

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Insert Table 4 about here

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As also shown in Table 4, half of the Experienced Jurors and half of the Inexperienced Jurors assigned to each of the six experimental conditions deliberated the case in six-person juries for a maximum of fifty minutes before they completed an extensive research questionnaire. All deliberations were governed by a unanimous verdict decision rule. Thus,

the complete experiment will involve ten deliberated verdicts--five rendered by Experienced Jurors and five by Inexperienced Jurors--in each experimental condition. The remaining Experienced and Inexperienced Jurors in each condition did not deliberate but viewed the trial and then completed the research questionnaire in anticipation of deliberating the case (cf. Hamilton, 1978). This procedure was included in order to better gauge the impact of the group deliberation process on individual juror judgments.

Table 4 presents some preliminary findings from the jury simulation experiment. Since data collection was completed so recently, we have not yet been able to conduct any statistical analyses of our data. Thus, our discussion of these findings will only highlight several descriptive trends on the consent and verdict measures. Sex differences on this measure or content analysis of the jury deliberations or, for example, the extent to which measures of sex-role identity, juror authoritarianism, rape myth acceptance and other social psychological variables might moderate and/or predict the conviction rate must await more extensive statistical analyses.

We generally expected to find interactions between Type of Exclusionary Rule and Probability of Consent. For example, verdicts should reflect a greater likelihood of conviction under the Radical Reform rule than under either the Moderate Reform or the Common Law rule, but this should especially be the case for Low Probability of Consent fact patterns which are probably the most likely to be prosecuted. It should be noted that such predictions rest on the general expectation of an inverse relationship between defendant guilt and victim consent. That is, the more jurors infer victim consent from the case fact pattern or prior sexual history

evidence or both, the less likely they were expected to convict the defendant. In the pilot study mentioned earlier, the correlation between juror certainty of guilt and perceived victim consent was -.72, $p = .001$ (Borgida, in press).

As may be seen in Table 4, there is indeed a more striking linear trend, in the predicted direction, for Combined Juror verdicts in the Low Probability conditions than in the High Probability conditions. Whereas only 22% of the jurors who deliberated the case in the Common Law condition rendered guilty verdicts, 80% of the jurors in the Radical Reform condition found the defendant guilty of criminal sexual assault. The Moderate Reform rule seemingly reduced the inference of victim consent in contrast to the Common Law condition. But in contrast to the conviction rate obtained under the Radical Reform rule, it would appear that the admission of some prior sexual history evidence nevertheless has a prejudicial effect ($\bar{x} = 46\%$). The implication of victim consent should have been particularly salient when prior sexual history was combined with a fact pattern that per se was suggestive of victim consent. Indeed, the lowest conviction rate was found when the High Probability fact pattern was crossed with the Common Law rule ($\bar{x} = 13\%$).

Although small sample size prohibits meaningful comparisons between deliberated and non-deliberated juror verdicts at this time, comparisons between Experienced and Inexperienced Jurors are possible and quite intriguing. For the Low Probability fact pattern, it would appear that prior sexual history evidence creates more "reasonable doubt" and therefore fewer guilty verdicts for Experienced ($\bar{x} = .17$) than for Inexperienced Jurors ($\bar{x} = .27$) in the Common Law condition. Surprisingly, this effect

is reversed in the Moderate Reform condition where Inexperienced Jurors seem to be more affected by the admission of prior sexual history. In the Radical Reform condition, where the inference of victim consent on the basis of the fact pattern alone is much less plausible, the highest conviction rates were expected and found for both Experienced and Inexperienced Jurors who deliberated the case. In contrast, it may be seen in Table 4 that for the High Probability of Consent fact patterns, regardless of the Type of Exclusionary Rule, Inexperienced Jurors would appear to be much less likely to convict than Experienced Jurors. Practically, such cases are usually screened out by the police or prosecutor's office before they ever reach court (Holmstrom & Burgess, 1978; Dawson, Note 4).

As for the impact of the evidentiary reforms on the perception of victim consent, it may be seen in Table 5 that, as expected, deliberated jurors inferred the most victim consent ($\bar{x}$ = 7.0) when the High Probability fact pattern was governed by the Common Law rules of evidence. It would also appear that, regardless of the Type of Exclusionary Rule, Inexperienced Jurors who deliberated the High Probability fact pattern were more susceptible to the prejudicial implications of prior sexual history testimony than their more judicially experienced counterparts.

In contrast, both Experienced and Inexperienced jurors who deliberated the Low Probability Consent fact pattern under the Radical Reform were, as predicted, least likely to infer victim consent. Under the Moderate Reform, however, Inexperienced Jurors were more likely ($\bar{x}$ = 6.1) than Experienced Jurors ($\bar{x}$ = 4.5) to perceive victim consent as a function of the admission of prior sexual history testimony. Interestingly, this

effect was reversed when the Low Probability fact pattern was deliberated under the Common Law. Although Experienced Jurors were more likely than Inexperienced Jurors to infer victim consent under the Common Law ($\bar{x}$ = 6.2 vs. $\bar{x}$ = 5.5), what is most interesting about these consent ratings is that, despite the Low Probability Consent fact pattern, both Experienced and Inexperienced Jurors nevertheless assumed that it was somewhat likely that the victim voluntarily consented to have sex with the defendant. Thus, it would certainly appear to be the case that the admission of prior sexual history under the Common Law affected jurors' perception of the victim and in an adverse way. That is, as Table 4 suggests, jurors in this condition were least likely to render guilty verdicts.

Obviously, at this stage in our research, it would be premature to suggest that these findings are conclusive with respect to the questions about evidentiary reform which were raised at the beginning of this presentation. Once we have completed our analysis, however, the data may have direct implications for the victim in that the rules of evidence contribute to the aversiveness of the courtroom experience for the victim. But it is important to realize that in a rape trial "the key issue is not whether a rape occurred, but whether people believe a rape occurred" (Holmstrom & Burgess, 1978, p. 165). And as our preliminary findings seem to suggest, the nature of the case fact pattern, whether or not prior sexual history is admitted, may alone provide a sufficient basis for vigorous attempts to discredit the victim and manipulate the definition of rape in the defendant's favor. From our perspective, victim-witness programs which provide pretrial counseling to victims and often accompany victims to court, represent an excellent approach to reducing the uncertainty

and sense of frustration and depersonalization associated with the legal process.

The results of this research should also be of interest to legislators and various interest groups who are considering the enactment or revision of statutes which counteract what appear to be the prejudicial effects of the admission of prior sexual history evidence in rape trials. To the extent that our results demonstrate that jurors improperly use prior sexual history evidence in the Common Law conditions, the necessity for evidentiary reform of rape laws will have received some empirical support. In addition, the results should clarify whether the Moderate Reform or Radical Reform statutes effectively eliminate or reduce the prejudice associated with the Common Law rules of evidence. Should it be the case, for example, that our analysis of jury deliberations suggests that jurors seem unable to evaluate such evidence, then a convincing argument could be made that the Radical Reforms more effectively vindicate the intent of the reform movement. If, however, the results suggest that some of the excluded evidence could have been evaluated properly by jurors, then the argument could be made that the Moderate Reforms should be more widely adopted in order to protect both the rape victim and the constitutional rights of the defendant.

It is important, however, to realize that our results only address the possible prejudicial effects associated with prior sexual history evidence. Although it is our belief that its probativeness is certainly questionable, the research does not address the relevance or probativeness of prior sexual history evidence. All evidence is subject to the test of relevance. Furthermore, all evidence must be more probative than

prejudicial if it is to be heard by the jury. Is the victim's prior sexual history relevant to and probative of consent? In other words, does the fact that a woman consented in the past tend to prove that she consented to the incident in question? Our research does not attempt to quantify relevance or probativeness. Our research does address the question as to whether prior sexual history has a prejudicical impact on the jury decision process. Our preliminary findings suggest that the introduction of prior sexual history is prejudicial. Constitutional challenges to the Radical Reform statutes, for example, must presume that prior sexual history is probative of consent and therefore relevant. There is no violation of constitutional rights when a court refuses to permit the introduction of irrelevant and prejudicial evidence. Thus, resolution of the issue will require a weighing of probative value against prejudicial impact. The potential value of the present research is that it may contribute empirical weight to one side of the balance.

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Table 1

Classification of states' exclusionary rules per evidence of the victim's prior sexual history with persons other than the defendant when offered on the issue of the victim's consent.[a]

| Common Law[b] | Moderate Reforms[c] | Radical Reforms[d] |
|---|---|---|
| 1. Alabama | 1. Alaska | 1. California |
| 2. Arizona | 2. Colorado | 2. Delaware |
| 3. Arkansas | 3. Florida | 3. Indiana |
| 4. Connecticut | 4. Georgia | 4. Louisiana |
| 5. District of Columbia | 5. Hawaii | 5. Maryland |
| 6. Illinois | 6. Idaho | 6. Massachusetts |
| 7. Maine | 7. Iowa | 7. Michigan |
| 8. Mississippi | 8. Kentucky | 8. Missouri |
| 9. Rhode Island | 9. Kansas | 9. Montana |
| 10. Utah | 10. Minnesota | 10. New Hampshire |
| 11. Virginia | 11. Nebraska | 11. North Dakota |
| | 12. Nevada | 12. Ohio |
| | 13. New Jersey | 13. Oklahoma |
| | 14. New Mexico | 14. Oregon |
| | 15. New York | 15. Pennsylvania |
| | 16. North Carolina | 16. South Carolina |
| | 17. South Dakota | 17. Vermont |
| | 18. Tennessee | 18. West Virginia |
| | 19. Texas | 19. Wisconsin |
| | 20. Washington | |
| | 21. Wyoming | |

[a]The statutory sections upon which this classification is based may be found as follows: Alaska Stat. §12.45.045 (Supp. 1977); Cal. Evid. Code §1103 (2) (a) (West Cum. Supp. 1977); Colo. Rev. Stat. §18-3-407 (Cum. Supp. 1976); Del. Code Ann. §3509 (Cum. Supp. 1976); Fla. Stat. Ann. §794.022 (2) (West 1976); Ga. Code Ann. §38.202.1 (Cum. Supp. 1977); Haw. Rev. Stat. §707-742 (Supp. 1976); Idaho Code §18-6105 (Cum. Supp. 1977); Ind. Code Ann. §35-1-32.5-1, -2 (Burns Cum. Supp. 1977); Iowa Code Ann. §782.4 (West Cum. Supp. 1977); Ky. Rev. Stat. §510.145 (Cum. Supp. 1976); Kan. Evid. Code §60-447a (1976); La. Code Crim. Proc. Ann. art. 15:529.1 §498 (West Cum. Supp. 1977); Md. Ann. Code art. 27 §461A (Cum. Supp. 1977); 1977 Mass. Adv. Legis. Serv. C. 110; Mich. Comp. Laws Ann. §750.520j (Cum. Supp. 1977); 1977 Minn. Sess. Law Serv. Rules Evid. 404(c) (West); 1977 Mo. Legis. Serv. Act 87 (Vernon); Mont. Rev. Code Ann. §§ 94-5-503(5) (1977); Neb. Rev. Stat. §28-408.05 (Supp. 1975); 1977 Nev. Stat. Sec. 11, 12, 59th Sess. (Amends §§ 48.069, 50.090); N. H. Rev. Stat. Ann. §623-A: 6 (Supp. 1975); N. J. Stat. Ann. §2A: 84A-32.1 (West Supp. 1977); N. M. Stat. Ann. §40A-9-26 (Supp. 1975); N. Y. Crim. Proc. Law §60.42 (McKinney Cum. Supp. 1976-77); N. D. Cent. Code §12.1-20-16 (Supp. 1977); 1977 N. C. Adv. Legis. Serv. C.851; Ohio Rev. Code Ann. §2907.02 (D) (Baldwin Supp. 1976); Okla. Stat. Ann. tit. 22 §750 (West Cum. Supp. 1977-78); Or. Rev. Stat. §163.475 (Supp. 1975); Pa. Stat. Ann. §3104 tit. 18, §3104 (Purdon Supp. 1977-78); S. C. Code §16-3-659.1(1) (Supp. Rev. 1977); S. D. Compiled Laws Ann. §23-44-16.1 (Supp. 1977); Tenn. Code Ann. §60.2445 (Cum. Supp. 1976); Tex. Penal Code Ann. tit. 5, §21.13 (Vernon Cum. Supp. 1977); Vt. Stat. Ann. tit. 13, §3255 (Supp. 1977); Wash. Rev. Code Ann. §9.79.150 (Supp. 1977); W. Va. Code §61-8B-12 (Supp. 1977); Misc. Stat. Ann. §972.11 (2) (West Cum. Supp. 1977); Wyo. Stat. §6-63.1 (Interim Supp. 1977).

[b]Defined in terms of the comparatively unlimited admissibility of prior sexual history evidence when offered on the issue of consent.

[c]Defined in terms of partial limitation on the admissibility of prior sexual history when offered on the issue of consent.

[d]Defined in terms of total exclusion of prior sexual history evidence when offered on the issue of consent.

Table 2

Proportion of guilty verdicts as a function of Type of Exclusionary Rule and Probability of Consent[a]

| | Common Law | Moderate Reform | Radical Reform |
|---|---|---|---|
| Low Probability of Consent | .45 (n = 20) | .60 (n = 20) | .65 (n = 20) |
| Ambiguous Probability of Consent | .40 (n = 20) | .20 (n = 20) | .65 (n = 20) |
| High Probability of Consent | .15 (n = 20) | .20 (n = 20) | .30 (n = 20) |

[a] $\chi^2(8) = 26.67$, $p = .0008$

Note. There are 8 degrees of freedom because the $\chi^2$ analysis was performed on the distribution of guilty/not guilty verdicts across the nine experimental conditions.

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Table 3

Comparison of Trial Fact Patterns

| | Low Probability of Consent | High Probability of Consent |
|---|---|---|
| A. Core Scenario | While at home in the early evening, the complainant, Cheryl Palmer, received a call from a girl friend, Kim Carlson, inviting her to go to the trailer house of another friend, Bob Lundberg, to play foosball for a few hours. Cheryl was initially hesitant because she had plans to meet her boyfriend later in the evening at a movie theater. But when Kim agreed to drop her off at the theater on the way back from Bob's, Cheryl agreed to Kim's invitation. While Cheryl and Kim were at Bob's trailer house, the defendant, Bill McNamara arrived. As Bob and Kim had decided to go dancing, Bill offered to give Cheryl a ride to the movie theater. On the way out of the trailer park Bill stopped the car on a poorly lit dead-end street and had sexual intercourse with Cheryl in the car. | The complainant, Cheryl Palmer, went to the Barrel Inn early in the evening where she was to meet her boyfriend later. At the Barrel Inn (a bar-disco) she saw a friend, Bill McNamara, and asked him to dance. Bill, the defendant, suggested that they leave the Barrel Inn and go to the trailer house of a mutual friend, Bob Lundberg, to play foosball. Cheryl accepted this invitation. After playing foosball at Bob's, Cheryl and Bill left to return to the Barrel Inn. On the way out of the trailer park Bill stopped the car on a poorly lit dead-end street and had sexual intercourse with Cheryl in the car. |

B. Congruent Testimony:

*Doctor Aronson: Testifies to the existence of a bruise on the left side of Cheryl's forehead and on her left lower lip. Reports that his Emergency Room exam of Cheryl revealed the existence of sperm in her vagina, but that it was impossible to tell whether the intercourse that had occurred was voluntary or involuntary.

*Pat Anderson: Testifies that upon reaching her apartment on the evening in question, Cheryl reported that she had been raped by Bill. Cheryl was crying and her hair was messed up. Pat testifies that although Cheryl had stated that she had been hit in the face, she could not see any bruises or blood.

| | | |
|---|---|---|
| *Cheryl Palmer: | Marital Status: | Single |
| | Height: | 5'6" |
| | Weight: | 120 lb. |
| | Occupation: | Unspecified |
| | Race: | Caucasian |
| *Bill McNamara: | Marital Status: | Single |
| | Height: | 6'0" |
| | Weight: | 175 lb. |
| | Occupation: | Manual laborer |
| | Race: | Caucasian |

C. Incongruent Testimony:

| | | |
|---|---|---|
| Prior Relationship: | Casual acquaintance--hardly knew each other | Very close friends |
| Physical Contact: | | |
| A. Prior to evening in question: | None | Had kissed but had not engaged in sexual intercourse |
| B. On the evening in question: | Cheryl: None<br>Bill: Placed arm around Cheryl in the car | Cheryl: None<br>Bill: Hugged each other while playing football |
| Physical Resistance: | Cheryl: Tried to push Bill away, get out of the car, as well as to keep the horn.<br>Bill: Cheryl pushed him away twice | Cheryl: Tried to push Bill away, get out of the car, as well as to keep the horn.<br>Bill: None |
| Force: | Cheryl: Tried to fight but Bill said she wasn't going home. Received bruises on the face.<br>Bill: States he didn't force Cheryl to do anything. Denies hitting Cheryl, saw no bruise. | |
| *Kim Carlson: | Testifies that she and Cheryl went to Bob Lundberg's trailer house on evening in question, to play football. | Testifies that she saw Cheryl Palmer leave the Barrel Inn with Bill McNamara on evening in question. |
| *Bob Lundberg: | Testifies that Cheryl Palmer arrived at his trailer house on evening in question with Kim Carlson, but left with Bill McNamara. | Testifies that Cheryl Palmer arrived at his trailer house on evening in question with Bill McNamara and left the trailer house with Bill McNamara. |

D. Prior Sexual History Testimony

| | |
|---|---|
| *Michael Fossen: (Moderate Reform and Common Law) | Testifies that after meeting Cheryl Palmer for the first time at a local bar one evening, Cheryl left the bar with him and willingly engaged in sexual intercourse with him in his parked van. |
| *Ellen Burns: (Common Law only) | Testifies that Cheryl Palmer had a reputation for being sexually "loose." After rooming with Cheryl for several months, Ellen states that she had to ask Cheryl to move out. The event which precipitated this request involved Ellen discovering Cheryl nude, engaging in "sex acts" with two men in Cheryl's room in their shared apartment. |

* = Prosecution witness

• = Defense witness

## Table 4: Preliminary Results From Jury Simulation Experiment

Proportion of guilty juror verdicts as a function of Type of Exclusionary Rule and Probability of Consent

| | Common Law | | Moderate Reform | | Radical Reform | |
|---|---|---|---|---|---|---|
| Probability of Consent | Deliberation | No Deliberation | Deliberation | No Deliberation | Deliberation | No Deliberation |
| LOW | | | | | | |
| Experienced Jurors | .17 (n = 30) | .50 (n = 10) | .53 (n = 30) | .20 (n = 10) | .79 (n = 42) | .22 (n = 9) |
| Inexperienced Jurors | .27 (n = 30) | .38 (n = 8) | .38 (n = 24) | .60 (n = 5) | .83 (n = 18) | .55 (n = 11) |
| Combined | .22 (n = 60) | .44 (n = 18) | .46 (n = 54) | .33 (n = 15) | .80 (n = 60) | .40 (n = 20) |
| HIGH | | | | | | |
| Experienced Jurors | .22 (n = 36) | .42 (n = 12) | .57 (n = 30) | .22 (n = 9) | .53 (n = 30) | .22 (n = 9) |
| Inexperienced Jurors | .00 (n = 24) | .36 (n = 11) | .17 (n = 18) | .25 (n = 8) | .25 (n = 24) | .25 (n = 8) |
| Combined | .13 (n = 60) | .39 (n = 23) | .39 (n = 54) | .47 (n = 17) | .41 (n = 54) | .24 (n = 17) |

Table 5: Mean Consent Ratings for Deliberated Jurors as a Function of Type of Rule and Probability of Consent[a]

| Probability of Consent | Type of Exclusionary Rule: Common Law | Moderate Reform | Radical Reform |
|---|---|---|---|
| LOW | | | |
| Experienced Jurors | 6.2 (n = 30) | 4.5 (n = 30) | 3.6 (n = 42) |
| Inexperienced Jurors | 5.5 (n = 30) | 6.1 (n = 24) | 3.1 (n = 18) |
| Combined | 5.8 (n = 60) | 5.2 (n = 54) | 3.5 (n = 60) |
| HIGH | | | |
| Experienced Jurors | 6.4 (n = 36) | 4.6 (n = 30) | 4.9 (n = 30) |
| Inexperienced Jurors | 7.8 (n = 24) | 5.6 (n = 24) | 7.1 (n = 24) |
| Combined | 7.0 (n = 60) | 5.0 (n = 54) | 5.9 (n = 54) |

[a] Jurors responded to the following item on a 10-point scale labeled: 1 = not at all likely that she agreed, 3 = unlikely that she agreed, 5 = somewhat unlikely, 6 = somewhat likely, 8 = likely that she agreed, 10 = very likely that she agreed. "Just on the basis of the testimony that you heard, please indicate below (by circling the appropriate number) the likelihood that the accusing witness in this case (Cheryl Palmer) voluntarily consented or agreed to have sex with the defendant, Bill McNamara."