New Directions in Psycholegal Research

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Evidentiary Reform of Rape Laws: A Psycholegal Approach

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Over the past several years, a considerable amount of attention has been focused on the fact that a rape victim is often twice victimized—as a victim of sexual assault and as a victim when she testifies in court. The common law rules of evidence in rape cases, which typically facilitate unrestricted admission of testimony about the victim's prior sexual history with third persons (i.e., persons other than the defendant), have particularly come under attack for contributing to this situation. As a result, various legislative reforms have been enacted, and a number of states have recently revised their evidentiary rules concerning the admissibility of the victim's prior sexual history with persons other than the accused assailant.

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The rationale behind such reforms is basically twofold: first, by excluding evidence of the victim's prior sexual history, the victim is less likely to be subjected to humiliation and abasement in court. Legal reformers have not only expressed concern about unjust acquittals resulting from the admission of prior sexual history testimony (and, conversely, the difficulty of obtaining convictions in rape cases), 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 and irrelevant 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 shield potentially irrelevant, prejudicial testimony from being heard by the jury. The admissibility of such evidence, according to the reformist position, is highly prejudicial and nonprobative. Restricting its admissibility presumably will, therefore, reduce juror prejudice and, in turn, improve the rate of convictions in rape cases.

The purpose of the present chapter is to examine the psycholegal assumptions underlying these recent evidentiary reforms in rape laws. First, the chapter briefly discusses the peculiar legal status of rape and the most controversial aspect of the evidentiary reforms—the admissibility of third party prior sexual history evidence. The reformist assumption that the admission of such evidence has a prejudicial effect on juror fact-finding is then discussed in the context of related experimental research in social psychology and law, as well as research on human judgment processes. The final section of the chapter presents the results of an exploratory study which examined some of the psycholegal assumptions about the impact of third party prior sexual history testimony in a rape case. The research specifically addresses a) whether the current types of legal reform seem to eliminate or reduce the prejudice which purportedly inheres in the common law rules of evidence; b) the extent to which empanelled adult jurors properly (i.e., without prejudice) utilize prior sexual history evidence in an individual judgment context; and c) the extent to which the different types of reform interact with the varying degrees of perceived victim consent that characterize rape cases and affect their outcome.

THE LAW OF RAPE [1]

In an analysis of the peculiar legal status of rape, Berger (1977) argues that rape is unique as a sex-specific crime. In rape cases, for example, the law goes beyond the protections offered defendants accused of other crimes and has constructed evidentiary rules that essentially protect men from irresponsible or fabricated accusations by women (LeGrand, 1973; Berger, 1977). One of the most obvious legal anomalies is the corrobora-

tion rule, which requires evidence other than the victim's testimony to convict a defendant charged with rape.[2] Although the corroboration rule has been dropped in all but a few states, there is no similar rule in other areas of criminal law.

Another practice peculiar to rape law is the judge's cautionary instruction to the jury. The jury is advised that a rape charge is easily made and difficult to disprove and that the testimony of a woman must be examined with caution.[3] In addition, judges often add their own opinions of the woman's credibility either directly or by innuendo (Mathiasen, 1974; Robin, 1977). Both the corroboration rule and the cautionary instruction, then, place a special burden on the credibility of the woman as a prosecuting witness which is not placed on such witnesses in other crimes.

The most controversial aspect of the law of rape is, however, the admissibility of evidence regarding the prior sexual history of the victim. Evidence of this nature is usually assumed to be relevant to the issue of consent. In fact, non-consent, in addition to the fact of sexual penetration, is perhaps the most basic element of the crime of rape, which is traditionally defined as an act of sexual intercourse forcibly accomplished by a man with a woman not his wife, without her consent and against her will (cf. Harris, 1976). There indeed are rape cases where consent is not an issue,[4] but proof of non-consent is usually regarded as absolutely crucial to the prosecution's case.[5]

Controversy particularly surrounds the question of whether evidence of the victim's prior sexual history is probative of consent. There is general agreement that evidence of the victim's past sexual behavior with the defendant is relevant and should be admitted. It is also generally agreed that the prosecutrix's sexual contact with another man is relevant to show the probable source of semen, pregnancy, or disease which might otherwise be attributed to the defendant (Berger, 1977).[6] Under common law rules of evidence, however, courts have admitted evidence of the victim's prior sexual history with third parties for a variety of other reasons.

Two major reasons are commonly cited. First, the defense has been allowed to introduce evidence of the victim's unchaste character in order to impeach her credibility as a prosecuting witness. The assumption behind this rather archaic notion is that a woman's sexual behavior is directly related to her credibility. If that were so, then one might expect that such testimony would also be admissible in any trial in which a woman serves as a witness (Note, Valparaiso Law Review, 1976). General evidence of immorality is, however, not permitted to impeach the credibility of a witness in any other area of criminal law. The second reason for the use of prior sexual history is that the defense should be allowed to introduce evidence of the victim's prior sexual history in order

to show likelihood of consent in the particular case. The assumption behind this rule is that a woman who has consented to various sexual advances in the past is more likely to have consented to the sexual encounter in question than is a chaste woman (Eisenbud, 1975). The weight of legal commentary in recent years, however, is highly critical of such an assumption. When evidence of a victim's reputation for promiscuity is, for example, admitted for the purpose of proving the probability of consent, despite uncontradicted evidence of physical abuse and medical evidence of forcible rape, the argument is made that the prejudicial effect of such evidence outweighs its minimal probative value (Note, Valparaiso Law Review, 1976). The fact that a woman has engaged in sexual relations with one man or with many simply does not prove that she consented to the act in issue [7] (Berger, 1977; Mathiasen, 1974; Harris, 1976).

Traditional common law rules of evidence have been strenuously criticized on the grounds that they distort the fact-finding process in a manner prejudicial to the rape victim and that they often tend to result in the acquittal of rape defendants who are guilty. 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 inflammatory prior sexual history evidence to blame the victim and thus to acquit the defendant. Moreover, the introduction of prior sexual history contributes to the trauma already experienced by a rape victim and has the effect of discouraging rape prosecutions. The overall effect is that the victim rather than the rapist bears the social cost of the crime. Efforts to shift the burden of the social cost of rape onto the rapist have resulted in widespread proposals for change in state and federal rules of evidence. All of the reforms restrict, to a greater or lesser degree, the evidence which may be introduced about a rape victim's prior sexual history. These reforms are discussed in the next section.

EVIDENTIARY REFORMS AND THE ADMISSIBILITY OF PRIOR SEXUAL HISTORY

Legislative response to criticism of existing laws has been dramatic in the past few years. Forty 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. Although the reforms make several other interesting changes in the common law, the discussion will focus on the admissibility of third party prior sexual history evidence, because this is the area in which there is the most variety among the different reforms and about which there is the most controversy.

The laws governing the admission of prior sexual history with third parties may be divided into three categories based on the extent to which such evidence is excluded when consent is involved. Those states having no statutory exclusionary rule pertaining to prior sexual history evidence are designated as *Common Law* in Table 8.1. For these 11 states, admission of prior sexual history evidence is of course subject to the conventional rule governing the admission of any kind of evidence; i.e., it must be relevant, and any prejudicial effect it may have must not outweigh its probative value. In addition, trial court decisions as to the admissibility of such evidence in a Common Law state are guided by case law. Although theoretically that law could favor a strict exclusionary rule, the practical effect of such a ruling would be minimal, because discretion still rests in the hands of the trial judge. Thus, the Common Law category includes any state without an exclusionary statute and assumes the comparatively unlimited admissibility of prior sexual history evidence.

In contrast, both categories of reform statutes reflect the arguments put forth by critics of the traditional law of rape. The major difference between the reform statutes categorized in Table 8.1 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.[8] The latter evidence must meet a statutory standard of relevance, such that its probative value is not substantially outweighed by the possibility of undue prejudice. Most Moderate Reform statutes provide for an *in-camera* hearing where the defendant presents his offer of proof supporting the admissibility of prior sexual history evidence and the prosecution may make rebuttal arguments. Laws of this type allow the trial judge considerable discretion in balancing the probative and prejudicial aspects of the evidence in question, but the effect of the statute is clearly to limit the admissibility of such evidence when compared to the Common Law. Furthermore, the Moderate Reform statutes provide for a recording of the trial court's findings and reasons for the ruling, which may then be reviewed on appeal for any abuse of discretion.

In contrast to this limited, discretionary mode of exclusion, 19 states have adopted statutes with a *Radical Reform* exclusionary rule that totally excludes third party prior sexual history when offered on the issue of consent (but not when pertaining to past sexual conduct with the defendant or establishing the source of semen, pregnancy, or disease). The Radical Reform statutes require complete exclusion of such evidence, because it is conclusively presumed to be irrelevant, overly prejudicial, and confusing to the jury by the creation of extraneous and collateral

Table 8.1. 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. 1976–1977); N. D. Cent. Code §12.1–20–14 (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. Nov. 1977); S. D. Compiled Laws Ann. §23–44–16.1 (Supp. 1977); Tenn. Code Ann. §40.2445 (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); Wisc. Stat. Ann. §972.11 (2) (West Cum. Supp. 1977); Wyo. Stat. §6–63.12 (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.

issues. Such statutes may expressly exclude prior sexual history offered to suggest consent or may simply omit consent from a list of permissible exceptions to the exclusionary rule.[9] The ultimate effect of the Radical Reform statutes is specifically to relieve the trial judge of virtually all discretion in determining the admissibility of third party prior sexual history evidence when offered on the issue of consent.

The assumption underlying both categories of reform statutes is essentially the same: The assumption that evidence of prior sexual history with a third party has a prejudicial effect on the outcome of the trial. Jurors will be inclined to give such testimony more weight than it deserves, or else they will be misled by the bias inherent in such evidence and decide the case on the basis of their disapproval of the victim's previous sexual conduct.[10] The Moderate Reforms' method of compensating for the assumed prejudicial effect is to place constraints on the admissibility of prior sexual history by prohibiting its admissibility, unless a judge determines that its probativeness outweighs its prejudicial effect. This limited admission of prior sexual history is justified on either one of two grounds: 1) the only evidence which will be admitted under these statutes is evidence which a jury will be able to evaluate properly; or 2) whatever prejudice remains must be tolerated, because of the greater probativeness of the evidence admissible by this standard.

Radical Reforms which make, however, the same general assumptions about the prejudicial effect of prior sexual history evidence, go further in terms of the weight that they give to the factor of prejudice. They conclusively presume that no evidence of prior sexual conduct with third parties can be evaluated properly by a jury. Its relevance and probativeness to the issue of consent is so attenuated, in all cases, to justify a blanket exclusion. Rather than balancing the interests of the rape victim and the rape defendant, as the Moderate Reforms attempt to do, the Radical Reforms shift the inequity of the Common Law from the victim to the defendant. Some legal scholars have in fact argued that the total exclusion of prior sexual history evidence under the Radical Reform statutes may, in certain circumstances, unconstitutionally infringe a rape defendant's due process right to mount a defense to the charges against him (cf. Herman, 1977).

PRIOR SEXUAL HISTORY AS A FORM OF EVIDENCE

As noted previously, central to the assumption underlying both reform categories is the notion that, as a form of evidence, prior sexual history will be regarded by jurors as informative about a victim's character and

that such information will be over-weighted and represent a source of bias in the juror decision process. A number of studies in social psychology and law suggest indeed that evidence which evokes character may influence jurors (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, has been shown to influence the fact-finding process in hypothetical rape cases (e.g., Feldman-Summers and Lindner, 1976; Frederick and Luginbuhl, 1976; Jones and Aronson, 1973). 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 and Kirshenbaum, 1972; Hans and Doob, 1976; Kalven and Zeisel, 1966; Landy and Aronson, 1969). On the basis of a hypothetical rape case, Brooks, Doob, and Kirshenbaum (1975) showed that when a man was convicted of raping a woman with a history of prostitution ("bad" character), as opposed to a woman of chaste character, both male and female subjects felt that justice had not been done.

Recent research on human judgment processes also suggests that evidence of prior sexual history may be likely to prejudice the juror decision process. In terms of the decisions that we often have to make, as well as our attributions and predictions about others' behavior, it has been demonstrated that certain kinds of information are more influential than others (e.g., Bower, 1972; Nisbett, Borgida, Crandall, and 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 in thought longer and triggers more inferences because of its greater emotional interest and salience (e.g., Borgida and Nisbett, 1977). Specific, anecdotal information may also be more evocative of a person's character than, for example, reputational testimony about a person's character in the community which, in contrast, seems bland, anonymous, and generally uninformative. The assumption here, of course, is that it is easier to assess character and future behavior from specific examples than from more global evaluations.

In fact, the rules of evidence pertaining to character evidence make a very similar assumption about the informational value of general reputation testimony and specific acts testimony. It is recognized, for example, that general reputation testimony is the less interesting method of character proof for jurors to hear and perhaps the least informative about character, as well. Nevertheless, general reputation testimony is the preferred mode of proving character, primarily because such evidence is more stable and less subject to bias. In contrast, specific acts testimony is regarded

as most informative and convincing about character. McCormick (1972), for example, notes the greater "pungency and persuasiveness" of specific acts testimony. Other legal scholars, however, have also argued that specific acts testimony "possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time" (Rule 405, Advisory Committee Note, Federal Rules of Evidence for U.S. Courts and Magistrates, p. 29). Specific acts are too easy to fabricate or misconstrue and are difficult to verify or rebut, according to this view. There is concern, therefore, that jurors could lose sight of the evidentiary issues before them and instead be swayed by issues of character raised by the specific acts. Consequently, the Federal Rules of Evidence carefully restrict the admissibility of specific acts testimony, in order to minimize any potentially confusing or prejudicial considerations which might arise as a result of introducing such evidence.

In a recent experiment, Borgida (1976) tested this legal assumption about the potentially prejudicial impact of specific acts character testimony in relation to general reputation testimony. To the extent that jurors' intuitive assessments of character affect the fact-finding process, it was expected that specific acts testimony—as specific, anecdotal information—would be more suggestive of a person's character than general reputation testimony and would therefore have more influence on juror verdicts. Undergraduate subjects served as non-deliberating jurors for a videotaped enactment of an automobile negligence trial. As part of the trial, subjects were shown character testimony on behalf of the plaintiff in the case. All character testimony was substantially pro-plaintiff and favorably commented upon the plaintiff's "cautiousness" which, in an auto negligence case, presumably is the central character trait in issue. Control subjects were not exposed to character evidence. Character testimony was presented either in terms of specific acts of conduct or in terms of general reputation. Cross-cutting the type of character evidence, subjects either received a low or a high amount of character evidence.

Borgida (1976) found that an *in vivo* presentation of a high amount of specific acts testimony, as opposed to a low amount, had a damaging effect on individually rendered negligence verdicts. In order to clarify this effect, which resulted from increasing the amount of specific acts testimony, an analysis of subjects' open-ended personality sketches of the plaintiff was conducted. It generally was expected that a cautious characterization of the plaintiff would be correlated positively with pro-plaintiff verdicts; this was, in fact, the case ($r = .35, p < .01$). Hence, subjects who regarded the plaintiff as a cautious, prudent person tended to render verdicts which were more favorable to the plaintiff. Thus, research in social psychology and law tends to support the notion that evidence suggestive

of a person's character may have prejudicial effects on juror and possibly jury verdicts (very few studies have, however, directly explored the latter possibility). Thus, an exploratory investigation was conducted to specifically test the generality of this finding and assess the impact of admitting prior sexual history evidence in rape cases.

TESTING THE VALIDITY OF THE RAPE REFORMS

A number of more specific questions about the recent reforms in evidentiary rules governing the admission of prior sexual history evidence can now be raised. With regard to the Moderate Reforms, for example, 1) does the admission of "sanitized" evidence increase the likelihood of conviction? and 2) how valid is the assumption that jurors, either on an individual basis or in the context of simulated jury deliberations, can properly (i.e., without prejudice) utilize such evidence? With regard to the Radical Reforms, 1) will such reforms obtain a higher conviction rate than the more Moderate Reforms, because no evidence of the victim's prior sexual history whatsoever is admissible? 2) do the Radical Reforms exclude evidence which is relevant and which could be assessed in a non-prejudicial manner by jurors? More generally, do both the Radical and the Moderate Reforms eliminate or reduce prejudice which the reforms assume inhere in the Common Law rules of evidence? And finally, to what extent do these different legal criteria (the Common Law vs. both reforms) governing the admissibility of prior sexual history interact with the varying degrees of implied victim consent, which characterize different rape cases?

This latter issue is particularly important in light of the substantive centrality of consent in the law of rape. Research on mock juror judgments in rape cases also suggests that implied consent is an important, though neglected variable (cf. Scroggs, 1976). Kalven and Zeisel (1966) found, for example, that jurors were less likely to convict the accused in criminal cases where there was some degree of victim precipitation. Indeed, research by Klemmack and Klemmack (1976) on the variables that affect whether or not various social situations are defined as rape provides support for the idea that situational scenarios or case fact patterns, irrespective of prior sexual history evidence, may be informative with respect to the inference of victim consent.[11] A random sample of female respondents in Tuscaloosa, Alabama was asked to evaluate seven situations in terms of the extent to which they believed a rape had occurred. According to the law of rape, forcible rape had occurred in each situation. The ratings revealed that for the three situations where implied consent was minimal, at least 75 percent of the respondents were certain that a rape

had occurred. In contrast, however, for the two situations where victim consent was strongly implied (e.g., the man forces sexual relations after the dating couple had been necking, despite the woman's resistance), only 20 percent were certain that a rape had occurred; situations where implied consent was ambiguous were rated midway between the two other clusters. Thus, it may be the case that fact patterns which convey a high probability of victim precipitation or consent actually increase the likelihood that jurors will make use of the victim's character, whether or not evidence of prior sexual history with third parties is admitted. Inference of victim consent may, therefore, be as likely from the case fact pattern as from personal characteristics of the victim, such as prior sexual history, although the latter inference is more straightforward than the former. The assumption here, of course, is that, in the absence of specific information about character, situations and contexts per se may be sufficiently informative about a person's character and behavior (cf. Price, 1974; Price and Bouffard, 1974).

In order to directly examine the extent to which levels of implied victim consent in a fact pattern might interact with the evidentiary rules of a Common Law, Moderate Reform and Radical Reform jurisdiction, the author and two of his colleagues, Marilyn Steere and Phyllis Oksner, conducted an exploratory study. Over a three-month period, encompassing a new jury panel every two weeks, questionnaires were administered to a total of 180 male and female adult jurors serving their last day of jury duty with the Fourth Judicial District Court in Minneapolis.[12] In addition to providing personality and demographic information, 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, as well as to rate the degree of victim consent.

Evidence of the victim's prior sexual history and varying degrees of implied victim consent were embedded within the set of case facts presented to each juror on the basis of a 3 x 3 between-subjects design, with 20 jurors randomly assigned to each condition. For each juror, the admissibility of prior sexual history in the rape trial description was governed either by evidentiary restrictions under the Common Law exclusionary rule (comparatively unlimited admissibility) or the Moderate Reform exclusionary rule (partial limitation on admissibility), or the Radical Reform exclusionary rule (total exclusion of such evidence). Because prior sexual history with third parties is inadmissible under the Radical Reform, the latter conditions, in effect, also served as no evidence control conditions. In addition to a different type of exclusionary rule, each juror either read a case fact pattern which conveyed a Low Probability of Victim Consent, an *Ambiguous Probability of Consent*, or a *High Probability of Consent*.

Pretest ratings of these case fact patterns by an independent sample of subjects corroborated this differential probability of consent.[13] Before reading the case fact summary, all jurors were instructed as follows:

> We are studying the process by which jurors make decisions. On the following pages, you will be presented with a case summary of a rape trial based on the actual trial transcript. You will be asked to make a number of judgments, and we therefore ask that you read the account carefully. Take as much time as you need in order to make your decision. The case summary contains all the essential facts of the case as originally presented in trial. Base your decision only on the case facts as given. If, for example, there is no mention of a weapon, assume that one was not used. In other words, you are to assume that all the evidence is before you as a juror, and you must render what you believe is an appropriate judgment. We realize that written summaries of such trials are not the same as sitting on the jury during the actual trial. Nevertheless, we ask that you approach this task seriously, just as you would, if you had been on the original jury.

The introductory scenario of the rape trial case summary presented to jurors in the nine experimental conditions was identical:

> The accusing party in this case was a medical technologist employed in a downtown medical laboratory. During the trial, she testified that on the evening in question she and a female co-worker worked late and then went out to dinner. They drove to a nearby restaurant in separate cars since they lived in different parts of the city. The two stayed at the restaurant for approximately an hour and then decided to leave because they both had to work the next day. On the way to the parking lot, the accusing party realized that she had left her purse in the restaurant. She explained her problem to the man who was sitting at the table that she had previously occupied and together they looked for her purse.

Jurors in the Low Probability of Consent conditions, however, next read that:

> Upon finding the purse, she thanked him and left the restaurant. As she approached her car in the parking lot she realized that he had followed her out of the restaurant. He caught up with her just as she reached her car, and he suggested that they go somewhere to have a drink. When she refused, he shoved her into the car where, despite her attempts to fight him off, he raped her and then fled the scene.

Jurors in the Ambiguous Probability of Consent conditions instead read:

> Upon finding the purse, he asked her to stay and to have a drink with him. Relieved to have found her purse, she accepted his offer. After a drink and some casual conversation, the accusing party explained to him that she had to be at work early the next day. She thanked him for the drink and for his assistance in finding her purse and then excused herself from the table. As she approached her car in the parking lot, she realized that he had followed her out of the restaurant. He asked her for a ride home and she agreed. Following his directions, she then drove to his apartment building parking lot where, despite her attempts to fight him off, he raped her and then drove them back to the restaurant where he left in his own car.

And jurors in the High Probability of Consent conditions read the following after the introductory scenario:

> Upon finding the purse, he asked her to stay and to have a drink with him. Grateful for his help in finding the purse, she accepted his offer. They had several drinks and after a couple of hours, the accusing party explained to him that she had to be at work early the next day. She thanked him for the drinks and offered him a ride home. He quickly agreed, and they walked out to her car in the parking lot. She then asked him to drive her car because she was not sure how to get to his apartment building from the restaurant. He then drove to his apartment building parking lot where despite her attempts to fight him off, he raped her and then persuaded her to drive him back to the restaurant, whereupon he left in his own car.

The case summary for each juror, regardless of experimental condition, then described the medical evidence introduced during the trial and stated the consent defense as follows:

> Medical tests taken shortly after the alleged rape and introduced as evidence during the trial indicated the presence of semen in her vagina.
>
> During the trial, the defendant testified that he did not rape the accusing party, that she appeared to display sexual interest in him while they were in the restaurant, and that she agreed to have sex with him in the car.

Finally, for jurors in the Common Law conditions, the case fact summary concluded with the following potentially admissible evidence about the victim's prior sexual history with third parties:

> A witness for the defense, who had known the accusing party since college and had the opportunity to learn her reputation for chastity, testified that it was generally known that the accusing party had sex frequently with many different men, some of whom were strangers, and that once during a college fraternity party, she had sex with several men on the same evening.

On the other hand, for jurors in the Moderate Reform conditions, the case fact summary concluded with the following potentially admissible evidence about the victim's prior sexual history with third parties:

> A witness for the defense who had known the accusing party for several years and who had the opportunity to learn her reputation for chastity testified that it was generally known among her friends and acquaintances that she had frequently had sexual relations with men who had picked her up at a bar.[14]

Jurors in the Radical Reform conditions, consistent with the total exclusionary rule pertaining to prior sexual history with third parties, did not receive such evidence.

We generally expected main effects and a two-way interaction for Type of Exclusionary Rule and Probability of Consent on the primary dependent measures: juror certainty of defendant guilt and juror certainty of victim consent. It was expected, for example, that verdicts would reflect a greater likelihood of acquittal in the Common Law conditions than in the Radical Reform conditions. Consistent with the reformist assumption, admission of inflammatory and prejudicial prior sexual history was expected to result in higher acquittal rates, regardless of the degree of implied consent. The implication of victim consent should be particularly salient when inflammatory evidence of prior sexual history is combined with a fact pattern that per se is highly suggestive of victim consent.

Verdicts in the Moderate Reform conditions were not, however, expected to reflect uniformly higher acquittal rates. In Ambiguous Consent cases, for example, the discretionary limitation on the admissibility of prior sexual history might in effect resolve the ambiguity for jurors—though, it was expected, in a prejudicial manner. Rather than increasing the likelihood of conviction, as was the intent of the Moderate Reforms, such testimony may nevertheless increase the likelihood of acquittal. On the other hand, in the Low Probability Consent condition, where the implication of victim consent is lower according to pretest data, the introduction of prior sexual history was not expected to increase the likelihood of acquittal.

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 summary, the less likely they were expected to convict the defendant. Conversely, the less jurors infer victim consent, the greater the likelihood of conviction. Unlike cases that are tried under Common Law evidentiary rules, however, where the inference of victim consent is often exacerbated by inflammatory evidence of prior sexual history, the inference of victim

consent should be somewhat, perhaps considerably, attenuated by the Moderate Reform rule.

Verdicts in the Radical Reform conditions, which exclude prior sexual history altogether, should reflect victim or defendant bias, depending on the degree of implied consent conveyed by the case fact pattern. In the Low Probability Consent condition, for example, where victim consent is not an issue, the greatest likelihood of conviction was expected. Presumably, jurors will not be able to infer victim consent when there is no prior sexual history evidence available and when the fact pattern itself suggests virtually nothing about the victim's character. In fact, we suspect that prosecutors regard such cases as very strong cases for the complainant (i.e., cases which have a high likelihood of resulting in conviction and which should therefore be prosecuted). It may be that the reportedly higher conviction rates for rape cases are partially attributable to the more likely prosecution of this kind of case. In contrast, we suspect that few prosecutors would bother bringing to trial a case which, in our terms, would be classified as a High Probability Consent case adjudicated under Common Law evidentiary rules (in fact, such cases are usually screened out by the police before they ever reach a prosecutor).

As shown in Figure 8.1, there was a significant main effect for Probability of Consent on certainty of defendant guilt, $F(2, 171) = 9.49, p = .001$. Individual contrasts showed that, as predicted, defendant guilt was more likely in the Low Probability Consent conditions compared with the Ambiguous Probability Consent conditions [$t(118) = -1.83$, $p < .07$], but especially more likely when compared with the High Probability Consent conditions [$t(118) = -4.53$, $p < .0001$].[15] For this dependent measure there was, however, only a trend effect for type of Exclusionary Rule [$F(2, 171) = 1.67$, $p = .19$, ns]. As is apparent from Figure 8.1, there was no interaction between Type of Exclusionary Rule and Probability of Consent.

Figure 8.2 shows a somewhat similar pattern of results for jurors' certainty ratings of perceived victim consent. As with certainty of defendant guilt, there was a significant main effect for Probability of Consent on certainty of perceived victim consent [$F(2, 171) = 3.40$, $p = .04$]. The pattern of individual contrasts was the same as for certainty of guilt. There was also a significant main effect for Type of Exclusionary Rule [$F(2, 171) = 8.79$, $p = .001$], and, as expected, jurors were more certain about victim consent in the Common Law conditions than in the Radical Reform conditions [$t(118) = -2.39$, $p < .02$]. Interestingly, jurors perceived as much victim consent in the Moderate Reform conditions as in the Common Law conditions [$t(118) < 1$, ns]; again, there was no interaction between Type of Exclusionary Rule and Probability of Consent.

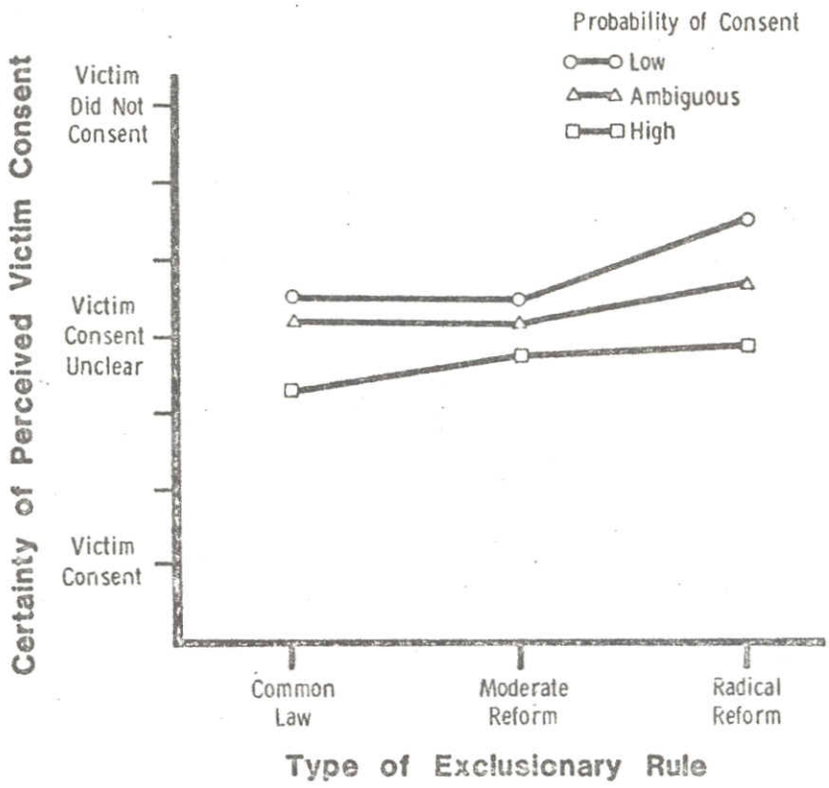

Figure 8.1. Mean juror verdicts as a function of type of exclusionary rule and probability of consent.

The impact of the rape reforms on the likelihood of conviction is, however, perhaps best understood in terms of the distribution of dichotomous juror verdicts displayed in Table 8.2. The overall distribution of dichotomous verdicts, as a function of Type of Exclusionary Rule and Probability of Consent, was highly significant [$\chi^2(8) = 26.67$, $p = .0008$]. Although this relationship was obtained for male jurors [$\chi^2(8) = 22.08$, $p = .005$], it was not significant for female jurors [$\chi^2(8) = 11.81$, $p = .16$, ns]. More important, however, across levels of Probability of Consent, the distribution of juror verdicts for Type of Exclusionary Rule varied significantly [$\chi^2(2) = 6.67$, $p = .04$]. Whereas the proportion of guilty verdicts was 33 percent for *both* Common Law and Moderate Reform conditions, the proportion of guilty verdicts increased to 53 percent under the Radical Reform exclusionary rule.[16]

Thus it appears to be the case that with a Radical Reform rule, which completely excludes evidence of the victim's prior sexual history with third parties, the likelihood of conviction is increased. It is also the case that with a Radical Reform rule, jurors are more likely to feel that they would have liked additional evidence in order to make a more informed decision. After rendering a verdict, each juror in the present research was asked to indicate whether there was "anything else you feel you would have liked to know about this case in order to make a better decision about it." Open-ended responses were then coded in terms of the frequency and type of evidentiary request.[17]

A 3x3 analysis of variance on the number of additional requests revealed a significant main effect for Type of Exclusionary Rule [F(2, 171)

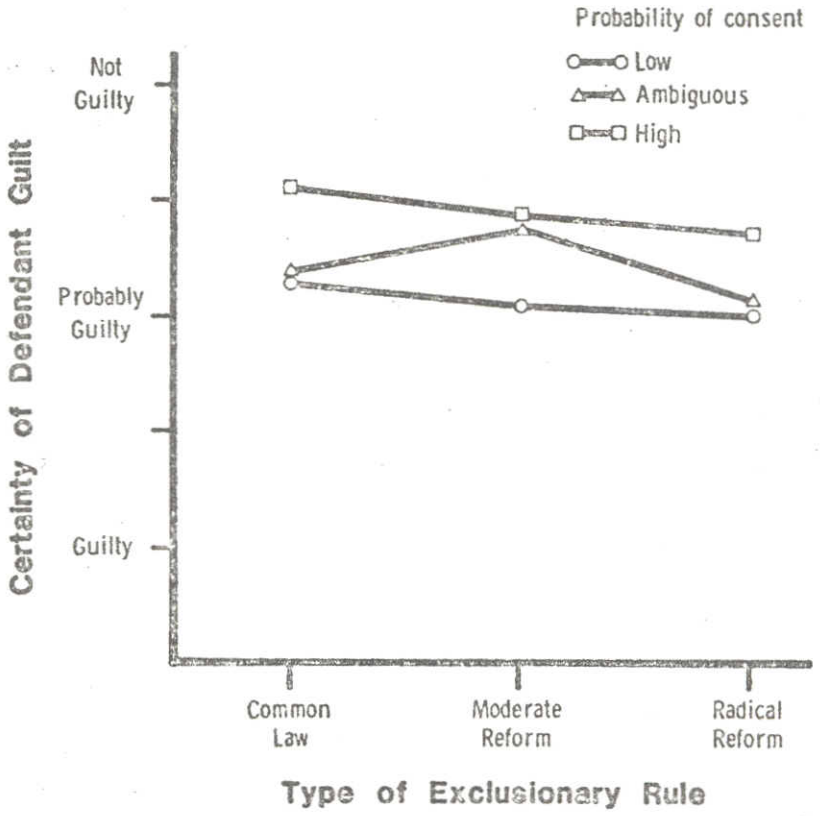

Figure 8.2. Mean juror ratings of perceived victim consent as a function of type of exclusionary rule and probability of consent.

Table 8.2. Dichotomous juror verdicts as a function of Type of Exclusionary Rule and Probability of Consent.[a]

	Common Law		Moderate Reform		Radical Reform	
	Guilty	Not Guilty	Guilty	Not Guilty	Guilty	Not Guilty
Low Probability of Consent	9	11	12	8	13	7
Ambiguous Probability of Consent	8	12	4	16	13	7
High Probability of Consent	3	17	4	16	6	14

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

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

$= 7.64$, $p < .001$]. Of the total number of such requests, 24 percent were made in the Common Law conditions, 33 percent in the Moderate Reform conditions, and 43 percent in the Radical Reform conditions. Of those jurors who did *not* request additional evidence, almost twice as many were in the Common Law conditions (47 percent) as in the Radical Reform conditions (26 percent); in other words, jurors in the Common Law conditions were more likely to feel that the evidence presented in the case was sufficient.

The question remains, however, as to whether jurors were more likely to request certain kinds of evidence, particularly in the Radical Reform conditions. Do jurors, for example, disproportionately request evidence of the victim's prior sexual history which was excluded under the Radical Reform rule? First, it should be noted that the most frequent request for additional evidence across Type of Exclusionary Rule was for a more detailed account of the interaction between the victim and the defendant on the night in question (e.g., exactly what the two said to one another, were either intoxicated at the time, etc.). The frequency of this request (23 percent of all requests in Common Law conditions, 22 percent in Moderate Reform conditions, and 26 percent in Radical Reform conditions) undoubtedly reflects the difficulty of deciding a case solely on the basis of a written fact summary.

The next most frequent request for additional evidence was indeed for character and prior sexual history information. Interestingly, regardless

of the Type of Exclusionary Rule, jurors more frequently requested such evidence about the defendant than about the victim. As might be expected, this was especially the case in the Common Law conditions, where jurors were much more likely to request further information about the defendant's prior sexual history (21 percent) than about the victim's prior sexual history (2 percent). In the Common Law conditions jurors were, of course, already quite well-informed about the victim's prior sexual history. Jurors may have felt compelled to request comparable information about the defendant, in order to somehow correct for this evidentiary imbalance. In both the Moderate Reform and Radical Reform conditions, however, juror requests for evidence of the victim's prior sexual history and character were five times more frequent than in the Common Law conditions! Thus, not only do jurors in the Radical Reform conditions generally make more requests for additional evidence, but, as the reformist position assumes, they specifically tend to request evidence of the victim's prior sexual history which has been denied them under the Radical Reform rule and, to a lesser extent, under the Moderate Reform rule. In contrast, jurors in the Common Law conditions generally make fewer requests for additional evidence and specifically do not request evidence of the victim's prior sexual history, probably because such evidence is so readily available to them.

As shown in Table 8.2, the distribution of dichotomous verdicts is influenced by Probability of Consent, in addition to the Type of Exclusionary Rule. Across Type of Exclusionary Rule, for example, the distribution of verdicts for Probability of Consent varied significantly [$\chi^2(2) = 15.42$, $p = .0004$]. As predicted, the proportion of *guilty* verdicts decreased linearly from the Low Probability Consent conditions (57 percent) to the High Probability Consent conditions (22 percent). This trend was the same for male and female jurors; in fact, the correlation between juror certainty of a guilty verdict and perceived consent was $-.72$, $p = .001$.[18] Furthermore, it may be seen from Table 8.2 that, as predicted, the lowest conviction rate (15 percent) was obtained under the Common Law when the case fact pattern conveyed High Probability Consent, and it may also be seen that under the Radical Reform law, the lowest conviction rate (30 percent) occurred when the case fact pattern implied High Probability Consent.

In light of the central importance of perceived consent in rape cases, the distribution of dichotomous perceived consent judgments was also examined. Table 8.3 shows that this distribution was indeed significant [$\chi^2(8) = 24.11$, $p = .002$], though an analysis for sex differences revealed that the relationship is obtained only for male jurors [$\chi^2(8) = 16.89$, $p = .03$]. This sex difference is clarified upon further partitioning of the overall distribution. Whereas male jurors inferred victim consent regardless of

the Type of Exclusionary Rule that was operative [$\chi^2(2) = 2.07$, ns], female jurors were much *less* likely to infer victim consent, especially under the Radical Reform rule [$\chi^2(2) = 5.59$, $p = .06$].[19] That males are more likely to infer victim consent has also been found in research on the social perception of rape victims (e.g., Calhoun, Selby, and Warring, 1976; Cann, Calhoun, and Selby, 1977; Selby, Calhoun, and Brock, 1977). The present research, however, demonstrates that this appears to be the case for male jurors, regardless of the Type of Exclusionary Rule involved. More importantly, though, the proportion of consent judgments displayed in Table 8.3 generally shows that only the Radical Reform rule suppresses the inference of victim consent [$\chi^2(2) = 7.03$, $p = .03$] and that the proportion of consent judgments increased from the Low Probability Consent conditions (48 percent) to the High Probability Consent conditions (78 percent), as predicted [$\chi^2(2) = 11.63$, $p = .003$].

Finally, the importance of perceived consent was further supported by the results of a least squares, stepwise multiple regression analysis (Nie, et al, 1975) which treated perceived consent, as well as several personality and demographic variables, as predictors of juror certainty of defendant guilt. The demographic predictors were juror age, income, and education. The personality measures were the *Just World Scale* (Rubin and Peplau, 1973, 1975) and a modified version of the *Rape Belief Scale* (Burt, 1978), Cronbach's Alpha = .71 and .55, respectively. Briefly, the Just World Scale was included in order to examine whether a juror who believed strongly in a just world would attribute more blame to a rape victim (i.e.,

Table 8.3. Dichotomous perceived consent judgments as a function of Type of Exclusionary Rule and Probability of Consent.[a]

	Common Law		Moderate Reform		Radical Reform	
	Consent	Non-Consent	Consent	Non-Consent	Consent	Non-Consent
Low Probability of Consent	10	10	13	7	6	14
Ambiguous Probability of Consent	13	7	16	4	9	11
High Probability of Consent	18	2	14	6	15	5

[a] $\chi^2(8) = 24.11$, $p = .002$

Note. There are eight degrees of freedom because the χ^2 analysis was performed on the distribution of consent/non-consent judgments across the nine experimental conditions.

the victim somehow deserved her fate) and would therefore be more likely to render an acquittal verdict. The Rape Belief Scale was included in order to examine whether a juror whose belief system incorporated a high number of stereotypical beliefs about rape and sexual assault would be more acquittal prone. The results of the multiple regression analysis were rather striking: The R^2 for perceived consent was .51 [$F(1, 167) = 172.90$, $p < .0001$]. Neither of the personality measures nor any of the demographic variables increased the prediction equation's R^2 by even 1 percent!

CONCLUSIONS

Doob (1976) recently articulated two approaches to psychological research on evidentiary questions in legal contexts. The first approach involves research on a question of interest to the psychologist, which may or may not be of interest to the legal community. The major drawback of this approach is that the researcher most likely does not consider the law of evidence in the original formulation of the problem, thereby limiting the applicability of the findings that are obtained. The second approach to evidentiary questions does, however, consider the law and examines the psycholegal assumptions underlying that law. "The law of evidence and the courts that interpret it, make a lot of assumptions about the way in which a judge or jury will use evidence. The psychologist can try to find out whether these assumptions are reasonable" (Doob, 1976, p. 137). The advantage to this approach is that the evidentiary question is initially framed so that the results are more directly applicable to the legal system.

The analysis of psycholegal assumptions underlying the recent evidentiary reforms in rape laws presented in this chapter is clearly in line with Doob's (1976) second approach to evidentiary questions. Both categories of reform statutes assume, for example, that third party evidence of the victim's prior sexual history will have a prejudicial effect on the outcome of a rape trial. In particular, it is assumed that jurors are overly influenced by such evidence, in that they will be more prone to base their verdicts on judgments about the victim's previous sexual conduct with persons other than the defendant, rather than on judgments about the facts of the particular case. Results from the exploratory study reported in this chapter tend to suggest that only the Radical Reform exclusionary rule (which totally excludes third party prior sexual history evidence when consent is in issue) seems to reduce this prejudice. Relative to a Common Law standard, only the Radical Reform rule increased the proportion of guilty verdicts in a case where forcible rape indeed occurred. The Moderate

Reform rule, in contrast, had no more impact on the conviction rate than the Common Law exclusionary rule.

Similarly, the Radical Reform rule was most effective in reducing potentially prejudicial inferences about implied victim consent, although jurors in the Radical Reform conditions indicated that they would have liked more explicit evidence about the victim's prior sexual history and character. In contrast, jurors in the Moderate Reform conditions perceived as much victim consent as jurors in the Common Law conditions. That the Radical Reform rule seems to curtail the perception of victim consent is especially important in light of the strong, inverse relationship overall between victim consent and defendant guilt, as well as the finding that victim precipitation (cf. Feild, 1978) or perceived consent is the most reliable predictor of juror verdict.

There are nevertheless several evidentiary questions raised by the reforms that are unresolved by the data reported in this chapter. It would be difficult to argue, for example, that the present data address the truly important assumptions of the reformist position concerning how jurors or, for that matter, juries actually utilize third party prior sexual history evidence, and whether they could ever assess such evidence in a non-prejudicial way. Whereas the present data clarify the impact of different types of exclusionary rules on conviction rate, one would have to examine, for example, the content of simulated jury deliberations in order to know to what extent these effects were attributable to prejudicial utilization of prior sexual history evidence. Related to this question is, of course, the thorny problem of determining what exactly constitutes prejudicial utilization in the deliberation process and how jurors ought to process such evidence. A more ecologically valid jury deliberation research strategy (cf. Davis, Bray, and Holt, 1976; Gerbasi, Zuckerman, and Reis, 1977; Kessler, 1975), perhaps based on the design employed in the study reported herein, would provide data more pertinent to these questions.

Finally, further research would be necessary in order to explicate the constitutional status of the Radical Reform rule. The interesting question here is whether the defendant is denied due process of law by the exclusion of evidence, possibly relevant to the issue of consent, which could be evaluated by jurors in a non-prejudicial manner had it been admitted. Recent research in cognitive social psychology, as well as the exploratory study discussed in this chapter, tends to suggest that jurors would not be able to evaluate such evidence non-prejudicially. Should further jury deliberation research support this view, then a convincing argument could be made that the Radical Reforms more effectively vindicate the intent of the reform movement. If, however, the results of such research demon-

strated 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 adopted in order to protect both the rape victim and the constitutional rights of the defendant.

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FOOTNOTES TO CHAPTER 8

[1]The "law of rape" is used here to refer not only to the definition of the crime, but also to the laws of evidence which govern proof in a rape trial. The criticism of the definitional principles of rape, while often quite perceptive, see Note, Recent Statutory Developments in the Definition of Forcible Rape, 61, Va. L. Rev. 1500 (1976), is not so widespread as criticism of the evidentiary principles governing proof, perhaps because the impact of these latter principles on the victim and upon the outcome of the prosecution is so much more obvious.

[2]The corroboration rule precludes a conviction for rape on the testimony of the victim alone without some other evidence which corroborates her testimony that she was raped. Many jurisdictions permit rather attenuated facts to serve as corroboration, and still others have abolished the requirement altogether. See Note, The Rape Corroboration Requirement: Repeal not Reform 81 Yale L. J. 1365 (1972); Note, Corroborating Changes of Rape, 67 Colum. L. Rev. 1137 (1967).

[3]As a result of recent court decisions, this instruction is no longer required in some jurisdictions. See 123 Cal. Rptr. 119, 538 P.2d 247, 252 (1975).

[4]In cases of statutory rape or in cases where the defense is that the event never occurred (fabrication defense) or where the defense claims that the defendant was not the assailant (mistaken identity defense) the issue of consent may never be raised.

[5]Much has been written about the need for some uniform standard of consent. Various criminal statutes use the phrases "against her will," "by force," and "without her consent" without clearly defining the standards to be met. In some jurisdictions, a woman who passively submits to a sexual assault has consented or at least has not been taken "against her will." Some courts have interpreted "by force" to mean that physical violence is an essential element of the crime; others have argued that resistance should be considered an essential element in addition to force and non-consent (Harris, 1976; LeGrand, 1973; Robin, 1977).

[6]There is one other circumstance in which the admission of evidence of the victim's unchastity is non-controversial. If the prosecution attempts affirmatively to prove that the complainant is a woman of chaste character, the defense may counter with character evidence tending to prove the opposite.

[7]Evidence of a person's prior conduct is generally inadmissible in contexts other than rape

prosecutions, when it is offered to show that the person acted similarly on another occasion. Such evidence is only admitted when it shows habitual, as opposed to isolated incidents of behavior, or where it reveals some peculiarity or characteristic which ties the person to the act performed.

[8]Evidence which is likely to be considered material to a fact in issue (other than consent) may refer to the complainant's sexual relations with another person on the day of the alleged rape to show source of semen, pregnancy, or disease.

[9]Statutes in the latter category state a general exclusion of evidence of the victim's prior sexual history and then list exceptions, such as past sexual conduct with the defendant to show the source of semen, pregnancy, or disease. If the list of exceptions does not include admission for the purpose of showing consent, the statute is classified in the Radical Reform category.

[10]Kalven and Zeisel, in their classic book on *The American Jury* (1966), attribute the gross judge-jury disagreement in the verdict in rape trials to the inability of jurors to avoid the second pitfall.

[11]Hitchhiking is a good example of this point. A Louis Harris survey of a national sample of 1,536 adult respondents recently reported that 79 percent of those polled believe that "any woman who hitchhikes alone can expect to run the risk of having a man driving a car try to have sex with her or even rape her" (*Minneapolis Star*, October 24, 1977, p. 8b). Judge Compton of the Second District Court of Appeal in California apparently shares this assumption that a female hitchhiker has sex and not a ride in mind. Although Compton and his colleagues later changed the inflammatory wording, they overturned the 1977 rape conviction of Clifford Hunt in a decision which strongly suggested that a woman who goes out alone and tries to hitch a ride is asking to be raped (*Washington Star*, November 10, 1977).

[12]The modal juror in the sample was a white (77.2 percent), married (54.4 percent), relatively young (39.5 percent of the jurors were less than thirty years old), high school graduate with some college (33.3 percent), whose yearly income from a non-professional occupation was between $15,000 and $19,999.

[13]The low probability implied consent fact pattern was rated as conveying low probability victim consent and was associated with a greater likelihood of conviction. The ambiguous implied consent fact pattern was rated as conveying ambiguous victim consent, and there was no significant correlation between implied consent and verdict. Finally, a high probability consent situation was rated as conveying high probability victim consent and was associated with a greater likelihood of acquittal. The range of scores on both the verdict and consent scales was, however, somewhat clustered around mid-scale, ranging from probably guilty of rape to probably not guilty. Similarly, pretest ratings of the likelihood of victim consent, given knowledge of either form of prior sexual history evidence, revealed scores that were clustered toward the "consent extremely likely" end of the scale.

[14]This particular example of prior sexual history evidence probably would be admissible under the Common Law, as well. Its admissibility under the Moderate Reform is, however, consistent with those Moderate Reform statutes (e.g., Minnesota) which might admit such inflammatory evidence on the basis of a "common plan, scheme, or design" criterion at the judge's discretion. "Common plan, scheme, or design" would justify the admission of testimony about a repetitive pattern of factual circumstances that was similar to the fact pattern in question. Thus, as the restricted range of pretest ratings suggests, the present operationalization of the Common Law and Moderate Reform categories represents a rather stringent test of the hypothesis.

[15]All p values for the contrasts are based on two-tailed tests.

[16]An identical proportion of guilty verdicts for Common Law and Moderate Reform conditions in this case only underscores the point made in footnote 15 that the present operationalization of Common Law and Moderate Reform indeed constitutes a rigorous test of the hypothesis.

[17]There were ten categories in this coding scheme: none (juror specifically requests no additional evidence); non-specific requests (e.g., "I need more information"); resistance evidence; dispositional information (e.g., appearance, demeanor, age, marital status, etc.); situational information (time, place); corroboration of act; nature of interaction between

victim and defendant (e.g., intoxication, threats, conversation); relationship between victim and defendant prior to the occasion in question; character of defendant and his prior sexual history; character of victim and her prior sexual history. Intercoder reliability, based on percentage agreement between two coders, was 87 percent.

[18]It could be argued that this zero order correlation between perceived consent and certainty of defendant guilt was artifactually inflated by the relationship between Probability of Consent as an independent variable and perceived consent as a dependent measure. A MANOVA (Nie, et al, 1975) was therefore conducted in order to control for the effects of Probability of Consent. The average within cell correlation between perceived consent and certainty of defendant guilt was nevertheless substantive ($r = -.68$).

[19]It appears that male jurors are much more willing to infer victim consent when the case involves a High Probability fact pattern. For males, the inference of consent increases from 55 percent in the Low Probability of Consent conditions to a striking 93 percent in the High Probability of Consent conditions [$\chi^2(2) = 11.48$, $p = .003$]; for female jurors, this trend is not even significant [$\chi^2(2) = 3.55$, $p = .17$, ns].