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LEGAL REFORM OF RAPE LAWS

Who is more likely to consent to the approaches of a man, the unsullied virgin and the revered, loved and virtuous mother of a family, or the lewd and loose prostitute, whose arms are open to the embraces of every coarse brute who has enough money to pay for the privilege?
(Camp v. State, 1847)

And will you not more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia?
(People v. Abbot, 1838)

If consent be a defense to the charge (of rape) then certainly any evidence which reasonably tends to show consent is relevant and material, and common experience teaches us that the woman who had once departed from the paths of virtue is far more apt to consent to another lapse than is one who had never stepped aside from that path.
(State v. Wood, 1942)

Consent, in most circumstances, is a complete defense to the charge of rape.[1] For generations the law has permitted men on trial for rape to introduce evidence of the complainant's prior sexual history in order to prove that the complainant consented to the act in question. The rationale, so eloquently expressed in the judicial opinions quoted above, is that a woman of unchaste character is more likely to consent to sexual rela-

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tions upon any given occasion than is a virtuous woman. Primarily for this reason, courts have permitted defense counsel to cross-examine the complaining witness on the subject of her sexual experiences, habits, and relationships. Often baseless questions designed to cast doubt upon the moral character of the witness have been permitted in many courts (Berger, 1977).

The practical effect of this legal rationale is to place a woman who dares to accuse a man of rape "on trial" along with her assailant. The abuse suffered by female complainants during rape trials has been in recent years a source of public outrage (Brownmiller, 1975; Gager and Schurr, 1976; Medea and Thompson, 1974). A study based on interviews with rape victims found that the primary reason for not pressing charges in rape cases was the victim's desire to avoid the ordeal of courtroom testimony (Holmstrom and Burgess, 1978). Moreover, it is well-recognized among law enforcement authorities that rape is a dramatically under-reported crime (U.S. Department of Justice, 1976). Fear of public humiliation and gross invasion of privacy may prevent many rape victims from reporting the crime to the police and assisting in the prosecution of the accused rapist.

However, in the past decade, the legal rules of evidence permitting the introduction of a rape complainant's prior sexual history as evidence of her tendency to consent have come under vigorous attack both by feminists and legal reformers (Ben Dor, 1976; Berger, 1977; Bienen, 1977; Bohmer and Blumberg, 1975; Ordover, 1977). Reformists have argued not only that such rules subject the female complainant to unnecessary trauma in the courtroom, thereby discouraging the reporting and prosecution of rapes, but also that juries are unreasonably influenced by evidence of a rape victim's sexual history and therefore will unjustly acquit rapists. Reformists argue further that the traditional legal rules are based upon archaic, sexist notions of female sexual behavior. Whether a woman has consented in the past may no longer be probative of consent on any particular occasion, given changing social mores and standards of sexual behavior. Evidence of a woman's prior sexual history is not probative of her tendency to consent to sexual relations in a given situation and therefore should not be admitted to prove consent (Indiana Law Review, 1976).

Arguments about the extent to which third party prior sexual history, in particular, distorts the truth-finding process in a manner prejudicial to

the rape complainant have been persuasive. To date, 46 jurisdictions have enacted statutory "rape shield" laws to protect rape victims at trial, a figure which includes the Privacy Protection for Rape Victims Act of 1978 that amends the Federal Rules of Evidence as they pertain to the admissibility of third party prior sexual history evidence.[2] The expressed rationale behind such reforms is basically twofold (Borgida, 1980a; Chappell, LeGrand, and Reich, 1978). First, the reforms should prevent potentially prejudicial testimony from being heard by the jury. Restricting the admissibility of such evidence is intended to reduce juror prejudice and improve the low rate of conviction in rape cases. Second, by excluding evidence of the victim's prior sexual history, the victim is less likely to be subjected to humiliating cross-examination in court. Thus, the reforms are meant to alleviate the extent to which a rape complainant is "on trial" along with the accused assailant, and reduce the number of instances in which juror verdicts in rape cases may be based on personal notions of morality rather than the facts of a particular case.

The rape shield laws governing the admission of third party prior sexual history evidence have been classified into three categories based on the extent to which such evidence is excluded when a consent defense is raised (Borgida, 1980a). The *Common Law* category includes those jurisdictions without an exclusionary rule and assumes the comparatively unlimited admissibility of third party prior sexual history testimony. In contrast, the two categories of reform statutes reflect the arguments put forth by critics of traditional rape laws. The critical difference between the reform statutes rests in the amount of discretion which is left to the trial judge in determining the admissibility of third party prior sexual history evidence. In those jurisdictions governed by a *Moderate Reform* exclusionary rule, such evidence is generally excluded 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 *intent* (as opposed to the actual application) of such statutes is clearly to screen the admissibility of prior sexual history evidence as compared to the Common Law.

Finally, a number of jurisdictions have adopted more restrictive *Radical Reform* statutes which require the exclusion of third party prior sexual history evidence. The view in these jurisdictions is that such evidence is more prejudicial than probative when offered to prove consent

and therefore must be excluded.[3] Several legal scholars, however, have raised cogent arguments against the "presumptive inadmissibility" of Radical Reform as well as the Moderate Reform statutes because, in certain cases, exclusion of the complainant's prior sexual history may violate the due process clause of the Fourteenth Amendment and the confrontation and compulsory process clauses of the Sixth Amendment (Herman, 1977; Rudstein, 1976; Tanford and Bocchino, 1980; Westen, 1978). Some have acknowledged that there may be prejudicial effects associated with prior sexual history evidence, but question whether such evidence is any *more* harmful than similar types of evidence like prior record of the accused or the prior criminal record of any prosecuting witness which traditionally have been admissible (Tanford and Bocchino, 1980). I shall return to these constitutional considerations later in this chapter.

As a social psychologist with research interests in human inference processes and legal psychology, I was intrigued by the various legal assumptions about human behavior and intuitive inference processes implicit in the evidentiary reform of rape laws. In previous research, for example, I had examined experimentally the validity of legal assumptions about methods of character proof in terms of recent theory and research in social cognition (Borgida, 1979). In fact, dating back to my graduate school years and legal course work at the University of Michigan, I have believed that the law was a prime naturalistic context in which to investigate social judgment processes which have *both* theoretical and legal implications. This conviction has certainly been buttressed over the last few years as legal psychology has begun to receive increased attention from social cognition researchers (e.g., Fincham and Jaspers, forthcoming; McGillis, 1979; Pennington and Hastie, 1980; Saks and Kidd, forthcoming).

Reformist assumptions about the impact of prior sexual history evidence and jury decision-making processes in rape cases struck me as particularly amenable to this research orientation. Various preconceptions and inferential strategies clearly guide our social judgments in everyday life (Nisbett and Ross, 1980). While these cognitive tendencies are generally valid and functional for people on a daily basis, they may be very dysfunctional in judgmental domains like the courtroom. I suspected that one such inferential tendency, our susceptibility to remember and use evidence which is concrete, image-provoking, and emotionally

interesting (Nisbett et al., 1976; Nisbett and Ross, 1980; Reyes, Thompson, and Bower, 1980), may indeed justify the evidentiary reforms which restrict the admission of a rape victim's prior sexual history in court.

In the absence of such exclusionary rules, I wondered whether the admission of often vivid, specific acts of prior sexual conduct in fact would unfairly prejudice and sidetrack jury decision-making onto an emotional and moral tangent, as suggested by theory and research in social cognition. Other questions of psychological and legal interest came to mind. Does the potential for such prejudice, for example, outweigh the arguably probative value of such evidence? Of equal importance, does the admission of prior sexual history evidence jeopardize the accuracy of the truth-finding process in rape cases, as the reform movement has assumed? And, finally, does the implementation of the new statutory reforms improve the accuracy and reliability of the truth-finding process?

Thus, over the past several years, my colleagues and I have conducted jury simulation studies to examine these psychological and legal issues associated with evidentiary reform of rape laws. In addition, we have also been interested in the extent to which various pretrial juror dispositions and experiences influence the decision-making process in rape cases. We have examined, for example, the role of prevalent social attitudes toward women and rape in our culture, as well as the role of personality constructs like Rotter's (1966) internal-external locus of control construct. We have also considered the role of prior criminal jury experience in the context of expert-novice decision-making demonstrated in nonlegal inferential domains. Finally, we have begun to examine the jury deliberation process using a log-linear approach not only as basic research on group decision-making, but to understand more precisely how jurors actually use and reason with various types of evidence in rape cases (Borgida, 1980b). The latter approach may very well enhance the policy relevance of simulation research in the eyes of the legal community (Vidmar, 1979).

The focus of the present chapter, however, is on the applied significance of our research for the prosecution of rape cases in the criminal justice system. I first discuss our choice of the jury simulation methodology and several problems associated with the adoption of this approach. Next, the results from a jury simulation study on statutory reform are discussed, followed by a discussion of the results from a second simulation study on a constitutionally less controversial *procedural* approach

to the admission of prior sexual history evidence. Finally, I discuss the basic constitutional issues associated with evidentiary reform of rape laws and review their current status in the appellate courts.

A JURY SIMULATION APPROACH TO EVIDENTIARY REFORM

Although experimental simulation studies of juror and jury behavior have proliferated over the last decade as the field of legal psychology has flourished (see Davis, Bray, and Holt, 1977; Elwork, Sales, and Suggs, forthcoming; Saks and Hastie, 1978), the external validity and generalizability of much of this simulation research to actual courtroom dynamics and legal policy has been deservedly questioned. Bermant et al., (1974), for example, have noted problems of "structural verisimilitude" (e.g., the weak realism of the setting in which subjects are asked to behave as jurors) and "functional verisimilitude" (e.g., the discrepancy between the simulated jury model and actual jury functioning under comparable conditions) often associated with jury simulation research. In addition, Vidmar (1979: 97) has questioned the "conceptual verisimilitude" of jury simulation research: "How much does the problem under investigation correspond to a problem as it would be viewed from a knowledgeable legal perspective?"

Any researcher who decides to use the simulation methodology must make some important decisions about structural, functional, and conceptual verisimilitude. Several years ago, for example, when I initially formulated my research on evidentiary reform of rape laws, I realized that *in situ* trial proceedings and pertinent archival data on actual jury decision-making in rape cases were simply unavailable. It was clear to me that access to "real-world" legal decision-making was unquestionably desirable, but not always possible (Konečni and Ebbesen, 1979). Therefore, I decided to use the jury simulation approach in the belief that one could, in fact, identify criteria for "good" simulations which, if fulfilled, would enhance the external validity and policy relevance of the research on evidentiary reform. Weiten and Diamond (1979) and Bray and Kerr (1979) more recently have discussed in depth such criteria and how they contribute to the degree of generalizability from simulation research to the courtroom and beyond. Before I discuss our research findings, therefore, it is important to evaluate our use of the simulation approach in light of some of these concerns. For convenience, I have organized this discussion in terms of Weiten and Diamond's (1979) six threats to the external validity of jury simulation research: inadequate sampling, inadequate trial simulations, lack of jury deliberations, inappropriate dependent measures, the issue of role-playing, and lack of corroborative field data. While these criteria fall under the rubric of structural and functional verisimilitude, later in this chapter I shall also consider the question of conceptual verisimilitude.

First, previous jury simulation research has been criticized for relying on the ubiquitous college sophomore rather than on samples of qualified adult jurors who serve on actual juries. Accordingly, and at considerable expense, my colleagues and I decided to use qualified adult jurors in all of our simulation studies. For example, participants in our first simulation study were selected from two independent samples of prospective jurors from the Minneapolis-St. Paul metropolitan area. Some of the participants had not previously served jury duty with the Fourth Judicial District Court but were eligible for jury duty at the time that my colleagues and I randomly sampled them from the county voter registration file. Other participants were selected from a second sample of jurors who had served on a District Court criminal jury (we excluded those jurors who had served on cases involving sexual assault). These jurors were typically white, middle-class and middle-aged with at least a high school education.

A second methodological concern about jury simulation research involves the adequacy of the trial stimulus presented to jurors. Whereas a number of experimental simulation studies have used rather impoverished written case materials, which obviously do not mirror the complexity of actual trials and therefore lack external validity, we decided to construct and use a two to two and one-half hour professionally produced videotape trial (hereafter referred to as State v. McNamara). We first edited the transcript of an actual rape trial involving a typical consent defense and then, with the assistance of professional actors, actresses, videotape technicians, and two experienced trial attorneys, we produced various versions of State v. McNamara in accordance with our research designs. Prior to filming, we conducted several workshops for this production team and my research staff with knowledgeable rape crisis counselors and attorneys to better understand and portray the phenomenology

of the rape victim's experience with the criminal justice system culminating in her courtroom appearance. These workshops with practitioners were especially helpful in enhancing the realism of our videotaped trial proceedings. In addition, we made sure that all our videotaped trials included key procedural features of an actual trial: opening remarks from the judge, opening arguments from the prosecution and defense attorneys, the victim's testimony and cross-examination, closing arguments, and the judge's final charge to the jury. Finally, all jurors were shown State v. McNamara in a realistic setting (the courtrooms at the University of Minnesota's Law School) rather than in a laboratory setting.

A third threat to external validity, according to Weiten and Diamond (1979), is the exclusion of jury deliberations in many simulation studies that have aspired for applied significance. Therefore, the simulation research conducted by my colleagues and I included six-person jury deliberations for a maximum of fifty minutes with a unanimous verdict decision rule requirement. The inclusion of jury deliberations was indeed an important variable. In one of our studies (Borgida and White, 1980a), for example, we found a strikingly different pattern of results for deliberating and nondeliberating jurors on verdict and other measures as a function of the type of exclusionary rule employed. Whereas verdicts for nondeliberating jurors did not differ as a function of the type of rule, those jurors who deliberated were more convinced of the defendant's innocence in Common Law trials and more convinced of the defendant's guilt in Radical Reform trials. A comparison of straw votes and final verdicts in this study underscored the significant impact of the deliberation process. Analysis of variance on the proportion of guilty straw ballots indicated that under the Common Law, 31 percent of the straw ballots recommended guilt, 43 percent recommended guilt under the Moderate Reform, and 50 percent recommended guilt under the Radical Reform ($p < .01$). After deliberation, however, the proportion of guilty verdicts decreased to 19 percent in the Common Law trials, remained almost constant under the Moderate Reform (42 percent), and increased to 69 percent in trials governed by the Radical Reform ($p < .001$). These data, as we have argued, provide further support for group polarization effects in jury decision-making (Bray and Noble, 1978; Myers and Lamm, 1976) and underscore the importance of including jury deliberations in simulation research.

A fourth drawback to the external validity of simulation research is the inclusion of inappropriate dependent measures such as probability-of-guilt ratings or sentencing measures. Jurors in our simulation research, however, were required to make more legally appropriate dichotomous (guilty/not guilty) judgments.

It is clear thus far that my colleagues and I made certain logistical decisions to enhance the external validity of our findings. But it is equally clear that the external validity of simulation research, including our own, may be constrained by a reliance on role-playing and any differences which may exist between decision consequences in actual and simulated jury decision-making. Although the strength and direction of role-playing biases in our research is unclear, and although jurors in our studies consistently report very high levels of interest and task involvement, role-playing must be acknowledged as a threat to the external validity of our findings.

Finally, jury simulation researchers should recognize that the external validity and applied value of simulation findings can be enhanced by corroborative field data. In advocating the use of archival data collection methodologies, for example, Konečni and Ebbesen (1979: 65) have questioned the applied value and policy relevance of simulation research: "to the extent that a simulation is trying to discover something about the operation of the real-world legal system, how can one know whether a simulation is 'bad' and which of several simulations is the 'best,' without actually collecting data not only in naturalistic settings and with 'real' participants in the legal system, but on 'real' legal decisions?"

While "real-world" data on actual jury deliberations in rape trials was not possible to collect, recent research by Marsh and Caplan (1979) on the impact of Michigan's Radical Reform statute, enacted in 1975, does provide some corroborative support for the validity of our simulation findings on evidentiary reform of rape laws. Marsh and Caplan did not study jury deliberations in rape cases, but rather conducted 175 face-to-face interviews with police, prosecutors, defense attorneys, judges, and rape crisis counselors in five Michigan counties in 1978, and did a time-series analysis of sexual assault statistics in Michigan from three years before Michigan reformed its criminal sexual assault code to two years after. The comprehensive interviews with these criminal justice system respondents assessed reactions to the new law and perceptions of a variety of related issues including procedures for issuing arrest warrants, plea bargaining, pretrial activities, *in camera* proceedings, trial tactics, and evidence requirements.

The new law in Michigan, according to Marsh and Caplan, has in-

creased the likelihood that assailants will be arrested, prosecuted, and convicted. While arrests for aggravated assault increased 17 percent between 1972 and 1977, for example, there was a 62 percent increase in arrests for forcible rape during the same period. Most significantly, the conviction rate for the most brutal type of rape (first degree criminal sexual assault) increased 80 percent between 1974 and 1976, the year after the statute was adopted, although the prosecution of cases based on lesser degrees of sexual assault was still not likely. Marsh and Caplan report that their respondents largely attributed the increase in rape convictions since the law reform to the new law's prohibition of evidence on the victim's past sex life.

It would appear, then, that at least in Michigan, those officials of the criminal justice system who are close to and involved in the processing of sexual assault cases have reason to believe that the new law is having an impact. While obviously these officials did not base their judgments on knowledge of actual jury decision-making in rape cases, a substantial percentage of them attributed the increased rate of conviction and reduced courtroom harassment of rape victims to the new law's evidentiary prohibition on the admission of the complainant's prior sexual history. As I shall discuss in the next section, these data on conviction rates, as well as the predictive importance of social attitudes toward women and rape, generally corroborate the results of our jury simulation studies on the impact of evidentiary reform.

STUDY ONE: JUDGMENTAL BIAS AND STATUTORY REFORM

With our first jury simulation study, my colleagues and I tested the reformist assumption that evidence of prior sexual history is inflammatory and prejudicial and that the admission of such evidence in a rape trial biases juries to acquit the defendant on issues not directly relevant to their guilt (Borgida and White, 1978, 1980a). Qualified adult jurors sampled randomly from the Minneapolis-St. Paul metropolitan area were shown one of six different versions of our videotaped rape trial (State v. McNamara) which presented a classic consent defense. That is, in each version of the trial the complainant maintained that she had been forcibly raped and the defendant claimed that the complainant had voluntarily consented to sexual intercourse.

Particularly in rape cases such as State v. McNamara, certain features of a fact pattern (e.g., location of the assault, presence or absence of physical force, evidence of resistance, prior relationship between the complainant and defendant) may combine to suggest to jurors complainant consent or contributory behavior. The presence of such features in any given case could reduce the likelihood of conviction, whether or not evidence of prior sexual history had been admitted, because jurors may come to believe that the complainant should "assume some of the risk" of the rape (Kalven and Zeisel, 1966).

Therefore, one-half of the State v. McNamara trials embodied an *Improbable Likelihood of Consent* fact pattern and the other half embodied a *Probable Likelihood of Consent* fact pattern. The same core scenario was included in both fact patterns, but certain critical features were varied between fact patterns. Whereas the complainant and defendant "hardly knew each other" in Improbable Likelihood of Consent, for example, they were "very close friends" and had been physically affectionate with one another in Probable Likelihood of Consent. Testimony by the defendant about the complainant's failure to resist was emphasized in Probable Likelihood of Consent. Furthermore, the complainant and defendant had met earlier on the evening in question at a bar-disco in Probable Likelihood of Consent, whereas in Improbable Likelihood of Consent they both just happened to visit the trailer home of a mutual friend earlier in the evening. It is important to note that pretest ratings of these two fact patterns clearly supported the two different levels of likelihood of consent. In fact, the strong relationship between inferred consent and verdict in State v. McNamara suggests that the Improbable Likelihood of Consent fact pattern may be regarded as "conviction-biased" (i.e., jurors should be more likely to convict the defendant) and the Probable Likelihood of Consent fact pattern may be regarded as "acquittal-biased" (i.e., jurors should be more likely to acquit the defendant).

The type of exclusionary rule applied to evidence of the victim's prior sexual history was the second factor which was varied in State v. McNamara. In accordance with my classification of the evidentiary reforms (Borgida, 1980a), the defense testimony of a prior sexual history witness whose testimony would have been admissible was included in the *Moderate Reform* versions of both Probable and Improbable fact patterns. In the *Common Law* versions of both fact patterns, the defense also pre-

sented the testimony of a second prior sexual history witness whose testimony would only have been admissible under the Common Law rule. No prior sexual history evidence was added to either fact pattern in the *Radical Reform* versions.

In order to enhance the conceptual verisimilitude of this legal operationalization, the admissibility of prior sexual history testimony in State v. McNamara was determined by the legal criteria which define a given exclusionary rule category. And in order to corroborate our discretionary judgments based on such criteria, I asked a District Court Judge from the Fourth Judicial District Court in Minneapolis and a veteran prosecutor from the County Attorney's Office, both of whom had extensive experience in sexual assault cases, to view State v. McNamara and rule on the admissibility of the prior sexual history testimony. Their rulings independently corroborated our legal operationalization.

Thus, our first simulation experiment examined the extent to which the types of legal rules affect not only juror perceptions of the complainant and defendant, which are so central to rape trials, but also the conviction rate in State v. McNamara. In addition, the study examined the extent to which the varying degrees of implied victim consent, which often characterize rape cases processed through the criminal justice system, moderate the efficacy of the different exclusionary rules. We generally expected an interaction between type of exclusionary rule and likelihood of consent. Since Improbable Consent fact patterns are less suggestive about the complainant's moral character and propensities than Probable Consent fact patterns, juror verdicts should reflect the highest likelihood of conviction when the restrictive Radical Reform rule governed the Improbable Likelihood of Consent fact pattern.

In State v. McNamara, we found that jurors were reluctant to convict the defendant when any testimony about the complainant's third party prior sexual history was introduced by the defense in support of the consent defense. As shown in Figure 1, only the Radical Reform rule, when applied to an Improbable Consent fact pattern, increased the likelihood of conviction as measured by a combined verdict and certainty of verdict scale (higher scores reflect greater certainty of a guilty verdict and lower scores reflect greater certainty of a not guilty verdict), $p = .008$. By contrast, the admission of third party prior sexual history testimony under the Moderate Reform or Common Law, in an otherwise conviction-biased case, was clearly detrimental to the prosecution's case. Neither

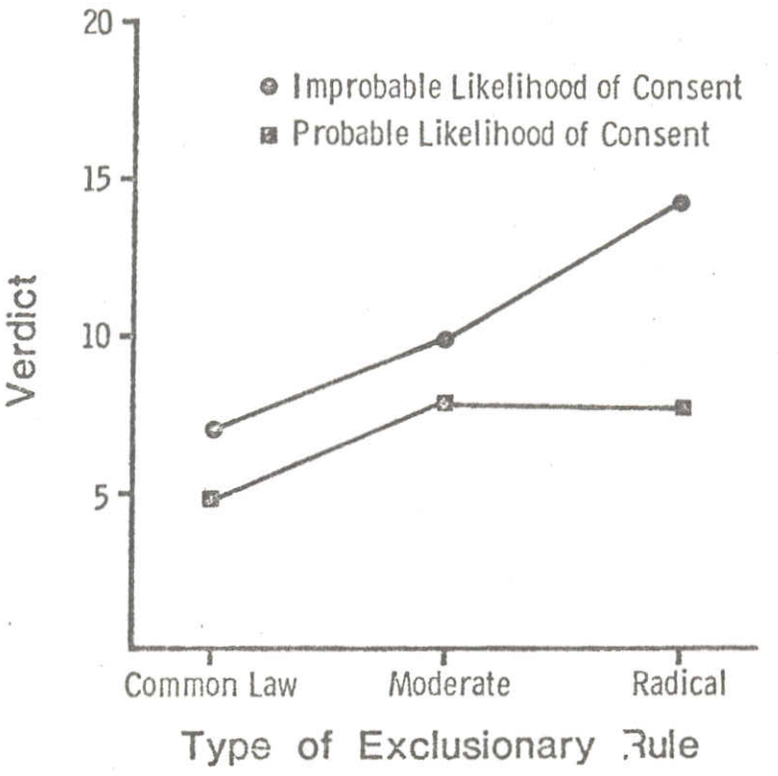

FIGURE 1 Juror Verdict as a Function of Type of Exclusionary Rule and Likelihood of Consent

type of legal reform enhanced the conviction rate when the trial fact pattern was acquittal-biased, i.e., conveyed probable consent.

In general, when third party prior sexual history evidence was introduced in State v. McNamara, jurors readily inferred complainant consent (which in turn was correlated $-.82$ with verdict), more carefully and unfavorably scrutinized the complainant's character than the defendant's character, attributed more responsibility to the complainant, and even

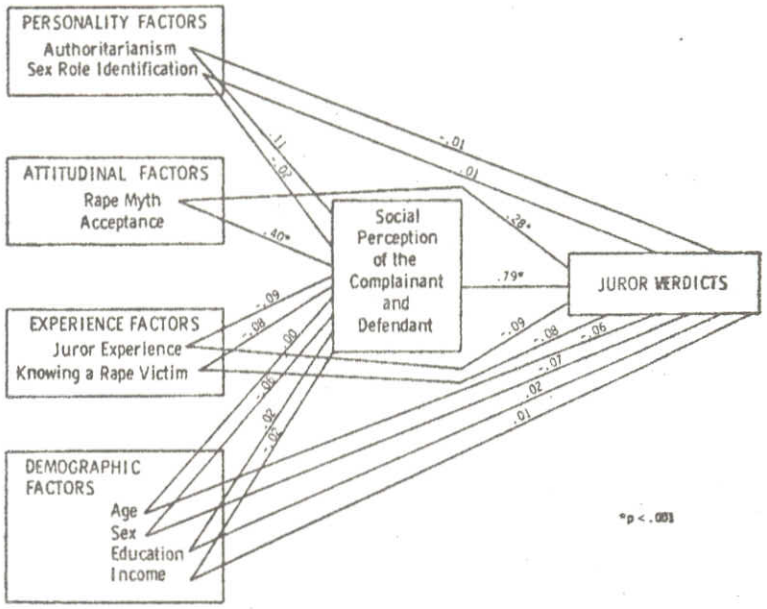

FIGURE 2 Path Model with Beta Coefficients Between Predictor Variables and Juror Verdicts—Study One

downgraded the skill and competence of her attorney. Rather than weigh the facts in this particular case, jurors seemed to use the complainant's prior sexual history with men other than the accused to impeach her credibility as a prosecuting witness and by inference to impugn her veracity. Such results suggest that the admission of third party prior sexual history, particularly in a case which is otherwise conviction-biased, affects the accuracy of the truth-finding process in a manner prejudicial to the complainant. Only the strict statutory prohibition or Radical Reform in this jury simulation study led to the higher conviction rate associated with the Improbable Consent fact pattern.

In order to examine further the notion that prior "promiscuity imports dishonesty," that jurors perceive a direct causal link between complainant credibility and culpability in State v. McNamara, a path analysis was conducted.

The direct causal effects of complainant credibility and various personality, attitudinal, experiential, and demographic predictors on individual juror verdicts, as well as the direct causal effects of these predictor variables on complainant credibility, are presented in Figure 2. It may be seen from the standardized regression coefficients presented in Figure 2 that the best predictor of verdicts in State v. McNamara was not jurors' socioeconomic characteristics, or their prior jury experience or acquaintance with a rape victim or, for that matter, their authoritarianism or sex role identification. The strongest predictor of verdicts was jurors' perceptions of the complainant's credibility which, as our analysis of variance results show, is directly influenced by the type of exclusionary rule governing State v. McNamara (beta = .79, $p < .001$, zero-order $r = .80$, $p < .001$.) In other words, 64 percent of the verdict variance was accounted for by the complainant credibility predictor.

In addition to the central importance of complainant credibility, Figure 2 shows that jurors' attitudes toward women and rape also reliably predict verdicts rendered in State v. McNamara (beta = .28, $p < .001$, zero-order $r = .34$, $p < .001$). High scores on the Rape Myth Acceptance Scale in this case are associated with a *low* endorsement of rape myths. That is, jurors whose belief systems incorporate a high number of stereotypical beliefs and cultural myths about rape (e.g., "In the majority of rapes, the victim is promiscuous or has had a bad reputation") were much less likely to find the defendant in State v. McNamara guilty of sexual assault. Such jurors apparently maintain rather restrictive intuitive definitions of what constitutes rape (Burt, forthcoming) and therefore were more likely to acquit the defendant in State v. McNamara.

STUDY TWO: PROCEDURAL REFORM THROUGH LIMITING INSTRUCTIONS

In addition to the research on statutory reform of rape laws discussed in the previous section, my colleagues and I were also interested in whether procedural reforms, such as special jury instructions, might counteract the prejudicial effects associated with the admission of prior

sexual history evidence in consent defense rape cases. In Common Law or Moderate Reform jurisdictions, for example, it has been suggested that a trial judge could offer a compensatory limiting instruction which would call the jury's attention to the appropriate and inappropriate use of such evidence (Berger, 1977; Livermore, 1978). Limiting instructions are commonly used in cases where prior criminal conviction has been admitted into evidence for purposes of establishing the credibility of a witness.

But psychological research on the effectiveness of such admonitions has been equivocal at best (Saks and Hastie, 1978; Lind, forthcoming). Archer et al. (1979), for example, have shown that a judicial instruction which focused attention on the facts of the case successfully attenuated the effects of a defense attorney's empathic appeal to jurors. In contrast, Doob and Kirshenbaum (1972) have shown that jurors do not heed limiting instructions with respect to evidence of prior criminal conviction (see also Doob, 1976). Previous research on the impact of judical instructions generally suggests three criteria which could affect the viability of a procedural reform approach in rape cases based on the use of limiting instructions.

One factor which may constrain the effectiveness of compensatory limiting instructions is that standard jury instructions are characteristically overburdened with legal jargon and difficult for the average juror to comprehend let alone use appropriately (Danet, 1980). Charrow and Charrow (1979), for example, randomly selected qualified jurors who were asked to listen to audiotaped judicial instructions in a civil trial. Using a paraphrasing recall technique, Charrow and Charrow showed that jurors' paraphrasing of the instructions included only about one-third of the linguistic units in the original instructions. Elwork, Sales, and Alfini (1977) also have shown that the comprehensibility of judicial instructions may be a factor in their appropriate use (see also Sales, Elwork, and Alfini, 1977).

A second factor which may limit the effectiveness of procedural reform through limiting instructions is the timing of their presentation in the flow of the trial proceedings. The traditional practice has been to present the law to the jury after the attorney's closing arguments at the end of the trial, rather than at the beginning of the trial. Although the use of preliminary pretrial instructions are at a trial judge's discretion (McBride, 1969), the frequency of their use has been constrained by a concern that juror decision-making may overemphasize the issues raised in such preliminary instructions. However, the risk of overemphasis might be justified if the *pro forma* approach to instructions actually hinders the extent to which jurors will be triers of the facts *and* the law.

Concerns about the timing of instructions are not unprecedented. Twenty years ago, for example, in arguing for the use of preliminary trial instructions, Judge Prettyman (1960: 1066) questioned a juror's ability to "go back over a stream of conflicting statements of alleged facts, recall the intonations, the demeanor, or even the existence of the witnesses, and retrospectively fit all these recollections into a pattern of evaluation and judgment given him for the first time after the events . . . The fact of the matter is that this order of procedure makes much of the trial of a lawsuit mere mumbo jumbo." Similarly, Sales, Elwork, and Alfini (1977) have argued that it is unreasonable to expect jurors to selectively recall and evaluate all of the appropriate evidence after the judicial instructions are explained at the end of the trial.

A more recent study by Kassin and Wrightsman (1979) provides further support for the importance of timing of judicial instructions. College student jurors watched a videotaped reenactment of a criminal case in which the defendant was charged with stealing a car and transporting it across state lines. Judicial instructions on the requirements of proof (presumption of innocence, burden of proof, reasonable doubt) were included either at the end of the trial or before the evidence was presented. A third control condition did not include judicial instructions regarding requirements of proof. Kassin and Wrightsman found that jurors who received judicial instructions before the evidence were less likely to convict the defendant than jurors who received no instructions, whereas jurors who received the instructions after the trial did not differ in their verdicts from jurors who received no instructions. Although recall of case-related facts was high for all jurors, jurors who received instructions after the trial demonstrated poorer recall than jurors who were preinstructed.

The type of limiting instruction presented to the jury is the third aspect of a procedural reform approach in rape cases which we felt was important. The pervasiveness of the prejudicial effects associated with prior sexual history evidence, so clearly demonstrated in our first jury simulation study, may not be amenable to a simple limiting instruction on appropriate or inappropriate usage. Once beliefs about the complainant have been formed and a disparaging *persona* has been evoked, there

is a greater likelihood that the trial will be diverted on an emotional, moral tangent. But limiting instructions which inform jurors not only that such reasoning is inappropriate, but also explain circumspectly (and within legal bounds) the nature of the bias associated with prior sexual history evidence, may be more effective in negating prejudicial effects. Research on lay inference, for example, has found that a concrete, thorough discrediting or "process debriefing," which addresses the cognitive mechanisms underlying belief perseverance, effectively eliminates biased or erroneous impressions and beliefs (Nisbett and Ross, 1980; Ross and Lepper, 1980).

Thus, to examine the effectiveness of a procedural reform approach under the Common Law and Moderate Reform, my colleagues and I modified State v. McNamara to incorporate two of the previously discussed factors which may affect the use of limiting instructions: type of instruction and the timing of the judge's instructions (Borgida and White, 1980b). Adult jurors, 284 in all, were recruited from the Minneapolis-St. Paul metropolitan area by letters sent to randomly selected university alumni and individuals in the county juror pool, or through ads in the university daily newspaper. The juror sample was predominantly white, relatively young and well-educated, middle-class, and 56 percent of the jurors were female.

Half of our qualified jurors received a compensatory limiting instruction based on Minnesota rules for criminal procedure and federal guidelines for jury practice and instructions (Limiting Instructions Only). The other half also received a limiting instruction, but one which specifically addressed the bias associated with admission of prior sexual history evidence (Process Instruction). Both types of instructions were written in comprehensible language which minimized legal jargon. Jurors in both of these conditions were generally cautioned that testimony about the complainant's prior sexual history does not prove that she consented to sexual intercourse with the defendant in this particular case. Jurors in both conditions were reminded that their moral approval or disapproval of the complainant's past sexual conduct was not relevant to their determination of her consent in this case. Jurors who received the Process Instruction, however, also were specifically told that:

> Some people wrongly assume that a woman who has consented to sexual relations in the past is more likely to have consented to sexual relations on a particular occasion like the one in this case. However, the fact that a woman has engaged in sexual relations with one man, or with several, does not prove that she consented to the act in issue. This is important to keep in mind because such beliefs may unfairly prejudice your assessment of the evidence in this case. Once such impressions of the complainant's moral character are formed, subsequent considerations of the evidence may no longer be as impartial as they should be.

An independent control group of jurors from the same population received traditional pattern jury instructions from the judge (Pattern Instructions) which did not call attention to the prior sexual history evidence.

In addition, timing of the instructions was manipulated such that one-third of the jurors received limiting instructions only at the end of the trial; one-third at the beginning as well as at the end of the trial; and the final third at the beginning, just prior to the sexual history testimony, *and* at the end of the trial. The case facts presented in all of these conditions were based on the improbable likelihood of complainant consent fact pattern used in the first simulation study (Borgida and White, 1978, 1980a). After viewing the modified State v. McNamara trial, jurors deliberated in four- to seven-person groups until a unanimous verdict was reached or until 50 minutes had elapsed. Jurors then rendered verdicts and completed a questionnaire which assessed their recall for the law and judgments about the litigants' character and behavior. Various demographic, personality, experiential, and attitudinal measures also were collected.

My colleagues and I expected to find that the prejudicial effects associated with the admission of prior sexual history would be reduced more effectively with the Process Instruction than with the Limiting Instruction Only, especially in Common Law trials where the prejudicial effects are so apparent. In Moderate Reform trials, however, where the prejudicial effects are already constrained by an exclusionary rule, we reasoned that the two types of instructions should be less differentially effective. Moreover, consistent with the importance of the timing of such instructions during the trial proceeding, we expected that prejudicial effects would be most effectively reduced when either type of limiting instruction was presented at the beginning of the trial, along with the prior sexual history testimony, and at the end of the trial. Let us consider the main results of this second jury simulation experiment.

First, contrary to our expectations, the Process Instruction was not as

effective in reducing prejudice as the Limiting Instruction Only. The Limiting Instruction Only was more likely to increase defendant guilt than the Process Instruction. One possible explanation for this relative failure of the Process Instruction is that jurors may have been more confused by the Process Instruction's "legal over-kill" orientation and, as a result, they may not have understood the implications of these instructions for the prior sexual history testimony which they heard during State v. McNamara. If jurors were confused by the Process Instruction, however, the recall data did not reflect such confusion.

A second, more compelling explanation for the failure of the Process Instruction is that jurors were more likely to focus their attention on the Process Instruction and to perceive the Process Instruction as a greater threat to their decision-making autonomy as "triers of the facts." The Process Instruction, in other words, may have created some psychological reactance (Brehm, 1966; Wicklund, 1974). Wolf and Montgomery (1977), for example, have shown that warning jurors to disregard certain types of evidence actually may lead to increased use of that evidence. Jurors in our study may have perceived the Process Instruction as a stronger threat to their decision freedom than the Limiting Instruction Only, and thus may have reacted against the instructions and the complainant's case by making more, rather than less, use of the prior sexual history testimony, obviously to the defendant's advantage. In fact, we found that jurors perceived the complainant as less credible and more responsible for the sexual assault when they received the Process Instruction.

By contrast, timing of the limiting instructions proved to be a more important feature of the procedural reform approach that we operationalized. The conviction rate in State v. McNamara was improved when limiting instructions were introduced at three different points in the trial proceeding: in the judge's opening remarks to the jury before the trial evidence was presented, just prior to the presentation of prior sexual history testimony, and in its traditional location at the end of the trial in the judge's final charge to the jury. Not surprisingly, such placement of limiting instructions was particularly effective in Common Law trials where prejudicial effects were more prevalent and damaging to the complainant's case. For example, when limiting instructions were thrice presented in Common Law trials, the complainant was perceived as more credible and less responsible for the sexual assault than the defendant,

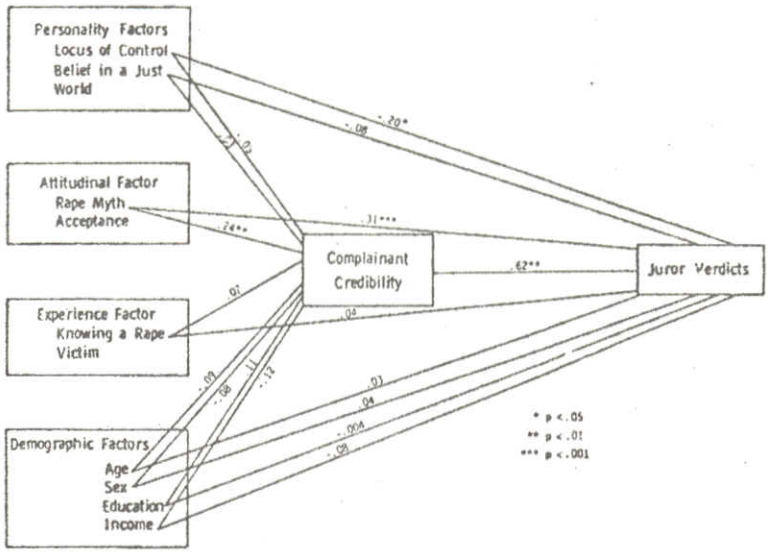

FIGURE 3 Path Model with Beta Coefficients Between Predictor Variables and Juror Verdicts—Study Two

and jurors were considerably more sympathetic to the complainant's plight and less likely to infer complainant consent. In addition, mean accuracy of total recall (which includes trial facts, the judge's general instructions to the jury, and recall for the limiting instructions) was higher in Common Law trials when limiting instructions were presented three different times.

The results from our second simulation study also provide further support for the central importance of juror perceptions of complainant credibility. The path analysis presented in Figure 3 shows the direct causal effects of complainant credibility and various personality, attitudinal, experiential, and demographic predictors on juror verdicts, as well as

the direct causal effects of these predictor variables on complainant credibility. It may be seen in Figure 3 that the best predictor of juror verdicts, again, is complainant credibility (beta = .62, $p < .001$). The more credible the complainant is perceived vis-à-vis the defendant, the higher the certainty of defendant guilt. The zero-order correlation between verdict and complainant credibility ($r = .65$, $p < .001$) indicates that, overall, 42% of verdict variance can be accounted for by the complainant credibility predictor.

Thus, to the extent that statutory and procedural reforms alter juror perceptions of complainant credibility, as our two simulation studies strongly suggest, noticeable improvement in the conviction rate for a consent defense rape case like State v. McNamara can be expected. Although the timing (rather than the type) of limiting instruction in our second simulation study proved to be effective in Common Law versions of State v. McNamara, this procedural reform tactic was less effective when a statutory reform also governed the evidence presented at trial. Evidentiary screening through statutory reform may be preferable to procedural reforms like the timing of limiting instructions (Borgida and White, 1980b). The adoption of unique procedural reforms, for example, however effective they might be, may only serve to accentuate the distinctive status of rape in the criminal law (Berger, 1977). On the other hand, the constitutionality of evidentiary screening through statutory reform has been challenged in several appellate courts. The constitutional questions associated with statutory reform as well as recent appellate rulings are discussed in the next section.

CONSTITUTIONAL CONSIDERATIONS

As I mentioned in the first section of this chapter, statutory but not procedural reforms raise a fundamental and complex legal question about the need to strike a balance between the interests of a rape victim and the constitutional rights of the accused. On the one hand, a rape complainant must be protected from humiliation in the courtroom and unnecessary intrusions into her private life. The state has a legitimate interest in protecting the complainant so that other victims are not discouraged from reporting rapes and assisting in the prosecution of accused rapists. Furthermore, the state must be sure that juries decide the guilt or innocence of a man accused of rape on the basis of relevant facts, rather than relying upon prejudiced judgments about the complainant's morality or "unchaste" character.

On the other hand, it is the right of the defendant to present a defense, to call witnesses on his behalf, to confront and cross-examine all witnesses against him; in short, to have due process of law. If the defendant can show that his accuser consented to have sexual relations with him, then that constitutes a complete defense to a charge of rape. The defendant is therefore entitled to offer any evidence which is arguably relevant to the issue of consent. Critics of the reform statutes point to the rules of evidence and argue that prior sexual history is relevant if it tends, however slightly, to increase the probability that consent was given. If the complainant's prior sexual history is relevant, a statute which denies the defendant the right to cross-examine the witness on that subject denies the defendant his constitutional right of confrontation.

Several U.S. Supreme Court decisions have emphasized the importance of the constitutional right to confrontation and cross-examination when a statutory privilege or evidentiary rule conflicts with that right. In Chambers v. Mississippi (1973), for example, the Court held that the state's "voucher rule," which prohibited impeaching one's own witness, could not be invoked to prevent the defendant from cross-examining an adverse witness called by the defense. The Court employed a "totality of the circumstances" test (in which the legitimate interests of the state are weighed against the constitutional rights of the defendant) and concluded that the defendant had not received a fair trial. It is important to note that the Court strictly limited its holding to the facts of the case, and stated that the right of cross-examination is not absolute and might yield to other legitimate interests in the criminal trial process.

In Davis v. Alaska (1974), a statutory shield prohibiting cross-examination of a juvenile regarding his adjudication as a juvenile offender was invoked at trial. The defendant was barred from asking the juvenile, a key witness for the state, about his involvement in the crime being tried or about his probationary status. The defense theory was that the juvenile had a motive to lie and to implicate the defendant in order to divert suspicion from himself. The Supreme Court held that the state's interest in protecting juvenile offenders from embarrassment and damage to reputation was outweighed by the critical need of the defendant for testimony upon which to build his defense. Again, the Court limited the holding by

indicating that there is no absolute right to cross-examine every witness in order to impeach credibility with evidence of past delinquency or criminal acts.

In order to decide whether the rape shield statutes violate a defendant's right of confrontation, the balancing test suggested in Davis v. Alaska (1974) may be applied. Certainly the state has a legitimate interest in protecting rape complainants at trial. Is the defendant's need to present evidence of the victim's prior sexual history enough to outweigh the state's interest? Herman (1977: 14), for example, has suggested rape cases in which it is asserted that the complainant's prior sexual history is highly relevant and therefore vital to the defense:

> (1) The complainant testifies that she met the defendant at a singles bar, danced and drank with him, and accepted his offer to drive her home. She testifies that at the front door he refused to leave, forced his way into her apartment, and raped her. The defendant wants to prove that the complainant had previously consented to intercourse with casual acquaintances she had met at singles bars. Is the evidence relevant?
>
> (2) The complainant, a juvenile, testifies that she was raped by her brother-in-law. The defendant wants to prove that the complainant previously had consented to intercourse with others; that she had been upbraided for her conduct by her sisters, who threatened to report her to juvenile authorities; and that she responded by saying that she would then charge her brother-in-law with rape. Is the evidence relevant? Does it tend, even slightly, to increase the probability that the complainant had a motive for making a false accusation of rape?

Most Moderate Reform statutes probably would admit the prior sexual history evidence in both of these cases. Radical Reform statutes probably would exclude the evidence.[4] Critics of the reform statutes argue that in each of the above cases, the defendant's right to produce the prior sexual history evidence outweighs the state's need to suppress it. Surely the Moderate Reform statutes do not suffer from a constitutional infirmity if the evidence would likely be admitted. But does the Radical Reform statute deprive the defendant of a constitutionally protected right? One analysis (Indiana Law Review, 1976: 440) has suggested that the second case outlined above poses a difficult question for a Radical Reform statute: "It would probably be constitutionally impermissible to allow the statute to be used to exclude probative motive evidence or impeachment evidence where the victim may have committed perjury. On the authority of Davis, however, the statute could be properly utilized. The statute in Davis was not declared unconstitutional but was merely set aside in order to protect the defendant's right to confrontation."

THE NEW RAPE LAWS IN THE COURTS

The rape shield statutes thus far have fared remarkably well in the appellate courts. Both Moderate and Radical Reform statutes have been upheld. To date, I am unaware of any court which has declared a shield statute unconstitutional.

Moderate Reform statutes have been examined by appellate courts in New York, Washington, New Jersey, and Kansas. In each case the court recognized the state's legitimate interest in protecting the privacy of the rape complainant and concluded that the exclusion of prior sexual history evidence did not deprive the defendant of any constitutionally protected right.

A brief examination of two of the cases emphasizes the valuable function of the shield statutes. In fact, it is disturbing to realize that without the new statutes, the evidence upon which the appeals were based might have been admitted at trial. For example, the defendant in People v. Smith (1977) claimed that he had been denied the right of confrontation because the trial court excised a statement from hospital records admitted at trial which indicated that the complainant was on birth control pills. The defendant argued that the evidence was relevant to his claim that the complainant had consented, in spite of the fact that the young victim had been violently beaten during the incident.

In State v. Blum (1977), the defendant was convicted of violently raping the complainant. His appeal was based upon the trial court's decision under the shield statute to prohibit testimony about the victim's prior sexual relationship with the defendant's cousin. The Court recognized that in some situations, evidence of the victim's sexual "misconduct" might be so highly relevant and material that it should be admitted, but in this case the trial court properly excluded the testimony. In light of the fact that the complainant was scratched and bruised, her clothes were torn, furniture was overturned and broken, and the victim was hysterical when she finally reached help, the trial court determined that the complainant's prior relationship with the defendant's cousin was not particularly probative of consent. On the other hand, evidence of the prior relationship may have had a prejudicial impact on the jury. The decision

in State v. Blum (1977) is typical of the decisions in Moderate Reform jurisdictions. If the trial court decides to exclude prior sexual history, it appears that the appellate court will support that decision. The cases which have been decided to date under the Moderate Reform statutes have not really presented a serious constitutional challenge.

It is no doubt more significant that the Radical Reform statutes have been able to withstand the constitutional challenge. Decisions in California, Oklahoma, Louisiana, and Michigan have refused to set aside Radical Reform statutes as unconstitutional. The opinions uniformly express the view that evidence of a complainant's prior sexual history is not probative of her credibility or her tendency to consent, and that such evidence, as the data from our first simulation study suggests, is highly prejudicial. In the words of the California court (People v. Blackburn, 1976: 866–867): "The relevance of past sexual conduct of the alleged victim of the rape with persons other than the defendant to the issue of her consent to a particular act of sexual intercourse is slight at best. The historical rule allowing the evidence may be more a creature of a one-time male fantasy of the 'girls men date and the girls men marry' than one of logical inference."

The courts continue this analysis by conceding that confrontation and cross-examination are fundamental rights, but that "there is no fundamental right to ask a witness questions that are irrelevant. Inquiry on cross-examination into the rape victim's sexual behavior with third persons is not relevant" (People v. Thompson, 1977). The Michigan court in People v. Thompson also notes that although one can imagine cases in which the complainant's prior behavior with persons other than the defendant is arguably probative of consent, "the probative value would not outweigh the prejudice to society and the criminal justice system of the consequences of its admission." Furthermore, it is significant that the court in Michigan, one of the first states to enact a rape shield statute, has so clearly stated its position on the constitutionality of the Radical Reform law. The court's reasoning may quiet the constitutional debate in Michigan and perhaps elsewhere.

CONCLUDING REMARKS

Psychological research on legal processes certainly has the potential to play an important role in the development of legal policy and procedural change in the criminal justice system (Loftus and Monahan, 1980; Monahan, forthcoming; Saks, 1978; Tanke and Tanke, 1979). Social psychological research on the psychological and legal assumptions of statutory reform of rape laws is no exception. Such research can contribute to discussion in a policy debate and/or contribute to a policy shift (Hennigan, Flay, and Cook, 1980). In the case of evidentiary reform of rape laws, however, most states had implemented some type of statutory reform prior to dissemination of the findings discussed in this chapter. But the judicial reform commissions in two of the four remaining Common Law states (Virginia and Connecticut) have indeed cited our simulation research in recent efforts to persuade their respective state legislatures to revise their rape laws dealing with the admission of third party prior sexual history evidence. Thus, in at least these two states our research on evidentiary reform has contributed to the policy debate. Whether the research is associated with successful policy shifts in these two states obviously awaits the final legislative outcome of these efforts.

Perhaps an even more important role for the research discussed in this chapter is in the future appellate debate on the constitutionality of the evidentiary reforms. Although several appellate decisions thus far have upheld the constitutionality of the new rape shield laws, legal scholars continue to argue that the absolute prohibition of even third party prior sexual history in some cases may deprive the defendant of his constitutional rights (Tanford and Bocchino, 1980). Defenders of the statutes continue to respond that evidence of a complainant's prior sexual history is not probative of consent nor is it relevant to any other issue. A defendant has no constitutional right, in this view, to present evidence that is arguably probative and highly prejudicial. "The problem," therefore, as Berger (1977: 69) has observed, "is to chart a course between inflexible legislative rules and wholly untrammeled judicial discretion: The former threatens the rights of defendants; the latter may ignore the needs of complainants." It is my belief that applied social psychological research can and should play an important role in charting the course of this constitutional debate.

NOTES

1. Nonconsent, in addition to the fact of sexual penetration, is the essential element of the crime of rape. Forcible rape is traditionally defined as an act of sexual intercourse

accomplished by a man with a woman not his wife, by force and against her will. Although specific statutory language varies considerably, the traditional elements are inevitably present.

2. Evidence of prior sexual history is typically admissible under "shield" statutes to show the source of semen, pregnancy, disease, or some other physical condition which might have been caused by someone other than the defendant. "Shield" statutes generally admit evidence of the complainant's prior sexual history with the defendant, although this may be subject to time limitations. This chapter is primarily concerned with the admissibility of the complainant's prior sexual history with persons other than the defendant.

3. Statutes in the Radical Reform category may expressly exclude prior sexual history offered to prove consent, or simply omit consent from a list of exceptions to the exclusionary rule. Exceptions to the exclusion typically include evidence of prior sexual conduct with the defendant within specific time limits; evidence showing the source of semen, pregnancy, or disease; and evidence offered to refute the complainant's claim of chastity.

4. Many Moderate Reform statutes include exceptions to the general exclusion of prior sexual history for evidence showing motive or "common scheme or plan." Even without explicit exceptions the trial court could admit the evidence if it was found to be more probative than prejudicial, a determination which of course will vary with judges. Radical Reform statutes would exclude the evidence since it is not included in any exception (see Note 2).

CASES

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