

A FEMINIST REPUDIATION OF THE RAPE SHIELD LAWS

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TABLE OF CONTENTS

I.	Introduction.....	45
II.	The Original Justifications for Rape Shield Laws	48
	A. Introduction	48
	B. The Legislative History of the Federal Rape Shield Law.....	53
	1. The Stated Goals of Rape Shield Proponents	53
	a. The American Bar Association.. ..	53
	b. The National Organization for Women.....	54
	c. Michigan Women's Task Force on Rape	55
	2. The Chauvinist Jury.....	57
	a. The Justice Department.....	57
	b. Michigan Women's Task Force on Rape	58
	c. The National Organization for Women.....	59
	d. The American Bar Association.	59
	e. American Civil Liberties Union.....	59
III.	The Myth of the Chauvinist Jury	60
	A. Mischaracterizations of <i>The American Jury</i>	61
	B. The Obsolescence of <i>The American Jury</i>	66
	C. The Post-Shield Evolution in Female Jury Service	70
IV.	The Interactive Model of Jury Education	73
V.	Proposal	78
VI.	Conclusion	80

I. INTRODUCTION

The federal government and forty-eight states currently enforce some version of a so-called rape shield law.¹ Rape shield laws generally bar defense

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attorneys from inquiring into a rape victim's sexual history.² Michigan adopted the nation's first rape shield law in 1974,³ after an unlikely coalition of feminists and "law and order" politicians organized a national consciousness-raising about the frequency of rape and the rarity of prosecution and conviction.⁴ This Article examines the original justifications for the rape shield laws and unearths flaws that have only deepened in light of legal and social developments. It concludes that feminists guaranteed the failure of a stated long-term goal—changing perceptions about female sexuality—by advancing empirically unsound and legally outdated arguments in order to win the short-term victory of passing the rape shield laws.

Part II reviews the history of rape shield laws and focuses on the legislative history of the federal rape shield law. The federal law is used as a case study; the

1. Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765 n.3 (1986). Additionally, Arizona courts judicially restrict the admissibility of sexual conduct evidence. *Id.*

2. See *id.* at 773 ("[Rape shield laws'] single common feature is a rejection of the previous automatic admissibility of proof of unchastity. Beyond that notable change, however, the statutes vary significantly in the degree to which they restrict the admissibility of evidence of the rape complainant's prior sexual conduct."). Galvin groups the statutes into four approaches. See *id.* at 812-94. The first, dubbed the "Michigan model," prohibits the use of sexual conduct evidence, but creates limited, specific exceptions. *Id.* at 812. Half of the states use the Michigan model. *Id.* at 773. Conversely, the "Texas model" gives trial courts great latitude to admit sexual history evidence using a traditional balancing of "probative value" against "prejudicial effect" standard. *Id.* at 876-77. Eleven states use the Texas model. *Id.* at 876. In the middle are the "federal model" and the "California model." See *id.* at 883, 894. The federal model essentially adopts the Michigan model, but adds a provision allowing defendants to introduce sexual history evidence falling outside one of the enumerated exceptions if doing so is "constitutionally required." *Id.* at 775; see also FED. R. EVID. 412(b)(1) (admitting evidence of the victim's sexual behavior when offered to prove someone else was the source of the semen, evidence of the victim's sexual behavior offered to prove consent, and evidence, the exclusion of which would violate the defendant's constitutional rights). Seven states use this federal model. Galvin, *supra* note 1, at 775. Finally, in the California model, sexual history evidence is barred or admitted depending on whether it is offered to prove consent or whether it is offered for credibility purposes. *Id.* Seven states follow the California model. *Id.*

3. MICH. COMP. LAWS § 750.520j (West 1991) (effective Apr. 1, 1975).

4. On the provenance of this coalition, see, e.g., Galvin, *supra* note 1, at 767.

Pressure for evidentiary reform came from an unusual and uneasy alliance of feminist organizations and law enforcement agencies. These groups persuaded legislators that in-court disclosure of the most intimate details of the rape complainant's personal life acted as a significant deterrent to the reporting and, hence, the prosecution of rape. They further maintained that such "character assassination" in open court, a common defense strategy approach essentially in forcible rape prosecutions, accounted for the high rate of acquittal in cases that proceeded to trial. Most important, a growing body of feminist literature questioned the traditional rationale that a woman's unchastity has probative value on the question of whether or not she was raped.

Id. (footnotes omitted).

arguments advanced in favor of that law were typical of the pro-shield lobbying taking place at the state level throughout the 1970s. Lessons drawn from the congressional lobbying effort and the resulting law shed light on the entire rape shield movement. This Article suggests that rape shield proponents had two distinct goals: (1) increasing rape reporting and conviction rates in the short term; and (2) proselytizing for a new view of female sexuality and female identity in the long term.⁵ In order to achieve these goals, rape shield proponents purported to offer empirical evidence documenting the phenomenon of the "chauvinist jury."⁶ According to this theory, juries in rape cases tended to acquit defendants if the victim making the allegations had been sexually active prior to the assault.⁷

Part III documents the shaky foundations underlying this theory. Proponents based the "chauvinist jury" model on the seminal work *The American Jury*,⁸ by Harry Kalven, Jr. and Hans Zeisel. This Part details how rape shield proponents misstated and mischaracterized Kalven and Zeisel's findings. It also demonstrates that Kalven and Zeisel's work was stale when the shield laws were adopted because of changes in state jury laws. The credibility of the "chauvinist jury" model has further waned in the years since the shield laws were adopted. Supreme Court cases and state statutes have succeeded in achieving gender parity on juries.⁹ This reality renders the basis for the chauvinist jury theory obsolete. Moreover, a new model of jury service—the "interactive public education" model—has emerged in the academy.¹⁰ This model suggests that repeal of the rape shield laws would force jurors to confront uncomfortable questions about the link between the victim's sexual history and consent, thereby achieving the rape shield proponents' stated goal of educating the public about modern female sexuality.

Part IV discusses the interactive model of jury education. The Framers intended the jury to serve as an institution for public education.¹¹ Top-down imposition of an orthodoxy regarding the link between sexual history and consent will stifle a potentially fruitful exchange of views between jurors. This Part argues that allowing juries to debate the relationship between sexual history and

5. See discussion *infra* Part II.B.1.

6. See *Privacy of Rape Victims: Hearings on H.R. 14666 and Other Bills Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary, 94th Cong. (1976)* [hereinafter *Judiciary Hearings*] (discussing eight bills dealing with the admissibility of a rape victim's prior sexual behavior); see also discussion *infra* Part II.B.2.

7. See, e.g., *Judiciary Hearings, supra* note 6, at 31.

8. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

9. See *infra* notes 165-96 and accompanying text.

10. See discussion *infra* Part IV.

11. See *infra* note 225 and accompanying text.

consent would actually further the feminist goal of public education about gender roles.

Finally, Part V argues that the rape shield laws should be repealed. It urges that the laws have obscured, and even blocked, feminists' stated long-term education goal by aborting a potentially edifying national dialog on female sexuality and the role of women in society.¹² It proposes alternate measures that would achieve this educational goal while accommodating the views of those who oppose the shield laws. Specifically, it proposes requiring jurors to complete special verdict forms detailing the rationale for their conclusion; and it proposes funding updated studies on male and female patterns of sexual activity, to be used by prosecutors to refute the implications of sexual history evidence.

II. THE ORIGINAL JUSTIFICATIONS FOR RAPE SHIELD LAWS

A. Introduction

In the early 1970s, a confluence of events brought the crime of rape to the top of the American political agenda.¹³ Newly politicized feminists aligned with the politically ascendant "law and order" government leaders of the Nixon era.¹⁴ Feminists had recognized that rape laws, both on their face and in their application, could be just as harmful to women as they were helpful.¹⁵ For instance, the substantive elements of the offense and the evidentiary requirements employed in some jurisdictions were unique to this crime, and made rape particularly hard to prove.¹⁶ In addition, some female leaders and law

12. See *infra* note 260 and accompanying text.

13. See Galvin, *supra* note 1, at 765 (stating that a nationwide reform of rape law "swept through state legislatures and Congress in the mid-1970s").

14. *Id.* at 767.

15. See *id.*; see also Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 5 (1977). Berger stated:

Rape is probably one of the most under-reported crimes. Reluctance to report serious offenses poses a problem for the criminal justice system in general. Fifty to eighty percent of such crimes may never enter statistical rolls because the victims, for reasons ranging from fear of reprisal to belief that nothing will ever be done, fail to make official complaints. . . . The system's perceived hostility to the rape complainant, coupled with the singular shame and trauma of sexual assault, may well explain this troubling phenomenon.

Id.

16. See Berger, *supra* note 15, at 8-18. Some jurisdictions required evidence of the woman's resistance; some required corroboration of the rape complainant's testimony; some required the judge to instruct the jury to "examine the testimony of the [complainant] with caution." *Id.* at 10 (quoting CALIFORNIA JURY INSTRUCTIONS, CRIM. (CALJIC) No. 10.22 (3d ed. 1970)). Berger points out that crimes such as robbery and assault require no evidence of resistance, corroboration of the complainant, or unique cautionary jury instructions. *Id.* at 8-9.

enforcement authorities charged that police and prosecutors exercised their discretion to charge and prosecute in a somewhat suspect manner.¹⁷

Feminists saw the entirety of rape law as emblematic of the male hierarchy they wanted to dismantle and argued:

[T]he male-dominated legal system viewed rape as 'different' from other crimes because of a set of historical attitudes about women and sexuality. . . . [Among these attitudes were the] notions that sex was normal for men but abnormal for women, and that the chaste woman functioned as the exclusive possession of one man while the unchaste woman, 'lacking status as a sole possession, function[ed] as the outlet for 'normal' male promiscuity.' Feminists urged that, as a result of this traditional orientation, the crime of rape was designed not to protect a woman's bodily integrity and freedom of sexual choice, but rather to protect a man's right to the exclusive possession of a chaste woman.¹⁸

These observations stemmed from the idea that female sexuality is a type of property, one embraced by scholars of all stripes.¹⁹ Historically, sexual exclusivity and the concomitant access to socially advantageous marriages, has been seen as the *only* commodity available to women. The onset of the industrialized economy and the gravitation of men towards factory jobs in the early nineteenth century led to the view that "family and home were . . . refuge from the commercial realm, [while] the marketplace and the pursuit of wealth inspired admiration and esteem. The idea of men as public market actors gave rise to a corollary image of women as passive consumers."²⁰ Thus, "[t]he idea of sexual barter is one way of naturalizing the fact that women have been forced to trade in sex because of their economic disempowerment."²¹

It is no mistake that marriage has been historically asserted as the primary justification for barring women from professional or commercial endeavors. For instance, Justice Bradley opposed admitting women to the bar because "the harmony" of "the family institution" was threatened by "the idea of a woman

17. See *id.* at 6 (noting that in 1974, only sixty percent of those arrested for rape were actually charged, and that according to statistics in 1970, a person reasonably suspected of rape stood a seventy percent chance of not being convicted).

18. Galvin, *supra* note 1, at 791-92 (footnotes omitted).

19. See, e.g., Richard Posner, *Conservative Feminism*, in *FEMINIST LEGAL THEORY* 99, 109 (D. Kelly Weisberg ed., 1993) (theorizing that "[p]ersons who want sex . . . should be required to 'bargain' for it"); Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 *YALE L.J.* 55, 76 (1952) (stating that there is "[a] popular conception of a girl's . . . virginity as a 'thing' of social [and] economic . . . value"); Alexandra Wald, *What's Rightfully Ours: Toward a Property Theory of Rape*, 30 *COLUM. J.L. & SOC. PROBS.* 459, 461 (1997) (arguing "the ability to consent to or refuse sex is a form of property that women have been denied").

20. Wald, *supra* note 19, at 491 (footnotes omitted).

21. *Id.* at 486 n.124.

adopting a distinct and independent career."²² Consequently, although feminists lobbying for the rape shield laws spoke specifically about wanting to wipe out the "view of women as less than fully human in their sexual lives,"²³ and wanting to establish "the right of women to sexual freedom of choice,"²⁴ one also hears in their demands a subtle chafing against socially constructed barriers to female participation in the market as purveyors of commodities rather than as commodities purveyed. In light of this Article's argument that feminists betrayed these long-term goals in order to secure the short-term victory of establishing rape shield laws, it is notable that women are still battling expectations regarding "appropriate" sexual behavior,²⁵ and still striving for parity in the marketplace. Accordingly, "[l]ow wages keep women dependent on men because they encourage women to marry [The] domestic division of labor, in turn, acts to weaken women's position in the labor market."²⁶ The idea that the proper role of a woman is as wife and mother is at the heart of the consent theory disclaimed by feminists, and it underlies many of the practical inhibitions on the full participation of women in the workplace.

Despite the vastly different origination points for their advocacy, feminists and law enforcement officers established a coalition that pushed a battery of reforms to the rape laws then in existence in most states.²⁷ The new laws redefined the crime of rape to recognize degrees of assault, changed the evidentiary regime surrounding the crime, offered graduated sentences for convicts, and established a rape-sensitive infrastructure in police and prosecutors' offices.²⁸ In addition, the new laws recognized marital²⁹ and homosexual rape.³⁰ They eliminated the mandate that someone other than the victim corroborate testimony about the alleged assault, and eliminated the requirement that a rape victim resist her assailant "to the utmost."³¹ Most controversially, the states began to adopt rape shield laws.³² Although the exact contours of the laws

22. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

23. See *Judiciary Hearings*, *supra* note 6, at 82 (statement of Judge Patricia Boyle of the Michigan Women's Task Force on Rape).

24. See *id.* at 32 (statement of Mary Ann Lergen, National Organization for Women).

25. See Martha Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCHOL. 217, 229 (1980) (providing a number of examples of sexual expectations that women still battle).

26. Heidi Hartmann, *Capitalism, Patriarchy, and Job Segregation by Sex*, in THE SIGNS READER 193-95 (Elizabeth Abel & Emily K. Abel eds., 1983).

27. Galvin, *supra* note 1, at 768-69.

28. *Id.*

29. *Id.* at 770 n.26.

30. *Id.* at 768 n.18.

31. *Id.* at 769-70.

32. *Id.* at 770-71.

varied, in essence, they barred defense attorneys from cross-examining rape victims about their sexual history.³³

Supporters of rape shield laws asserted that the shields would redress the flawed historical justifications for the use of sexual history evidence, namely, to test the victim's honesty and explore the likelihood that she consented to the disputed sexual encounter.³⁴ The primary elements of rape are a sexual encounter and unwillingness of one participant.³⁵ Because consent may or may not be manifested verbally during a sexual encounter, the element is difficult to prove. Therefore, the integrity of the two participants is crucial in a rape trial. Historically, evidence of "unchastity" was said to cast doubt on a woman's veracity.³⁶ Accordingly, rape victims who had been sexually active prior to their assault were deemed legally less credible than those who had been "chaste."³⁷ Feminists and law enforcement leaders argued that there was no logical relationship between a woman's sexual history and the likelihood of her

33. *Id.* at 765.

34. *Id.* at 792-98.

35. *See, e.g.,* IOWA CODE § 709.1 (2001) ("Any sex act between persons [where] [t]he act is done by force or against the will of the other."). Jurisdictions capture the notion of "unwillingness" in various ways. Each jurisdiction's definition of this element of the rape offense captures many prejudices about the relationship between men and women. For instance, the Model Penal Code rejects the notion that the victim's "nonconsent" makes the sexual assault a rape. MODEL PENAL CODE § 213.1 cmt. at 302-03 (1980). Instead, it insists that the assailant's actions be "forcible" in order to show the victim's unwillingness. *Id.* at 304. Obviously the definition of the "unwillingness" component can shift the burden of proof; if the definition is "victim nonconsent," the burden is on the perpetrator to get consent, and if the definition is "assailant force," the burden is on the victim to physically resist. The Model Penal Code drafters discussed their reasons for rejecting the "nonconsent" standard:

[I]nquiry into the victim's subjective state of mind and the attacker's perceptions of her state of mind often will not yield a clear answer. The deceptively simple notion of consent may obscure a tangled mesh of psychological complexity, ambiguous communication, and unconscious restructuring of the event by the participants. Courts have not been oblivious to this difficulty, but in attempting to resolve it they have often placed disproportionate emphasis upon objective manifestations of non-consent by the woman. It seems plain that some courts have gone too far in this direction, although it is equally plain that one can go too far in the opposite direction.

Id. at 303 (footnotes omitted).

36. *See Berger, supra* note 15, at 16-17 (discussing the belief that "promiscuity imports dishonesty"). Apparently this belief did not apply to men; male sexual activity was seen as unrelated to truthfulness. *Id.* at 16.

37. *See id.* (stating that some courts believe a woman's chastity bears on her credibility).

truthfulness.³⁸ Because a woman's sexual history is not relevant to credibility, they argued that sexual history should not be admissible on that basis.³⁹

Additionally, evidence of prior sexual activity was historically seen as relevant to the question of whether the rape victim in fact agreed to the sexual encounter at issue.⁴⁰ For years it was argued that a woman who had consented to sexual relations in the past, either with the defendant or with other people, was generally more likely to consent to sex, and therefore less likely to have withheld consent in the encounter at issue in the rape trial.⁴¹ Feminists argued that past sexual history was irrelevant to the issue of present consent, and that assertions of relevancy were "blatantly sexist."⁴² Further, rape shield proponents argued that juries improperly considered past sexual history of the rape victim when deciding the guilt or innocence of the rape defendant.⁴³

Opponents of the rape shield laws focused on two issues. On a purely doctrinal level, they argued that rape shield laws could violate defendants' Sixth Amendment right of confrontation.⁴⁴ The American Civil Liberties Union (ACLU) and the National Association of Criminal Defense Lawyers (NACDL)

38. See Galvin, *supra* note 1, at 793-97 (discussing the effect of hostility and suspicion toward the rape victim on the justice and legal systems).

39. See *id.* at 767 ("questioning the traditional rationale that a woman's unchastity has probative value").

40. See Berger, *supra* note 15, at 15-16 (citing 7 J. WIGMORE ON EVIDENCE § 200 (3d ed. 1940)). Berger explains that an "unchaste" woman was considered more likely to assent to sex than a "virtuous" woman. *Id.* at 15. Berger illustrates the application of this precept by quoting the infamous case *People v. Abbot*, 19 Wend. 192, 195-96 (N.Y. 1838), in which the judge asked, "will you not more readily infer assent in the practised Messaline, in loose attire, than in the reserved and virtuous Lucretia." *Id.* at 15-16.

41. *Id.* at 15-16 nn.96-98 (collecting cases).

42. *Judiciary Hearings*, *supra* note 6, at 63 (statement of Dovey Roundtree, American Civil Liberties Union); see also Berger, *supra* note 15, at 19-20 (quoting J. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 188, at 445 (2d ed. 1972) ("Character when used for this purpose generally 'comes with too much dangerous baggage of prejudice, distraction from the issues, time consumption, and hazard of surprise.")). Berger bases her objection on evidence doctrine; she first states that sexual history evidence is "quite remote." *Id.* at 19. She then states that it assumes, perhaps wrongly, that people have "fixed characters." *Id.* at 20. Further, she states that the use of specific instances of conduct to show likelihood of an action is less favored than reputation evidence. *Id.* She then concludes that the state's case can be prejudiced by inflammatory questions about the complainant's sexual history. *Id.*

43. *Judiciary Hearings*, *supra* note 6, at 62 (statement of Dovey Roundtree, American Civil Liberties Union) (discussing the impact of the victim's sexual history and the defendant's right to a fair trial).

44. See, e.g., *id.* at 5 (statement of Roger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division, Justice Department); Lawrence Herman, *What's Wrong with the Rape Reform Laws?*, 3 CIV. LIBERTIES REV. 60, 70-72 (Dec. 1976/Jan. 1977).

adhered to this view at the inception of the rape shield movement.⁴⁵ The NACDL cited the case of *Davis v. Alaska*,⁴⁶ in which the Supreme Court held that the confrontation doctrine required striking a state law that kept the fact of a witness's juvenile probation from the jury.⁴⁷ Relatedly, and in broader policy terms, they argued that in limited circumstances, the victim's prior sexual history *could* be relevant to the issue of consent.⁴⁸ In sum, the rape shield laws were quite controversial when adopted.

B. *The Legislative History of the Federal Rape Shield Law*

This Section examines statements and evidence that the United States Justice Department, the American Bar Association (ABA), the ACLU, the National Organization for Women (NOW), and the Michigan Women's Task Force on Rape (which spearheaded the drive for the nation's first rape shield law) offered in support of the federal rape shield law in 1976 testimony before the United States House of Representatives Judiciary Committee.⁴⁹

The rape shield proponents said their short-term goals were to increase rape reporting, prosecution, and conviction, and to spare victims the "humiliation" of testifying about their sexual history.⁵⁰ Their long-term goal was to educate citizens about healthy female sexuality and consequently dismantle stereotypes regarding the role of women in American society.⁵¹ The witnesses argued that prior sexual history was irrelevant to the issue of consent, and that juries were biased against rape victims with sexual histories.⁵²

1. *The Stated Goals of Rape Shield Proponents*

Rape shield proponents stated their goals as follows:

a. *The American Bar Association.* The ABA's policymaking House of Delegates in February 1975 adopted a resolution stating its general position in favor of rape shield laws.⁵³ In 1976 testimony before the House Judiciary Committee, Judge Sylvia Bacon, chairperson of the ABA Criminal Justice

45. See *Judiciary Hearings*, *supra* note 6, at 52-53, 62 (letter from Melvin B. Lewis, Professor of Law, John Marshall Law School and statement of Dovey Roundtree, American Civil Liberties Union); see also Herman, *supra* note 44, at 70.

46. *Davis v. Alaska*, 415 U.S. 308 (1973).

47. See *Judiciary Hearings*, *supra* note 6, at 53 (letter from Melvin B. Lewis, Professor of Law, John Marshall Law School) (citing *Davis v. Alaska*, 415 U.S. at 320-21).

48. See, e.g., *id.* at 5 (statement of Roger A. Pauley, Deputy Chief of Legislation and Special Projects Division, Criminal Division, Justice Department); *id.* at 53 (letter from Melvin B. Lewis, Professor of Law, John Marshall Law School); Herman, *supra* note 44, at 67-68.

49. See *Judiciary Hearings*, *supra* note 6.

50. See discussion *infra* Part II.B.1.

51. See discussion *infra* Part II.B.1.

52. See discussion *infra* Part II.B.1.

Section Committee on Women and Criminal Justice, suggested that rape shield laws were needed to increase the reporting of rape and its successful conviction.⁵⁴ The ABA also stated in a report submitted to its House of Delegates that it favored rape shield laws not just to increase reporting and conviction, but to scotch stereotypes regarding female sexuality and the role of women in American society.⁵⁵ The report stated that "[m]ost states' rape statutes are based on an outdated moral code recognizing two kinds of women—bad women who enjoy sex and good women who don't and have to be overpowered."⁵⁶ This statement demonstrates that the ABA supported rape shield laws in part to mold a new public consensus about the proper attitude of women towards sex.

b. *The National Organization for Women.* Mary Ann Largen, former Coordinator of NOW's National Rape Task Force, represented NOW before the House Judiciary Committee.⁵⁷ She told the committee her group's goals included increasing the rate of rape reporting and the law enforcement system's commitment to prosecuting rape.⁵⁸ She continued, raising the hope that the laws could achieve larger social goals:

Worst of all, rules of evidence which allow unlimited inquiry into the specific acts of sexual conduct of the prosecutrix would ignore the right of women to sexual freedom of choice by failing to focus on the consent in each individual case. Surely a woman should be free not only to choose who her sexual partners are, but also, when and under what circumstances she will engage in sexual activity with them.

To the extent that Victorian mores still exist in our society, evidence of the prior sexual conduct of the complaining witness in a rape case in [sic] unduly prejudicial. . . .

In 1976 it is hard for women to accept the burden of a judgment made by male jurors over 100 years.⁵⁹

Largen further advocated doing away with the existing scheme for using prior sexual history "[b]ecause the courts confuse rape with healthy sexual union, [so] the victim must also deny any healthy history of, or interest in, sex in order

53. See AMERICAN BAR ASSOCIATION, PROCEEDINGS OF THE HOUSE OF DELEGATES 22 (Feb. 1975) [hereinafter ABA REPORT AND RESOLUTION] (resolution and report introduced by the Law Student Division; adopted by House of Delegates as amended by Criminal Justice Section).

54. See *Judiciary Hearings*, *supra* note 6, at 23 (statement of Sylvia Bacon); ABA REPORT AND RESOLUTION, *supra* note 53, at 22.

55. ABA REPORT AND RESOLUTION, *supra* note 53, at 22.

56. *Id.*

57. See *Judiciary Hearings*, *supra* note 6, at 30.

58. See *id.* at 30, 34 (statement of Mary Ann Largen, former Coordinator of NOW's National Rape Task Force) (stating that NOW is concerned and active with the problems of rape, including the lack of reporting and prosecution of rape).

59. *Id.* at 32.

to deny an implication of 'unconscious desire' to be violated."⁶⁰ Largen buttressed this point by citing a study indicating that in ninety-three percent of cases where the rape was considered "victim precipitated" because the victim allowed herself to be alone with the offender, the offender used violence to complete the sexual encounter.⁶¹ "If consent was inferred it was a result of years of perverted socialization which causes people to think that when one says 'no', one means 'yes', which is *not* a 'reasonable inference.'"⁶² This statement suggests that NOW thought the rape shield law could shape public opinion about proper sexual behavior for the genders. Later in the hearing, Largen admitted that, to some extent, the goal of rape shield proponents was to sidestep what she considered troubling social ambiguities surrounding rape:

The discovery of . . . "truth" in a rape case is complicated by three factors: (1) rape is often an emotional topic with complex moral overtones, (2) the legal definition of rape is not always the same as the social definition of rape, (3) and the social belief that one who consents to sexual intercourse is not a victim of a crime. These factors can only be avoided by placing the focus of a rape trial where it properly belongs—on the actions of the defendant . . .⁶³

c. *Michigan Women's Task Force on Rape.* Judge Patricia Boyle, of the Michigan Women's Task Force on Rape, also testified before the House Judiciary Committee.⁶⁴ Michigan adopted the nation's first rape shield law in 1974.⁶⁵ Unfortunately, there is no legislative history, strictly speaking, for the law.⁶⁶ However, Boyle helped draft the Michigan statute,⁶⁷ and in her testimony evinced a hope that the rape shield laws would encourage "reporting and prosecution of sexual offenses."⁶⁸

Boyle also argued that rape shield laws were justified for several other reasons.⁶⁹ First, the laws spared victims the "humiliation" of testifying about private matters, which meant more women would be willing to report and press

60. *Id.* at 31.

61. *Id.*

62. *Id.*

63. *Id.* at 32.

64. *See id.* at 77.

65. MICH. COMP. LAWS § 750.520j (West 1991) (effective Apr. 1, 1975).

66. According to *People v. Nelson*, 261 N.W.2d 299, 306 (Mich. App. 1977), the Michigan Women's Task Force on Rape submitted proposals and position papers to the Michigan House Judiciary Committee. "Although much of this input cannot be considered legislative history (because much of it was never presented to the full Legislature), nevertheless, it is important in the sense that the whole Legislature was aware, in a general way, of the group's efforts . . ." *Id.* at 307 n.27.

67. *Judiciary Hearings, supra* note 6, at 77.

68. *Id.* at 81.

69. *See id.* at 79-81.

charges when raped.⁷⁰ Second, she theorized that the laws would preempt juries likely to be biased against sexually active women.⁷¹ Together, she argued, these changes would achieve "justice in the courts—that is, the proper outcome of criminal cases"⁷²

Boyle also stated more expansive goals, noting that rape shield laws would publicize "the social question of the recognition of women as fully free adults fully capable of making private sexual choices and not subjected to any social or legal recrimination other or different than that applied to males as the result of these choices."⁷³ She acknowledged that rape shield laws reassigned priority among competing interests by stating:

[The objectives of the bill] demand . . . that the policy [of the Federal Rules of Evidence] be struck between these goals and the interests of an accused as represented in the proposed rule. . . . [I]t is past time for the Congress of the United States to say clearly and without reservation that the right of women to independence and privacy in their sexual lives is more important than a rule whose operative purpose is humiliation, whose actual effect is injustice, and whose social consequence is perpetuation of a view of women as less than fully human in their sexual lives.⁷⁴

The Judiciary Committee's minority counsel, Mr. Smietanka, reminded Boyle that even if Congress made such a policy statement, the rape shield proponents had admitted that jurors seemed to take the opposite view by hesitating to convict where the victim was sexually active.⁷⁵ Boyle responded:

[T]he law ought not sanction the recognition of [a logical connection between sexual history and consent to rape], even if there is one, because the policy reasons are too compelling to permit people to draw those inferences. The inference is improper in my view anyway, and I think the law ought to reflect proper inferences. But if people are drawing those inferences still, if the people sitting on juries are still thinking that because a college student has slept with someone then that student is more likely to have been raped then I don't think the law can afford to support that inference. It ought to be eradicated from the law if we cannot eradicate it from people's minds.⁷⁶

70. *Id.*

71. *See id.* (stating that judgments about female sexuality made by male jurists fifty to one hundred years ago represent the present views about the nature of women and the nature of female sexuality).

72. *Id.* at 80.

73. *Id.*

74. *Id.* at 81-82.

75. *Id.* at 84.

76. *Id.*

A review of the stated goals of the witnesses on behalf of the federal rape shield laws shows a two-tiered plan. First, the proponents hoped to regularize the reporting and prosecution of rape. Second, the proponents hoped that Congress could influence public opinion about gender equality by permitting women to be as sexually active as men without forfeiting legal protections when victimized.

2. *The Chauvinist Jury*

In order to justify the proposed rape shield law, proponents contended that empirical evidence showed juries were biased against sexually active women, and were more likely to acquit their assailants.⁷⁷ But a study of the testimony reveals that little empirical evidence was offered to illustrate the existence of the "chauvinist jury,"⁷⁸ and that the empirical evidence that was offered was crucially mischaracterized.⁷⁹

a. *The Justice Department.* Roger A. Pauley, Deputy Chief of Legislation and Special Projects for the Criminal Division of the Justice Department, testified before the House Judiciary Committee in favor of the federal rape shield law in 1976.⁸⁰ He testified that the department generally supported the bill with a few minor amendments.⁸¹ He cited as one justification the history of jury bias against sexually active women, which he said was documented in Kalven and Zeisel's *The American Jury*.⁸² Pauley noted:

77. See, e.g., *id.* ("[I]f the people sitting on juries are still thinking that because a college student has slept with someone then that student is more likely to have been raped then I don't think the law can afford to support that inference."); see also *infra* text accompanying note 78 (stating it is difficult to convict of rape when consent is raised).

78. See, e.g., *infra* note 82 and accompanying text.

79. See discussion *infra* Part III.A (providing as an example of mischaracterization that three of forty-two juries convicted defendants in rape cases "where consent was likely to constitute a viable defense," when the study was just stating there were no signs of violence in rape cases).

80. See *Judiciary Hearings*, *supra* note 6, at 3. Interestingly, the Justice Department did not offer the irrelevance of sexual history to consent as a justification for the rape shield laws, as did so many other proponents. See *id.*; see also *supra* note 42 and accompanying text. In order to promote the laws, the Justice Department concentrated on jury bias and the concomitant chill to rape reporting and conviction. *Judiciary Hearings*, *supra* note 6, at 31. Therefore, the *only* argument in favor of rape shield laws that was adopted by *all* shield proponents was the jury bias argument. See *supra* Part II.B.1.

81. See *Judiciary Hearings*, *supra* note 6, at 7. The Justice Department had several objections to the bill unrelated to the general question of the relevance of past sexual history. See *id.* at 4-7. It objected to the broad definition of "past sexual behavior," objected that the proposed shield appeared to bar defense lawyers from countering prosecution evidence of chastity, and objected that in its exception allowing judges to admit relevant evidence on past sexual history, it required that "the probative value of [the evidence offered by the accused] *substantially* outweighs the danger of unfair prejudice," a reversal of the usual relevance standard. *Id.* at 5-7.

82. *Id.* at 4 (citing KALVEN & ZEISEL, *supra* note 8, at 70).

[T]he introduction of evidence of the complainant's reputation for unchastity results in substantial prejudice to the conduct of a fair trial is borne out by a major study of American juries which indicates that the admission of such evidence often leads juries to acquit on preconceived notions of contributory fault and a hesitancy to convict for the rape of a person deemed by jurors to constitute "fair game." . . .

In a study by Kalven and Zeisel of 42 rape cases where consent was likely to constitute a viable defense, it was found that the jury returned verdicts of guilty in only three instances, whereas the trial judges reported that they would have convicted in twenty-one of the same cases. The conclusion drawn by the authors is that the jury, faced with evidence concerning the reputation as to past sexual conduct of the victim, evinced an undue sympathy with the accused where the victim's past behavior appeared to offend the moral precepts of the jurors and could be said to have contributed to the assault.⁸³

Chairman William Hungate later quizzed Pauley on the Kalven and Zeisel study.⁸⁴ Hungate characterized the study as one involving forty-two rape cases in which juries found defendants guilty seven percent of the time, whereas judges would have found them guilty fifty percent of the time.⁸⁵ Pauley agreed to that characterization, and elaborated:

Kalven and Zeisel concluded from their study . . . that in fact American juries operate on sort of rudimentary principles of morality as they perceive it to such a degree that, at least at the time of this study, they were likely to acquit a defendant, even though the Government had proved its case under the terms of the statute, and the elements of the offense, if they regarded the woman as a "loose woman" who was fair game and who had somehow by her attitude, taken a libertine attitude toward sex . . .⁸⁶

b. *Michigan Women's Task Force on Rape.* Boyle, of the Michigan Women's Task Force on Rape, also discussed the bias of juries as a justification for the rape shield laws.⁸⁷ She explained the likely result when victims did press charges and cases went to trial, referring to the "inflammatory impact of prior sexual history on the fact finder, that is, the jury."⁸⁸ She eventually adverted to Kalven and Zeisel:

The Chicago American jury project results indicated that the juries returned guilty verdicts in only 3 of 42 rape trials, a far lower percentage than in

83. *Id.* (citing KALVEN & ZEISEL, *supra* note 8, at 70).

84. *See id.* at 20.

85. *Id.* at 20-21.

86. *Id.* at 21.

87. *See id.* at 80-81 (indicating that social perspectives regarding female sexuality are perpetuated by juries).

88. *Id.* at 80.

trials for other offenses. The researchers concluded that the jury was returning those not guilty verdicts based on what might have been termed provocative behavior on the part of the victim and previous bad character on the part of the victim. This indicates that these attitudes are still at work in a devastating way before juries in this country.⁸⁹

c. *The National Organization for Women.* Mary Ann Largen, former Coordinator of NOW's National Rape Task Force, contended that evidence of past sexual history "is often so prejudicial that it results in jury acquittals, even in cases where the victim has been seriously injured by her assailant."⁹⁰ She cited no studies supporting this assertion.⁹¹

Largen later stated:

To the extent that Victorian mores still exist in our society, evidence of the prior sexual conduct of the complaining witness in a rape case in [sic] unduly prejudicial . . . Jurors have certain irrational ideas about rape, some of which are believed with such ferocity that jury verdicts are often examples of outright nullification . . .⁹²

She cited no studies documenting the nullification she discussed.⁹³

d. *The American Bar Association.* In February 1975, the ABA Law Student Division proposed that the group's policymaking body, the House of Delegates, adopt a position in favor of rape shield laws, citing the studies on rape acquittal rates as one justification.⁹⁴ The ABA spokeswoman at the Judiciary Committee hearings explained that the group supported the rape shield laws in part because it "had before it evidence of difficulty in securing convictions because the penalties were so heavy. And in reaching this position it relied on studies which showed jury reaction to the severity of the penalty."⁹⁵ It is not clear whether spokeswoman Bacon was referring to *The American Jury*.⁹⁶

e. *American Civil Liberties Union.* Lawrence Herman, who drafted the rape shield recommendations of the ACLU's Due Process Committee, wrote a 1977 article discussing the justifications for—and weaknesses of—the reforms.⁹⁷

89. *Id.*

90. *Id.* at 31.

91. *See id.*

92. *Id.* at 32.

93. *See id.* Largen stated in response to a question about the strain that rape places upon marriages that NOW had deployed court-watching teams in "a lot of cities" to observe trials. *Id.* at 42. She did not specify whether her statements regarding jury bias and jury nullification were gleaned from observations recorded by those teams. *See id.*

94. *Id.* at 22-23 (statement of Judge Sylvia Bacon, Chairperson, Criminal Justice Section, Committee on Women and Criminal Justice, on Behalf of the American Bar Association).

95. *Id.* at 29.

96. *See id.*

97. *See Herman, supra* note 44, at 60.

In the Article, he acknowledged that "even when complaints are filed and prosecuted, the stereotypical, gender-based attitude of judges and jurors results in too many unjustified acquittals."⁹⁸ He cited no study or article supporting this contention.⁹⁹

In sum, two groups lobbying for rape shield laws—the Justice Department and the Michigan Women's Task Force on Rape—cited Kalven and Zeisel in detail to prove the existence of a chauvinist jury justifying the rape shield laws.¹⁰⁰ At least one legislator, Chairman Hungate, appeared impressed by the study.¹⁰¹ And three groups—NOW, the ACLU, and the ABA—made generalizations about the chauvinism of juries without any specific empirical evidence.¹⁰²

III. THE MYTH OF THE CHAUVINIST JURY

Rape shield proponents suggested that the shields were needed because of jury bias against sexually active rape victims.¹⁰³ But this phenomenon was illusory at the time the laws were passed. Three groups failed to cite any evidence of jury chauvinism.¹⁰⁴ Two others cited only Kalven and Zeisel's *The American Jury* to support the existence of the chauvinist jury.¹⁰⁵ This Part shows that the rape shield proponents misrepresented the findings presented in *The American Jury*, and therefore did not sufficiently document the existence of the chauvinist jury at the inception of the rape reforms. Furthermore, this Part illustrates that changes in the law had diminished the relevance of Kalven and Zeisel's 1976 rape statistics—these statistics were outdated when proponents cited the study. Thus, the statute's impact had already been preempted by changes in the law, an earmark of legislative obsolescence.¹⁰⁶ Finally, this Part

98. *Id.* at 70.

99. *See id.*

100. *See* discussion *supra* Part II.B.2.a-b.

101. *See Judiciary Hearings, supra* note 6, at 21 (Hungate stated: "It struck me that the juries in those state cases were finding defendants guilty in 7 percent of the cases and the judges thought they should be guilty in 50 percent.").

102. *See* discussion *supra* Part II.B.2.c-e.

103. *See, e.g., supra* notes 36-37 and accompanying text.

104. *See* discussion *supra* Part II.B.2.c-e.

105. *See* discussion *supra* Part II.B.2.a-b.

106. *See* Samuel Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age*, 57 N.Y.U. L. Rev. 1126, 1130 n.10 (1982) (providing examples of types of statutes requiring judicial nullification, including "statutes whose whole impact is altered by changes in the law"). In the broadest sense, any law that passes the relevant representative body and is signed by the relevant executive is "valid." But, particularly in the case of evidentiary law which is given shape by lawyers and judges, and in the case of criminal law which is applied by jurors, the law is more likely to be respected and followed if it bears more meaningful indices of legitimacy. Thus, statutes whose entire impact is altered by changes in the law have been characterized as "obsolete." *Id.* Similarly, statutes designed for a specific problem "when the triggering event has passed," and statutes "originally intended to depart from the legal

demonstrates that legal developments since 1976 have further eroded the value of *The American Jury's* findings, and consequently call into serious question the jury chauvinism that was the prime moving force behind the rape shield laws.

A. *Mischaracterizations of The American Jury*

In 1966, Harry Kalven and Hans Zeisel published one of the first comprehensive studies on jury decisionmaking—*The American Jury*.¹⁰⁷ The book is frequently cited, even today, for its groundbreaking findings on jury deliberations.¹⁰⁸ In their study, Kalven and Zeisel mailed questionnaires regarding jury verdicts to a diverse pool of judges presiding over trials.¹⁰⁹ About five hundred judges returned the questionnaires.¹¹⁰ Judges were asked to document jury findings in particular types of cases.¹¹¹ They then recorded the verdict they would have announced had they conducted a bench trial.¹¹² Finally, in cases where the judge and jury differed, judges were asked to hypothesize a reason for the divergence.¹¹³

Judges returned information on 106 rape cases.¹¹⁴ In thirty-one cases the judges would have acquitted the defendant, while in the remainder they would have convicted.¹¹⁵ Meanwhile, in forty-four cases, the juries acquitted the defendant, while in the remainder they would either have convicted or they were not able to agree on a verdict.¹¹⁶

fabric that have failed to exert a 'gravitational pull' on the legal framework" can also be described as illegitimate. *Id.* The rape shield laws, for a variety of reasons, can be fairly fitted into any of these three categories.

107. KALVEN & ZEISEL, *supra* note 8.

108. See, e.g., Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 764 (2002) (stating that Kalven and Zeisel's questionnaires to presiding judges in actual civil jury trials yielded data showing a seventy-eight percent agreement between judge and jury on liability); Phillip G. Peters, Jr., *The Role of the Jury in Modern Malpractice Law*, 87 IOWA L. REV. 909, 923 (2002) (stating that after reviewing four thousand civil trials, Kalven and Zeisel found that in nearly seventy-eight percent of cases the judge and jury agreed); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 148 (2002) (stating that Kalven and Zeisel found that across four thousand civil cases, judges reported they would have made the same liability decisions as did the jury seventy-eight percent of the time). However, some academics have questioned Kalven and Zeisel's methodology, and some have proposed that a second *American Jury*-type study be conducted today. See Valerie P. Hans et al., "Is it Time to Replicate *The American Jury?*," Address Before Association of American Law Schools (Jan. 9, 1998).

109. KALVEN & ZEISEL, *supra* note 8, at 35-36.

110. *Id.* at 36.

111. *Id.* at 45.

112. *Id.*

113. *Id.* at 48.

114. *Id.* at 251.

115. *Id.* at 252 tbl.71.

116. *Id.*

Taking this general information, Kalven and Zeisel then split the rape cases into two categories, which they called "aggravated" rape and "simple" rape.¹¹⁷ They described aggravated rape as "all cases in which there is evidence of extrinsic violence or in which there are several assailants involved, or in which the defendant and the victim are complete strangers at the time of the event."¹¹⁸ They described simple rape as "cases in which none of the aggravating circumstances is present."¹¹⁹

Examining jury verdicts in the two categories, the judges and juries were substantially in agreement on the aggravated rape cases.¹²⁰ In the sixty-four cases of aggravated rape studied, the judges would have acquitted fifteen defendants and convicted the remaining forty-nine.¹²¹ In those same cases, the juries acquitted sixteen defendants and either convicted or were unable to agree on a verdict for the remaining forty-eight.¹²²

In the simple rape cases, the juries and judges reached widely divergent results.¹²³ The judges would have convicted the defendant of the major charge of rape in twenty-two of the forty-two cases, while the jury convicted in just three.¹²⁴ The judges would have acquitted twenty times, while the jury acquitted in thirty-seven cases and were hung in two cases.¹²⁵ When juries were offered the option in simple rape cases of convicting the defendant on a lesser charge, they did so nine times.¹²⁶

It is startling to compare this full exposition of Kalven and Zeisel's statistics to the versions presented by proponents of the rape shield laws. Pauley, of the Justice Department, explained that juries convicted three of forty-two defendants in rape cases "where consent was likely to constitute a viable defense."¹²⁷ This description of Kalven and Zeisel's "simple rape" category is an embroidery. The scholars merely stated that, in cases of simple rape, the victim and defendant were acquainted and there were no signs of external violence.¹²⁸ Pauley's characterization was not disingenuous, as Kalven and Zeisel explained

117. *Id.* at 252. The authors explained that they used external clues to define the categories because they "lacked the foresight to ask a series of questions about the cooperativeness of the victim . . ." *Id.* at 252 n.14.

118. *Id.* at 252.

119. *Id.*

120. *See id.* at 253 tbl.72 (comparing the judges' holdings with the juries' verdicts).

121. *Id.*

122. *Id.*

123. *See id.* (comparing the judges' holdings with the juries' verdicts).

124. *Id.* at 254 tbl.73.

125. *Id.*

126. *Id.* at 253.

127. *Judiciary Hearings, supra* note 6, at 4.

128. *KALVEN & ZEISEL, supra* note 8, at 252.

they were trying to capture cases where consent was a real possibility.¹²⁹ Nevertheless, statements like Pauley's do not give readers the full picture of Kalven and Zeisel's findings.

Further, when Chairman Hungate questioned Pauley about the Kalven and Zeisel study, he characterized it as a study of forty-two rape cases in which juries found defendants guilty just three times.¹³⁰ Pauley agreed with this description, despite the fact that the statistics on rape, when not divided between simple and aggravated rape, involved 106 rape cases, in which the jury convicted fifty-eight times.¹³¹ Paraphrasing Kalven and Zeisel's findings, Pauley stated that jurors "were likely to acquit a defendant, even though the Government had proved its case under the terms of the statute and the elements of the offense, if they regarded the woman as a 'loose woman.'"¹³² This suggests that jurors would have punished sexually active women even in cases of aggravated rape where violence was used and the actors were unacquainted. In those cases, however, the conviction rate was much higher—about one-half.¹³³

Additionally, although some judges offered a "loose woman" theory in their narrative explanation of juries' actions in simple rape cases,¹³⁴ the acquittal rate for the entire pool of rape cases does not support Pauley's assertion that sexual promiscuity led to acquittals. First, neither of the objective factors used to describe the "aggravated rape" category suggest that the victim had a sexual history.¹³⁵ Notably, sexual history, not acquaintance with the defendant or lack of violence in the encounter, was the phenomena to which Pauley suggested that juries respond when acquitting defendants.¹³⁶ Kalven and Zeisel did not use sexual history as a factor in distinguishing the simple rape statistics Pauley cited in support of the shield law.¹³⁷ Conversely, it is not clear that sexual history evidence was excluded in the aggravated rape cases.¹³⁸ Therefore, it is not accurate to say that even where the government proved its case juries were likely to acquit based on promiscuity, because the acquittal rate in aggravated rape cases was relatively high despite the possibility that sexual history was discussed.

129. *Id.* at 252 n.14.

130. *Judiciary Hearings, supra* note 6, at 20.

131. KALVEN & ZEISEL, *supra* note 8, at 252 tbl.71.

132. *Judiciary Hearings, supra* note 6, at 21.

133. KALVEN & ZEISEL, *supra* note 8, at 253 tbl.72.

134. *See id.* at 249-51 (providing as an example, "[t]he jury probably figured the girl asked for what she got").

135. *See id.* at 252 (providing aggravated rape includes all cases where there is evidence: (1) of extrinsic violence or there were several assailants, or (2) the defendant and victim were complete strangers).

136. *Judiciary Hearings, supra* note 6, at 21.

137. *See* KALVEN & ZEISEL, *supra* note 8.

138. *See id.* at 252 n.14 (noting they failed to ask whether the victim and defendant were strangers).

Finally, Pauley failed to mention that in nine cases of simple rape (where consent was arguably a possibility), jurors voted to convict the defendant on a lesser charge.¹³⁹

Boyle, of the Michigan Women's Task Force on Rape, more dramatically misstated the findings of the Kalven and Zeisel study. Boyle stated that "juries returned guilty verdicts in only three of forty-two rape trials . . . based on what might have been termed provocative behavior on the part of the victim and previous bad character on the part of the victim."¹⁴⁰ This description misstates the number of rape trials studied; Kalven and Zeisel studied 106 rape trials rather than forty-two.¹⁴¹ It also misstates the number of convictions in the entire universe of rape trials studied. In 106 rape trials, juries voted to convict defendants of rape fifty-eight times, and voted to convict defendants of rape or a lesser charge sixty-seven times.¹⁴² Further, in the simple rape cases to which Boyle is actually referring, Kalven and Zeisel stated only that the assailant and victim were acquainted, not that any "provocative behavior" on the part of the victim was introduced as evidence.¹⁴³

Thus, Boyle seriously skewed the import of the Kalven and Zeisel study. She suggested that in any rape case, regardless of the circumstance of the assault, juries would be swayed to acquit if the defendant presented evidence about the victim's prior sexual activity.¹⁴⁴ Unfortunately, the Kalven and Zeisel study did not examine whether in cases of aggravated rape the victim was cross-examined about her sexual history.¹⁴⁵ Thus, one cannot test the thesis that mere sexual history, in cases where the defendant and victim were not acquainted, prompted acquittals. Certainly, it appears from the statistics and the judges' narratives that in cases where the defendant and victim were acquainted, juries were receptive to information about the victim's sexual history. Some commentators, both at the time the rape laws were adopted and today, argued that in such a case, the

139. *See id.* at 253. These figures suggest that while the juries may have been swayed by the victim's acquaintance with the assailant, they did not hold the assailant totally blameless in the assault. Thus, although technically the jury did not convict the assailant of rape, the jury did not completely ignore the evidence before it, or reach a logically indefensible verdict, as suggested by the stark "3 of 42" figure. *See id.* (noting that in cases of simple rape, the jury convicted the defendant in just three of forty-two cases). Certainly, rape reformers would argue that acquaintance rape—the type most likely at issue here—is no less an assault than stranger rape. The point is only that the proponents withheld a full picture of jury activity from Congress, not that the juries, or the law they were applying, were correct.

140. *Judiciary Hearings*, *supra* note 6, at 80.

141. *KALVEN & ZEISEL*, *supra* note 8, at 252 tbl.71.

142. *Id.* at 252 tbl.72, 253.

143. *See id.* at 252 n.14.

144. *See Judiciary Hearings*, *supra* note 6, at 80 ("[T]he inflammatory impact of prior sexual history on the fact finder . . . has a devastating effect on the prosecution's case.")

145. *See KALVEN & ZEISEL*, *supra* note 8, at 527-34.

victim's sexual history was particularly relevant to the issue of consent.¹⁴⁶ But Boyle's description would lead the average reader to believe that in rape cases where prior acquaintance did not give rise to questions about consent, sexual history was a key factor. Kalven and Zeisel's figures do not support that contention.

Additionally, Boyle theorized that Kalven and Zeisel's study "indicates that these attitudes are *still* at work in a devastating way before juries in this country."¹⁴⁷ Boyle did not specify, however, that Kalven and Zeisel's study was conducted between 1954 and 1958.¹⁴⁸ Therefore, the statement that the study reflected jury decisionmaking in the mid-1970s is dubious.

In addition to misstating and mischaracterizing Kalven and Zeisel's study, the rape shield proponents all neglected to address contextual information offered in *The American Jury*. For instance, as noted above, none of the commentators explained that nine juries in the forty-two simple rape cases convicted defendants of lesser charges.¹⁴⁹ These nine guilty verdicts result in a conviction rate of twelve of forty-two, significantly less dramatic than the three of forty-two usually cited.

Furthermore, proponents ignored an additional layer of context. Kalven and Zeisel offered some quotations from the judicial narratives theorizing on the reasons for divergence between judge and jury.¹⁵⁰ In five of the seven vignettes offered, the theorizing judges mentioned that the rape victim had been drinking or had been at a drinking establishment.¹⁵¹ Later in Kalven and Zeisel's discussion of jury decision making in all crimes involving possible contributory fault by the victim, alcohol consumption is addressed:

With an insistent regularity the judge reports that the defendant and the victim have been "drinking together." The suggestion is that in some way this activity marks a crucial assumption of risk. The cases tend to have a familiar plot. Victim and defendant drink together, a quarrel starts, at the climax of which violence erupts, and the victim is either injured or killed. . . . [There] is the constant theme that the parties, both the victim as well as the defendant, have been simply drinking together.¹⁵²

Thus, in a purely speculative fashion, it is possible to attribute juror acquittals in the simple rape cases to a factor other than the victim's past sexual

146. See, e.g., Berger, *supra* note 15, at 17.

147. *Judiciary Hearings*, *supra* note 6, at 80 (emphasis added).

148. See *id.*; KALVEN & ZEISEL, *supra* note 8, at 33 n.1.

149. See, e.g., *supra* text accompanying note 133.

150. KALVEN & ZEISEL, *supra* note 8, at 248-51.

151. See *id.* (questionnaires I-1922; II-0232; I-1634; I-0488; I-0653).

152. *Id.* at 254-55; see also *id.* at 255-57 (citing other questionnaires and contexts in which drinking appears to have been a decisive factor).

history; namely, the fact that she was drinking in the hours leading up to the rape. Certainly, rape commentators would argue that juries, and the society from which they are assembled, often view drinking as a sign of "loose" behavior on the part of women, for which they may punish the woman by acquitting her alleged assailant.¹⁵³ However, none of the proponents mentioned Kalven and Zeisel's alternate theory for acquittals.¹⁵⁴ In sum, it appears that rape shield proponents, possibly inadvertently, misrepresented the study they relied upon to establish the "chauvinist jury" against which the shield was to guard.

B. *The Obsolescence of The American Jury*

In 1976, the Kalven and Zeisel study was arguably invalid as a justification for rape shield laws, not only because its proponents mischaracterized its findings,¹⁵⁵ but because by 1976, it was growing stale. Kalven and Zeisel's study was conducted between 1954 and 1958,¹⁵⁶ meaning it was about two decades out-of-date at the time it was cited in support of the rape shield laws. In addition to the sheer age of the study, the law and the reality of female jury participation had evolved dramatically between the time Kalven and Zeisel conducted the study and the time legislatures adopted rape shield laws.¹⁵⁷ Thus, the shield laws demonstrate a second characteristic of obsolescence: Their impact has been entirely altered by a drastic change in the law over the past three decades.¹⁵⁸

This Part outlines the evolution of the law and reality of female jury service between 1954, the year the study began, and 1976, the year the House Judiciary Committee heard testimony on the proposed federal rape shield law. This issue arose only briefly during the testimony before the House Judiciary Committee.¹⁵⁹ At the House Judiciary hearings on the proposed federal rape shield law, Chairman Hungate countered a speaker's reference to jury bias with a logical question: "As we discuss the jury system and how it works and whether it works under present conditions . . . are there any impediments to women

153. See, e.g., Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. WOMEN & L. 203, 212-13 (1997) (citing studies showing that prosecutors and juries considered drinking with an assailant a form of victim precipitation). "The woman who 'repairs to some private place for a few drinks and a little shared affection' has, by her acceptance of such a cozy invitation, given the man reason to believe she is a candidate for whatever he might have in mind." *Id.* at 213 (quoting John D. Ingram, *Date Rape: It's Time for "No" to Really Mean "No,"* 21 AM. J. CRIM. L. 3, 33 (1993) (quoting Ann Landers, BOSTON GLOBE, July 29, 1985, at 9)).

154. See *Judiciary Hearings*, *supra* note 6.

155. See discussion *supra* Part III.A.

156. KALVEN & ZEISEL, *supra* note 8, at 33 n.1.

157. See *infra* notes 165-76 and accompanying text.

158. See Estreicher, *supra* note 106, at 1138-39.

159. See *Judiciary Hearings*, *supra* note 6, at 46 (questioning NOW's Largen about existing obstacles to women serving on juries).

serving on juries . . . that you are aware of at this time? Is that handled fairly equally?"¹⁶⁰ The speaker answered that she did not know.¹⁶¹

The rate of female jury service was equally oblique in *The American Jury*.¹⁶² The authors did not examine the composition of juries in the book; the only statistics on the identity or background of jurors concerned the regional breakdown of the participating judges and jurors.¹⁶³ However, in a discussion of methodology and possible biases that might accompany certain juror characteristics, the authors quoted one judge who noted that "[w]omen in the community refuse jury duty."¹⁶⁴ That comment is not surprising. Statistics on the actual rate of female jury service between 1954 and 1958, the years of the Kalven and Zeisel study, are unavailable. But an examination of state laws suggests that female jury service in those years was extremely rare.¹⁶⁵

As of 1954, five states—Texas, West Virginia, Mississippi, South Carolina, and Alabama—barred women from jury service.¹⁶⁶ Jury qualification in the federal courts was determined by reference to state laws until 1957,¹⁶⁷ the middle of the Kalven and Zeisel study. Therefore, some federal juries in the Kalven and Zeisel study completely excluded women.

Furthermore, sixteen states had changed the law to allow female jury service a decade or less before the Kalven and Zeisel study began in 1954.¹⁶⁸ Also, examination of state laws as of 1966 suggests that those states permitting

160. *Id.*

161. *Id.*

162. See KALVEN & ZEISEL, *supra* note 8.

163. See *id.* at 36-38 (providing an analysis of "the geographic distribution of cases by states and census regions and compar[ing] it with the frequency of actual jury trials in each area"). Chapter Three of *The American Jury* discusses study methodology in depth.

164. *Id.* at 467 n.8 (citation omitted).

165. See AMERICAN CIVIL LIBERTIES UNION, *THE CASE FOR EQUALITY IN STATE JURY SERVICE*, app. 3, tbl.I (1966) [hereinafter *THE CASE FOR EQUALITY*].

166. *Id.*

167. See *id.* at 9. The practice was changed by the Civil Rights Act of 1957, which extended to women the right to sit on all federal juries. See 28 U.S.C. § 1861 (2000). This result was foreshadowed by the Supreme Court's decision in *United States v. Ballard*, 329 U.S. 187 (1946). While the Court accepted Congress's decision that the federal courts would permit female jurors only in districts where the local rules permitted jury service, Justice Douglas posited that "the exclusion of [either sex] may indeed make the jury less representative of the community . . ." *Id.* at 194. Notably, even though this holding argued in favor of women, it was based on stereotypes about the proper role of women as homemakers and helpmates. *Id.* at 194-95. Justice Douglas quoted with approval the lower court judge who reasoned that women were particularly suited for service on the *Ballard* jury because it involved allegations of religious fraud, and "[i]n the average family . . . children . . . receive the first and most lasting teaching of religious truths from their mothers," while "the major social function of men is concerned with the creation of material things . . ." *Id.* at 194 (quoting *Ballard v. United States*, 152 F.2d 941, 951 (9th Cir. 1946) (Denman, J., dissenting)).

168. See *THE CASE FOR EQUALITY*, *supra* note 165, at app. 3, tbl.I.

women to serve on juries often actively or passively discouraged them from doing so.¹⁶⁹ In sixteen states (or in some counties of those states), women were eligible for exemptions from some or all types of trials merely on the basis of their sex.¹⁷⁰ In 1947, New York offered women a general exemption from jury service.¹⁷¹ That year, of 60,000 jurors registered in New York City, just 7,000 were women.¹⁷² Notably, as of 1966, Massachusetts specifically extended women exemption from jury service "in criminal trials involving rape or crimes against chastity, morality, decency, and good order."¹⁷³ As of 1966, seventeen states allowed women an automatic exemption if they claimed child care or family responsibilities.¹⁷⁴ In addition to these gentle discouragements of female jury service, as of 1966, three states placed an affirmative burden on women seeking jury service, by requiring them to register for jury service.¹⁷⁵ Men in these states were automatically registered for jury service, while women had to seek it out.¹⁷⁶

These statistics suggest that female jury service at the time of Kalven and Zeisel's study was an exercise both rare and embryonic. Thus, although this Article postulates that *The American Jury* does not document the extreme *chauvinism* the shield proponents claimed, it is undoubtedly true that Kalven and Zeisel studied primarily *male* juries.

In 1961, the Supreme Court affirmed this likelihood in *Hoyt v. Florida*,¹⁷⁷ where it held that it was reasonable "despite the enlightened emancipation of women" to extend exemptions from jury service based on gender alone.¹⁷⁸ The Court reasoned that although women were qualified to serve on juries, automatic exemptions were justified because of the female role as "center of [the] home."¹⁷⁹

However, the male jury that was so prevalent in Kalven and Zeisel's day was changing by 1976. As of the 1965-1966 state legislative session, many state bodies were considering and passing jury service reforms to encourage or require women to serve.¹⁸⁰ In that year, Minnesota deleted the automatic exemption for female jurors,¹⁸¹ Maryland made female jury service mandatory in counties

169. See *id.* at app. 3, tbl.II.

170. See *id.*

171. *Id.*

172. *Id.* at 37.

173. *Id.* at 13 (citing MASS. ANN. LAWS ch. 234, § 1A (Recomp. 1956)).

174. See *id.* at app. 3, tbl.II.

175. *Id.* at 11-12. These states are Florida, Louisiana, and New Hampshire. *Id.*

176. See *id.* at 44.

177. *Hoyt v. Florida*, 368 U.S. 57 (1961).

178. *Id.* at 61.

179. *Id.* at 62.

180. THE CASE FOR EQUALITY, *supra* note 165, at 47-48.

181. *Id.* at app. 3, tbl.III.

where it had previously been optional;¹⁸² New Hampshire eliminated its registration requirement for female jurors;¹⁸³ New York changed its automatic gender exemption to a need-based exemption for women with child care obligations;¹⁸⁴ and Washington State eliminated its automatic exemption for women.¹⁸⁵ At the same time, Mississippi and South Carolina struck their bans on female jury service.¹⁸⁶ State commissions on the status of women in Florida, Minnesota, Nebraska, Nevada, North Dakota, Rhode Island, Tennessee, Utah, and Washington had urged equalizing jury service as of 1966.¹⁸⁷ By 1968, all states permitted women to serve on juries.¹⁸⁸ By 1975, the number of states offering women exemptions from jury service based solely on their gender had dropped from sixteen to four, and the number of states offering child care exemptions had dropped from seventeen to five.¹⁸⁹

This trend towards equalization of female jury service reached a high point in 1975, when the United States Supreme Court ruled in *Taylor v. Louisiana*¹⁹⁰ that states could not place the affirmative burden of registration upon potential female jurors.¹⁹¹ The Court has characterized *Taylor* as a repudiation of its holding in *Hoyt*.¹⁹² The Court in *Taylor* justified its move toward gender equality in jury eligibility on two grounds.¹⁹³ First, it reasoned that jury venires composed

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* Interestingly, the drive for gender equalization was in part a response to the habit of all-white, all-male, Southern juries to acquit men charged with murdering civil rights workers or African Americans. *See id.* at 50 (citing "The Negro Revolution and The American Woman," excerpt from Plaintiff's Brief, in *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (No. 2263-N)). The American Civil Liberties Union Letter of February 14, 1966, provided:

An official of the Department of Justice has observed that where women have served on Southern juries in civil rights cases, the chances for impartial verdicts have been increased. The brief in the *White [v. Crook]* case submitted by ACLU attorneys . . . who represented the plaintiffs, documented the civilizing and democratizing impact of Southern women, Negro and white, upon the movement for racial justice

Id. (quoting "The Negro Revolution and the American Woman," excerpt from Plaintiff's Brief, in *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (No. 2263-N)).

187. *See id.* at app. 3.

188. Rhonda Copelon et al., *Constitutional Perspectives on Sex Discrimination in Jury Selection*, WOMEN'S RTS. L. REP., June 1975, at 3.

189. *Id.*

190. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

191. *Id.* at 537.

192. *See J.E.B. v. Alabama*, 511 U.S. 127, 134 (1994) ("In 1975, the Court finally repudiated the reasoning of *Hoyt* and struck down, under the Sixth Amendment, an affirmative registration statute nearly identical to the one in *Hoyt*.").

193. *Taylor v. Louisiana*, 419 U.S. at 530.

of a diverse population were more likely to offer the accused impartial justice.¹⁹⁴ Second, it reasoned that "sharing in the administration of justice is a phase of civic responsibility" that would benefit men and women equally.¹⁹⁵

In sum, the jury Kalven and Zeisel studied in the mid-1950s no longer existed at the time rape shield proponents cited the work in 1976. In the intervening years, efforts at the state level eliminated many of the bars to female jury service. In 1975, the Court put its imprimatur on the ideal that women should serve on juries on a basis equal with men. Thus, to the extent that the jury chauvinism documented by Kalven and Zeisel in the 1950s reflected the overwhelmingly male composition of juries, the existence of the chauvinist jury was on the wane as a matter of case law and statute by 1975, when shield proponents cited it as an evil justifying the rape shield laws.¹⁹⁶

C. *The Post-Shield Evolution in Female Jury Service*

In 1978, the same year that the federal rape shield law took effect based on the myth of the chauvinist jury,¹⁹⁷ the Supreme Court decided *Duren v. Missouri*,¹⁹⁸ which struck down Missouri's automatic jury exemption for women.¹⁹⁹ The details of the case suggest that neither state legislation permitting but not requiring women to serve, nor the *Taylor* holding, had yet equalized jury venires.²⁰⁰ For instance, in 1976, fifty-four percent of those eligible for jury service in Jackson County, Missouri, were women, but less than one percent of the 1,800 people chosen for jury service were women.²⁰¹

In the late 1980s, presumably as women came to constitute closer to half the jury venire as a result of *Duren* and *Taylor*, the legal battle over female jury

194. *Id.*

195. *Id.* at 531 (citation omitted).

196. Admittedly, this assertion rests on the assumption that a gender-diverse jury would not display the same purported bias against sexually active women as did mostly male juries. It also rests on the more general assumption that women would bring different viewpoints to the previously all-male enclave of the jury. The first assumption is subject to some debate, as reflected in the footnotes to *J.E.B. v. Alabama*, 511 U.S. at 138 n.9 (citing studies yielding different results on female votes in rape cases). The second, however, has been endorsed by the Court. See *infra* notes 217-18 and accompanying text. Moreover, it is likely that the "chauvinist jury" was a real phenomenon in some jurisdictions at some point in time. The point is merely that the proponents of the rape shield laws did not adequately prove the concurrent existence of such a phenomenon at the Judiciary Hearings because they cited only their skewed version of an outdated *The American Jury* and no other study to support their contention.

197. Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046 (1978).

198. *Duren v. Missouri*, 439 U.S. 357 (1978).

199. *Id.* at 360.

200. See *id.* at 357-63.

201. *Id.* at 362-63.

service shifted to the question of peremptory challenges. In 1986, the Supreme Court ruled in *Batson v. Kentucky*²⁰² that peremptory challenges designed to strike potential jurors on racial grounds violated the Equal Protection Clause.²⁰³ Women quickly exploited *Batson* to argue for protection against peremptory challenges. As soon as 1987, a request to extend *Batson* was lodged before the Rhode Island Supreme Court.²⁰⁴ A similar case, *United States v. Hamilton*,²⁰⁵ reached the Fourth Circuit in 1988.

In 1994, the Supreme Court agreed to resolve a persistent circuit split on the issue of whether striking female venire members violated the Equal Protection Clause. *J.E.B. v. Alabama*²⁰⁶ involved a state complaint regarding paternity and child support filed by the mother against the alleged father.²⁰⁷ At trial, a venire of thirty-six people—twelve males and twenty-four females—was called.²⁰⁸ The court excused three jurors for cause, including two men.²⁰⁹ “The State then used 9 of its 10 peremptory strikes to remove male jurors; petitioner used all but one of his strikes to remove female jurors. As a result, all the selected jurors were female.”²¹⁰ The petitioner objected that the state’s use of the peremptory challenges to strike male jurors violated the Equal Protection

202. *Batson v. Kentucky*, 476 U.S. 79 (1986).

203. *Id.* at 84. It is notable that women initially sought jury service in order to counteract suspect acquittals in racial crimes. See THE CASE FOR EQUALITY, *supra* note 165, at 50 (citing “The Negro Revolution and the American Woman,” excerpt from Plaintiff’s Brief, in *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (No. 2263-N)). Their eventual right to be shielded from peremptory challenges was a logical outgrowth of the fight of racial minorities for the same shield. As the ACLU points out, women and racial minorities have had a symbiotic relationship throughout the civil rights movement, as both were to an extent battling prejudices held by the same dominant class, white men. See *id.* at 32, 33.

The historical evidence is overwhelming that the position of women in this society was comparable to that of the Negro slave. . . . Under these circumstances, it is not surprising that many of the Abolitionists, men and women, were also foremost in the movement for women’s rights and that the pioneer feminists identified their cause with that of the Negro slave.

Id.

204. *State v. Oliviera*, 534 A.2d 867, 869-70 (R.I. 1987).

205. *United States v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988).

206. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

207. *Id.* at 129.

208. *Id.* It is interesting to note that by 1991, when the trial was held, the jury venire in Alabama was dominated by women. Alabama did not strike its bar to female jury service until 1966. *White v. Crook*, 251 F. Supp. 401, 408 (M.D. Ala. 1966). That the venire was dominated by women twenty-five years later suggests anecdotally that the jury reform efforts of the mid-1960s and the Supreme Court cases decided in the mid-1970s had taken effect by the early 1990s. This suggestion supports the assertion that the mythical chauvinist jury, if it ever existed, has been largely dismantled.

209. *J.E.B. v. Alabama*, 511 U.S. at 129.

210. *Id.*

Clause.²¹¹ The Supreme Court agreed, declaring for the first time that “gender, like race, is an unconstitutional proxy for juror competence and impartiality.”²¹²

Interestingly, in reviewing the history of female jury participation, the Court explained that the historic justification for keeping women off juries was to “protect women from the ugliness and depravity of trials. Women were thought to be too fragile and virginal to withstand the polluted courtroom atmosphere.”²¹³ The Court quoted an illustrative 1949 Arkansas case in which the jurist stated that “[c]riminal court trials often involve testimony of the foulest kind, and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships and other elements that would prove humiliating, embarrassing and degrading to a lady.”²¹⁴ The Court then denounced this reasoning, quoting its own opinion in *Frontiero v. Richardson*:²¹⁵ “This attitude of ‘romantic paternalism’ . . . put women, not on a pedestal, but in a cage.”²¹⁶

The Court then evaluated the two-tiered benefit of jury service that it had outlined in *Taylor*—the benefit to litigants and the benefit to women.²¹⁷ It stated that men and women may bring different qualities to jury service: “The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables.”²¹⁸ In a footnote, the Court conspicuously averred that gender-diverse juries were not expected to reach different results than exclusively male juries, and that it did not believe women were predisposed to come to different conclusions on the facts than were men.²¹⁹

Next, the Court analyzed the reverse side of the issue—the benefit of jury service to members of the public.²²⁰ It referenced its 1975 *Taylor* decision for the proposition that juries must be diverse not only to assure impartial administration

211. *Id.*

212. *Id.*

213. *Id.* at 132.

214. *Id.* (quoting *Bailey v. State*, 219 S.W.2d 424, 428 (Ark. 1949)).

215. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

216. *J.E.B. v. Alabama*, 511 U.S. at 133 (quoting *Frontiero v. Richardson*, 411 U.S. at 684). It is ironic that the justification for keeping women off of juries—the humiliation of having to hear graphic sexual testimony—is similar to one justification for the rape shield law: the humiliation of having to give graphic sexual testimony. *Judiciary Hearings*, *supra* note 6, at 80. The “humiliation” can only stem from the previously discussed notion that a woman’s chastity and unfamiliarity with sexual topics are valuable assets. *See Comment*, *supra* note 19, at 76. If this notion is outdated, then the corollary conclusions that women cannot hear rape evidence as jurors, and that women should not be made to testify about their rapes or their sexual history, are also outdated.

217. *J.E.B. v. Alabama*, 511 U.S. at 133-34.

218. *Id.* (quoting *Ballard v. United States*, 329 U.S. 187, 193-94 (1946)).

219. *Id.* at 138 n.9.

220. *See id.* at 134 (discussing the problems of restricted jury service).

of justice, but because "sharing in the administration of justice is a phase of civic responsibility."²²¹ Thus, by 1994, the Court had made clear that female jury service was to be the norm. A sea change has taken place in the law governing jury service in the decades since Kalven and Zeisel's study. Although the Court has been chary of stating that men and women may reach different conclusions on the facts, the legal evolution between 1954 and 1994 discredits the usefulness of statistics in *The American Jury* to prove jury chauvinism.

Consequently, the rape shield laws fit into a third category of obsolescence: they were "originally intended to depart from the legal fabric," but have "failed to exert a 'gravitational pull' on that framework."²²² As documented above, the laws were intended to dispel the previously crucial notion that sexual history was linked to consent.²²³ Numerous studies conducted since the advent of the laws demonstrate that jurors persist in linking the two.²²⁴ This failure is profound, not only because it indicates that the shield statutes have failed on their own terms, but because—as further discussed below—it reveals that the short-term feminist goal of trial decorum was purchased at the expense of the long-term goal of public education.

IV. THE INTERACTIVE MODEL OF JURY EDUCATION

Academics have long agreed that the Framers intended the jury as an institution for public education.²²⁵ But in recent years, scholars and judges have de-emphasized the traditional model of judge-to-juror education in favor of an interactive model in which judges educate jurors, jurors educate each other, and juries educate their communities.²²⁶ This model suggests that allowing juries to debate the relationship between sexual history and consent would actually further the feminist goal of public education about gender roles. This Part discusses the interactive model.

221. *Id.*

222. Estreicher, *supra* note 106, at 1130 n.10; *see supra* note 99 and accompanying text.

223. *See supra* notes 54-73 and accompanying text.

224. *See infra* note 244 and accompanying text. These studies are a striking repudiation of Judge Patricia Boyle of the Michigan Women's Task Force, who said that the perceived link between a woman's sexual history and her consent to a specific instance of allegedly forced sex "ought to be eradicated from the law if we cannot eradicate it from people's minds." *Judiciary Hearings*, *supra* note 6, at 84; *see supra* note 73 and accompanying text.

225. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1186-87 (1991) (citing *Essays by a Farmer* (pt. IV), in 5 *THE COMPLETE ANTI-FEDERALIST* 39 (Herbert J. Storing ed., 1981) (showing the jury as a "gratuitous public school, ever open," where jurors learn their rights, the law, and the practice of equality)); Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 *SUP. CT. REV.* 127, 178 (comparing Supreme Court Justices to teachers, molding and educating the public).

226. *See discussion infra* notes 229, 243-46 and accompanying text.

In the early years of the Republic, most commentators and judges viewed juror education as a top-down affair. When the Court was first constituted, the Justices were charged with serving as Circuit Court judges in various jurisdictions throughout the new nation.²²⁷ As such, the Justices presided over trials and instructed grand juries.²²⁸ It was common for the Justices to deliver political "sermons" as part of the grand jury instruction process.²²⁹ These "sermons" were meant to teach citizens of the fledgling nation about their new form of government and the traits they should refine in order to participate optimally, while discussing the application of specific laws.²³⁰

Further, it appears that the Justices consciously addressed themselves not only to the grand jurors in the courtroom. The admonitory portions of the jury charges were "often printed in the newspapers at the request of the grand jurors."²³¹ Also, the Justices specifically exhorted grand jurors to report the essence of the instructions to their neighbors. Admonished Justice James Wilson:

"In the situation, in which I have the honour to be placed, I deem it my duty to embrace every proper opportunity of disseminating the knowledge of [the criminal code] far and speedily. . . . Inform and practically convince everyone within your respective spheres of action and intercourse, that, as excellent laws improve the virtue of citizens, so the virtue of the citizens has a reciprocal and benign energy in heightening the excellence of the law."²³²

De Tocqueville was particularly enamored with this jury service model:

"The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged

. . . It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most

227. See Lerner, *supra* note 225, at 130-31 ("The Justices were quick to see and seize the chance to proselytize for the new government and to inculcate habits and teachings most necessary in their view, for the maintenance of self-government.")

228. *Id.* at 130.

229. *Id.* at 131.

230. *Id.*

231. *Id.* at 135 ("[T]he Justices knew that their audiences extended beyond the confines of the courtroom.")

232. Lerner, *supra* note 225, at 141-42 (quoting 3 WILSON, WORKS OF THE HONOURABLE JAMES WILSON 392-93 (1804)).

learned and enlightened members of the upper classes, and becomes practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties

. . . I look upon [the jury] as one of the most efficacious means for the education of the people which society can employ."²³³

Others shared this view.²³⁴ The "Maryland Farmer," an Anti-Federalist writing propaganda regarding the Bill of Rights, noted that while the average citizen was "much degraded in the powers of the mind," jury service would refine his mental abilities.²³⁵ "Give them power and they will find understanding to use it," the Farmer wrote.²³⁶

Academics have recently begun coaxing more subtle educational dynamics out of the institution of the jury. For instance, Akhil Reed Amar has postulated that one of the jury's several functions was to serve as a parochial intermediary, able to employ local norms in arbitrating decisions about guilt, innocence, and liability.²³⁷ This view suggests the Framers intended jurors to serve as more than mere receptacles for judicial wisdom, but to interpose their own values and experiences into their decisionmaking.

Amar has theorized that jury service has taken on an additional educational dimension as the nation has grown more diverse and polarized along ethnic, geographic, and socioeconomic lines.²³⁸ Amar notes that "the jury provides a forum to force citizens who might never engage each other—they live in different neighborhoods, work in different worlds, attend different schools, worship in different churches—to listen to each other, and deliberate collectively."²³⁹ Justice Marshall embraced this dynamic in *Curtis v. Loether*,²⁴⁰ in which the Court held that the Seventh Amendment required a jury trial in an action under the Civil Rights Act for damages and injunctive relief.²⁴¹ Justice Marshall acknowledged that "jury prejudice may deprive a victim of discrimination of the verdict to which he or she is entitled."²⁴² Nevertheless, he

233. See Amar, *supra* note 225, at 1186-87 (quoting 1 ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 295-96 (Vintage ed. 1945) (emphasis omitted)).

234. See *Essays by a Farmer*, *supra* note 225, at 39.

235. *Id.*

236. *Id.*

237. See Amar, *supra* note 225, at 1186 (stating that jurors may consider community customs when applying procedural devices).

238. See Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1186-87 (1995).

239. *Id.* at 1179.

240. *Curtis v. Loether*, 415 U.S. 189 (1974).

241. *Id.* at 192.

242. *Id.* at 198.

expressed hope that "jury trials will expose a broader segment of the populace to the example of the federal civil rights laws in operation . . ."²⁴³

Others have echoed and amplified this view. For instance, George Priest has stated that civil juries are ideal "[t]o resolve cases requiring the application of complex societal values, especially where statement of the values applied is inherently difficult or problematic."²⁴⁴ The Supreme Court reached a similar conclusion in *Ballew v. Georgia*,²⁴⁵ when it counseled against shrinking juries.²⁴⁶ It reviewed studies of group deliberations and stated that "[w]hen individual and group decision making were compared, it was seen that groups performed better because the prejudices of individuals were frequently counterbalanced."²⁴⁷

Not only may jurors educate each other, they may send messages to the community as a whole. Judge Jerome Frank was one of the first to criticize the general verdict as a device for hiding jury errors and allowing jurors to conflate unrelated issues.²⁴⁸ Since 1937, the Federal Rules of Civil Procedure have allowed judges to submit so-called "special verdicts" to juries,²⁴⁹ and many states adopted the practice even earlier.²⁵⁰ A growing number of commentators are urging the use of special verdicts.²⁵¹ In particular, Priest has argued that jurors should be required to explain their decisions, and that appellate courts should be allowed to reverse them based on those explanations.²⁵²

243. *Id.*

244. George L. Priest, *Justifying the Civil Jury*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 103, 111 (Robert E. Litan ed., 1993) [hereinafter VERDICT].

245. *Ballew v. Georgia*, 435 U.S. 223 (1978).

246. *Id.* at 233.

247. *Id.*

248. See *Zell v. Am. Seating Co.*, 138 F.2d 641, 648 n.27 (2d Cir. 1943) ("Much of the difficulty derives from the use of the general verdict which makes it all but impossible to control the jury . . .").

249. FED. R. CIV. P. 49 and advisory committee's note.

250. See Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575 (1923) (providing a history of special verdicts pre-1923).

251. See, e.g., Jonathan D. Caspar, *Restructuring the Traditional Civil Jury*, in VERDICT, *supra* note 244, at 414, 433 (defining special verdicts to be essentially flow-charts, laying out a series of fact questions to jurors; the answer to each question directs the jury to the next legally relevant question and so on until the final question results in a verdict); H. Lee Sarokin & G. Thomas Munsterman, *Recent Innovations in Civil Jury Trial Procedures*, in VERDICT, *supra* note 244, at 378, 393-94 (adding a similar procedure is the special interrogatory, which allows jurors to arrive at a general verdict, but guides their deliberation through a series of discrete questions isolating the key issues as given in jury instructions). Special verdicts are generally not used in criminal cases, although the Supreme Court has never expressly barred them. *United States v. O'Looney*, 544 F.2d 385, 391-92 (9th Cir. 1976). One lower court, *United States v. Spock*, 416 F.2d 165, 182-83 (1st Cir. 1969), overturned a criminal conviction because the jury arrived at it using a special verdict.

252. Priest, *supra* note 244, at 111.

Most recently and most profoundly, Paul Butler has sparked heated debate by proposing that African-Americans use jury service as a vehicle to condemn the failure of the criminal justice system to address racial stereotypes and the unique problems of racial minorities.²⁵³ Butler suggests a systematic program of jury nullification in select cases.²⁵⁴ He suggests that jurors can use trial deliberations as a forum to educate fellow citizens and to send a message to the community as a whole.²⁵⁵

Thus, history suggests that juries have always been intended as a forum for public education. Originally, the Framers seem to have envisioned the judge as mentor to the juror. When this static vision of jury education was prevalent, it may have been sensible for feminists to advocate rape shield laws as a method of educating the public. If judges instructed jurors that there was, as a matter of law, no link between previous sexual experience and consent to rape, perhaps it was reasonable to believe that jurors would mold their private views accordingly. But recent studies suggest this pedagogic method has not quelled the ambiguous influence of sexual history evidence in rape trials.²⁵⁶

253. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). Butler suggests that African-American jury members should automatically vote to acquit black defendants charged with nonviolent crimes, regardless of their likely innocence or guilt. See *id.* at 724 (noting that through implementation of his proposal "the people would have a formula for what justice means in the African-American community, rather than having to decide it on an ad hoc basis"). He urges black ministers, writers, playwrights, and rap singers to educate the minority community about jury nullification. *Id.* at 723. He states a hope that "there are enough of us out there, fed up with prison as the answer to black desperation and white supremacy, to cause retrial after retrial until, finally, the United States 'retries' its idea of justice." *Id.* at 724-25. Of course, Butler is advocating the converse of this Article's proposal. This Article suggests that in rape cases, information should flow from judge to jury and from juror to juror, while Butler disavows the notion of juror-to-juror education in favor of individual jurors sending a message to judges and lawmakers. Still, he sees the jury as a voluble participant in citizen education, and in that sense, his proposal has helped to drive what this Article characterizes as the "interactive public education" model of the jury.

254. See *id.* at 715-25 (arguing that the jury should consider nullification in non-violent, malum in se crimes and that there should be a presumption in favor of nullification in "victimless," malum prohibitum offenses).

255. See *id.* at 724-25 (analogizing nullification to a "grass-roots campaign").

256. See, e.g., REID HASTIB ET AL., *INSIDE THE JURY* 140 (1983), quoted in *J.E.B. v. Alabama*, 511 U.S. 127, 138 n.9 (1994) (noting that women are more likely to convict in rape cases than are men); GARY D. LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* 154 (1989) (discussing a study of forty-one rape trials in Indianapolis from 1978 until 1980, documenting defendants' and victims' characteristics, their behavior before and during the alleged rape, and prosecutors' evidence, finding that whether the victim was sexually active was "more than twice as important for predicting jurors' reactions than whether the victim and defendant were acquainted"); Burt, *supra* note 25, at 229 (a 1980 study showed more than "half of the sampled individuals agree[d] with statements such as '[a] woman who goes to the home or apartment of a man on the first date implies that she is willing to have sex' and '[i]n the majority of rapes, the victim was promiscuous or had a bad reputation . . .").

Current trends suggest that a more dynamic model of public education via jury service is an interactive one. As the Court observed in *Ballew*, one of the advantages of group decision making in the jury context is that the prejudices of some individuals may be counterbalanced by the views of others.²⁵⁷ This dynamic suggests that juries offer an opportunity for juror-to-juror education concerning deep-seated but rarely discussed social prejudices. Moreover, as Amar, Priest, and Butler suggest, they can educate—or at least provoke discussion in—the community with their verdicts, particularly if they complete special verdict forms.²⁵⁸ Based on the interactive model of public education via jury service, it is no surprise the rape shield law has failed to achieve the public education goal. Top-down imposition of an orthodoxy regarding the link between sexual history and consent will stifle a potentially fruitful exchange of views between jurors. The burgeoning interactive model of jury education suggests that the best way to educate the public about female sexuality is to dismantle the rape shield.

V. PROPOSAL

Congress and state lawmakers should repeal the rape shield laws. Defense attorneys should be permitted to introduce evidence on a victim's sexual history, subject, of course, to the general evidentiary rules regarding relevance.²⁵⁹ Instead of suppressing a jury debate on the role of sexual history in rape, legislatures should compel jurors to discuss the issue by requiring that juries in rape cases involving a consent theory complete a special verdict form. The special verdict would force into the open a debate on the link between sexual history and consent. The special verdict form would specifically ask whether the jury believed the evidence regarding the victim's sexual history with the accused and with other men. It would specifically ask whether the jury believed that the woman consented to this instance of sexual conduct.

Appellate courts could then evaluate how often credible evidence of sexual history was coupled with a finding of consent. They could also evaluate how often credible evidence of sexual history and a finding of no consent led to an acquittal—an even more stark outcome. Repealing the rape shield laws would achieve the feminist goal of educating the public about female sexuality by providing a forum in which people from vastly different social backgrounds are required to meet as equals and engage in a meaningful debate.²⁶⁰ An emerging

257. *Ballew v. Georgia*, 435 U.S. 223, 233 (1978).

258. See *supra* notes 233, 252-53 and accompanying text.

259. See FED. R. EVID. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.”).

260. See Amar, *supra* note 238, at 1179 (noting “the jury provides a forum to force citizens who might never engage each other—they live in different neighborhoods, work in

view of the jury as an institution of interactive learning suggests that such debate is ideal for jury rooms. And jury verdicts—both those repudiating a link between history and consent and those condoning it—would inevitably spark public discussion of the issue.²⁶¹

Moreover, forcing juries to undertake frank discussions about the role of sexual history in rape consent would not necessarily thwart the feminist goal of increasing rape conviction. First, as detailed in Part III.A, the evidence marshaled by rape shield proponents—the Kalven and Zeisel study—was inconclusive on the question whether juries would be biased against sexually active women. Second, as detailed in Part III.B, even if the 1950s juries studied by Kalven and Zeisel were chauvinist, juries sitting in 1976, when the rape shield law was passed, may not have followed the same course. Finally, as demonstrated in Part III.C, juries today are highly unlikely to demonstrate the same purported chauvinism, as they are populated equally by men and women. And, as the Court noted in *Ballew*, group decision making tends to mute extreme voices.²⁶² It is entirely conceivable, therefore, that gender equality on juries would result in a more moderate stance regarding sexually active women. Of course, as Justice Douglas noted in *Ballard*, the different approaches that men and women might take to some issues are “among the imponderables.”²⁶³ Still, the presence of women on juries would most likely lead to a more realistic discussion regarding female sexual activity and its relationship to consent.

Finally, private interest groups should undertake up-to-date studies on American sexual activity, documenting the rate of premarital sex for both men and women. Prosecutors could use these statistics to refute defense strategies tying prior sexual consent to rape consent. Use of such statistics might neutralize the moral opprobrium attached to rape victims’ forced recitations of their sexual histories at trial.

different worlds, attend different schools, worship in different churches—to listen to each other, and deliberate collectively”).

261. For instance, in February 1999, an Italian judge overturned a rape conviction based in part on the fact that the woman was wearing “tight” jeans at the time of the assault. Toros Harmonie, *Outcry Grows Over Rape Ruling*, DES MOINES REG., Feb. 13, 1999, at 10. He reasoned that the assailant could not remove the woman’s jeans without her cooperation, and therefore she consented. *Id.* The Italian ruling sparked protests, letter-writing campaigns, and news coverage across Europe and the United States. *Id.* Thus, even what most rape activists would call an incorrect ruling was transformed into a significant event of public education on the irrelevance of female “promiscuity.” One could imagine that if a jury’s acquittal based on a woman’s sexual history became public in a similarly pointed way, as it inevitably would if special verdict forms were used, the decision would initiate a similar outcry and dialog.

262. See *Ballew v. Georgia*, 435 U.S. at 233 (observing that group decision making counterbalanced prejudices of individuals).

263. *Ballard v. United States*, 329 U.S. 187, 193-94 (1946).

VI. CONCLUSION

This Article proposes that the time has come to repeal rape shield laws. The laws were adopted based on invalid justifications regarding jury bias. The laws unnecessarily forfeited long-term feminist goals at the expense of short-term goals, with dubious success.

Even if the statutes were justified when adopted in the mid-1970s, the laws are obsolete today. First, the law governing jury composition has changed significantly since the rape shields were adopted. It is likely that women constitute half or near half of the jurors hearing rape cases today. Second, the debate obscured by the rape shield laws—the relevance of sexual history to consent—has simmered among citizens despite its resolution in law. The long-term goals of the rape shield laws—socialization and education—should come to the fore. Those goals cannot be realized in an artificial legal system that obscures the remaining divide over the question of whether sexual history is relevant to consent.

This Article has argued that the jury is an interactive forum for public education: that the judge should educate the jury and jurors should educate one another, the community, and government officials. Using this model, the sensible way to achieve the stated feminist goals of education and socialization on gender roles is to let jurors debate the issue of sexual history and consent to rape.