

# THE IMPACT OF COMPLAINANT SEXUAL HISTORY EVIDENCE ON JURORS' DECISIONS

## Considerations From a Psychological Perspective

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Although Canada's sexual assault laws have undergone considerable modification and revision since the late 1970s and early 1980s, it has only been within the past decade that a "rape shield" protection has applied to the complainant's prior sexual conduct with the defendant. Although the admission of evidence concerning the complainant's prior sexual conduct with the defendant now receives legislative protection, it can still, under some circumstances, be admitted at trial. Specifically, if the trial judge determines that the evidence pertaining to the complainant's prior sexual conduct with the defendant is of significant probative value to a fact at issue (other than the complainant's consent or credibility) and that this value is not outweighed by any potential prejudicial effects, it may be admitted at trial. Drawing on psychological research investigating the role played by complainant/defendant relational history in people's evaluations of sexual assault, the current article critically examines the potential impact that this evidence may have on jurors' decisions in sexual assault trials. This review suggests that significant dangers are associated with its introduction at trial and also includes a discussion of the legal implications of these research findings.

On the basis of a national survey conducted in 1993, it was estimated that over half a million women in Canada experienced at least one incident of sexual assault in the year preceding the survey (H. Johnson, 1996). Moreover, contrary to the common belief that sexual assaults are committed by strangers, the vast majority of these assaults were committed by someone known to the victim. These findings are consistent with prevalence rates reported in other Canadian surveys (DeKeseredy, 1996; DeKeseredy & Kelly, 1993; DeKeseredy, Schwartz, & Trait, 1993; Newton-Taylor, DeWit, & Gliksman, 1998; Randall & Haskell, 1995) and have been similarly documented south of the border (Abbey, Ross, McDuffie, & McAuslan, 1996; Harney & Muehlenhard, 1991; I. M. Johnson & Sigler, 2000; Koss, 1992; Koss, Gidycz, & Wisniewski, 1987; Muehlenhard & Linton, 1987). For instance, Koss et al. (1987) found that in a sample of over 3,000 women drawn from 32 colleges and universities, 17% had experienced rape or attempted rape in the previous year, and 84% of these incidents involved someone known to the victim (in 57% of the rapes, the perpetrator was a date). Similarly, Abbey et

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al. (1996) found that over half of the 1,160 women in their sample of students had experienced some form of sexual assault, with 95% of these assaults perpetrated by someone they knew (e.g., casual or steady dating partner, friend, spouse/ex-spouse).

Given the relational history that often exists between a woman and her alleged perpetrator, this variable can take on considerable significance in the adjudication of sexual assault. Indeed, of considerable legal relevance is the way in which the criminal courts have handled the unique problems—that is, the resultant tension between the defendant's right to a fair trial and the need to protect the rights of the complainant—that occur when the victim of an alleged sexual assault has been involved in a prior sexual relationship with the defendant. Implicit in the policy decisions and commentary regarding the admissibility of complainant sexual history evidence is a myriad of assumptions about how the information is likely to impact the triers of fact (i.e., jurors, judge). The present article reviews the psychological literature and data bearing on this issue.

Part 1 provides a brief historical overview of Canada's treatment of complainant sexual history evidence in sexual assault trials, particularly emphasizing prior sexual history evidence involving the defendant. This section ends with a brief discussion of the treatment of prior sexual history evidence in U.S. courts. Parts 2 and 3 follow with a review of the social-psychological research bearing on the question of how complainant sexual history evidence is likely to influence people's evaluations of sexual assault. Studies that assess the impact of complainant relational history are discussed in Part 2, while research bearing on the potential effectiveness of judicial-limiting instructions that accompany the admission of sexual history evidence is considered in Part 3. Part 4 reviews some survey and recent juror simulation research that examines the impact of complainant sexual history evidence on the perceptions and judgments of mock jurors. Finally, Part 5 considers the policy implications of this body of work.

### Legal Background

As it is aptly noted in *R. v. Seaboyer* (1991), the sexual assault victim “who comes to the attention of the authorities has her victimization measured against . . . current rape mythologies” (p. 171). Historically, the mythology that prevailed, and was reflected in English criminal law, cast the sexually experienced woman as one who was more likely to grant sexual favors indiscriminately and, thus, as one who was more likely to have consented and was less worthy of belief (Chapman, 1999; Kolby, 1992). As such, up until the early 1980s, evidence pertaining to the prior sexual history of a complainant was admissible in sexual assault trials in both Canada and the United States, with the information deemed relevant to the triers' determination of the complainant's consent and credibility (Chapman, 1999; Fishman, 1995; Galvin, 1986; Kolby, 1992).

#### *Canadian Context*

It was not until 1983 that the Canadian government acknowledged the prejudicial nature of this “outmoded, sexist-based use” of information and introduced what came to be referred to as the “rape shield” provisions (set out in

§§246.6 and 246.7 of the *Canadian Criminal Code*, renumbered in 1985 as §§276 and 277, respectively). These provisions strictly prohibited the intrusive and irrelevant cross-examination of a complainant on matters of sexual history (§276)<sup>1</sup> and sexual reputation (§277).<sup>2</sup> It should be noted, however, that the legislation encompassed the complainant's sexual history with any person *other* than the defendant. Thus, at that point in time, there were no specific restrictions on complainant sexual history evidence involving the defendant, and the admission of this type of evidence was subject to little scrutiny (Chapman, 1999).

Not long after the enactment of the rape shield provisions, the constitutionality of §§276 and 277 was challenged (*R. v. Gallant*, 1986; *Re Seaboyer and the Queen, Re Gayme and the Queen*, 1987; *R. v. Wald*, 1989). Although evidence pertaining to the sexual reputation of the complainant (§277) was viewed as serving no legitimate purpose and thus presenting no constitutional challenge, §276 was deemed unconstitutional. In particular, the Supreme Court of Canada (*R. v. Seaboyer*, 1991), in a 7:2 decision, struck down this section on the grounds that it violated the defendant's right to a "fair" trial (specifically, §§7 and 11(d) of the *Canadian Charter of Rights and Freedoms*). Writing on behalf of the majority decision, Madame Justice McLachlin acknowledged that current "rape mythology and sexist beliefs" can prevail over sexual assault trials but noted that, in attempting to curb their pernicious influence, §276 "overshoots the mark," rendering inadmissible evidence that "may be essential to the presentation of legitimate defenses and hence to a fair trial" (*R. v. Seaboyer*, 1991, p. 150). To curb the negative influence of "rape myths" that may potentially govern the impact of sexual history evidence, the Court recommended that jurors be provided with judicial instructions specifying the limited use for which the evidence can be used.

Thus, although the use of complainant sexual history evidence for the purpose of inferring consent or impeaching the complainant's credibility would be clearly illegitimate, the evidence may be relevant and of sufficient probative value to support other inferences. For instance, one of the more common circumstances under which this information may be adduced at trial occurs when the defendant raises the defense of an "honest but mistaken belief in consent" (see Boyle & MacCrimmon, 1998; Schwartz, 1994). In so doing, the evidence pertaining to the complainant's prior sexual conduct with the defendant is only to be used to determine whether the defendant honestly believed the victim had consented. However, the evidence may not be used to determine the likelihood that she, in

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<sup>1</sup>Section 276 prohibited evidence "adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused," noting, however, three specific exceptions to this blanket exclusion: (a) "... evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution," (b) "... evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge," or (c) "... evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant." R.S.C. 1985, c. C-46.

<sup>2</sup>Section 277 outlined the prohibition of "evidence of sexual reputation, whether general or specific ... for the purpose of challenging or supporting the credibility of the complainant." R.S.C. 1985, c. C-46.

fact, did consent, nor may it be used to determine her credibility. In addition to the defense of an “honest but mistaken belief in consent,” the court noted other, although not exhaustive, examples in which sexual history evidence may be deemed relevant. For instance, such evidence may go to support the basis for similar fact evidence, or evidence that goes to motive to fabricate (Boyle & MacCrimmon, 1998; Schwartz, 1994).

In light of the *Seaboyer* decision, legislative reforms to the sexual assault laws swiftly followed (Bill C-49, coming into force in 1992), and currently the Canadian sexual assault laws allow judicial inquiry into the complainant’s past sexual history (Boyle & MacCrimmon, 1998). The admission of sexual history evidence is still prohibited where, by reason of the sexual nature of that activity, it relates to inferences regarding what the courts have referred to as the *twin myths*—the complainant’s credibility or consent (§276(1)).<sup>3</sup> If, however, and as outlined in *Seaboyer*, the judge determines that the evidence is relevant for some issue other than the determination of the complainant’s credibility or likelihood of consent, and it “has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice,” the evidence may be admitted at trial (§276(2)). The main restrictive element of the current legislation is that the sexual nature of such evidence cannot be used as a basis to infer consent or credibility. The constitutionality of these provisions were most recently upheld by the Supreme Court of Canada in *R. v. Darrach*, a case in which the defense challenged their constitutionality on the grounds that the provisions violated the defendant’s right to make full answer and defense, his right not to be compelled to testify against himself, and his right to a fair trial (*R. v. Darrach*, 1998, 2000; see also Stewart, 1999).

Section 276(3) sets out the factors that the judge must consider in this balancing exercise (e.g., the defendant’s right to make full answer and defense, the need to remove any discriminatory belief or bias, the risk that the evidence may unduly arouse sentiments of prejudice, sympathy, or hostility in the jury).<sup>4</sup> Although these factors provide guidelines to judges, they embody a great deal of

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<sup>3</sup>These guidelines were incorporated into §276(1): evidence that the complainant has engaged in sexual activity, whether with the accused or any other person, is not admissible to support an inference that, by reason of the sexual nature of that sexual activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief. Note, as was recommended in *R. v. Seaboyer*, the same evidentiary standards governing the admission of sexual history evidence involving the complainant’s sexual conduct with individuals other than the accused should similarly apply to the complainant’s sexual conduct with the accused.

<sup>4</sup>In determining whether evidence is admissible under this section, the judge, provincial court judge or justice shall take into account (a) the interests of justice, including the right of the accused to make a full answer and defense; (b) society’s interest in encouraging the reporting of sexual assault offenses; (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; (d) the need to remove from the fact-finding process any discriminatory belief or bias; (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury; (f) the potential prejudice to the complainant’s personal dignity and right of privacy; (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and (h) any other factor that the judge, provincial court judge or justice considers relevant. R.S.C. 1980-81-82-83, c. 125, s. 19; R.S.C. 1985, c. 19 (3rd Supp.), s. 12; 1992, c. 38, s. 2.

judicial discretion, as judges are left to rely on their own beliefs and experiences in making their determinations (Boyle & MacCrimmon, 1998). It is perhaps not surprising that, at the trial court level, decisions regarding the admissibility of evidence pertaining to prior sexual relations between the complainant and the defendant on occasions other than the one in question have been somewhat inconsistent (*R. v. Crosby*, 1995; *R. v. Park*, 1995; *R. v. R.E.D.*, 1997; see Chapman, 1999). These reforms have also been the subject of considerable debate among the legal community (see generally, Boyle, 1996; Boyle & MacCrimmon, 1998; Chapman, 1999; Paciocco, 1993, 1995; Schwartz, 1994; Wagner, 1993), with some judiciary (see Madame Justice L'Heureux-Dubé's dissenting opinion in *R. v. Seaboyer*, 1991) as well as feminist legal scholars who are highly critical of the admission of complainant sexual history evidence at trial (e.g., Boyle & MacCrimmon, 1998). For instance, Schwartz (1994) has argued that, although it appears that the courts have "finally rejected the myth that some women are 'the type' who 'always say yes,'" current legal changes suggest a belief "that a woman who has engaged in consensual sexual intercourse with *a particular man* 'is more likely' to do so at another time with *that same man*" (p. 233).

### *U.S. Context*

Similar to the legal reforms that have taken place in Canada, federal and state courts in the United States have also reformed their sexual assault laws in recognition of the potential prejudice that prior sexual history evidence may present at trial. Indeed, since the early 1970s, "legislatures or courts in each of the fifty states have enacted statutes, composed rules of law, or authored judicial opinions to protect rape complainants" (Soshnick, 1987, p. 644; see also Hazelton, 1991). Clearly signaling national approval of the earlier state statutory rape shield measures (Hazelton, 1991), the federal version of the statutory rape shield, Federal Rule of Evidence 412, was enacted in 1978. Reflecting a more enlightened "social policy in which evidence of consent to sex in the past" was not to "be taken as probative of consent on a given occasion" (Eichhorn, 1989, p. 350), the rationale behind its introduction closely paralleled the law adopted in Canada.

In particular, Rule 412(a) prohibits the introduction at trial of reputation or opinion evidence of a sexual assault complainant's sexual history. As in Canada, sexual history evidence is deemed irrelevant to the issue of whether the woman consented to a specific individual at a particular point in time (Murthy, 1991). Rule 412(b) prohibits the introduction of sexual history evidence in the form of opinion or reputation, unless it falls under one of the exceptions and is deemed both relevant and more probative than prejudicial.<sup>5</sup> Thus, as in Canada, the

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<sup>5</sup>These exceptions pertain to situations where: (a) the defendant has a constitutional right to introduce such evidence (FRE 412(b)(1)). For example, if, in accordance with due process, a defendant admits evidence for a defense provided him by the substantive law (e.g., mistaken belief); (b) the victim's sexual behavior with persons other than the defendant is to be used by the defendant to demonstrate that he was not the source of the semen or injury (FRE 412(b)(2)(A)); (c) the past sexual behavior between the victim and defendant is offered by the defendant to show consent (FRE 412(b)(2)(B)). It should be noted, however, that even if the evidence falls under one of these exceptions, as in Canada, it is deemed admissible only if the trial judge finds that the evidence is relevant, and its probative value outweighs its prejudicial effects (FRE 412(C)).

evidence may be deemed probative, and therefore potentially admissible, for determinations of the defendant's claim that the woman consented to sex (Murthy, 1991), or for "determining elements of the charge or defence" (Jendrek & Kaplan, 1987, p. 44). The exception most relevant to our current discussion involves those situations in which the past sexual behavior between the alleged victim and the defendant is offered by the defendant to show consent (FRE 412(b)(2)(B)). For instance, prior sexual conduct evidence based on the defendant's knowledge of the complainant's previous sexual activity with him can be admitted to demonstrate the fact that she did consent to the sexual activity in question and/or to support the defendant's version of events. For example, it may demonstrate that the victim "willingly took part in acts of a similar nature, and/or in a similar situation, in the past," therefore challenging the complainant's version of events (Jendrek & Kaplan, 1987, p. 44).

Although this exception does afford the defendant the opportunity to introduce evidence regarding the victim's prior sexual conduct with him to demonstrate consent, it does not address the issue of whether the defendant may introduce the evidence to demonstrate his mistaken belief in her consent (Murthy, 1991). According to Murthy (1991), the question becomes one of whether the word "consent" in this exception includes the defendant's mistaken belief in consent. On this point, one of the major federal cases dealing with the interplay of Rule 412 and the mistake of fact defense (*Doe v. United States*, 1981) suggests that it does. The Court in this case held that, although the victim's past sexual history was inadmissible to show consent, it was admissible to demonstrate the defendant's state of mind. In its decision, the Court concluded that evidence pertaining to the victim's past sexual activity with the defendant (even in reputation or opinion form) was admissible as long as it was based on the defendant's knowledge of the victim's sexual history and it was used to demonstrate his mistaken belief in consent (Murthy, 1991).

Essentially, the Court stipulated that, if the defendant can show, independent of the actual sexual activity, that the complainant's behavior at the time of the alleged sexual assault was a manifestation of his belief in her consent, then it would be considered as relevant evidence (Murthy, 1991). The defendant's knowledge of the woman's prior activity may be deemed relevant for demonstrating the defendant's claim that the woman's particular behavior (verbal or otherwise) constituted a communication of consent (Murthy, 1991). In short, the Court provides a "backdoor entrance" for the admission of sexual history evidence. It should be noted, however, that such a defense would only be considered a complete defense if the belief is both honest and reasonable. Yet, the notion that "a woman's sexual experience could lead a reasonable person to believe in consent, undermines the purposes behind Rule 412" (Murthy, 1991, p. 559; see also Spector & Foster, 1982).

Although Rule 412 is typical of the rape shield statutes passed in many states (Hazelton, 1991; Murthy, 1991), significant syntactical differences exist among them (Soshnick, 1987). Although all rape shield laws limit, to some extent, the degree to which the complainant's prior sexual history is admissible (Kessler, 1992), the nature of that limitation varies from state to state. Soshnick (1987) has divided the different state statutes into the following five broad categories: those that generally prohibit the introduction of sexual evidence, except in limited

circumstances (e.g., New Hampshire, Oklahoma); those that generally prohibit sexual history evidence, except in a few specifically defined situations, and only after a hearing to determine admissibility (e.g., Arkansas, Massachusetts); those that admit sexual history evidence under traditional rules requiring that relevance outweigh prejudicial effect (e.g., Kansas, South Dakota); those that generally allow sexual history evidence but require a hearing on admissibility for some uses of this evidence (e.g., Florida, New York); and those that give the trial judge general discretion to admit sexual history evidence but limit such discretion in certain circumstances (e.g., New Jersey, Nevada) (Soshnick, 1987, p. 653).<sup>6</sup> Despite this variation, the majority of states follow the basic ideals and intent of Rule 412 (Murthy, 1991). That is, each state has determined that evidence of a complainant's prior sexual history is of such a nature that its admission must be limited to some extent. More importantly, even those that do not necessarily limit the admission of such evidence have stipulated that such evidence must be examined critically before it is admitted.

In summary, both the Canadian and U.S. courts explicitly acknowledge the potential dangers that may accompany the admission of complainant sexual history evidence and restrict the admission of this evidence at trial. Although neither country allows the introduction of prior sexual history evidence that is in reputation or opinion form, when such evidence refers to specific sexual activity between the victim and the defendant, it can, under some circumstances, be admitted at trial. In particular, such evidence may be deemed relevant to understanding the defendant's reasons for concluding that the woman consented to the sexual activity in question. Although the potential prejudice inherent in this evidence has been recognized in both countries, little attention has been given to the exact influence of such evidence. The following sections review the psychological literature and data bearing on this issue. Specifically, what impact is sexual history evidence likely to have on the jurors' perceptions of the complainant and defendant? Does it provide probative information? Is it likely to be associated with any negative inferences or judgments about the complainant and, if so, can its prejudicial impact be controlled by judicial instructions? Ultimately, is the information likely to be used by the jurors in a legally appropriate manner?

### The Impact of Complainant Relational History

The pervasive impact of stereotypical or false beliefs regarding sexual assault, typically referred to as *rape myths* (Lonsway & Fitzgerald, 1994), on people's perceptions and judgments of sexual assault have been demonstrated in numerous studies (e.g., Schuller & Wall, 1998; Wall & Schuller, 2000; see generally, Lonsway & Fitzgerald, 1994). Considerable support can be found in the literature for the hypothesis that a complainant who has engaged in sexual relations with the defendant in the past is likely to be judged more harshly than if these relations had not occurred. *Rape myths* have been defined as descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims and their interaction) that serve to deny, trivialize, or justify sexual violence exerted

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<sup>6</sup>A complete listing of which states fall into which category are provided by Soshnick (1987, pp. 693–698).

by men against women (Bohner et al., 1998). Moreover, they have been viewed as serving a number of cultural functions, the primary of which are the "denial and justification" of rape (Payne, Lonsway, & Fitzgerald, 1999, p. 31). One of the most common rape myths that permeates people's judgments about sexual assault involves the myth of "rapist as stranger." Indeed, although the vast majority of sexual assaults are committed by individuals known to the victim, the common belief that sexual assaults are committed by strangers persists.

Consistent with people's perceptions of what constitutes a "real" sexual assault, a large body of psychological research demonstrates that people view sexual assault committed by a stranger quite differently from one committed by an individual known to the victim. Along these lines, researchers have investigated people's judgments of sexual assault by presenting research participants with scenarios depicting a sexual assault in which the victim/offender relationship is varied. A consistent pattern emerges across these studies. Research participants presented with sexual assault scenarios committed by an acquaintance, as opposed to a stranger, are harsher in their evaluations of the victim, attribute less responsibility to the perpetrator, and attribute more responsibility and enjoyment to the victim (Bridges, 1991; J. A. Johnson & Russ, 1989; J. D. Johnson, 1994; Kanekar, Shaherwalla, Franco, Kunju, & Pinto, 1991; Quackenbush, 1989; Szymanski, Devlin, Chrisler, & Vyse, 1993; Tetreault & Barnett, 1987; Willis, 1992). For instance, in a study by Willis (1992) in which the relationship between the complainant and perpetrator was varied (dating or strangers), it was found that the victim was viewed as less truthful when the alleged assault had been committed by a dating partner as opposed to a stranger. More importantly, participants were less certain of the complainant's consent and recommended a shorter sentence for the defendant when the sexual assault was perpetrated by a dating partner as opposed to a stranger. Szymanski et al. (1993) also found that participants were less certain of a perpetrator's guilt when the sexual assault involved an acquaintance as opposed to a stranger. These findings suggest that when the complainant knows her assailant, people's judgments about her are likely to be more negative than if she had not known her assailant.

It can also be hypothesized that the negative effect of such information will increase as the relationship between the victim and the perpetrator increases in terms of intimacy. Again, some support for this hypothesis can be found in analogue studies. For instance, Willis and Wrightsman (1995) conducted a study in which research participants viewed a videotape of an alleged victim's trial testimony in which the defense attorney asked the victim about her relationship with the defendant. The relationship involved either a dating couple, friends, co-workers, or strangers. They found that the victim was considered less truthful when she was involved in a close relationship with the defendant (i.e., dating or friends). Furthermore, participants perceived the victim as suffering less and recommended a shorter sentence for the defendant when the sexual assault involved a dating couple as opposed to involving either friends, co-workers, or strangers. Similarly, studies by Bridges (1991) and Monson, Byrd, and Langhinrichsen-Rohling (1996) suggest that the more intimate the prior relationship between the complainant and the defendant, the more lenient participants are in judging a defendant and the harsher they are in judging the complainant.

Unfortunately, the role played by the sexual conduct of the complainant

cannot be discerned in these studies because the scenarios used by the researchers did not elaborate on the sexual nature of the relationship (i.e., only the relationship status was varied). It is plausible, however, that the research participants in these studies may have inferred that the couple portrayed in the dating relationship was sexually involved. As such, the “belief may be that if a woman consents to sexual intercourse at some point in a relationship, a man is entitled to sex at another point” (Monson et al., 1996, p. 421). This interpretation finds some support in a study conducted by L’Armand and Pepitone (1982). These researchers assessed participants’ evaluations of simulated newspaper accounts depicting rape. Within the accounts, the couple was portrayed as either strangers, dating, or dating with prior consensual intercourse. Their results indicated that the rape was viewed as less serious and less damaging to the victim in the accounts that depicted a dating couple with a history of prior sexual activity compared with the other dating condition, which in turn was viewed as less serious and less damaging compared with the stranger condition.

More recently, Monson and her colleagues (Monson, Langhinrichsen-Rohling, & Binderup, 2000) investigated how a couple’s sexual intercourse history influenced people’s perceptions of the victim in an acquaintance rape. Participants were presented with one of four possible victim–perpetrator relationship conditions: strangers, early dating, late dating, or marriage. Within the two dating conditions (both early and late), participants responded to three different vignettes in which the sexual history of the couple was varied such that there was either a previous history of consensual intercourse, a statement indicating that there was no previous sexual history, or no mention of the couple’s sexual history. Consistent with previous research, as the level of intimacy between the victim and the perpetrator increased, perceptions of the seriousness of the assault decreased, and the level of blame that participants attributed to the victim increased. The sexual history variable produced similar results. Compared with the no-sexual history control condition, participants were more likely to blame the victim and trivialize the sexual assault when the couple had a history of consensual intercourse, regardless of how long the couple had been dating or whether they were married. Thus, although there was no evidence to suggest that people automatically assumed that a dating couple had engaged in sexual intercourse, the researchers did find that the mere knowledge that a woman had engaged in prior consensual intercourse with a man powerfully and negatively colored their inferences about her subsequent sexual encounters with him.

A study by Shotland and Goodstein (1992) similarly demonstrated that when consensual sexual intercourse has occurred in a relationship, people’s subsequent perceptions of the sexual assault are altered. Participants were presented with one of three different sexual-history conditions, with the number of previous sexual encounters manipulated to include 0, 1, or 10. The results demonstrated that people’s perceptions of the woman’s right to refuse sex were prejudiced if she had engaged in 10 prior consensual sexual encounters. In particular, the woman was perceived as having more intent to engage in sex and was viewed as less sincere in her protests. Participants in this condition also viewed the incident as less violent and were less likely to view the incident as rape. As these results suggest, “if a man has a history of sexual relations with a woman and has therefore established *sexual precedence*, he and others may believe that he has some legal

and legitimate claim on her future sexuality” (Shotland & Goodstein, 1992, p. 756).

Taken in their entirety, the findings from these studies have important implications for the introduction of complainant sexual history evidence in sexual assault trials. As the findings of Monson et al. suggest, once a woman “consents to sexual intercourse in a relationship and this is known, people’s perceptions of the seriousness of the rape decreases as the victims’ culpability increases” (Monson et al., 2000, p. 1168). In other words, as the sexual intimacy of the couple increases, people are more likely to be focused on the behavior of the woman and question the validity of her claim. Although people’s use of sexual history evidence does not in itself imply improper reasoning, information about a complainant’s prior sexual activity with the defendant may lead jurors to draw the type of inferences about her character and credibility that are forbidden by *Seaboyer*. As noted earlier, however, the Supreme Court of Canada (*R. v. Seaboyer*, 1991) was clearly cognizant of the potential dangers that may accompany the jurors’ exposure to the sexual history information (e.g., inferring complainant consent) and held that judicial instructions must specify the limited purpose for which the information may be used (e.g., evaluating the defendant’s honest, but mistaken belief in consent).

How effective are such instructions likely to be? This question is addressed in the next section, which reviews the larger body of psychological research examining the impact of judicial-limiting instructions on mock jurors.

### The Impact of Judicial-Limiting Instructions

The law often acts on the assumption that the triers of fact are able to disregard “prejudicial aspects of testimony and adjust appropriately the weight attached to it on the basis of its probative value” (Schaefer & Hansen, 1990, p. 159). Prejudicial information is often handled by the introduction of curative instructions that require the jurors to either ignore and give no weight to evidence and/or to limit and restrict the purpose for which the evidence is offered. Researchers investigating people’s ability to follow jury instructions, however, have found discouraging results: Most studies demonstrate that people fail to comply with judicial instructions. This body of work raises doubt as to whether limiting instructions are likely to curb the prejudicial impact of sexual history information.

Research in other areas of the law suggest that instructions limiting the weight that jurors should give to sexual history evidence may have little effect. For example, prior conviction evidence influences mock jurors’ assessments of guilt, and the inclusion of judicial instructions restricting the use of this evidence only to credibility judgments does not eliminate the prejudicial impact (Doob & Kirshenbaum, 1973; Hans & Doob, 1976; Wissler & Saks, 1985). Similarly, other research has demonstrated that instructions to disregard evidence later ruled to be inadmissible are ineffective (Carretta & Moreland, 1983; Thompson, Fong, & Rosenhan, 1981; see generally, Lieberman & Arndt, 2000). Research by a number of authors suggests that the ineffectiveness of instructions may stem from the inability of jurors to comprehend the instructions in the first place (see generally, Elwork & Sales, 1985; Elwork, Sales, & Alfini, 1977, 1982; Lieberman & Sales,

1997, 2000; Rose & Ogloff, 2001; Severance & Loftus, 1982). In short, "if jurors do not understand the law, they cannot be expected to apply it" (Lieberman & Arndt, 2000).

In other instances, research has even indicated that the presence of limiting instructions may have perverse effects. When Tanford and Cox (1987) assessed the impact of a defendant's prior perjury conviction (to be used for determination of credibility but not of character or propensity) on mock jurors' assessments of liability in a civil case, they found that the presence of limiting instructions resulted in a "boomerang effect" that enhanced the prejudicial impact of the evidence. Wolf and Montgomery (1977) similarly demonstrated that judicial instructions to ignore inadmissible information can backfire. In particular, these researchers found that mock jurors were not biased when evidence was simply ruled inadmissible, but were biased by a strong judicial admonishment to disregard the information. The result was interpreted as representing a "psychological reactance" (J. W. Brehm, 1966; S. S. Brehm & Brehm, 1981) to the judicial admonishment in which the jurors' freedom to consider all the available evidence was threatened, thereby resulting in a more contemplative treatment of the information. If the jurors view a judicial admonishment as a threat to their ability to process relevant information, they may "attempt to reduce reactance and re-establish their freedom by performing the threatened behavior" (Lieberman & Arndt, 2000, p. 694). Thus, attempts to suppress thoughts about information may paradoxically result in the greater accessibility and salience of that information, thereby increasing its impact (Lieberman & Arndt, 2000; Wegner, 1994; Wegner, Schneider, Carter, & White, 1987).

At the other end of the continuum, Schaefer and Hansen (1990) found evidence of an "overcorrection effect" in their examination of limiting instructions on similar fact evidence. Participants in this study received either admissible or inadmissible similar fact evidence that was favorable to the prosecution's case. The presence of limiting instructions led to a decrease in the proportion of guilty verdicts, and participants provided with instructions rated information relating to the defendant's prior behavior as less important and the judge's summary as marginally more important. The authors concluded that participants who received the limiting instructions overcorrected for what they perceived to be prejudicial evidence and posited that the overcorrection effect may be the result of the triers' misinterpretation of the limited-use instructions (i.e., that the similar fact evidence is tainted and, as such, casts doubt on the prosecution's case) and/or the result of the doubt that the instructions may have cast upon the participants' decision-making processes in general (i.e., create doubt toward an already established decision). In a similar vein, Schuller and Paglia (1999) found that limiting instructions pertaining to hearsay produced a "spill-over" effect that weakened the credibility of other evidence at trial.

This body of work vividly demonstrates that jurors have difficulty performing the fine-grained distinctions required by the law. Such findings are entirely consistent with the current models of decision making that emphasize how jurors cognitively organize and process the testimony presented at trial into a coherent whole or "story" (Pennington & Hastie, 1986, 1988). Jurors are not merely passive recipients of trial testimony but are actively involved in evaluating the strength and meaning of evidence throughout the trial presentation (Diamond &

Casper, 1992). Moreover, jurors do not approach their task as “blank slates” but with preexisting beliefs, not only about human interaction, but about justice (Finkel, 1995) and what constitutes a crime (Finkel, 2000; Smith, 1991, 1993). These representations may at times conflict with the judge’s instructions (Finkel, 2000; Smith, 1991, 1993), thereby rendering the instructions unlikely to be followed. Moreover, the jurors’ interpretations of the trial testimony are factually interdependent, and attempts to alter the meaning of any one piece of evidence are likely to influence jurors’ interpretation of other evidence.

In summary, current models of juror decision making, coupled with the findings of the effectiveness of curative instructions, suggest that the presence of limiting instructions on complainant sexual history evidence is unlikely to limit its prejudicial effect, and in some instances may even highlight the significance of this or other information presented at trial.

### Impact of Complainant Sexual History Evidence

This section presents the results of a survey conducted by Schuller and Hastings<sup>7</sup> and reports the results of a recent simulation study that examined the impact of complainant sexual history evidence within a realistic trial context (Schuller & Hastings, 2002).

To investigate laypersons’ beliefs about how complainant sexual history could be used at trial, we conducted an investigation that directly asked people how useful this information would be for discerning who was telling the truth. The investigation assessed the basic assumption underlying the court’s rationale for admitting complainant sexual history evidence (i.e., its probative value), along with the court’s concern that the evidence may have a prejudicial impact on the decision process (i.e., would be used for assessing complainant credibility or likelihood of consent). Seventy-one participants, 35 men and 36 women, ranging in age from 18 to 55 (mean age = 34.2,  $SD = 9.99$ ), were surveyed at laundromats located in Toronto. Participants completed the survey while at the laundromat and then returned the questionnaire to the experimenter in a sealed envelope. In the survey, participants were asked to consider the typical “he says/she says” sexual assault scenario: both parties agree that sexual intercourse occurred, but the woman claims she was raped, and the man claims the woman consented. Of particular interest was whether people perceived sexual history as relevant to their determination of the man’s belief in consent and the woman’s credibility and likelihood of consent. Thus, respondents were asked to rate a series of facts in terms of their relevance for determinations of the man’s belief that the woman was consenting, the woman’s credibility, and the likelihood that she consented. Respondents also indicated whether the information should be admitted at trial. We included additional items involving clearly inadmissible information (e.g., the woman has been sexually active with a number of different partners) and irrelevant filler items (e.g., the woman lives alone in the city) to measure the relative impact of sexual history evidence. How respondents rated the usefulness of sexual history evidence in comparison to other potential evidence is shown in the Appendix: Section A presents evidence items pertaining to relationship status or

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<sup>7</sup>We thank Patricia A. Hastings for her assistance with the survey.

prior sexual activity between the man and the woman, Section B presents items involving the woman's character and behavior, Section C presents items pertaining to the alleged perpetrator, and Section D presents items regarding physical evidence obtained following the incident.

We conducted one-sample *t*-tests using the neutral point of the 7-point rating scale (4) as the test value ( $p < .01$ ). A significant *t* value (i.e., means marked with an asterix) indicates that the mean rating of an item is polarized toward one end of the scale and is therefore viewed as a diagnostic piece of evidence (e.g., not very likely to have consented, or very likely to have consented, depending on the direction of the mean).<sup>8</sup> As the results displayed in Section A of the Appendix indicate, respondents felt that the couple's sexual history and relationship status were very diagnostic of both the man's belief that the woman was consenting and the likelihood that the woman consented, but with one exception did not effect the woman's credibility; the majority of respondents felt that sexual history and relationship status information should be admitted as evidence. Respondents also felt that physical evidence obtained following the incident (Items 26–28), evidence of the past criminal activity of the woman (Item 10) and the man (Items 17 and 18), and the woman's delay in reporting the incident (Item 8) should be admitted. Although the results of the complainant's medical examination (Item 28) was not viewed as diagnostic information, respondents felt it should be admitted at trial, a fact of little consequence given that both parties agreed that the sexual intercourse had occurred. In contrast, although some of the remaining items had some diagnostic value for respondents, they were less certain as to whether the information should be admitted at trial (across the majority of these items, less than 50% of the respondents felt that the information should be admitted at trial).

The results suggest that complainant sexual history evidence may have probative value for jurors' determinations of the defendant's belief in the complainant's consent. Compared with other types of evidence, sexual history had a higher diagnostic value, and the vast majority of respondents felt that it should be admitted at trial. With respect to complainant credibility or likelihood of consent, the results were somewhat mixed. Although the sexual history evidence was associated with increased perceptions that a woman was likely to have consented, its effect on the woman's credibility was negligible. Interpretations of these findings, however, must be tempered by the limitations of the sample used, as well as the questionnaire format that was used. The sample size was relatively small and, although it went beyond the student sample typically used in this type of research,

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<sup>8</sup>A series of two-sample *t*-tests were also conducted to identify any gender differences across the items. If gender was found to be significant ( $p < .05$ ), one-sample *t*-tests were again conducted separately for men and women, comparing the means to the neutral point of the scale. The gender differences are noted in the Appendix (i.e., means in bold); however, the mean differences reported in the Appendix represent the overall sample mean. With the few exceptions noted below, the gender differences were typically characterized by more extreme responses for male, compared with female respondents (Items 1, 2, 7, 10 (woman's credibility), 16 (woman's consent), and 21). On three of the items (Items 6, 10 (woman's consent), and 17 (man's belief), it was only the men's responses that differed from the neutral value of the scale. On Item 13, it was the female respondents who were more extreme in their ratings from the neutral value of the scale, whereas on Item 20, it was only the women's responses that significantly differed from the neutral point of the scale.

given the location of recruitment, it is still likely biased toward the young, urban and single. As well, given the self-report nature of the data, the validity of the findings themselves can be questioned. People's general lack of awareness regarding the variables that may influence their behavior has been amply demonstrated in the literature (Nisbett & Wilson, 1977). Moreover, the responses were obtained in the abstract, with respondents receiving no information as to its legal relevance. Perhaps a more realistic context in which instructions given specifying the use for which the sexual history evidence can be used may result in a more legally appropriate application of the information.

Schuller and Hastings (2002) recently investigated this possibility by conducting a juror-simulation study. The purpose of the study was twofold: (a) It assessed the impact of complainant sexual history evidence on mock jurors' judgments, and (b) it assessed what role, if any, judicial-limiting instructions on the use of the sexual history evidence might play in the decision process. Participants listened to an audiotape of a sexual assault trial in which the issue was consent. Evidence of the prior sexual history of the complainant and defendant was varied to produce different trial conditions. In two of the conditions, the complainant and defendant had a history of involvement. To differentiate the impact of sexual history from the relationship status of the couple, in one of the conditions the couple had a history of sexual intercourse, in the other only minimal sexual activity (i.e., kissing/petting). In each condition, half the participants received limiting instructions on complainant sexual history evidence, and the other half received no such instructions. An additional condition with no prior history was also included as a control. Perceptions of the complainant's credibility and likelihood of consent and of the defendant's mistaken belief in consent were the focus of the research. In particular, the authors tested whether these perceptions mediated assessments of guilt.

The findings of the study demonstrated that the nature of the prior relationship did not influence participants' defendant-related judgments—his credibility, his blameworthiness, and most important, his mistaken belief in consent. In contrast, however, the admission of the prior sexual history evidence did influence their complainant-related judgments. As would be predicted by the previous research, when the defendant and complainant had a prior relationship involving sexual intercourse, compared with the no-history control condition, the complainant was viewed as less credible, more blameworthy, and more likely to have consented. Ratings in the kissing/petting condition fell midway between the sexual intercourse and control condition but did not significantly differ from either. Although not reaching statistical significance, ratings of the defendant's guilt were lower in the sexual intercourse condition as compared with the other two conditions.

To determine whether sexual history information had an indirect influence on participants' evaluations of the defendant's guilt, in particular through its influence on participants' evaluations of the complainant, structural equation analysis was performed. The analysis revealed that the prior sexual history evidence was used in a legally impermissible fashion. That is, the information influenced the complainant-related judgments (i.e., her credibility and likelihood of consent), which in turn were related to the mock jurors' perceptions of the defendant's guilt. Prior sexual history information also had a direct effect on guilt. The more intimate the contact between the complainant and the defendant, the less guilty the

defendant was perceived to be. In contrast, there was no evidence to suggest that the evidence was used in a legally permissible fashion (i.e., via influencing the mock jurors' perceptions of the defendant's mistaken belief in consent). Also of notable importance, the researchers found that the presence of the judicial-limiting instructions had no impact on jurors' judgments. In short, the proposed safeguard of providing jurors with limiting instructions to curb the pernicious impact of prior history evidence appeared to be ineffective.

The results of these two studies demonstrate that, although people may view evidence of a complainant's prior consensual activity with the defendant as relevant to their determination of whether an alleged sexual assault was consensual, it may have little actual probative value for their decisions. Rather, such information may tend to be used by jurors in a prejudicial manner. The prejudicial impact of the prior history evidence was most damaging to the complainant when the prior relationship involved sexual intercourse as opposed to a less intimate form of contact. As was suggested by Shotland and Goodstein (1992), it appears that previous sexual activity may set a precedent for people's expectations regarding future sexual interactions. Clearly at odds with the fair administration of law, the findings suggest that, although the courts have "finally rejected the myth that some women are 'the type' who 'always say yes'" (Schwartz, 1994, p. 233), "the impact of what the courts have referred to as the 'twin myths' may still prevail in jurors' decisions when complainant sexual history evidence is admitted at trial" (Schuller & Hastings, 2002, p. 260).

### Policy Implications

This use of complainant sexual history evidence has been the subject of considerable debate among legal scholars (see generally, Boyle, 1996; Boyle & MacCrimmon, 1998; Chapman, 1999; Kolby, 1992; Paciocco, 1989, 1993, 1995; Ruby & Jarvie, 1993; Schwartz, 1994; Wagner, 1993) and the target of constitutional challenges (*R. v. Darrach*, 1998; see Stewart, 1999). Although much of the dialogue surrounding the issue is replete with assumptions as to how jurors are likely to use the evidence, little attention has been directed to research bearing on the topic.

Although the current rape shield provisions acknowledge that evidence of a woman's past sexual conduct with the defendant (or others) may be used in a prejudicial manner, an avenue for its entry has been provided. The current legislation, in both Canada and the United States, permits its admission if its probative value substantially outweighs its prejudicial impact. Research suggests that, although potential jurors may find sexual history evidence useful for evaluating the perpetrator's belief in consent, within the context of a trial the information may have little impact on their perceptions of the defendant's mental state. Coupled with its lack of impact on the defendant's beliefs and perceptions, the research reviewed suggests that the information is likely to be used in a prejudicial manner, that is, to determine the alleged victim's credibility and consent. Moreover, there is little evidence to suggest that reliance on judicial-limiting instructions curbs the prejudicial impact of sexual history evidence. In short, if the intent of the legal reforms is to permit the defense to introduce evidence of probative value, while ensuring that its prejudicial impact (i.e., the

influence of the twin myths) is held at bay, then, based on the research reviewed herein, it appears that the law has failed.

The question becomes one of whether it is possible to admit this evidence without its prejudicial nature overshadowing its probative value. On the basis of the research reviewed, it is probably fair to conclude that this will be a very difficult goal to accomplish. More important, the research reviewed calls into question whether such evidence can even be considered probative in the first place. Although it would be clearly premature to draw any firm conclusions as to the probative value of complainant sexual history evidence, the research by Schuller and Hastings (2002) suggests that this evidence may not be used for the purpose for which it is admitted. Although it is clear that the legal concept of a fair trial exists independently of what jurors may or may not do with the evidence presented, such findings clearly underscore the need for additional research. To protect the rights of both the defendant and the complainant, it is crucial that the rules of evidence accurately reflect when the admission of prejudicial evidence is a "necessary evil" in the pursuit of justice and when its admission is outweighed by its prejudicial impact. On this count, more data are needed to evaluate whether—and if so, how—sexual history evidence should be admitted at trial. Such a research agenda would greatly assist judicial evaluation of the legitimacy of admitting sexual history evidence, which, at the moment, is rendered extremely difficult given the lack of guidance as to how the determination is to be made.

### Conclusions

Since the late 1970s and early 1980s, the laws and legal policies governing the treatment of complainant prior sexual history evidence in sexual assault trials have undergone considerable modification. Currently, within both Canada and the United States, sexual history evidence may be admitted at trial at the discretion of the judge so long as it is relevant and its probative value outweighs its prejudicial effect. Although the courts are cognizant of the prejudicial impact of such evidence and include cautionary-limiting instructions, the present review of the relevant psychological research suggests that this remedy may fall short of its mark and more protection is needed to meet the ends of justice. We hope that this review of the literature highlights some of the concerns that are raised when sexual history evidence is admitted at trial and provides an impetus for more critical research on the topic. Such a research agenda is sorely needed, as legal policy regarding the adjudication of sexual assault is likely to be mired by constitutional challenges to the rape shield provisions and further controversy with respect to the adjudication of these cases.

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## Appendix

Percentage of Respondents Who Indicated the Information Should Be Admitted at Trial, and the Mean Ratings of Extent to Which the Evidence Was Suggestive of Accused Belief in Consent, Complainant Credibility, and Complainant Consent

| Evidence item  | Should be admitted (%) | Man's belief (M) | Woman's credibility (M) | Woman's consent (M) |
|--|------------------------|------------------|-------------------------|---------------------|
| A. The man and woman . . .   |                        |                  |                         |                     |
| 1. . . <b>have had prior consensual sexual intercourse</b>                               | 80.0                   | <b>5.39*</b>     | 3.64                    | 4.63*               |
| 2. . . had consensual sex one week following the incident                                | 88.7                   | 5.77*            | <b>2.68*</b>            | 5.34*               |
| 3. . . had been seen 'kissing and fooling around' prior to the incident                  | 71.8                   | 5.11*            | 3.84                    | 4.38*               |
| 4. . . had consumed alcohol prior to the incident  | 81.4                   | 4.93*            | 3.75                    | 4.41*               |
| 5. . . had been dating for the past five months  | 71.4                   | 4.83*            | 3.98                    | 4.60*               |
| 6. . . had been living together prior to the incident                                    | 88.7                   | 5.13*            | <b>3.73</b>             | 4.97*               |
| 7. . . have been married for several years   | 92.8                   | 5.79*            | 3.86                    | <b>4.90*</b>        |
| B. The woman . . .   |                        |                  |                         |                     |
| 8. . . waited 5 weeks before reporting incident  | 83.1                   | 4.35             | 3.44*                   | 4.28                |
| 9. . . suggests through records with crisis worker that she felt she may have led him on | 64.7                   | 5.01*            | 4.03                    | 4.22                |
| 10. . . was arrested for prostitution two years ago                                      | 75.0                   | 5.43*            | <b>2.97*</b>            | <b>4.69*</b>        |
| 11. . . in the past had sex with several men on the same occasion                        | 50.0                   | 5.07*            | 3.38*                   | 4.59*               |
| 12. . . in the past year, has been sexually active with different partners               | 40.6                   | 4.75*            | 3.77                    | 4.28                |
| 13. . . was dressed provocatively on the evening in question                             | 33.8                   | <b>4.87*</b>     | 4.07                    | 4.04                |
| 14. . . has been seeing a psychiatrist for the past 5 years                              | 50.7                   | 3.94             | 4.23                    | 3.77                |
| 15. . . is not well liked by her co-workers  | 20.0                   | 4.00             | 3.93                    | 3.97                |
| 16. . . lives alone in the city  | 19.7                   | 3.86             | 4.30*                   | 3.84                |
| C. The man . . .   |                        |                  |                         |                     |
| 17. . . had a prior sexual assault conviction  | 94.2                   | <b>3.65</b>      | 5.32*                   | <b>2.60*</b>        |
| 18. . . was arrested on charges of assault 2 years ago                                   | 87.1                   | 4.01             | 4.76*                   | 3.06*               |

(Appendix continues)

Appendix  
(continued)

| Evidence item  | Should be<br>admitted<br>(%) | Man's<br>belief<br>( <i>M</i> ) | Woman's<br>credibility<br>( <i>M</i> ) | Woman's<br>consent<br>( <i>M</i> ) |
|--|------------------------------|---------------------------------|--|------------------------------------|
| C. The man . . . (continued)   |                              |                                 |  |                                    |
| 19. . . in the past had sex with several women on the same occasion        | 45.6                         | 4.49*                           | 3.33*                                  | 3.90                               |
| 20. . . in the past year, has been sexually active with different partners | 39.4                         | <b>4.44*</b>                    | 4.21                                   | 3.99                               |
| 21. . . has been seeing a psychiatrist for the past 5 years                | 47.1                         | 4.14                            | 4.31*                                  | <b>3.76*</b>                       |
| 22. . . according to friends' reports loses his temper                     | 60.6                         | 4.08                            | 4.42*                                  | 3.52*                              |
| 23. . . is not well liked by his co-workers                                | 27.9                         | 3.91                            | 4.13                                   | 3.79                               |
| 24. . . had been unemployed for several months                             | 24.3                         | 3.94                            | 4.19                                   | 3.77                               |
| 25. . . is a high school dropout   | 20.6                         | 3.96                            | 4.16                                   | 3.87                               |
| D. Following the incident . . .  |                              |                                 |  |                                    |
| 26. . . medical doctor noted several scratches and bruises on the woman    | 98.6                         | 2.94*                           | 4.90*                                  | 2.59*                              |
| 27. . . friend saw woman (crying, face puffy/red)                          | 78.6                         | 3.65*                           | 4.81*                                  | 3.03*                              |
| 28. . . medical examination revealed sexual intercourse had occurred       | 92.9                         | 4.12                            | 4.10                                   | 3.94                               |

*Note:* Means designated with an asterisk are significantly different from the mean value of 4. Means highlighted in bold indicate that a significant gender difference was found (see Footnote 6).

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