WHEN MEN ARE VICTIMS: APPLYING RAPE SHIELD LAWS TO MALE SAME-SEX RAPE

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INTRODUCTION

> Few people believe that male rape exists outside prisons. . . . Male rape victims attract little attention because few report the crimes. They rarely report the crimes because they often face mockery, disbelief and disdain from law enforcement and the community at large.[1]

Alan Lane went to a friend's party one summer night. He awoke that night to find a male acquaintance raping him.[2] Steven Dooley asked a male friend to sleep over at his parents' house after his high school prom. The friend later raped Dooley though Dooley tried to resist.[3] Michael Blucker served five years in an Illinois prison for burglary, theft, and forgery. While there, he was raped multiple times by a gang of prison inmates.[4] Fred Pelka was picked up by a seemingly harmless stranger while hitchhiking. The stranger later raped him by luring him into a deserted building.[5]

The circumstances in which these men were raped varied widely. They were raped by acquaintances and strangers, by one attacker and multiple attackers, in their homes and outside their homes. They shared one common experience, however—their rapists were never prosecuted. Despite the different circumstances of their assaults, the different kinds of evidence, and the different credibility problems, all four men decided not to pursue prosecution. They did so for a

* This Note never would have been completed without the invaluable guidance of Professors David Richards and Stephen Gillers; the thoughtful contributions of Marianna Vaidman Stone, Jennifer Mason, Michelle Cherande, and the staff of the *New York University Law Review*; the encouragement of my parents and brother; and especially the love and support of Eric Chun. My sincere thanks to each of you.

1 Nkiru Asika, Male Rape Victims Hide in Shame, Times-Picayune, June 15, 1997, at A27.

2 See id.

3 See id.

4 See Carolyn Starks, Moms Unite After Sons Were Raped in Prison, Chi. Trib., Feb. 10, 1997, § 2, at 1.

5 See Fred Pelka, Raped: A Male Survivor Breaks His Silence, in Rape and Society: Readings on the Problem of Sexual Assault 250, 250-51 (Patricia Searles & Ronald J. Berger eds., 1995).

number of reasons: feelings of shame, fear of retribution, concern about being perceived as gay, the negative reactions they received from the police and their families, or a combination of the above.[6]

These four men thus became part of a largely ignored group. Despite a growing body of literature about rape law, legal commentators rarely discuss male same-sex rape,[7] in which men are both victims and perpetrators, and the legal system's response to it. Instead, they commonly reduce male same-sex rape to a footnote. It may be a disclaimer: "The author in this Note refers to the victim as a female and the accused as a male for consistency purposes only;"[8] a generalization: "[T]he discussion of the alleged victim's past sexual conduct would apply equally to a male complainant;"[9] an argument that a discussion of male same-sex rape is unnecessary in a work about rape: "To employ gender-neutral language in discussing the evidential issues that arise in rape cases would . . . ignore reality and serve no useful purpose;"[10] or an acknowledgment of the author's conscious decision not to address the issue: "Because the process of identifying biases or stereotypes through the lens of a different perspective is unique to each perspective, this article will discuss only the rape of women by

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[6] See id. at 252-53 (noting disbelief and scorn of police officers to whom victim reported his assault); Asika, supra note 1 (stating that "Lane . . . was too ashamed" and "Dooley . . . was too wracked with guilt" for either of them to press charges, and noting that both Lane's and Dooley's parents blamed their sons for their assaults); Cheryl Corley, Illinois Prisoner Who Contracted AIDS Sues State, on Morning Edition (National Public Radio broadcast, Aug. 26, 1997), available in LEXIS, News library, Curnews file (noting that Blucker "kept quiet about the abuse for six months because gang members threatened his life").

[7] This Note will use the term "same-sex rape" instead of "homosexual rape." Neither the victims nor the perpetrators of male same-sex rape are necessarily homosexual. See A. Nicholas Groth & Ann Wolbert Burgess, Male Rape: Offenders and Victims, 137 Am. J. Psychiatry 806, 807 (1980) (finding that only two of 16 men who admitted sexually assaulting other men limited their consensual sexual encounters to men, and only two of six victims of male same-sex rape considered themselves homosexual or bisexual). The term "homosexual rape" suggests inaccurately that one or both parties in a male-male rape are gay, while the term "same-sex rape" avoids this inaccuracy. I am indebted to Ms. Bea Hanson, M.S.W., of the New York City Gay and Lesbian Anti-Violence Project for identifying the proper terminology. See also Stephen Donaldson, The Rape Crisis Behind Bars, N.Y. Times, Dec. 29, 1993, at A11 (stating that "the phrase 'homosexual rape' is extremely misleading" because both victims and perpetrators of male same-sex rape are usually heterosexual).

[8] Shacara Boone, Note, New Jersey Rape Shield Legislation: From Past To Present—The Pros And Cons, 17 Women's Rights L. Rep. 223, 224 n.11 (1996).

[9] David Ellis, Comment, Toward a Consistent Recognition of the Forbidden Inference: The Illinois Rape Shield Statute, 83 J. Crim. L. & Criminology 395, 396 n.9 (1992).

[10] Clifford S. Fishman, Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior, 44 Cath. U. L. Rev. 709, 713 n.10 (1995).

men."[11] The lack of academic literature on the topic is likely a symptom of the larger problem. Because of the stigma attached to male same-sex rape, men rarely report the crime and are involved in prosecution efforts even less frequently. Thus, there are relatively few reported cases discussing male same-sex rape in any detail and, in turn, few legal articles addressing the issue.

A logical question, given the apparent lack of interest in this topic,[12] is whether male same-sex rape is really a significant problem. According to the numbers, it is. Department of Justice statistics indicate that 25,560 men reported that they were the victims[13] of rape or sexual assault in 1994.[14] This number, however, does not reflect the true prevalence of male same-sex rape, since such assaults are widely believed to be underreported.[15] For example, in San Bernadino County, California, only 13 out of 213 men who contacted a sexual assault services center reported their attack to police.[16] Further, in institutional settings there is an enormous problem with male same-sex rape. Studies have found that as many as 290,000 men are sexually assaulted by other men in prison and jail each year.[17] This number is close to double the 162,640 women who reported being the victims of rape in the United States in 1994.[18]

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11 Beverly J. Ross, Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape, 100 Dick. L. Rev. 795, 802 n.22 (1996).

12 See, e.g., Arthur Kaufman et al., Male Rape Victims: Noninstitutionalized Assault, 137 Am. J. Psychiatry 221, 221 (1980) (arguing that "[s]exual assault against men is much neglected"); Panel Discussion, Men, Women and Rape, 63 Fordham L. Rev. 125, 127 (1994) (noting that male same-sex rape is "unjustifiably downplayed").

13 Most counselors prefer the term "survivor," as it focuses on the strength of the person who has lived through a sexual assault, rather than his powerlessness during the assault itself. See, e.g., Michael Scarce, Male on Male Rape: The Hidden Toll of Stigma and Shame 8 (1997) ("*Victimization* implies powerlessness and a lack of control, whereas *survivor* carries a measure of strength, perseverance, and empowerment."). This Note uses the term "victim" only because it is the term typically used by courts and commentators.

14 See Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 1995, at 232 tbl.3.3 (1995). The statistics do not indicate how many of these men were sexually assaulted by men rather than women.

15 See, e.g., Stephen Donaldson, Can We Put an End to Inmate Rape?, USA Today: Mag. of Am. Scene, May 1995, at 40 (noting that "[v]ery few [prison rapes] ever are reported to administrators, much less prosecuted"); Courtenay Edelhart, Male Survivors Also Deal With Myths, Chi. Trib., June 1, 1995, § 2, at 4 ("Experts say the statistics [on the prevalence of male rape] are conservative because they believe a majority of attacks go unreported and prisoners weren't included.").

16 See Asika, supra note 1.

17 See Donaldson, supra note 7; see also Donaldson, supra note 15 (citing data suggesting that over 300,000 men per year are sexually assaulted in prison).

18 See Bureau of Justice Statistics, supra note 14, at 232. As most rapes of women go unreported, this figure (162,640) probably represents only a fraction of the actual number of rapes of women that occur every year. See, e.g., Steve Pokin, Tracking Incidence of Male Rape Difficult, The Press-Enterprise (Riverside, Calif.), Sept. 10, 1995, at D3, avail-

A primary reason for the underreporting of male same-sex rape is the two-fold stigma associated with being a victim of such an assault.[19] Rape is generally a crime in which the victim is stigmatized as much as, if not more than, the rapist.[20] This stigma can be especially severe when the victim is a man. It is difficult for many to conceive of the possibility, let alone the prevalence, of male-on-male sexual assaults and easy for many to feel disdain for a man who becomes a victim. In order to increase the reporting and prosecution of male same-sex rape, the criminal justice system must develop strategies for neutralizing this stigma and enhancing sensitivity to these crimes.

In the effort to develop such strategies, it is helpful to examine how the criminal justice system increased the reporting and prosecution of female opposite-sex rape.[21] One successful technique, implemented during the 1970s, was the passage in most states of Rape Shield Laws.[22] In the decades before Rape Shield Laws, the prior sexual history of female rape victims was considered highly probative evidence on whether victims consented to sexual contact.[23] Admitting evidence of victims' prior sexual history at trial deterred women from reporting rape, however, because they feared being humiliated and disbelieved.[24] It also discouraged prosecutors from prosecuting rape and juries from finding men guilty of rape due to the inflammatory nature of prior sexual history evidence.[25] Rape Shield Laws limited the admission of such prior sexual history evidence at trial.[26] As a result, both the reporting and prosecution of opposite-sex rape increased.[27]

Like female victims of opposite-sex rape, male victims of same-sex rape fear being disbelieved by authorities and having their prior

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able in LEXIS, News Library, Arcnews File (stating that "[i]t's estimated that one in 10 women who are raped contact police" and that all rape is underreported).

19 See, e.g., Susan Estrich, Rape, 95 Yale L.J. 1087, 1089 n.1 (1986) ("The apparent invisibility of the problem of male rape . . . may well reflect the intensity of the stigma attached to the crime and the homophobic reactions against its gay victims. . . . [T]he situation facing male rape victims today is not so different from that which faced female victims . . . two centuries ago.").

20 See infra Part I.A.1.

21 This Note uses the term "female opposite-sex rape" to refer to the rape of women by men, the situation that many think of as a "typical" rape. The term is used for clarity of comparison with male same-sex rape.

22 See infra Part I.A.1 (describing history of rape shield laws).

23 See infra notes 30-33 and accompanying text.

24 See infra note 34 and accompanying text.

25 See infra notes 85-87 and accompanying text.

26 See, e.g., Alaska Stat. § 12.45.045(b) (1996); Colo. Rev. Stat. § 18-3-407(1)(a)-(b) (1996); Mass. Gen. Laws Ann. ch. 233, § 21B (West 1986); Mich. Comp. Laws Ann. § 750.520j (West 1991).

27 See infra note 57 and accompanying text.

sexual histories exposed at trial. They worry that the jury will not believe them and that, therefore, their rapists will go free. In addition to these problems, common to all rape victims, male victims have their own set of concerns. They are worried about being stigmatized by their mere status as victims. They also fear being perceived as unmasculine or gay, or, if they are gay, being forced to come out publicly. They suspect that verdicts in criminal cases can be compromised because of anti-gay bias, regardless of the evidence.[28]

Male victims, therefore, require at least the same kind of protection that female victims receive under Rape Shield Laws, as well as additional protection that addresses their unique concerns. However, the law cannot be concerned solely with the plight of same-sex rape *victims*. While Rape Shield Laws should be used to encourage male same-sex rape victims to come forward, they should be crafted to protect male same-sex rape *defendants* from prejudice as well. Both admitting and refusing to admit evidence of a victim's prior sexual history at trial may unfairly prejudice male same-sex rape defendants by eliciting bias against or misunderstanding of homosexuality.

This Note argues that in most respects, Rape Shield Laws should be applied to male same-sex rape cases in the same way that they are applied to female opposite-sex rape cases. Cases of male same-sex rape, however, implicate homophobia rather than sexism. As a result, Rape Shield Laws must be interpreted to provide a "shield" in male same-sex rape cases not only for sexual history evidence, but also for sexual orientation evidence. Courts should be aware of both the direct and indirect forms that sexual orientation evidence can take and protect victims and defendants from the admission of evidence in either form.

Part I discusses the initial motivation for the creation of Rape Shield Laws and the framework of a typical Rape Shield statute. It outlines the policy concerns that led to the advent of Rape Shield Laws and argues that the same concerns typically apply to cases of male same-sex rape.

Part II briefly explores historical prejudices about homosexuality. It then examines manifestations of those prejudices evident today, both in society generally and the criminal justice system in particular. It proceeds to analyze how homophobia may bias jurors in cases of male same-sex rape.

Finally, Part III discusses how to incorporate concerns about juror bias when applying Rape Shield Laws to cases of male same-sex

[28] See Telephone Interview with Bea Hanson, Director, New York City Gay and Lesbian Anti-Violence Project (Sept. 19, 1996).

rape. It suggests that the defendant in male same-sex rape cases should not be able to introduce evidence of the victim's sexual history or evidence of his sexual orientation for the purpose of proving consent. The defendant must be allowed to impeach the victim, however, if the victim testifies that he is not gay or has never engaged in consensual same-sex activity. In order to avoid such testimony altogether, the prosecution should not be allowed to inquire on direct examination about the victim's sexual history or sexual orientation. This includes indirect evidence of the victim's heterosexual sexual orientation, such as evidence that the victim has been married or has children. By modifying the understanding of Rape Shield Laws to encompass direct and indirect sexual orientation evidence, courts can best further the policy goals underlying Rape Shield Laws.

I
THE CREATION OF RAPE SHIELD LAWS, THE PUBLIC POLICIES BEHIND THEM, AND THE APPLICATION OF THESE POLICIES TO CASES OF MALE SAME-SEX RAPE

A. The Creation of Rape Shield Laws

1. The History of Rape Shield Laws

Rape victims have long been treated unfairly by society and the criminal justice system. For centuries, the courts were extraordinarily suspicious of women who claimed they had been raped. Early legal commentators argued that rape was "'an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.'"[29] They posited that rape was "different" than other crimes because women consent to sex every day.[30] Due to the widespread distrust of rape complainants and concern about protecting men who were wrongfully accused, legislators made proving rape uniquely difficult.[31] Unlike the victims of other crimes,

[29] Estrich, supra note 19, at 1094-95 (quoting 1 M. Hale, The History of the Pleas of the Crown 634 (1778)).

[30] See Sakthi Murthy, Note, Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent, 79 Cal. L. Rev. 541, 546 (1991) (noting common argument that "rape's uniqueness" is basis for treating rape differently than other crimes). The notion that rape is different than all other crimes has been widely criticized, notably by Professor Susan Estrich. Professor Estrich challenges the notion that rape is "different" due to the possibility of consent by arguing that nonconsent is an element of many crimes, such as robbery (robbery with consent is charity) and trespass (trespass with consent is visiting). See Estrich, supra note 19, at 1126. Victims of these crimes, however, are not treated with the same contempt and skepticism as rape victims. See id. at 1126 n.122.

[31] For example, some states required that complaints of rape be corroborated by witnesses other than the victim. See generally Note, Corroborating Charges of Rape, 67

rape victims were often questioned closely about their behavior preceding the rape, in an effort to determine whether they provoked, enjoyed, or consented to defendants' sexual advances.[32] A victim who had engaged in previous sexual encounters was considered not only more likely to consent to sex with any man, but also more likely to lie.[33] Under these circumstances, incidents of rape were underreported, and victims of rape who did report the crime often were humiliated at trial.[34]

Over time, however, criminal justice advocates and feminist groups began to question the treatment of rape and rape victims and to confront the sexism that infused the laws surrounding rape.[35] By the mid-1970s, these organizations convinced most state legislatures to re-examine rape laws.[36] These initiatives resulted in the passage in virtually every state and at the federal level of laws that limited evidence of a victim's prior sexual history at trial.[37] Termed "Rape Shield Laws," these statutes encourage the reporting and successful prosecution of rape by limiting embarrassing and inflammatory testimony about the victim's prior sexual history.[38]

Colum. L. Rev. 1137 (1967) (discussing New York's one-time requirement that charges of rape be corroborated by evidence in addition to complainant's testimony). Such requirements made proving rape nearly impossible, as sexual attacks rarely happen in public places where others might observe the assault. Reformers, however, helped end such requirements. See Harriett R. Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 Minn. L. Rev. 763, 769-70 (1986) (stating that "reformers . . . dispensed with the requirement that the complainant's testimony be corroborated").

32 See Estrich, supra note 19, at 1127-30 (discussing claim that woman's resistance may be interpreted as ambivalence or even enjoyment of defendant's sexual advances).

33 See Euphemia B. Warren, She's Gotta Have It Now: A Qualified Rape Crisis Counselor-Victim Privilege, 17 Cardozo L. Rev. 141, 144 (1995) ("Myths and stereotypes . . . led rape to be one of the least reported crimes in the United States.").

34 See Fishman, supra note 10, at 716 (describing how evidentiary use of prior sexual history discouraged victims from coming forward to testify); Galvin, supra note 31, at 764 ("'Too often in this country victims of rape are humiliated . . . when they report and prosecute the rape.'" (quoting 124 Cong. Rec. 34,913 (1978) (statement of Rep. Holtzman))).

35 See, e.g., Ronet Bachman & Raymond Paternoster, A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?, 84 J. Crim. L. & Criminology 554, 554 (1993) ("The reform of state and federal rape statutes has been the product of a fragile alliance among feminist groups, victim's rights groups, and organizations promoting more general 'law and order' themes.").

36 See Galvin, supra note 31, at 767. For an influential discussion of the history of rape published during the time that traditional rape law began to be questioned, see generally Susan Brownmiller, Against Our Will (1975).

37 See supra note 26.

38 The manner in which these statutes limit evidence about a victim's prior sexual history varies considerably. See, e.g., Alaska Stat. § 12.45.045(b) (1996) (stating that evidence of sexual assault victim's prior sexual history "occurring more than one year before the date of the offense charged is presumed to be inadmissible"); Colo. Rev. Stat. § 18-3-407(1)(a)-(b) (1996) (providing that evidence of victim's prior or subsequent sexual history

Michigan passed the first Rape Shield Law in 1974.[39] Additional states soon followed, enacting statutes that varied considerably in their wording and provisions.[40] Currently, the laws all share one feature: they "reject[ ] the previous automatic admissibility of proof of unchastity."[41]

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shall be presumed irrelevant, except "[e]vidence of the victim's prior or subsequent sexual conduct with the actor" or "[e]vidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease . . . offered for the purpose of showing that the act or acts charged were or were not committed by the defendant"). Under Michigan law, evidence of the victim's prior sexual history will not be admitted unless the judge finds that

> the following proposed evidence [is] material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value: (a) Evidence of the victim's past sexual conduct with the actor. (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

Mich. Comp. Laws Ann. § 750.520j (West 1991).

[39] See Galvin, supra note 31, at 765 n.3 (noting that Michigan passed nation's first Rape Shield Statute in 1974 and citing Act of Aug. 12, 1974, 1974 Mich. Pub. Acts 1025, 1028-29 (codified as amended at Mich. Comp. Laws Ann. § 750-520j (West 1991))).

[40] See, e.g., supra note 38. For the purposes of this Note, the basic policy considerations are more relevant than the nuances of the laws in different states. This Note, therefore, does not analyze the subtle distinctions between the Rape Shield Laws of various states. For such a discussion, see generally Galvin, supra note 31. For an in-depth analysis of the relative strengths and weaknesses of Rape Shield Laws, see id. at 773-76 (discussing four basic models of Rape Shield Laws and differences between provisions of each model); David Haxton, Comment, Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence, 1985 Wis. L. Rev. 1219, 1220 n.3, 1222-31 & nn.7-44 (1985) (arguing that there are four categories of Rape Shield Laws and discussing differences between categories).

[41] Galvin, supra note 31, at 773. Evidence of the victim's prior sexual history is admissible in certain circumstances, however. First, most Rape Shield Laws specifically allow the admission of evidence of previous sexual conduct between the victim and the defendant. See, e.g., Mass. Gen. Laws Ann. ch. 233, § 21B (West 1986) ("Evidence of specific instances of a victim's sexual conduct . . . shall not be admissible except evidence of the victim's sexual conduct with the defendant . . . ."). At least one commentator has questioned the rationale of such provisions, arguing that they hinder the effective prosecution of husbands and boyfriends for rape and are based on sexist and outdated notions of female sexuality. See generally Garth E. Hire, Holding Husbands and Lovers Accountable for Rape: Eliminating the "Defendant" Exception of Rape Shield Laws, 5 S. Cal. Rev. L. & Women's Stud. 591 (1996) (claiming that "defendant" exception fails to protect about half of all women raped and arguing for its elimination).

Second, evidence of the victim's prior sexual activity with people other than the defendant may be admitted in order to show who caused the "physical consequences" attributed to the rape, such as semen, disease, or pregnancy. Some statutes only allow the defendant to present such evidence in order to prove someone other than the defendant had sexual intercourse with the victim. See, e.g., Fed. R. Evid. 412(b)(1)(A) (admitting "evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence"). Other statutes allow either the defendant or the prosecution to introduce such evidence. See, e.g., Colo. Rev. Stat. § 18-3-407(1)(b) (1986) (admitting "[e]vidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or any

2. *Facial Application of Rape Shield Laws to Male Same-Sex Rape*

Rape Shield Laws were intended to protect female victims of opposite-sex rape. Legislators did not write the laws with male victims in mind, nor did they examine the impact such laws would have on male victims of rape.[42] On their face, however, most Rape Shield Laws apply equally to victims and defendants of either sex. They typically refer to evidence offered by the "defendant" or "accused" about the "victim" or "complaining witness" without specifying the gender of either party.[43] Thus, in states where the statutes defining rape and sexual assault are gender neutral, courts have used the gender neutral language to find Rape Shield Laws applicable to cases of male same-sex rape. These courts generally have held that, despite the lack of legislative history supporting such an application, it is consistent with the policies behind Rape Shield Laws to apply them to cases of male same-sex rape.

For example, in *Commonwealth v. Quartman*,[44] the Superior Court of Pennsylvania acknowledged that originally Rape Shield

similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant").

Third, many Rape Shield Laws explicitly provide that evidence that is constitutionally required to be admitted is admissible. See, e.g., N.H. R. Evid. 412 (stating that evidence of victim's prior sexual history is inadmissible "[e]xcept as constitutionally required"). Evidence of prior sexual history might be constitutionally required if, for example, it was also evidence of a motive for the victim to lie about being raped. See, e.g., Olden v. Kentucky, 488 U.S. 227, 233 (1988) (holding that Constitution required that evidence of rape victim's prior sexual history be admitted at trial because it was evidence of motive for victim to lie about being assaulted).

Under these and other exceptions, judges retain some discretion to admit prior sexual history evidence. Most Rape Shield Laws specify strict procedures that must be followed by judges, however, before they admit any prior sexual history evidence. These procedures generally include in camera hearings, see, e.g., Mass. Gen. Laws Ann. ch. 233, § 21B (West 1986) (admitting evidence of prior sexual history "only after an in camera hearing on a written motion for admission of same and an offer of proof"), and a finding by the judge that the evidence is relevant, see, e.g., N.Y. Crim. Proc. Law § 60.42(5) (McKinney 1975) (admitting evidence of victim's prior sexual history if court determines evidence is "relevant and admissible in the interests of justice"), or that its probative value outweighs its prejudicial effect, see, e.g., Mass. Gen. Laws Ann. ch. 233, § 21B (West 1986) (stating that "weight and relevancy of . . . evidence [of victim's prior sexual history must be] sufficient to outweigh its prejudicial effect to the victim" to be admitted).

[42] See, e.g., Lucado v. State, 389 A.2d 398, 403-07 (Md. Ct. Spec. App. 1978) (stating that intention of Maryland legislature in passing Rape Shield Law was to protect female victims of rape from inquiry into their "chastity" and that legislature did not have same concern with respect to male victims).

[43] See, e.g., Colo. Rev. Stat. § 18-3-407 (1986 & Supp. 1996) (referring to "victim" and "defendant" without specifying gender); Mass. Gen. Laws Ann. ch. 233, § 21B (West 1986) (same); Mich. Comp. Laws Ann. § 750.520j (West 1991) (same); N.Y. Crim. Proc. Law § 60.42 (McKinney 1975) (referring to "victim" and "accused" without specifying their gender).

[44] 458 A.2d 994 (Pa. Super. Ct. 1983).

Laws were formulated to protect female victims of rape from inquiries into irrelevant material about their prior sexual history.[45] Because the language of Pennsylvania's rape statute had become gender neutral, the court found it appropriate to extend Rape Shield Laws to cases of male same-sex rape.[46] Like the *Quartman* court, other courts have found Rape Shield Laws applicable to cases of male same-sex rape, although women were the intended beneficiaries of such statutes.[47]

Not all rape laws use gender neutral language, however. Statutes in some states still define rape and other sexual offenses solely as crimes by men against women. For example, in *State v. Dixon*,[48] the Missouri Court of Appeals refused to apply the state's Rape Shield Law to a case of male same-sex rape because the law then only applied to cases of "rape, attempt to commit rape or conspiracy to commit rape."[49] As "rape" in Missouri was then defined as "'penetration . . . of the female sex organ by the male sex organ,'"[50] the Rape Shield Law, read literally, could not apply to a case of male same-sex rape.

Although Missouri has since made its rape law gender neutral,[51] a number of states have not.[52] It is crucial to the goal of protecting victims of same-sex rape that these states rewrite Rape Shield Laws, as well as the underlying substantive statutes defining sex crimes such as rape, in gender neutral language. Doing so is the first step to providing men with equal protection from inappropriate inquiry into their prior sexual experiences at trial.

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45 See id. at 995 n.2.

46 See id. ("Because the Pennsylvania sexual offense provisions are clearly gender neutral, we conclude that any evidentiary exclusions established to aid victims of those crimes are equally applicable to both male and female victims.").

47 See, e.g., Kelly v. State, 586 N.E.2d 927, 929 (Ind. Ct. App. 1992) (applying state's Rape Shield Law to case of male same-sex rape); State v. Hackett, 365 N.W.2d 120, 127 (Mich. 1985) (same); State v. Rodgers, No. 01-C-01-9011-CR-00312, 1991 Tenn. Crim. App. LEXIS 648, at *9 (Aug. 16, 1991) (same); State v. Camara, 781 P.2d 483, 488-90 (Wash. 1989) (same).

48 668 S.W.2d 123 (Mo. Ct. App. 1984).

49 Id. at 125 (citing Mo. Rev. Stat. § 491.015 (1978), amended by Mo. Ann. Stat. § 491.015 (West 1996) (expanding scope of Rape Shield Law to cover all sex offenses, including sodomy and deviate sexual assault)).

50 See id. (quoting Mo. Rev. Stat. § 566.010(1) (1978) (current version at Mo. Ann. Stat. § 566.010(4) (West Supp. 1997))).

51 See Mo. Ann. Stat. § 566.010(4) (West Supp. 1997).

52 See, e.g., Ga. Code Ann. § 16-6-1 (1996 & Supp. 1997) (defining rape in gender specific terms as "carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ."); Idaho Code § 18-6101 (1997) ("Rape is defined as the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator's penis accomplished with a female . . . .").

B. The Policies Behind Rape Shield Laws and Their Application to Cases of Same-Sex Rape

Rape Shield Laws should apply to cases of male same-sex rape not only because such cases are encompassed within the strict language of gender neutral statutes, but also because the policies underlying Rape Shield Laws are equally applicable to male and female victims. Legislators passed Rape Shield Laws with four major policy considerations in mind: the need to increase the reporting of rape, the recognition of the lack of probative value of prior consensual acts, the lack of connection between chastity and truthfulness, and the need to reduce acquittals of guilty defendants.[53] These concerns are equally relevant in cases of female and male rape, underlining the need to apply these statutes to cases of male same-sex rape.

1. The Need to Increase the Reporting of Rape

An interest in increasing the reporting of rape was a primary impetus for the adoption of Rape Shield Laws. The women's groups and law enforcement officials who supported the adoption of Rape Shield Laws believed that the admission of victims' prior sexual histories at trial deterred women from reporting rape.[54] Many rape victims were understandably reluctant to press charges before the passage of Rape Shield Laws because they knew that their personal lives could become a focus of inquiry at trial and often felt that introduction of this evidence "compounded the trauma of the rape."[55] Legislators hoped that Rape Shield Laws would encourage the reporting of rape by lim-

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[53] See infra Parts I.B.1-4.

[54] See Jon R. Waltz & Roger C. Park, Cases and Materials on Evidence 439 (8th ed. 1995) (noting that common law practice of allowing introduction of evidence of victim's character for chastity "deterred victims from pursuing well-founded complaints because of fear of abuse and degradation in the courtroom"); Ronald J. Berger et al., Rape-Law Reform: Its Nature, Origins, and Impact, in Searles & Berger, supra note 5, at 223, 227 (discussing alliance of women's groups and "law-and-order groups" that led to rape law reform); Galvin, supra note 31, at 767 (noting evidentiary reform efforts of feminist organizations and law enforcement agencies and relating their arguments that admission of chastity evidence deterred reporting and prosecution of rape).

[55] Fishman, supra note 10, at 716 (allowing rape defendants to humiliate and embarrass rape victims at trial "discouraged many victims from coming forward in the first place"); see Galvin, supra note 31, at 767 ("[I]n-court disclosure of the most intimate details of the rape complainant's personal life acted as a significant deterrent to the reporting . . . of rape."). Fear of being humiliated at trial is still a major cause of nonreporting. See, e.g., Diana E.H. Russell, The Trauma of Rape: The Case of Ms. X, in Searles & Berger, supra note 5, at 9, 11 (discussing rape survivor's reasons for not reporting rape, including knowledge that if she went to court, she would have "to be in a roomful of people who knew what happened to [her, and that] made [her] sick").

iting such traumatic evidence.[56] Since that time, Rape Shield Laws seem to have helped increase the number of rapes reported in jurisdictions around the country.[57]

Like opposite-sex rape, male same-sex rape is widely believed to be underreported. There are numerous reasons why victims of same-sex rape do not go to the police or other authorities. First, as one New York court has noted, merely by reporting the fact that they were raped, "[h]eterosexual male victims may feel that their sexual orientation is called into question and homosexual male victims fear that their sexual preference may be revealed."[58] Second, society's conception of masculinity has led many men to believe that they should be able to defend themselves from sexual attacks; those who are not able to do so are embarrassed and fear that authorities will not believe that the sexual contact was forced.[59] As a result, like female victims of rape, many male victims find it humiliating to tell authorities that they have been sexually assaulted.[60] Finally, victims of same-sex rape are reluctant to report their rape because they believe their past sexual history will be exposed at trial.[61] This concern may be especially true of male same-sex rape victims who are homosexual, who often fear

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[56] See, e.g., Murthy, supra note 30, at 551 ("[One] purpose[ ] of rape shield statutes [is] to encourage rape victims to come forward. The statutes attempt to achieve this end by banning humiliating and intrusive questions about rape victims' sexuality."). But see Ellis, supra note 9, at 398 (agreeing that Rape Shield Laws were introduced to encourage reporting of rape by assuring women that their prior sexual history would not be divulged at trial, but arguing that this motivation for Rape Shield Laws is not justifiable).

[57] See Bachman & Paternoster, supra note 35, at 565-66 (finding slight increase in reporting of rape after passage of Rape Shield Laws). See generally Cassia C. Spohn & Julie Horney, The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases, 86 J. Crim. L. & Criminology 861 (1996) (discussing expected effect of Rape Shield Laws on reporting of rape, acknowledging more subtle changes that actually occurred, and analyzing data from Detroit to determine effect of Rape Shield Laws on processing particular types of rape). But see Hubert S. Feild & Leigh B. Bienen, Jurors and Rape: A Study in Psychology and Law 180-81 (1980) ("[N]o one has convincingly demonstrated that the new evidence statutes have increased reporting. . . . Is not the decision to report governed by factors which have nothing to do with the . . . evidence provision[s] in effect in the jurisdiction?").

[58] People v. Yates, 637 N.Y.S.2d 625, 629 (Sup. Ct. 1995); see Groth & Burgess, supra note 7, at 808 (quoting male rape survivor as saying that "reporting puts your masculinity in jeopardy"); Pelka, supra note 5, at 254 (claiming male rapists capitalize on fact that "straight victims don't want to appear gay"); Telephone Interview with Bea Hanson, supra note 28 (noting that male victims who are gay fear that reporting rape will expose their homosexuality).

[59] See Groth & Burgess, supra note 7, at 808 (finding that male victims do not report being attacked in part because they fear that no one will believe that they could not defend themselves); see also Pelka, supra note 5, at 252 (noting that one police officer to whom he reported his rape "obviously didn't believe [him]").

[60] See Groth & Burgess, supra note 7, at 808 (finding that men do not report being assaulted in part because telling anyone is "embarrassing" and "distressing").

[61] See Telephone Interview with Bea Hanson, supra note 28.

that their sexual orientation alone will cause jurors to believe that they consented to the sexual contact.[62]

Because some, though not all, of the above concerns are also common to female victims, Rape Shield Laws should be at least as effective in alleviating them with respect to male victims. By assuring male same-sex rape victims that their prior sexual history will be presumed inadmissible, Rape Shield Laws would help increase reporting by alleviating victims' concerns about being humiliated at trial. Proper Rape Shield Law application can also ameliorate victims' other anxieties.

Applying Rape Shield Laws to cases of male same-sex rape will not dispel immediately all of the reasons that victims of same-sex rape are discouraged from reporting their assaults. Rape Shield Laws will not instantly change society's ideas about masculinity or about men's ability to defend themselves from sexual assault. Nor will they directly enhance the sensitivity of police officers who deal with male victims of same-sex assault. Similarly, Rape Shield Laws did not necessarily counteract all prejudices about female rape victims.

Indirectly, however, Rape Shield Laws did help change the way in which people thought about rape. They symbolized society's increasing concern for victims. They also provided a compelling practical reason for police officers and prosecutors to take victims of rape more seriously—Rape Shield Laws made convictions for rape easier to obtain.[63] Thus, by limiting the type of evidence about a victim deemed relevant at trial, Rape Shield Laws can alter society's prejudices about rape. Applying Rape Shield Laws to cases of male same-sex rape could similarly alter society's attitudes toward victims of such crimes.

Unfortunately, Rape Shield Law reform may have no effect on reporting in the prison context. Inmates who report being assaulted and identify their rapists often become the victims of additional sexual assaults, physical violence, and even murder.[64] Inmates who are raped

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[62] See id.

[63] See Spohn & Horney, supra note 57, at 882 (analyzing data on rape cases in Detroit and finding that more "simple rape" cases have been held over for trial in Detroit since rape law reform). Professors Spohn and Horney explain this data by hypothesizing that either victims of rape now report such crimes more often to police, or police and prosecutors have begun to change their criteria when deciding which rape charges to pursue. They suggest that these findings may indicate that Rape Shield Laws have indirectly changed law enforcement attitudes toward rape, but the data on this issue are scarce. See id.

[64] See Carl Weiss & David James Friar, Terror in the Prisons 52, 79 (1974) (relating accounts of prison rape victims who suffered retaliatory attacks after reporting rape or who were threatened with further attack if they reported rape).

thus keep silent about who raped them.[65] Given this threat of retaliation, it is unclear whether the number of rapes reported in prison would increase markedly if Rape Shield Laws were uniformly applied to cases of male same-sex rape: such rapes are underreported primarily because of fear of inmate retaliation, not fear of being humiliated by evidence of past sexual history at trial.[66]

2. *The Lack of Probative Value in Prior Consensual Acts*

In addition to encouraging the reporting of rape, Rape Shield Laws were written to recognize formally that a victim's prior sexual history is usually of little or no relevance to the factual question of whether she consented to sexual intercourse in a particular instance. Rape law historically presumed that women who consented to sexual contact once were more likely to consent to sex again.[67] Rape Shield Law advocates argued, however, that contemporary young women, like contemporary young men, often engage in premarital sex.[68] This fact, coupled with the idea that women, like men, select some sexual partners and reject others based on highly individualized criteria, undermined the notion that a woman's consent to sex with one man meant that she would consent to sex with any man.[69] The presump-

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[65] See, e.g., Corley, supra note 6 (noting that prison same-sex rape victim Michael Blucker did not report being raped by fellow inmates for six months for fear of retaliation).

[66] This is not to say that the issue of the victim's past sexual history does not arise in trials for prison rape. In fact, many such cases have struggled with the application of Rape Shield Laws to same-sex prison rape. Most often, the defense wishes to introduce evidence that the victim engaged in other, consensual homosexual activity while in prison. See, e.g., Dixon v. Jones, No. 88-0815-CV-W-5-P, 1990 U.S. Dist. LEXIS 883, at *17-*18 (W.D. Mo. Jan. 16, 1990) (discussing application of rape shield law to case of prison rape where defendant claimed victim consented); Kvasnikoff v. State, 674 P.2d 302, 303-05 (Alaska Ct. App. 1983) (same); Kelly v. State, 586 N.E.2d 927, 928-29 (Ind. Ct. App. 1992) (same); State v. Hackett, 365 N.W.2d 120, 126-27 (Mich. 1985) (same); Commonwealth v. Quartman, 458 A.2d 994, 995-98 (Pa. Super. Ct. 1983) (same); State v. Whaley, No. 03C01-9101-CR-00025, 1992 Tenn. Crim. App. LEXIS 607, at *14-*15 (July 21, 1992) (same); State v. Rodgers, No. 01-C-01-9011-CR-00312, 1991 Tenn. Crim. App. LEXIS 648, at *5-*10 (Aug. 16, 1991) (same).

[67] See Fishman, supra note 10, at 715 & n.19, 718 (calling this assumption "[the] yes/yes inference").

[68] See Galvin, supra note 31, at 798.

[69] See Vivian Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1, 56 (1977) (arguing that women choose and reject partners based on "highly personal standards"); Fishman, supra note 10, at 741-42 (noting that idea that consent to sex with one man makes consent to sex with another man more likely has been recognized almost universally as fallacious); Galvin, supra note 31, at 767 & n.14 (citing additional sources that describe fallacy of this argument); see also *Kvasnikoff*, 674 P.2d at 306 (describing idea that women are more likely to consent to sex if they have had consensual sex in past as "more a creature of a one-time male fantasy of the 'girls men date and the girls men marry' than one of logical inference" (quoting People v. Blackburn, 128 Cal. Rptr. 864, 867 (Ct. App. 1976))).

tive exclusion of a victim's prior consensual sexual activity under virtually all Rape Shield Laws explicitly recognizes the marginal probative weight of such evidence on the issue of consent.[70]

Male victims of same-sex rape, like female victims of opposite-sex rape, choose some sexual partners and reject others. Although male victims of same-sex rape are not necessarily gay, even those victims who are gay or bisexual should not be presumed to have consented to sex with a man merely because they have done so in the past.[71] Of course, gay men are more likely than heterosexual men to engage in sex with men. Being gay, however, does not make one more likely to engage in sex with a *particular* person of the same sex.[72] Thus, the concern with protecting female victims of opposite-sex rape from the inference that because they consented once they probably consented again is an equally valid concern with respect to male victims of same-sex rape.

3. *The Lack of Connection Between Chastity and Truthfulness*

A third policy concern that led to the adoption of Rape Shield Laws was the recognition of another fallacy underlying rape law, namely, that women who were "unchaste" were less likely to be truthful.[73] This connection between unchastity and untruthfulness was only

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[70] But see supra text accompanying note 41 (noting that most Rape Shield Laws do admit evidence of complainant's prior sexual history *with defendant* if offered as evidence that victim consented). For an example, see Fed. R. Evid. 412(b)(1)(B) (admitting "evidence of specific instances of sexual behavior by the alleged victim with respect to the . . . accused . . . offered by the accused to prove consent"). Further, most Rape Shield Laws allow evidence of prior sexual activity to be admitted in order to show another possible source of the physical consequences of the alleged rape, such as injury, pregnancy, and semen. See Waltz & Park, supra note 54, at 439. The wording of such exceptions varies widely. See, e.g., supra note 41.

[71] Courts have recognized this fact. See, e.g., *Kvasnikoff*, 674 P.2d at 306 ("A homosexual has no more or less free will than a heterosexual to engage in consensual sex with another individual.").

[72] One could argue that protecting male victims of rape from the "yes/yes inference" is not a concern because men were never subject to such an inference. This is true, in part, because society encouraged men to have multiple sexual partners, while women were supposed to "save themselves" for marriage. See Galvin, supra note 31, at 783-84 (stating that "women who had engaged in sexual intercourse outside of marriage had violated societal norms and therefore possessed the character flaw of unchastity"). Given the feminization of men who engage in same-sex sexual activity, however, the "yes/yes inference" potentially could be implicated in cases of male same-sex rape. See infra text accompanying note 81. In addition, the stereotype of promiscuity associated with gay men may give rise to its own "yes/yes inference."

[73] See, e.g., Galvin, supra note 31, at 787 (stating that some courts believed that unchastity was relevant to determination of woman's credibility). Under the laws of evidence, the credibility of witnesses is almost always relevant. See, e.g., Fed. R. Evid. 608(a) (allowing impeachment of witnesses through opinion or reputation evidence only on issue of their "character for truthfulness or untruthfulness").

thought to be true of women, while promiscuity was viewed as having no bearing on men's ability to tell the truth.[74] Dean Wigmore importantly influenced this perception of female sexuality and its relation to truthfulness.[75] As late as 1970, Wigmore's *Evidence in Trials at Common Law* said of women and girls who charge men with rape or seduction: "Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts . . . . One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste . . . mentality finds incidental but direct expression in the narration of imaginary sex incidents."[76] Rape Shield Laws expressly rejected these sexist rationales by holding evidence of sexual history irrelevant and inadmissible to prove a propensity to lie.[77]

Unlike women, men traditionally have not been discredited by acting in a sexually promiscuous manner.[78] Although the unchastity of heterosexual men rarely has any impact on the perception of their credibility, gay men have been subjected to attempts to discredit them solely because of their sexual orientation.[79] Further, the feminization of men who have been forced into sexual "passivity"[80] could make male same-sex rape victims the object of prejudice normally reserved in our culture for women.[81]

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74 See Galvin, supra note 31, at 787 n.116 ("'What destroys the standing of [females] in all the walks of life has no effect whatever on the standing for truth of [males].'" (quoting State v. Sibley, 33 S.W. 167, 171 (Mo. 1895))).

75 See id. at 787-88 (tracing perceived connection between female unchastity and veracity to "the powerful influence of Dean Wigmore"); see also Gary D. LaFree, Rape and Criminal Justice: The Social Construction of Sexual Assault 200 (1989) (quoting John Henry Wigmore, Evidence in Trials at Common Law 924a (Chadbourn rev. 1970)).

76 John Henry Wigmore, Evidence in Trials at Common Law 924a (Chadbourn rev. 1970).

77 See, e.g., Fishman, supra note 10, at 716 (finding that connection between unchastity and credibility was recognized by rape law reformers as "factually questionable and . . . politically unacceptable"); Galvin, supra note 31, at 799-800 (arguing that it is now widely recognized that chastity bears no relationship to credibility, and that fact that such evidence was only used against female rape complainants indicates it was based "on a sexist assumption that unchaste women will falsely charge rape").

78 See supra note 74 and accompanying text.

79 See, e.g., People v. Peters, 101 Cal. Rptr. 403, 409-10 (Ct. App. 1972) (rejecting defendant's argument that evidence of association with homosexuals would give credence to theory that witness was testifying out of homosexual jealousy).

80 See infra Part II.B.

81 See, e.g., Elisabeth Young-Bruehl, The Anatomy of Prejudices 36, 148-49 (1996) (linking homophobia to sexism expressly). Young-Bruehl argues convincingly that homophobia often encompasses many of the characteristics of sexism and states that homophobia by men toward gay men is often an expression of hatred of femininity. See id. Given this connection between prejudice toward women and gay men, it seems reasonable to believe that prejudices normally reserved for women are also likely to be directed at gay men.

In *People v. Hackett*,[82] for example, a defendant in a male same-sex rape case attempted to introduce evidence of the victim's homosexuality "to impeach his credibility as a witness."[83] Although judges in such cases typically are not sympathetic to defendants' claims of a connection between homosexuality and untruthfulness,[84] men who have been victims of same-sex assault should not be forced to rely on the good sense of a few state court judges acting on a case-by-case basis. Instead they need formal protection from the assertion of such a connection.

4. *The Need to Reduce the Acquittals of Guilty Defendants*

A final concern that led to the enactment of Rape Shield Laws was the fear that evidence of a victim's prior sexual history often led to the acquittal of men who were guilty of rape.[85] This concern was well founded. Studies of juror behavior have indicated that jurors are more likely to acquit men accused of rape when evidence of the victim's prior sexual history is admitted at trial, even in cases where the victim was injured severely in the attack.[86] Furthermore, researchers have found that jurors are much less likely to believe female victims who engage in "nontraditional" behavior—including premarital sex and alcohol and drug use—than women who conform to traditional

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[82] 365 N.W.2d 120 (Mich. 1984).

[83] Id. at 126.

[84] See, e.g., *Peters*, 101 Cal. Rptr. at 409-10 (rejecting defendant's attempt to admit evidence in burglary case that witness was homosexual and thus his credibility was suspect); cf. Ohio v. Cruz, C.A. No. WD-86-72, 1987 Ohio App. LEXIS 8703, at *7-*10 (Sept. 18, 1987) (rejecting, in opposite-sex rape trial, defendant's argument that victims' homosexuality made them "abnormal" and thus likely to enjoy watching each other engage in sex with stranger and to lie about being raped).

[85] See Fishman, supra note 10, at 716 (stating that Rape Shield Laws were created to mitigate fact that "admission of [evidence of a victim's prior sexual history] too often resulted in acquittals of men who should have been convicted"); Galvin, supra note 31, at 767 (stating that rape law reformers argued that allowing defendants to attack character of rape victims "accounted for the high rate of acquittal" of men accused of rape).

[86] See LaFree, supra note 75, at 217-18 (finding that in study measuring effect of victim's behavior on outcome of rape trials, "[j]urors were less likely to believe in a defendant's guilt when the victim had reportedly engaged in sex outside of marriage . . . . In contrast, [presence of a] weapon, victim injury, number of charges[, and] eyewitnesses had [no] significant effect on verdicts"). One juror interviewed stated that hospital records do not "mean it was rape. Abrasion of the vagina still doesn't mean rape—she might want that force." Id. at 218; cf. Feild & Bienen, supra note 57, at 118 (agreeing that as "rape law . . . reformers have argued . . . sexual experience of the victim proved to have important effects on juror decision making" but finding that "effects of information on the victim's sexual experiences are more complex than some writers have thought [as jurors consider evidence of a victim's sexual experience in combination with other characteristics of the assault,] such as race of the defendant, race of the victim, and the type of rape committed").

notions of appropriate female behavior.[87] Thus, evidence of a victim's prior sexual history may tend to result in the unjust acquittal of guilty defendants.

The concern that admitting evidence of a victim's prior sexual history can lead to unjust acquittals in cases of opposite-sex rape is also applicable to cases of male same-sex rape. Those jurors who believe women are discredited by engaging in premarital sex are likely to feel the same way about men who engage in sexual activity with other men.[88] Since defendants are likely to raise the issue of the victim's prior sexual history by introducing evidence that the victim had sex with other men, juror prejudices will often be directed at the victim. These prejudices could lead to unjust acquittals. On the other hand, if the prosecution sought to introduce evidence that the victim is not gay, the defendant could be unjustly convicted.

In addition to the bias against homosexuality, many jurors believe that people who are promiscuous do not deserve the protection of rape laws, or are less harmed by the crime of rape.[89] A common stereotype of gay men is that they are promiscuous. When such prejudices about promiscuity and homosexuality are combined, male victims of same-sex rape become doubly in need of the protection Rape Shield Laws provide against juror biases about sexuality.

II
HOMOSEXUALITY AND SAME-SEX RAPE

Although applying Rape Shield Laws to cases of male same-sex rape furthers many of the same policies as applying them to cases of female opposite-sex rape, male same-sex and female opposite-sex rape are not identical. The prejudice about homosexuality implicated in cases of male same-sex rape is typically not an issue in cases of

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[87] See LaFree, supra note 75, at 207 (noting that rape prosecutions in which accused's defense was consent were more likely to involve allegations that victim engaged in "nontraditional behavior," including premarital sex and drinking or drug use, and were much less likely to end in guilty verdicts than were rape cases with different defense strategy). Not surprisingly, jurors with conservative ideas about appropriate gender roles appear particularly likely not to believe victims of rape who engage in nontraditional behavior. See id. at 224-25.

[88] Cf. Denise Bricker, Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners, 58 Brooklyn L. Rev. 1379, 1400-01 (1993) (noting similarity of juror hostility toward women and hostility toward gay men and lesbians).

[89] See Galvin, supra note 31, at 796 (concluding that "jurors, in effect, 'rewrit[e] the law of rape' when the accuser is deemed undeserving of its protection" (quoting Harry Kalven, Jr. & Hans Zeisel, The American Jury 251 (1966))); see also Feild & Bienen, supra note 57, at 142 (finding that in cases where jurors interpreted women victims as encouraging rape, defendants received lighter sentences).

female opposite-sex rape. As noted above,[90] male same-sex rape victims are aware of this prejudice and fear stigmatization. Male same-sex rape defendants may also fear being convicted as a result of bias rather than the evidence against them. Although only a percentage of people who are raped by others of the same sex are homosexual, jurors will likely believe that homosexuality was a factor in the assault regardless of research indicating the contrary.[91] Any discussion of how the criminal justice system can best cope with cases of male same-sex rape must take anti-gay bias into consideration.

A. Society's Understanding of Homosexuality

Turn-of-the-century Americans considered only men who behaved in an effeminate manner and were the passive partner in sexual intercourse as homosexual.[92] "Normal" men were able to engage in sexual intercourse with effeminate men, often called "fairies," without risk of being identified as homosexual so long as they played only the active role in sex.[93] In fact, using a "fairy" sexually became an effective means to enhance one's masculinity.[94] Similarly, like these "normal" men, male rapists of men were not seen as gay because they chose to assault men, but were rather perceived as more masculine.[95]

Alfred Kinsey became one of the first sociologists to question publicly the idea that only passive, and not active, male sexual partners were homosexual.[96] In 1948, Kinsey argued in his famous study, *Sexual Behavior in the Human Male*,[97] that it was untenable to believe that only the passive partner in a male-male sexual encounter was ho-

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90 See supra notes 58-62 and accompanying text.

91 See, e.g., Groth & Burgess, supra note 7, at 809 ("Since rape is commonly misconstrued to be a sexually motivated crime, it is generally assumed that . . . when it does occur [to men], it reflects a homosexual orientation on the part of the offender."); cf. Robert B. Mison, Note, Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation, 80 Calif. L. Rev. 133, 158 (1992) (arguing that "typical American juror" is product of "homophobic and heterocentric American society," and that this fact is exploited by murder defendants presenting "homosexual-advance" defenses).

92 See George Chauncey, Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940, at 65-66 (1994) (arguing that "gender behavior rather than homosexual behavior per se was the primary determinant of a man's classification").

93 See id. at 66.

94 See id. at 81 (claiming that "using a fairy not only could be construed and legitimized as a 'normal' sexual act but could actually provide some of the same enhancement of social status that mastering a woman did").

95 See id. at 60-61.

96 See id. at 70-71 (noting Kinsey's efforts to refute this idea).

97 Alfred C. Kinsey et al., Sexual Behavior in the Human Male (1948).

mosexual.[98] Rather, Kinsey's view was that both partners were engaged in homosexual activity.[99]

Society has since adopted a similar view of sexual orientation—that one's sexuality is "centrally defined by . . . homosexuality or heterosexuality," which are two distinct options for sexual orientation.[100] Homosexuality is viewed as the inferior of these two options for sexual orientation. The fact that a majority of people identify themselves as primarily heterosexual, coupled with historical and religious taboos about homosexuality, led the American Psychiatric Association to consider homosexuality a disease until 1973.[101] Today, biases about homosexuality include the stance that homosexuality is morally repugnant and the (incorrect) belief that gay men are likely to molest children.[102]

The bias against homosexuality is especially evident in the context of the criminal law. For many decades, consensual sodomy was criminalized in the United States.[103] Although some laws have been changed in recent years, many states continue to criminalize sodomy, sometimes labeled "crimes against nature," even when occurring in private between consenting adults.[104] While these statutes do not always refer to the gender or marital status of the participants in the illegal sexual activity, law enforcement personnel consistently have enforced the statutes more stringently against people performing the proscribed acts with others of the same sex.[105] In 1986, the Supreme Court upheld the criminalization of same-sex sodomy in *Bowers v. Hardwick*,[106] finding that the right to privacy does not encompass the

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98 See id. at 615-16.

99 See id.

100 See Chauncey, supra note 92, at 12-13. Chauncey argues that although bisexuality is acknowledged, it "depends for its meaning on its intermediate position on the axis defined by those two poles [of homosexuality and heterosexuality]." Id. at 13.

101 See Young-Bruehl, supra note 81, at 138.

102 See D.J. West, Homophobia: Covert and Overt, in Male Victims of Sexual Assault 13, 17 (Gillian C. Mezey & Michael B. King eds., 1992) (noting that studies have found no connection between male homosexuality and child molestation).

103 See Donal E.J. MacNamara & Edward Sagarin, Sex, Crime, and the Law 128-36 (1977) (discussing selective prosecution, focus on "public" activity, and 1970s movement by gay activists to repeal anti-homosexual legislation).

104 See Developments in the Law—Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1519 (1989) [hereinafter Developments] (stating that as of 1989, 24 states and the District of Columbia still had statutes that criminalized sodomy).

105 See Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187, 188-90 (1988) (discussing why "criminal law punishes homosexual conduct more severely than similar heterosexual behavior").

106 478 U.S. 186 (1986).

right to engage in consensual same-sex sodomy.[107] A significant percentage of Americans continue to support the criminalization of sodomy—a 1996 study indicated that forty-five percent of men and forty-nine percent of women believe that consensual homosexual relationships between adults should be illegal.[108]

The criminal status of sexual activity between same-sex partners has been used to justify denying other rights to gay men.[109] Gay men often are denied parental custody and visitation rights in part because they are presumed to participate in criminal sexual behavior.[110] They are not allowed to marry.[111] There is often little assurance that wills benefiting long term partners will be upheld against challenges by relatives.[112] Thus, the criminal law not only reflects societal disapproval of homosexual behavior, but also contributes to more widespread discrimination against gay men.[113]

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107 See id. at 195 ("The right pressed upon us here has no . . . support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles of construing the Fourteenth Amendment.").

108 See Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 1996, at tbl.2.119 (1996).

109 See MacNamara & Sagarin, supra note 103, at 136 (arguing that illegality of sodomy provides legal arguments to those trying to deny other rights to gay men and lesbians, such as participation in armed forces, government, and private employment); Law, supra note 105, at 190-93 (discussing consequences of criminalizing same-sex sexual activity); Developments, supra note 104, at 1521 ("[T]hese statutes are frequently invoked to justify other types of discrimination against lesbians and gay men on the ground that they are presumed to violate these statutes."); see also Romer v. Evans, 116 S. Ct. 1620, 1631 (1996) (Scalia, J., dissenting) (arguing that *Bowers* allowed criminalization of homosexual conduct and should have been dispositive in challenge to law denying antidiscrimination protection to people based on their sexual orientation). These statutes, obviously, also have a negative impact on lesbian women. That issue, however, is outside the scope of this Note.

110 See Mark Strasser, Fit To Be Tied: On Custody, Discretion, and Sexual Orientation, 46 Am. U. L. Rev. 841, 842-43 (1997) (discussing problems gay parents face in custody proceedings).

111 But see Mark Hansen, More Battles Ahead Over Gay Marriages: Opponents Seek To Overturn Hawaii Ruling With A Constitutional Amendment, A.B.A. J., Feb. 1997, at 24 (discussing recent Hawaii court decision that prohibition of same-sex marriage is unconstitutional).

112 See Law, supra note 105, at 192.

113 Some have noted, however, that sodomy statutes also have more benign, or even positive, uses. For example, prosecutors have used such statutes to prosecute the rape and sexual assault of male victims in states where rape statutes apply only to female victims. See Developments, supra note 104, at 1520 n.8. Such violent crimes could also be prosecuted, however, by rewriting all rape statutes in gender neutral language. Making rape statutes gender neutral, as many states have done, would allow the prosecution of violent sexual assaults on men, while eliminating any discrimination against gays and lesbians that results indirectly from sodomy statutes. See Jeanne C. Marsh et al., Rape and the Limits of Law Reform 76 (1982) (noting that rape of men was prosecuted under sodomy statute until Michigan's rape law was rewritten to be gender neutral); see also Galvin, supra note 31, at 768 (noting that "majority" of states have rewritten rape laws to be gender neutral). Sodomy statutes thus are unnecessary for the prosecution of violent sex crimes.

It is important to remember this treatment of homosexual activity within the criminal and civil law when thinking about same-sex rape. First, it indicates the widespread nature of prejudice against homosexuals. Second, it illustrates that gay men are subject to different societal prejudices than women: the bias against gay men is both more widespread and more formally entrenched in current American law. It is also currently more socially acceptable than bias against women.

These points support two conclusions. First, Rape Shield Laws are necessary to keep male same-sex rape trials focused on evidence and to avoid prejudice to the litigants. Second, Rape Shield Laws must be applied in a manner that accounts for the different character of the bias implicated in male same-sex rape cases.

B. Cases of Male Same-Sex Rape Implicate Bias Against Homosexuality

Courts that have found that Rape Shield Laws apply to cases of male same-sex rape have done so with little discussion of the differences between the prejudice against women that motivated the passage of Rape Shield Laws and the anti-gay prejudice implicated in cases with male victims. They have noted correctly, for example, that the prior sexual histories of both male and female rape victims are irrelevant on the issue of consent.[114]

However, courts have failed to recognize that society has unique biases about gay men.[115] Courts must be sensitive to the fact that evidence that might seem innocuous in an opposite-sex rape trial—such as evidence about marriage or children[116]—can be very prejudicial to a defendant or embarrassing to a victim in a male same-sex rape trial. Thus, courts must apply Rape Shield Laws to ensure that male same-sex rape defendants receive a fair trial and that male victims of same-sex rape can tell their stories without a cloud of bias.

Issues of homosexuality become implicated in cases of male same-sex rape primarily because same-sex rape mimics the physical act of same-sex sex. In male same-sex rape, the victim is typically forced to have anal intercourse, with the perpetrator of the rape act-

114 See, e.g., State v. Whaley, No. 03C01-9101-CR-00025, 1992 Tenn. Crim. App. LEXIS 607, at *15 (July 21, 1992) (comparing same-sex and opposite-sex rape victims by stating that "[t]he fact that someone has consented to homosexual acts on a previous occasion is no more proof that he or she consented at the time of an alleged single sex rape than prior consensual heterosexual relations would be in the case of a male/female rape").

115 See supra Part II.A. (exploring how societal understanding of homosexuality has led to bias within criminal law and society in general).

116 See, e.g., People v. Murphy, 899 P.2d 294, 296 (Colo. Ct. App. 1994) (finding that evidence about same-sex rape victim's previous marriage and child was sexual orientation evidence), rev'd, 919 P.2d 191 (Colo. 1996).

ing as the active party.[117] Many jurors will thus assume that at least one, if not both, of the men involved in a same-sex rape is gay.[118] Such an assumption, however, rests on two faulty premises: that men involved in same-sex rape are generally homosexual, and that men who rape men are interested primarily in the sexual aspect of the assault.

Neither the victims nor the perpetrators of same-sex rape are necessarily homosexual. Studies indicate that victims of same-sex rape are often heterosexual, as are same-sex rapists.[119] Furthermore, like opposite-sex rapists, same-sex rapists are more interested in their dominance over their victim than in the "sexual" aspect of the assault.[120] Male same-sex rapists are thus often indifferent to the gender of the person they rape.[121] Jurors may nevertheless link same-sex rape to homosexuality, regardless of the actual sexual orientation of the victim or offender.[122]

Prejudice about homosexuality will be even more likely to influence the jurors' thinking about a case when the victim *is* gay and that fact is brought out at trial.[123] The effects of such bias can be staggering—jurors have gone so far as to acquit men for killing gay victims

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117 See, e.g., Michael B. King, Male Sexual Assault in the Community, in Mezey & King, supra note 102, at 1, 3-5 (noting that 17 of 22 male sexual assaults in survey consisted of forced anal intercourse); see also Groth & Burgess, supra note 7, at 807 (finding that most common sexual attack of men in study was "sodomy").

118 See supra note 91 and accompanying text.

119 See, e.g., Groth & Burgess, supra note 7, at 807 (finding that three of six victims and eight of 16 offenders were involved exclusively in heterosexual consensual sexual relationships); Kaufman, supra note 12, at 223 ("Male victims of sex assault in our study seemed in general to be unaffiliated with the homosexual community.").

120 See Margaret T. Gordon & Stephanie Riger, The Female Fear: The Social Cost of Rape 44-46 (1989) (arguing that rape is violent, not sexual, crime); Groth & Burgess, supra note 7, at 808 (finding that "[a]ll assaults [of men by men] served as an expression of power and mastery on the part of the offender"). Some jurors do believe that "rape is a crime of violence." See LaFree, supra note 75, at 225-26. Even those jurors who believe that female opposite-sex rape is a violent crime, however, may not believe or understand that men can be raped, that a man who rapes a man need not be gay, and so on.

121 See Groth & Burgess, supra note 7, at 809 (finding that "[t]he gender of the victim did not appear to be of specific significance to half of the subjects" studied by researchers).

122 The fact that some commentators have called same-sex rape "homosexual rape" illustrates the difficulty of divorcing the violent crime of same-sex rape from a concept of sexual orientation and homosexuality. See, e.g., MacNamara & Sagarin, supra note 103, at 150 (speaking of male-male rape as "homosexual rape"); Galvin, supra note 31, at 768 n.18 (discussing protection which gender neutral terms such as "sexual assault" provide to victims of "homosexual assaults"). For a discussion of why the term "same-sex rape" is more appropriate, see supra note 7.

123 See, e.g., Mison, supra note 91, at 153-58 (discussing impact of homophobia and heterosexism on jurors' perceptions of defendant in murder cases where victim was gay).

despite enormous evidence of guilt.[124] Conversely, where a victim is shown to be heterosexual, juries may convict under the mistaken belief that a man who is not gay will never consent to sex with another man. Sexual history evidence necessarily sways a jury's belief about what transpired between the victim and the defendant, and thus may have a huge role in determining the outcome of a case.

Anti-gay bias can be particularly virulent in cases of male same-sex rape because such cases implicate both homophobia and sexism. Men who are passive in same-sex sexual intercourse assume a role that is viewed as physically similar to that of women in opposite-sex sexual intercourse. Men who assume this passive role have been feminized, historically and today.[125] For example, prison inmates call men who are about to be raped "virgins," a term that equates their sexuality with that of women—the prisoners are virgins until penetrated for the first time.[126] Male rape victims themselves are cognizant of this feminization, often begging their rapists not to "make [them] a girl."[127] As our society teaches men to reject femininity,[128] many men are uncomfortable with men who play a passive sexual role.

Some psychologists believe that this discomfort with the perceived femininity of passive male sexual partners, or homophobia, is an extension of hatred of women, or sexism.[129] Men who have been raped may find themselves the object of denigration by men who, uncomfortable with male sexual passivity, feel compelled to "denigrat[e] . . . the femaleness and femininity in other men and in [themselves]."[130]

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124 See, e.g., Rick Moore, Justice Is Not Blind for Gays, San Diego Union-Trib., Jan. 10, 1989, at B7 (discussing cases in which jurors found defendants accused of murder not guilty, or guilty of crimes less serious than murder, when victims were gay).

125 Historically, some men who allowed themselves to be penetrated during intercourse thought of themselves as "acting as a woman" and believed that these actions threatened the perception of their masculinity. See Chauncey, supra note 92, at 80-81. In fact, effeminate men were at one time considered not men, or even women, but an indeterminate third sex. See id. at 122-23.

126 See Weiss & Friar, supra note 64, at 66-67.

127 See id. at 4.

128 See Elizabeth M. Iglesias, Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality, 49 Vand. L. Rev. 869, 905 n.85 (1996) ("'A boy represses those qualities he takes to be feminine inside himself, and rejects and devalues women and whatever he considers to be feminine in the social world.'" (quoting Nancy Chodorow, The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender 181 (1976))).

129 See Young-Bruehl, supra note 81, at 148 ("Those psychologists who have focused their attention on male prejudice against male homosexuals are almost unanimous in seeing this prejudice as a particular sort of sexism.").

130 Id.

Anti-gay bias may be directed against male same-sex rape victims not only because they are seen as feminine, and thus subject to sexism-based hatred, but also because men who are passive sexual partners threaten the social order.[131] A society that adheres to the idea that men should dominate women is threatened when men assume the passive role in sex. Passive men implicitly reject through their behavior the idea that "social traits . . . such as dominance and nurturance" are inextricably linked to gender.[132] Thus, commentators have argued that homophobia results from society's recognition that gay men challenge the traditional view that men "naturally" dominate women socially and sexually.[133] Anti-gay bias then becomes a strategy for "preserv[ing] and reinforc[ing] the social meaning attached to gender."[134]

In addition to the bias that can confront a male same-sex rape victim because he is perceived as gay and/or feminine, there is a serious and distinct stigma associated with being a male who has been victimized. Our society, profoundly uncomfortable with men being dominated and humiliated as they are in sexual assault, believes that "victims" are women.[135] Women can become victims of rape because their relative physical weakness and social status allow them to be dominated by men.[136] Men, unlike women, generally do not fear being harmed in this way and thus typically do not fear rape.[137] There seems to be little recognition of the differences in strength and social status among men, leading many people to believe that men cannot be

131 See, e.g., Elizabeth A. Reilly, The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights, 5 Am. U. J. Gender & L. 147, 198-99 (1996) ("Violence against women . . . is not as upsetting as homosexuality because it does not threaten authority, existing power relations, or gender roles.").

132 See Law, supra note 105, at 196.

133 See generally id.

134 Id. at 187.

135 See, e.g., Brownmiller, supra note 36, at 309 ("Women are trained to be rape victims.").

136 See, e.g., id. ("To simply learn the word 'rape' is to take instruction in the power relationship between males and females."); see also Gordon & Riger, supra note 120, at 47-56 (discussing historical and current societal beliefs about female sexuality and appropriate female social roles and arguing that such beliefs contribute to feelings of powerlessness and fear in women).

137 See LaFree, supra note 75, at 150-51 (noting that research indicates that women are more afraid of rape, and of being alone at night or in dangerous places, than are men); see also Pelka, supra note 5, at 253 ("While women tell me that the possibility of rape is never far from their minds, most men never give it a first, let alone a second, thought."). In institutional settings, on the other hand, men may be more fearful of sexual assault.

victims of sexual assault.[138] By undermining these assumptions, male victims of same-sex rape disturb our society's definition of "victims."

Because a man who has been sexually assaulted confounds this "men cannot be victims" stereotype, it can become difficult for other men to relate to him. As one male rape victim wrote, it is "precisely because [male rape victims] have been 'reduced' to the status of *women* that other men find [them] so difficult to deal with. . . . I was held in contempt because I was a *victim*—feminine, hence perceived as less masculine."[139] Due to widespread discomfort with their victimization, men who are sexually assaulted may be accused of having "wanted it" and confronted with the incorrect belief that men cannot be assaulted against their will.[140] In *Commonwealth v. Gonsalves*,[141] for example, a nineteen-year-old victim's own father "reacted to the victim's complaint of rape . . . by asking him why he had not prevented it by fighting off the defendant."[142] Men who report their assault also may be ridiculed by policemen who dismiss the idea that a "real man" could be raped.[143] For example, in *State v. Johnson*,[144] a victim of attempted rape "sought help from two deputies" he saw on the street after his assault, but, not surprisingly, "neither took his complaint seriously."[145] Thus, the raped man becomes subject to many of the stereotypes surrounding the rape of women—he is lying, must have asked for it, probably enjoyed it,[146] and so on. Men need the same

138 See Groth & Burgess, supra note 7, at 809 (finding that common belief that men cannot be raped is untrue). In fact, some people believe that no woman can be raped if she does not want to be. One juror told a researcher: "A judge . . . told me that a woman can run faster with her pants down than a man, and I believe that. . . . If you want to say rape, then she must be unconscious. She can scream and kick if she's awake and doesn't want it." LaFree, supra note 75, at 225. If some people believe that women can defend themselves from all sexual attacks, they are unlikely to believe that men cannot.

139 Pelka, supra note 5, at 255-56.

140 See, e.g., King, supra note 117, at 3 (noting that in British survey of male sexual assault survivors, many reported fearing that police and their friends would not believe them).

141 499 N.E.2d 1229 (Mass. App. Ct. 1986).

142 Id. at 1231.

143 See, e.g., King, supra note 117, at 3 (discussing experience of heterosexual victim of same-sex rape whose "social life ended" because his friends believed perpetrator's claim that victim had tried to seduce him). Men in prison may also fear being viewed as "culpable in having attracted the assault." Michael B. King, Male Rape in Institutional Settings, in Mezey & King, supra note 102, at 67, 69; see also Weiss & Friar, supra note 64, at 74-75 (noting inmates' belief that "a real male should be able to defend his sexual zones from invasion").

144 No. 96-KA-0950, 1997 La. App. LEXIS 2106 (Aug. 20, 1997).

145 Id. at *4-*5.

146 In fact, some rapists attempt to have their male victims ejaculate by masturbating them during the rape. In these cases the male victim often cannot understand his physical reaction to the violent assault, further confusing his (not to mention police officers') understanding of whether he "wanted it" or not. See, e.g., Groth & Burgess, supra note 7, at 809

protection from such stereotypes and misunderstanding as women, and additional protection from the added layer of bias they confront.

III
THE APPROPRIATE APPLICATION OF RAPE SHIELD LAWS TO CASES OF MALE SAME-SEX RAPE

As noted above, bias against homosexuality has many current manifestations. Given this level of intolerance, it is not surprising that so many victims of male same-sex rape decide not to report their assault to the police, much less to participate in a public prosecution effort. It is also evident that defendants in same-sex rape trials are legitimately concerned that juror prejudice and misunderstanding of homosexuality will lead to unwarranted convictions. Rape Shield Laws can address these concerns by minimizing the evidence presented to juries that improperly suggests information about a victim's sexual orientation. Although few courts have addressed these concerns, those that have considered them sometimes failed to account for anti-gay bias. As a result, these courts have applied Rape Shield Laws inappropriately to cases of male same-sex rape. This Part discusses three basic situations in which the problem of applying Rape Shield Laws to cases of male same-sex rape arises and suggests the proper way to resolve them.

A. Defense Use of Victim's Prior Sexual History to Prove Consent

There are two ways in which defendants typically attempt to use a victim's sexual conduct to prove consent. The most common is introducing evidence of the victim's prior sexual history. In male same-sex rape cases, the defendant will try to use evidence that the victim previously had sex with other men in order to imply to the jury that the sexual incident at issue in the case was consensual. Rape Shield Laws were written to prohibit precisely this use of sexual history evidence.[147] Such evidence has no bearing on whether the victim consented to sex with a particular defendant, unless, arguably, the prior

(noting that offenders get victim to ejaculate as "strategy" to confuse him, impair his credibility, and confirm offender's fantasy that victim "wanted" rape); King, supra note 117, at 5 (noting that victims who ejaculated during rape were confused by their physiological response and reported feelings of anger and embarrassment). Physical responses such as ejaculation or erection, however, are completely normal reactions to an assault. See New York City Gay and Lesbian Anti-Violence Project, Male Sexual Assault (1996) (on file with the *New York University Law Review*), available at Male Sexual Assault (visited Jan. 26, 1998) <http://www.avp.org/sa/men/male_sexual_assault_brochure.en.html>.

147 See supra Part I.B.2.

sexual acts were with the defendant.[148] As one court has explicitly noted, "The fact that someone has consented to homosexual acts on a previous occasion is no more proof that he or she consented at the time of an alleged single sex rape than prior consensual heterosexual relations would be in the case of male/female rape."[149] Further, prior sexual history evidence is highly prejudicial and unnecessarily invasive of the victim's privacy. Defense use of such evidence thus should be limited.

Some courts, however, cling to the idea that there can be significant probative value in evidence of a male same-sex rape victim's prior sexual history. In *State v. Rodgers*,[150] the Tennessee Criminal Appeals Court reversed a conviction because the trial court did not permit the defendant to "establish that the victim had in fact engaged in consensual homosexual relationships with two other inmates" at the prison where the defendant and victim were incarcerated in order to show consent.[151] During cross examination of the victim, the defense attorney elicited statements implying that the victim required medical attention as a result of intercourse, but could not admit to having had consensual intercourse without losing certain privileges.[152] The Tennessee Court of Criminal Appeals stated that the defendant had thus raised "the consent issue"[153] and that under these circumstances the Rape Shield Law required the trial court to hear a proffer of the prior sexual history evidence and decide on its relevance.[154]

The *Rodgers* court correctly noted that the issue of consent was raised in that case. Its suggestion that the victim's prior sexual history may have been relevant to that issue, however, was incorrect. In fact, the defendant in *Rodgers* presented the best evidence about the possibility that the victim consented—he pointed out inconsistencies in the

148 Such evidence could be admitted under the "prior sexual history with the defendant" exception that is part of most Rape Shield Laws. See supra note 41. But see generally Hire, supra note 41 (arguing that defendant exception to Rape Shield Laws is not logically sound and that prior consensual sexual history between victim and defendant is irrelevant to whether there was consent on particular occasion).

149 State v. Whaley, No. 03C01-9101-CR-00025, 1992 Tenn. Crim. App. LEXIS 607, at *15 (July 21, 1992); see also Galvin, supra note 31, at 799 (noting that "the mere fact that the complainant has previously engaged in consensual sexual activity affords no basis for inferring consent on a later occasion"); Note, If She Consented Once, She Consented Again—A Legal Fallacy in Forcible Rape Cases, 10 Val. U. L. Rev. 127, 137-49 (1976).

150 No. 01-C-01-9011-CR-00312, 1991 Tenn. Crim. App. LEXIS 648 (Aug. 16, 1991).

151 Id. at *6.

152 See id.

153 Id. at *8.

154 See Tenn. R. Evid. 412(d) (describing procedure under Rape Shield Law for admitting evidence of victim's prior sexual history at trial, including filing written motion to introduce such evidence followed by in camera hearing at which both defendant and prosecution may present evidence).

victim's statements, called witnesses who testified that they were nearby but heard no struggle or screaming during the assault,[155] and presented testimony that the victim had told someone else that he had lied about the rape charge.[156] Prior sexual history evidence would have provided no additional useful evidence of consent. Whether the victim previously engaged in homosexual relationships with other inmates was totally irrelevant to whether he consented in this particular case—he could have wanted to have sex with some men but not the defendant. Further, asking the victim about his prior sexual history would have led to all of the adverse consequences Rape Shield Laws are designed to eliminate. The victim would have been humiliated by being asked extremely personal questions about his sexual relationships at trial, and this evidence could easily have inflamed jurors, making them less likely to consider the case fairly. Thus, the court's decision to admit evidence of the victim's prior sexual history on this basis was inappropriate.[157]

Most courts that have considered the use of prior sexual history evidence to prove consent in male same-sex rape cases have not agreed with the *Rodgers* court, finding instead that such evidence is irrelevant and inadmissible.[158] A typical case in this vein is *Commonwealth v. Quartman*,[159] a case with facts similar to *Rodgers*. In *Quartman*, the Superior Court of Pennsylvania considered whether a defendant accused of a male same-sex rape that occurred in prison could introduce evidence that the victim previously had consensual sex with other male inmates.[160] The court upheld a lower court's refusal to allow the defendant to present such testimony.[161] Noting that such evidence would have been introduced to imply that the victim consented, the court found that this was "the precise use of the evidence the legislature sought to preclude."[162]

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155 See *Rodgers*, 1991 Tenn. Crim. App. LEXIS 648, at *7-*8.

156 See id.

157 The *Rodgers* court's alternative ground for admitting the prior sexual history evidence—impeachment of the victim—may have had more merit. See infra Part III.B.

158 See, e.g., Dixon v. Jones, No. 88-0815-CV-W-5-P, 1990 U.S. Dist. LEXIS 883, at *17-*18 (W.D. Mo. Jan. 16, 1990) (rejecting defendant's attempt to introduce evidence of victim's prior sexual history to show consent); Kvasnikoff v. State, 674 P.2d 302, 303-05 (Alaska Ct. App. 1983) (same); State v. Hackett, 365 N.W.2d 120, 126-27 (Mich. 1985) (same); Commonwealth v. Quartman, 458 A.2d 994, 998 (Pa. Super. Ct. 1983) (same); State v. Whaley, No. 03C01-9101-CR-00025, 1992 Tenn. Crim. App. LEXIS 607, at *14-*15 (July 21, 1992) (same).

159 458 A.2d 994 (Pa. Super. Ct. 1983).

160 See id. at 998.

161 See id.

162 Id.

The second issue that arises under Rape Shield Laws in cases of male same-sex rape[163] is rarely encountered in cases of female opposite-sex rape and is somewhat more complex. It is whether evidence of the victim's sexual *orientation* should be admissible as evidence that the victim consented. Typically, defendants want to introduce evidence that the victim is gay in order to imply that the victim consented to the sexual contact at issue.[164] Due to the prejudicial and misleading quality of such evidence, however, it should be inadmissible under Rape Shield Laws.[165]

Sexual orientation evidence should be considered inadmissible for two seemingly opposing, but actually parallel reasons. On the one hand, sexual orientation is not inextricably linked to sexual conduct. A victim may be gay but choose not to engage in sexual activity. Any suggestion that such a person would be more likely to engage in sex with the defendant because of his sexual orientation would be fallacious. Thus, revealing to the jury that the victim is gay will not tell them very much about the likelihood of consent. As one court has said, evidence "of a rape victim's sexual orientation [has] no bearing on his or her credibility *or the issue of consent*."[166]

On the other hand, and more importantly, "[e]vidence of past sexual conduct is closely related to evidence of sexual orientation."[167] Some parties in same-sex rape cases have argued that sexual orientation should be viewed not as evidence of sexual activity, but as sexual "status" or "preference" evidence distinct from sexual activity evidence.[168] However, a defendant typically will have a difficult time proving that a victim is gay except through evidence of his prior sexual behavior. For example, in *People v. Murphy*,[169] the "homosexual orientation" evidence the defendant proffered was not abstract evidence that the victim was gay. Instead, it was testimony that the victim had a

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163 In a very few cases of female opposite-sex rape, courts have had to consider how to treat sexual orientation evidence under Rape Shield Laws. See, e.g., State v. Kemblowski, 559 N.E.2d 247, 250-51 (Ill. App. Ct. 1990) (finding reversal of rape conviction necessary because evidence introduced by prosecutor at trial that female victim was lesbian was improper prior sexual history evidence under Rape Shield Law).

164 See, e.g., supra note 158 and accompanying text.

165 It is unlikely that this evidence could be admitted under an exception. Exceptions usually include evidence of prior sexual conduct with the defendant or evidence about the origin of semen or physical injury that has been attributed to the rape. See supra note 41. Neither of these issues is implicated in testimony that a victim is, or is not, gay.

166 People v. Murphy, 919 P.2d 191, 195 (Colo. 1996) (emphasis added).

167 Id.

168 See *Kemblowski*, 559 N.E.2d at 250 (finding unpersuasive prosecutor's argument that sexual orientation evidence was evidence of victim's sexual "status," not victim's sexual activity).

169 919 P.2d 191 (Colo. 1996).

consensual sexual relationship with a male neighbor.[170] Similarly, in *Kvasnikoff v. State*,[171] the evidence that the defendant wished to introduce about the victim's homosexuality was testimony by other inmates about the victim's "homosexual acts."[172] Because sexual orientation evidence is necessarily connected to evidence of particular acts by the victim, it is the exact type of prior sexual history evidence that most courts agree is inadmissible.

Defendants may argue, with some persuasive force, that the need for sexual orientation evidence in male same-sex rape cases is almost unique to those cases. As the defendant in *Kvasnikoff* reasoned, "the usual rape case . . . involves a male defendant and a female complaining witness. In those cases the jury would almost certainly assume that the complaining witness would have a sexual interest in men."[173] Jurors will not have the same assumption about the possibility of consent in male same-sex rape cases. Instead, they may presume that no man would consent to such activity. However, expert testimony about male same-sex sexual behavior could effectively take care of this problem. Such testimony may make a jury aware of the theoretical possibility of consent without going into intimate details of the victim's life.[174]

Finally, defendants may argue that Rape Shield Laws do not specify that evidence of a victim's sexual orientation is inadmissible but rather provide that only prior sexual history evidence is inadmissible. That is, there is a lack of statutory authority for the proposition that sexual orientation should not be admitted. As noted above, however, it is not easy to separate prior sexual history evidence from sexual orientation evidence. Because the latter is a subset of the former, it is fair to read Rape Shield Laws as implicitly prohibiting the admission of sexual orientation evidence. As the *Murphy* court noted, although a Rape Shield Law may "not refer to evidence of 'sexual orientation,'" the legislature's intent in enacting Rape Shield Laws can best be accomplished by viewing sexual orientation evidence as within the purview of such statutes.[175]

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170 See id. at 193.

171 674 P.2d 302 (Alaska Ct. App. 1983).

172 Id. at 304.

173 Id. at 308 (Coats, J., dissenting).

174 See, e.g., *Murphy*, 919 P.2d at 193 (noting that defendant introduced expert testimony about possibility that men can marry and have children but still be gay), rev'd, 919 P.2d 191 (Colo. 1996).

175 Id. at 194-95.

B. Defense Use of Prior Sexual History to Impeach a Victim

Although evidence of the victim's sexual orientation should not be used to prove consent (or lack of consent), courts occasionally will be confronted with situations where the defendant wishes to use evidence of the victim's sexual orientation or past sexual history to assail the victim's credibility rather than to show consent. Under most Rape Shield Laws, a defendant cannot impeach a victim with evidence of the victim's prior sexual history, in the sense that he cannot use the evidence to ask the jury to infer that because the victim consented to sex before, she is likely to be lying about not consenting this time.[176]

There are cases, however, where a defendant must be able to impeach a victim with evidence of prior sexual history—for example, when the prior sexual history evidence is also evidence of a motive for the victim to lie about what happened. In such an instance, the Sixth Amendment, which guarantees defendants the right to confront witnesses against them, demands that such evidence be admitted.[177] In *Olden v. Kentucky*,[178] for example, a case of female opposite-sex rape, the Supreme Court held that evidence that the victim had a prior sexual relationship with a witness was admissible under the Sixth Amendment.[179] The evidence was central to the defendant's theory that the victim had lied about being raped in order to protect her romantic relationship with that witness.[180]

In conformity with that constitutional principle, questioning male victims of same-sex rape about their sexual history should be allowed when necessary to present a full and fair view of the evidence. Such impeachment use of prior sexual history evidence in male same-sex rape cases will usually arise when the prosecutor asks a victim if he is gay, and the victim answers that he is not.[181] Once the prosecutor has asked such questions of the victim, the defendant has a legitimate way to get prior sexual history evidence in front of the jury. The defendant's evidence that the victim lied in response to a direct question on

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176 See supra Part I.B.2; see also, e.g., People v. Sandoval, 552 N.E.2d 726, 737 (Ill. 1990) (noting that under Illinois's Rape Shield Statute, defendant cannot introduce evidence of victim's prior consensual participation in sexual act because "[w]hether the complainant had participated in this particular sexual practice 2 times or 20 times has no bearing . . . on whether a particular instance of sex was consented to").

177 U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

178 488 U.S. 227 (1988).

179 See id. at 232-33.

180 See id.

181 This Note argues that such a question should not be allowed in the first place, however, as it is more prejudicial than probative at best and irrelevant at worst. See infra Part III.C. (arguing that prosecutor should not be permitted to ask victim whether he is gay in first instance).

the stand must be admitted by the trial judge as such information could be central to the jury's determination of the victim's credibility. The defendant in such cases thus should be allowed to use evidence that the victim had prior consensual sex with other men in order to cast doubt on the victim's truthfulness.

Judges generally have allowed the impeachment of male same-sex rape victims who testify explicitly that they are not gay. For example, in *State v. Lang*,[182] the Court of Appeals of South Carolina reversed a conviction where a victim had denied on direct and cross examination that he was gay, but the defendant had not been allowed to impeach the victim on this point.[183] The court held that the South Carolina Rape Shield Law did not bar evidence of a victim's prior sexual history if such evidence was offered for a purpose other than attacking the victim's "morality."[184] Thus, the impeachment evidence had to be admitted, because precluding such evidence had prejudiced the defendant at trial.[185]

Other courts have made similar rulings.[186] In *State v. Rodgers*,[187] for example, the Tennessee Court of Criminal Appeals held that, in addition to being probative of consent,[188] evidence that the victim had consensual sex with other men prior to the alleged rape was admissible to impeach the victim. The victim in that case was asked directly by the prosecutor whether he was "a homosexual" or had "ever had sex with a man before."[189] The victim answered no to both questions.[190] As the victim had explicitly denied being gay under oath, the court held that "[t]he defendant was entitled . . . to show that the victim was untruthful in this regard. The state opened the door."[191]

As these cases demonstrate, judges are hesitant to allow testimony about a victim's heterosexual orientation to go unchallenged.[192]

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182 403 S.E.2d 677 (S.C. Ct. App. 1991).

183 See id. at 678.

184 See id. (finding no bar when "the State itself made the matter of the victim's sexual preference an issue in the case").

185 See id.

186 See, e.g., Commonwealth v. McGregor, 655 N.E.2d 1278, 1280 (Mass. App. Ct. 1995) (finding that exclusion of evidence that victim wanted to keep secret fact that he engaged in sex with men for drugs was reversible error because exclusion deprived defendant of ability to demonstrate victim's motive to lie about being raped).

187 No. 01-C-01-9011-CR-00312, 1991 Tenn. Crim. App. LEXIS 648 (Aug. 16, 1991).

188 See id. at *8-*9; see also supra text accompanying notes 151-57 (discussing consent issue in *Rodgers*).

189 Id. at *5-*6.

190 See id.

191 Id. at *9.

192 State v. Williams, 487 N.E.2d 560 (Ohio 1986), is also relevant on this point, although the case involved opposite-sex rape. In *Williams*, a female rape victim claimed that she was gay, and that as a result she would not have had sex willingly with any man. The

They are correct to protect the defendant in this manner, as the truthfulness of any witness, including the victim, is clearly probative evidence.[193] Further, a defendant easily could be convicted in part on evidence that the victim is not gay, and thus statements to that effect should be challenged. Therefore, when such evidence is introduced, the Sixth Amendment demands that the defendant be allowed to challenge the victim's testimony about his sexual orientation. Disallowing such testimony in the first place as irrelevant or more prejudicial than probative, as suggested in the following section, however, would remove the need to allow impeachment evidence on the victim's sexual orientation or prior sexual history.

C. Prosecution Use of Victim's Prior Sexual History to Show Nonconsent

As addressed above, the prosecution in male same-sex rape cases may seek to introduce evidence of the victim's prior sexual history or sexual orientation in order to show nonconsent. Such evidence generally consists of testimony that the victim has never engaged previously in consensual same-sex sexual acts or is not gay. Courts presiding over male same-sex rape cases should not allow attorneys to use past sexual history or sexual orientation evidence in this way. Such evidence is not conclusive on the issue of consent to same-sex sexual activity. A man could testify honestly that he is not "gay," for example, but still experiment with sexual partners of different sexes.[194] Further, allowing evidence of a victim's prior sexual history opens the door to humiliating testimony about the victim, a possibility that Rape Shield Laws are intended to protect against. In order to protect the defendant, however, courts must be aware that the definition of "prior sexual history" evidence must be broader in male same-sex rape cases than in female opposite-sex rape cases. If the definition is not broadened, much evidence that suggests information about the victim's sexual orientation—such as evidence of a victim's marriage or children—

Supreme Court of Ohio affirmed a lower court ruling that the defendant was entitled under the Sixth Amendment to challenge the victim's testimony on this point, both as impeachment evidence, and as evidence relevant to the issue of consent, which had been raised at the trial. See id. at 562-63.

193 See, e.g., Fed. R. Evid. 608(a) (admitting evidence of witness's character only as it relates to character for "truthfulness or untruthfulness").

194 Individuals may be bisexual or may have other reasons for not wanting to be pigeonholed by a label such as "gay" or "homosexual." See, e.g., Chi Chi Sileo, Studies Put Genetic Twist on Theories About Sex and Love, Insight on the News, July 3-10, 1995, at 36 (noting that "scientists are beginning to view human sexual orientation as 'fluid'" and "homosexuality [as] part of a continuum of sexual behavior").

could unfairly undermine a same-sex rape defendant's case without providing him with an effective means of rebuttal.

The first problem with allowing prosecutors to introduce evidence of a victim's sexual orientation is the fact that such evidence is only marginally relevant to whether the victim consented to the sexual contact at issue. The most obvious use of a victim's sexual orientation to prove lack of consent occurs when a prosecutor, like the one in *State v. Rodgers* (discussed above), asks a victim directly if he is gay.[195] A man who answers "no," however, nevertheless might consent to sex with a man (though not necessarily the defendant). Similarly, a male victim who had not had sex with a man in the past might decide to have sex with a man at some point in his life: many people develop a different understanding of their sexuality over time or experiment with different sexual partners.[196] Thus, evidence that a male victim is "not gay" does not necessarily mean that he would never consent to sex with a man. In addition, better evidence about consent is usually available. Testimony about whether the victim said no, or was physically attacked or threatened by the defendant during the sexual activity in question, provides much more useful information to a jury on the issue of consent.

A second problem with allowing the prosecution to admit evidence of a victim's non-homosexual orientation is the rebuttal evidence that the defense needs to introduce to contradict such testimony. The most effective means of contesting testimony that the victim is not gay is introducing evidence that the victim *is* gay—in other words, evidence about the victim's sexual activity. As noted above, invasive questioning about the victim's prior sexual history by the defendant might be required to allow the defendant a fair opportunity to contest the evidence proffered by the prosecution.[197] Rape Shield Laws, however, were designed to limit precisely that kind of embarrassing testimony about a victim.[198] Further, both sexual orientation and sexual conduct evidence can confuse jurors about the primary questions in the case by raising issues of sexual promiscuity and anti-gay bias.[199] Thus, given its demonstrated marginal probative

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195 See, e.g., State v. Lang, 403 S.E.2d 677, 678 (S.C. Ct. App. 1991) (holding that evidence of homosexuality was admissible for purpose of impeachment after victim testified to being heterosexual); *Rodgers*, 1991 Tenn. Crim. App. LEXIS 648, at *8-*9 (finding that defendant had to be given opportunity to rebut evidence of victim's heterosexuality).

196 See John Leland, Bisexuality Is the Wild Card of Our Erotic Life, Newsweek, July 17, 1995, at 44 (discussing bisexuality and observing that some people have sexual relationships with people of both sexes).

197 See supra Part III.B.

198 See supra Part I.B.

199 See supra Part II.B.

value, evidence of the victim's non-homosexual orientation should not be introduced by the prosecution in the first instance. Even if the male victim is willing to be questioned in this manner, the court should not allow it because of the concern that the defendant will be prejudiced.

In addition to disallowing evidence from the prosecution in its case in chief about the victim's prior sexual history, courts should also limit questions about the victim's sexual orientation during redirect questioning. For example, in *Lucado v. State*,[200] the defendant's defense was that the victim consented to the sexual contact at issue.[201] The prosecution successfully argued that this consent defense necessarily implied that the victim was gay and that they must have an opportunity to rebut that implication. Thus, the prosecution was allowed to have the victim's uncle testify on rebuttal that the victim had no reputation for being gay.[202] In deciding on the admissibility of this rebuttal evidence, the Maryland Court of Special Appeals held that the state of Maryland only prohibited inquiry into a victim's reputation for heterosexual "chastity."[203] Evidence of the victim's lack of reputation for homosexuality did not fit into this category and was thus admissible. Although this reading of the statute may have reflected the intention of the Maryland legislature when writing the Rape Shield Law, a better rule would have been to disallow testimony about the victim's reputed sexual orientation, whether homosexual or heterosexual.

Logically, virtually every consent defense in a male same-sex rape trial involves an attempt to convince the jury that the victim is gay. If inquiry into the victim's sexual orientation is allowed to prove nonconsent, there is increased danger that the jury will become confused or prejudiced against the defendant. The defendant will be unable to contradict such prejudicial evidence effectively without introducing additional evidence about the victim's prior sexual history, which will divert attention even further from the specifics of the current assault. Therefore, rebuttal evidence of sexual orientation should not be allowed.

When guarding against improper admission of evidence on sexual orientation, courts must be vigilant, because such evidence may come in subtle forms. In some sense, *Rodgers* and *Lucado* are relatively easy cases—it is clear in these cases that the prosecution is introducing evidence of prior sexual history, evidence that Rape Shield Laws dis-

200 389 A.2d 398 (Md. Ct. Spec. App. 1978).
201 See id. at 400.
202 See id.
203 Id. at 407 (quoting Md. Ann. Code art. 27, § 461A (1996)).

allow. Prior sexual history evidence is not always so obvious, however. In male same-sex rape cases, evidence that the victim has been married or has children may serve as evidence of prior sexual history. Marriage in the United States is only legal between people of opposite sexes.[204] Thus, the fact that a victim is or has been married indicates that the victim was involved in a serious romantic relationship with a person of the opposite sex, which in turn implies that the victim is not gay.[205] Similarly, evidence that a male victim has a child is proof that he was sexually intimate with a woman and thus tends to show that he is not gay. In a case of female opposite-sex rape, the fact that the victim was married or has children would not be considered extraordinarily probative on the possibility of consent, as jurors will assume that consent is a possibility between any man and woman.[206] For male same-sex rape defendants, however, evidence that the male victim was married implies that he is heterosexual and thus would not consent to same-sex sex. If such testimony is not recognized as prior sexual history evidence, defendants will be unfairly prejudiced by it.

The Colorado Supreme Court recently struggled with this issue in *People v. Murphy*.[207] In *Murphy*, the defense theory was that the victim consented to the sexual contact at issue.[208] The Colorado Court of Appeals had held that although evidence of the victim's sexual orientation was barred by the Colorado Rape Shield statute, the prosecutor opened the door to such evidence, in part by questioning the victim repeatedly about his former wife and daughter.[209] The court found that evidence about the victim's family had been introduced to help "establish that the victim was heterosexual and would not consent to a homosexual experience."[210] The court found that the defendant had a right to rebut this inference about the victim's sexual orientation, as it was relevant to his defense of consent.[211]

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[204] But see Hansen, supra note 111 (noting recent rulings on same-sex marriage in Hawaii).

[205] But see infra text accompanying note 213 (noting that expert testimony to contrary may rebut this implication).

[206] Evidence that the female victim had a child out of wedlock, however, might be seen as evidence of promiscuity. Such evidence should not be introduced at trial due to the risk of jurors misusing that information to imply consent in the current case. On the other hand, evidence that the victim is currently married or has children can prejudice a defendant's case by increasing juror sympathy for the victim. See, e.g., LaFree, supra note 75, at 200-28 (discussing evidence that victims' traditional behavior, such as marriage, made jurors more likely to convict for rape).

[207] 919 P.2d 191 (Colo. 1996).

[208] See id. at 193.

[209] See People v. Murphy, 899 P.2d 294, 296 (Colo. Ct. App. 1994), rev'd, 919 P.2d 191 (Colo. 1996).

[210] Id.

[211] See id.

The Colorado Supreme Court agreed with the appeals court that evidence about the victim's sexual orientation was inadmissible under the Colorado Rape Shield statute.[212] The court disagreed, however, that the prosecution had opened the door to rebuttal testimony about the victim's prior sexual history. Instead, the court found that a defense expert, who testified that men who are homosexual may get married and have children, effectively rebutted any inference that the victim was not gay.[213] Further, the court believed that the victim's other remarks indicating that he was not homosexual—that he was "not that kind" and that he was "not into whatever it is"—could have been understood merely to mean that the victim did not enjoy the particular sadistic acts perpetrated by the defendant.[214] Thus, the court concluded that the prosecution had not "open[ed] the door" to testimony about the victim's sexual orientation.[215]

The Colorado Supreme Court may have been correct that the defendant's expert testimony in *Murphy* effectively rebutted the implication that the victim was not gay. Certainly the testimony made the jury aware of the possibility that the victim was gay. More likely, however, Murphy was significantly prejudiced by the evidence of the victim's prior marriage and child. The fact that a victim is a previously married father is far more compelling evidence of his sexual orientation than an expert witness's wholly abstract testimony. Further, Murphy testified that he often engaged in consensual same-sex sex and indicated that he enjoyed sado-masochistic sex.[216] Emphasizing the victim's traditional, heterosexual family was an effective prosecution strategy for contrasting the "gay defendant" and the "straight victim," thus directing any anti-gay sentiment in the jury toward the defendant.[217] The defendant should have been better protected from such bias.

CONCLUSION

Although the problem of male same-sex rape has been largely overlooked by state and federal legislators, the Rape Shield Laws legislators passed to protect female victims of opposite-sex rape can be-

212 See *Murphy*, 919 P.2d at 195 ("Evidence of past sexual conduct is closely related to evidence of sexual orientation.").

213 See id. at 196.

214 See id. at 196-97.

215 Id. at 197.

216 See id. at 193 (stating that defendant Murphy testified that he and victim discussed Murphy's "interest in 'rough sex'").

217 For example, a local newspaper discussing the *Murphy* case described the victim as "a husband and father." Denver Digest, Denv. Post, June 11, 1996, at 3B.

come an effective tool for protecting male victims of same-sex rape. The policy concerns that led to the adoption of Rape Shield Laws for female opposite-sex rape are largely relevant to cases of male same-sex rape. First, applying Rape Shield Laws to male same-sex rape encourages the reporting of the crime. Second, the laws limit the introduction of irrelevant prior sexual history evidence on the issue of consent. Third, Rape Shield Laws prohibit the defendant from asking the jury to infer that because the victim was sexually active in the past he is less likely to be truthful. Finally, Rape Shield Laws minimize the chance that defendants guilty of male same-sex rape will go free by disallowing inflammatory evidence. Thus, applying Rape Shield Laws to cases of male same-sex rape furthers the policy goals of such legislation.

Although the policy arguments for applying Rape Shield Laws to cases of male same-sex and female opposite-sex rape are similar, the issue of homosexuality distinguishes cases of male same-sex rape. Anti-gay jury prejudice is a very real problem when the issue of homosexuality is raised during a case. Both prosecutors and defendants will be inclined to use the prejudices and misconceptions surrounding same-sex sexual activity to their advantage by presenting evidence about the victim's sexual orientation and history to prove their case, despite the suspect probative value of this evidence. Male victims of same-sex rape, and defendants in same-sex rape cases, should be protected from this use of such evidence. Information about the victim's sexual orientation and history should be minimized in order to prevent anti-gay bias from being directed at either the victim or the defendant.

Ultimately, Rape Shield Laws must be applied consistently and sensitively to cases of male same-sex rape if the reporting and prosecution of such crimes are to increase and improve. Male same-sex rape is a traumatic crime with serious emotional and physical consequences for its victims. Until society gives victims confidence that their privacy and dignity will be respected, victims will remain unwilling to participate in any prosecution through trial. Rape Shield Laws, written and interpreted to account for the unique bias that is implicated in cases of male same-sex rape, can become an important legal tool for providing victims with such confidence. Perhaps then society will begin to acknowledge the problem of male same-sex rape and, finally, treat its victims with fairness and compassion.