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Thelma and Louise and the Law: Do Rape Shield Rules Matter

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Louise: *"Just what do you think we should tell them? Just about a hundred people saw him dancing with you cheek to cheek."*
Thelma: *"Tell them he was raping me . . ."*
Louise: *"We don't live in that kind of a world Thelma."*[1]

Thelma and Louise drive away from a bad marriage, a lukewarm lover, rape and a murdered rapist, through an oppressively phallic terrain of mountains and oil wells and gas pumps and tank trucks and rock monuments and exploitative men. They reach the Grand Canyon, where the landscape opens up, female and concave. At first they back away. It seems impossible to go on. The male forces—cars, rifles, police—converge on them. Demanding surrender, one of the men shouts through his bullhorn, "Any failure to obey that command will be considered an act of aggression against us."

Earlier in the film, Louise told her lover, "It's time to just let go of the old mistakes. Just chalk it up to bad timing. It's time to let go."[2] And Thelma has said, "Something's like . . . crossed over in me and I . . . I can't go back."[3] Now Thelma says, "Let's keep going . . . go!" They

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1. THELMA AND LOUISE (Metro-Goldwyn-Mayer 1991) (written by Callie Khouri; directed by Ridley Scott).

2. Louise's lover, Jimmy, is a rock musician whom we see in his apartment cramped with his exercise machines, electronic music equipment and a large dog. Having avoided commitment for a long time, Jimmy responds to Louise's flight by presenting her with an engagement ring in a dingy motel room. Louise explains to Thelma, "He's no different than any other guy. He just loves the chase."

3. Going back for Thelma would mean returning to a suffocating marriage to a man who lacks the slightest understanding of her wants and needs. We see the husband, Darryl, in the dark brown interior of his living room, drinking beer, watching football, surrounded by football trophies and an old pinball machine. Consider, along with this image of Thelma's husband and the image of Louise's lover described in the preceding footnote, the picture of the police station (decorated with rows of toy soldiers), the crowded, airless bar where Thelma meets her rapist, the succession of seedy diners, motel rooms and stores, and the monumental western rock formations, looking claustrophobic, as photographed at night. In the visual logic of the movie, their final flight over and into the canyon is right, because only dark, grimy, cluttered men's spaces lie behind them, while the image of them and the Thunderbird in the sky is fully

kiss, join hands and drive the metallic green Thunderbird out into thin air. There, they remain frozen in time. The screen bleaches to white and, given cinematic magic, they transcend the world of men and enter into the sublime. The world to Thelma and Louise is a world of men. Men's interests, men's values, men's interpretations[4] and men's laws hold sway. They could only break free by racing out of the world entirely: a depressing thought.[5]

I.

Most lawmakers, lawyers and law professors like to view law as a neutral mechanism that they can adjust to serve whatever goals they decide to embrace,[6] not a device permanently tuned to the interests of any particular group. It may have been that the law protected the interests of men in sexual access to women when it allowed those accused of rape to impeach their accusers (and deter accusations) by permitting extensive cross-examination into the victim's intimate relations. But lawmakers heard the critiques women made, and they responded with rape shield statutes that take an aggressively exclusionary stance. Does that demon-

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bright. *Cf.* KEIKO I. MCDONALD, THE DIALECTIC OF LIGHT AND DARKNESS IN KUROSAWA'S *Rashomon* (1983) (Donald Richie ed., 1990).

4. In the Senate confirmation hearings of Clarence Thomas, one Senator after another used a male standard of behavior to generate doubt about the truth of Professor Anita Hill's testimony. Why would anyone continue to work with a man who had sexually harassed her? Why would she follow him to the next job and maintain cordial relations with him over the years? Why would she not file a legal complaint at the time the events occurred? Hearing these questions raised over and over, one felt a sense of futility. The problem was not the evidence, but the frame of mind of those who would interpret it.

5. Many women do not find the ultimate flight into the air depressing at all. One need not see their final leap as suicidal, and indeed, the film-maker's decision to deprive us of the sight of a fiery wreck on the floor of the canyon encourages us to make a different interpretation. Viewing the ending symbolically, one can say that Thelma and Louise drastically cut all ties with men and male-dominated institutions and see their future in alliance with each other and with the Feminine (embodied by the canyon). This interpretation explains the exhilaration many women viewers experience.

In the original version of the movie, the women (and the car) actually survive the landing in the Grand Canyon and, presumably, successfully escape to Mexico. *See* John Horn, *Screen Test: Relying on Audience Research, Hollywood Cuts Risks and Creativity*, WISC. STATE J., Sept. 22, 1991, at 61. Preview audiences reportedly rejected this lapse in verisimilitude and the ending was changed, though not to the point where we see the death at the bottom of the canyon. We see them airborne and then by way of a flashback montage, happy and free together in the past. Interestingly, other lapses in verisimilitude escaped revision: we are shown Thelma, almost immediately after her rape/attempted rape, discovering bliss in sexual intercourse—and with a stranger/hitchhiker/admitted armed robber! Reviewers, however, took note: "When Thelma takes up with an attractive young hitch-hiker . . . good sex has as magical an effect on her as any male chauvinist pig could wish." Adam Mars-Jones, *Getting away from It All*, THE INDEPENDENT, July 12, 1991, at 18.

6. *See* LIEF H. CARTER, REASON IN LAW 13-14 (3d ed. 1988).

strate that the law is not inherently bound to the service of male interests?

In *Thelma and Louise*, Slocumbe,[7] the "good cop," embodies this idealized concept of law. A more cynical character refers to him as "Mr. Johnny Fucking Law."[8] Slocumbe cares about the women and tries to reach out to them. He does not want to see them hurt and tells them so, in his kindly, paternal telephone voice. He knows about the trauma of rape. He knows that like Thelma, Louise was also raped.[9] He purports to understand how their experience has driven their actions. He seems eager to incorporate extenuating circumstances particular to women into the application of the law. He decries the use of excessive force against them: he does not want the FBI called in; there are too many police cars; the guns are not necessary. In the end, he runs toward them, risking the aimed rifles at his back, holding one arm outstretched. He wants them to engage with him, trust him, negotiate their way out. He portrays himself as the only hope that does not lead to violence and destruction.

But Thelma and Louise reject his overtures and leave him behind along with all the men who did not try to understand or help them. Symbolically, they take the position that even the help and protection that men offer is suspect and tainted with patriarchy. (Slocumbe does refer to them relentlessly as "girls," and his kindly telephone conversations provide the means for tracing their whereabouts.) The law may

7. The name, pronounced "slow come," is a pun that suggests that the help men offer would take the form of better sex. This suggestion is made quite loudly in the series of scenes involving the hitchhiker "J.D." Thelma's night of "great sex" with J.D. transforms her from a nervous housewife, who can only swig her Wild Turkey from tiny, one-serving-size bottles, to a powerful and composed woman capable of carrying out a well-orchestrated robbery and drinking her Wild Turkey from a full-sized bottle. (To drive home the causal connection, Thelma kicks the tiny bottles off the motel-room dresser during her rousing sexual encounter with J.D.) After her great sex, of which Louise murmuringly approves ("Oh, darlin', I'm so happy for you, that's great, I really am. You finally got laid properly. It's so sweet."), Thelma's voice, manner and even hairstyle are radically transformed. Thelma is soon enough disappointed by J.D., who absconds with their money, but Thelma does seem jolted with power after this experience. It is not the rape that sears her consciousness and changes her way of acting in the world, but the great sex. The initial run from the law is motivated not by the rape, but by the murder, an action taken by Louise, whom Thelma more or less follows. Thelma becomes the dominant actor, robbing the convenience store, disarming the state trooper, and suggesting the drive into the canyon, only after the sexual encounter with J.D.

8. The "cynical character" referred to is J.D., the hitchhiker Thelma and Louise pick up. J.D. translates easily to "juvenile delinquent," emphasizing the character's antagonism to the law (he is also a robber). Slocumbe, questioning him about Thelma and Louise, tells J.D., "I have no feeling for you." Ironically, Slocumbe takes to beating J.D. about the head during interrogation, distinctly marring his "good cop" persona. (The niceties of constitutional police questioning have never been Hollywood's forte.)

9. On the telephone, he says, "Louise, I'll do anything. I know what's making you run. I know what happened to you in Texas."

sound as though it can provide a solution, but women should not trust it. Slocumbe is left behind along with the other men: the good, idealized view of law is rejected as just one more male-dominated institution.[10]

II.

Before rape shield rules came into being, juries heard an immense amount of detail about the alleged victim's sex life. The defense commonly adopted the strategy of casting doubt on her[11] characterization of the event in question by encouraging the jury to infer that if the victim had consented to sexual activity in the past it is more likely that she consented on this occasion as well.[12] Even if there were some slight correlation between prior consent and consent on a particular occasion, the circumstances surrounding the event in question have far more probative value. Although under the Federal Rules evidence is deemed relevant if it has "any tendency" to affect the determination of a "fact of consequence,"[13] the great danger is that jurors will overrate the evidence. They may assume a willingness to consent to sexual activity far beyond what is realistic; sexually active women reject many would-be sexual partners. More importantly, details about the event in question can entirely cancel the probative value of an inference based on past behavior; if the defendant was a stranger or used a weapon or acted in concert with others, past sexual encounters with individual, nonviolent acquaintances become utterly irrelevant. Jurors may also succumb to the temptation to disregard the judge's instructions: they may decide that rape does not harm a sexually active woman enough to warrant criminal punishment. When evidence hurts the factfinding process more than it helps—when "the probative value is substantially outweighed by the danger of unfair prejudice"—the judge should exclude it.[14] Thus, it seems apparent that

10. As one despairing reviewer puts it, " 'Thelma & Louise' makes a grandiose spectacle of rejecting reason." Gary Arnold, *Fires, Females, Felons, Fat Folks, Phooey!; Moronic "Thelma" Bombs as Comic Davis Captivates*, WASH. TIMES, May 24, 1991, at E1.

11. By use of the feminine personal pronoun, I do not mean to suggest that men are not raped, only that female rape victims greatly predominate over male. I do not want to flatten out this reality by neutralizing my pronouns. The female personal pronoun can today easily be read as representing a genderless subject. I intend the female pronouns to carry their traditional meaning.

12. For criticism of this practice, see SUSAN ESTRICH, REAL RAPE (1987); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 12-15 (1977).

13. FED. R. EVID. 401.

14. FED. R. EVID. 403. Other rules in Article IV follow the same principle as they identify specific categories of evidence that present recurring problems of balancing prejudicial and probative values.

judges should have excluded most evidence of past sexual behavior even without a rape shield rule.[15]

If jurors were perfectly attuned to the reality of sexual relations in general and rape in particular, they would not overvalue the evidence. If they really could use it for nothing more than its scintilla of value, free from any unfair prejudice, then no exclusion to protect the factfinding process would be needed. A judge, living alongside of these jurors in this Utopia, would understand the jurors' impressive capacities, though he or she should nevertheless exclude the evidence as a waste of time[16] or as a way to protect the witness from harassment.[17] But nonresidents of Utopia labor under various and unpredictable prejudices and misconceptions. Living in the same society, judges will share many of their prejudices and thought processes.[18] Not only will jurors overvalue evidence of past sexual behavior in their deliberations, judges will view the prejudicial inferences as appropriate and therefore an aspect of probative value weighing in favor of admissibility, not against it. The reasoning processes of the human mind do not come from rules of evidence. A rule may say "probative value" and "unfair prejudice," but a human mind, subject to prejudice, must assign these labels to the proffered evidence. If the same misconceptions that impair the jury impair the judge, the judge cannot screen out evidence that jurors will misuse.

If a human mind, steeped in a particular social context, must apply the rules of evidence, then one should perhaps despair at the prospect of controlling the treatment of rape cases with rules of evidence. The prom-

15. These judges did not dramatically undermine the arguments of those who opine that we may do without rape shield rules because the existing rules already dictate exclusion of all the evidence that should be excluded. *See, e.g.*, J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 590 (1981).

16. FED. R. EVID. 403. Waste of time is one of the counterweights to probative value that the judge may consider under Rule 403.

17. Rule 611(a)(3) authorizes the judge to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . protect witnesses from harassment or undue embarrassment." FED. R. EVID. 611(a)(3). Note, too, that in the imagined Utopia, the defense lawyer would lack motivation to offer the questionable evidence in the first place.

18. The chief difference would seem to be the judge's greater contact with rape cases (as well as other legal cases). Through his or her life experience, which has taken place in large part in a courtroom, the judge may have developed a heightened power to assess the truth of testimony, a more jaundiced view of human nature, and a more callous attitude toward the consequences of criminal punishment. In GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (1989), Professor LaFree reports that judges as a general rule are more likely to find a rape defendant guilty and thus frequently disagree with the jury verdicts returned in their courtrooms. *Id.* at 95-96, 199. A judge with this experience, one would think, would tend to mistrust the jury's ability to weigh evidence properly and might attempt to control their miscalculations by excluding evidence.

ise of law reform resembles the good cop Slocumbe running toward us with an arm outstretched in an offer of help. Like Thelma and Louise, should we head full speed in the opposite direction, turning our back on the institution of law, even when it appears understanding and enlightened and willing to help? Should we say that even the attempts at help are part of a larger, overbearing system that only shifts around its modes of oppressing women? Should we leap into the Thunderbird and drive on?

III.

Most exclusionary rules premised on a comparison of prejudice and probative value only forbid a specific purpose.[19] For example, Federal Rule of Evidence 404 forbids evidence of character only if it is used "for the purpose of proving action in conformity therewith on a particular occasion."[20] The very same evidence is allowed if the proponent can articulate some other purpose.[21] Rape shield rules, such as Federal Rule of Evidence 412,[22] follow a much more restrictive structure, flatly barring the category of evidence of past sexual behavior and providing only a short list of exceptions.[23] Other Article IV rules invite circumvention through the articulation of an alternate purpose, but rape shield rules convey a much stronger exclusionary message to the judges who must apply them.[24]

Rule 412, like its state law counterparts, is buttressed with additional safeguards. It completely bars evidence in the form of reputation and opinion evidence, without exception.[25] It requires a rape defendant who seeks to use evidence of past sexual behavior to make a written motion at least fifteen days before trial (unless that evidence is "newly dis-

19. These rules appear in Article IV of the Federal Rules of Evidence. *See, e.g.*, FED. R. EVID. 403, 404(a), 404(b), 407-412.

20. FED. R. EVID. 404(a).

21. *See* FED. R. EVID. 404(b). If the forbidden use of the evidence "substantially outweighs" the permissible use, Rule 403 bars it. FED. R. EVID. 403.

22. FED. R. EVID. 412(a).

23. *See, e.g.*, FED. R. EVID. 412(b). For example, the exeptions enumerated in Rule 412 are: evidence of a victim's past sexual behavior offered to establish the source of the semen or injury and evidence of past sexual behavior with the accused offered on the issue of consent. When one of the exceptions applies, specific instances of past sexual behavior are the only permissible form of proof. However, the Constitution has supremacy over a mere statute, such as the Federal Rules of Evidence (or any state rule or state constitutional provision), and thus it remains open for a court to hold that the Constitution requires proof in the forbidden form. *See* FED. R. EVID. 412(b)(1).

24. *See, e.g.*, FED. R. EVID. 412.

25. FED. R. EVID. 412(b).

covered"), with service to the alleged victim as well as the other parties.[26] It provides for an in camera hearing to determine whether the proffered evidence fits within an exception; facts upon which relevancy depends must be fulfilled at this point, rather than over the course of the trial as Federal Rule of Evidence 104(b) generally permits.[27] Contrary to the balancing test of Rule 403, weighted distinctly in favor of admissibility,[28] the rape shield rule requires evidence within the exceptions to have a probative value that outweighs the danger of unfair prejudice.[29] Finally, it permits evidence of specific instances and cross-examination of the alleged victim only to the extent specified in a judicial order.[30]

Given the strong message of exclusion conveyed by the text of rape shield rules and the clear legislative history full of consideration for the complaining witness, one would expect this rule to make a striking difference. Certainly, if rules matter, this rule should matter. Most of the Federal Rules of Evidence (and state evidence codes modelled after them) accord the trial judge leeway to either admit or exclude much evidence.[31] To say that *these* rules "don't matter" is only to say that these rules represent a decision to invest trial judges with discretion, not that rules generally lack power to constrain judges. But rape shield rules represent a clear attempt to rein in the usual discretion: they reflect a mistrust of judges (not just juries). Recognizing that the judge who shares the jurors' prejudices will not use his or her discretion to exclude the evidence jurors will misuse, rape shield rules set up a restrictive structure distinctly different from the rest of the rules of evidence.

But as long as prejudice, misconception and sexism persist in the minds of judges and jurors, can a mere rule, even a rule as strongly worded as this, have its intended effect? Has the rule succeeded in creating the kind of atmosphere of safety and trust that will encourage women to report the crime of rape and to serve as witnesses in rape trials? Or is the shield rule a nice gesture, an outstretched hand of the legislature, that seen against the backdrop of the judges and juries that "just don't get

26. FED. R. EVID. 412(c)(1).

27. FED. R. EVID. 104(b), 412(c)(2).

28. FED. R. EVID. 403 (prejudicial danger must "substantially outweigh" probative value).

29. FED. R. EVID. 412(c)(3).

30. *Id.*

31. The broad theory of admissibility is expressed clearly in Rules such as 401 and 601. FED. R. EVID. 401, 601. Discretion to exclude evidence is found, most importantly, in FED. R. EVID. 403. While exclusionary rules remain, the rules leave room for judges to reclaim their discretion: for example the Federal Rules preserve the rule against hearsay, FED. R. EVID. 802, but in addition to the specific exceptions, they also create open-ended, discretionary exceptions in Rules 803(24), 804(5). *See* FED. R. EVID. 803(24), 804(5).

it,"[32] inspire women only to slam down the accelerator and speed away from the legal process?

IV.

One cannot simply rely on the promise of the rule because a judge or jury that does not share the goals and beliefs embodied in the rule can drastically undercut its effect. First, judges can give a generous interpretation to the exceptions found in the rape shield rules,[33] and they can trump the provisions of the rules with expansive definitions of constitutional rights.[34] Assessing the weight of the proffered evidence is part of

32. "[They] just don't get it" became somewhat of a catch phrase during the Thomas confirmation hearings. *See* Linda Winer, *They're Still Not Getting the Point*, NEWSDAY, Nov. 8, 1991, II-71; *see also supra* note 4 and accompanying text.

33. Rape shield statutes vary from state to state. *See* Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 773 (1986) (cataloguing and analyzing forms of statutes in various states). The basic form bars all evidence of past sexual behavior and then lists several exceptions, such as, for example, evidence offered to show that another person caused physical injury or was the source of semen or evidence of past sexual behavior with the accused. *See* FED. R. EVID. 412. Some rape shield statutes, like Federal Rule of Evidence 412, specify an exception for "constitutionally required" evidence, *id.*, but under the Supremacy Clause, a constitutional right will take precedence over any mere evidence rule, state or federal, whether the rule acknowledges that or not. U.S. CONST. art. VI, cl. 2. Failure to acknowledge the hierarchy of the Supremacy Clause might risk facial invalidation, but courts have shown their ability to override the rule on a case by case basis, thus preserving the evidentiary rule. The primary question, then, becomes whether the Constitution requires this sort of evidence, an inquiry that hinges not merely on the expansiveness of a judge's definition of constitutional rights, but on how probative the judge thinks the evidence is. *See infra* note 34 and accompanying text.

34. There is scant Supreme Court case law on these issues. The key confrontation case, Davis v. Alaska, 415 U.S. 308 (1974), held that a state law privilege shielding a juvenile's records had to yield to the criminal defendant's right to confront witnesses. *Id.* at 320. Yet *Davis* cannot be read to mean that all privileges will always yield to assertions of the right of confrontation. As Professor Vivian Berger discusses in her article *Man's Trial, Woman's Tribulation*, *Davis* emphasizes the relevance of the evidence in question to the issue of *bias*, which is seen as presenting a particularly strong need for cross-examination. Berger, *supra* note 12, at 52-53; *see, e.g.*, United States v. Abel, 469 U.S. 45 (1984) (limitations of FED. R. EVID. 608(b) barring use of specific instances to show character for truthfulness not applicable to establishing bias).

Moreover, *Davis* refers to an evidence rule based on *privilege*, that is, a rule designed to further social interest extrinsic to the factfinding process at trial. Some commentators recharacterize the rape shield statute as a rule of privilege, either because it can be viewed as embodying a social policy to protect rape victims and encourage the reporting of rape or because such a recharacterization renders it amenable to an attack premised on *Davis*. *See* Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245, 1272-73 (1989). This recharacterization reflects a belief that a significant amount of the excluded evidence is probative, but is excluded for reasons having little or nothing to do with the accuracy of the factfinding process. Seeing the rule as one of relevance and countervailing prejudice (as its placement in Federal Rules of Evidence Article IV suggests) reflects the belief that the evidence is excluded because it is worthless or likely to distort the factfinding process

the constitutional analysis. Thus, if the judge thinks the evidence of past sexual behavior has strong probative value, it becomes more likely that the right to confront the witness or the due process right to present evidence will require its admission. The judicial mind, subject to prejudice and distorted assumptions, must assess how probative evidence of past sexual behavior is, and constitutional decision-making follows accordingly, overriding the detailed exclusions of the evidence rule.

Rape shield rules cannot simply outlaw this kind of decision-making. Nevertheless, they convey a strong message to judges that many persons who have considered the relevance of past sexual behavior have reached the conclusion embodied in the rape shield rule.[35] Knowing this, a judge may become more likely to agree and assign the evidence low probative value and consequently reject the constitutional claim. On the other hand, a judge could still maintain independent doubt about that conclusion, particularly if he or she sees the statute as a mere political move, dismissive of the rights of the criminally accused and intended to

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more than enhance it. Anyone taking the position that the rape shield rule really belongs in Article IV where the legislators placed it, along with the other relevance rules, would naturally view *Davis* as only tangentially applicable.

The key case on the right to present evidence ("compulsory process") is Chambers v. Mississippi, 410 U.S. 284 (1973). According to the Court in *Chambers*, when the evidence "bore persuasive assurances of trustworthiness" and was "critical" to the defense, the trial court could not apply the hearsay rule "mechanistically" to exclude the evidence. *Id.* at 302. But *Chambers* presented evidence that if believed would necessarily exculpate the defendant: another person had confessed to the murder with which the defendant was charged. *Id.* at 287. By contrast, the rape shield rule only excludes evidence that could be the basis of an inference helpful to the defendant. *See* FED. R. EVID. 412. Moreover, in *Chambers,* the evidence was unusually strong, in that the person who confessed had signed a sworn statement for the police; the Court acknowledged that hearsay confessions are frequently excluded. *Chambers*, 410 U.S. at 287, 298. Indeed, the statement against penal interest exception to the hearsay rule is relatively new and it only permits the use of such statements to exculpate the accused if "corroborating circumstances clearly indicate the trustworthiness of the statement." *See* FED. R. EVID. 804(b)(3). The Court in *Chambers* affirmed "the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures," and emphasized the fact-specific nature of its determination that Chambers had not received a fair trial. *Chambers*, 410 U.S. at 302-03. Thus, *Chambers* can scarcely be read as standing for the general proposition that the accused has a due process right to present "relevant" or even "fairly probative" evidence.

35. A study of judges, prosecutors and defense attorneys indicated their willingness to express general beliefs that evidence of past sexual behavior lacks probative value, *see* Cassia Spohn & Karen Horney, *"The Law's the Law, But Fair Is Fair:" Rape Shield Laws and Officials' Assessments of Sexual History Evidence*, 29 CRIMINOLOGY 137, 157-58 (1991). But verbalizing agreement with the general principle underlying the rule and rigorously applying the rule in practice are two different things. A judge may say what the rule has made him or her think is the appropriate thing to say but still may easily find that a particular bit of evidence has unusual weight in a given case.

appease a powerful group or to make a show of crime control.[36] If so, the judge can interpret either the rule's exceptions or the defendant's constitutional rights to minimize the effect of its general ban on the use of evidence of sexual behavior.[37]

Even if the judge *does* adhere to the rule's strict exclusion of this evidence, a problem remains. The tendency to focus a rape trial on the victim's behavior, to make the victim look and feel as if she is on trial, and to deflect attention from the defendant's behavior can simply take a different form. Even if the judge restricts the inquiry to evidence of the event upon which the charge in a particular case is based, the victim can still be questioned accusingly about her behavior.[38] Insinuations about her "moral character" can encourage the jury to conclude that the defendant should go free because the victim does not deserve the law's protection. If judges and jurors do not take rape seriously, do not trust women who report rape or do not think "unchaste" women should be permitted to invoke the protection of the criminal law, these notions will infect their interpretation of evidence relating to the event in question.[39] Juries will hear about how the witness dressed,[40] where she voluntarily went walking alone, how she accepted an invitation, say, to go for a walk

36. *See, e.g.*, Tanford & Bocchino, *supra* note 15, at 544-50 ("[E]ven as the old laws were premised on the myths of a male-dominated society, the vituperative attacks and much of the legislation are themselves based on an emotional premise: that the rape victim is unfairly subject to a 'second rape' by the criminal justice system.").

37. *See, e.g.*, Leo A. Farhat & Richard C. Kraus, *Michigan's "Rape Shield" Statute: Questioning the Wisdom of Legislative Determinations of Relevance*, 4 COOLEY L. REV. 545, 558 (1987). Mssrs. Farhat and Kraus approve of the Michigan courts' interpretation of the state's strict rape shield statute to permit evidence that is clearly excluded by its text. They write: "The history of Michigan's rape-shield statute should raise concerns about further legislative intrusions into the traditionally judicial functions of weighing probative value and determining admissibility of evidence." *Id.* Professors Tanford and Bocchino write that the Constitution bars special rules relating to past sexual behavior and demands that the judge subject the evidence to the same weighing of probative value against prejudicial effect that applies to evidence not covered by a special rule. *See* Tanford & Bocchino, *supra* note 15, at 589. For an empirical study of the tendency to override rape shield rules when evidence seems more relevant than the usual general character information, see Spohn & Horney, *supra* note 35. For a recent comprehensive survey of cases, see Joel E. Smith, Annotation, *Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences*, 1 A.L.R.4th 283 (1980 & Supp. 1991).

38. *See, e.g.*, Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75, 79-80 (1987) (describing treatment of victim during trial for interracial rape in which victim is accused of being racist).

39. For a statutory proposal aimed at deflecting the attention from the victim, see Cynthia Ann Wicktom, Comment; *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 429-30 (1988) (emphasizing proof of use of force and shifting burden of proving consent on defendant).

40. *E.g.*, in a recent Florida rape trial, the jury foreman admitted that the jury acquitted the defendant because the victim's clothing—a tank top and a short skirt with no underwear—

on the beach[41] or to enter an apartment with the defendant, and how much she had to drink. A defense attorney can aggressively interrogate the witness, using this kind of evidence rather than evidence of past sexual behavior to create the impression that the witness is the one on trial. And jurors can take this sort of evidence and use it prejudicially, acquitting the defendant even where a rape has occurred.[42]

In *Thelma and Louise*, Louise takes the law into her own hands and shoots Thelma's rapist.[43] She acts out of cynicism, despair and anger borne of personal experience: years ago, she was raped and, it is implied, she went through a painful and disillusioning trial.[44] They assume that the rapist would not have been convicted. But why not? Why doesn't the rape shield rule achieve its intended effect and encourage Thelma to report the rape (and Louise to forgo vigilantism)? The problem is not evidence of past sexual behavior. Thelma has been involved with only one man since she was fourteen years old. The problem in her case is the situation surrounding this event: she drank excessively, she smiled at her rapist and engaged in conversation with him, she danced with him, she willingly accompanied him into the parking lot. As Thelma puts it, "They would have all made out like I'd asked for it."

The anticipated humiliation and futility of the trial is no mere plot device. Current newspapers are cluttered with stories about rape trials in which facts of this kind are used to insinuate that women are lying or unworthy of protection and that the defendants do not deserve prison. For example, the St. John's University rape trial in New York City re-

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suggested that she "asked for it." *Rape Guilty Plea, After Acquittal*, N.Y. TIMES, Dec. 7, 1989, at B21. The rapist subsequently pled guilty to a rape charge in another state. *Id.*

41. This is the factual circumstance of the William Kennedy Smith case, which the media have covered extensively. *See, e.g., infra* note 46. Commentators frequently discuss this case as if a decision to go for a walk with a person creates a strong inference of consent to sexual intercourse or as if the law should withhold protection from those who voluntarily engage in "risky" behavior (with "risk" defined very broadly).

42. *See* LAFREE, *supra* note 18, at 217-18 (study of rape jurors).

43. The moral and legal context of the film is muddied by the murder: it is not simply that Thelma cannot hope for a rape conviction anymore but that Louise quite justly faces a murder charge. (There is no valid claim of self-defense here, though Thelma suggests making such a claim, adding "It's almost the truth.") Thelma wants to go to the police at first, and Louise talks her out of it, on the ground that Thelma's story will not be believed. Thelma could, however, simply have declined to report the rape, as most rape victims do. She did not need to become an outlaw. It is only in following Louise, who *does* need to fear arrest, that Thelma becomes implicated in other crimes.

44. The film never more than alludes to this past event. The viewer is left to imagine Louise's past experience, which, in the absence of particularized information, tends to become a composite of all the stories of rape and rape trials one has ever heard. Interpretations of this film vary in part because each viewer must construct the story of Louise's rape and trial experience.

sulted in acquittal based in part on evidence the victim displayed a romantic interest in one of the defendants and drank a large amount of liquor (albeit under pressure from one of the defendants).[45] In the case of three University of Minnesota basketball players tried in Madison, Wisconsin, there was evidence that the alleged victim accompanied the defendant to a hotel room where she was told there was a party.[46] Even given the admitted incidence of group sex, the jury accepted the defense of consent.[47] And the case involving William Kennedy Smith has led to an immense amount of public discussion about the victim, focusing on her drinking and her interest in socializing with the defendant.[48] A supermarket tabloid even featured a cover photograph of a blue brassiere and the headline "This bra could save Kennedys—Willie Smith's lawyer drops rape bombshell."[49]

V.

The way people think about the evidence they hear is more important than any rule. Consider how filmgoers saw and interpreted the events the camera allowed them to "witness" in *Thelma and Louise*.[50] We see Thelma ordering a drink in a crowded roadside bar, engaging in conversation with a man (Harlan), agreeing to dance with him. We see Harlan, on hearing Louise say they were about to leave, aggressively spin the drunken Thelma, and then, when she predictably sickens, lead her

45. *See, e.g.*, Lorrin Anderson, *Boyz N St. John's; Minority Dominated Jury Acquits St. John's University White Male College Students of Sex Abuse Charge by Jamaican Female Student*, NAT'L REV., Aug. 26, 1991, at 22.

46. This case is discussed at length in Bumiller, *supra* note 38.

47. *Id.* at 79.

48. *See, e.g.*, Hugh Davies, *Kennedy Clan under Siege*, DAILY TELEGRAPH, Nov. 2, 1991, at 3; Paul Richter, *Smith Case Jury Likely to Focus on Character; Rape Trial: Personas of Accuser and Accused May be More Crucial Than High-Tech Evidence, Legal Maneuvers*, L.A. TIMES, Nov. 4, 1991, at A4.

49. *Why Willie's Pinning His Hopes on a Bra*, STAR, Nov. 19, 1991, at 42.

50. A film is not a true life event: seeing a crime on film differs from witnessing a crime in real life. Not only is it based on a writer's screenplay and performed by actors, a mere imitation of life, but it is also shot, lit and cut according to the manipulative methods of filmmaking. If we happen upon an event in real life, no close-ups drag our attention to a specific facial expression or a gun in a hand. No human actor has structured our point of view (though contact with numerous human actors has shaped our minds and thus has an impact on what we notice and focus on and how we react to, interpret and talk about an event). It is our choice or the accident of our physical position that determines whether our eyes linger on the victim, scrutinize the movements of some other participant, scan the surroundings for other evidence, or look away. By contrast, a film-maker controls what portions of the scene we see, which characters we follow and whose construction of the events we hear. But jurors in a trial do not witness the crime themselves, they listen to witnesses, who, like filmmakers, present a point of view and can distort reality in any number of ways.

into the parking lot purportedly for "air." We then witness Harlan's attack on Thelma.

Reading a large number of reviews of *Thelma and Louise*, I was struck by how consistently filmgoer-witnesses reached the conclusion that Harlan did not rape Thelma, but merely attempted it. Words like "would-be rapist" or "trying to rape" appear with disconcerting frequency.[51] To my knowledge, not a single reviewer said unequivocally that Harlan raped Thelma, though two did say that he "was raping" Thelma when Louise stopped him at gunpoint.[52] Given the sustained

51. See Nigel Andrews, *The Western Reinvented for Women*, FIN. TIMES, July 11, 1991, at 11 ("Thelma is *all but raped* by a redneck customer . . . . "); Jay Carr, *"Thelma & Louise": Buddies with Heart*, THE BOSTON GLOBE, May 24, 1991, at 45 ("the vicious *would-be rapist*"); Mike Clark, *"Thelma" Makes Road to Hilarity Harrowing Ride*, USA TODAY, May 25, 1991, at 1D ("At a stop-off honky-tonk, Thelma gets looped, then *nearly raped* by her evening-long dance partner. . . . *rape was prevented* by Louise's gun-wielding threats."); Jack Garner, *"Thelma and Louise"—Rich Movie Triumph*, GANNETT NEWS SERVICE, May 21, 1991 ("A few moments of dancing escalate into an ugly, violent confrontation with a *would-be rapist* . . . ."); Susan Henderson, *On the Run in a 1966 Thunderbird Convertible*, ORIGIN UNIVERSAL NEWS SERVICES LIMITED, July 3, 1991 ("When Louise goes out to the car park and finds the man *trying to rape* her friend . . . . "); Brian D. Johnson, *Feminist Fast Lane*, MACLEAN'S, May 27, 1991, at 64 ("After making her drunk and dizzy, he takes her outside and *tries* to rape her on the hood of a parked car."); Stanley Kauffmann, *Thelma and Louise*, THE NEW REPUBLIC, July 1, 1991, at 28 ("[S]he *stops the rape attempt* at gun point . . . . "); Jack Kroll, *Back on the Road Again*, NEWSWEEK, May 27, 1991, at 59 ("But at their first pit stop a local superpig *tries to rape* Thelma . . . . "); Craig MacInnis, *The Real Guys: Thelma & Louise Raises Question Why Recent Movies Can Only Show Women Making Progress by Making Men Look Like Idiots*, THE TORONTO STAR, June 22, 1991, at F1 ("the lovely outlaws shoot a *would-be rapist* dead"); Mars-Jones, *supra* note 5, at 18 ("The red-neck *tries to rape* Thelma and Louise intervenes with a gun."); M.S. Mason, *The Movie "Thelma & Louise" Isn't Just About Trashing Men*, THE CHRISTIAN SCI. MONITOR, July 1, 1991, at 11 ("Before the first day ends, Thelma is beaten and *nearly raped,* and Louise . . . has saved her friend at gunpoint and then shot the would-be rapist as he verbally abuses her."); Richard Schickel, *Gender Bender; A White-Hot Debate Rages over Whether Thelma & Louise Celebrates Liberated Females, Male Bashers—or Outlaws*, TIME, June 24, 1991, at 52 ("follows her to the parking lot and *almost succeeds* in raping her . . . Louise kills the *would-be* rapist."); John Simon, *Thelma and Louise*, NAT'L REV., July 8, 1991, at 48 ("Provocative as she is, she gets not air, but *attempted* rape."); David Sterritt, *A Driving Movie With Women at the Wheel*, THE CHRISTIAN SCI. MONITOR, June 17, 1991, at 11 ("He takes Thelma outside and *tries* to rape her . . . "); Clifford Terry, *"Thelma & Louise": Rowdy Road Trip Slowed by Plot Holes*, CHI. TRIB., May 24, 1991, at H ("[A] lout who assaults and *tries to rape* Thelma . . . ."); Bruce Williamson, *Thelma and Louise; Movie Reviews*, PLAYBOY, May 1991, at 58 ("[T]hese newly liberated members of the fair sex are up to their eyebrows in *near rape* . . . .") (emphases added).

52. *See* Catherine Dunphy, *Thelma & Louise's Excellent Adventure*, TORONTO STAR, May 24, 1991, at D1 ("Louise shoots a man who was raping Thelma in the parking lot of an Arkansas roadhouse. . . ."); Jack Matthews, *On The Run With "Thelma, Louise,"* NEWSDAY, May 24, 1991, at 87 ("It's hard to believe that two women, even two as simple and unsophisticated as Thelma and Louise, would panic and head for Mexico after shooting a man who was furiously raping one of them."). Note that both of these reviews use the expression "was raping" which also draws attention to the unfinished nature of the action. This terminology, like the use of the "attempt" language set out in the preceding footnote, suggests that viewers instinc-

close-up of the sides of the two bodies and a good deal of suggestive manipulation of bodies and clothing and Thelma's explicit statement, "He was raping me," there is, I would think, no basis for downgrading the event to a mere rape attempt.[53] The movie reviewers were only purporting to describe what they saw and did not, like jurors, need to give Harlan the benefit of reasonable doubt.[54] Indeed, since the movie takes Thelma and Louise's point of view one would think that reviewers would be more inclined to accept Thelma's characterization of the event than a juror would.

Many of the reviewers' other statements suggest the kind of thinking that leads jurors to construe evidence about the event in question against the alleged victim. John Simon wrote that Harlan "gets the somewhat drunk Thelma to dance with him in complete, newly emancipated abandon."[55] This statement seems to imply that Thelma has opened herself up to sexual activity or at least has sent a strong message of availability. The next statement intensifies this implication:

> You'd think that a woman, even a quasi-runaway, would not trust a man who dances with a beer bottle in one hand poking his partner's shoulderblades, but Thelma does, and even follows him out into the parking lot for a breath of sobering air. Provocative as she is, she gets not air, but attempted rape.[56]

After this excessive foray into victim-blaming, Simon has the obtuseness to wonder why Thelma does not go to the police.[57]

Rita Kempley places the blame squarely on the victim: "Thelma is the scatterbrain who gets them into trouble when she insists on stopping

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tively take the defendant's perspective: since Louise stopped him, Harlan did not commit rape. From the victim's perspective (which the text of statutory criminal law also takes), rape occurs on penetration (in the words of many statutes, "however slight").

53. One never actually *sees* penetration, but one would probably not see it in real life. The visibility of penetration produced in hard-core pornography takes some doing. And reviewers could scarcely expect such a sight in an R-rated Hollywood film. It may be that the reviewers fail to find rape because they care about Thelma and wish a better outcome into existence. But that caring takes the form of disbelieving her. Another possibility should be considered. Perhaps the reviewers are not so bad at finding facts and they have merely transformed the law. Louise's interruption of Harlan's activity: her gun suddenly appears at the base of his skull, and he must pull away from Thelma to confront Louise. Perhaps the reviewers feel they have witnessed only an "attempt" because *his* goal was not fully attained.

54. A fastidiously accurate reviewer could avoid concluding rape or attempted rape with other language, for example "Thelma is brutally assaulted." *See Buddy Can You Spare a Dame?*, Times Newspapers, Ltd., Sunday Times, July 14, 1991, *available in* LEXIS, Nexis library, Currnt file.

55. Simon, *supra* note 51, at 48.

56. *Id.*

57. *Id.*

for a drink at a roadside honky-tonk. A drunken dance-floor flirtation turns suddenly ugly. . . ."[58] Similarly, Janet Maslin acquits Harlan and astonishingly trivializes the event with the following statement: "Out for a weekend's fishing trip, mischievously stealing away from Thelma's husband and Louise's boyfriend, the two heroines first get into trouble in an Arkansas honky-tonk, where a man who makes a pass at Thelma mistakes her high spirits and alcoholic haze for sexual availability."[59] Like Maslin, Richard Schickel views Harlan as the victim of a mistake and Thelma as the one who led him into his mistake. He writes: "On the way, [Thelma and Louise] stop at a roadhouse for a drink. One of its resident lounge lizards mistakes Thelma's naive flirtatiousness for a come-on, follows her to the parking lot and almost succeeds in raping her."[60]

To my eye, Harlan engages in egregiously predatory behavior: he buys the women a second round of drinks, he sits down with them uninvited and makes ingratiating conversation emphasizing their physical appearance, he deliberately spins Thelma and makes her dizzy, then takes advantage of her condition to lead her into isolation in the parking lot, and he slugs her with his full strength and pins her against the hood of a car. Thelma repeatedly says "no" and pleads with him ("I'm married."). Harlan scarcely is the victim of mistake.

Despite the apparent sympathy and admiration many of these reviewers express for Thelma, one can easily imagine them as jurors focusing on her behavior, finding it misguided, misleading and reckless, and acquitting Harlan, contemptible though they may have found him. Only in light of the hitting and bruising does conviction seem a real possibility. In adding this decisive violence, the film distinctly weights the evidence against Harlan. But one may rightly wonder what the reviewers would have written if they had witnessed a rape without the dramatic slugging or if they had merely heard a witness describe that sort of rape.[61]

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58. Rita Kempley, *"Thelma & Louise": In the Hammer Lane*, THE WASH. POST, May 24, 1991, at B1. Kempley avoids mentioning the Harlan character or the rape in this early review of the movie, so her statement could be attributed to a desire to keep its surprises intact.

59. Janet Maslin, *Lay Off "Thelma and Louise,"* N.Y. TIMES, June 16, 1991, § 2, at 11. This review, interestingly enough, is a fierce defense of the film.

60. Schickel, *supra* note 51, at 52.

61. On the dismissive treatment "simple rape" receives from police, prosecutors and juries, see ESTRICH, *supra* note 12 at 4-7. If filmgoers were more attuned to the realities of rape, the film would have been more provocative and meaningful without this additional violence. (The average filmgoer is probably unusually inured to compelled sex on the screen: rape is frequently depicted without being called rape or even recognized as bad. *See, e.g.*, GONE WITH THE WIND (Metro-Goldwyn-Mayer 1939)). The makers of *Thelma and Louise* seemed to have realized that they would need to beat the audience over the head with the fact that this

VI.

Does the rape shield rule matter? Perhaps it matters the way a film or a famous rape case matters. It is a cultural phenomenon that shapes the minds of the judges and juries who decide the outcomes of trials. The rule represents an attempt to control the information a jury will hear and to rein in their tendencies to decide rape cases by judging the victim, but it cannot in one grand gesture change those tendencies. Judges who resist the conclusions that underlie the rule can find their way out from underneath even its strictly worded prescriptions. Juries who do not share the mindset of the rule's legislators can, even when the rule is used to bar evidence, find whatever way they can to judge the victim and not the defendant.

But knowing that an impressive panel of legal experts, endorsed by a large politically responsible institution, has found the evidence irrelevant can influence judges to abandon or modify their beliefs, ideas and patterns of reasoning. If their minds do change, they may willingly pronounce this evidence irrelevant and thus incapable of triggering constitutional protections and they may use all of their many discretionary powers to deflect attention from the victim's behavior. Jurors too may change, influenced by the decreased barrage of information about the victim. If the evidence begins to focus on the culpability of the defendant, they may lose the sense that it is just and fair to judge the victim. If their minds genuinely undergo this change, then the rule will finally have its intended effect.

This process of change is disconcertingly slow and uncertain, particularly compared with the impressive (but deceptive) speed and clarity of a new rule. It is in fact too slow and uncertain to offer much inspiration to the individual victim who must make her own decision about whether to respond to the law's outstretched hand. And so, daily, victims do turn away and, even if they do not head over the precipice like Thelma and Louise, they decline to take part in the public struggle of the courtroom. But one may nevertheless continue to nurture the hope that enough will respond to the law's overtures to allow this process of change to go forward. And one can credit the modest step of enacting a rule with making the courtroom a somewhat more bearable place for those courageous volunteers.

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was "real rape." A rape in which the only violence is the rape itself would not read as rape to many viewers and the characters' reactions would have made no sense at all to them.