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We're Only Fooling Ourselves: A Critical Analysis of the Biases Inherent in the Legal System's Treatment of Rape Victims (Or Learning from Our Mistakes: Abandoning a Fundamentally Prejudiced System & Moving Toward a Rational Jurisprudence of Rape)

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WE'RE ONLY FOOLING OURSELVES: A CRITICAL ANALYSIS OF THE BIASES INHERENT IN THE LEGAL SYSTEM'S TREATMENT OF RAPE VICTIMS

(OR LEARNING FROM OUR MISTAKES: ABANDONING A FUNDAMENTALLY PREJUDICED SYSTEM & MOVING TOWARD A RATIONAL JURISPRUDENCE OF RAPE)

BY THOMAS A. MITCHELL*

"You know what a rape usually is? It's a woman who changed her mind afterward."[1]

"It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." [2]

"Since four out of five rapes go unreported, it is fair to say categorically that women do not find rape 'an accusation easily to be made.' . . . [The issue in rape cases] is based on the cherished male assumption that female persons tend to lie." [3]

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This Article is dedicated to Professor Robert Rodes for introducing me to medieval legal history, to my parents for their patience and understanding, and to all survivors of sexual abuse for their strength and courage.

[1] JOHN UPDIKE, RABBIT REDUX 37 (1971).

[2] SIR MATTHEW HALE, 1 THE HISTORY OF THE PLEAS OF THE CROWN 634 (W.A. Stokes & E. Ingersoll eds, 1st Am. ed., 1847).

[3] SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 369 (1975); *see also* SUSAN ESTRICH, REAL RAPE 5 (1987) ("The male rape fantasy is a nightmare of being caught in the classic, simple rape. A man engages in sex. . . . But this time is different: she charges rape. There are no witnesses. It's a contest of credibility, and he is the accused 'rapist'.").

INTRODUCTION

The more things change, the more they stay the same. In the past 800 years, many changes have been wrought in the treatment of the crime of rape in the Anglo-American legal system. Many of these changes, particularly in recent decades, have been intended to protect the alleged victims of rape, to encourage victims to report the crime, and to convict a higher percentage of offenders.[4] Given the prevalence of rape and other forms of sexual assault in this country, these efforts should be lauded.[5] However, while improvements have been made and should not be underappreciated, real progress has been minimal.[6] The underlying problem, its causes, and the majority of its consequences are the same today as they were at the formation of the Anglo-American legal system, almost a millennium ago.

Substantial scholarship, litigation, and general debate have disputed the propriety of changes in the law's treatment of rape cases and the statutes enacted to effectuate these changes.[7] On the side of "reformers" and victim's rights advocates, it has been argued that the legal system "rapes" or

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[4] *See, e.g.*, FED. R. EVID. 412-15.

[5] A few statistics will show the importance of the issue of improving the law in relation to rape to today's legal system. First, approximately 1.3 women in the United States are raped each minute, totaling to over 680,000 rapes each year. *See* ANNE M. DERINGER, CEASE: RAPE STATISTICS, http://oak.cats.ohiou.edu/~ad361896/anne/cease/rapestatisticspage.html (last visited Dec. 6, 2004); UCSC RAPE PREVENTION EDUCATION: RAPE STATISTICS, http://www2.ucsc.edu/rape-prevention/statistics.html (last updated Sept. 17, 2004).

Second, the percentage of rapes reported to the police are unusually low, and only two percent of rapists are convicted and imprisoned. *See* UCSC RAPE PREVENTION EDUCATION: RAPE STATISTICS; Christina E. Wells & Erin Elliot Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 128–29 (2001) (quoting STAFF OF S. COMM. ON THE JUDICIARY, 103d CONG., THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE iii (Comm. Print 1993)).

Additionally, for a comparison of various statistical studies regarding rape, see DIANA E.H. RUSSELL & REBECCA M. BOLEN, THE EPIDEMIC OF RAPE AND CHILD SEXUAL ABUSE IN THE UNITED STATES (2000).

[6] *See, e.g.*, Wells & Motley, *supra* note 5, at 151 ("[M]ost research shows only marginal improvement in the legal system's response to rape.").

[7] *See* FED. R. EVID. 412-15.

victimizes the woman[8] a second time.[9] Thus, the argument goes that the law must be changed to provide adequate protection to the victim and to substantiate justice against the offender. On the other side, endorsed by defendant's rights advocates and civil libertarians, the argument states that the Constitution prohibits these statutory protections.[10] Any interest of the "prosecutrix," the woman bringing the allegations, is outweighed by the accused's rights under the Sixth Amendment's Confrontation Clause and the Due Process Clauses of the Fifth and Fourteenth Amendments. Both of these positions have merit. Therefore, the law finds itself in a quagmire of judicial opinions attempting to satisfy rights that are presented as mutually exclusive.[11]

The problem, however, is not really with the law in its current incarnation. The problem is deeper – it is in society's persistent (mis)conceptions of the crime of rape. Although the law can serve as a conduit for social change, it can also impede

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[8] This Article will distinctly consider rape as a crime committed by a man against a woman above the age of consent. There are many debated issues in the crime of rape, including concepts such as statutory rape, spousal rape, and interracial rape, to name a few. It is beyond the scope of this Article to discuss any of these topics. Furthermore, the author wishes to affirm the view that rape of men, both by other males and by females, does in fact occur. For an interesting treatment of this issue, see, e.g., MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME (1997).

[9] *See, e.g.*, Wells & Motley, *supra* note 5, at 149 ("Scholars argued that legal rules . . . effectively put[] the rape victim on trial.").

[10] *See, e.g.*, Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 711, 712 (1995) ("This uncertainty has . . . given rise to concern that excessive restrictions on admissibility may infringe upon a defendant's Sixth Amendment rights to present a defense and to confront and cross-examine his accusers.").

[11] *See, e.g.*, Michigan v. Lucas, 500 U.S. 145 (1991) (determining that the constitutionality of preclusion of prior sexual conduct evidence for failure to follow procedural requirements depended upon the particular requirements of the rape shield statute), People v. Ivers, 587 N.W.2d 10 (Mich. 1998) (limiting the ability of statements to qualify as prior sexual conduct), and Commonwealth v. Spiewak, 617 A.2d 696 (Pa. 1992) (holding that the Sixth Amendment prohibited exclusion of evidence of prior sexual conduct by rape shield laws in some situations).

change by codifying and validating society's misperceptions.[12] In the area of rape, the law has done the latter. This has happened because the law displays the belief that these protections are necessary for the alleged victim. In other words, the presence of a rape shield law in and of itself implies that a rape shield law is necessary to prevent admissibility of the information barred by the law; the implication is that the information would be relevant and admissible if not for the statute.[13] Thus, the true problems are the underlying ones, which have been embedded in these new statutes – the societal beliefs that rape law is *so* different from other crimes as to necessitate its own evidentiary rules and that prior lack of chastity by a victim has some bearing on her consent in this case.

Of course, rape is different from other crimes. Rape is both more difficult to prove and more difficult to defend because rape involves the intent of the *victim*.[14] The mental state of the accuser is part of the *corpus delicti*. In most laws, only the intent of the defendant is an issue; it is the *mens rea*, a substantive element of the crime.[15] However, in rape, the intent of the accuser is more important than the intent of the accused.[16] This is a large difference from most cases. But this difference does not lead to the conclusion that different evidentiary rules are necessary for rape cases. Instead, societal recognition of the realities of rape is necessary, so that the normal rules of evidence can be applied correctly to rape cases.

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[12] *See, e.g.*, John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L.J. 433, 508 (1997) ("Ideas that reflect the reality and understanding of their time support and facilitate necessary change. And ideas that linger beyond their time impeded necessary change.").

[13] *See* FED. R. EVID. 404 advisory committee's note ("[A]n accused may introduce pertinent evidence of the character of the victim, as in support of a claim of . . . consent in a case of rape.").

[14] *See, e.g.*, Robert E. Rodes, Jr., *On Law and Chastity*, 76 NOTRE DAME L. REV. 643, 689 (2001) ("The emphasis on autonomy has also caused a shift in doctrine regarding the amount of resistance a woman has to put up in order to claim that what occurred was against her will.").

[15] *See, e.g.*, JOHN KAPLAN, ROBERT WEISBERG, & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 181-286 (4th ed. 2000).

[16] *See id.* at 1109-13.

The problem with rape is caused by a persistent lingering of the idea of rape as an affront to chastity, as opposed to rape as an affront to autonomy.[17] Throughout most of history, rape was considered a crime against the chastity of the victim; even in cases in which the victim was not a virgin, the victim had the right to change her ways.[18] During the women's movement of the 1970s, this concept of rape gave way to the idea of rape as an injury to a woman's autonomy.[19] A woman has the right to choose when and with whom she will engage in sex.

Despite this change, the controversy in rape cases still tends to center around the woman's "character" for chastity – her past sexual conduct and/or her "sexual" conduct with the accused, *i.e.* whether she "invited" intercourse.[20] In most cases, the issue of the woman's consent, or lack thereof, dominates the trial. This is how the woman's actions become relevant – her actions show whether she was "more likely" to consent to this man.[21] This result may be inevitable in rape cases – it may be impossible to prevent a rape case from revolving around the woman. An unfortunate consequence is produced because of this, however: rape cases appear as if the alleged victim is on trial, not the defendant. Therefore, determining what evidence is and is not admissible and the procedures for consideration of potential evidence hold additional importance in the rape context.

This Article will show that the underlying problem in rape cases is this lingering historical assumption in society

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[17] *See* Rodes, *supra* note 14, at 686 ("The law concerning rape has developed ambiguously with a shift of emphasis from the chastity of the victim to her autonomy.").

[18] *See id.* at 687; People v. Abbot, 19 Wend. 192 (N.Y. Sup. Ct. 1838).

[19] *See* Rodes, *supra* note 14, at 687 ("These sentiments seem to have been regarded as good law well into the 1970s.").

[20] *See, e.g.*, Tyson v. State, 619 N.E.2d 276 (Ind. Ct. App. 1993); Complaint/Information, People v. Bryant (Col. County/District Ct. July 18, 2003) (No. 03CR204), *available at* http://news.findlaw.com/hdocs/docs/bryant/cobryant71803cmp.pdf [hereinafter Bryant Complaint].

[21] *See* Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 711, 715 (1995).

that a woman's previous lack of chastity is somehow a "pertinent character trait"[22] in a trial for rape, that the standard rules of evidence[23] can adequately accommodate both the privacy rights of the alleged victim and the constitutional rights of the defendant, and that the rape-specific rules of evidence[24] work to reinforce the historical assumptions and prevent progress in society's understanding of the crime of rape. Section I of this Article will provide the history of the law of rape in the Anglo-American legal system, from the creation of the system after the Norman invasion until the rise of the women's movement in the 1970s. This history will show the original requirements and underlying assumptions implicit in the law, substantive changes made to the law, and how those changes preserved the original rationales of rape law. Section II will then provide an analysis of the "rape shield" laws and a discussion of the case law between 1970 and 1990. The third section will complete the history of rape law, while demonstrating the impact that rape-specific evidentiary rules have had on the cases. Section IV will show how the current laws of evidence, without the rape shield statutes, would adequately accommodate all of the concerns inherent in rape cases. In the fifth section, a method to solve the problems created by the rape shield laws, while still retaining their benefits, will be presented – repeal of the rape shield laws and incorporation of the concepts behind those laws into the working of the other rules of evidence. Finally, this Article will conclude by positing that all actors in rape cases would be better served by implementing this solution, forcing society to begin to change its perceptions of rape and rape complainants and reaffirming that women have the right to choose.

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[22] FED. R. EVID. 404(a)(2).
[23] *See* FED. R. EVID. 403, 404, 608.
[24] *See* FED. R. EVID. 412-15.

I. A BRIEF HISTORY OF THE LAW OF RAPE IN THE ANGLO-AMERICAN SYSTEM

A. Origins in Twelfth Century England Through The American Revolution

1. The Twelfth Through Sixteenth Centuries

The treatise written by Randolph Glanvill provides a sound starting place for analyzing the history of rape law. Glanvill wrote his treatise sometime between 1187 and 1189,[25] and it includes a short discussion of "the plea of the crime of rape."[26] The very first sentence in this section reads: "In the crime of rape a woman charges a man with violating her by force in the peace of the lord king."[27] However, the law required a formal process before a woman could bring a charge of rape. The woman claiming to be violated had to report it shortly afterward, and she had to show the injury and any rips in her clothes or blood on her person to "trustworthy men" in "the nearest vill."[28] She had to then proceed "to the reeve of the hundred" (akin to the sheriff, whom was the reeve of the shire) and the county court, where she had to make the same report.[29] The accused then had the option of either submitting "to the burden of the ordeal"[30] or attempting to "disprov[e] the accusation of the woman."[31] Finally, it was permissible for the woman and man to "be reconciled to each other by marriage," although it had to be consented to by the woman, as the man's willingness for marriage alone would not excuse him from punishment.[32] Thus, a representation of rape law in the

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[25] RANNULF GLANVILL, THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL xi (G.D.G. Hall ed., 1965).
[26] *Id.* at 175.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 176. The option for the man to submit to the ordeal ended in 1215, however. *See* Bruce Kahn, *Applying the Principles and Strategies of Asian Martial Arts to the Art of Negotiation*, 58 ALB. L. REV. 223, 223 n.2 (1994) ("[T]rial by ordeal was abolished in 1215.").
[31] *See* GLANVILL, *supra* note 25, at 176.
[32] *See id.*

twelfth century can be constructed: a woman could bring the suit; rape was committed by a man who violated a woman by force; strict formal requirements after the alleged incident occurred must have been observed; and the woman could essentially pardon her attacker by agreeing to marry him.

A more complete picture of the early status of the crime of rape can be found in a sampling of typical cases and statutes from this period. One common outcome of cases involved the failure of the prosecutrix to follow up on her appeal.[33] In these cases, the alleged victim would end up in mercy for a false appeal and would either be fined[34] or taken to jail.[35] The accused, on the other hand, would be released from her claim, but would still be liable to suit by the king. Therefore, he would pay either half a mark or a mark "by pledge of another"[36] to say that he was not guilty, and he would then be set free.[37] These cases are numerous, and they display the difficulty of charging rape at this time. The woman was expected to fully pursue her appeal because she was expected to defend her chastity. Moreover, if she failed to pursue her case, she would be taken into custody and he would generally wind up being let go.[38] Thus, these cases provide some evidence that the rationale behind rape was to protect a woman's chastity and that there were potential consequences to the prosecutrix for bringing a charge of rape.

Many additional requirements were placed on the alleged victim. For example, in *Hulle v. Whatcomb*,[39] the prosecutrix appealed for rape. The defendant denied the rape, claiming that the alleged victim did not raise the hue and "did

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[33] *See* 83 SELDEN SOCIETY, PLEAS BEFORE THE KING OR HIS JUSTICES: 1198-1212 (Doris Mary Stenton ed.,1966) (nos. 3475-77, 3490).

[34] *See id.* (no. 3475).

[35] *See id.* (nos. 3476, 3477, 3490).

[36] *See, e.g., id.* (no. 3477).

[37] *See id.* (nos. 3475-77, 3490).

[38] *See id.* (nos. 3475-77, 3490). As will be seen, the alleged victim was taken into custody any time she lost her case. However, although this may seem unduly harsh, this was probably a reaction to the fact that a man convicted of rape would be sentenced to death. *See* Statute of Westminster of 1275, 1 Statutes of the Realm, Y.B. 3 Edw. 1, c. 13, at 29.

[39] 90 SELDEN SOCIETY, ROLL AND WRIT FILE OF THE BERKSHIRE EYRE OF 1248, at 317 (M. T. Clanchy ed.,1973) (no. 787).

not come to the next county [court]."[40] As an alternative, if the suit was properly made, "he put[] himself on [the verdict of] the country."[41] The coroners' rolls showed that she had not gone to the next county, so she was in mercy for a false appeal and was to be taken into custody.[42] To protect the king's peace, jurors were still summoned, and they said that he had forced her into sex, so he was in mercy and was taken into custody.[43] This case shows that failure to fulfill even one of the procedural hurdles, which were required at the time of the alleged rape, necessary to bring a suit was fatal to the woman's case and resulted in the woman being in mercy for a false appeal.[44] In addition, the case did not end if the woman failed in her appeal. It was prosecuted by the king. This shows that rape was considered to be a serious offense. Finally, the verdict was rendered by a jury, who made their decision based upon their own personal knowledge. Thus, issues such as consent could not be determined based upon the word of the alleged victim, but could only be based upon her actions during and immediately after the alleged rape – the corroborating evidence of the crime.

Another case which demonstrates the requirements to file suit for appeal of rape is *Seler v. Limoges*.[45] In the case, Joan, an eleven-year-old girl brought an appeal of rape.[46] In the case, she alleged that she had raised the hue and the cry and pursued him from ward to ward, to the sheriffs, and to the coroner.[47] The defense claimed that the process was not correctly followed and that the suit had been brought too late.[48] Furthermore, Joan had already brought this suit in a different court, in which she had been non-suited.[49] The judgment in the

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[40] *Id.* at 318.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Y.B. 14 Edw. 2 (1321), *reprinted in* 85 SELDEN SOCIETY 87 at cxxiii (Helen M. Cam ed.,1968).
[46] *Id.* at cxxiii.
[47] *Id.* at 88.
[48] *Id.*
[49] *Id.* at 89. In the previous case, Joan had brought suit and Reymund de Limoges had answered that he was a clerk and could not answer without his

case was for the defendant because first, the appeal varied from the plaint which was made before the coroner (the day on which the rape allegedly occurred was Sunday according to the plaint and was Tuesday according to the appeal) and therefore was defective and could not be pursued and second, the king's suit had already been argued in the previous case, and could not be brought again.[50] Therefore, the alleged victim had to remain in prison due to her false appeal, and the defendant was set free.[51] Again, it can be seen that the prosecutrix had to clear a number of procedural hurdles to bring a claim, that any defect in the procedure was fatal to her case, and that she suffered repercussions for these deficiencies. It can also be seen that the defendant had a number of alternatives for challenging and/or defending an appeal of rape. Finally, the importance of bringing a suit quickly after the alleged rape, and the dubious nature with which rape allegations were viewed if charges were not brought almost immediately, can be seen by the defense's allegation that the suit was begun well after the "time limit of forty days within which one ought to commence appeal of rape."[52]

Two additional cases display important aspects of, and typical results in, rape cases. First, in a case from the Warwickshire Eyre in 1221, the prosecutrix appealed for rape, and the defendant put himself upon the verdict.[53] The jurors found him not guilty for two reasons. First, the defendant had already had her "a long time before this" by her own free will and again in her father's house, and, second, "no cry was

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Ordinaries. *Id.* at 91. The jury was called so that his status upon delivery to the Ordinary could be ascertained. *Id.* When the case reconvened, however, he dropped his claim of status as a clerk and put himself upon the jury. *Id.* Joan did not show up to pursue her appeal, so she was found in mercy and was arrested. *Id.* Thus, Reymund was quit of her suit, and the jury stated that he was not guilty, so he was quit of the king's suit. *Id.* at 91-92. Interestingly, there is speculation about whether Reymund was being framed by Joan's father or whether Reymund had pled that he was a clerk in order to buy time to bribe the jury. *Id.* at cxxiv.

[50] Y.B. 14 Edw. 2, *supra* note 45, at 89–90.

[51] *Id.* at 90.

[52] *Id.* at 88.

[53] 1 SELDEN SOCIETY, SELECT PLEAS OF THE CROWN v. 1, A.D. 1200-1225, at 109 (F.W. Maitland ed., 1887).

raised."[54] Again, she was in mercy for a false appeal and was taken into custody.[55] In the second case, *Crawe v. Robert*,[56] it was "testified that he thus raped her and that she was seen bleeding."[57] The suit was concluded, however, not by a verdict against the defendant, but by settlement of the claim by an agreement of marriage between the victim and the defendant.[58] These two cases make two important points: (1) if the alleged victim has consented to previous relations with the defendant, her case is much harder to make and subject to greater speculation, and (2) the affront to chastity could be forgiven by the alleged victim by agreeing to marry him, which thereby removes the affront because he will be her husband.

Finally, two statutes and a passage from *The Mirror of Justices* shed some light on the law of rape during this period. The first Statute of Westminster, enacted in 1275, prohibited "ravishing" any underage girl with or without her consent and "any Wife or Maiden of full Age, [or] any other Woman, against her Will."[59] In the event of a violation, suit had to be brought within forty days, for which "the King shall do common right" – which was the death sentence.[60] If suit was not brought within the time limit, the accused had to answer to the King, but the punishment was reduced to two years imprisonment and a fine.[61] In 1285, the second Statute of Westminster contained a new provision for rape.[62] In this prohibition, a man who ravished a woman, "married, Maid, or other," without consent was sentenced to death.[63] Additionally, even if she consented afterwards, he still had to answer to the King, and the punishment for a conviction was still death.[64] *The Mirror of Justices* contains one last issue regarding the consent of the

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[54] *Id.* at 109-10.
[55] *Id.* at 110.
[56] *Id.* at 3.
[57] *Id.*
[58] *Id.*
[59] 1 Statutes of the Realm, Y.B. 3 Edw. 1, c. 13, at 29 (1275).
[60] *Id.*
[61] *Id.*
[62] 1 Statutes of the Realm, Y.B.13 Edw. 1, c. 33, at 87 (1285).
[63] *Id.*
[64] *Id.*

woman. If the woman became pregnant due to the alleged rape, it provided some indication that she had consented.[65] Thus, pregnancy was an available defense to a charge of rape. These references make a number of important points. First, the woman did not have to be a virgin in order to be raped. Second, there was a statute of limitations of only forty days for bringing a charge of rape – reinforcing the importance of protecting the victim's chastity and corroborating evidence (as the incident would be fresh in the minds of the townspeople, who were the potential jurors). Third, the severity of the punishment for committing a rape – conviction led to the death sentence.[66] Finally, the recognition of pregnancy as an indication of consent by the woman shows the importance of any external evidence which could be used to corroborate or refute the alleged victim's claim.

2. The Seventeenth and Eighteenth Centuries

A number of prominent treatises were written during the seventeenth and eighteenth centuries. Three of particular prominence are Coke's *Institutes of the Laws of England*,[67] Hale's *Pleas of the Crown*,[68] and Blackstone's *Commentaries*.[69] All three of these jurists dealt with the topic of rape. Therefore, this section will first present an overview of the

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[65] 7 SELDEN SOCIETY, THE MIRROR OF JUSTICES 103 (Frederick William Maitland ed.,1893). *See also* 105 SELDEN SOCIETY, READINGS AND MOOTS AT THE INNS OF COURT VOL. II, at 275 (Samuel E. Thorne and J. H. Baker eds.,1989) (stating that an appeal for rape could be abated due to the prosecutrix' pregnancy, as proof of her consent; although the clergy contended that only the body consented and not the mind, but the justices held their authority was only over the body).

[66] All felonies were subject to the death penalty until relatively recently. *See* Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After* Penry v. Johnson, 35 AKRON L. REV. 327, 352 (2002) ("Beginning in the thirteenth century, death was the fixed punishment for murder and virtually all felony crimes, regardless of their severity or frequency.").

[67] 3 EDWARD COKE, THE FIRST INSTITUTE OF THE LAWS OF ENGLAND (J.H. Thomas ed., 1836).

[68] HALE, *supra* note **Error! Bookmark not defined.**.

[69] 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Thomas M. Cooley & James DeWitt Andrews eds., 4th ed. 1899).

state of the law of rape according to each of these jurists and then, will demonstrate some of these issues using an exemplary case from Massachusetts.[70]

i. Coke

Lord Coke wrote his multi-volume treatise, *The Institutes of the Laws of England*, between 1628 and 1644. In the *First Institute*, he defined rape as "when a man hath carnal knowledge of a woman by force and against her will."[71] Non-consent of the female was an element of the crime, and "the guilt [would] not be lessened, if her consent was obtained by duress, threats of murder" or by consent after-the-fact.[72] Also, it was possible to rape someone who was not a virgin because "the law presumes the possibility of her return to virtue."[73] This treatise provides a number of significant insights into the law of rape at this time. First, the definition of rape did not just require sexual conduct without the consent of the woman, but it also required actual physical force (as opposed to threatened force, deception, fear, or emotional force). This again promotes the idea that rape was an affront to chastity, and the woman was expected to protect her chastity with all of her power. The next few concepts, that coerced consent or later consent could not relieve the defendant of guilt and that the law assumes the woman can return to virtue, also show the prevalence of the ideal of female chastity. Finally, the fact that a woman permanently "consented" to sexual relations with her

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[70] The choice of a case from Massachusetts was based on two considerations: (1) its nature of being representative of cases from the time, and (2) the fact that it is inclusive of most of the important concepts from the time. The origin of the case in Massachusetts thus has no material bearing on its inclusion here.

[71] COKE, *supra* note 67, at 436. Coke provides a slightly different definition in his Third Institute, wherein he defines rape as a common law felony consisting of "the unlawfull and carnall knowledge and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years with her will, or against her will." EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 60 (William S. Hein Co. Reprint 1986).

[72] COKE, *supra* note 67, at 436.

[73] *Id.*

husband provides another source of proof that the rationale behind the law was to protect a woman's chastity; the woman could not revoke consent from her husband once she had married him – either because (1) the matrimonial consent extended to intercourse and was irrevocable or (2) rape was premised on the concept that the victim was "'dishonoured' or 'debauched' by the rapist."[74]

ii. Hale

Hale's *Pleas of the Crown* provides another influential depiction of the law of rape.[75] He defines rape as "the carnal knowledge of any woman above the age of ten years against her will, and of a woman-child under the age of ten years with or against her will."[76] However, to be sufficient, the allegation must state that "the rape was committed with violence and against the will of the woman."[77] Also, a husband could not rape his wife because "by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[78] Moreover, if an unmarried couple lived together, this was evidence of assent on her part, although it was not dispositive because "the woman may forsake that unlawful course of life."[79] If the consent was given only upon threat of death, it was "not a consent to excuse a rape."[80] Conception was no longer held to prevent an act

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[74] *See* Rodes, *supra* note 14, at 682-83

[75] HALE, *supra* note **Error! Bookmark not defined.**, at 626-36. This work is the source of oft-quoted language used by courts both in jury instructions and as a general guideline for deciding rape cases: "It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." *Id.* at 634. For an interesting and informative discussion of this statement and rape law in eighteenth-century England in general, see Laurie Edelstein, *An Accusation Easily to be Made? Rape and Malicious Prosecution in Eighteenth-Century England*, 42 AM. J. LEGAL HIST. 351 (1998).

[76] HALE, *supra* note **Error! Bookmark not defined.**, at 627-28.

[77] *Id.* at 628.

[78] *Id.* at 629.

[79] *Id.* at 628.

[80] *Id.* at 631.

from being considered a rape.[81] But if the woman consented afterwards, she no longer had an appeal; this did not impact others though, and her husband still could appeal and the king could still bring suit.[82]

For the requirements imposed upon the prosecutrix in order to bring a suit, the woman had to "make fresh discovery and pursuit of the offense and offender" and the appeal had to "be speedily prosecuted."[83] Failure to comply with either of these requirements led to a "presumption of a malicious prosecution."[84] Additionally, the alleged victim was permitted to testify, but her testimony was to be weighed according to the corroborating factors in the case, such as her reputation; how quickly she reported the offense; the presence of visible injuries on her person; if she cried out or was too far from people for it to matter; and whether the accused fled.[85] The absence of these factors led to "a strong presumption, that her testimony [was] false or feigned."[86]

Finally, Hale stated that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[87] Hale then provided two examples of women who had filed false accusations of rape – the men accused of the crime were later found to be impotent. After discussing these trials at some length, Hale finally concluded by stating:

> I only mention these instances, that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the person accused

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[81] *Id.*
[82] *Id.*
[83] *Id.* at 632, 633.
[84] *Id.* at 633.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 634.

> thereof, by the confident testimony sometimes of malicious and false witnesses.[88]

Thus, Hale shows his concern that the right of the defendant to a presumption of innocence will be lost in rape cases due to the nature of the crime.[89]

Hale provides several significant insights beyond those presented by Coke.[90] The presumption that the suit was a malicious prosecution if the prosecutrix failed to adequately meet the requirements for bringing suit reveal one of the underlying biases in rape law: fear that women will bring false charges against innocent men.[91] This fear also appears in Hale's statements about caution in these cases and the difficulty in defending them.[92] This fear and the chastity rationale can also be seen in the corroborating factors listed by Hale, all of which relate to evidence external to the alleged victim to prove her case and to show that she was trying to protect her chastity.

iii. Blackstone

Blackstone's *Commentaries*, drafted between 1765 and 1769, also provide some insight into the rape law.[93] Blackstone also defined rape as "the carnal knowledge of a woman forcibly and against her will."[94] Blackstone also discusses the reporting requirements discussed above, but states that there was no time limitation during this period.[95] This was because "time runs not against the king" and most suits were brought by the

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[88] *Id.* at 636.

[89] *See* Edelstein, *supra* note 75, at 355-56.

[90] For purposes of brevity, the points made in the discussion regarding Coke will not be repeated here. *See supra* Part I.A.2.i.

[91] *See* Rodes, *supra* note 14, at 688 ("The main rationale for the now discredited use of the victim's unchastity as evidence of consent seems to have been a worry . . . about the danger of false accusations.").

[92] This statement is not intended to make any comment on the accuracy of those fears.

[93] *See* BLACKSTONE, *supra* note 69.

[94] *Id.* at 210.

[95] *Id.*

king, "but the jury will rarely give credit to a stale complaint."[96] Blackstone specifically discusses rape as protecting the violation of a woman's chastity, stating that rape can be committed against a prostitute or harlot "because the woman may have forsaken that unlawful course of life."[97] Finally, Blackstone quotes Hale's discussion of testimony and credibility of the prosecutrix.

Thus, Blackstone substantially reiterates the statements of the other two treatises, but with a few additional emphases. First, the fact that juries would not give credit to complaints which are not brought soon after the alleged incident stresses the importance of the appearance of the woman protecting her chastity and corroborating evidence. Second, he underscores the rationale of rape as an affront to the woman's chastity.

iv. An Example: A Massachusetts Case[98]

A few initial observations should be made regarding the extremely low reporting rate of rape in Massachusetts during the seventeenth century.[99] A number of factors accounted for this low rate. First, there were severe "consequences of a public admission of loss of virginity" – namely, it was "a significant bar to future marriage."[100] Second, accusing a man of rape carried with it a significant risk of being prosecuted for fornication.[101] Finally, due to the "difficulty in securing a conviction," there was not a great likelihood of success of the charge even if it were brought.[102] Thus, there were significant barriers to bringing a rape charge in the first place.

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[96] *Id.*

[97] *Id.* at 213.

[98] Again, the geographic origin has no meaning in the choice of the case analyzed. *See supra* note 70.

[99] Else L. Hambleton, *"Playing the Rogue": Rape and Issues of Consent in Seventeenth-Century Massachusetts*, in SEX WITHOUT CONSENT: RAPE AND SEXUAL COERCION IN AMERICA 27 (Merril D. Smith ed., 2001).

[100] *Id.* at 36.

[101] *Id.*

[102] *Id.* at 37.

Nevertheless, a few rape charges were brought. In an illustrative case, Elizabeth Emerson of Havervill had charged Timothy Swan with rape. She claimed that he "had raped her in her parents' new bedchamber, which [he] had asked to see."[103] This charge was "greeted with skepticism."[104] Neighboring women questioned "why she hadn't scratched or kicked him" and "asserted that she would have made ye towne ringe of it before ye morning."[105] These statements show that "there was a community expectation that rape victims should struggle vigorously and call out."[106] Furthermore, she became pregnant, and depositions "provide evidence of the Puritan expectation that" a woman could not become pregnant if she was a virgin prior to the instance of intercourse that caused her pregnancy.[107] They did not believe "that conception would . . . occur as the outcome of rape."[108] Additional damage was done to her claim by her failure to cry out or to make "a timely accusation of rape."[109] In fact, the combination of all of these factors was so great that "Swan was not charged with rape or fornication."[110] Emerson, however, was charged with fornication.[111]

This case shows the difficulties with bringing a rape charge. Emerson's initial charge was received skeptically. The initial reaction of others was to ask for corroborating evidence and to query why she had not fought harder to protect her chastity. Additionally, the fact that she conceived a child weighed heavily against her. She also failed to cry out or to bring the action quickly enough. Finally, the repercussions associated with bringing a charge can be witnessed by the fact that she was prosecuted for fornication, but the alleged rapist was not charged at all.

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[103] *Id.* at 30.
[104] *Id.*
[105] *Id.* (internal quotations omitted).
[106] *Id.*
[107] *Id.* at 31.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 30. In fact, it was the depositions from her prosecution for fornication which provided the information regarding this case. *Id.*

B. The Nineteenth Century

Rape trials in the nineteenth century generally involved one of three main issues: the admissibility of evidence of the unchastity of the prosecutrix, sufficiency of the evidence proffered by the prosecutrix, and what constituted "consent" by the prosecutrix. This section will briefly explore each of these issues through presentation of some representative cases.

1. Unchastity Evidence

Generally, evidence regarding the admissibility of the prosecutrix's reputation for chastity was admissible for three purposes – to "judge the intention of the defendant,"[112] to help determine whether the alleged victim had consented,[113] and to impeach the credibility of the alleged victim.[114] The Georgia case of *Camp v. State*[115] provides an example of these concepts. In the case, the defendant was charged with attempt to commit a rape.[116] One of the grounds upon which the defendant challenged his conviction was the court's instruction to the jury, which stated that testimony regarding the lack of chastity of the alleged victim "was admitted *solely* to enable them to judge of the *intention* of the prisoner."[117] The Supreme Court of Georgia determined this instruction to be error and therefore, reversed the lower court.[118] The Court held that this evidence was admissible for additional purposes. First, the Court said "that evidence of ill fame, of general character for want of chastity, may be admitted for the further purpose of enabling the jury to judge of the truth of the material facts stated by

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[112] Camp v. State, 3 Ga. 417, 420 (1847).
[113] *See, e.g., id.* at 422.
[114] *See, e.g., id.* at 421.
[115] *Id. But see* Rex v. Hodgson, 168 Eng. Rep. 765 (1812) (holding that evidence of sexual relations with other men was not admissible). For one particularly oft-quoted decision stating that evidence of lack of chastity by the alleged victim was admissible, see People v. Abbot, 19 Wend. 192 (N.Y. 1838) ("And will you not more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia?").
[116] *Camp*, 3 Ga. at 418.
[117] *Id.* at 420.
[118] *Id.* at 422.

her."[119] The rules of evidence were determined to be different in rape cases than in other cases, and the unchastity of a woman was admissible to discredit her only in rape cases.[120] Furthermore, the Court explicitly states that a woman who is not a virgin is more likely to consent to intercourse than a virgin, so that this evidence was admissible to prove a greater likelihood of consent on her part.[121] Thus, the Court reversed the conviction because this evidence was relevant and admissible for additional purposes, so the jury instruction was wrong.[122]

The admissibility of specific prior acts of indecency was less certain, however. Most cases held specific acts to be inadmissible.[123] Two exceptions were occasionally recognized, allowing for admission of specific prior acts. In one exception, specific acts occurring shortly before the alleged rape were permitted as evidence. For example, in *Brown v. Commonwealth*,[124] the court held it to be error to refuse evidence that the complaining woman had permitted other men, shortly before the incident, to "put[] their hands under her clothes and feel[] her person."[125] This evidence was admissible because it was relevant to show that "she more likely consented to the intercourse."[126] The other exception allowed for specific evidence to be inquired into from the prosecutrix on the witness stand. This exception required the defendant to accept her answers however, as contradiction of her answers was only permitted to prove prior instances with the defendant.[127] Thus, in *Regina v. Cockcroft*[128] the defendant was permitted to ask the complainant if she "ever had connection before with other men," but not to call witnesses to

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[119] *Id.* at 420.
[120] *Id.* at 420, 421.
[121] *Camp*, 3 Ga. at 422.
[122] *Id.*
[123] *See, e.g., id.* at 422.
[124] 43 S.W. 214 (Ky. 1897).
[125] *Id.* at 214.
[126] *Id.*
[127] *See, e.g.*, Regina v. Cockcroft, 11 Cox's Crim. L. Cases 410, 411 (1870).
[128] *Id.*

rebut her testimony.[129] The judge also stated, however, that inquiry into whether she had engaged in any previous actions involving the defendant was permissible and a negative response could be contradicted by other witnesses.[130]

2. Evidentiary Requirements

Non-consent of the alleged victim was not sufficient to establish the crime of rape.[131] Moreover, testimony of the complainant was also not sufficient by itself to convict a man of rape.[132] The corroborating evidence discussed in previous periods was still required.[133] Additionally, a new focus developed during this period, which mandated the woman to resist the man to the utmost of her ability. Two cases shall be examined to demonstrate these evidentiary requirements.

In *Oleson v. State*,[134] the defendant's conviction for rape was reversed due to the insufficiency of the evidence.[135] The only evidence in support of the claim was the testimony of "the prosecuting witness."[136] The court quoted from a number of opinions, establishing presumptions based on the existence, or nonexistence, of corroborating factors in the case and the requirement that the alleged victim resist either "to the utmost" or at least "to the extent of her ability" in the circumstances.[137] The court then applied the factors to the case: she did not cry out for the neighbors to hear, there were no tears in her clothes, and she testified that she had no marks upon her person.[138] This evidence "fail[ed] to show such resistance on her part as [would] warrant a conviction for rape."[139] She did complain the next day, but the lower court

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[129] *Id.*
[130] *Id.*
[131] Mills v. United States, 164 U.S. 644, 648 (1897).
[132] Mathews v. State, 27 N.W. 234, 236 (Neb. 1886).
[133] *See supra* Part I.A.
[134] 9 N.W. 38 (Neb. 1881).
[135] *Id.* at 39, 40.
[136] *Id.* at 39.
[137] *Id.*
[138] *Id.* at 39-40.
[139] *Oleson*, 9 N.W. at 40.

had allowed the details of the complaint to be admitted into evidence, which was reversible error.[140] The fact that complaint had been made was admissible, but the details of the complaint were not.[141] Thus, based on the admission of the details of the complaint and the lack of other evidence sufficient to sustain the verdict, the conviction was reversed, and the case was remanded.[142]

Another exemplary case of an appellate court reversing a conviction for rape based on insufficient evidence is *Mathews v. State*.[143] The defendant made two charges of error which are relevant and based upon which, the verdict was reversed. First, the defendant claimed "that the verdict [was] not sustained by the evidence."[144] The only testimony supporting the verdict was that of the prosecutrix.[145] In her testimony, she stated that she would not sleep with a man who was not her husband and that she "used all the strength [she] had to get away from him, but could not."[146] In the opinion, the court reviewed this testimony and set out the applicable case law, establishing the resistance rule.[147] The court then provided the reason for the rule: few women would admit to consenting to "illicit intercourse," and women would no doubt allege rape if "mere refusal to give express assent was sufficient to establish the crime."[148] The court then stated that if the defendant testifies and denies the charge and there is no corroborating evidence, in the form of marks on her person or clothing or evidence that a complaint was "made at the first opportunity," then the prosecutrix's testimony alone is insufficient.[149] In this case, "the testimony failed to show such resistance on the part of the prosecutrix as would constitute the offense."[150] The

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[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] 27 N.W. 234 (Neb. 1886).
[144] *Id.* at 234.
[145] *Id.*
[146] *Id.* at 234, 235.
[147] *Id.* at 235.
[148] *Mathews*, 27 N.W. at 236.
[149] *Id.*
[150] *Id.*

second error alleged that "[t]here [was] no corroborating evidence whatever."[151] When the accused denied the charge in his testimony, corroborating evidence was required.[152] The prosecutrix in the case had not attempted to corroborate her testimony, so "her evidence alone could not have been sufficient."[153] Therefore, the case was reversed due to lack of evidence supporting the verdict.[154]

3. Constructive Consent

An interesting, and recurrent, problem arises in rape cases due to the requirements of non-consent and/or resistance – the issue of whether fraud or other factors can vitiate the need to adhere to these requirements. The most common situation in which this problem surfaced occurred when a man would climb into a married woman's bed and engage in intercourse with her under the pretense of being her husband.[155] The following example displays how this fraud occurred and the legal system's response to it.

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[151] *Id.*

[152] *Id.* at 237.

[153] *Mathews*, 27 N.W.at 237.

[154] *Id.* at 238.

[155] This problem also arose in other contexts, wherein isolated cases held that fraudulent conduct was found to supplant the requirement of resistance. *See* Regina v. Dee, 15 Cox's Crim. L. Cases 579 (Ireland 1884) (finding the defendant guilty of rape for obtaining intercourse by pretending to be the woman's husband); Regina v. Flattery, 2 L. Rep. 410 (Q.B.D. 1877) (affirming conviction for rape when intercourse was procured by the fraud of pretending to perform a medical examination); Regina v. Mayers, 12 Cox's Crim. L. Cases 311 (1872) (refusing to require resistance when the victim was asleep at the time of the rape) and Regina v. Camplin, 1 Cox's Crim. L. Cases 220 (1845) (finding that continued resistance was unnecessary when the defendant purposefully made the victim, who had been resisting, drunk, knowing it would make her incapable of continued resistance). It should be noted, though, that the Irish court offers little assistance in most fraud cases, because it based its holding on a determination that marital and non-marital intercourse are qualitatively different, so that consent to marital intercourse does not provide consent to non-marital intercourse. *See* Regina v. Dee, 15 Cox's Crim. L. Cases 579 (Ireland 1884). The majority of courts found that fraud did not constitute rape, however. *See, e.g.*, Regina v. Barrow, 19 L.T.R. 293 (1868); Regina v. Williams, 173 Eng. Rep. 497 (1838); Regina v.

In *Regina v. Clarke*,[156] the prosecutrix had gone to bed at 9:30 in the evening, expecting her husband to return home later that night.[157] At 2:30 in the morning, she awoke when a man, whom she assumed was her husband, got into bed with her.[158] She fell asleep again, but ten minutes later was awakened by his attempts to engage in intercourse.[159] She, believing the man to be her husband, consented.[160] She fell asleep again afterwards, and twenty minutes later, she awoke a third time to find that the man was the defendant, who then fled.[161] The defendant was found guilty by a jury, but was also found to have "intended to have connection with her fraudulently, but not by force, and, if detected, to desist."[162] The conviction was reversed because she consented and did not resist.[163]

C. Turn of the Twentieth Century Through 1970

The first three-fourths of the twentieth century entailed a substantial continuation of the policies and concepts behind rape law from the nineteenth century. At least one important shift in judicial thinking occurred, however. During this period, appellate judges considered it an affirmative duty in rape cases "not only to carefully consider the evidence but to reverse the judgment if the evidence is not sufficient to remove all reasonable doubt of the defendant's guilt and is not sufficient to create an abiding conviction that he is guilty of the crime charged."[164] By itself, this is not a change from the nineteenth century – appellate courts had already reversed

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Saunders, 173 Eng. Rep. 488 (1838); Rex v. Jackson, 168 Eng. Rep. 487 (1822).

[156] 169 Eng. Rep. 397 (1854).

[157] *Id.* at 398.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Clarke*, 169 Eng. Rep. at 398.

[162] *Id.*

[163] *Id.*

[164] People v. Scott, 95 N.E.2d 315, 316 (Ill. 1950) (citing People v. Abbate, 181 N.E. 615, 617 (Ill. 1932)).

convictions due to insufficient evidence.[165] The difference, however, was that appellate courts in the twentieth century reviewed not only the sufficiency of the evidence, but the credibility of the evidence also. Thus, the following two cases are examples of the regular practice of appellate courts to go behind a trial court's findings to overturn a conviction because the appellate judges did not believe the evidence offered by the prosecution.

One typical occurrence can be found in *Mares v. Territory*,[166] in which the defendant's conviction was overturned and a new trial was ordered due to "slight," "weak," "insufficient," and "doubtful" evidence.[167] The defendant in the case worked in a butcher shop with a main room and a side room.[168] The prosecutrix alleged that after he waited on her, the accused came around the counter, locked the door, pushed her into the side room, and raped her.[169] The woman, however, did not cry out, had no marks upon her or her clothing, and did not complain until she had a miscarriage four months later.[170] The court stated that "the probability of the commission of the alleged offense [was] so far outside of the domain of reason that there was absolutely nothing for the consideration of the jury except the bare improbable statement of the prosecutrix."[171] The opinion provides a number of factors which were "not probable": that an employee would commit rape at a time when customers came to the store, that the victim would not cry out or resist, that she would not complain sooner, and that she would not blame someone else for her transgression (pre-marital sex was considered to be immoral).[172] Emphasis was placed on the lack of outcry by the alleged victim. Although the prosecutrix testified that she "didn't say anything at all, because he told [her] not to say anything, because if [she] did

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[165] *See supra* Part I.B.2.
[166] 65 P. 165 (N.M. 1901).
[167] *Id.* at 168.
[168] *Id.* at 165.
[169] *Id.*
[170] *Id.*
[171] *Mares*, 65 P. at 165.
[172] *Id.*

say anything he would kill [her],"[173] the court gave no weight to the alleged threat "in the light of her subsequent testimony."[174] As "feminine nature" and "feminine tendency" made an outcry "intuitive and natural," the finding that she did not cry out was important.[175] Emphasis was also placed upon the "absolute lack of testimony . . . to show any resistance on the part of the prosecutrix."[176] Although she testified that she "told him he was a rough fellow; [she] pushed him back and would kick at him, and done the best [she] could to defend [her]self,"[177] the court found no evidence "that the sexual act was by force or against her will."[178] Her own testimony even worked against her: "there is some of the testimony of the prosecutrix too vulgar to be repeated. It indicates such a degree of familiarity with the depraved parlance of the street and brothel that the conclusion is imperative that she had an experience of the world not limited to the single alleged incident at the butcher shop."[179] Thus, the evidence was "so slight, so weak, and so insufficient, and much of it [was] so doubtful, and all of it without a corroborating circumstance," the conviction was set aside, and a new trial was ordered.[180]

Another representative case can be found in *People v. Scott*,[181] which overturned another conviction for rape, but this time actually reversing and not remanding the decision. In the case, three defendants were charged with rape.[182] After they waived a jury trial, the judge found two defendants not guilty and convicted the third, who was sentenced to fifteen years imprisonment.[183] The last defendant was the owner of a furniture store, above which was his apartment, and the two other defendants were his employees.[184] The prosecution's

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[173] *Id.* at 166.
[174] *Id.*
[175] *Id.*
[176] *Mares*, 65 P. at 166.
[177] *Id.*
[178] *Id.*
[179] *Id.* at 167.
[180] *Id.* at 168.
[181] People v. Scott, 95 N.E.2d 315 (Ill. 1950).
[182] *Id.* at 316.
[183] *Id.*
[184] *Id.*

theory of the case was that the prosecutrix went to the store for furniture, was told that it was in storage on the second floor, and was held captive there for thirty-seven hours, during which time she was beaten and raped.[185] The defendant denied that any intercourse had occurred at all.[186] The appellate court first stated that it had a duty "to reverse the judgment if the evidence is not sufficient to remove all reasonable doubt of the defendant's guilt" and then proceeded to review the evidence.[187] The prosecutrix had testified that while upstairs, she became frightened, called for help out a window, and then "was beaten for ten minutes and threatened with death."[188] The defendant then coerced her into having two drinks of whiskey, undressing, and taking a bath.[189] Next, she was led into the bedroom, where they had sexual relations for five hours.[190] The court, evaluating this testimony, stated that "it is clear that, however reluctantly begun, the sexual acts were engaged in without any resistance whatsoever on the part of the prosecutrix."[191] The court found that her lack of resistance was not excused because she had the power to resist him and was not overcome by his superior strength. The fact that she slept in his bed after the alleged attack also was inconsistent with "the conduct of a chaste and injured woman" who had just been raped.[192] Furthermore, although a police officer and a state attorney testified that she had complained to them on the day she left his apartment, the fact that a doctor, her cab driver, and her brother and mother did not testify weakened the credibility of her case.[193] Other "improbabilities" were also cited by the court: business was occurring in the store, she was alone at one point in the apartment, and she stayed for two nights, cooking and cleaning.[194] Therefore, the court concluded

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[185] *Id.*
[186] *Scott*, 95 N.E.2d at 316.
[187] *Id.*
[188] *Id.* at 317.
[189] *Id.*
[190] *Id.*
[191] *Scott*, 95 N.E.2d at 317.
[192] *Id.*
[193] *Id.* at 318.
[194] *Id.*

that her conduct was "inconceivable and inconsistent with the conduct of one whose womanhood had just been outraged."[195] Finally, the court held that "no good purpose could be served by a new trial," so reversed the case outright, without remand.[196]

II. RISE OF THE RAPE SHIELD LAWS IN THE 1970S AND 1980S

During the 1970s, rape law began to be regarded as protecting a woman's autonomy, not her chastity.[197] Recognizing this progressive mentality, some courts began to show potential for significant success of reform efforts in rape. Greater promise came near the end of the decade with the passage of "rape shields" laws. This promise never really materialized, however, due to unfortunate side effects of the rape shield laws. This section will explore each of these developments in turn.

A. Progress in the Courts

Beginning a few years before the enactment of the federal rape shield statute, some courts started abandoning the prejudices and biases in rape law. Two years prior to the enactment of Federal Rule of Evidence 412, the District of Columbia Court of Appeals even "held that rape offenses are not inherently different from other crimes and consequently abrogated the legal requirement of corroboration of the complaining witness' testimony."[198] Two cases demonstrating this process will be discussed.

One of the first cases to discuss the merits of rape-specific requirements, such as a cautionary jury instruction and mandatory corroboration of the complainant's testimony, was *People v. Rincon-Pineda.*[199] The defendant's sole ground for appeal of his rape conviction was the refusal of the trial judge to give a mandatory cautionary jury instruction based on

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[195] *Id.*

[196] *Scott*, 95 N.E.2d at 319.

[197] *See* Rodes, *supra* note 14, at 686-88.

[198] McLean v. United States, 377 A.2d 74, 79 (D.C. 1977) (citing Arnold v. United States, 358 A.2d 335, 344 (D.C. 1976)).

[199] 538 P.2d 247 (Cal. 1975).

the statements of Lord Hale.[200] In the case, the alleged victim testified that she was awakened at approximately 3 a.m., screamed, turned on a light, and discovered the man lying beside her was the defendant.[201] She ordered him to leave and then began screaming.[202] She tried to run away; he caught her in the kitchen.[203] He beat her in the face to stop her screaming and then choked her.[204] She stopped resisting, believing her life to be in danger.[205] She coaxed him into a different room, to get away from the knives, and submitted to a dozen sexual acts.[206] Finally, she persuaded him to leave by convincing him she had to go to work, at which time he warned her not to report the rape.[207] After he left, she went and talked to a friend.[208] A few hours later, she returned with the police whereupon the defendant was arrested (he lived in the house next to hers).[209] Upon arrest, the defendant had scratches on his forehead.[210] Later that day, she went to a doctor, who testified she had bruises all over her body.[211] At the police station, the defendant stated that he had been very drunk and did not remember what had happened.[212] No other evidence, scientific or otherwise, was introduced to support the victim's allegation.[213] The defendant testified that he had left his wife behind in Mexico, was faithful to her, and had been drinking with friends during the day.[214] None of the friends testified as they had allegedly fled out of fear of deportation.[215] However, the landlord did testify that the defendant had been

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[200] *Id.* at 249. The judge refused the instruction because "he considered it demeaning of the victim in the instant case." *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Rincon-Pineda*, 538 P.2d at 249.
[205] *Id.*
[206] *Id.*
[207] *Id.* at 250.
[208] *Id.*
[209] *Rincon-Pineda*, 538 P.2d at 250.
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.* at 251.
[214] *Rincon-Pineda*, 538 P.2d at 251.
[215] *Id.*

drinking.[216] The jury convicted him of rape.[217] The defendant, however, objected to the judge's refusal to give the instruction that the charge is easy to make and difficult to defend so "the law requires that you examine the testimony of the female person named in the information with caution."[218] The court acknowledged that, based on prior precedent,[219] the refusal to give the instruction was error – the instruction was mandatory and the lower court could not refuse to give it without a ruling by the higher court.[220] However, it held that the error was not prejudicial in this case.[221]

The court then proceeded to examine the cautionary instruction to determine whether its use had continuing validity. First, the court recognized the increase in protections given to the accused, noting that "the spectre of wrongful conviction, whether for rape or for any other crime, has led our society to arm modern defendants with the potent accouterments of due process which render the additional constraints of Hale's caution superfluous and capricious."[222] Second, the court evaluated the claim that the charge is unusually difficult to defend against. The court found that it was not for a number of reasons: (1) "'jur[ies] choose[] to redefine the crime of rape in terms of [their] notions of assumption of risk,' such that juries will frequently acquit a rapist or convict him of a lesser offense, notwithstanding clear evidence of guilt";[223] (2) rapes are grossly underreported, for a variety of reasons;[224] (3) many rapes "are deemed 'unfounded' by the police and are pursued no further;"[225] (4) even if an arrest is made, it may not go any further;[226] and (5) the prosecution rarely relies solely on the evidence of the

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[216] *Id.*
[217] *Id.*
[218] *Id.* at 252.
[219] *Rincon-Pineda,* 538 P.2d at 249.
[220] *Id.*
[221] *Id.* at 252, 253.
[222] *Id.* at 257.
[223] *Id.* at 258 (quoting KALVEN & ZEISEL, THE AMERICAN JURY 254 (1966)).
[224] *Rincon-Pineda,* 538 P.2d at 258 (quoting KALVEN & ZEISEL, THE AMERICAN JURY 254 (1966)).
[225] *Id.* at 259.
[226] *Id.*

complainant.[227] Finally, the court disapproved of allowing the instruction even discretionarily.[228] The court reasoned that because sexual assault charges, including rape, were "no more easily made or harder to defend against than many other classes of charges," the complainant's credibility should be "deemed no more suspect" than other complainants.[229] Instead, the court decided to "reaffirm and reinforce the existing instructions as to the credibility of witnesses which must presently be given."[230]

This line of reasoning was extended in *State ex rel. Pope v. Superior Court.*[231] The controversy came before the Arizona Supreme Court by way of a "special action requesting that [the] Court reconsider existing law on the admissibility of evidence concerning the unchaste character of a complaining witness in a prosecution for first degree rape."[232] The action was brought by a county attorney after the judge had "reluctantly denied petitioner's motion in limine to bar the admission of such evidence."[233] The Court first addressed whether chastity evidence could be admitted to attack the credibility of the prosecutrix.[234] This issue was disposed of quickly as "[t]he law does not and should not recognize any necessary connection between a witness' veracity and her sexual immorality."[235] Furthermore, if her reputation for chastity was that bad, there would be other evidence "to prove that she had a bad reputation for truth and veracity."[236] The Court then considered the more difficult question of whether unchastity

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[227] *Id.*

[228] *Id.* at 260.

[229] *Id.*

[230] *Rincon-Pineda,* 538 P.2d at 260.

[231] 545 P.2d 946 (Ariz. 1976); *see also* McLean v. United States, 377 A.2d 74 (D.C. App. 1977) (finding that evidence of prior sexual acts of the complainant is inadmissible regarding her credibility except in unusual circumstances, that reputation evidence should rarely be admitted to show her consent, and that the specific evidence of prior acts with the defendant was properly admitted).

[232] *Pope,* 545 P.2d at 948.

[233] *Id.*

[234] *Id.* at 950.

[235] *Id.*

[236] *Id.*

evidence should be admitted when the defense of consent is introduced.[237] The Court again found the evidence inadmissible.[238] The Court compared evidence of unchastity to other prior bad acts of a witness, which are not permitted.[239] These acts diverted attention from the real issues of the case, and "[t]he fact that a woman consented to sexual intercourse on one occasion is not substantial evidence that she consented on another, but in fact may indicate the contrary."[240] The Court recognized that there were exceptions, such as when the evidence would contradict evidence of "the victims alleged loss of virginity, the origin of semen, disease or pregnancy."[241] Reputation evidence was also barred because it "deals with collateral matters and thus is of limited probative value, tends to unduly prejudice jurors' minds and is almost impossible to effectively rebut."[242] There were two exceptions to this rule, for purposes of rebutting evidence introduced by the prosecution and for cases involving a charge of attempted rape, "where the subjective intent of the assailant is an element of the crime."[243] Finally, the Court held that evidence of prostitution could be admitted if the defendant claimed the alleged victim consented to an act of prostitution and it was offered "to show that the complaining witness has made unsubstantiated charges of rape in the past."[244] Therefore, because the case at bar did not involve any of the exceptions discussed, the character evidence of the prosecutrix was not admissible in the case.[245]

B. Creation of Rape Shield Laws

While the cases above were being decided, state and federal legislatures were debating statutory reforms to the rules of evidence. These efforts resulted in four variations of

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[237] *Pope*, 545 P.2d at 951.
[238] *Id.* at 953.
[239] *Id.* at 952.
[240] *Id.*
[241] *Id.* at 953.
[242] *Pope*, 545 P.2d at 953.
[243] *Id.*
[244] *Id.*
[245] *Id.*

rape shield laws.[246] These four can be characterized as the federal approach,[247] the Michigan approach,[248] the Texas approach,[249] and the California approach.[250] The Michigan approach is the most restrictive, permitting admission of the victim's past sexual conduct only in two specific situations[251] and only if the alleged rapist followed strict procedural requirements.[252] Due to the stringent requirements and limited exceptions allowing for admissibility, it has been declared unconstitutional in particular applications.[253] The Texas approach is the most permissive, providing for additional exceptions to the general ban, requiring only that the evidence's probative value outweigh the danger of unfair prejudice to be admissible, and not imposing any deadlines on the party desiring to offer the evidence.[254] Thus, the Texas approach provides trial courts with "nearly unfettered discretion to admit sexual conduct evidence."[255] The California approach bifurcates the question into two categories – evidence introduced to prove consent and evidence introduced to attack credibility.[256] This approach is difficult to apply due to a number of ambiguities inherent in the statute.[257] The federal approach is a combination of the restrictive and permissive approaches.[258] For purposes of clarity and brevity, the

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[246] *See generally* Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986) (analyzing and critiquing the four approaches to rape shield statutes, and suggesting an alternative approach).

[247] FED. R. EVID. 412.

[248] MICH. COMP. LAWS § 750.520j (2005).

[249] TEX. EVID. R. 412.

[250] CAL. EVID. CODE §§ 782, 1103 (Deering 2005).

[251] Past sexual conduct with the actor and to prove a different source of semen, pregnancy, or disease. Both exceptions require relevance to a material fact at issue and the prejudicial nature of the evidence does not outweigh its probative value.

[252] *See* Galvin, *supra* note 246, at 773-74; *see also* MICH. COMP. LAWS § 750.520j (2005).

[253] *See* Galvin, *supra* note 246, at 773.

[254] *See* TEX. EVID. R. 412; *see also* Galvin, *supra* note 246, at 774.

[255] *See* Galvin, *supra* note 246, at 774.

[256] *Id.*

[257] *Id.*

[258] *Id.*

remainder of this Article will focus on the federal approach, although the discussion generally applies equally to all of the approaches.

The federal approach was enacted in 1978, as Federal Rule of Evidence 412.[259] The rule is separated into three subsections: a general rule, exceptions to the rule, and a procedure for determining admissibility of sexual evidence.[260] The general rule establishes a presumptive ban, in both civil and criminal cases, on evidence of an alleged victim's previous sexual behavior and sexual predisposition.[261] In criminal cases, however, so long as the evidence is not prohibited by another rule,[262] evidence of specific instances of conduct is admissible to prove a different "source of semen, injury or other physical evidence;"[263] specific instances with the defendant are admissible when offered by the defense to prove consent or by the prosecution;[264] and any evidence is admissible if required to protect the defendant's constitutional rights.[265] In civil cases, the exception from the rule encompasses any evidence for which the "probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party,"[266] except that reputation evidence must be "placed in controversy by the alleged victim" before it may be admitted.[267] Finally, the rule requires that any party desiring to introduce sexual evidence pursuant to an exception to the rule must "file a written motion at least 14 days before trial" or at other times as permitted or required by the court,[268] the party must "serve the motion on all parties and notify the alleged victim,"[269] and

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[259] For purposes of this discussion, the rule will be analyzed in its current form, resulting from amendments in 1988 and 1994.
[260] FED. R. EVID. 412
[261] FED. R. EVID. 412(a).
[262] FED. R. EVID. 412(b)(1).
[263] FED. R. EVID. 412(b)(1)(A).
[264] FED. R. EVID. 412(b)(1)(B).
[265] FED. R. EVID. 412(b)(1)(C).
[266] FED. R. EVID. 412(b)(2).
[267] *Id.*
[268] FED. R. EVID. 412(c)(1)(A).
[269] FED. R. EVID. 412(c)(1)(B).

an in camera hearing must be held to determine whether the evidence should be admitted.[270]

A few comments from the Congressional discussion of H.R. 4727, which became Federal Rule of Evidence 412, shed some additional light on the purposes and intention of the rule. First, "the principal purpose of [the] legislation [was] to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives."[271] It was noted that rape was "the least reported crime" and that the "trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt."[272] Second, the intent and breadth of the exceptions was discussed. The constitutional exception was expected to apply only in "infrequent instances."[273] The other two exceptions were both to remain subject to the usual requirements that the evidence must be "relevant and that its probative value outweighs the danger of unfair prejudice."[274] The in camera hearing was designed to provide the defendant with an opportunity to argue for the admissibility of the evidence while still protecting the privacy of the alleged victim.[275] Finally, the expectations were that this type of "evidence [would] be admitted only in clearly and narrowly defined circumstances and only after an in camera hearing"[276] and that all of the circumstances surrounding the evidence would be considered.[277]

C. Application of the Rape Shield Rules

The rape shield statutes represent a laudable attempt at alleviating the historical prejudices and biases against rape complainants – that women make up complaints, must fight to protect their chastity, need corroborating evidence, do not submit prior to penetration, and are more likely to consent to

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[270] FED. R. EVID. 412(c)(2).
[271] 124 CONG. REC. H11945 (Oct. 10, 1978) (statement of Rep. Mann).
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *See id.*
[276] 124 CONG. REC. H11945 (Oct. 10, 1978) (statement of Rep. Mann).
[277] *See id.*

sex if they have engaged in it previously. However, the effectiveness of the rule to accomplish this purpose can only be determined by evaluating the cases in which it has been applied. The following case demonstrates that although the rule has improved the situation, it has significant shortcomings and has produced some unfortunate consequences.

An example of the unfortunate effect of this rule arose in 1981. In *Doe v. United States*,[278] the Fourth Circuit held that "reputation and opinion evidence of the past sexual behavior of an alleged victim" was admissible when proffered for the purpose of showing the defendant's state of mind.[279] In the case, a Rule 412 pre-trial hearing had been conducted, and the trial judge ruled that the proffered evidence was admissible.[280] The alleged victim appealed the ruling.[281] The defendant argued that the evidence was "admissible to support his claim that the victim consented, to show the reasonableness of his belief that she consented, and to corroborate his testimony."[282] The Court partially agreed and upheld the admission of some of the proffered evidence, stating that the defendant's "knowledge, acquired before the alleged crime, of the victim's past sexual behavior is relevant on the issue of [his] intent."[283] This evidence included "telephone conversations that [defendant] had with the victim,"[284] testimony of men who informed the defendant that the alleged victim was promiscuous, and a love letter she had written to another man, to the extent that "this evidence [was] introduced to corroborate the existence of the conversations and the letter."[285] This evidence was allowed because the court determined that the rule did not apply to evidence offered to prove the intent of the defendant, the admissibility therefore

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[278] 666 F.2d 43 (4th Cir. 1981).
[279] *Id.* at 48.
[280] *Id.* at 45, 47.
[281] The procedural history which permitted this appeal is not relevant to this discussion. For a discussion of that history, see *id.* at 45-46.
[282] *Id.* at 47.
[283] *Doe*, 666 F.2d. at 48.
[284] *Id.* at 47, 49.
[285] *Id.* at 48.

depended on the general rules of evidence, and the court determined that this evidence was relevant.[286]

The unfortunate effect of the rape shield law arises from the acceptance of the defendant's argument in this case – that an erroneous belief that the victim consented to his advances absolved him of liability. Prior to abandonment of the resistance requirement in the 1970s, this argument would not have been tenable.[287] The resistance requirement prevented the defendant from having a reasonable belief that the alleged victim consented because physical resistance destroyed any chance of having a "reasonable" belief. This, in and of itself, is not truly problematic, although it is an unfortunate side effect of abandoning this requirement. The problem develops from the consequences of legitimizing this argument.

Judicial validation of this argument is problematic for three primary reasons. First, it presents a backdoor method of introducing the evidence that Congress (and state legislatures) had attempted to prohibit; in effect, it permits this evidence in all cases where the defendant can make a colorable claim that he knew of the information prior to the incident. This means that evidence of the victim's past sexual conduct would be admitted if the alleged attacker claims that he knew about the conduct before the alleged rape. Even though there may be no question as to whether the woman actually consented or that sexual activity occurred, evidence of the woman's prior sexual conduct would be introduced into evidence. Thus, the rationale and determination underlying the rape shield statutes, that this type of evidence has low probative value and is highly prejudicial, fails to exclude the evidence merely because the defendant claims that he knew about it.

Second, it declares that this evidence is relevant to the stated purpose – to show that the alleged rapist had a "reasonable belief" that the alleged victim consented. This is hard to harmonize with the understandings of the legislatures that this evidence is generally not relevant, or is at least unduly prejudicial. Whether the defendant knew of past sexual experiences of the alleged victim or not has no bearing on

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[286] *Id.*

[287] *See* Rodes, *supra* note 14, at 690-91.

whether she consented to sex with him on this occasion. It may bear on his belief that she would have sex with him, but it seems hard to imagine that he could have a reasonable belief that she would agree to it if she told him no. If the woman resists, this should prevent any "reasonable belief" in consent, no matter what the alleged rapist has heard about her. Unless she told him that she wanted to feign resistance on this occasion, resistance on her part must present a sign to the reasonable man that she does not consent, thereby preventing any possibility of a "reasonable belief" defense. Furthermore, if she says no to an offer to engage in intercourse, this also must negate any argument in a "reasonable belief" of consent. If resisting or saying no is insufficient, and the contention that the accused rapist had heard about past conduct by the alleged victim that led him to believe she was consenting despite resisting or saying no and therefore cannot be held liable is upheld, then evidence of a woman's past sexual conduct could never be precluded from a rape trial.

An illustration of this problem can be found in the 1974 case of *R v. Morgan*.[288] In that case, the prosecutrix's husband had told three of his co-workers that they should have intercourse with his wife.[289] He said that she liked sexually deviate conduct and provided them with contraceptives.[290] The other men also averred that he told them to expect resistance by his wife, but that it was merely a method of self-arousal for her and was not serious.[291] The four men, including the husband, had intercourse with her.[292] She struggled and screamed throughout.[293] The men claimed at trial that any resistance by the prosecutrix was "no more than playacting" and that she had consented.[294] The trial judge instructed the jury that a defendant could not be guilty if he reasonably and honestly believed that the alleged victim had consented, even if

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[288] [1976] AC 182 (H.L.).
[289] *Id.*
[290] *Id.*
[291] *Id.*
[292] *Id.*
[293] R v. Morgan, [1976] AC 182 (H.L).
[294] *Id.* at 186.

it was proved that she had not actually done so.[295] Furthermore, the burden was on the prosecution to prove that the defendant did not reasonably believe that the woman had consented.[296] The House of Lords upheld this instruction as an accurate summation of the law, thereby upholding the defense of reasonable belief of consent in this case.[297] Thus, this decision shows that a man who had no personal or direct experience with a woman can rely on any information from any source, whether the information is true or not and without investigating its accuracy, to engage in intercourse with a woman. Then, even if the woman were to resist his advances, he could be found not guilty of rape, merely because someone had told him a rumor about a woman or had lied about her past behavior. Worse yet, even if the woman had previously feigned resistance to intercourse which she actually consented to, it does not mean that she is doing so on the occasion in question. Therefore, relying on a past episode, even if true, should not matter because otherwise, the woman would never be able to say no. If she had once consented when feigning resistance, she could never again rely on resistance as a method to convey non-consent and would have no method by which to convey that message. Thus, reliance on past sexual conduct of the alleged victim cannot provide a "reasonable belief" in consent, so it should not be admitted, and even if it could so provide, the same policy reasons precluding past sexual conduct evidence from admissibility to show consent apply in the realm of a "reasonable belief" in consent.

Finally, the "reasonable belief" argument displays the effect that shifting the focus of the admissibility inquiry can have. Without the rape shield statute, the inquiry would consist of applying the general rules of evidence to the facts of the case. Therefore, the evidence would have to be relevant (Rule 401), not prejudicial (403), offered for a valid purpose (404-406), and not hearsay (801-803). With the rape shield statute, however, the inquiry focuses on the applicability of that statute and the admissibility of the evidence under that

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[295] *Id.* at 187.
[296] *Id.*
[297] *Id.* at 183.

statute. Therefore, other rules of evidence can be overlooked or neglected. In *Doe* for example, the court began by considering whether Rule 412 applied, which it decided in the negative.[298] The court then determined that the evidence was relevant, but the analysis stopped there; the court admitted the evidence.[299] It never applied Federal Rule of Evidence 403, thereby overlooking any possible unfair prejudice under that rule.[300] It also never considered whether the evidence was excluded by a different rule.[301] Thus, because the focus becomes distracted by the rape shield, other rules which could be important are disregarded.

III. FROM RAPE SHIELD LAWS TO THE TWENTY-FIRST CENTURY

Other issues regarding the rape shield laws have arisen over the last fifteen years. These issues include whether evidence may be precluded by the rape shield laws' procedural requirements despite the Sixth Amendment's Confrontation Clause;[302] the correlative question of whether evidence may be precluded by the rape shield laws' substantive requirements despite the Confrontation Clause;[303] and whether Rule 412, imposing a general ban, subject to limited exceptions, on past sexual conduct evidence, applies in any given case.[304] While the courts were busy addressing these issues produced by Rule 412, Congress produced additional rules to help alleged victims of rape: Federal Rules of Evidence 413-415. These rules permit introduction of prior acts of sexual assault and child

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298 *See* Doe v. United States, 666 F.2d 43, 48 (4th Cir. 1981).

299 *See id.*

300 *See id.* ("Certainly, the victim's conversations with [defendant] are relevant, and they are not the type of evidence that the rule excludes." "Therefore, its admission is governed by the Rules of Evidence dealing with relevancy in general.").

301 *See id.*

302 *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."); *see also* Michigan v. Lucas, 500 U.S. 145 (1991).

303 *See* Commonwealth v. Spiewak, 617 A.2d 696 (Pa. 1992).

304 *See* People v. Ivers, 587 N.W.2d 10 (Mich. 1998); Commonwealth v. Spiewak, 617 A.2d 696 (Pa. 1992).

molestation by the alleged attacker, and they were designed to help victims by easing the restrictions placed on the admissibility of evidence of prior sexual assaults by the alleged rapist.[305] This section will explore these developments and their consequences and present two case studies using the Mike Tyson[306] and Kobe Bryant[307] trials.

A. Issues with Rule 412

Three main issues arose from the application of Rule 412 during this period. First, the rule conflicts with the Sixth Amendment as it operates in many situations to prevent a defendant in a criminal case from fully questioning, and therefore confronting, the accusing witness. Second, there was a correlative issue of whether the evidence prohibited by Rule 412 could nonetheless be introduced for impeachment purposes to show that the prosecutrix's testimony was either contradictory or based on an ulterior motive or bias. Finally, a preliminary issue of whether evidence falls within the purview of Rule 412 developed.

The overarching concerns about the conflict between Rule 412's procedural requirements and the Sixth Amendment were addressed by the United States Supreme Court in *Michigan v. Lucas*.[308] In the case, the defendant allegedly forced his ex-girlfriend into his apartment at knifepoint, and then he forced "her to engage in several nonconsensual sex acts."[309] The defendant had not filed a motion, required by the Michigan rape shield statute to be filed within ten days of his arraignment, stating his desire to admit evidence of his prior sexual relationship with the alleged victim.[310] At the trial, the accused relied on a defense of consent, but because of the failure to comply with the statutory requirements, he was not

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[305] *See* FED. R. EVID. 413-15; *see also* United States v. Bird, 372 F.3d 989 (8th Cir. 2004); United States v. Bull, 32 Fed. App'x 778 (8th Cir. 2002).
[306] Tyson v. State, 619 N.E.2d 276 (Ind. Ct. App. 1993).
[307] *See* Bryant Complaint, *supra* note 20.
[308] 500 U.S. 145 (1991).
[309] *Id.* at 147.
[310] *Id.* at 146, 147.

permitted to offer this evidence.[311] He was found guilty in a bench trial.[312] The Michigan Court of Appeals held the statute to be unconstitutional when it prohibited prior evidence of "sexual conduct between a rape victim and a criminal defendant" and therefore, reversed the conviction.[313] The U.S. Supreme Court accepted the case to consider the *per se* finding of unconstitutionality.[314] The Court began by assuming that the statute authorized preclusion as a remedy for a violation and then stated that preclusion "implicate[d] the Sixth Amendment."[315] Next, the Court identified a number of valid purposes that the statute served.[316] Finally, the Court held that the Sixth Amendment did not forbid preclusion in every case and that "[f]ailure to comply with [the notice-and-hearing] requirement may in some cases justify even the severe sanction of preclusion."[317] The Court then remanded the case for determination by the Michigan courts of first, whether the statute authorized preclusion and second, whether the ten day notice period was "overly restrictive."[318] Thus, this case shows that first, it is possible for prior sexual conduct evidence to be precluded by rape shield statutes under certain conditions and second, these statutes implicate serious Sixth Amendment concerns which courts must address, parties must argue, and cases must include as an issue.

A correlative issue, whether the Sixth Amendment mandates inclusion of certain substantive evidence banned by the rape shield laws, was addressed by the Supreme Court of Pennsylvania in *Commonwealth v. Spiewak*.[319] The case involved a charge against the defendant for "having engaged in involuntary deviate sexual intercourse with his fifteen year old stepdaughter."[320] The girl testified that prior to her sixteenth

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[311] *Id.* at 147, 148.
[312] *Id.*
[313] *Lucas*, 500 U.S. at 147, 148.
[314] *Id.* at 149.
[315] *Id.*
[316] *Id.*
[317] *Id.* at 152, 153.
[318] *Lucas*, 500 U.S. at151, 153.
[319] 617 A.2d 696 (Pa. 1992).
[320] *Id.* at 697.

birthday, she came downstairs in the home, tried cocaine offered by the defendant, allowed him to lick some from her breasts, and that defendant "performed oral sex on her."[321] Furthermore, after she turned sixteen and after her mother and stepfather separated, she returned to her former home and engaged in sexual intercourse with the defendant.[322] Finally, she testified that she informed a boy she had dated "that she had been involved with an older man and had engaged in oral sex with him."[323] The defendant, on the other hand, testified that he did have both oral and sexual intercourse with the girl, but only after her sixteenth birthday and without the use of drugs.[324] Defendant's counsel twice[325] attempted to introduce evidence that two years prior to the trial, the girl had testified at a custody proceeding to having "been seduced by an older man" and that the "encounter . . . involved not only oral intercourse but also the use of cocaine."[326] The evidence was offered first "to impeach her credibility"[327] and again for the additional purpose of "show[ing] an alternative account of [the girl's] statement to [her friend] that she had experienced oral sex with an older man."[328] The trial court refused to admit the evidence because of the rape shield law.[329] The Court reversed, holding that preclusion of the evidence violated the defendant's Sixth Amendment rights, particularly in light of the unfair advantage taken by the prosecution in creating an inference that there was only one older man involved with the girl.[330] The Court stated that "[t]he statute cannot be both shield and sword" and that "[i]t cannot . . . preclude a defendant from offering evidence which is so highly probative of the witness's credibility that such evidence is necessary to allow/permit a

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321 *Id.*
322 *Id.*
323 *Id.* at 698.
324 *Spiewak*, 617 A.2d at 697.
325 Once during cross-examination to impeach her credibility and once during recross-examination to provide an alternate explanation for the girl's statement to the boy she had dated. *Id.* at 700.
326 *Id.* at 698.
327 *Id.*
328 *Id.* at 699.
329 *Spiewak*, 617 A.2d at 698, 699.
330 *Id.* at 701-02.

jury to make a fair determination of the defendant's guilt or innocence."[331] Thus, this case demonstrates that evidence may not be possible to preclude under the rape shield statutes, thereby requiring the court to first determine whether the evidence is barred by the rape shield and then, if so, to further evaluate the evidence under the Confrontation Clause.

Finally, courts must address the seemingly innocuous question of whether the rape shield statute even applies to the case. The case of *People v. Ivers*[332] provides an exemplary case of how this can become a difficult issue. In the case, the alleged victim was visiting a friend in college and met the defendant in her friend's dorm room.[333] Later that night, they drank beer in the defendant's room and drank more alcohol at a party.[334] She testified that she remembered nothing between leaving the party and realizing that "the defendant was on top of her with his penis in her vagina."[335] The prosecution's theory was rape and that he "knew or had reason to know that she was physically incapacitated due to the consumption of alcohol."[336] The defendant testified that they had kissed on the way to his apartment; she said she wanted to go the bedroom with him; and they removed their clothes, got into bed, and had intercourse.[337] There was evidence supporting both "versions of the events."[338] The issue in the case revolved around statements allegedly made by the complainant to her friend earlier in the day: first, that she was ready to have sex and probably would at college, and second, that she had requested her friend to "'get her a guy' that night."[339] The trial judge refused the testimony of the friend regarding both statements as prohibited by the rape shield statute and "absolutely irrelevant."[340] The Court of Appeals reversed finding "the rape-

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[331] *Id.* at 702.
[332] 459 Mich. 320 (1998).
[333] *Id.* at 322.
[334] *Id.*
[335] *Id.*
[336] *Id.*
[337] *Ivers*, 459 Mich. at 322-23.
[338] *Id.* at 323.
[339] *Id.* at 323-24, 325.
[340] *Id.* at 324, 325.

shield statute inapplicable" because it did not "concern the complainant's past sexual conduct, opinions about her sexual conduct or her reputation regarding sexual conduct."[341] The Supreme Court of Michigan affirmed the Court of Appeals, finding "the proposed testimony outside the scope of the rape-shield statute"[342] because "[t]he proposed testimony . . . does not reveal any prior sexual activity by the complainant."[343] The Court basically found that statements could only fall within the ambit of the rape shield statute if they "*amount* to or *reference* specific conduct."[344] Thus, this case displays how even the applicability of Rule 412 can be an issue.

B. Protections of Rules 413-415

In 1994, three new evidentiary rules intended to benefit victims of sexual misconduct were added to the Federal Rules of Evidence: Rules 413, 414, and 415.[345] Rule 413 makes "evidence of the defendant's commission of another offense or offenses of sexual assault" admissible in criminal sexual assault cases.[346] The rule also defines "sexual assault"[347] and imposes procedural requirements on the prosecution.[348] Rule 414 mirrors Rule 413, but applies to "offenses of child molestation."[349] Finally, Rule 415 extends the permissions granted in Rules 413 and 414 to civil cases.[350]

These rules seem to work relatively effectively. An example of a case where an issue regarding these rules arose can be found in *United States v. Bull*.[351] The defendant in the case had been found "guilty of three counts of aggravated

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[341] *Id.* at 326.
[342] *Ivers*, 459 Mich. at 328.
[343] *Id.*
[344] *Id.* at 329. The court provided phone sex as an example of a statement which amounted to specific conduct. *Id.*
[345] *See* FED. R. EVID. 413-415.
[346] FED. R. EVID. 413(a).
[347] FED. R. EVID. 413(d).
[348] FED. R. EVID. 413(b).
[349] FED. R. EVID. 414.
[350] FED. R. EVID. 415.
[351] 32 Fed. App'x 778 (8th Cir. 2002).

sexual abuse of a child."[352] Amongst his arguments on appeal was that "the court erred by allowing five witnesses to testify under Federal Rule of Evidence 413, because the alleged uncharged acts discussed were unlike the instant charges and occurred many years ago."[353] The court quickly disposed of the argument. First, the court recognized that the rule was intended "to relax the standard of admissibility for propensity evidence in sex offense cases," while keeping the evidence subject to Rule 403.[354] Next, the court found that the evidence was not unfairly prejudicial and that "[m]any similarities" existed between the acts testified to and the current charged offense.[355] Finally, the court cited precedent holding that even twenty years passage of time since the previous events would not preclude them under Rule 413.[356] The court affirmed the conviction.[357] Although the case does raise a few considerations, such as whether the conduct is "sexual,"[358] that must be taken into account, there are considerably fewer additional considerations introduced in a case involving these rules than in Rule 412. This is because Rules 413-415 do not invoke problems such as conflicts with the Sixth Amendment and exclusion of relevant evidence.

C. Two Case Studies

Two rape trials which captured the public's attention demonstrate many issues which occur in rape cases and the focus placed on certain issues in rape trials. The two cases occurred completely in the public spotlight because they involved sports stars: Mike Tyson in one and Kobe Bryant in the other. Although the two cases resulted in very different outcomes, both are instructive regarding the law of rape. The

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352 *Id.* at 779.
353 *Id.*
354 *Id.*
355 *Id.*
356 *Bull,* 32 Fed. App'x at 779.
357 *Id.* at 780.
358 *Id.* at 779; *see also* United States v. Bird, 372 F.3d 989, 991-95 (8th Cir. 2004) (providing a lengthy discussion of what constitutes a "sexual act" or attempt at "sexual contact").

first case, which resulted in a conviction, was the trial of Mike Tyson;[359] the second case, which did not even go to trial, involved charges filed against Kobe Bryant.[360]

1. The Mike Tyson Trial

The state of Indiana charged Mike Tyson with rape based on events that occurred on July 18 and 19, 1991. In the case, Tyson met the alleged victim in Indianapolis at a rehearsal for the Miss Black America pageant.[361] The prosecutrix testified that no advances were made towards her at this meeting and no agreement to meet again was arranged.[362] Tyson testified that he told her he would like to have sex with her and that she agreed.[363] Other pageant contestants testified that the prosecutrix discussed Tyson's penis size, his intelligence (or lack thereof), and his wealth with them; she denied these conversations.[364] The next morning at 1:30 a.m., Tyson called her from his limousine; he was leaving the next morning and wanted to spend time with her.[365] Tyson told the driver to stop at his hotel.[366] He stated that they were kissing in the limousine; she disagreed and added that they did not hold hands on the way into the hotel.[367] At the hotel, they both went to his hotel room.[368] He testified that they engaged in consensual intercourse, but she "had become annoyed afterward when he refused to escort her downstairs."[369] She testified that she went to the restroom and

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[359] Tyson v. State, 619 N.E.2d 276 (Ind. App. 1993).
[360] *See* Bryant Complaint, *supra* note 20.
[361] Tyson v. Trigg, 50 F.3d 436, 442 (7th Cir. 1995). The facts of the case have been taken from the habeas corpus proceedings on appeal in the Seventh Circuit, which provides a concise and comprehensive summary of the differing versions of events. *See id.* at 442-43.
[362] *Id.* at 442–43.
[363] *Id.* at 443.
[364] *Id.*
[365] *Id.*
[366] *Tyson,* 50 F.3d at 443.
[367] *Id.*
[368] *Id.*
[369] *Id.*

when she returned, Tyson was wearing only underwear.[370] She tried to leave, but "[h]e grabbed her, forcibly removed her clothes, and raped her."[371] Her efforts to fight him off were "like hitting a wall."[372] Afterwards, she dressed and left the hotel.[373] The limo driver, who took her back to her hotel, testified that "she 'rushed toward' the limousine and entered it 'in a state of shock,' 'dazed,' 'disoriented,' 'frantic,'" and saying that he was "a bad person."[374] Tyson's bodyguard booked a flight at 2 a.m., and "Tyson left his hotel for the airport" at 4 a.m.[375] The prosecutrix told her roommates that Tyson raped her, and she went to a hospital in Indianapolis the next day.[376] Tyson was convicted "of rape and two counts of criminal deviate conduct."[377]

Tyson's arguments on appeal illustrate the types of issues that arise and the focus of the trial in rape cases. Four relevant issues[378] were raised on appeal and will be addressed here: the refusal to allow witnesses not on Tyson's witness list to testify, the exclusion of motive evidence arising from past incidents between the complainant and her parents, the exclusion of the complainant's prior sexual conduct, and the rejection of jury instructions requested by the defense.[379]

The first issue on appeal was the refusal of the trial court to permit testimony from three witnesses who came forward with information during the trial.[380] Before the trial, the judge ordered the defense to disclose relevant information regarding all witnesses expected to testify to the issue of consent no later than December 18, 1991.[381] The trial began on Monday, January 27, 1992, and evidence was first introduced

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370 *Id.*
371 *Tyson*, 50 F.3d at 443.
372 *Id.*
373 *Id.*
374 *Id.*
375 *Id.*
376 *Tyson*, 50 F.3d at 443.
377 Tyson v. State, 619 N.E.2d 276, 280 (Ind. App. 1993).
378 Eight issues were raised, but the remaining four are inapplicable to this discussion. *Id.*
379 *Id.*
380 *Id.*
381 *Id.*

on Thursday, January 30, 1992.[382] That afternoon, the defense was informed that three women had come forward with information relevant to the case.[383] A defense attorney "spoke to one of the women by telephone midday Friday, and had a face-to-face interview with two of the women . . . on Friday evening."[384] That night, the attorney informed Tyson's trial attorneys about these potential witnesses.[385] The defense did not inform the prosecution of these women until Sunday afternoon.[386] The trial court did not allow the witnesses to testify.[387] The appellate court, in analyzing the appropriateness of this exclusion, began by stating that the pre-trial disclosure order created a "continuing duty to disclose [the required information] as soon as reasonably possible."[388] The court then stated that it was reasonable of the trial court to require notification to the State of the women's potential testimony by Friday night.[389] Although the court did not attribute the delay in notification to bad faith or deliberate misconduct, the two-day delay in disclosure weighed in favor of the trial court's exclusion of the testimony.[390] Next, the court considered the nature of the proffered testimony.[391] The testimony of all three witnesses would have shown that they saw two people in the backseat of the limousine hugging and kissing, they saw that the man was Mike Tyson when he got out, and Tyson and the defendant were holding hands on their way into the hotel.[392] Two different theories for admission of this testimony were presented: first, that it was relevant to whether or not "Tyson might have reasonably believed . . . that [the prosecutrix] consented" and second, "as impeaching evidence."[393] The court rejected both of these theories. As to

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[382] *Tyson*, 619 N.E.2d at 280.
[383] *Id.* at 280-81.
[384] *Id.* at 281.
[385] *Id.*
[386] *Id.*
[387] *Tyson*, 619 N.E.2d. at 281.
[388] *Id.* at 282.
[389] *Id.* at 283.
[390] *Id.* at 284.
[391] *Id.*
[392] *Tyson*, 619 N.E.2d at 284 n.9, 286.
[393] *Id.* at 286, 287.

his belief in her consent, the evidence only tended to show that the prosecutrix "would consent to sexual conduct in the future if the opportunity presented itself."[394] In this regard, the evidence was cumulative because the "record [was] replete with evidence from which a reasonable fact finder might reasonably conclude that Tyson had such a belief."[395] Furthermore, the evidence was not vital because "an honest and reasonable belief that a member of the opposite sex will consent to sexual conduct at some point in the future is not a defense to rape or criminal deviate conduct," only "the defendant's honest and reasonable belief at [the time of the sexual conduct], and not at any other point, . . . is relevant."[396] The evidence was also cumulative for impeachment purposes because the prosecutrix "was impeached on other points, including the details of the rape."[397] Finally, the extra burdens which this testimony would have created, including recalling all of the prosecution's witnesses and the delay caused by the extensive discovery necessary to determine the accuracy and veracity of the new witnesses, were too great given the evidence's "nature and marginal relevance and the status of the trial at the time."[398] Therefore, this testimony was properly excluded.[399]

The second issue was whether it was error to preclude "evidence regarding incidents between [prosecutrix] and her parents which allegedly would have shown that [she] had a 'powerful and secret motive' to fabricate the rape charge and would have exposed an alternative explanation for the psychological problems experienced by [the prosecutrix] following the subject incident."[400] The defense contended that exclusion of this evidence violated his Sixth Amendment rights.[401] The appeals court did not consider the issue however,

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394 *Id.* at 286.
395 *Id.*
396 *Id.*
397 *Tyson*, 619 N.E.2d at 287.
398 *Id.* at 288.
399 *Id.*
400 *Id.* at 288-89.
401 *Id.* at 289.

as it had been waived due to Tyson's failure to preserve the issue for appeal.[402]

In the third argument on appeal, Tyson claimed that it was error to exclude "all evidence of [the prosecutrix's] prior sexual conduct because the State 'opened the door' by making 'an all out effort to portray [her] as a paragon of innocence and virtue.'"[403] The appellate court held that this issue too was waived because Tyson had again failed to preserve it.[404] The court did address the issue in a footnote, however.[405] The court stated, in dicta, that the exclusion of this evidence was not an abuse of discretion.[406] Even if the evidence was relevant to rebut the picture of the prosecutrix as a sexual innocent, it was barred by the rape shield statute and was not within one of the enumerated exceptions and was therefore, not admissible.[407]

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[402] *Tyson*, 619 N.E.2d at 289.

[403] *Id.* at 289–90.

[404] *Id.* at 290.

[405] *Id.* at 290 n.15.

[406] *Id.*

[407] *Tyson*, 619 N.E.2d at 290 n.15. This issue has arisen in numerous cases; the problem is one of reciprocity. The question in most cases is whether the alleged victim is allowed to produce evidence of her previous chastity even though the alleged rapist is not permitted to introduce evidence of unchastity. Generally, the cases have held either that the prosecution may not introduce the evidence because the defense is not permitted to rebut it or that the prosecution may admit chastity evidence which the defense is then allowed to rebut. *See, e.g.*, People v. Wigfall, 690 N.Y.S.2d 2, 3-4 (N.Y. App. Div. 1999) (admitting prior sexual history evidence offered by the prosecution and stating that defendant was permitted to rebut this evidence)and Gov't of Virgin Islands v. Jacobs, 634 F.Supp. 933, 937 (D. V.I. 1986) (applying the proscriptions of Rule 412 to evidence offered by the government). A more appropriate result would be that the alleged victim may not introduce chastity evidence, because it is not any more relevant or any less prejudicial than unchastity evidence. *See Jacobs*, 634 F.Supp. at 939-40. In addition, if the evidence is admitted without objection, then rebuttal testimony should not be permitted, because the exclusion would be waived. *See* Tyson v. State, 619 N.E.2d 276, 289-90 (Ind. App. 1993). However, if objection is made, then introduction of the evidence should be error. *See Jacobs*, 634 F.Supp. at 939-40. This does not lead to the conclusion that rebuttal testimony should be allowed, but rather, if the alleged rapist loses the trial, requires a determination on appeal of whether the admission of the evidence created harmful error. If so, then the holding of the trial court should be reversed and the case should be re-tried. If not, then the holding should be affirmed. Only in this way would the rationale behind rape shield laws be upheld, by

In the final relevant issue on appeal, Tyson argued that the trial court's refusal to give his "Tendered Instructions" regarding his belief that the alleged victim had consented was error.[408] Refusal to give the instructions could not be error, however, because "there [was] no evidence in the record from which a reasonable juror could conclude that Tyson reasonably believed [the prosecutrix] consented to the sexual conduct."[409] Although Tyson "provide[d] some evidence that he honestly believed [the prosecutrix] consented to sexual intercourse, [his] assertions [were] not evidence of the reasonableness of that belief."[410] Furthermore, his description of the actual act of intercourse and the immediately preceding events was "a plain assertion of actual consent."[411] Therefore, based on this testimony, a reasonable juror could only conclude that she consented, not that "he misunderstood [her] actions."[412] Tyson also argued that she made statements during the sexual conduct which "were consistent with a reasonable belief on his part that the sex was consensual."[413] These statements included an affirmative reaction to his question of whether she wanted to be on top (without explaining that she wanted to get on top in the hopes of getting away) and a request that he put on a condom.[414] The appellate court held, however, that these statements could not, in the context of an unequivocal sexual assault charge, lead to a reasonable belief in consent.[415] Therefore, because there was "evidence of only consent or compulsion,"[416] there was no error in refusing to give the instructions.[417]

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preventing the introduction of irrelevant (or minimally relevant) and highly prejudicial evidence.

[408] *See Tyson*, 619 N.E.2d at 292. *See also supra* Part II.C.

[409] *Tyson*, 619 N.E.2d at 294.

[410] *Id.*

[411] *Id.* at 295.

[412] *Id.*

[413] *Id.*

[414] *See Tyson*, 619 N.E.2d at 295.

[415] *See id.*

[416] *Id.* at 297.

[417] *See id.* at 298.

2. The Kobe Bryant Debacle

The Kobe Bryant investigation stands in sharp contrast to the ordered trial of the Tyson case. This case was never actually litigated due to the series of events preceding the date scheduled for the trial to begin. Because of Bryant's status as one of the biggest, and most likeable, stars in the National Basketball Association (NBA), every event in the investigation and pre-trial proceedings was subjected to in-depth coverage by the media. This subsection will discuss some of these events and the public reaction to the accusation and will display some of the problems in the legal system's treatment of rape cases.

The case, which began in the summer of 2003 and came to an abrupt halt in the summer of 2004, provides critical insight into the current status of the law of rape and of society's views on the subject in general. "Wendy Murphy, a professor at the New England School of Law in Boston and a former prosecutor, said the case could shake many women's faith in the justice system."[418] Admittedly, this case is an unusual case; it was not a typical rape case by any stretch of the imagination. The differences between this case and other rape cases serve to highlight the problems in the law of rape, however.

The biggest problem this case illustrates is summed up by a newspaper article headline on July 20, 2003: "Bryant's Accuser Should Now Expect to be the Accused."[419] This is, in a nutshell, the single biggest problem with the law of rape: the scrutiny is placed on the prosecutrix, the alleged victim, instead of on the defendant, the person accused of the crime. In this case, Bryant appeared with his wife a mere four hours after the charges were announced, at which time he stated "that his only mistake was adultery."[420]

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[418] *Rape Case Against Bryant Dismissed,* MSNBC NEWS, Sept. 2, 2004, http://www.msnbc.msn.com/id/5861379/.

[419] Grace Lee & Rachel Uranga, *Bryant's Accuser Should Now Expect to be the Accused,* L.A. DAILY NEWS (July 20, 2003), *available at* http://www.dailynews.com/Stories/0,1413,200~20954~1523522,00.html.

[420] *Id.*

> With that, the accuser became the accused, said Laurie Levenson, a criminal-law professor at Loyola Law School in Los Angeles and a former federal prosecutor. The common reversal is one of the reasons that rape is the most underreported crime, she said.
> "From the defense team, every aspect of her life is going to be under the microscope. Even if she wears a provocative outfit there, there [sic] will be a dossier on her," she said.[421]

Thus, the amount of time for which the focus was on the person accused was approximately four hours. The amount of time the focus was on the accuser, however, was approximately fourteen months.[422]

Because the case was dismissed prior to going to trial, the facts are sketchy and somewhat inconsistent. According to the prosecutrix, she met Bryant on June 30, 2003 when he checked into the hotel at which she worked.[423] She gave him a tour of the property, and the two hit it off.[424] She stated that there was mutual flirting before and during the tour.[425] He then asked her to come to his room, which she did.[426] She asked for a hug, which she got.[427] He began kissing her, he groped her breasts and her butt, and she finally decided to leave when he put his hand under her panties.[428] When she tried to leave, he grabbed her by the neck.[429] She became afraid.[430] He bent her over a chair, pulled her dress up and her

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[421] *Id.*

[422] *Judge Dismisses Sexual Assault Case vs. Bryant*, SPORTS ILLUSTRATED, Sept. 1, 2004, http://sportsillustrated.cnn.com/2004/basketball/nba/09/01/kobe.dismissed.ap/.

[423] *Summary of Accuser's Statement to Det. Doug Winter*, THE DENVER CHANNEL, Oct. 9, 2003, http://www.thedenverchannel.com/news/2544380/detail.html.

[424] *Id.*

[425] *Id.*

[426] *Id.*

[427] *Id.*

[428] *Id.*

[429] *Id.*

[430] *Id.*

panties down, and had intercourse with her, despite her protests of "no."[431] She claims that he then forced her to kiss his penis.[432] After washing up, she went downstairs, finished her work, and told the bellman what had happened.[433]

She reported the crime to the Eagle County Sheriff's Department the next day, July 1.[434] Bryant originally claimed that he did not have sex with his accuser.[435] He later changed his story, admitting that he had sex with her, but denying it was without her consent.[436] In this admission, Bryant admitted that he committed adultery, but he denied that it was nonconsensual.[437] The complaint was filed against Bryant on July 18, 2003.[438]

At this point, information about the case began to be leaked outside of the courtroom. Private, personal information about the victim became public knowledge. This information included her name, which was supposed to be kept confidential; the defense attorney "let it slip," repeating the name six times in less than ten minutes.[439] In this same ten minute span, the defense counsel also alleged that the "victim's vaginal injuries might have been caused by having sex with three men in three days."[440] This allegation came in the form of a question after the sheriff's detective had testified that her injuries "were not consistent with consensual sex."[441] The question "seemed to trash Colorado's 'rape shield' law."[442] Additionally, evidence

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[431] *Id.*

[432] *Id.*

[433] *Id.*

[434] *Kobe Bryant's Accuser Tried to Commit Suicide Two Months Ago*, ORANGE COUNTY REGISTER, http://www.lukeford.net/profiles/profiles/kobe_bryant.htm.

[435] Randy Wyrick, *Sources: Bryant Incident Began Consensually*, VAIL DAILY (July 30, 2003), *available at* http://www.vaildaily.com/apps/pbcs.dll/article?AID=/20030730/NEWS/307300101.

[436] *Id.*

[437] *Id.*

[438] Bryant Complaint, *supra* note 20.

[439] Melinda Kruse, *Bombshell Question Clears Court*, VAIL DAILY (Oct. 9, 2003), *available at* http://www.vaildaily.com/article/20031009/NEWS/310090101&SearchID=73203965470520.

[440] *Id.*

[441] *Id.*

[442] Patrick O'Driscoll & Tom Kenworthy, *Bryant's Hearing Ends as More Bombshells Fall*, USA TODAY (Oct. 15, 2003), *available at* http://www.usatoday.com/

was inquired into by the defense attorney and reported in the media, which showed that the alleged victim had gone to the hospital the day after the alleged assault "wearing underwear stained with another man's semen."[443] The accuser admitted to having sex with another man on June 27 or June 28, only a few days before the alleged incident.[444] She stated that they had used a condom.[445] Other, possibly irrelevant, information was also revealed. This included the fact that the accuser had attempted suicide four months prior to the alleged incident.[446] This information, which could be used to undermine the accuser's credibility (and most likely was leaked to do so, although not necessarily by the defense team), may or may not be legally relevant and therefore, may or may not have been admissible, depending on the facts of the case.[447]

Additionally, a critical ruling went against the prosecution in the case – the judge decided to allow evidence of the accuser's sexual activity within seventy-two hours of the alleged incident to be admitted into evidence.[448]

> District Judge Terry Ruckriegle ruled that the woman's sex life in the three days surrounding her encounter with Bryant could be admitted as evidence, which may have bolstered the defense contention that she slept with someone after leaving Bryant and before she went to the hospital exam --- a potentially key blow to her credibility. The woman's lawyers have denied the accusation.[449]

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sports/basketball/nba/lakers/2003-10-15-bryant-hearing_x.htm.

[443] *Id.*

[444] *Id.*

[445] *Id.*

[446] *Accuser Hospitalized This Winter in Mental Health Case*, SPORTS ILLUSTRATED, July 4, 2003, http://sportsillustrated.cnn.com/basketball/news/2003/07/24/accuser_hospitalized_ap/.

[447] *See* State v. Gregory W. K., 1997 Del. Fam. Ct. LEXIS 8 (No. JN96-2161), and cases cited therein.

[448] *Rape Case Against Bryant Dismissed*, *supra* note 419.

[449] *Id.*

The case was ultimately dropped when the alleged victim "no longer wanted to participate."[450] "[A]fter mistakes that revealed her identity, at least two death threats and relentless media attention, she apparently had had enough."[451]

Moreover, the alleged victim faced other problems which are typical for rape complainants. According to California Supreme Court Justice Armand Arabian, "[d]espite the changes [in society], . . . a rape victim still faces the idea that 'she is of corrupt motive' and driven by financial gain."[452] This causes the existence of corroborating evidence to acquire extraordinary importance to a successful prosecution – a requirement that theoretically does not even exist.[453] This corroboration typically consists of cries for help that are heard by other witnesses, torn clothing, bruises, and injuries.[454] The timing of the complaint is also important.[455] All of these factors should be familiar by now as these are the same elements that have been contemplated and required for the last 800 plus years.[456]

Finally, the most telling aspect of this case has yet to be mentioned. This facet of the case is public perception. One major example of this is the lack of focus on or interest in the fact that Bryant *did* commit adultery, no matter what else happened.[457] Whether his accuser consented or not, he still cheated on his wife. This fact was largely glossed over by the media and the public alike. The few news articles that mention it at all only have a one sentence, unemotional, matter of fact statement concerning this fact.[458] Contrast this with the rampant interest in the possibility that the accuser may have engaged in intercourse with other people before and/or after

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[450] *Judge Dismisses Sexual Assault Case vs. Bryant*, *supra* note 423.
[451] *Rape Case Against Bryant Dismissed*, *supra* note 419.
[452] Lee & Uranga, *supra* note 420.
[453] *Id.*
[454] *Id.*
[455] *Id.*
[456] *See infra* Parts I-II.
[457] *See* Wyrick, *supra* note 436.
[458] *See, e.g.*, *id.*; Associated Press, *Judge Dismisses Sexual Assault Case vs. Bryant*, SPORTS ILLUSTRATED, Sept. 1, 2004, http://sportsillustrated.cnn.com/2004/basketball/nba/09/01/kobe.dismissed.ap/

the alleged incident, the difference is astounding. Furthermore, the reactions of people, and the topics of the case that people discuss, are very revealing. A sample of discussions will prove the point:[459]

> Not naming the women (and victims of sex crimes are usually women) is blatant sexism.
> If [rape accusers] want to avoid the publicity of charging a star with rape, they should not file a charge, and they should see if there's anything they can learn from the experience, such as do not go to a man's room alone unless you want to have sex.
> Dennis Prager points out that Kobe has developed a strong moral bank account. . . . He got married.
> According to Ms Magazine, rape is any sex a woman regrets.
> Her past gives plenty of reasons for people to question and criticize her.
> [W]omen need to fight the infantilism of the feminists and expect to look after their own safety by being reasonable and sensible about where they go and with whom.

This is just a small sampling, but it is very revealing. The discussions concentrate on the accuser, not the accused. Not only is the fact that Bryant admitted to adultery not held against him, the fact that he is married is credited to him. Many people blame her for what happened saying that she should have taken more care of herself.

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[459] All of the following examples come from: *Kobe Bryant's Accuser Tried to Commit Suicide Two Months Ago*, *supra* note 435.

IV. INTEGRATING RAPE CONCERNS INTO THE RULES OF EVIDENCE

"[A]n appellate court should avoid theories that are rape-specific in their application."[460]

The subject of the issues on appeal in the Mike Tyson case[461] relating to "sexual"[462] conduct and prior history of the prosecutrix and the number and substance of the problems that occurred in the Kobe Bryant trial[463] indicate that substantial problems remain in rape trials. The rape shield statutes, although helpful in some cases, have not solved the problems. Therefore, it seems appropriate to reevaluate these rules and to answer the fundamental question underlying the usefulness of any evidentiary rule: do the additional protections afforded to rape complainants outweigh the negative consequences created by the rape shield laws?

The answer posited by this Article is no. In light of the history and tradition within which the law of rape developed[464] and the rules were created, the negative consequences flowing from the rules overshadow the benefits they afford. This does not, however, mean that these statutes should just be repealed – that would make the problem even worse by implying that the evidence barred by the rules should be permitted. Instead, the rules should be incorporated into the other rules of evidence by implication in the notes accompanying the rule

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[460] Christine Kenmore, Note, *The Admissibility of Extrajudicial Rape Complaints*, 64 B.U. L. REV. 199, 237 (1984).

[461] *See supra* Part III.C.1.

[462] In this context, sexual appears to encompass less provocative acts, such as holding hands, as well as more traditional "sexual" actions, such as sexual intercourse. *See supra id.*

[463] *See supra* Part III.C.2.

[464] Interpretation of statutes, rights, and rules typically involves analyzing the provision or right in light of its history and tradition. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 571-72 (2003) (considering history and tradition in determining individual substantive rights to engage in sexual matters) and Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").

when possible and by explicit addition to the text of the rule itself when necessary. This section will therefore discuss first, what negative consequences the rape-specific rules create and why these negate the benefits of these rules and second, how the benefits of the rules can be assimilated into the other rules.

A. Aggregate Effects of the Rape-Specific Evidentiary Rules

The rape shield rules do offer protection to rape complainants. Rule 412 offers a clear presumption against admissibility of evidence regarding other sexual behavior or sexual predisposition of the alleged victim.[465] It also unequivocally requires any evidence proposed to be admitted under an exception to the rule to be subjected to explicit procedural requirements, including notice and an in camera hearing before trial.[466] Rules 413-415 relax the rules of admissibility for prior act evidence of the alleged rapist by allowing evidence of prior acts of sexual assault or child molestation.[467]

The rules also generate negative consequences for alleged victims. When considered cumulatively, these consequences tend to overwhelm the benefits that flow from the rape shield laws. These negative effects can generally be separated into three categories. First, the rules themselves are hard to interpret because they contain numerous ambiguities, broad language, and exceptions. Second, the rules suffer from a hole created by the mistake of fact defense, which further confuses the trial and provides a backdoor entrance for admissibility of a complainant's sexual history. Finally, the existence of the rules in and of itself reinforces the biases and prejudices which have pervaded rape law since its creation. Each of these concerns will be addressed in more detail below.

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[465] *See* FED. R. EVID. 412(a).
[466] *See* FED. R. EVID. 412(c).
[467] *See* FED. R. EVID. 413-415.

1. Interpretation Difficulties

The first problem with rape shield statutes is that they contain numerous exceptions and ambiguities, which end up detracting from the protection the statutes were intended to establish and creating confusion and additional concentration on the information intended to be private. Rule 412 provides exceptions from its general ban of sexual evidence in criminal cases for three enumerated reasons, including for "evidence the exclusion of which would violate the constitutional rights of the defendant."[468] This exception, in particular, is unnecessary and confusing.[469] It is unnecessary because a statute does not have the power to preclude constitutional rights.[470] It is confusing because it provides "no guidance to trial courts regarding what evidence meets the statutory standard."[471] The determination of this issue – what evidence is constitutionally required – also focuses the attention of the trial on disputed sexual conduct, as evinced in the cases of *Michigan v. Lucas*[472] (considering whether evidence of a prior sexual relationship was constitutionally required to be admitted by the Sixth Amendment) and *Commonwealth v. Spiewak*[473] (revolving around the applicability of the Confrontation Clause to evidence of prior sexual conduct which would explain a statement made by the prosecutrix). Thus, the trial ends up concentrating on the activity that it is meant to help protect and keep secret. Additionally, the rule never defines "sexual misconduct," "sexual behavior," or "sexual predisposition."[474] This ambiguity creates another potential issue which focuses the attention in a trial onto questionably sexual conduct – whether the conduct is "sexual" within the meaning of the statute. This problem is demonstrated by the issues in *People v. Ivers*[475] (discussing the applicability of the rape shield

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[468] *Id.* 412(b)(1)(C).
[469] *See* Galvin, *supra* note 246, at 886-87.
[470] *See id.* at 886.
[471] *Id.* at 887.
[472] 500 U.S. 145 (1991); *see also supra* Part III.A.
[473] 617 A.2d 696 (Pa. 1992); *see also supra* Part III.A.
[474] *See* FED. R. EVID. 412.
[475] 587 N.W.2d 10 (Mich. 1998); *see also supra* Part III.A.

statute to statements made by the prosecutrix). Finally, Rules 413 and 414 (and 415 by incorporation) define "offense of sexual assault"[476] and "offense of child molestation"[477] by providing a list of applicable offenses, including reference to other code provisions. These definitions, although provided, are still not clear and can be difficult for courts to apply, as seen in the case of *United States v. Bull*[478] (determining admissibility of evidence of prior convictions of the defendant for sexual abuse of a child pursuant to Rules 413-415).

2. Mistake of Fact

Another problem with rape shield statutes is that they suffer from the introduction of the mistake of fact defense into the rape context. Prior to the abolition of the resistance requirement, mistake of fact was not a viable defense in rape trials – an alleged rapist could not claim reasonable belief of consent if the alleged victim had physically resisted. Now, however, resistance is not generally an element of the crime of rape,[479] and reasonable belief in consent has become a viable defense to the charge.[480] This means that any information which the alleged rapist learned about prior to the alleged incident may be admissible to show that he reasonably believed there was consent, even if there was not. In effect, it provides the defense with a back door method of introducing sexual behavior and sexual predisposition evidence despite the existence of the general ban of the rape shield law. Thus, the statutes again only place greater emphasis on this evidence because of the issue of whether the evidence is barred by the rule or admitted for the alternate purpose of showing mistake of fact. Illustrations of this issue are provided by the cases of *Doe v. United States*[481] (permitting introduction of evidence to

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[476] FED. R. EVID. 413(d).
[477] FED. R. EVID. 414(d).
[478] 32 Fed. App'x 778 (8th Cir. 2002); *see also supra* Part III.B.
[479] *See* KAPLAN, WEISBERG, & BINDER, *supra* note 15, at 1109.
[480] *See, e.g.*, Doe v. United States, 666 F.2d 43 (4th Cir. 1981) and Tyson v. State, 619 N.E.2d 276 (Ind. Ct. App. 1993).
[481] 666 F.2d 43 (4th Cir. 1981).

show the defendant's belief that the alleged victim had consented) and *Tyson v. State*.[482]

3. Inherent Biases

A final problem with rape shield statutes stems from the reasons that produced the statutes and the inferences they create. Rape shield laws were passed with the background history and tradition of the law of rape in mind.[483] Therefore, these laws are premised on the ideas that they are necessary for the protection of rape complainants and that the evidence prohibited by the rules would otherwise be admissible.[484] For this reason, the enactment of these rules creates the impression that the prohibited evidence would be relevant and admissible without the rules. This, in turn, creates the inference that the sexual history and "predisposition" of a woman are relevant to her consent and conduct in the case at bar. The basis for this inference, however, is the history and tradition surrounding the law of rape. Thus, the rules generate a circular pattern of reasoning, whereby the courts are precluded from helping society overcome the prejudices and biases that women who have consented once are more likely to consent in this instance.[485] In this way, the rules actually *prevent* progress from occurring in societal attitudes about rape and in the law of rape. Finally, the implication that these rules are necessary to protect rape complainants because the other rules are insufficient for this purpose is faulty as displayed by

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[482] 619 N.E.2d 276 (Ind. Ct. App. 1993).

[483] *See, e.g.*, FED. R. EVID. 412 advisory committee's note.

[484] *Id.*

[485] In today's society, it is just as likely that a woman who has never engaged in intercourse previously would be more likely to consent to a given occasion, simply because society has produced a culture in which engaging in intercourse is the norm and abstinence is unusual. Even the television show "Friends" displays this attitude; for example, when a character goes six months without intercourse, this is a big deal and is considered a "long" time. *See Friends: The One With the Videotape* (NBC television broadcast, Oct. 18, 2001). Another popular show, Seinfeld, presents another example, when the characters have a contest to see who is "the master of his domain," and each of them succumbs to masturbation within a matter of days. *See Seinfeld: The Contest* (Sony Pictures Television broadcast, Sept. 16, 1992).

the cases of *People v. Rincon-Pineda*[486] (rejecting the use of the cautionary instruction for rape cases and finding that the bases for the instruction had been determined to be unfounded) and *Pope v. Superior Court*[487] (finding that evidence of unchastity is generally inadmissible, except in certain limited circumstances, because the evidence did not prove consent and it confused the issues).

B. Incorporating Rape Shield Laws into Other Rules

The myth that the rape shield laws are necessary to protect rape complainants can be dispelled by an analysis of other provisions of the rules of evidence which could adequately serve the concerns protected by these laws. Other applicable provisions include Rules 401 (relevancy), 403 (unfair prejudice), 404 (character evidence), 405 (methods of proving character), 406 (habit), 608 (character of a witness), and 104 (preliminary questions). How each of these rules applies and how they can serve the goals of the rape shield law or be reformed to do so is addressed below.

1. Rule 401

Evidence must be relevant to be admissible.[488] This is a minimum requirement, and it is subject to numerous exceptions; nonetheless, all evidence must be relevant to be admissible.[489] Under Rule 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[490] When applied to the crime of rape, the biggest questions for the relevancy of evidence regard evidence pertaining to the accuser's sexual history. The issue is whether sexual history evidence is relevant in the case. Generally speaking, the

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[486] 538 P.2d 247 (Cal. 1975); *see also supra* Part II.A.
[487] 545 P.2d 946 (Ariz. 1976); *see also supra* Part II.A.
[488] FED. R. EVID. 401, 402.
[489] FED. R. EVID. 402.
[490] FED. R. EVID. 401.

answer should be no.[491] This is the generally accepted answer, and it is the answer articulated in the rape shield laws.[492] What the woman has done in the past generally has no bearing on whether she consented in this particular instance. The woman is free to change her ways, to deny this particular man, or to just not feel like it – or to refuse for any other reason she may choose.

There are exceptions, however. Past sexual history is relevant to show that someone else was the source of semen, injury, disease, or bruises.[493] This evidence may be relevant if the evidence relates to specific acts between the defendant and the alleged victim[494] depending on the situation. This should not be a blanket grant of relevancy. The relevancy of this evidence is contingent upon the facts of the case; if the act happened ten years ago, it probably will not be relevant, but if it happened yesterday, then it has a higher probability of relevancy (the feelings or reasons that led to consent yesterday are more likely to exist today than the feelings that led to consent ten years ago because less time has passed; this is not, however, an absolute rule).[495] Thus, the prevailing rule on relevancy should be that sexual history is generally not relevant, but there are a few exceptions for purposes which are always relevant, and the evidence should always be analyzed for relevancy by the trial judge.

2. Rule 403

Even if the evidence is relevant, it still may be inadmissible. The federal rules prohibit relevant evidence "if

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491 *Cf.* FED. R. EVID. 412.

492 *Id.*

493 *See* FED. R. EVID. 412(b)(1)(A); *see also* People v. Johnson, 671 P.2d 1017, 1020-21 (1983) ("Here, the trial court properly allowed evidence concerning the source of semen found on the victim's jeans.").

494 *See* FED. R. EVID. 412(b)(1)(B); *see also* LaJoie v. Thompson, 217 F.3d 663, 670-71 (9th Cir. 2000) (holding that prior sexual conduct between the defendant and his accuser was constitutionally required to be admitted).

495 *See* Karen M. Fingar, *And Justice For All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence*, 5 S. CAL. REV. L. & WOMEN'S STUD. 501, 541-42 (1996).

its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[496] As applied to the crime of rape, the main concerns are unfair prejudice and/or confusion of the issues. This means that the evidence cannot be unfairly prejudicial to either the plaintiff or the defendant and it cannot make the jury concentrate on an issue that distracts the focus of their attention from the question of whether or not the woman was raped. Of particular importance to the determination of whether the evidence causes unfair prejudice is the history and tradition of biases and prejudices against the veracity of rape complainants. Throughout the development of rape law, rape complainants have faced substantial suspicion regarding the truth of their charges.[497] Coupled with the typically low probative value of previous sexual conduct, this history suggests that prior sexual conduct and predisposition of the prosecutrix should be carefully scrutinized under this factor. Furthermore, the tendency of rape trials to focus on the admissibility and importance of prior sexual conduct by the alleged victim should also weigh in favor of finding the evidence inadmissible under this rule. Finally, the rape shield laws' proclivity for exacerbating the focus on the prior conduct of the alleged victim actually acts counterproductively with this factor.

3. Rules 404, 405, 406, and 608

Character evidence is generally not admissible under the federal rules.[498] Character evidence of an alleged victim is only permissible to prove action in conformity therewith if it is a pertinent trait.[499] Past sexual history should never be considered a pertinent "trait." Society today no longer speaks of rape as being about chastity; rape is regarded now as being

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[496] FED. R. EVID. 403.
[497] *See supra* Parts 1-3.
[498] FED. R. EVID. 404.
[499] FED. R. EVID. 404(a).

about the woman's autonomy.[500] Society's expressed attitude recognizes that sexual conduct is no longer considered to be a "distinguishing feature"[501] of a person's character, even if the overt treatment of rape victims has yet to display this recognition.[502] Furthermore, although previous sexual activity would affect a person's chastity, it does not affect an autonomous decision of whether to engage in sex or not; therefore, the fact that a woman has slept with a man before, even if that man is the defendant, generally has no bearing on whether she consented on *the occasion in question.*

Additionally, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[503] Although this provision originally intended past sexual conduct evidence of the alleged victim to be admissible under an exception,[504] the advisory notes which accompany the rule could be changed from expressing an inclusive intent to expressing a prohibitive intent. This means that specific actions of sexual conduct would not be admissible unless presented for a different purpose – in which case, the character rules would not apply. Finally, character evidence of a witness is admissible when it pertains to character for truthfulness or untruthfulness.[505] This provision does not permit any sexual behavior history, however, as sexual behavior has no correlation to veracity;[506] there is one possible exception, if the alleged victim were to make a false statement during her testimony which could then

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[500] *See* Rodes, *supra* note 14, at 686.

[501] WEBSTER'S II NEW RIVERSIDE DICTIONARY 726 (Berkley ed. 1984) (defining "trait" as "a distinguishing feature, as of one's character").

[502] *Compare* Rodes, *supra* note 14, at 686 (discussing the shift in attitude toward rape from an affront to chastity to an affront to autonomy), *with* the Kobe Bryant case, *supra* Part III.C.2 (displaying how society reacted to the accusations against Kobe Bryant).

[503] FED. R. EVID. 404(b).

[504] *See* Fed. R. Evid. 404(a)(2) advisory committee's note.

[505] FED. R. EVID. 608.

[506] *See* McLean v. United States, 377 A.2d 74, 78 (D.C. App. 1977) ("It should be obvious that evidence of prior sexual acts by the prosecutrix has no relevance whatsoever to her credibility as a witness and therefore defense counsel should be precluded from asking the prosecutrix questions concerning her past sex life.").

be impeached during cross examination by her previous sexual conduct.[507] In this case, the evidence would be evaluated under Rule 403, and it would most likely only be admissible if there was no other impeachment evidence and was not highly prejudicial. Thus, evidence of past sexual activity is not admissible for the purpose of proving action in conformity with the particular character of the woman. It should be noted, however, that this rule in no way limits admission of this evidence for other purposes; admissibility for other purposes would be evaluated under the other rules of evidence.

If character for sexual predisposition or sexual conduct was considered to be admissible, it would then have to follow the provisions of Rule 405.[508] This rule allows reputation or opinion evidence of any admissible character trait, and it allows evidence of specific conduct on cross-examination.[509] Therefore, to retain the protections of the rape shield statutes in the event that character evidence was determined to be a pertinent character trait, this rule would need to be modified. This could be done without too much trouble by simply adding an exception into Rule 405(a) for character for sexual conduct and predisposition, which may only be admitted as specific acts introduced for certain enumerated purposes. This addition would cover the concerns articulated in Rule 412.

Finally, it could be argued that previous sexual conduct is relevant under Rule 406.[510] This rule declares that evidence of habit is relevant to show action in conformity with that habit.[511] Habit "describes one's regular response to a repeated

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[507] *See* People v. Wigfall, 690 N.Y.S.2d 2, 3 (N.Y. App. Div. 1999); *see also* Gov't of the Virgin Islands v. Jacobs, 634 F.Supp. 933, 940 (D.V.I. 1986) (holding that impeachment evidence consisting of prior sexual conduct must be admitted when the government has opened the door). But see Tyson v. State, 619 N.E.2d 276, 290 & n.15 (Ind. App. 1993), wherein the court upheld the trial court's ruling in limine that evidence of the prosecutrix's previous unchastity was not admissible to rebut the "angelic image" of the prosecutrix created by the prosecution.

[508] FED. R. EVID. 405.

[509] *Id.*

[510] FED. R. EVID. 406.

[511] *Id.*

specific situation."[512] Furthermore, "[t]he doing of the habitual acts may become semi-automatic."[513] It should be apparent that sexual activity itself would not qualify as habit – a woman cannot have a "regular response" of consenting to sleep with any man who offers, and consenting to sex is not "semi-automatic." Nor would it be appropriate to qualify consenting to sex with a particular individual as a "habit," even though a stronger argument could be made, because consent to sexual conduct can never be "semi-automatic." This rule *could* operate to make evidence of prior *reports or claims* of a similar nature to the claim made against the alleged rapist relevant, however.[514] In that situation, the prior similar report or claim could be a habitual response to a set of circumstances in which the alleged victim finds herself. In these cases, the evidence should properly be admitted.[515]

4. Rule 104

The Federal Rules of Evidence also contain a provision for the determination of the admissibility of evidence.[516] This provision, entitled "Preliminary Questions," reads: "Preliminary questions concerning the . . . admissibility of evidence shall be determined by the court."[517] Furthermore, "[h]earings on other preliminary matters shall be so conducted [outside the hearing of the jury] when the interests of justice require."[518] Thus, this rule provides for an avenue of conducting in camera hearings to determine the admissibility of past sexual activity evidence. The admissibility of the

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[512] Fed. R. Evid. 406 advisory committee's note (quoting MCCORMICK ON EVIDENCE § 162 (J. Strong ed., 5th ed. 1999)).

[513] *Id.* (quoting MCCORMICK ON EVIDENCE § 162 (J. Strong ed., 5th ed. 1999)).

[514] *See* United States v. Stamper, 766 F.Supp. 1396, 1401-04 (W.D.N.C. 1991) (holding that evidence that amounted to a prior scheme or modus operandi was required to be admitted).

[515] The evidence should be admitted, but its weight should be carefully considered and argued by counsel, given the fact that admissibility of prior reports or claims could operate to make women who have levied previous accusations or charges targets of potential rapists.

[516] *See* FED. R. EVID. 104.

[517] FED. R. EVID. 104(a).

[518] FED. R. EVID. 104(c).

evidence must be determined by the court, and the privacy interest of the woman requires that the matter be conducted out of the hearing of the jury. Thus, this rule affords the same protection as the provisions for in camera hearings to determine admissibility under Rules 412-415. Finally, the notice and discovery deadline requirements can be imposed by the judge through his common law powers and under Rule 611.[519]

V. TOWARD A RATIONAL JURISPRUDENCE OF RAPE

"There is no uniform response to rape, or a uniform time for recovery."[520]

Much of this Article has been devoted to showing the history and current status of rape. The focus has been on the problems, biases, and prejudices inherent in the law. This section suggests a plan that could be implemented going forward, to reduce the occurrences of these issues and to promote progress in the law and protection of rape victims.[521]

As it currently stands, rape law is a product of a long history of prejudice and bias against rape complainants. Although some progress has been made, at least some of the biases which existed in the twelfth century still inherent in our rape law today. Nonetheless, progress has been made. The rape shield laws themselves are signs of that progress. There are other signs of progress too, particularly in cases from the 1970s, such as *People v. Rincon-Pineda*[522] (refusing to give a cautionary jury instruction in a rape case) and *State ex rel.*

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[519] FED. R. EVID. 611.

[520] BROWNMILLER, *supra* note **Error! Bookmark not defined.**, at 361.

[521] An alternative solution which might help alleviate some of the problems associated with rape law would be to create more than one category of rape. Multiple categories would allow for multiple levels of punishment, thereby reducing the ambivalence that juries have about inflicting the relatively drastic sentences on men convicted based solely on the testimony of the prosecutrix. *See* Rodes, *supra* note 14, at 689. The arguments behind implementing this change are outside the scope of this Article, however.

[522] 538 P.2d 247 (Cal. 1975).

Pope v. Superior Court[523] (recognizing that past sexual conduct evidence is generally not admissible). However, since the great strides taken in the 1970s, there appears to have been little additional progress. Ironically, major reasons for this sudden halt in improvement are the rape shield statutes themselves.

The rape shield laws, although initially helpful, have become detrimental to the women they were intended to protect. In addition to the problems discussed above, these laws have stymied the courts' ability to advance the protection and privacy afforded to women in rape cases. Because these rules are statutory law, they cannot be modified by the courts. Therefore, the courts "may not graft additional exceptions onto the statute[s]."[524] Without this ability, however, courts are not free to promote the interests of rape complainants because they are bound by the strictures of the rape shield laws.

An alternative method of achieving the goals of the rape shield statutes could fulfill these goals while alleviating this obstruction to progress. This method is to repeal the rules which expressly pertain only to rape and sexual conduct cases and infuse the positive aspects of these rules into the other rules of evidence.[525] A simple method of accomplishing this change could be achieved by merely discussing the proper application of the rules to the rape context in the advisory committee notes which accompany each rule. In fact, the notes originally associated with Rule 404(a)(2) did specifically refer to rape cases, albeit by providing that previous sexual conduct of the alleged victims of rape was admissible character evidence.[526] Thus, the proper application of the rules of evidence to rape cases could be articulated by the committee notes as opposed to express, stand-alone rules of evidence applicable solely to the rape context.

This method of addressing rape concerns would also provide the flexibility necessary for courts to promote progress in rape trials. Use of advisory notes would provide guidelines

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[523] 545 P.2d 946 (Ariz. 1976).

[524] Tyson v. State, 619 N.E.2d 276, 290 n.15 (Ind. App. Ct. 1993) (quoting Kelly v. State, 586 N.E.2d 927, 929 (Ind. App. 1992)).

[525] *See supra* Part IV.B.

[526] *See* Fed. R. Evid. 404(a)(2) advisory committee's note.

for courts so that courts would have some precedent to rely upon in rejecting the argument that repeal of the rape shield laws opens the door for past sexual conduct evidence, but they would not bind the courts. This means that courts would have discretion in the application of the rules of evidence to rape cases. With this discretion, judges would be able to follow the lead of the judges of the highest courts in California[527] and Arizona[528] by applying the rules of evidence to protect the privacy of the rape complainant and thereby move the focus of rape trials away from the victim and onto the attacker. The privacy of the victim could then be appropriately balanced against the rights of the defendant so that most prior sexual conduct evidence of the alleged victim is excluded, but evidence which is vital to the alleged rapist's defense or offered for a valid purpose would be admitted.[529]

Finally, this solution offers an additional significant benefit in rape cases. In many arenas, the legal system leads, or even pushes, society to change its attitude and perception of an issue. A prime example of this phenomenon occurred in the equal rights movement during the middle of the twentieth century.[530] The legal system required school integration despite massive resistance within society.[531] It forced perceptions of inequality to begin to change.[532] This same trend could occur within the rape context. If the rape laws are repealed, but their effect is maintained through the use of the other rules, the legal system would be showing society that the rules are not necessary to prevent admission of prior sexual conduct evidence; in effect, retaining the outcomes of the rape shield laws, but not the laws themselves would show that a victim's chastity or unchastity has no, or extremely little, relevance in the normal rape case. In addition, if judges are permitted to exercise discretion to develop the law of rape, there is the potential that they will be able to lead or push

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[527] *See* People v. Rincon-Pineda, 538 P.2d 247 (Cal. 1975).
[528] *See* Pope v. Superior Court, 545 P.2d 946 (Ariz. 1976).
[529] *See supra* Part IV.B.1.
[530] *See, e.g.*, Brown v. Bd. Of Educ., 347 U.S. 483 (1954) (*Brown I*).
[531] *See* Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown II*).
[532] *See id.*

society to change its mentality and response to rape allegations.

CONCLUSION

"You still have a choice."[533]

The 2002 movie *Minority Report*, based upon the novel of the same name by Philip K. Dick, portrayed a futuristic society in which our fate was predetermined.[534] Three "Pre-Cogs" have visions of murders which have not happened, but are going to in the future.[535] This enables the Pre-Crime Unit to catch the murderers before the murders actually take place.[536] The plot of the movie, however, revolves around the conundrum that is created by the conflict between the concept of Pre-Crime and the defining characteristic of humanity: free choice.[537] As humans, we can always change our minds. But if we are fated to fulfill this vision of a murder, then free choice does not exist, and there is no real choice in our actions. In the end, the moral shows that humans *do* have free choice: we are free to change our minds, right up until the point that we actually do something.[538]

This same premise can be applied to the crime of rape. A woman, or a man, is entitled to change his or her mind anytime before intercourse. A person is never committed to consenting to sexual relations with another. This is true whether or not the person has slept with a third person before, whether the person has slept with the defendant of the case before, or whether the person has actually consented and then retracted that consent. Thus, the statement that a woman should learn not to go to a man's hotel room unless she is going to sleep with him is ludicrous. The woman is entitled to choose.

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[533] MINORITY REPORT (Twentieth Century Fox and Dreamworks Pictures 2002).
[534] *Id.*
[535] *Id.*
[536] *Id.*
[537] *Id.*
[538] *Id.*

The law of rape in our legal system is the product of an almost millennial-long history and tradition. This history and tradition is rife with discrimination and mistreatment of women and rape victims. The justice system needs to recognize this and account for it. The justice system needs to do this in a constructive manner, which will begin to alleviate the cultural and societal perception that rape is substantially and dramatically different. Thus, laws and evidentiary rules that single out rape for disparate treatment should be repealed and incorporated into the other rules of evidence. This incorporation can even be explicit in the notes and commentary that accompany each rule. In this manner, the beneficent purpose of the rules will be realized, but the negative implications and the effect of perpetuating the stereotypes and perceptions that the laws and rules are designed to combat will be avoided. Instead, the crime of rape should be treated similarly to other crimes.

Societal perceptions of the crime of rape and of rape victims must be changed. Society needs to recognize that it is the defendant who is on trial, not the alleged victim. Society needs to abandon its fear of the vindictive female and realize that the burden of proof is already on the prosecution or complainant and that rape is no more likely to result in mistaken convictions than other crimes (if anything, it is less likely to do so at this stage in history). Both men and women in our society need to realize one very important thing: no means no. The legal system needs to take the first step towards change, however, by removing a major impediment to progress – the embodiment of a history and tradition of prejudice and bias against rape complainants that is a rape shield law. By taking this step, the legal system can make a simple, yet powerful statement to rape victims: you still have a choice.