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RAPE SHIELD LAWS: PROTECTING THE VICTIM AT THE EXPENSE OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS

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I. Introduction

Rape is a crime different from any other,[1] in part because of the elements of the crime,[2] but mostly because of the historical treatment of the crime and its victims.[3] Traditionally, a crime is defined by examining what the defendant did and what the intended consequences of the crime were.[4] Rape is different from this standard definition because courts have almost always focused on the victim and only

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[1] Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1093 (1986) (stating that there is no "model statute" solution where rape law is involved because the problem is with our interpretation or our understanding of words in the statute such as "consent" and "will" and "force"); *see also* Sakthi Murthy, *Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent*, 79 CAL. L. REV. 541, 545 (1991) (stating that people would never consent to assault or murder whereas sex can be consensual).

[2] *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. 709, 713-14 (1995) (stating the elements of most sexual offense crimes are: "(1) the defendant engaged in a statutorily designated sexual activity with the complainant, (2) without her consent, and (3) against her will," and noting that some states still require proof of the use of force by the defendant).

[3] Estrich, *supra* note 1, at 1093 (stating that the only way to determine whether there was consent is to examine the victim's response to the situation); *see also* Catherine L. Kello, *Rape Shield Legislation—Is It Time for Reinforcement?*, 21 U. MICH. J. L. REF. 317, 319 (1988) (noting that prior to the adoption of Michigan's rape shield law the judiciary considered rape a sex crime rather than a crime of violence, thereby requiring the victim to prove the attack was against her will and defense attorneys would harass victims by questioning them about their prior sexual activity, thus putting the victim, rather than the defendant, on trial).

[4] Estrich, *supra* note 1, at 1094.

incidentally on the defendant.[5] In addition, the issue of a victim's consent is always a key component in a rape prosecution, whereas in other criminal prosecutions it is not a critical issue.[6]

For the past two decades, almost all fifty states and the federal government have adopted rape shield laws[7] in order to protect the victim of a rape from having to disclose her past sexual conduct when testifying against her alleged attacker.[8]

This Note will first look at the origin of rape shield legislation and why the need for reform arose. Next, the Note will look at each of the four categories or varieties of rape shield statutes and how they differ from each other. Third, this Note will conduct a case-by-case analysis of how the courts have interpreted the rape shield statute of their jurisdiction and how these interpretations have infringed on defendants' constitutional rights because of an abuse of judicial discretion and a lack of legislative guidance, especially in cases where consent is the defense. Fourth, this Note will show that when judges do not receive proper guidance from the legislature, victims are not properly protected. Finally, this Note will argue that, because of the varied state court interpretations of rape shield laws, it is now necessary for the United States Supreme Court to address these issues.

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[5] *Id.* at 1094.

[6] *Id.* at 1126. For example, the issue of consent is not a focus in robbery cases where there would normally be no "claims that the victim cooperated with the taking of money." *Id.*

[7] Michael Phillips, *Utah Rape Rate Among Highest in the Nation, Utah Among Worst in Rape Rates, State Experts Point to Population, Puritanism*, SALT LAKE TRIB., Apr. 28, 1993, at A1 (noting that only Arizona and Utah have not enacted rape shield statutes). *But see* State *ex rel* Pope v. Super. Ct. of Ariz., 545 P.2d 946 (Ariz. 1976) (holding that evidence of a victim's chastity is not admissible in most circumstances, thereby enforcing the state rape shield law through the common law); State v. Johns, 615 P.2d 1260 (Utah 1980) (creating a common law rape shield law by holding that evidence of a victim's past sexual activity is irrelevant to the issue of consent).

[8] Kello, *supra* note 3, at 319-21 (analyzing the legislative history of the nation's first rape shield statute).

II. The History of Rape Shield Statutes

A. Common Law

At common law, evidence of a victim's past sexual behavior was always relevant and admissible into evidence in rape prosecutions.[9] This is because a victim's past sexual conduct could prove a history of unchaste behavior.[10] Unchaste behavior also was thought to purport dishonesty.[11] This allowed allegations of promiscuity to be entered into evidence not only to show consent, but also to attack a victim's credibility.[12]

As society changed, attitudes towards sexual behavior became more relaxed.[13] These relaxed views negated the traditional belief that a promiscuous victim will always consent to sex.[14] This change of philosophy paved the way for the introduction of rape shield legislation to protect a victim of a rape from being traumatized by an attorney when she testified at trial against her attacker.[15]

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[9] Pamela J. Fisher, State v. Alvey: *Iowa's Victimization of Defendants Through the Overextension of Iowa's Rape Shield Law*, 76 IOWA L. REV. 835, 837-38 (1991) (stating that at common law a victim's lack of chastity could lead the jury to infer an assent to the alleged rape); *see also* Murthy, *supra* note 1, at 541 (stating that prior to jurisdictions enacting rape shield laws, evidence of a victim's past sexual practices was considered relevant).

[10] "Chastity can be defined as a woman's abstention from premarital or extramarital sexual intercourse." Fisher, *supra* note 9, at 837 n.17.

[11] *Id.* at 838.

[12] *See* Fishman, *supra* note 2, at 715 (stating it was believed that a woman's lack of chastity was relevant to prove that she was a liar).

[13] Fisher, *supra* note 9, at 839 (noting that attitudes towards non-marital sexual relations have relaxed because there is no longer "the traditional belief that a promiscuous victim always consents to sex").

[14] *Id.* (explaining that these relaxed attitudes led legislatures to review the common law rule).

[15] David Haxton, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1220 (1985) (stating that rape shield statutes are intended to limit harassing defense questions and to encourage victims to report

B. Adopting Rape Shield Legislation

In the mid-1970's, Congress and state legislatures began passing statutes that protected the victim of a rape from victimization when testifying against her[16] attacker.[17] The first rape shield statute was passed in Michigan in 1974 and by 1976 over half of the states had enacted some form of a rape shield statute.[18]

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the crimes).

[16] To avoid confusion, this Note will depict the victim as a female and the male as the defendant. This in no way minimizes the reality of male rape. However, male rape is beyond the scope of this Note. For a discussion of the subject of male rape, see generally Nicholas Groth & Ann Burgess, *Male Rape: Offenders and Victims*, 137 AM. J. PSYCHIATRY 806 (1980).

[17] Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 764-65 (1986).

[18] *See* FED. R. EVID. 412 (West 1996); ALA. CODE § 12-21-203 (1995); ALASKA STAT. § 12.45.045(Michie 1990); ARK. CODE ANN. § 16-42-101 (Michie 1993); CAL. EVID. CODE § 782, 1103 (West 1995); COLO. REV. STAT. § 18-3-407 (West 1986); CONN. GEN. STAT. ANN. § 54- 86F (West 1994); DEL. CODE ANN. tit. §§ 3508-3509 (1995); FLA. STAT. ANN. § 794.022(2)-(3) (West 1995); GA. CODE ANN. § 24-2-3 (Michie 1995); HAW. REV. STAT. § 626-1, RULE 412 (Michie 1992); IDAHO CODE § 18-6105 (1987); ILL. COMP. STAT. ANN. § 725:5/115-7(West 1992); IND. CODE ANN. § 35-37-4-4 (West 1994); IOWA R. EVID. 412 (West 1995); KAN. STAT. ANN. § 21-3525 (1994); KY. R. EVID. 412 (1992); LA. CODE EVID. ANN. art. 412, 412.1 (West 1995); ME. R. EVID. 412 (1995); MD. ANN. CODE art. 27, § 461A(1992); MASS. ANN. LAWS ch. 233, 21B (West 1994); MICH. COMP. LAWS ANN. §750.520j(West 1991); MINN. R. EVID. 412 (1990); MISS. CODE ANN. § 97-3-68 (1996); MO. ANN. STAT. § 491.015 (West 1995); MONT. CODE ANN. § 45-5-511(2) (1993); NEB. REV. STAT. ANN. § 28-321 (Michie 1989); NEV. REV. STAT. ANN. §§ 48.069, 50.090 (Michie 1993); N.H. R. EVID. 412 (1996); N.J. STAT. ANN. § 2A:84A-32.1 (West 1994); N.M. R. EVID. 11-413 (Michie 1996); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992); N.C. R. EVID. 412 (1996); N.D. CENT. CODE § 12.1-20-14(1985); OHIO REV. CODE ANN. § 2907.02 (D) (Anderson 1994); OKLA. STAT. ANN. tit. 12 § 2412 (West 1995); OR. EVID. CODE 412 (1995); 18 PA. CONS. STAT. ANN. § 3104 (West 1983); R.I. GEN. LAWS § 11-37-13 (1994); S.C. CODE ANN. §16-3-659.1(Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 23A-22-15 (Michie 1995); TENN. R. EVID. 412 (1996); TEX. R. CRIM. EVID. 412 (1996): VT. STAT. ANN. tit. 13, § 3255 (1995); VA. CODE ANN. § 18.2-67.7 (Michie 1996); WASH. REV. CODE ANN. § 9A.44.020(West 1988); W. VA. CODE § 61-8B-11 (1992); WIS. STAT. ANN. §§ 971.31(11), 972.11 (2) (West 1994); WYO. STAT. § 6-2-312 (Michie 1988).

The need for reform arose[19] because countless victims, already traumatized by the rape, refused to report the crime or to testify out of fear that the proceedings would become an inquisition into her sexual past, thereby requiring victims to justify their behavior.[20] The pressure for reform came from an alliance of feminist organizations and law enforcement agencies.[21]

The most important issue in the debate over rape legislation reform was whether a women's unchaste behavior had any probative value to the question of whether she was raped.[22] To date, nearly all jurisdictions have a rape shield statute[23] which falls into one of four categories.[24] Although the four "model" approaches differ, their "single common feature is a rejection of the previous automatic admissibility of proof of unchastity."[25] The four approaches have been referred to as the Michigan, New Jersey, Federal and California approaches.[26]

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[19] Haxton, *supra* note 15, at 1220.

[20] People v. Arenda, 330 N.W. 2d 814, 816 (Mich. 1982).

[21] Galvin, *supra* note 17, at 767 (citing C. Wright & K. Graham, FEDERAL PRACTICE AND PROCEDURE § 5382); *see also* Lara English Simmons, Michigan v. Lucas: *Failing to Define the State Interest in Rape Shield Legislation,* 70 N.C. L. REV. 1592, 1601 (1992).

[22] Galvin, *supra* note 17, at 767-68 (stating that the women's movement not only targeted the evidentiary problems of rape prosecutions but also attacked all stereotypical views and attitudes towards women).

[23] *See* Simmons, *supra* note 21, at 1592; *see also* Haxton, *supra* note 15, at 1219; Fisher, *supra* note 9, at 840.

[24] Galvin, *supra* note 17, at 773. For a discussion of the four categories see *infra* Part III.

[25] *Id.*

[26] *Id.* Professor Galvin first used this four model approach in her 1986 article analyzing rape shield statutes. *Id.* Other commentators have chosen different ways to categorize these statutes. *See* Andrew Z. Soshnick, Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation,* 78 J. CRIM. L. & CRIMINOLOGY 644 (1987) (focusing on the rape shield laws of five states which the author argues is representative of the various statutes). For purposes of this Note, I will use Professor Galvin's classification because I believe they are the clearest. However, in the time since Professor Galvin published her article, Texas has amended its rape shield statute. Therefore, the model that Professor Galvin regarded as the Texas model will now be referred

III. The Four Approaches

A. The Michigan Approach[27]

The Michigan Rape Shield Statute is the most restrictive and the most prevalent of the rape shield laws.[28] Under this approach, judges have the least discretion in determining which evidence of a victim's past sexual history will be considered relevant.[29] The Michigan legislature has predetermined through its statute which evidence will be admissible.[30] The statute prohibits all evidence of the victim's past sexual conduct unless the trial judge finds it is evidence of: (1) the victim's past sexual conduct with the actor, or (2) specific instances or origin of semen, pregnancy or disease.[31] Evidence of the victim's sexual conduct with third parties is admissible only if the defendant uses this evidence to show he was not the source of the semen found in the victim.[32] As a result of these rigid requirements, appellate courts have "strained to uphold the validity of these statutes, while at the same time

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to as the New Jersey model.

[27] Twenty-two jurisdictions follow the Michigan approach. These states include: Alabama, Colorado, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, North Carolina, Ohio, Pennsylvania, South Carolina, Vermont, Virginia, West Virginia and Wisconsin. *See generally* Galvin, *supra* note 17.

[28] MICH. COMP. LAWS ANN. § 750.520j (West 1991). *See* Galvin, *supra* note 17, at 773 (noting that the states following the Michigan approach have virtually stripped the court's power to determine relevance of evidence pertaining to a complainant's past sexual history on a case-by-case basis); *see also* Haxton, *supra* note 15, at 1225-26 (stating that the reason behind this restrictive statute was the legislature's distrust of the judiciary).

[29] *See* Linda Robayo, *The Glen Ridge Trial: New Jersey's Cue to Amend its Rape Shield Statute*, 19 SETON HALL LEGIS. J. 272, 297 n.161 (1994) (stating that the goal of these statutes is to eliminate any evidence that does not specifically comport with the two exceptions set out in the statutes).

[30] *See* MICH. COMP. LAWS ANN. § 750.520j (West 1991).

[31] *See* MICH. COMP. LAWS ANN. § 750.520j (1)(a) and (1)(b) (West 1991).

[32] *Id.*

ordering the introduction of relevant sexual conduct evidence."[33] Although the statutes go a long way in attempting to protect a rape victim, they also deny, in many cases, a defendant's Sixth Amendment right to confront all witnesses against him.[34] If a court does not wish to circumvent the statute through its discretionary powers, it will, find the statute unconstitutional as applied to a particular factual setting, thus allowing such evidence.[35]

Considering that roughly half of the jurisdictions in this country have enacted some variant under the Michigan model, it is important to examine some of the added exceptions that certain states have adopted to try to reduce the rigidity of the prohibition of admitting evidence of a victim's past sexual conduct.[36] All states following this model allow evidence of prior sexual conduct between the defendant and the victim.[37]

Twenty-two jurisdictions allow a defendant to introduce evidence of sexual conduct between the victim and other individuals to prove that the source of semen or other physical injury was not the defendant.[38] In states that do not allow any evidence of sexual conduct,

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[33] Galvin, *supra* note 17, at 773. For a discussion of cases applying the Michigan approach and analysis of how the judiciary has circumvented the statutes see *infra* Part IV.B.

[34] U.S. CONST. amend VI. *But see* Michigan v. Lucas, 500 U.S. 145, 149 (1991) (holding that the Sixth Amendment's "right to present relevant testimony is not without limitation," and that a defendant has no right to introduce irrelevant evidence).

[35] Galvin, *supra* note 17, at 773-74 (concluding that it is virtually impossible for the legislature to anticipate the "myriad" of facts that may arise in which evidence of past sexual conduct is relevant).

[36] *See id.* at 816-71 (discussing the different exceptions present in states following the Michigan approach and cases relevant to such exceptions).

[37] *See, e.g.*, FLA. STAT. ANN. § 794.022(2)-(3)(West 1995); GA. CODE ANN. § 24-2-3 (Michie 1995).

[38] These jurisdictions include: the U.S. Government, Connecticut, Florida, Hawaii, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New York, North Carolina, Ohio, South Carolina, Tennessee, Vermont, Virginia and Wisconsin. *See* Galvin, *supra* note 17, at 818-19 (stating that this evidence is only relevant where the defendant denies engaging in the sexual act in question). These jurisdictions do not all necessarily follow the Michigan approach, as the Federal approach also has specific exceptions to admissibility. *See infra* Part III.C.

except between the defendant and victim, courts take it upon themselves to admit evidence when the defendant claims he is not the source of the semen, therefore, the courts circumvent the legislature through their own rulings.[39] However, it is necessary for courts to have such discretionary power; otherwise defendants would not be given due process and the statute would not pass constitutional muster.[40]

Other exceptions that exist in various states include the admissibility of evidence showing a pattern of behavior tending to prove the alleged victim consented,[41] evidence of past false accusations of rape,[42] and evidence of conduct to rebut the state's proof.[43] These examples are just a few of the variations of exceptions found in state statutes which follow the Michigan model.[44]

For a court to determine whether evidence is admissible under any of the enumerated exceptions, it is almost always necessary to first review the sexual conduct evidence, and to weigh its probative value

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[39] *See, e.g.*, Shockley v. State, 585 S.W.2d 645, 649-50 (Tenn. Crim. App. 1978) (approving the trial court's admittance of evidence that the victim was pregnant to prove that she had intercourse during the relevant time period in spite of the fact that there were no Tennessee cases that directly addressed this issue. However, the appellate court held that the trial court erred when the defendant was prevented from introducing evidence that he was not the man who impregnated her. The appellate court stated the purpose of the statute was to prevent the defendant from besmirching the victim's reputation, but since the defendant was not doing this, the statute was not controlling).

[40] State v. Howard, 426 A.2d 457, 462 (N.H. 1981) (holding that a trial court, "while remaining mindful of the important policy considerations underlying the rape shield statute," must, upon motion, afford the defendant the opportunity to give an *in camera* offer of proof of why otherwise inadmissible evidence should be allowed. After such hearing, the trial court, in its discretion, may permit such evidence in the interest of protecting the defendant's rights to due process, and to confront the witness who accuses him).

[41] *See, e.g.*, FLA. STAT. ANN. § 794.022 (2)-(3) (West 1995).

[42] *See, e.g.*, WIS. STAT. ANN. §§ 971.31 (11), 972.11 (2) (West 1994).

[43] *See, e.g.*, MD. CODE ANN. art.27, § 461A (1992). *But see* Galvin, *supra* note 17, at 854 (stating that evidence of this type raises the question of whether the prosecution should be allowed to introduce evidence of a victim's past sexual conduct at all).

[44] *See* Galvin, *supra* note 17, at 819-71 (discussing all the other exceptions).

against its prejudicial value.[45] However, even if a court finds the probative value is greater than its prejudicial effect, according to all statutes following the Michigan model, a court is not allowed to introduce such evidence unless the statute specifically provides an exception for admission.[46] This is the commonality among all Michigan-type statutes. Regardless of the number of exceptions the statute contains, the trial court must follow these exceptions without using its discretion to allow the admission of any unexcepted evidence.[47] Although a court may find the proffered evidence relevant given the circumstances of the case, when courts allow unexcepted evidence to be presented at trial they are going beyond their authority.[48] This is the flaw in the Michigan model.[49]

B. The New Jersey Approach[50]

The New Jersey approach has the opposite problem.[51] In states

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[45] *Id.* at 872.

[46] *Id.*

[47] *Id.* at 873.

[48] *See infra* Part IV.B.

[49] *See* Galvin, *supra* note 17, at 873 (stating that instead of finding the statutes unconstitutional,courts will admit this evidence on a case-by-case basis, thus undermining the legislative intent); *see also* J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 560 (1980).

[50] The jurisdictions that follow the New Jersey approach include: Alaska, Arkansas, Idaho, Kansas, New Mexico, Rhode Island, South Dakota and Wyoming. *See generally* Galvin, *supra* note 17. As mentioned above, this is the category Professor Galvin referred to as the Texas approach, however Texas has since amended its statute and is listed under the Federal approach. *See* TEX. R. CRIM. EVID. 412 (1996). When this Note refers to the New Jersey approach it is synonymous to what Professor Galvin would have labeled the Texas approach.

[51] Galvin, *supra* note 17, at 774 (referring to the New Jersey approach as having the opposite defect as the Michigan approach); *see also* Robayo, *supra* note 29, at 302 n.191 (stating that judges in jurisdictions that follow the New Jersey approach have the freedom to determine what is admissible).

following this model, the trial judge has complete discretion on the issue of whether to admit evidence of the victim's past sexual conduct.[52] The discretion the trial judge uses is the traditional balancing test of whether the evidence's probative value outweighs its prejudicial effect.[53] If the probative value prevails, the evidence is admissible.[54] This approach does not suffer the same constitutional attacks as does the Michigan approach because discretion is given solely to the trial judge on a case-by-case basis.[55] Under the New Jersey-type statute, if a defendant wishes to introduce evidence of a victim's past sexual behavior, he must inform the court, and the relevance of the evidence will be reviewed through an *in camera* hearing, after which time the trial judge will frame the limits of the questions that will be allowed.[56] If the judge rules that certain questions are inappropriate, these inquiries may not be raised during the trial and the victim will be spared the humiliation of public disclosure of her sex life.[57] This amount of judicial discretion, without any guidelines on what evidence is relevant, does not serve the intentions of rape shield legislation—it does not protect the victim any more than she would have been prior to the passing of rape shield legislation.[58]

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[52] Robayo, *supra* note 29, at 302.

[53] *See* FED. R. EVID. 403 (West 1996).

[54] *See* N.J. STAT. ANN. § 2A:84-32.1 (West 1994).

[55] Robayo, *supra* note 29, at 302.

[56] *See* N.J. STAT. ANN. § 2A:84-32.1 (West 1994).

[57] Galvin, *supra* note 17, at 883 (stating that the dangers of giving the trial court such unfettered discretion always leaves open the possibility that this discretion will be abused).

[58] Robayo, *supra* note 29, at 302 (stating that the victim's protection from an intrusion into her sex life under the New Jersey statute is solely at the discretion of the trial judge).

C. The Federal Approach[59]

The Federal approach is a hybrid of both the under-inclusive Michigan model and the over-inclusive New Jersey model.[60] The three features of this approach are: (1) a general prohibition of any evidence regarding a victim's past sexual conduct; (2) several exceptions allowing evidence considered relevant;[61] and (3) a "catch-all" provision authorizing the trial court to review any sexual behavior evidence for which there is no exception.[62] The states that follow the Federal approach vary slightly regarding the evidence for which they provide exceptions.[63] The "catch-all" provision excludes from the statute all evidence that is "constitutionally required to be omitted" or "relevant and admissible in the interest of justice."[64] The "catch-all" provision can potentially undermine the rest of the statute by allowing evidence of a

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[59] The jurisdictions following the Federal approach are: Connecticut, Hawaii, Illinois, Iowa, New Hampshire, New York, Oregon, Tennessee, Texas and the U.S. military. *See generally* Galvin, *supra* note 17.

[60] *See generally* Galvin, *supra* note 17, at 883.

[61] FED. R. EVID. 412 (b)(1)(A) and (b)(1)(B) reads:

> (1) In a criminal case, the following evidence is admissible . . . (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence; (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent . . . .

FRE 412 was amended in 1995. Fishman, *supra* note 2, at 719. The new version differs from its predecessor primarily in style. *Id.* The basic changes are that the rules now extend to civil cases and, also, the balancing test used by the judge to determine probative value was altered. *Id.*

[62] Galvin, *supra* note 17, at 883.

[63] *Id.* at 885.

[64] FED. R. EVID. 412 (b)(1)(C) (West 1996).

victim's past sexual conduct due to judicial bias.[65] Essentially, the "catch-all" provision of the statute gives judges as much discretion in admitting evidence as would a judge in a jurisdiction following the New Jersey approach.[66] For these reasons, although the language of the Federal rape shield statute appears to provide the victim with greater protection, the "catch-all" provision virtually eliminates the other provisions in the statute.

D. The California Approach[67]

The final approach to rape shield laws is the California approach. The uniqueness of this approach is that it divides past sexual history into two categories: 1) evidence that goes toward proving the defense of consent and, 2) evidence offered to attack the credibility of the accuser.[68] The California statute generally does not allow evidence of past sexual behavior evidence offered for the issue of consent, however, this evidence may be admitted to attack a victim's credibility.[69]

Critics of the California-style law argue that the statute is basically ineffective if a trial court rules the proffered evidence attacks

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[65] Robayo, *supra* note 29, at 299 (stating that this exception poses a great risk because Congress never defined what evidence should constitutionally be permitted); *see also* Galvin, *supra* note 17, at 886-87.

[66] *See* Galvin, *supra* note 17, at 887.

[67] The jurisdictions that follow the California approach include: Delaware, Mississippi, Nevada, North Dakota, Oklahoma and Washington. *See generally* Galvin, *supra* note 17.

[68] Galvin, *supra* note 17, at 775 (stating that the first category of evidence is substantive evidence and the other category is credibility evidence); *see also* Haxton, *supra* note 15, at 1226.

[69] *See* CAL. EVID. CODE §§ 782, 1103 (West 1995); *see also* Robayo, *supra* note 29, at 301-02 (stating that the defendant simply has to change the purpose for which he is using the evidence to make it admissible under the credibility section, where it would not have been admissible if used to show consent).

credibility rather than proves consent.[70] The statute does not do a sufficient job of distinguishing between the evidence that proves consent and that which proves credibility.[71] In essence, evidence that attacks credibility and evidence that proves consent are actually "functional equivalents."[72]

The fact that evidence tending to prove consent is essentially the same as that offered to attack credibility is apparent from the statutes following the California model. Some of these jurisdictions, although still following the California approach of separating evidence into consent and credibility, allow evidence which may prove consent while excluding evidence that would attack a victim's credibility.[73] Again, in order to make these statutes effective, legislatures following the California approach must amend their statutes to define evidence which they are willing to accept as that which tends to prove consent and that which tends to prove credibility. Otherwise, defendants can continue to claim that the evidence of the victim's past sexual history falls in the category for which their state has an exception.

IV. Challenges To Rape Shield Statutes

Rape shield statutes have been consistently upheld by the courts despite numerous claims that they violate a defendant's due process or equal protection rights and that they deny a defendant the right to cross-

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[70] Robayo, *supra* note 29, at 301 n.185.

[71] Galvin, *supra* note 17, at 894-95 (stating further that allowing evidence which attacks a victim's credibility apparently resurrects the common law notion allowing evidence of unchastity to prove a lack of credibility). Ironically, California was not one of the states at common law that adopted the notion that "promiscuity imports dishonesty" and that the drafters of the statute probably did not intend to change their common law rule. *Id.* at 895.

[72] *Id.* at 775 (stating that "[e]vidence that establishes consent by the complainant will simultaneously impeach her credibility, and evidence that impeaches her credibility will raise the likelihood of consent").

[73] *See, e.g.*, WASH. REV. CODE ANN. § 9A.44.020 (West 1988); NEV. REV. STAT. ANN. §§ 48.069, 50.090 (Michie 1993).

examine and confront his accusers.[74] No rape shield statute has been found unconstitutional on its face, although there have been cases where courts have held that the statute as applied to the particular facts of a case was unconstitutional.[75] When a legislature predetermines that a category of evidence is irrelevant and prejudicial, it may prevent a defendant from cross-examining a complainant on relevant evidence.[76] Judicial protection of rape victims through broad interpretations of the state rape shield laws unfairly victimizes the defendant by denying him his constitutional rights.[77]

A. Supreme Court Decisions on Rape Shield Laws

On two occasions, challenges to rape shield laws have been heard by the United States Supreme Court.[78] In *Michigan v. Lucas,*[79] the defendant did not give the required notice of his intent to introduce evidence of the alleged victim's past sexual relations with him.[80] The trial court ruled this evidence was inadmissible.[81] The Michigan Court of Appeals reversed the decision and adopted a per se rule that "preclusion of evidence of a rape victim's prior sexual relationship with a criminal defendant violates the Sixth Amendment."[82] The United

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[74] Fishman, *supra* note 2, at 722.

[75] For a discussion of cases challenging rape shield statutes see *infra* Part IV. *But see* State v. Herndon, 426 N.W.2d 347 (Wis. Ct. App. 1988) (stating that if a statute were to absolutely prohibit evidence of a complainant's past sexual history it would violate a defendant's Sixth Amendment rights).

[76] Simmons, *supra* note 21, at 1594.

[77] *See* Fisher, *supra* note 9, at 835 (explaining this victimization occurs when a court bars impeachment evidence under the state's rape shield statute).

[78] Olden v. Kentucky, 488 U.S. 227 (1988); Michigan v. Lucas, 500 U.S. 145 (1991).

[79] 500 U.S. 145 (1991).

[80] *Id.*

[81] *Id.*

[82] *Lucas,* 500 U.S. at 146.

States Supreme Court reversed,[83] holding that the notice and hearing requirement of the statute[84] served a legitimate state interest and failure to comply justified preclusion. However, the Court concluded that a per se rule declaring the notice and hearing requirement unconstitutional was error.[85] Thus, the rape shield statute in issue was held constitutional.

The other Supreme Court decision came in *Olden v. Kentucky*.[86] In *Olden*, the defendant, an African-American male, wished to introduce evidence to show the alleged victim consented to intercourse and had a motive to fabricate the charges.[87] The trial court did not allow this evidence believing it would be too prejudicial.[88] The Supreme Court found that the trial court abused its discretion by excluding testimony which showed a motive to lie[89] and reversed the decision of the lower court and the Kentucky Court of Appeals.[90] This decision is consistent with the Michigan approach because if the evidence is not specifically

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[83] *Id.*

[84] *See* MICH. COMP. LAWS ANN. § 750.520j (West 1991) (requiring that the defendant file written notice if he wishes to introduce evidence of a victim's past sexual conduct within ten days after arraignment).

[85] *Lucas*, 500 U.S. at 153. On remand, the Michigan Court of Appeals held it was necessary to determine whether the exclusion of evidence was proper, and if the trial court concluded the excluded evidence was necessary, a new trial should be granted. Michigan v. Lucas, 484 N.W. 2d 685 (Mich. Ct. App. 1992).

[86] 488 U.S. 227 (1988). Kentucky's rape shield law follows the Michigan approach. *See supra* note 27.

[87] *Olden*, 488 U.S. at 228. Specifically, the defendant wanted to introduce evidence that the victim and a man, Russel, who testified at trial to partially corroborate the victim's story that she got out of a car after being raped, were lovers and the reason she fabricated the story was to keep Russel from finding out she had cheated on him. *Id.* Russel was a black male and the trial court excluded this evidence because showing that the victim was co-habitating with a black man would be highly prejudicial. *Id.* at 230.

[88] *Id.* at 227.

[89] The trial court did not prohibit the proffered evidence due to its sexual nature but rather because of potential biracial prejudice. *Id.* Therefore, the Supreme Court's holding was not truly based on the rape shield law. *See* Fishman, *supra* note 2, at 753 (stating that the result no doubt would have been the same had the Court ruled on the sexual nature of the evidence).

[90] *Olden*, 488 U.S. at 233.

precluded by the rape shield statute, it should be admitted, thus supporting the legislative intent to take power away from the judiciary.[91]

B. Challenges to the Michigan Approach at the State Court Level

The Michigan Supreme Court has consistently upheld the constitutionality of their state's rape shield law.[92] Michigan's statute, like the twenty-five states that follow it, is the most restrictive of all the rape shield statutes.[93] Therefore, although the statute has been ruled constitutional on its face, there may be instances where the facts of a particular case make the law unconstitutional as applied because it infringes upon a defendant's rights.[94]

In *People v. Arenda,*[95] the Michigan Supreme Court stated "the right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation and helps assure the 'accuracy of truth determining process."[96] However, the Court went on to state that "the right to confront and cross-examine is not without limits. It does not include a right to cross-examine on irrelevant issues. It may bow to accommodate other legitimate interests

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[91] See *infra* Part IV.B. discussing the intent behind the Michigan approach.

[92] *See* People v. Arenda, 330 N.W.2d 814 (Mich. 1982); People v. Williams, 330 N.W.2d 823 (Mich. 1982).

[93] *See* MICH. COMP. LAWS ANN. § 750.520j (West 1991).

[94] *See* People v. Hackett, 365 N.W.2d 120, 124 (Mich. 1985) (explaining that in certain limited situations, evidence of a rape complainant's prior sexual conduct may be relevant and its admission may be required to preserve a defendant's constitutional right to confrontation).

[95] 330 N.W. 2d 814 (Mich. 1982). The defendant was convicted on three counts of criminal sexual conduct involving an eight-year-old male victim. He wished to introduce evidence that the victim had past sexual relations with others in order to explain his ability to accurately depict the sexual acts that allegedly occurred. *Id.* at 815.

[96] *Id.* at 815 (quoting Chambers v. Mississippi, 410 U.S. 284 (1973)).

in the criminal trial process."[97]

In Court ruled that the statute was facially valid and therefore reinstated the defendant's conviction.[98] The *Arenda* Court found that evidence of a victim's past sexual conduct is of minimal relevance in most cases, and therefore found the defendant's right of confrontation should not be violated.[99] Although ruling the statute was constitutionally valid on its face, the Court left open the idea that certain facts, in operation with the statute, could violate a defendant's rights. The Court stated "if such a set of facts arises as to place in question the constitutional application of the rape shield law, it can be addressed."[100]

In *People v. Hackett,*[101] the Court explained its decision in *Arenda*: "[b]y enacting a general exclusionary rule, the Legislature recognized that in the vast majority of cases, evidence of a rape victim's prior sexual conduct with others, and sexual reputation, when offered to prove that the conduct at issue was consensual or for general impeachment, is inadmissible."[102] In both these scenarios, a victim's past sexual conduct is inadmissible.[103]

The courts of other states which follow the Michigan approach have also ruled on the constitutionality of rape shield statutes in operation. The Ohio Supreme Court, in a trilogy of cases, determined the constitutionality of Ohio's rape shield law. In *State v. Williams,*[104]

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[97] *Id.* at 816.

[98] *Id.*

[99] *Id.* at 817.

[100] *Arenda*, 330 N.W.2d at 818.

[101] 365 N.W.2d 120 (Mich. 1975).

[102] *Hackett*, 365 N.W.2d at 124 (stating that the reason for prohibiting evidence tending to prove consent is because it is circumstantial evidence of conduct, and that evidence of prior sexual conduct is a collateral matter bearing on credibility which may be denied).

[103] For example, the Court stated this evidence might be relevant to show prior false accusations or motive for the victim to lie. *Id.* at 124-25.

[104] 487 N.E.2d 560 (Ohio 1986). In *Williams*, the defendant wished to introduce evidence that the victim was a prostitute and that he was her pimp in order to prove she fabricated the rape charge to get even with him for stealing money from her. *Id.* The Ohio

the Court employed a balancing test to determine whether their state statute was constitutional.[105] The Court sought to balance the state's interest which the statute was designed to protect, against the probative value of the excluded evidence.[106] In *State v. Gardner,*[107] the Ohio Supreme Court described the state's interest as protecting the victim from undue harassment.[108] In addition, the statute was intended to aid the Court in the truth finding process by excluding evidence that is unduly inflammatory.[109] In *Gardner*, the defendant sought to introduce evidence that the victim, a prostitute, routinely solicited sex from third parties.[110] The Court ruled that the state's interest in excluding evidence that the victim was a prostitute outweighed what little, if any, probative value it may have had.[111]

In *State v. Ferguson,*[112] the defendant sought to introduce evidence that the victim had intercourse two days prior to the alleged incident, where the victim claimed it was at least ten days earlier.[113] The Court ruled this evidence was inadmissible because the only relevant fact was whether the defendant and victim had prior sexual relations, not when victim had her last sexual encounter. The evidence would have been relevant in order to prove the defendant was not the source of the

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Supreme Court reversed the decision of the appeals court which held the evidence was inadmissible. *Id.* The Court distinguished this case from others because the defendant offered the evidence after the victim testified she was a lesbian and the evidence would impeach her statements and go directly to the matter at issue, namely consent. *Id.*

[105] *Id.*

[106] *Id.*

[107] 391 N.E.2d 337 (Ohio 1979).

[108] *Id.* at 340.

[109] *Id.*

[110] *Id.* at 340-41.

[111] *Id.* at 341; *see also* Roberts v. State, 510 So. 2d 885, 892 (Fla. 1987) (holding that evidence of prostitution is excluded by Florida's rape shield law). *Cf.* N.Y. CRIM. PROC. LAW § 60.42 (b) (McKinney 1997) (allowing evidence of a complainant's arrests for prostitution).

[112] 450 N.E. 2d 265 (Ohio 1983).

[113] *Id.* at 269.

semen, however, the Court found this was not at issue.[114] The Court found the only reason the defense wanted to introduce this evidence was to impeach the credibility of the victim.[115]

The Maryland Court of Appeals sustained the Maryland rape shield law in *Thomas v. State*.[116] In *Thomas*, the defendant, on cross-examination, wished to inquire whether the alleged victim was a virgin and whether she used birth control as evidence of his contention that she consented to the incident in question.[117] He also wanted to introduce evidence that the alleged victim "liked sex with black men."[118] The Court upheld the trial court's decision, finding this inquiry to be irrelevant because "the victim's prior sexual acts with persons other than the defendant is not relevant to prove that she consented to intercourse with the defendant."[119] In upholding the statute's constitutionality, the Court stated that "a defendant has no constitutional right to present irrelevant evidence" and that "where the probative value of the evidence is outweighed by the State's interest," there is no violation of the defendant's rights.[120]

Another example where a defendant was denied his right to cross-examine was in *People v. Sandoval*.[121] In *Sandoval*, the defendant was on trial for the sexual assault of his former girlfriend.[122] Defense counsel wished to show that the victim had anal sex with other men in the past in order to show she would have consented to anal sex with the defendant.[123] The trial court did not allow this testimony, the Illinois

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[114] *Id.*

[115] *Id.*

[116] 483 A.2d 6 (Md. 1984).

[117] *Id.* at 17-18.

[118] *Id.* at 18.

[119] *Id.* The defendant in this case was also on trial for double murder and the rape shield law was only one of many appeals before the court. *Id.* at 10.

[120] *Id.* at 18-19.

[121] 552 N.E.2d 726 (Ill. 1991).

[122] *Id.* at 727.

[123] *Id.* at 728.

Appellate Court reversed[124] and the Supreme Court of Illinois reinstated the guilty verdict stating: "the question before the jury was whether the defendant forced the complainant to have anal and oral sex against her will" and that any other matter was collateral and not admissible.[125] The Court also found that the cross-examination of the defendant was in violation of the rape shield law but at the time of the questioning the defendant did not object.[126] If a court allows this practice to continue, a defendant can avoid application of the statute by not objecting to a prosecution question and then impeaching the victim.[127] In other words, if a prosecutor asks a question about a victim's past sexual history which is prohibited by a rape shield statute and the defendant does not object, he is barred from introducing evidence to rebut the answer.

Several cases have found that particular circumstances require an inquiry into a complainant's past sexual history in order to protect a defendant's constitutional rights. In *Lewis v. State,*[128] the Supreme Court of Florida reversed the conviction of a defendant who was denied the right to introduce evidence showing the alleged victim's propensity to lie about the allegations of rape.[129] The defense wished to proffer testimony showing that the victim was sexually active with her boyfriend, a fact which she lied to her mother about, and that the victim was concerned that her gynecological exam would reveal this fact to her mother.[130] The Court held that "exclusion of the proffered cross-examination with such strong potential to demonstrate the falsity of the alleged victim's accusations cannot be justified by the public policy furthered by the

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[124] 178 Ill. App. 3d 669 (Ill. App. Ct. 1989).

[125] *Sandoval*, 552 N.E.2d at 742. The other matters the court referred to were whether the alleged victim had anal sex with other men besides the defendant. *Id.* at 741.

[126] *Id.* at 728.

[127] *Id.* at 729 (noting that any prejudice suffered by the defendant as a result of the complainant saying she never had anal sex was remedied by the trial court's instruction to the jury to ignore this testimony).

[128] 591 So.2d 922 (Fla. 1991).

[129] *Id.* at 923.

[130] *Id.*

exclusion."[131]

In *Winfield v. Commonwealth,*[132] the defendant proffered evidence to show the alleged victim had a "pattern of past sexual conduct involving extortion of money by threats after acts of prostitution."[133] This evidence was not allowed by the trial court, but the Supreme Court of Virginia found this evidence was admissible to show that the victim had a distinct pattern of extortion following sexual conduct for money.[134] This evidence, though usually not permissible, is allowed if the behavior shows a pattern directly relating to the conduct of the victim as alleged by the defendant.[135] Under the motive to fabricate provision, the trial court must ascertain whether the evidence goes toward proving the defense's claim or if it is simply an attack on the character of the victim.[136]

When a legislature attempts to create such a rigid statute, as do states following the Michigan approach, there are bound to be flaws.[137] As the above cases show, there is a need to conduct inquiries on a case-by-case basis, as courts have been doing, in order to avoid violation of a defendant's constitutional rights. However, this is explicitly prohibited in all Michigan-type statutes.[138] Although the statute sets absolute guidelines, the courts of many states attempt to weaken the statute by requiring an *in camera* inspection to determine relevancy.[139] As written,

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[131] *Id.* at 926.

[132] 301 S.E.2d 15 (Va. 1983).

[133] *Id.* at 20.

[134] *Id.* at 21.

[135] *See* VA. CODE ANN. § 18.2-67.7(3)(B) (Michie 1996) (stating that "[n]othing contained in this section shall prohibit the accused from presenting evidence relevant to show the complaining witness had a motive to fabricate the charge against the accused").

[136] *See Winfield,* 301 S.E.2d at 21. *But see id.* (stating that the motive to fabricate provision should be narrowly construed and used in only limited circumstances)(Thompson, J., dissenting).

[137] Galvin, *supra* note 17, at 872.

[138] *See, e.g.*, MICH. COMP. LAWS ANN. § 750.520j (West 1991).

[139] *See* People v. Hackett, 365 N.W.2d 120 (Mich. 1975) (allowing an *in camera* inspection).

the Michigan model statute does not work because courts continuously abuse their power by allowing *in camera* hearings to see if evidence can be admitted, where the legislature has already decided that such evidence is not admissible.[140] This is what the Michigan approach sought to remove. The legislative intent was to remove any arbitrary or biased rulings by the judiciary.[141]

C. Challenges to the New Jersey Approach

Where the Michigan approach is extremely limited, if not theoretically absolute with regard to judicial discretion, states following the New Jersey approach give judges absolute discretion in determining the admissibility of a victim's past sexual conduct.[142] The sole factor in determining relevance is whether the prejudicial effect outweighs the probative value.[143] The only protection afforded the victim is an *in camera* inspection to protect public disclosure of irrelevant prejudicial evidence.[144]

In *Allen v. State,*[145] the Texas Court of Criminal Appeals determined the facial constitutionality of the Texas rape shield statute, as well as the statute's constitutionality as applied to the facts of the *Allen*.[146] The defendant wished to introduce evidence that the victim

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[140] *See* Galvin, *supra* note 17, at 874 (discussing a case where court permitted an *in camera* hearing).

[141] It is up to the courts to decide if a statute is to be held unconstitutional, however, it is beyond the court's power to give themselves discretion where they do not have any. *See generally* Galvin, *supra* note 17.

[142] Galvin, *supra* note 17, at 876 (stating that the Texas approach gives "untrammeled judicial discretion" to the judge).

[143] *See* N.J. STAT. ANN. § 2A:84A-32.1 (West 1994).

[144] Galvin, *supra* note 17, at 877.

[145] 700 S.W.2d 924 (Tex. Crim. App. 1985). This case was decided under the former Texas rape shield law which gave the judiciary full discretion, thus it is placed in this section of the Note.

[146] *Id.* at 932.

was not a virgin, through evidence of her past sexual conduct, and that her testimony that she was a virgin left a false impression with the jury.[147] The Court held the trial judge properly excluded the evidence. The Court found the Texas statute has two parts, the first being that the evidence must be relevant, and second, the evidence cannot be inflammatory or prejudicial.[148] The Court stated "whether she was or was not a virgin was not material to an issue in the case. Even if [it] was relevant . . . its inflammatory or prejudicial nature certainly outweighed its probative value."[149]

The decision in *Allen* clearly shows that in jurisdictions following this approach, full discretion is given to the judge and the balancing test used is no different than the standard rules of evidence.[150] Clearly, if the purposes of rape shield laws are to be achieved, there should be a more structured statute which reduces the discretion of the trial court.[151] A statute such as this allows far too much opportunity for judicial bias against both the victim and the defendant.[152]

Opinions interpreting this type of statute further illustrate that legislation has failed to provide the necessary guidelines to courts regarding what evidence should be relevant. *State v. Sheard*[153] exemplifies the difficulties surrounding these statutes. In *Sheard*, ten defendants were charged jointly with the rape of a fifteen-year-old

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[147] *Id.* at 926-27.

[148] *Id.* at 924; *see also* TEX. PENAL CODE ANN. § 22.065 (1985) (noting that the former Texas rape shield law was repealed on September 1, 1986).

[149] *Allen*, 700 S.W.2d at 930.

[150] *See* FED. R. EVID. 401-03. The only difference between the rape shield laws following the New Jersey model and these basic rules of evidence is that the rape shield law presumes evidence of past sexual conduct is irrelevant; State v. Parker, 730 P.2d 921, 926 (Idaho 1986) (Bakes, J., dissenting in part) (referring to the hearing the court holds outside the presence of the jury as "clearly a relevancy hearing").

[151] Galvin, *supra* note 17, at 883 (stating that an individual judge, not particularly sympathetic to a rape victim, could easily admit potentially humiliating evidence, in addition to the fact that the prosecution cannot appeal the judges ruling, makes this danger very real).

[152] *Id.*

[153] 870 S.W.2d 212 (Ark. 1994).

girl.[154] Several of the defendants sought to introduce evidence of sexual activities between the victim, Sheard and three of the other defendants which occurred several months before the alleged rape.[155] These defendants testified at an *in camera* evidentiary hearing that the victim had a continuous and ongoing sexual relationship with Sheard, her boyfriend, and several others, including some of the other defendants.[156] The trial court ruled that all of the evidence to which the defendants testified would be admissible at trial.[157]

On an interlocutory appeal brought by the State, the Supreme Court of Arkansas reversed the trial court's decision, stating that they "fail to see how [the victim's] prior sexual conduct, as related by the three defendants . . . bears on or relates to whether she consented to a group sex situation. . . ."[158] The Court further held that a victim's prior sexual relations with a single defendant was not relevant to a situation of alleged gang rape.[159]

The Arkansas rape shield statute grants trial courts great latitude in weighing proffered testimony and making determinations as to

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[154] *Id.* at 213 (stating that the charges were subsequently dismissed against two of the defendants).

[155] *Id.* at 213.

[156] *Sheard*, 870 S.W.2d at 213. Specifically, defendant Sheard testified that the other defendants were present in the house at one time or another while he was having consensual sex with the victim. *Id.* Sheard further testified that, on one occasion, the victim had sex with himself and defendant Turner on the same day. *Id.* Defendant Robinson testified that he and some of the other defendants looked under the door and saw defendant Sheard having consensual sex with the victim. *Id.* He also testified that he had seen the victim having consensual sex with defendant Turner. *Id.* Defendant Bryant testified that he also looked under the door while defendant Sheard and the victim were having consensual sex and that he never had sex with the victim before the date of the alleged rape. *Id.*

[157] *Sheard*, 870 S.W.2d at 213.

[158] *Id.* at 214 (stating that all of the past incidents were in private and even when the victim had sex with two of the defendants on the same day, each episode was in private).

[159] *Id.*

admissibility at trial.[160] The ruling of the trial court should not be reversed absent a showing that the trial court abused its discretion in deeming the testimony admissible.[161] An appellate dissent noted that there was no showing that the trial court abused its discretion or did not properly weigh the probative value of the testimony against its prejudicial effect.[162] Under the statute, the dissent argued, the trial court was correct in finding that the probative value outweighed its prejudicial effect.[163] If the legislature desires the trial courts do more, it must draft a statute which explicitly states what is relevant and admissible at trial.[164] The court in this case focused on whether the past sexual conduct between the victim and the defendants was admissible. Even under the rigid Michigan approach, this type of evidence is always relevant and admissible if the probative value outweighs the prejudicial effect.[165] Theoretically, the New Jersey approach should provide greater protection for the defendant and less for the victim than the Michigan approach, but the unintended reality is that the reverse can occur, which is illustrated by the *Sheard* case.

State v. Parker[166] is another case where an appellate court reversed the finding of a trial court.[167] In *Parker*, the defendant sought to introduce evidence of the fourteen-year-old victim's pregnancy at the time of the alleged rape in order to establish a motive for her to fabricate

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[160] *Id.* at 216 (Newburn, J., dissenting); *see also* ARK. CODE ANN. §16-42-101 (Michie 1993); Marion v. Arkansas, 590 S.W.2d 288 (Ark. 1979) (summarizing the Arkansas rape shield law).

[161] *Sheard*, 870 S.W.2d at 216 (Newburn, J., dissenting).

[162] *Id.* (stating that "[t]here is no clear right or wrong in such a decision").

[163] *See id.* (stating that although the alleged incidents are "abhorrent . . . it must be remembered that at this point they are only allegations").

[164] *See id.* at 217 (supporting the legislature's purpose for the rape shield law and stating that under the statute, the decision of a trial judge should not be disturbed unless it is clearly erroneous and the "threshold is high").

[165] *See supra* Part III.A.

[166] 730 P.2d 921 (Idaho 1986).

[167] *Id.* at 924.

the rape.[168] The trial court did not allow this evidence because it gave rise to an inference about the victim's past sexual conduct. The Supreme Court of Idaho reversed stating that "where the defense is consent, evidence of prior unchastity may be relevant and material."[169] Regardless of whether one agrees with the Court's holding, if a legislature enacts a New Jersey-type statute, a trial court's determination as to the admissibility of past sexual conduct should not be reversed unless the objecting party shows that the trial court's decision evinces an abuse of its discretion.[170] In *Parker,* there was no showing that the trial court abused its discretion. The Court merely relied on its belief that where consent is in issue, evidence of a victim's past sexual conduct is admissible because her credibility is in issue.[171]

Both the *Sheard* and *Parker* cases illustrate the problems inherent in the New Jersey-type statutes.[172] In both cases the appellate courts reversed their respective lower courts without first finding that their decisions were predicated on an abuse of discretion.[173] These rulings show that in states following the New Jersey approach, it is necessary for the legislature to reform their rape shield statutes to provide trial courts with the guidance they need. Failure on the part of a legislature to reform the rape shield laws will perpetuate the arbitrary rulings of the trial courts and the unfounded reversals by their respective appellate courts.

D. Challenges to the Federal Approach

The Federal approach combines the rigid Michigan model with

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[168] *Id.*

[169] *Id.* at 925.

[170] *See id.* at 926 (Bakes, J., dissenting).

[171] *Parker*, 730 P.2d at 925.

[172] For a full discussion of the New Jersey approach see *supra* Part III.B.

[173] *Id.*

the amorphous New Jersey model.[174] There is a "catch-all" provision included in Federal approach statutes that provides the trial court with discretion to allow evidence that is not excepted explicitly by the statute.[175]

In *State v. Christiano*,[176] the defendant was convicted of sexual assault and appealed on the grounds that his Sixth Amendment rights were violated when he was not allowed to introduce evidence of the victim's past sexual conduct, which he claimed was critical to his defense of consent.[177] The Connecticut Supreme Court found that the rape shield law was enacted to prohibit exactly what the defendant wished to introduce.[178] The Court further stated that evidence of such a prejudicial nature is not admissible and it does not violate the Constitution to prohibit it.[179]

In *State v. Alvey*,[180] the defendant wished to introduce evidence that the victim had falsely claimed she was raped in the past.[181] The trial court did not admit the evidence and the Iowa Supreme Court found that they did not abuse their discretion.[182]

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[174] For a full discussion of the Federal approach see *supra* Part III.C.

[175] This is essentially what the courts following the Michigan approach have done, though they are supposedly prohibited from doing so. *See supra* Part III.B.

[176] 637 A.2d 382 (Conn. 1994).

[177] *Id.* at 387. Specifically, the defendant wished to introduce that the victim, his foster child, consented to sexual relations with her foster brothers, sexual abuse by her natural brothers, and various sexual encounters at the workplace. *Id.* at 387-88.

[178] *Id.* at 388-89.

[179] *Id.* at 389 (citing Chambers v. Mississippi, 410 U.S. 284 (1973)) (holding that "the determination of whether the state's interest in excluding evidence must yield to those interests of the defendant is determined by the facts and circumstances of the particular case"). In addition, the Court stated that the defendant did not raise the defense of consent by explicitly denying having sex with the alleged victim. *Christiano*, 637 A.2d at 388.

[180] 458 N.W. 2d 850 (Iowa 1990).

[181] *Id.* at 852.

[182] *Id.* at 852-53 (stating their reasoning was due in part to their doubt of the truthfulness of the proffered evidence. The Court stated that ordinary truthfulness of evidence is a matter for the fact-finder but claimed the quality of evidence in light of the rape shield statute is relevant to keeping the focus off the victim.).

"The *Alvey* Court exploited the rights of the defendant . . . by categorizing evidence of a prior false rape accusation as irrelevant."[183] The evidence of a false rape charge should be admitted because it directly relates to the complainant's credibility and does not bring out nor focus on her unchaste conduct.[184] The *Alvey* case exemplifies the danger in leaving discretion, without sufficient guidance, to the trial judge.[185] Without guidance the results will be inconsistent and the defendant will be victimized when he is not permitted to introduce potentially relevant evidence which the jury should weigh in their evaluation.

Although the Federal approach employs both the Michigan and New Jersey models, it also adopted the problems inherent in each.[186] The "catch-all" provision gives no guidelines at all, essentially making the statute like the New Jersey model.[187] In addition, the absolute prohibition on reputation testimony, as in the Michigan model, may deprive the finder of fact from hearing relevant evidence.[188]

E. Challenges to the California Approach

The California approach is unique in that it separates sexual conduct evidence into two parts.[189] Evidence offered to prove consent is inadmissible unless the evidence is of prior sexual conduct between the victim and the defendant.[190] Evidence offered to attack the

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[183] Fisher, *supra* note 9, at 836.

[184] *Id.* at 846.

[185] *See generally* Fisher, *supra* note 9 (discussing the problems inherent in Iowa's rape shield law which follows the Federal approach).

[186] Galvin, *supra* note 17, at 893 (stating that although the legislature included a "catch-all" provision in the law, they gave no guidance as to when a court should rely on it).

[187] *Id.*

[188] *Id.*

[189] For a full discussion of the California approach see *supra* Part III.D.

[190] *See* CAL. EVID. CODE §§ 782, 1103 (b) (West 1995).

credibility of the victim is subject to an *in camera* inspection and is admissible within the discretion of the trial court.[191]

In *Johnson v. State,*[192] the twelve-year-old victim claimed that the defendant entered her home, grabbed her, placed his hand on her vagina, and eventually strangled her until she passed out.[193] The defendant contended that he should have been allowed to ask the victim whether she ever had sex to prove that the seminal fluid found in her was not from him.[194] The Delaware Supreme Court said that this question was too open-ended and all it would have shown was that the victim had sex at an unknown time and not whether it was in the proximity of the attack.[195] The Court further stated that the admissibility of evidence is solely within the discretion of the trial judge.[196]

The confusion surrounding the California approach is clear in *People v. Varona.*[197] In *Varona*, the defendant raised the defense of consent claiming the encounter was in exchange for money.[198] He sought to introduce evidence that the alleged victim had prior convictions for prostitution.[199] The trial court did not admit this evidence and the California Court of Appeals reversed the decision stating it was relevant to the victim's credibility.[200]

The California Court of Appeals was wrong in admitting the evidence of prostitution. It was not admitted to prove that prostitutes have a lack of credibility, but rather to prove consent.[201] To admit the

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[191] *Id.*

[192] 550 A.2d 903 (Del. 1988).

[193] *Id.* at 905.

[194] *Id.* at 906.

[195] *Id.*

[196] *Id.* at 906-07 (stating that this evidence only would have misled the jury and created confusion).

[197] 143 Cal. App.3d 566 (Cal. Ct. App. 1983).

[198] *Id.*

[199] *Id.* at 569.

[200] *See also* People v. Randle, 181 Cal. Rptr. 746 (1982) (allowing the defendant to admit evidence of the victim's prostitution).

[201] *See* Galvin, *supra* note 17, at 898.

evidence for this purpose is prohibited by California-type rape shield statutes.[202]

The above cases show the fine line between evidence proving consent and evidence impeaching credibility. This is the flaw in the California approach. The ambiguity and discretion given to the trial judge, without specific guidelines, is unfair and risks violating a defendant's constitutional rights, as well as undermining the legislative intent of the statute—protecting the victim.[203]

V. The Issue of Consent and Abuse of Judicial Discretion

Proving lack of consent in rape cases has always been problematic.[204] In "date rape" situations, where the victim and the defendant know each other, court rulings on the admissibility of evidence show the dangers of a lack of legislative guidance as to what evidence can be admitted.[205] Most courts allow evidence of prior sexual encounters between the defendant and the victim, however this evidence may not be relevant in all cases, especially if the last encounter was not close in time to the alleged incident.[206] In addition, where the victim and defendant are acquaintances but never had any sexual relationship, evidence of a victim's sexual history may be relevant under certain factual situations. As a result, rulings in this area of law appear arbitrary.

One case that exemplifies the fact that rape shield laws do not adequately protect the victim is *Commonwealth v. Berkowitz*.[207] In

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[202] *Id.* at 899.

[203] *Id.* at 894 (discussing the problems inherent in the California model and other states following that approach).

[204] *See generally* Barbara Fromm, *Sexual Battery: Mixed Signal Legislation Reveals the Need for Further Reform*, 18 FLA. ST. U. L. REV. 579 (1991).

[205] *Id.* at 601 n.161.

[206] *Id.*

[207] 609 A.2d 1338 (Pa. Super. Ct. 1992).

Berkowitz, the Pennsylvania Superior Court found that the defendant should have been allowed to introduce evidence in support of his theory that the prior sexual history of the victim may have influenced her decision to fabricate rape charges.[208] In *Berkowitz*, the victim went to visit her boyfriend who was not at home, and having nothing to do, went to the room of the defendant, whom the victim knew.[209] According to the victim, the defendant asked for a backrub and the victim declined saying she did not trust him.[210] After talking for a while longer, the defendant sat next to the victim and "kind of pushed her back with his body."[211] The victim stated she had to leave at which point the defendant lifted her bra and began fondling her.[212] The victim again said "no."[213] The victim did not physically resist so the defendant unzipped his pants and attempted to place his penis in her mouth, at which point the victim again said she had to leave.[214] The defendant placed the victim on the bed in a way described by the victim as being somewhere between romantic and forceful, he removed her pants, and eventually had sex with her until he ejaculated.[215] He then stated that they got carried away to which the victim responded that "he" got carried away.[216] The victim left and told her boyfriend that she had been raped.[217]

The defendant wished to introduce evidence that the victim was having problems with her boyfriend.[218] The defendant alleged that these

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[208] *Id.* at 1340-41.
[209] *Id.* at 1339.
[210] *Id.* at 1340.
[211] *Id.*
[212] *Berkowitz*, 609 A.2d at 1340.
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Berkowitz*, 609 A.2d at 1340.
[218] *Id.* at 1349.

problems were due to the victim's continuous infidelities.[219] The defendant contended that evidence of these infidelities should be admissible because the victim may have fabricated the rape to avoid further arguments with her boyfriend.[220]

The Court held that the Pennsylvania rape shield law[221] cannot preclude evidence supporting the defense claim of consent.[222] In holding that the evidence was relevant, the Court found the proffered evidence was the only way to show the accusations were fabricated and necessary to protect the defendant's rights.[223]

In so holding, the Court clearly overstepped its discretion and disregarded the legislative intent of the statute.[224] The Pennsylvania statute and others like it leave no room for judicial discretion.[225] The issue here is not whether the proffered evidence is relevant. The Pennsylvania legislature specifically said it was not relevant through the structure of their rape shield statute. If a court is going to use its

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[219] *Id.*

[220] *Id.*

[221] *See* 18 PA. CONS. STAT. ANN. § 3104 (West 1983). This statute can be categorized as a Michigan-type statute. *See generally* Galvin, supra note 17.

[222] *Berkowitz*, 609 A.2d at 1352.

[223] *Id.* at 1351. The Court further stated that the defendant should not be allowed unlimited questioning and any prejudicial effect of the questioning will be reduced by a limiting instruction by the judge. *Id.* at 1352. *But see* Cheryl Siskin, *No. The "Resistance Not Required" Statute and "Rape Shield Law" May Not Be Enough*—Commonwealth v. Berkowitz, 609 A.2d 1338, 66 TEMP. L. REV. 531, 533 (1992) (stating that the Court misapplied the law by allowing the focus to shift from the defendant's forceful conduct to the victim's reputation for consensual intercourse which is clearly in opposition to the legislative intent of enacting the law).

[224] Siskin, *supra* note 223, at 548-49 (stating that the Court's application of the rape shield law has setback the progress made by it's general prohibition of evidence).

[225] *See* 18 PA. CONS. STAT. ANN.§ 3104 (West 1983) (allowing evidence of a victim's past sexual history only if it is between the defendant and the victim and is offered for the issue of consent).

discretion regardless of the statute,[226] the legislature should respond with rape shield legislation that will set explicit guidelines so as to better protect victims from unnecessary harassment, as was originally intended, as well as eliminate the risk of violating a defendant's constitutional rights.[227]

VI. The Supreme Court's Failure to Respond

Although the U.S. Supreme Court has twice touched on issues concerning rape shield statutes,[228] it has never ruled on the facial validity of these statutes.[229] In the first case, *Olden v. Kentucky*,[230] the Court addressed a lower court's prejudice due to the biracial nature of the evidence involved—the sexual nature of the evidence was only secondary.[231] In the other case, *Michigan v. Lucas*,[232] the Court ruled on the procedural aspects of Michigan's rape shield law, not the substance of the law.[233] Due to the inherent constitutional issue surrounding rape shield laws, it is time for the Supreme Court to rule on their validity and

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[226] *See* Galvin, *supra* note 17, at 873 (stating that appellate courts in over half the states following the Michigan approach have allowed defendants to admit evidence of conduct explicitly prohibited by their respective statutes).

[227] *See generally id.* at 903-05 (recommending a statute that will cure the defects inherent in rape shield laws); *see also* Fisher, *supra* note 9, at 869-70.

[228] *See supra* Part IV.A.

[229] Lisa M. Dillman, Stephens v. Miller: *Restoration of the Defendant's Sixth Amendment Rights*, 28 IND. L. REV. 97, 103 (1994) (discussing the issues before the Court in Michigan v. Lucas); *see also* Fishman, *supra* note 2, at 753 (discussing the Court's holding in Olden v. Kentucky).

[230] 488 U.S. 227 (1988).

[231] Fishman, *supra* note 2, at 753 (stating that *Olden* was not a rape shield case per se, but the Court's holding would have been the same if it had been decided on rape shield grounds).

[232] 500 U.S. 145 (1991).

[233] Dillman, *supra* note 229, at 103 (stating that the issue in *Lucas* was the notice and hearing requirement embodied in the statute and the Court did not have to address the intricate constitutional aspects of Michigan's statute).

guide legislatures on what evidence cannot be constitutionally excluded and assist lower courts by establishing a balancing test to use in weighing the relevance of a complainant's past sexual conduct with her right to privacy.

The Supreme Court had this opportunity in *Stephens v. Miller*.[234] The controversial issues present in *Stephens* were apparent from the Seventh Circuit's en banc 6-5 plurality opinion.[235] In *Stephens*, the Seventh Circuit issued seven different opinions,[236] each presenting a different opinion of the law and the appropriate balancing test.[237]

The facts of *Stevens* are as follows: after an evening of drinking, the defendant, Lonnie Stephens, went to the trailer home of an acquaintance, Melissa Wilburn.[238] The complainant testified at trial that she awoke to find Stephens standing in her doorway and that he sat down next to her and tried to kiss her.[239] She claimed that she called out to her sister and brother-in-law who were asleep in the next room.[240] Wilburn testified that Stephens then unfastened her bra, ripped a button from her shirt, and opened his pants.[241] At this point, Wilburn allegedly pushed the defendant off and ran to her sister's room.[242] The defendant left and went to the home of a friend and told him that he had been at a local store.[243]

Stephens testified to quite a different scenario at trial. He stated that Wilburn invited him in and "one thing led to another" and they had

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[234] 13 F.3d 998 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 57 (1994).

[235] John Lausch, Stephens v. Miller: *The Need to Shield Rape Victims, Defend Accused Offenders, and Define a Workable Constitutional Standard*, 90 NW. U. L. REV. 346, 348 (1995) (stating that "the constitutionality of applying a rape shield statute is a difficult, gut-wrenching, and controversial issue").

[236] *See Stephens*, 13 F.3d at 998.

[237] *Id.*

[238] *Id.* at 1000.

[239] *Id.*

[240] *Id.*

[241] *Stephens*, 13 F.3d at 1000.

[242] *Id.*

[243] *Id.* (noting that Stephens later repeated this same story to the police).

consensual sex.[244] The defendant was only allowed to testify that he then said "something" to the complainant that angered her and caused her to ask him to stop and leave her home.[245] The trial court found that Indiana's rape shield statute[246] prohibited the defendant from introducing the content of those remarks. In an offer of proof, Stephens stated that he and Wilburn were "doing it doggy fashion" and he said to the complainant "don't you like it like this? . . . Tim Hall said you did."[247] The lower court did not allow the jury to hear this and the defendant was found guilty of attempted rape.[248]

In his petition for habeas corpus to the Seventh Circuit, the defendant raised three issues.[249] The Court only discussed one of the issues and summarily dismissed the other two.[250] The Court did not review the facial validity of the rape shield law which had been upheld in a past decision.[251] However, the Court stated that the statute's constitutionality as applied remains subject to a case-by-case analysis.[252] The plurality opinion found that although the defendant had a constitutional right to testify, that right is not unlimited.[253] Moreover, the Court held that the restrictions imposed by the rape shield law cannot be arbitrary and disproportionate.[254] They concluded that the trial court

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[244] *Id.*

[245] *Id.* at 1001.

[246] IND. CODE ANN. § 35-37-4-4 (West 1994). This statute follows the Michigan approach.

[247] *Stephens*, 13 F.3d at 1000.

[248] *Id.* at 1000-01.

[249] Lausch, *supra* note 235, at 351.

[250] *Id.* at 352 (stating that Stephen's claim that the Court did not properly apply Indiana law and his claim that the evidence was part of the res gestae of the crime were summarily dismissed on the grounds that a federal habeas corpus petition does not allow for review of the application of state law. That decision is left for the state appellate courts, and the res gestae claim was rejected on the grounds that it had no place in federal law).

[251] *See* Moore v. Duckworth, 687 F.2d 1063 (7th Cir. 1982).

[252] *Stephens*, 13 F.3d at 1001.

[253] *Id.* at 1002.

[254] *Id.*; *see also* Rock v. Arkansas, 483 U.S. 44, 55 (1987).

correctly weighed the evidence and properly excluded Stephen's vulgar statements.[255]

The Court believed that allowing the defendant to testify that he said "something" to upset the complainant satisfied any constitutional requirements.[256] They stated that the jury heard both stories and could believe whichever story they chose.[257] However, one commentator pointed out that this would ordinarily be true, but due to the rape shield statute, the defendant was not permitted to give his full side of the story.[258] For the defendant to win he must introduce evidence that overcomes the victim's advantage, in addition to introducing evidence that would tip the scale in his favor.[259]

In his dissent, Justice Cummings stated that the rape shield statute is a valid determination that rape victims need to be protected but this must yield to another vital interest: the accused's right to present evidence in his favor.[260] The purpose of rape shield legislation was not to put one party ahead of another, however many courts appear to be interpreting the statutes as putting the victim before the defendant.[261]

The Supreme Court decided to leave the issues raised in *Stephens* and other rape shield cases unresolved.[262] Eventually, the Court will have to address the questions raised in the *Stephens* dissents, as well as other controversial rape shield cases. Once again the lack of guidance surrounding rape shield laws and the abuse of judicial discretion has infringed on a defendant's constitutional rights and it is

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[255] *Stephens*, 13 F.3d at 1002-03; *see* Lausch, *supra* note 235, at 355. "The plurality also hinted that Stephens' story was unbelievable." *Id.* "The Court found it significant that Stephens directed David Stone, the friend . . . to commit perjury." *Id.*

[256] *Id.* at 1002.

[257] *Id.* at 1003.

[258] *See* Dillman, *supra* note 229, at 109 (stating that the defendant and the complainant were not starting on equal ground while telling their respective stories).

[259] *Id.* (arguing that this initial inequality renders the statute unconstitutional).

[260] *Stephens*, 13 F.3d at 1010 (Cummings, J., dissenting).

[261] *See* Dillman, *supra* note 229, at 110 (stating that the reason rape victims are put ahead of defendants is to make up for the suffering the victims endured in the past).

[262] Stephens v. Miller, 115 S.Ct. 57 (1994).

time for the Supreme Court to resolve these issues when they are again presented with the opportunity.[263]

VII. Conclusion

Rape shield laws are necessary to protect a victim of a sex crime from being victimized in court. However, this in no way means that a defendant, who sits in the courtroom, presumed innocent, should have his constitutional rights diminished. The structure of the current rape shield allows violation of the defendant's constitutional rights. The lack of guidance from the legislature leaves the courts guessing at what evidence is admissible, which in turn leads to arbitrary decisions. In order to prevent such injustices, it is time for the Supreme Court to resolve the conflicting issues inherent in rape shield statutes and for the legislature to follow by amending the statutes of their jurisdictions in accordance with such rulings. Until the Supreme Court acts, state legislatures will be afforded too much power over a defendant's rights, the judiciary will not have the needed guidance from the legislature, and defendants will continue to have their rights violated.

Shawn J. Wallach

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[263] *See* Lausch, *supra* note 235, at 386 (suggesting an alternative balancing test which would give trial courts further guidance to protect a defendant's constitutional guarantees while still enforcing rape shield laws which "must be retained"); *see also* Dillman, *supra* note 229, at 110-13 (outlining the arguments the Supreme Court will have to resolve concerning rape shield statutes).