

Understanding Rape Shield Laws¹

The highly publicized prosecution of NBA star Kobe Bryant for sexual assault has brought the issue of rape shield laws into sharp public focus. The popular media and the internet have responded to the case by focusing negative attention on the alleged victim's sexual history. This focus reaffirms the need for strong shield laws that can protect jurors' decision-making process in rape trials. This paper will outline the history of rape shield laws and delineate the types of shield laws in all fifty states. It will then analyze the serious gaps in these laws and critique the continued admission of evidence of complainants' sexual history in rape trials. Finally, this paper will propose and defend a new model rape shield law to address the problems under the status quo. We now have the opportunity to analyze the weaknesses in rape shield laws and to push legislatures to strengthen them.

Rape law has been a site for the moral condemnation of women who have not led sexually chaste lives. Historically, the law insisted that the sexual history of a woman who alleged that she was raped was relevant to the truth of her allegation. A chaste woman was considered more likely to have resisted the defendant's sexual advances and to have lodged a legitimate claim of rape. An unchaste woman was considered more likely to have consented to the defendant's advances and to have lied about it later. Embedded within rape law, therefore, was an informal, though powerful, normative command that women maintain an ideal of sexual abstinence in order to obtain legal protection.

Beginning in 1974, rape shield laws began to emerge on the legal landscape, circumscribing defendants' abilities to cross-examine rape complainants about their sexual histories. In the late 1970s and early 1980s, almost all jurisdictions in the United States adopted some form of rape shield statute. Legislators concluded that it was illogical to assume that the complainant consented to sexual intercourse with the defendant, or was more likely to lie under oath, simply because she had previously consented to sexual intercourse with someone else.

Despite the progress represented by their passage, rape shield laws are riddled with holes. All rape shield laws admit evidence of the sexual history between the complainant and the defendant himself. Many of them admit evidence of the sexual history between the complainant and third parties as well. Cases manage to slip past rape shields when they involve women previously intimate with the defendant, women who frequent bars to attract new sexual partners, prostitutes, or other women deemed similarly promiscuous.

Although most rape shield laws appear to bar the admission of a rape complainant's sexual history except under limited and carefully defined circumstances, their exceptions routinely gut the protection they purport to offer. For example, Federal Rule of Evidence 412 states that evidence of a rape complainant's sexual history is inadmissible, except: (1) when it is offered "to prove that a person other than the accused was the source of semen, injury or other physical evidence," (2) when it is offered to

¹ This article is an excerpt from a longer article by the author entitled "From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law," that was published in volume 70 of the George Washington Law Review in 2002 at page 51. For more information, please consult the other article, also posted here on VAWnet.

prove consent and it consists of “specific instances of sexual behavior by the alleged victim with respect to the person accused,” or (3) when the exclusion of the evidence “would violate the constitutional rights of the defendant.” The first, narrow exception is appropriate, especially when misidentification of the perpetrator is a common evidentiary issue in stranger and inter-racial rape cases.

The second and third exceptions to the federal shield (and to analogous state shields), however, render the armor defective. The second exception—the admission of sexual history with the defendant—cracks the shield because, according to the Department of Justice, 62 percent of adult rapes are committed by prior intimates—spouses, ex-spouses, boyfriends, or ex-boyfriends. The third exception—the admission of evidence when its exclusion would violate the defendant’s constitutional rights—often crumbles what is left of the shield because courts routinely misinterpret and exaggerate the scope of the defendant’s constitutional right to inquire into the complainant’s sexual history, particularly when the complainant is deemed promiscuous with the defendant or others.

Types of Rape Shield Laws

In 1974, Michigan passed the first rape shield law in the United States. Forty-eight states and the District of Columbia eventually followed suit and enacted their own rape shield rules of evidence or statutes. These laws divide roughly into four categories, distinguishable by the manner and degree to which they admit evidence of a woman’s sexual history.

1. Legislated Exceptions Laws

Twenty-five of the nation’s rape shield laws fall within the legislated exceptions approach. They contain general prohibitions on evidence of the complainant’s prior sexual conduct, subject to at least one legislated exception. The exceptions various states allow include: the admission of evidence of prior sexual conduct between the complainant and the accused; evidence of an alternative source of semen, pregnancy, or injury; evidence of a pattern of prior sexual conduct by the complainant; evidence of bias or motive to fabricate the sexual assault; evidence offered to prove that the accused had a reasonable but mistaken belief in the complainant’s consent; and evidence of prior false accusations of sexual assault by the complainant.

2. Constitutional Catch-All Laws

Eleven state rape shield laws and the District of Columbia’s law fall within the constitutional catch-all approach. Laws in this category, modeled after the federal rape shield law, are similar to those in the legislated exceptions category in that they prohibit evidence of prior sexual conduct, subject to at least one legislated exception. The unique aspect of these laws is that each contains an additional exception stating that sexual history evidence is admissible if a judge determines that the Constitution requires its admission.

3. Judicial Discretion Laws

Nine states have rape shield laws that fall within the judicial discretion approach. These laws have no legislated exceptions; they simply grant to judges the broad discretion to admit or bar evidence of a woman's sexual history.

4. Evidentiary Purpose Laws

The four states that fall within the evidentiary purpose approach determine the admissibility of a woman's sexual history based on the purpose for which the evidence is offered at trial. In California and Delaware, a complainant's sexual history offered to prove her consent to sexual intercourse with the defendant is prohibited, but the same evidence offered to attack her credibility is admissible. In Nevada and Washington, the standard is exactly the opposite: a complainant's sexual history offered to attack her credibility is prohibited, but the same evidence offered to prove her consent to sexual intercourse with the defendant is admissible.

Rape Shield Laws Fail to Defend Victims

Since their passage, federal and state rape shield laws have repeatedly failed to protect victims in many real cases. Cases have systematically fallen through the rape shield cracks created by the legislated exceptions in many laws. Judges have also created other exceptions, frequently employing the flexibility afforded them by the other kinds of rape shield laws (constitutional catch-all, judicial discretion, or evidentiary purpose). Even in legislated exceptions jurisdictions, judges have found cause for new exceptions that the legislature did not authorize by statute. I will discuss five of these exceptions.

1. Prior Pattern Sexual Conduct with Third Parties

The legislated exception to the general prohibition on sexual history for a prior pattern of sexual conduct with third parties appears in five state rape shield statutes: Florida, Minnesota, Nebraska, North Carolina and Tennessee. Additionally, judges in numerous other jurisdictions have created the same exception to their state's rape shield laws, despite the fact that their legislatures did not explicitly authorize it.

The reported appellate rape cases that address what courts determine is a pattern of sexual conduct by a complainant tend to focus disparagingly on the complainant's promiscuity, often describing her as a "sexually aggressive" woman who frequents bars, clubs, or parties. For example, *United States v. Kelly* involved a female soldier, Specialist L, who became inebriated with members of her unit, according to the court, "practically every weekend." One evening, L went dancing and drinking with Kelly and Hubbard, two men in her unit. On the dance floor, L danced "very closely" with Kelly, rubbed her buttocks against him, and touched him in the genital area. Later, she returned to her barracks and passed out on her bed, fully clothed. She testified that she awoke to the feeling of Kelly's penis already inside her vagina. She passed in and out of consciousness due to her intoxication and tried to roll away to stop him. Kelly testified, by contrast, that L kissed him when she awoke and they engaged in consensual sex.

Kelly tried to bolster his defense with what he claimed was evidence of L's prior pattern of sexual conduct with third parties. He sought to testify that over the past two years he had observed L "behaving in a sexually aggressive manner when she was intoxicated." At some point in the past two years he had heard L announce to a group of male soldiers her interest in having sex, with statements such as "I need to get fucked."

He also wanted to testify that he had previously observed L at a party “lying on a bed in plain view” hanging “all over” another man. Finally, he wanted Hubbard to testify that, on the night in question, L had danced lewdly with him as well. However, the trial court applied the military rape shield rule (identical to the federal rape shield law), and excluded this evidence. Kelly was convicted of rape.

On appeal, the United States Army Court of Military Review reversed the conviction. It noted that the case involved L’s prior pattern of sexual conduct. It decided:

Each of the [prior] incidents ... was similar to the events that led to the charges against him. The statements about wanting to “get fucked” or to “come downstairs and fuck” tended to show that the prosecutrix sought sex indiscriminately... . The evidence that L was drunk practically every weekend, and behaved in a sexually aggressive manner toward males when drunk was also relevant, material, and probative. The evidence tended to show that she was engaged in a pattern of behavior rather than unrelated incidents.

The court’s censure of L’s prior sexual decision-making reveals how prejudicial evidence of a complainant’s prior sexual conduct can be. To categorize L’s behavior as a “pattern” is unreasonable. At most, her prior behavior shows that on previous occasions she had been interested in sexualized talk or sexual conduct with people who were not at issue in this case. L’s prior statements, such as “I need to get fucked,” even if true expressions of sexual desire (as opposed to bravado to prove she was “one of the boys”), were temporally and factually unconnected to the instance in question, having occurred with third parties on prior occasions.

A woman’s prior pattern of sexual behavior is marginally relevant to her willingness to engage in sexual intercourse generally. A defendant arguing the defense of consent in a rape case, however, is not simply claiming that the complainant consented. Instead, he is claiming that she consented, but then falsely reported that he raped her to the police, pursued the claim through the investigative process, and then lied under oath about the experience at trial. Without a pattern of prior false accusations, a pattern of sexual behavior is irrelevant on this crucial question.

Even if a prior pattern of sexual conduct were helpful to the defendant’s case, its relevance would be outweighed by the substantial, unfair prejudice it would bring to the truth-seeking process. Psychological and sociological research over the past two decades indicates that a complainant’s promiscuity or perceived promiscuity with third parties subverts the truth-seeking process by biasing jurors against the woman who has failed to live up to a model of feminine modesty. Because evidence of a prior pattern of sexual conduct is prejudicial and ordinarily irrelevant, rape shield laws should not allow for the categorical admission of such evidence.

2. Prior Sexual Conduct with Third Parties to Prove Reasonable but Mistaken Belief as to Consent

The legislated exception for sexual history evidence that would prove that the defendant held a reasonable but mistaken belief as to the victim’s consent appears in four rape shield statutes. Additionally, judges in other jurisdictions have imposed this

exception, despite the fact that the legislature did not formally authorize it. This defense reasons that, although the victim did not consent, the defendant did not have the guilty mental state necessary for the crime because he was under a mistaken belief that she did consent, and that belief was based on his knowledge of her prior sexual acts with third parties.

In addition to raising a claim about L's pattern of sexual conduct with third parties, for example, the defendant in *United States v. Kelly* also raised a claim about his reasonable but mistaken belief as to L's consent to sexual intercourse with him. The reviewing court held that L's prior statements about sex to her unit buddies were not only relevant to her actual consent to sex with Kelly (and thus should not have been excluded), but "the statements also were relevant to show the reasonableness of appellant's belief that the prosecutrix consented to his sexual overtures."

However, a woman's sexual reputation or acts with third parties do not make it more probable that the defendant had a reasonable belief in consent because it is unreasonable to draw conclusions about consent with oneself based on a woman's sexual behavior with others. To allow such an exemption creates a substantial loophole through which evidence that was previously inadmissible becomes admissible, and the old prejudices around women's sexuality again become operational. This categorical exception should be abolished.

3. Prior Prostitution with Third Parties

It is important to note at the outset that prostituted women are especially vulnerable to rape. Research indicates that 73% of street prostitutes have been raped while working as prostitutes, and fifty-nine percent of those have been raped more than five times.

The exception to the prohibition on prior sexual conduct for convictions of prostitution shows up only in one rape shield statute. Judges in a number of other jurisdictions, however, have admitted complainants' prior prostitution convictions, despite the fact that their legislatures did not explicitly authorize such admissions.

In *Drake v. State*, for example, the Supreme Court of Nevada explained why it was holding that a complainant's prior prostitution convictions should be admissible. After recounting that the purpose of rape shield laws was "to protect rape victims from degrading and embarrassing disclosure of the intimate details of their private lives," the court stated:

When dealing with illegal acts of prostitution, however, the policies behind the rape shield laws largely disappear. Illegal acts of prostitution are not intimate details of private life. They are criminal acts of sexual conduct engaged in, for the most part, with complete strangers.

Other courts, however, have barred evidence of a rape complainant's prior prostitution. In *State v. Johnson*, for example, the complainant testified that Johnson enticed her into his car, drove her to a secluded area, and raped her. Johnson claimed that what occurred was consensual prostitution and he sought to admit evidence of the complainant's prior prostitution with third parties. When it assessed the case on appeal, the Supreme Court of New Mexico decided that "a distinctive pattern of past sexual

conduct, involving the extortion of money by threat after acts of prostitution” would be relevant and admissible. The court held, however, that “simply showing that the victim engaged in an act or acts of prostitution is not sufficient to show motive to fabricate.”

The prejudice of prior prostitution convictions is high, while its probative value on the issue of false charges is ordinarily low. To routinely admit evidence of prior prostitution, therefore, is unwise. Evidence of prior prostitution should not be categorically admissible.

4. Prior Sexual Conduct with the Defendant

The legislated exception to the general prohibition on prior sexual conduct for sexual behavior with the defendant is by far the most common, appearing in all rape shield laws in the legislated exceptions and constitutional catch-all categories. In jurisdictions that have not included this exception by statute, judges have created it.

The categorical admission of prior sexual conduct with the defendant relies on a number of incorrect assumptions. Such a rule suggests, for instance, that rape does not often happen between prior intimates. In fact, however, a 2000 National Institute of Justice research report indicates that 62 percent of adult rapes are committed by prior intimates—spouses, ex-spouses, boyfriends, or ex-boyfriends.

Such a rule suggests that a rape that occurs after a man and a woman have been previously intimate is less damaging to the victim than is rape by a stranger. In fact, however, research indicates that acquaintance rape tends to inflict more psychological damage on a victim than does stranger rape.

Such a rule suggests that prior sexual behavior short of intercourse is a prelude to sexual intercourse and, as such, is evidence of consent to intercourse. In an age of HIV/AIDS, however, people often engage in significant sexual behavior without engaging in intercourse. They often engage in petting and oral sex under the belief that these practices maintain technical virginity, avoid pregnancy, and constitute safe sex. The more diverse sexual experiences people engage in, experiences that deliberately do not include vaginal intercourse, the less relevant those sexual experiences are to proving consent to penetration. More than it ever has been, sexual intercourse is a specific act that sexually active people negotiate.

The potential prejudicial effect that prior sexual conduct between the complainant and the defendant can have on the truth-seeking process in a rape trial is great. Psychological and sociological research indicates that jurors are often biased against a rape victim who has been previously intimate with the defendant. For those women raped by boyfriends and husbands, as well as for those women raped by acquaintances with whom they have been previously intimate, rape shields provide little protection. Evidence of the sexual history between the complainant and the defendant should not be categorically admissible.

5. Prior Public Sexual Conduct with Third Parties

When women engage in sexualized behavior in public places, such as bars, some courts have been hesitant to exclude evidence of their behavior. In *State v. Colbath*, for example, Richard Colbath and a woman met at the Smokey Lantern Tavern in Farmington, New Hampshire. According to the New Hampshire Supreme Court, “there was evidence that she directed sexually provocative attention toward several men in the

bar, with whom she associated during the ensuing afternoon, the defendant among them.” Colbath testified that he felt the woman’s breasts and buttocks, and she rubbed his groin area before they left the bar together. At Colbath’s trailer, sexual intercourse ensued. The woman alleged that it was forcible and against her will; Colbath claimed that it was consensual.

New Hampshire prosecuted Colbath for rape. The trial judge allowed Colbath to testify about the sexual attention that the woman had paid to him directly at the bar. The trial judge instructed the jury that evidence of the woman’s behavior with other men at the bar, however, served only to provide “background information” but was “not relevant on the issue of whether or not she gave consent to sexual intercourse” to Colbath. The jury convicted Colbath of rape.

Colbath appealed the trial court’s jury instruction that “evidence of the complainant’s behavior with men other than the defendant in the hours preceding the incident was immaterial, or irrelevant, to the question of the defendant’s guilt or innocence.” The Supreme Court of New Hampshire reversed. Justice David Souter, then a justice on the state’s highest court, penned the opinion.

Souter reasoned:

evidence of public displays of general interest in sexual activity can be taken to indicate a contemporaneous receptiveness to sexual advances that cannot be inferred from evidence of private behavior with chosen sex partners.

In the instant case, Souter explained, “the jury could have taken the evidence of the complainant’s openly sexually provocative behavior toward a group of men as evidence of her probable attitude toward an individual within the group.” Souter continued, “evidence that the publicly inviting acts occurred closely in time to the alleged sexual assault by one such man could have been viewed as indicating the complainant’s likely attitude at the time of the sexual activity in question.”

As a rationale for admitting evidence, however, the contrast between public and private sexual behavior is unpersuasive. Today, bars, parties, dance floors, and other public venues are bastions of sexual bravado. They are the place where women and men can “let it all hang out” without implying that they consent to sexual intercourse with anyone in particular, much less with everyone in general. A woman’s public sexualized behavior with others is irrelevant to the question of whether she consents to sexual intercourse with any individual man.

Public, sexualized behavior, however, is highly prejudicial because it implies promiscuity. It plays into a common bias that women are to blame for inviting rape. For this reason, there should be no categorical admission of the complainant’s prior public sexual behavior in rape trials.

A New Rape Shield Law

It is time that we strengthen rape shield laws to do two important things: 1) to provide rape victims with real protection at trial, and 2) to preserve the truth-seeking function of the criminal trial. I propose the following New Rape Shield Law:

Evidence of the complainant's sexual conduct and sexual communication with the defendant on the instance in question is admissible. Direct or opinion evidence of the complainant's sexual conduct and sexual communication prior or subsequent to the instance in question is inadmissible, subject to the following three exceptions:

(1) Evidence of an alternate source for the semen, pregnancy, disease, or injury that the complainant suffered.

(2) Evidence of negotiations between the complainant and the defendant to convey consent in a specific way or to engage in a specific sexual act at issue.

(3) Evidence of the complainant's bias or motive to fabricate the charge of rape.

This proposed law begins by emphasizing that evidence temporally related to the incident between the complainant and the defendant is admissible. There is no restriction on the admission of evidence of the events that occurred between the defendant and the complainant on the instance in question. Under this law, however, most evidence of the complainant's sexual conduct and sexual communication before or after the instance in question would be inadmissible. Most evidence of the complainant's sexual conduct with the defendant himself preceding the instance in question would be inadmissible. Additionally, most evidence of the complainant's sexual conduct and communication with third parties would also be inadmissible.

The New Rape Shield Law contains three exceptions to what would otherwise be a categorical prohibition on the complainant's prior and subsequent sexual conduct and sexual communication.

Exception One states, "evidence of an alternate source for the semen, pregnancy, disease, or injury that the complainant suffered" is admissible. A complainant's prior sexual conduct might provide evidence of an alternate source for those things that prove sexual penetration—semen, pregnancy, or a sexually transmitted disease. To the extent that the state wants to prove that the defendant deposited semen in the complainant in an effort to prove penetration, the defendant should be able to prove that someone else created the evidence, even if it means revealing the woman's unrelated sexual history. Likewise, prior sexual conduct that might provide an alternate source for evidence that often proves force—injury—would also be admissible under Exception One. To the extent that the state wants to prove that the defendant caused a physical injury in an effort to prove the element of force, the defendant should be able to prove someone else did it, even if it means revealing the woman's unrelated sexual history.

Exception Two states, "evidence of negotiations between the complainant and the defendant to convey consent in a specific way or to engage in a specific sexual act at issue" is admissible. This provision narrows considerably the sexual history that may be offered under existing rape shield laws to prove non-consent. No longer will evidence of a prior pattern of sexual conduct with third parties, prior prostitution with third parties, or prior public sexual conduct with third parties be admissible to benefit the defendant, willy-nilly. In fact, any prior sexual conduct with third parties would be inadmissible under this provision.

Additionally, no longer will prior sexual conduct with the defendant himself be categorically admissible to prove consent to sexual intercourse on the instance in question. Exception Two would admit negotiations between the defendant and the complainant about how they planned to communicate consent between each other. For example, if two people decided that “red” would substitute for the word “no” in their sexual interactions and that “yellow” would mean “slow down,” their discussions of and agreements about methods to communicate consent would be admissible evidence.

Exception Two would also cover negotiations or agreements between the defendant and the complainant about the sexual practices they planned to enjoy together. For example, if a woman and man agreed to engage in specific fantasy roles during a sexual interaction later claimed as rape, their discussion and negotiation of those roles and the content of the scene they wanted to enact would be admissible evidence. What would not be admissible, however, is sexual banter that did not constitute negotiations between the defendant and the complainant about specific methods of communicating consent or specific acts they planned to engage in together. This provision would dramatically reduce the kinds of evidence of prior sexual history between the defendant and the complainant that would be admissible.

If a jurisdiction allows a rape defendant to claim that he held a reasonable but mistaken belief that the complainant consented to sexual intercourse with him, Exception Two would not allow him to admit evidence regarding third parties. It is reasonable to assume that two people consent to a sexual act when they have negotiated it and agreed to engage in it. It may also be reasonable to assume that one’s partner consents when one has negotiated a method of expressing non-consent that has not been employed during the sexual act. Exception Two, therefore, allows exactly that evidence upon which a reasonable belief in consent might be based.

Exception Three ensures that the defendant has the ability to present “evidence of the complainant’s bias or motive to fabricate the charge of rape.” Evidence of a complainant’s prior false allegations of rape or threats to falsely allege rape would fall within this exception. Having a prior claim deemed “unfounded” by police or child protective services would not necessarily constitute a false allegation, however, because police in many communities classify rape allegations as “unfounded” when they are simply difficult to prove.

Conclusion

The law’s sordid past of measuring rape victims against a model of sexual propriety must be exposed to public scrutiny and rejected as unethical. The New Rape Shield Law no longer allows a rape defendant to have admitted all the promiscuous sexual history he can find to tarnish the complainant in the eyes of the jury. Instead, it would allow a rape defendant to defend himself by using the complainant’s prior sexual history only when such evidence would be relevant and not over prejudicial to the truth-seeking process. The New Rape Shield Law thereby strikes a better balance between the rights of the defendant, the sexual freedom of rape complainants, and the integrity of the judicial quest for truth.

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