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Andrew Z. Soshnick

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COMMENT

THE RAPE SHIELD PARADOX: COMPLAINANT PROTECTION AMIDST OSCILLATING TRENDS OF STATE JUDICIAL INTERPRETATION

I. INTRODUCTION

In the past seventeen years, legislatures or courts in each of the fifty states have enacted statutes,[1] composed rules of court,[2] or authored judicial opinions[3] designed to protect rape complainants from the psychological trauma associated with the public disclosure

[1] ALA. CODE § 12-21-203 (Supp. 1986); ALASKA STAT. § 12.45.045 (Supp. 1986); ARK. STAT. ANN. § 1810.1-4 (Supp. 1985); CAL. EVID. CODE §§ 782, 1103 (West Supp. 1987); COLO. REV. STAT. § 18-3-407 (1986); CONN. GEN. STAT. ANN. § 54-86f (West 1985); DEL. CODE ANN. tit. 11, §§ 3508-09 (1979); FLA. STAT. ANN. § 794.022 (West Supp. 1987); GA. CODE ANN. § 38-202.1 (Supp.1986); ILL. ANN. STAT. ch. 38, § 115-7 (Smith-Hurd Supp. 1987); IND. CODE ANN. § 35-37-4-4 (West 1986); KAN. STAT. ANN. § 21-3525 (Supp. 1986); KY. REV. STAT. ANN. § 510.145 (Michie Bobbs-Merrill 1985); LA. REV. STAT. ANN. § 15:498 (West Supp. 1987); ME. REV. STAT. ANN. tit. 17-A, § 252 (Supp. 1985); MD. ANN. CODE art. 27, § 461A (Supp. 1985); MASS. ANN. LAWS ch. 233, § 21B (Law. Co-op. 1986); MICH. COMP. LAWS ANN. § 750.520j (West Supp. 1987); MINN. STAT. ANN. § 609.347 (West 1987); MO. ANN. STAT. § 491.015 (Vernon Supp. 1987); MONT. CODE ANN. § 45-5-511(4) (1985); NEB. REV. STAT. § 28-321 (1984); NEV. REV. STAT. ANN. §§ 48.069, 50.090 (Michie 1986); N.H. REV. STAT. ANN. § 632-A:6 (1986); N.J. STAT. ANN. § 2A:84A-32.1 (West Supp. 1987); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1981); N.D. CENT. CODE § 12.1-20-14 (1985); OHIO REV. CODE ANN. § 2907.02 (Baldwin Supp. 1986); OKLA. STAT. ANN. tit. 22, § 750 (West Supp. 1987); 18 PA. CONS. STAT. ANN. § 3104 (Purdon 1983); R.I. GEN. LAWS § 11-37-13 (1981); S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 23A-22-15 (1979); TENN. CODE ANN. § 40-17-119 (1982); VT. STAT. ANN. tit. 13, § 3255 (Supp. 1986); VA. CODE ANN. § 18-2-67.7 (1982); WASH. REV. CODE ANN. § 9A.44.020 (Supp. 1986); W. VA. CODE § 61-8B-12 (Supp. 1986); WIS. STAT. ANN. §§ 904.04, 972.11 (West 1985); WYO. STAT. § 6-2-312 (1983).

[2] HAW. R. EVID. 412 (1983); IDAHO R. EVID. 412 (1985); IOWA R. EVID. 412 (1983); MISS. R. EVID. 412 (1986); N.M. R. EVID. 413 (1978); N.C. R. EVID. 412 (Supp. 1985); ORE. EVID. CODE, Rule 412 (1981); TEX. R. CRIM. EVID. 412 (1986); UTAH R. EVID. 404 & 405 (1986).

[3] State v. Reinhold, 123 Ariz. 50, 597 P.2d 532 (1979) (en banc).

of the rape complainant's prior sexual activities and propensity for unchastity. Consistent with this pattern of state action, Congress, in 1978, enacted Rule 412 of the Federal Rules of Evidence, which excludes from evidence all reputation and opinion testimony concerning a rape complainant's prior sexual conduct, while allowing for the limited admissibility of evidence of the complainant's specific prior sexual acts.[4] These evidentiary rules mark a sudden departure from the lack of sensitivity traditionally accorded rape complainants

[4] The Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046 (1978), was signed into law on October 28, 1978, and, as FED. R. EVID. 412, applies in all trials conducted after November 29, 1978. Rule 412 provides:

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is -

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of -

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

(c)(1) If the person accused of committing rape or assault with intent to commit rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

by early English and early American courts.[5]

This Comment examines the disparate array of rape shield laws hastily enacted by state legislatures in response to constituent pressures. Such rape shield laws range from highly exclusionary rules[6] to broadly inclusive statutes.[7] After briefly reviewing the chronological development of the evidentiary rules governing rape cases, this Comment evaluates the effectiveness of such provisions. A focus on the recent judicial trends of several state courts reveals that less than cogent judicial opining, while purporting to comprehend the recent legislative thrust advocating the protection of the integrity of rape complainants, misconstrues the intent underlying the enactment of rape shield laws. This Comment, through an analysis of the trends of judicial decisions in several states, unveils a significant pattern of judicial confusion as to the proper mode of interpretation of

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[5] From its inception, English common law provided that evidence of a rape complainant's prior sexual history was always admissible. Gold & Wyatt, *The Rape System: Old Roles and New Times*, 27 CATH. U.L. REV. 695, 698-705 (1978); People v. Bastian, 330 Mich. 457, 47 N.W.2d 692 (1952) (statutory rape case allowing the admission of evidence of the rape complainant's prior sexual conduct to establish nymphomania for the purpose of impeachment).

[6] *See, e.g.*, IND. CODE ANN. § 35-37-4-4 (West 1986). This statute prohibits the admissibility of:

1. evidence of the victim's past sexual conduct,
2. evidence of the past sexual conduct of a witness other than the accused;
3. opinion evidence of the victim's past sexual conduct,
4. opinion evidence of the past sexual conduct of a witness other than the accused;
5. reputation evidence of the victim's past sexual conduct; and
6. reputation evidence of the past sexual conduct of a witness other than the accused.

See also *infra* Tables IV & V, app.

[7] *See, e.g.*, WYO. STAT. § 6-2-312 (1983), which provides:

(a) In any prosecution under W.S. 6-3-302 through 6-2-305 or for any lesser included offense, if evidence of the prior sexual conduct of the victim, reputation evidence or opinion evidence as to the character of the victim is to be offered the following procedure shall be used:
(i) A written motion shall be made by the defendant to the court at least ten (10) days prior to the trial stating that the defense has an offer of proof of the relevancy of the evidence of the sexual conduct of the victim and its relevancy to the defense;
(ii) The written motion shall be accompanied by affidavits in which the offer of proof is stated;
(iii) If the court finds the offer of proof sufficient, the court shall hold a hearing in chambers, and at the hearing allow the questioning of the victim regarding the offer of proof made by the defendant and allow pertinent evidence;
(iv) At the conclusion of the hearing, if the court finds that the probative value of the evidence substantially outweighs the probability that its admission will create prejudice, the evidence shall be admissible pursuant to this section. The court may make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted.
(b) This section does not limit the introduction of evidence as to prior sexual conduct of the victim with the actor.
(c) Any motion or affidavit submitted pursuant to this section is privileged information and shall not be released or made available for public use or scrutiny in any manner, including posttrial proceedings.

rape shield laws. The examination focuses on five states which have enacted rape shield laws representative of the vast array of statutes. This Comment determines that the most functional rape shield laws are those which foist judicial discretion upon the state courts while simultaneously providing adequate legislative guidance. Implicit in this survey is the recognition that state judiciaries often fall prey to the fallacies[8] underlying the traditional evidentiary analysis applied in rape cases. The resulting opinions generally implicate a lesser degree of protection for the rape complainant than can be reconciled with state mandates. This Comment concludes that state courts must make a more expansive reading of the legislative intent underlying rape shield laws in order to effectuate the intended level of protection for the rape complainant. State legislatures, moreover, should aid state courts in this task by more clearly articulating the purpose of the rape shield law evidentiary exclusion. The inevitable result, should state legislatures and courts fail to adequately perform in their respective roles, is the unconscious emasculation of the evidentiary protections that rape shield laws afford rape complainants.

The recent change in the emphasis of rape shield laws traces its origin to two societal phenomena which suggest that evidence relating to a rape complainant's character and prior sexual history carries minimal probative value. First, the late 1960's and 1970's saw the advent of a broad societal movement aimed at advancing the rights and dignity of women. The resultant shift in social mores provided the impetus to elicit legislative and judicial reform of the treatment accorded rape complainants under existing laws.[9] Secondly, empirical studies over the past two decades advocating a complainant-protective definition of rape supplemented the women's equality movement and played a large role in dispelling misconceptions associated with the crime of rape.[10]

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8 *See infra* notes 34-46 and accompanying text.

9 State v. Reinhold, 123 Ariz. 50, 597 P.2d 532 (1979) (en banc); Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391, 395 (1975) (supporting the enactment of rape shield laws by critiquing the traditional admissibility of evidence of the complainant's reputation and past sexual history at trial as being highly embarrassing and having a deep psychological effect); Hibley, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent and Character*, 11 AM. CRIM. L. REV. 309, 323 n.48 (1973) (noting the adverse effects upon the complainant of the barbs and insinuations of defense counsel).

10 Recent psychological and sociological research characterizes rape as a crime of violence rather than a crime of sex. *See, e.g.*, A. GROTH, MEN WHO RAPE (1979). This research has led some reformers to eliminate the consent element and define rape solely in terms of the force used by the assailant. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.520d (West 1987).

As a result of these scientific and social endeavors, the new state statutory and judicial pronouncements profoundly restrict the ability of the defendant to present evidence of a rape complainant's prior sexual activities and propensity for unchastity for the purpose of impeaching the complainant's credibility.[11] These state provisions, commonly labelled "rape shield laws," raise multiple constitutional issues.[12] Rape shield laws potentially preclude defendants charged with rape from exercising their sixth amendment right to confront the complainant and other adverse witnesses.[13] This lack of confrontation, in turn, renders questionable the effective preservation of the defendant's right to a fair and impartial trial under the due process clause of the fourteenth amendment.[14] In addition to constitutional questions, the ambiguous language of some rape shield laws raises issues of vagueness.[15] The wide variance in content and quality among rape shield laws complicates judicial review[16] and forces courts to strain in interpreting sometimes incomprehensible provisions.[17] Despite these fundamental concerns, rape shield laws have survived multiple constitutional challenges in state courts.[18] Nevertheless, these exclusionary provisions may yield to significant state interests in order to preserve the trial process.[19] In light of these developments, rape shield laws continue

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11 The term "character" encompasses two distinct concepts. One focus is upon the complainant's disposition—trait, group of traits, or the sum of her traits. The second emphasis examines how the community perceives reputation of character. IA J. WIGMORE, EVIDENCE § 52 (Tillers rev. ed. 1983). Opinion testimony, reputation evidence, and evidence of prior sexual conduct are the three principal means of establishing a witness' pertinent character traits, such as unchastity. Opinion testimony is "testimony by a witness who is familiar with the person in question and who can state his opinion whether the subject has a certain character trait." G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 102 (1978). Reputation evidence is "evidence of the subject's community reputation for possessing the character trait in question." *Id.* "Chastity" refers to an unmarried person's abstention from unlawful sexual intercourse with another person. State v. Brionez, 188 Neb. 488, 490, 197 N.W.2d 639, 640 (1972). For married persons, "chastity" refers to the abstention from extramarital sexual intercourse. State v. Bird, 302 So. 2d 589, 592 (La. 1974).

12 *See, e.g.*, State v. Davis, 269 N.W.2d 434 (Iowa 1978). *See also infra* note 80 and accompanying text.

13 U.S. CONST. amend. VI provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . ." The sixth amendment confrontation clause was held applicable to the states through the due process clause of the fourteenth amendment in Pointer v. Texas, 380 U.S. 400 (1965).

14 U.S. CONST. amend. XIV provides, in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

15 *See, e.g.*, People v. Blackburn, 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (1976).

16 *See infra* notes 47-52 and accompanying text.

17 *See, e.g.*, WASH. REV. CODE ANN. § 9A.44.020 (Supp. 1986).

18 *See infra* note 80 and accompanying text.

19 The Supreme Court of the United States has employed a balancing test to weigh

to pose a significant constitutional issue[20] and, in many cases, paradoxically signal a regression toward the Victorian posture allowing for the unlimited admissibility of evidence of a rape complainant's prior sexual activity and propensity for unchastity.[21]

II. Historical Origins Of Rape Evidentiary Rules

The earliest codifications of ancient law recognized the crime of rape.[22] In prosecutions for sex offenses, Dean John Henry Wigmore forcefully argued for the full admissibility of evidence concerning the rape complainant's character and evidence of her prior sexual conduct.[23] English rules had previously acceded to this position, providing that such evidence was always admissible.[24] Dean Wigmore's attitude reflected a rudimentary fear of baseless criminal prosecutions which required careful scrutiny of the credibility of the rape complainant.[25] This perspective also reflected the expectation of males of this generation that women would remain chaste until marriage.[26]

Three elements underlying the prevailing moral climate in the

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these conflicting interests, noting that when an evidentiary rule results in the "denial of or significant diminution" of the right to confront, the competing state interests will be closely examined. Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

20 Even a staunch proponent of rape shield laws concedes that scenarios exist in which evidence of the complainant's prior sexual conduct may be so probative of the defendant's guilt that it cannot constitutionally be withheld from the jury. Comment, *Federal Rule of Evidence 412: Was the Change an Improvement?*, 49 U. Cin. L. Rev. 244, 250 (1980).

21 See *infra* notes 27-31 and accompanying text.

22 The Babylonian Code of Hammurabi, dating from approximately 1900 B.C.E., defined a series of crimes involving lying with women who were betrothed or married to others. The Code provided that "the man shall be put to death and that women shall go free." Approximately one thousand years after the Code of Hammurabi, a set of laws relating to rape and adultery appeared in Deuteronomy as part of the laws of Moses. *Deuteronomy* 22: 23-27. The laws provided that a woman raped in the city is punished greatly, and both she and the perpetrator shall die. A woman raped "in the field," unlike the woman of Babylon, goes free due to the difficulty of proving resistance. Gold & Wyatt, *supra* note 5, at 696-98.

23 IA J. Wigmore, Evidence § 62 (Tillers rev. ed. 1983).

24 Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544, 546 (1980).

25 *Id.* Wigmore referred to the overall credibility of the complainant in society—not merely her credibility as a witness in the courtroom.

26 Indeed, these laws accorded with the male-dominated view of society of this era. Males viewed women as personal property. Rape evidence laws, therefore, developed more from the male need to protect property rights than from a chivalrous desire to protect women. Women who were not virgins were considered damaged and were scorned by society. Men who inflicted such injury were, thus, subject to severe penalties. This historical perspective explains the dichotomy between the high value placed on virginity and the difficult burden that a woman faced in proving a rape charge. *See* Gold & Wyatt, *supra* note 5, at 696-705.

Victorian era contributed to this position. First, the male-dominated society feared that vindictive women would perpetuate false rape charges against innocent men.[27] As Sir Matthew Hale, Lord Chief Justice of the King's Bench, stated, "rape is an accusation easy to be made, hard to be proved, and harder to be defended by the party accused though ever so innocent."[28] Dean Wigmore, in the extreme, suggested that rape complainants submit to a psychiatric examination before trial in order to determine whether the charges were the product of a psychological predisposition for fabrication.[29] Second, society conceptualized chastity as a character trait.[30] Finally, society believed that premarital sex was immoral.[31] The Victorian era, in general, exhibited a pervading concern for the welfare of the male members of society with little regard for females.

In contrast, modern commentators have shifted their emphasis away from the protection of males. Instead of attempting to shelter men from potential fabricated rape charges, the contemporary focus perceives chastity evidence as relevant to the determination of the guilt of the accused, consent to the act in question, and the impeachment of the complainant's credibility.[32] Such analyses frequently evaluate rape shield laws in the context of sixth amendment and due process concerns.[33]

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27 Tanford & Bocchino, *supra* note 24, at 546.

28 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 634, 635 (1st Am. ed. Philadelphia 1847).

29 Wigmore feared that women, having a psychological disposition to "imaginary and false charges," needed the countervailing effect of the admissibility of character evidence as protection. IA J. WIGMORE, EVIDENCE § 62 (Tillers rev. ed. 1983).

30 Implying that if a woman could be shown to be unchaste by nature, it could be inferred that she consented to sex with the defendant. Tanford & Bocchino, *supra* note 24, at 546.

31 Acts of previous illicit sexual relations could be used to impeach the credibility of both married and unmarried complainants in rape cases. *Id.*

32 Professor Berger has articulated seven types of evidence that, subject to judicial findings of relevance and fairness, the defendant should be allowed to introduce: (1) Evidence of the complainant's sexual conduct with the defendant; (2) evidence of specific instances of conduct to show that someone other than the accused caused the physical condition (semen, pregnancy, disease) allegedly arising from the act; (3) evidence of a distinctive pattern of conduct closely resembling the defendant's version of the encounter in order to prove consent; (4) evidence of prior sexual conduct known to the defendant (presumably by reputation) tending to prove that he believed the complainant was consenting; (5) evidence showing a motive to fabricate the charge; (6) evidence that rebuts proof offered by the state on the complainant's sexual conduct; and (7) evidence as the basis for expert testimony that the complainant fantasized the act. Berger, *Man's Trial, Woman's Tribulation: Rape Cases In The Courtroom*, 77 COLUM. L. REV. 1, 98-99 (1977).

33 *See infra* notes 72-79 and accompanying text.

III. The Modern Progression Toward Rape Shield Laws

Over the past two decades, scholarly literature has often attacked the traditional evidentiary rules governing the admissibility of evidence in rape cases.[34] Commentators have dismissed views shared by Dean Wigmore and the men of his era as chauvinistic utterances in light of the growing social awareness generated by the women's equality movement.[35] In addition, media critics exposed the mistreatment often accorded rape complainants by the criminal justice system.[36] These views rapidly led to an erosion of support for the Victorian myth that an unchaste woman is more likely to engage in indiscriminate sexual activity than a virtuous woman. The impact of such efforts led most jurisdictions to repeal the automatic admission of character evidence and, concomitantly, to implement rape shield laws.[37]

In addition to public sentiment, empirical data helped decay the rationale underlying the traditional English rule of unlimited admissibility. Sir Matthew Hale's concern for the impact of fabricated rape charges carries little statistical significance today.[38] The danger of false rape charges does not exceed the potential for the fabrication of any other type of allegation.[39] In fact, rape continues to be one of the most underreported crimes; some studies estimate that as many as eighty percent of all rapes go unreported.[40] Moreover, elaborate police and prosecutorial screening techniques eliminate a high percentage of unfounded rape charges prior to trial.[41]

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34 *See, e.g.*, Gold & Wyatt, *supra* note 5; Note, The Victim in a Forcible Rape Case: A Feminist View, 11 Am. Crim. L. Rev. 335 (1973); Note, *Rape Reform Legislation: Is It the Solution?*, 24 Clev. St. L. Rev. 463 (1975); Note, *If She Consented Once, She Consented Again: A Legal Fallacy in Forcible Rape Cases*, 10 Val. U.L. Rev. 127 (1975).

35 The majority of rape shield statutes were enacted in 1975, coinciding with International Women's Year. The goal of International Women's Year was to prevent human rights violations against women, including rape. Report of the World Conference of the International Women's Year 7 (1976).

36 *See, e.g.*, S. Brownmiller, Against Our Will (1975) (focusing public attention on the treatment of rape victims by the judicial system).

37 *See* sources cited *supra* notes 1-2.

38 *See, e.g.*, Federal Bureau of Investigation, Uniform Crime Reports for the United States 24 (1975)(estimating that, as a national average, fifteen percent of all forcible rapes reported to police were determined to be unfounded); Comment, *Police Discretion and the Judgment That a Crime Has Been Committed—Rape in Philadelphia*, 117 U. Pa. L. Rev. 277, 280-81 (1968)(observing that, in Philadelphia, twenty percent of all rapes reported were determined to be unfounded upon police investigation). *Cf.* The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and Its Impact—An Assessment 25 (1967)(stating that some police departments conclude that fifty percent of all forcible rape complaints are unfounded).

39 *Id.*; Tanford & Bocchino, *supra* note 24, at 547.

40 *Id.*

41 *See* Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 Wm. & Mary L. Rev.

Such information provided additional impetus to the movement to reform evidentiary rules respecting rape proceedings.

Legislative and judicial recognition of changing social norms played a pivotal role in the reform of rape evidentiary rules. Today, an increasing number of women engage in premarital or extramarital relationships.[42] This behavior bears no correlation to the likelihood that women who engage in these types of relationships more frequently consent indiscrimately to sex than do women who refrain from such conduct.[43] Both legislators and judges recognize that these changing social mores bear no significant connection with the issue of female consent.[44] This realization erodes much of the foundation underlying the traditional evidentiary rules governing cases involving rape. Moreover, reputation and opinion evidence is most often used to establish the character of the rape complainant.[45] These types of evidence are the least accurate methods of establishing that a rape complainant casually chooses sexual partners.[46] Recognition of this shortcoming further undermines the credibility of the arguments advanced by proponents of adherence to traditional evidentiary rules in rape proceedings.

IV. CATEGORIZATION OF RAPE SHIELD LAWS

Many significant syntactical differences exist among state rape shield laws.[47] These divergences, when analyzed concordantly with the enormous amount of publicity given to the women's equality movement, intimate that the state legislatures responsible for the enactment of these statutes and rules failed to adequately comprehend the complexity of the task of formulating such provisions. In general, the result is a set of poorly-drafted and ambiguous statutes.[48] For example, certain laws focus on the use of evidence of

1, 27-28 n.109 (1976) (stating that it is commonly known that prosecutors pursue only those rape cases in which there is a strong probability of conviction and that they are willing to accept a plea of guilty to a lesser offense, such as battery, if the chances for a conviction for rape are small).

42 *See* M. HUNT, SEXUAL BEHAVIOR IN THE 1970's 149-55 (1976).

43 Tanford & Bocchino, *supra* note 24, at 548.

44 *Id.*

45 IIIA J. WIGMORE, EVIDENCE § 920 (Chadbourn rev. ed. 1970).

46 *See, e.g.*, People v. Benson, 6 Cal. 221, 223 (1856) (stating that general reputation is an insufficient substitute for particular facts).

47 *See* sources cited *supra* notes 1-2.

48 IA J. WIGMORE, EVIDENCE § 62 (Tillers rev. ed. 1983). *See also* FLA. STAT. ANN. § 794.022 (West Supp. 1987). The language of § 794.022 potentially implies that evidence of prior sexual activity between the complainant and third persons is only admissible in regards to the issue of consent. Such an interpretation may also relate to reputation and opinion evidence.

prior sexual conduct for testimonial impeachment purposes while neglecting the issue of whether such evidence is probative on the issue of consent by the complainant.[49] Likewise, some provisions explicitly permit the use of evidence of prior sexual conduct by the complainant to prove consent while failing to consider the admissibility of such evidence to establish the defendant's reasonable belief in consent.[50] In addition, several statutes initially imply a total exclusion of certain types of evidence while later ambiguously qualifying this position.[51] Even if such exclusion is unqualified, the statute may be rendered inadvertently overinclusive since the inadmissible evidence may be relevant to the interaction that is the basis of the criminal charge.[52] These examples are merely representative of the numerous linguistic and substantive nuances implicated by the vagaries of state rape shield laws. State courts, therefore, are often required to employ considerable ingenuity when construing such poorly-drafted provisions.[53]

Despite the sweeping differences among state rape shield laws, the statutes and rules of court are cognizable into five broad classifications: (1) laws that generally prohibit the introduction of sexual history evidence, except in limited circumstances; (2) laws that generally prohibit sexual history evidence, except in a few specifically defined situations, and even then only after a hearing to determine admissibility; (3) laws that admit sexual history evidence under traditional evidence rules requiring that relevance outweigh prejudicial effect; (4) laws that generally allow sexual history evidence, but require a hearing on admissibility for some uses of this evidence; and (5) laws that give the trial judge general discretion to admit sexual history evidence, but limit such discretion in certain circumstances.[54] A majority of the new evidentiary provisions forego the traditional position articulated by Dean Wigmore in favor of presumptive inadmissibility.[55] The degree of restriction varies greatly

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[49] *See, e.g.*, DEL. CODE ANN. tit. 11, § 3509 (1979); N.D. CENT. CODE § 12.1-20-1 (1985).

[50] *See, e.g.*, WASH. REV. CODE ANN. § 9A.44.020 (Supp. 1986): TENN. CODE ANN. § 40-17-119 (1982).

[51] *Id.*

[52] *See, e.g.*, N.H. REV. STAT. ANN. § 632-A:6 (1986).

[53] *See, e.g.*, State v. Howard, 121 N.H. 53, 426 A.2d 457 (1981)(determining that due process required the admission of evidence of prior consensual activity between the complainant and a third person in contravention of the "plain meaning" of the New Hampshire statute).

[54] *See* Tanford & Bocchino, *supra* note 24, at 548; *see also infra* app.

[55] *See, e.g.*, COLO. REV. STAT. § 18-3-407(1) (1986) ("shall be presumed to be irrelevant").

among jurisdictions.[56] The first grouping of rape shield laws purports to prohibit the introduction of character and sexual history evidence except in certain enumerated circumstances.[57] These laws do not involve judicial discretion and do not distinguish between types of evidence. The second category of rape shield laws prohibits the introduction of propensity and conduct evidence, except for certain enumerated purposes after a pre-trial or an in camera hearing to determine issues of relevance and prejudicial effect.[58] The great bulk of statutes fall into the second classification.

At the other extreme are rape shield laws more closely attuned to the historical position recognizing the substantial probity of evidence of a rape complainant's prior sexual activity and propensity for unchastity. A small group of statutes compose the third classification, which allows for the admissibility of such evidence merely on a showing of relevance and admissibility under the traditional evidentiary standard requiring that relevance outweigh prejudicial effect.[59] The fourth series of rape shield laws generally permits the admissibility of such evidence, but requires a hearing to determine the appropriate uses.[60] These statutes again apply the traditional evidentiary standard governing admissibility. Finally, the fifth category of rape shield laws employs the traditional evidentiary standard but allows the trial judge discretion in limited enumerated situations.[61] These areas usually include issues of consent and impeachment.[62]

In theory, then, two polar formulations of rape shield laws exist. Many rape shield laws adhere closely to the position of Dean Wigmore and support the unlimited admissibility of evidence of a rape complainant's propensity to engage in sexual conduct and prior sexual history. At the other extreme are rape shield laws which dictate a complete ban on the use of propensity and conduct evidence, subject to a few enumerated exceptions. Most formulations, however, fall into the intermediate gradations which combine variants of the two approaches. The tension between highly exclusionary rape shield laws and provisions which liberally admit evi-

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56 *See infra* app. The appendix is modeled after tables contained in Tanford & Bocchino, *supra* note 24, at 591-602.

57 *See infra* Table IV, app.

58 *See infra* Table V, app.

59 *See infra* Table I, app.

60 *See infra* Table II, app.

61 *See infra* Table III, app.

62 *See, e.g.*, DEL. CODE ANN. tit. 11 § 3508 (1979) (limit on consent); NEV. REV. STAT. ANN. § 48.069 (Michie 1986) (limit on impeachment).

dence poses the most severe problems for state courts in attempting to administer justice evenhandedly.

V. Potential Infirmities Implicated By Rape Shield Law Divergences

A. JUDICIAL INTERPRETATION

As previously emphasized, rape shield laws present enormous interpretational difficulties for both state and federal courts. In particular, statutes which explicitly prohibit the admission of evidence of a rape complainant's personal propensities or evidence of prior sexual activity[63] are most problematic. These rape shield laws directly contravene the defendant's constitutional right to confrontation.[64] This implicit limitation upon cross-examination improperly abridges the defendant's right to fully confront his accuser. The fundamental concern of the judiciary—to administer justice in a fair and impartial manner—may compel courts to formulate exceptions to explicit statutory prohibitions in order to preserve the consitutional guarantees of the defendant.[65] The majority of decisions, however, support the fact that state courts often find it impossible to satisfactorily resolve evidentiary difficulties through a literal reading of a rape shield law.[66] Courts often feel obligated to consider the broader purposes of the statute in order to formulate an appropriate solution. Judicial activism, however, in a super-legislative capacity creates enormous conceptual problems for statutory interpretation as well as separation of powers concerns.[67] State courts may be guilty of openly infringing upon the legislative function by contravening the expressed intentions of the drafters of statutes and rules of court. Yet, ex ante, responsibility for this situation lies fully with the state legislatures. Incomprehensible rape shield laws enhance the possibility that judicial interpretations may contradict the legislative intent underlying such provisions. In addition to ambiguity, the absence of comprehensive indicia of legislative history at the state level compounds the task of judicial interpretation. It is evident from the context and structure of many state rape shield

63 *See, e.g.*, N.H. Rev. Stat. Ann. § 632-A:6 (1986).

64 *See infra* notes 76-79 and accompanying text.

65 *See, e.g.*, State v. Howard, 121 N.H. 53, 426 A.2d 457 (1981)(defendant given the right to demonstrate that due process requires the admission of evidence of the complainant's prior sexual activity and was to be afforded the opportunity to present testimony concerning the victim's allegedly decadent sexual environment).

66 *See infra* notes 86-149 and accompanying text.

67 *Id.*

laws that the state legislatures did not possess a fundamental knowledge of the substantative and procedural goals of the enactments.

A cogent illustration of this difficulty is the existence of rape shield laws which purport to prohibit or severely restrict the admissibility of evidence of the prior sexual history of the complainant with persons other than the accused, while allowing evidence of the complainant's prior sexual activity with the defendant.[68] Many of these statutes contain an express prohibition on the admissibility of reputation or opinion evidence.[69] Implicit in such a statutory scheme is the intention to exclude extraneous, non-probative evidence. As previously noted, however, no statistically significant correlation exists between an individual's conduct on a particular occasion and those sexual propensities.[70] These statutes, in accordance with the goals of society, attempt to reconcile the competing interests of justice and personal privacy.

Under these rape shield laws, it is unclear whether evidence of the complainant's relationships with third persons is presumptively or automatically inadmissible when offered to rebut evidence that she had never engaged in intercourse prior to the alleged rape. In this situation, evidence of the complainant's sexual history with third persons is relevant to the issue of her credibility. Extremely restrictive rape shield laws[71] literally prohibit the admission of such evidence to establish the veracity of the complainant. This result portends for serious sixth amendment and due process implications for the defendant.

B. CONSTITUTIONAL INFIRMITIES

During the second half of the 1970's and early 1980's, a considerable and growing body of literature surfaced suggesting the presence of constitutional infirmities in rape shield laws.[72] Commentators identifying these problems gleaned much of their support from the decisions of the United States Supreme Court in *Chambers v. Mississippi*[73] and *Davis v. Alaska*.[74] In *Chambers*, the

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68 IA J. WIGMORE, EVIDENCE § 62 (Tillers rev. ed. 1983).

69 *See, e.g.*, VT. STAT. ANN. tit. 13, § 3255 (Supp. 1986).

70 *See supra* note 43 and accompanying text.

71 *See supra* note 63 and accompanying text.

72 *See, e.g., Hearing on H.R. 14,666 and Other Bills Before the Criminal Justice Subcomm. of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 64-65 (1976); Herman, *What's Wrong With the Rape Reform Laws?*, 3 CIV. LIB. REV. 544 (1976); Tanford & Bocchino, *supra* note 24, at 550 (sixth amendment).

73 410 U.S. 284 (1973). *Chambers* involved a defendant charged with shooting a police officer. Another man, McDonald, admitted to defense attorneys that he had shot the policeman, and he had, on three occasions, made similar confessions to friends. When

United States Supreme Court, reversing the defendant's conviction, held that the application of the evidentiary rules precluding the defendant from introducing evidence in his behalf and from impeaching his own witness rendered the trial fundamentally unfair and denied the defendant due process of law.[75] In *Davis*, the United States Supreme Court held that preventing the defendant's attorney from cross-examining a witness violated the confrontation clause of the sixth amendment.[76] In reversing the defendant's conviction, the Court emphasized that "whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record . . . is outweighed by petitioner's right to probe into the influence of possible bias on the testimony of a crucial identification witness."[77]

Commentators rely on *Chambers* and *Davis* for the proposition that a state cannot exclude probative evidence crucial to the defense of an accused without violating the accused's right of confrontation and right to due process of law.[78] This translates into the postulate that a state's policy interest in protecting a rape complainant from trauma or embarrassment does not outweigh the defendant's right to produce evidence in his own behalf or to confront a witness. A restrictive rape shield law may similarly deny the defendant the opportunity to engage fully in direct and cross-examination. This denial effectively abridges the constutionally preserved right to confrontation.[79] Given this extrapolation, the constitutionality of

called as a defense witness at trial, however, McDonald denied committing the murder and recanted his prior confession. Because of Mississippi's "voucher" rule, which prohibits a party from impeaching his own witness, and because Mississippi did not recognize an exception to the hearsay rule for declarations against penal interest, the defendant was unable to introduce evidence of McDonald's alleged out-of-court confessions to his friends. The jury convicted the defendant and sentenced him to life imprisonment. *Id.*

74 415 U.S. 308 (1974). *Davis* involved a defendant charged with breaking into a tavern and stealing a safe containing cash and checks. The primary evidence introduced against the defendant was the testimony of Green, a juvenile, who was on probation after having been adjudicated a delinquent for committing two acts of burglary. A court rule aimed at preserving the confidentiality of juvenile adjudications for delinquency precluded the defendant from impeaching Green by establishing that Green's identification of the defendant might have been motivated out of fear of possible probation revocation. *Id.*

75 410 U.S. at 294. The Court prefaced its decision by enunciating that "[t]he right of the accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The right to confront and cross-examine witnesses and to call witnesses in one's own behalf have been recognized as essential to due process." *Id.*

76 415 U.S. at 317. The Court stated that "[t]he accuracy and truthfulness of Green's testimony were key elements in the State's case against the petitioner." *Id.*

77 *Id.* at 319-20.

78 *See* Rudstein, *Rape Shield Laws: Some Constitutional Problems*, *supra* note 41, at 18.

79 *See* Davis v. Alaska, 415 U.S. 308 (1974).

rape shield laws is called into question.

Nevertheless, rape shield laws have generally withstood a variety of constitutional challenges.[80] Courts have shown some willingness to fashion judicially-created exceptions to rape shield laws in order to allow effective cross-examination and testimonial impeachment on behalf of defendants in rape cases.[81]

Legislative and judicial pronouncements purport to display the sound rationale underlying the rejection of the traditional evidentiary stance permitting the unlimited admissibility of evidence of the complainant's sexual propensities and her sexual history in rape cases.[82] Yet, the recognition that evidence of a complainant's prior sexual activity and propensity for unchastity may contain a degree of probative value creates a volatile environment which both the legislatures and the judiciary are ill-equipped to handle. The resulting uncertainty may foster an environment which blurs the purpose of recent reforms. Accordingly, both legislatures and courts may embark on a course which unknowingly obscures the intended goals of rape shield laws.

VI. Objectives Of Rape Shield Laws

Rape shield laws serve an important symbolic function by protecting the rape complainant from the trauma associated with the public disclosure of evidence of her sexual propensities and her prior sexual activity. The difficulties legislatures face in formulating rape shield laws reflect the complex interactions between society's positive and normative assessments of the relevancy and probity of sexual history evidence. Foremost in this analysis is the tension be-

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80 *See, e.g.*, Marion v. State, 267 Ark. 345, 590 S.W.2d 288 (1979)(rape shield laws represent no abridgement of sixth amendment right to confrontation); Dorn v. State, 267 Ark. 365, 590 S.W.2d 297 (1979)(rape shield statute does not violate equal protection clause)(citing United States v. Kasto, 584 F.2d 268 (8th Cir. 1978)); People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978)(rejecting claim that legislative enactment of rape shield law violates the doctrine of separation of powers); State v. Williams, 224 Kan. 468, 580 P.2d 1341 (1978)(attack on requirement of pre-trial notice rejected; no violation of due process); Smith v. Commonwealth, 566 S.W.2d 181 (Ky. Ct. App. 1978)(upholding constitutionality of rape shield law's prohibition against evidence of sexual relations between complainant and third persons).

81 *See, e.g.*, Commonwealth v. Carty, 8 Mass. App. Ct. 793, 397 N.E.2d 1138 (1979)(holding that the failure to permit the defendant to inquire into the complainant's juvenile record to establish her probationary status in order to support the inference that the complainant was motivated to fabricate the rape charge to conceal the nature of her activities violated the right to confrontation pursuant to the sixth amendment); Tanford & Bocchino, *supra* note 24, at 553 (citing Counselman v. Hitchcock, 142 U.S. 547, 585 (1892)("[L]egislation cannot abridge a constitutional privilege.")).

82 *See supra* notes 34-46 and accompanying text.

tween the constitutional privileges[83] of both the rape complainant and the defendant.

The complexity and intricacies of rape shield laws have also percolated a second layer of confrontation—that between state legislatures and state courts. In an attempt to placate proponents of competing concerns, superfluous legislative amendments and creative judicial opining have burgeoned. These amendments range from mere stylistic changes[84] to substantive alterations.[85] Of greater concern than legislative enactments are judicial opinions which are forced to interpret the sometimes obscure intent underlying rape shield laws. Though well-intentioned in praising the purpose of such provisions, the judiciary may unknowingly compromise the integrity of rape complainants at the expense of constitutional concerns for the defendant. The sections below explore the implications of several such decisions.

VII. JUDICIAL MISPERCEPTIONS

A. NEW HAMPSHIRE

New Hampshire's rape shield law provides, in pertinent part, that "[p]rior consensual sexual activity between the victim and any person other than the actor shall not be admitted into evidence in any prosecution under this chapter."[86] Through the enactment of this rape shield statute, the New Hampshire Legislature offered a seemingly clear enunciation of its intent with respect to the admissibility of evidence of a rape complainant's prior sexual activity with third persons. Despite this apparent clarity, the Supreme Court of New Hampshire's initial analysis of the New Hampshire rape shield law imputed an elastic reading into the statute in *State v. Howard*.[87] In *Howard*, the defendant was charged with having sexual relations with a twelve-year-old girl.[88] Defense counsel made several offers of

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83 As discussed above, the defendant enjoys the sixth amendment right to confront witnesses and the right to due process of law as included in the fourteenth amendment. The complainant, however, has the directly competing right to privacy through the fourteenth amendment. These constitutional privileges create an inherent tension between the two parties to an adjudication.

84 *See* IOWA R. EVID. 412 (1983), which parallels the federal rule except that it applies to all cases of "sexual abuse," rather than rape alone.

85 N.C. R. EVID. 412 (Supp. 1985)(change from admitting all evidence to admitting evidence which refers to past conduct between the complainant and the defendant, evidence which reveals a distinct pattern of sexual behavior, or an expert psychiatric opinion).

86 N.H. REV. STAT. ANN. § 632-A:6 (1986).

87 121 N.H. 53, 426 A.2d 457.

88 *Id.* at 55, 426 A.2d at 458. Prior to trial, the State filed a motion in limine to limit testimony regarding the complainant's prior sexual activity. *Id.*, 426 A.2d at 458.

proof in direct contravention of New Hampshire's rape shield statute.[89] At the outset of its analysis, the Supreme Court of New Hampshire examined the constitutionality of the New Hampshire rape shield statute.[90] The court noted the propriety of the statute's purpose, namely, to protect rape complainants.[91] Moreover, the court acknowledged that a nationwide inquiry into procedures historically used in rape trials produced a nearly unanimous consensus that drastic revisions were necessary in order to afford the requisite protection to the complainant.[92]

Despite this pervasive sentiment, the court questioned the validity of implementing such sweeping reforms.[93] The court framed the issue of the validity of the New Hampshire rape shield statute as one of serious constitutional importance.[94] Focusing on the confrontation clause of the sixth amendment, the court held that in order to uphold the constitutionality of the New Hampshire rape shield statute, the defendant, upon motion, must be given an opportunity to demonstrate that due process requires the admission of evidence when the probative value outweighs the prejudicial effect on the complainant.[95] The court also intimated that the questioned testimony, when balanced against the protection of the privacy of the complainant, may be found relevant and admissible at the discretion of the trial judge.[96]

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89 *Id.* at 55, 426 A.2d at 458. The defense alleged that the testimony would reveal: the complainant had sex with her father and grandfather, the latter in exchange for money; the complainant lived with a man who was not her husband; a Nashua police report contained allegations of sexual contact between the complainant and the Edwards brothers; and the complainant had engaged in sexual activities with others while being shown on closed circuit television. *Id.*, at 426 A.2d at 458.

90 *Id.* at 57, 426 A.2d at 459-60. The court stated that it remained "mindful of the legislative intent of the statute which obviously is to protect the victims of rape from being subjected to the unnecessary embarrassment, prejudice, and courtroom procedures that only serve to exacerbate the trauma of the rape itself." *Id.*

91 *Id.* at 57, 426 A.2d at 460 (citing Davis v. Alaska, 415 U.S. 308 (1974)).

92 *Id.* at 57, 426 A.2d at 460.

93 *Id.*, 426 A.2d at 460. The court recognized that forty-six jurisdictions at that time had adopted some form of rape shield law. Thirty of these jurisdictions had adopted restrictive provisions with the option of an in camera hearing to determine the relevancy of such evidence. *Id.*

94 *Id.* at 57-58, 426 A.2d at 460 (citing Tanford and Bocchino, *supra* note 24, at 577-83). The court recognized that the New Hampshire statute purports to prohibit completely the complainant's consensual activity with persons other than the defendant. This prohibition, however, cannot limit the sixth amendment right to confrontation. *Id.*, 426 A.2d at 460.

95 *Id.* at 58, 426 U.S. at 460-61 ("[T]here are some cases in which the reputation of the prosecutrix and in which specific prior sexual history may become relevant and its probative value outweigh[s] the detrimental impact of its introduction." (citing State v. Johns, 615 P.2d 1260, 1263-64 (Utah 1980))).

96 *Id.* at 59, 426 A.2d at 462.

Several infirmities exist within the *Howard* court's conceptual framework. In 1973, the United States Supreme Court recognized that a person's consensual heterosexual sexual activity is a right of personal privacy which is afforded a measure of protection under the Constitution.[97] The court's preoccupation in *Howard* with due process and sixth amendment concerns resulted in the failure to adequately consider the wide variance of legislative responses in addressing constitutional issues. Accordingly, the court gave little merit to the fact that sixteen jurisdictions had not provided a pretrial or in camera mechanism for judicial review.[98]

More peculiar is the court's intimated application of the traditional evidentiary balancing standard to the complainant's sexual propensities and her prior sexual activity.[99] The court's focus in *Howard* upon the rights of the defendant completely neglects the legislative intent to drastically limit these privileges. Moreover, the court ignores the fact that several states do not employ the "relevance outweigh prejudice" standard.[100] Additionally, the New Hampshire rape shield statute facially excludes all prior consensual sexual activity between the complainant and third persons. Though the court couches its discussion in terms of the protection of the fundamental rights of the defendant, there is little analysis of the intent of the New Hampshire Legislature in enacting the rape shield statute.[101] The court's implicit reliance upon antiquated societal views with little or no empirical support results in an outcome inapposite to the thrust of the prior two decades.[102] This rationale imparts an unwarranted regression towards the traditional posture of unlimited admissibility of sexual history evidence premised on long-outmoded considerations.[103] The super-legislative function undertaken by the court scratches the outer bounds of the doctrine of separation of powers and implicates an unmerited reduction in the

97 Roe v. Wade, 410 U.S. 113, 152-53 (1973).

98 121 N.H. at 57, 426 A.2d at 460.

99 *Id.* at 58, 426 A.2d at 460. The traditional evidentiary standard is where "relevance outweighs prejudicial effect." The court states that "the admission of . . . reputation and . . . specific prior sexual activity . . . may become relevant when the probative value outweigh[s] the detrimental impact of its introduction." *Id.*, 426 A.2d at 460.

100 *See infra* app.

101 Indeed, the only discussion of legislative intent by the *Howard* court stated that the New Hampshire rape shield law "obviously is to protect the victims of rape from being subjected to unnecessary embarrassment, prejudice and courtroom procedures that only serve to exacerbate the trauma of the rape itself." 121 N.H. at 57, 426 A.2d at 459. The court's analysis summarily ignored this proposition.

102 *See supra* notes 34-46 and accompanying text.

103 121 N.H. at 61, 426 A.2d at 462 ("[A] defendant must be afforded the opportunity to show, by specific incidents of sexual conduct, that the prosecutrix has the experience and ability to contrive a statutory rape charge against him.").

protection of the fundamental right of privacy properly afforded to rape complainants.

Seven months later, the Supreme Court of New Hampshire reaffirmed and expanded the framework of *Howard* in *State v. La Clair*.[104] *La Clair* involved a defendant's appeal of his conviction for aggravated felonious sexual assault.[105] The defendant contended that the trial court improperly denied him the opportunity to cross-examine the complainant with respect to inconsistent statements that she had made regarding whether she was a virgin at the time of the alleged rape.[106] The trial court, relying on the text of the New Hampshire rape shield statute, ruled that the defendant was precluded from submitting evidence of sexual activity between the complainant and any person other than the defendant.[107]

The Supreme Court of New Hampshire reaffirmed the rationale of *Howard* and reversed the trial court, holding that, "despite the literal language of the [New Hampshire rape shield] statute, the . . . defendant . . . must, upon motion, be given an opportunity to demonstrate that due process requires the admission of . . . evidence [concerning] the past sexual activities of the [complainant] because the probative value . . . [of the evidence] outweighs its prejudicial effect on the prosecutrix [sic]."[108] The court stated further that the effect of *Howard* "is to make evidence of a prosecutrix's [sic] prior sexual activity with persons other than the defendant admissible when the trial court, in the exercise of its discretion, determines that due process so requires."[109]

The court concluded that the complainant issued inconsistent statements regarding her virginity.[110] In remanding the case to the superior court for a retrial, the court stated that "[b]ecause the prejudice to the prosecutrix [sic] resulting from the disclosure that she may not have been a virgin at the time of the alleged rape is minimal, the defendant must be afforded the opportunity to cross-ex-

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104 State v. La Clair, 121 N.H. 743, 433 A.2d 1326 (1981).

105 *Id.* at 744, 433 A.2d at 1328. The court's opinion gives a limited recount of the facts. The state's case involved the testimony of a physician who examined the complainant between 8:30 p.m. and 9:00 p.m. on the night of the alleged rape and found semen in her vagina. The physician's medical opinion was that the complainant had had intercourse within hours of the examination. *Id.* at 747, 433 A.2d at 1329.

106 *Id.*, 433 A.2d at 1329.

107 *Id.*, 433 A.2d at 1329.

108 *Id.*, 433 A.2d at 1329 (citing State v. Howard, 121 N.H. at 58-59, 426 A.2d at 461).

109 *Id.* at 745, 433 A.2d at 1328.

110 *Id.* at 745, 433 A.2d at 1329. The complainant allegedly told the investigating law enforcement officer that she had been a virgin prior to the alleged attack. Under oath at a later deposition, the complainant indicated that she had not been a virgin prior to the alleged attack. *Id.*, 433 A.2d at 1329.

amine her concerning her inconsistent statements."[111]

Though purporting to reaffirm the rationale of *Howard*, *La Clair* broadly expands the judicial discretion of the Supreme Court of New Hampshire. For the first time, the court, in direct contravention of the statutory language, explicitly acknowledged that the sexual activities of a complainant immediately prior to an alleged rape may be an appropriate area of inquiry for cross-examination.[112] Moreover, the court noted that evidence of prior sexual activity may be particularly relevant when such evidence explains the physical injuries of the complainant[113] or the source of semen.[114] The holding and dicta of *La Clair* provides a substantial basis for the emasculation of the scope of protection afforded the complainant under the New Hampshire rape shield statute and is a substantial step in the unmerited judical decimation of a facially restrictive rape shield statute, contrary to the legislative purpose.[115]

In 1982, judicial activism further eroded the intent of the New Hampshire Legislature.[116] The Supreme Court of New Hampshire, in *State v. Miskell*, held that the protection of the New Hampshire rape shield statute extended to questions asked of a rape complainant during a deposition.[117] The court declared that the New Hampshire Legislature intended to create a testimonial privilege to protect a rape complainant from "being subjected to unnecessary embarrassment, prejudice and certain procedures that only serve to

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111 *Id.* at 746, 433 A.2d at 1329. The court specifically noted that the evidence might be relevant to the explanation of the presence of semen in the complainant's vagina. This is analagous to the "source of semen" exception expressly contained in many rape shield statutes. *See infra* Table V, app.

112 *Id.* at 746, 433 A.2d at 1329. *See also* United States v. Kasto, 584 F.2d 268, 272 (8th Cir. 1978).

113 121 N.H. at 746, 433 A.2d at 1329. *See also* State v. Murphy, 134 Vt. 106, 111-12, 353 A.2d 346, 350 (1976).

114 121 N.H. at 746-47, 433 A.2d at 1329.

115 *See infra* Table V, app. The Supreme Court of New Hampshire's application of the New Hampshire rape shield law in *La Clair* is virtually identical in application to the language of CONN. GEN. STAT. ANN. § 54.86f (West 1985).

116 State v. Miskell, 122 N.H. 842, 451 A.2d 383 (1982).

117 *Id.* at 844, 451 A.2d at 384. The procedural posture is relevant to a full understanding of *Miskell*. The defendant's counsel, during a deposition, asked the complainant a series of questions concerning: her sexual relations with her former husbands, both during and allegedly after their marriages; any extramarital sexual relations that the complainant might have had; and any current sexual relations that the complainant might be having. Upon advice of the assistant county attorney, the complainant refused to answer any questions regarding her prior sexual activity. The defendant then filed a motion to compel answers to the depositions. After a hearing, the judge granted the motion reserving the question of the admissibility of any of the compelled evidence. The county attorney's office followed with a motion for an interlocutory appeal. *Id.*

exacerbate the trauma of the rape itself."[118] In extending the rationale of *Howard* and *La Clair* to depositions, the court again cautioned that in "specific circumstances . . . due process require[s] that the evidence be admitted because its probative value outweigh[s] its possible prejudicial effect."[119] The court fashioned a rule similar to that enunciated in *Howard*, stating that, for questions that a defendant asks a rape complainant in a deposition, "[t]he defendant must show, in a hearing before the trial judge, that there is a reasonable possibility that the information sought will produce the type of evidence that due process will require to be admitted at trial."[120]

At first glance, *Miskell* appears merely to extend the protection of the New Hampshire rape shield law to pre-trial discovery. In reality, the decision further erodes the intended application of the New Hampshire rape shield statute. *Miskell* aims to prevent the defendant from asking traumatic questions during discovery. The extension of the *Howard* hearing procedure to depositions replicates existing evidentiary techniques. Adequate protection is already in place as the complainant's attorney could advise the complainant not to answer any questions regarding her prior sexual conduct at deposition. A defendant, wishing to compel an answer, could follow routine discovery procedures requesting an in camera evidentiary ruling. Furthermore, any evidence revealed in a depostion would still be subject at trial to the strictures of New Hampshire's rape shield statute. In connection with the twentieth century conception of the crime of rape, the *Miskell* court's defendant-protective posture is untenable.

This criticism, standing alone, is insufficient to attack the *Miskell* rationale. Procedural duplication is inefficient, but not necessarily unmerited. Other competing concerns exist, however. The Supreme Court of New Hampshire applies a less stringent "reasonable possibility" standard to the admissibility of evidence under New Hampshire's rape shield statute obtained during discovery.[121] Subsequently, in depositions involving contentious questions, judges will be compelled to evaluate the issue of admissibility of sex-

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118 *Id.* at 845, 451 A.2d at 385 (citing State v. Howard, 121 N.H. 53, 57, 426 A.2d 457, 459 (1981)).

119 *Id.* at 846, 451 A.2d at 385.

120 *Id.* 451 A.2d at 386. The court noted that mere speculation that favorable information might be forthcoming is insufficient. Moreover, when a rape complainant is compelled to answer a question at a deposition, the question may not automatically be asked again at trial. The defendant still must, at an in camera hearing, establish that, in light of the answer given at the deposition, due process requires that the complainant again must testify about instances of prior sexual activity. *Id.*, 451 A.2d at 386.

121 *Id.*, 451 A.2d at 386.

ual history evidence under a lesser degree of scrutiny than applied prior to *Miskell*. This factor, paradoxically, increases the possibility that the rape complainant will be subject to "unnecessary embarrassment [and] prejudice . . . that only serve[s] to exacerbate the trauma of . . . rape."[122] The *Miskell* opinion, therefore, appears in direct contention with the court's stated interpretation of the legislative intent behind New Hampshire's rape shield statute.[123]

More recently, in *State v. Walsh*,[124] the defendant faced charges in superior court for the aggravated felonious sexual assualt of his thirteen-year-old stepdaughter. At the beginning of the trial, the defendant objected to the participation of the complainant's guardian ad litem at trial.[125] The Supreme Court of New Hampshire held that the New Hampshire rape shield statute created a limited testimonial privilege insulating the complainant from being questioned about certain topics at trial.[126] With respect to minors, the court noted that "a trial court must take special care in guiding a juvenile in the assertion of a testimonial privilege."[127] The court also concluded that "given the young age of the [complainant], her stake in obtaining the full protection available to her under the rape shield statute, and the limited involvement of the guardian ad litem in this case, we find no error in the guardian ad litem's participation at trial."[128] In reaching this determination, the court in *Walsh* properly acknowledged the judiciary's special responsibility in cases involving minors.

Despite the appropriate extension of the New Hampshire rape shield statute to procedural issues, the Supreme Court of New Hampshire again ignored the language of the rape shield statute.[129] Unlike *Howard* and *La Clair*, however, the court gave far less consideration to the defendant's contentions.[130] *Walsh* may be distinguishable, given the age of the complainant. Yet, it is illogical that the court should distinguish between the protection of the complainant

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122 *Id.* at 845, 451 A.2d at 385.

123 *Id.*, 451 A.2d at 385. *See also supra* note 118 and accompanying text. The *Miskell* court recites the legislative intent behind the New Hampshire rape shield law, but ignores the history in its analysis.

124 126 N.H. 610, 611, 495 A.2d 1256 (1985).

125 *Id.*, at 611, 495 A.2d at 1257. Specifically, the defendant objected to the trial court's permitting the presence of the guardian ad litem at the prosecution's table for the purpose of protecting the victim's rights. *Id.*, 495 A.2d at 1257.

126 *Id.* at 612, 495 A.2d at 1257.

127 *Id.*, 495 A.2d at 1257.

128 *Id.* at 612, 495 A.2d at 1257-58.

129 The court disregarded the exclusionary language of the New Hampshire rape shield statute and applied the "balancing" test. *Id.*, 495 A.2d at 1257-58.

130 *Id.*, 495 A.2d at 1257-58.

based on age. In fact, given the probability that a complainant of majority age has engaged in more sexual activity than a complainant of tender years, the avowed purpose of "protect[ing] the victims of rape from being subjected to unnecessary embarrassment, prejudice, and courtroom procedures that only serve to exacerbate the trauma of the rape itself" is at least equally satisfied by applying the rape shield statute uniformly to more aged complainants.[131]

The most recent decision of the Supreme Court of New Hampshire reaffirmed that a defendant in a rape trial is entitled, under the rape shield statute, to an in camera hearing to determine the admissibility of sexual history evidence.[132] In *State v. Baker*, the court considered the conviction of a defendant for the felonious sexual assault of a thirteen-year-old male.[133] Counsel for the defendant sought to prove that the complainant had engaged in sexual activity with persons other than the defendant.[134] During cross-examination, defense counsel asked the complainant whether he had engaged in any "experiences" with a named third person.[135] Defense counsel explained that the object of his questioning was "to show [the complainant's] experience with regard to these matters and his ability . . . to fabricate a story . . . ."[136] At a bench conference, defense counsel responded that under *Howard*, the New Hampshire rape shield statute bars the admission of evidence of prior sexual activity between the complainant and a third person only if the defendant is "given an opportunity to demonstrate that due process requires the admission of such evidence because the probative value in the context of that particular case outweighs the prejudicial effect on the complainant."[137] Later in the conversation, defense counsel requested a hearing to determine the admissibility of such evidence.[138] The State objected to the motion on the grounds of time-

131 State v. Howard, 121 N.H. 53, 57, 426 A.2d 457, 459 (1981). Even though the trauma to younger rape complainants who have had minimal exposure to sex is great, rape shield laws are not necessarily designed to offer younger complainants a greater degree of protection. Older rape complainants, with more numerous sexual experiences, are far more susceptible to degrading cross-examinations than are younger complainants. Defense counsel are likely to give a lesser degree of deference to older complainants in attacking their credibility and veracity of testimony. Rape shield laws, therefore, should have equivalent application to complainants, regardless of age.

132 State v. Baker, 127 N.H. 801, 508 A.2d 1059 (1986).

133 *Id.* at 802, 508 A.2d at 1060-61.

134 *Id.* 508 A.2d at 1061.

135 *Id.*, 508 A.2d at 1061. The court subsequently sustained an objection by the state that the question was "confusing or not clear."

136 *Id.* at 803, 508 A.2d at 1061.

137 *Id.*, 508 A.2d at 1061. citing State v. Howard, 121 N.H. 53, 58-59, 426 A.2d 457, 460-61 (1981)).

138 *Id.* at 803, 508 A.2d at 1061.

liness.[139] The superior court sustained this objection and excluded the evidence, refusing to grant a hearing at this particular stage of the proceeding.[140]

The Supreme Court of New Hampshire held that the ruling was reversible error and that the defendant was entitled to a hearing on the admissibility of the evidence.[141] Acknowledging the exasperation of the trial judge at the untimely motion, the court, nevertheless, noted that the timing of the defense counsel's motion had no impact on the right to a hearing.[142] The court, in granting the hearing, explained that a "*Howard* hearing is a due process requirement, which must be given a higher priority than efficiency in the use of jurors' and witness' time."[143]

The court, reaffirming that the New Hampshire rape shield statute is "a testimonial privilege to protect the [complainant's] privacy,"[144] then formulated an ingenious construction of the *Miskell* holding, stating that "an offer of proof may be demanded before the shield law's privacy privilege must yield to pretrial questioning."[145] On the other hand, the *Baker* court entertained that "*Miskell* did not hold, however, that the defendant must make such an offer of proof before he is entitled even to insist that a *Howard* hearing be scheduled."[146] Balancing these findings, a defendant who subsequently fails to make an offer of proof renders the *Howard* hearing process effectively moot. Clearly, this method is unlikely to "force an accommodation of sound judicial management with constitutionally mandated procedure . . . ."[147]

The Supreme Court of New Hampshire treads on soft equal protection footing through its casual gender-based distinctions. *Baker* involved a male complainant who was a minor.[148] It is not evident why the male complainant in *Baker* is afforded a lesser degree of protection than is the minor female complainant in *Walsh*.[149] It is apparent from the lack of analysis that the court in *Walsh* and

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139 *Id.*, 508 A.2d at 1061. The State argued that the motion was untimely because the jury was seated and a witness was on the stand.

140 *Id.*, 508 A.2d at 1061.

141 *Id.*, 508 A.2d at 1061.

142 *Id.* at 804, 508 A.2d at 1061. The court stated that the state did not cite any rule of the superior court requiring more timely practice. *Id.*, 508 A.2d at 1061.

143 *Id.* at 804, 508 A.2d at 1062.

144 *Id.*, 508 A.2d at 1061.

145 *Id.*, 508 A.2d at 1061.

146 *Id.*, 508 A.2d at 1061.

147 *Id.*, 508 A.2d at 1061.

148 *See supra* note 133 and accompanying text.

149 *See supra* notes 124-31 and accompanying text

Baker failed to consider the equal protection implications of their gender-based differentiations.

Howard, *La Clair*, *Walsh*, and *Baker* exemplify the Supreme Court of New Hampshire's futile attempt to reconcile the tenets of the judicial process with the dictates of the New Hampshire Legislature. The court's cursory attention to the development of the New Hampshire rape shield statute, intertwined with the court's lack of attention to the overall societal trend recognizing the equality of women, contributed greatly to the morass of judicial confusion. The court's directive in *Howard* for in camera hearings, while professing to aid the statute in compliance with due process requirements, neglects relevant constitutional concerns. The in camera hearing stands only as a monument to the creativity of the Supreme Court of New Hampshire in imposing its views over a constitutionally-sound legislative mandate. The New Hampshire series of cases provides a stirring example of the concerns that state judiciaries confront when interpreting facially clear rape shield laws. New Hampshire, however, is not alone in its dilemma. Other states, as demonstrated below, entertain similar problems in the interpretation of drastically different statutes through the application of entirely different principles.

B. TEXAS

At the other extreme from the New Hampshire statute are rape shield laws which are far more lenient in admission of evidence of the prior sexual history of the complainant.[150] Prior to September 1, 1986, Texas' rape shield statute explicitly stated that evidence of specific instances, opinion evidence, and reputation evidence of the complainant's past sexual conduct is admissible if, at an in camera hearing, the judge finds the evidence material to a fact at issue in the case and that the probative value of the evidence outweighs its inflammatory or prejudicial nature.[151] This language, contrasted with

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150 *See infra* Table I, app.

151 *See, e.g.*, TEX. PENAL CODE ANN. § 22.065 (Vernon Supp. 1986), which provided:

(a) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct may be admitted under Sections 22.011 and 22.021 of this code only if, and only to the extent that, the judge finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(b) If the defendant proposes to ask any question concerning specific instances, opinion evidence, or reputation evidence of the victim's sexual conduct, either by direct examination or cross-examination of any witness, the defendant must inform the court out of the hearing of the jury prior to asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under

the plainly restrictive text of the New Hampshire rape shield statute, offered a conciliatory tone which promoted judicial discretion. Unlike the New Hampshire rape shield statute, the Texas law explicity provided for an in camera process enunciating standards to determine admissibility. Thus, the Texas rape shield statute seemingly

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Subsection (a) of this section. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits nor refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(c) The court shall seal the record of the in camera hearing required in Subsection (b) of this section for delivery to the appellate court in the event of an appeal.

(d) This section does not limit the right of the state or the accused to impeach credibility by showing prior felony convictions nor the right of the accused to produce evidence of promiscuous sexual conduct of a child 14 years or older as a defense to sexual assault, aggravated sexual assault, or indecency with a child. If evidence of a previous felony conviction involving sexual conduct or evidence of promiscuous sexual conduct is admitted, the court shall instruct the jury as to the purpose of the evidence and as to its limited use.

The Texas Legislature repealed TEX. PENAL CODE ANN. § 22.065, effective September 1, 1986. In its place, the Texas Court of Criminal Appeals promulgated TEX. R. CRIM. EVID. 412, which provides:

(a) In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(b) In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit assault or aggravated sexual assault evidence of specific instances of an alleged victim's past sexual behavior is also not admissible, unless:

(1) such evidence is admitted in accordance with paragraphs (c) and (d) of this rule;

(2) it is evidence (A) that is necessary to make or explain scientific or medical evidence offered by the state; (B) of past sexual behavor with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged; (C) that relates to the motive or bias of the alleged victim; (D) is admissible under Rule 609; or (E) that is constitutionally required to be admitted; and

(3) its probative value outweighs the danger of unfair prejudice.

(c) If the defendant proposes to introduce any documentary evidence or to ask any question, either by direct examination or cross-examination of any witness, concerning specific instances of the alleged victim's past sexual behavior, the defendant must inform the court out of the hearing of the jury prior to introducing any such evidence or asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under paragraph (b) of the rule. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits nor refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(d) The court shall seal the record of the in camera hearing required in paragraph (c) of this rule for delivery to the appellate court in the event of an appeal.

(e) This rule does not limit the right of the accused to produce evidence of promiscuous sexual conduct of a child 14 years old or older as a defense to sexual assault, aggravated sexual assault, indecency with a child or an attempt to commit any of the foregoing crimes. If such evidence is admitted, the court shall instruct the jury as to the purpose of the evidence and as to its limited use.

The complete exclusion of reputation and opinion evidence under Rule 412, however, does not alter the analysis of opinions which interpret former § 22.065.

resolved the dilemma that the Supreme Court of New Hampshire confronted in determining the appropriate level of judicial review to comply with due process and sixth amendment concerns. Yet, despite the tone and detail of the Texas rape shield statute, Texas courts were still required to balance the merits of admission and exclusion in the same fashion as are the courts of New Hampshire. When forced into this role, Texas courts applied extraneous interpretations innundated with confusing references to legislative history in order to substantiate their opinions.

Texas' initial recognition of the inherent tension between the rights of the complainant and the defendant surfaced in 1984 in *Ex parte Rose*.[152] *Ex parte Rose* arose from a criminal indictment charging the defendant with the aggravated rape of his fifteen-year-old daughter.[153] Prior to voir dire, the Criminal District Court of Dallas County instructed defense counsel, Robert Rose, that, under the Texas rape shield statute, "no questions are to be asked of the victim, alleged victim, and no evidence is to be offered in any way, going into prior sexual activity of the victim . . . ."[154] Upon cross-examination of the complainant, Rose inquired, "I take it nothing like that [rape] ever happened to you before?"[155] The prosecution objected to the question on the ground that it implicated the prior sexual activity of the complainant.[156] The court, pointing out the admonition issued prior to voir dire, cited Rose for contempt of court.[157]

Following a hung jury and the declaration of a mistrial in the principal case, Rose filed an application for a writ of habeas corpus in the Court of Criminal Appeals of Texas.[158] Rose contended that the admonition of the trial court prior to voir dire referred to questions implicating "sexual conduct" as proof of the promiscuity of the complainant, not as to whether the complainant had been the victim of a previous rape.[159] The court rejected this limited definition of the term "sexual conduct," holding that in the context of the Texas rape shield statute, the term "encompasses sexual activity or

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152 704 S.W.2d 751 (Tex. Crim. App. 1984)(en banc) (*reh'g denied* February 26, 1986).

153 *Id.* at 752.

154 *Id.* at 753.

155 *Id.*

156 *Id.*

157 *Id.* at 754. Rose received a five hundred dollar fine as punishment. *Id.*

158 *Id.* Rose argued that there was no evidence to support the respondent judge's conclusion that the question propounded to the complainant violated the constricts of the Texas rape shield statute. *Id.*

159 *Id.* at 755.

conduct whether willingly engaged in or not."[160] The court subsequently denied Rose's application for relief.[161]

The Texas Court of Criminal Appeals' liberal interpretation of the former Texas rape shield statute comported well with the modern complainant-protective perception of rape shield laws.[162] On rehearing, Judge Clinton's concurrence in the denial of Rose's application attempted to glean the legislative intent behind the enactment of Texas' rape shield statute.[163] The analysis noted that "22.065 is derived from former 21.13 and it, in turn, from the 'Weddington package.' "[164] With respect to the thrust of the original bill, the concurrence noted the advancement of two propositions:

> The authors of the bill felt that, except where such conduct pertains to the issue of consent, the victim's past sexual activity is irrelevant to the question of whether or not a crime was committed. Even where consent is an issue, only particular acts, not the woman's entire sexual history would be relevant to consent to intercourse with a particular individual.[165]

Moreover, the legislative history indicates that the Texas rape shield statute was "strongly worded in favor of excluding most of the victims' sexual activity—even more so than our original proposal."[166]

In dissent, Judge Teague asserted that Rose was not guilty of contempt of court.[167] Reasoning that Rose was not ordered to refrain from asking any specific question, Judge Teague argued that "[t]he pretrial order in this cause is a punitive order and must be considered in that light. There also must be no doubt from the record that Rose intentionally and wilfully violated it before he can be

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160 *Id.* The court opted for the normal meaning and common usage of the term "sexual conduct." H. BLACK, BLACK'S LAW DICTIONARY 367 (4th Ed. 1968) defines "conduct" as "personal behavior; deportment; mode of action; any positive or negative act." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (unabr. ed. 1967), defines "sexual" as "of or pertaining to sex; sexual matters." 704 S.W.2d at 755.

161 704 S.W.2d at 757.

162 *See supra* notes 34-46 and accompanying text.

163 704 S.W.2d. at 757 (Clinton, J., concurring).

164 *Id.* at 758 (Clinton, J., concurring). § 21.13 was the forerunner to § 22.065. Weddington, who was a member of the Texas Legislature, co-sponsored the Texas rape shield law. *Id.*

165 704 S.W.2d at 758 (Clinton, J., concurring)(citing Weddington, *Rape Law in Texas: H.B. 284, And the Road to Reform*, 4 AM. J. CRIM. L. 1, 11 (1975-76)). Weddington provides a rationale for the Texas rape shield law, stating:

> The accused enjoys many protections during the course of his prosecution, including the inadmissibility of his own past sexual behavior—even if other women have previously accused him of rape or rape attempts. In voting to add [the Texas rape shield law]. . . , a majority of House members asserted that irrelevant testimony about the victim's past at trial did not meaningfully protect the defendant.

Id. at 758-59 n.4.

166 *Id.* at 759 (Clinton, J., concurring).

167 *Id.* at 761 (Teague, J., dissenting).

found guilty of contempt."[168] The dissent also noted that the word "that," as used in the question "I take it nothing like that ever happened to you before?," did not necessarily refer to the prior sexual activity of the complainant.[169]

Facially, the dissent appears as nothing more than an illogical attempt to support a proffered result. Criticism is easily levelled at the constructionist nature of the argument.[170] This linguistic dispute, nevertheless, laid the framework for the interpretation of the legitimate scope of the former Texas rape shield statute. Subsequent opinions confirm that this battle remains unresolved in the context of the recent adoption in Texas of a new rule of evidence.

The case of *Allen v. State* provided the first extensive explanation of the prior Texas rape shield statute after *Ex parte Rose*.[171] In *Allen*, the Texas Court of Criminal Appeals affirmed the defendant's conviction for the aggravated rape of a seventeen-year-old female.[172] The defendant had contended that the trial court erred in excluding evidence of the complainant's prior sexual activity, particularly that the complainant was not a virgin.[173] In its analysis, the court traced the development of the Texas rape shield statute,[174] emphasizing that:

> [t]he rationale behind these statutes is that evidence of a rape victim's prior sexual activity is of dubious probative value and relevance and is highly embarrassing and prejudicial. Often such evidence has been used to harass the prosecuting victim. Sponsors of these statutes assert that they encourage victims of sexual assault to report the crimes without fear of having their past sexual history exposed to the public.[175]

Using this standard of admissibility, the court posited that, under the Texas rape shield statute, the evidence be material to an issue in the case and that the inflammatory or prejudicial nature of the evi-

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168 *Id.* at 763 (Teague, J., dissenting) (advocating a more restrained application of the protective scope of the Texas rape shield law).

169 *Id.*

170 *See supra* notes 167-69 and accompanying text.

171 700 S.W.2d 924 (Tex. Crim. App. 1985).

172 *Id.* at 932.

173 *Id.* at 926. The defendant specifically alleged three grounds for error. Each ground stated that the trial court erred in not allowing testimony of the complainant's prior sexual activity: (1) to refute the misleading testimony elicited by the state; (2) that was material to the defensive theory of consent, and (3) after the complainant left a false impression with the jury. *Id.*

174 *Id.* TEX. PENAL CODE ANN. § 21.13 was in effect at the time of the defendant's trial. It has since been replaced by TEX. PENAL CODE ANN. § 22.065 and, subsequently, TEX. R. CRIM. EVID. 412, with little substantive alteration.

175 700 S.W.2d at 929 (citing Bell v. Harrison, 670 F.2d 656, 658 (6th Cir. 1982)).

dence not outweigh its probative value.[176]

The court also determined that the issue of the complainant's virginity was not material to an issue in the case.[177] Reiterating the second prong of its criteria for admissibility, the court emphatically noted that "rape shield statutes should not be used to exclude highly relevant evidence and violate the defendant's right of confrontation or other constitutional rights."[178] The language in *Allen* suggests that:

> [i]n order to assess the rape shield laws one must ask whether these state interests [responsibility of the judiciary to protect the complainant from questions not within the proper bounds of cross-examination], as embodied in particular statutory standards applied in specific factual contexts, outweigh the defendant's valued [sixth amendment] right to meet the prosecution's case that he is indeed innocent. Where the balance inclines toward the accused, any provision including this evidence cannot be squared with the Constitution.[179]

Applying this balancing approach, the court held that the trial judge correctly applied the Texas rape shield statute in excluding the admission of evidence of the complainant's prior sexual conduct.[180]

Consistent with his concurrence in *Ex parte Rose*, Judge Clinton offered a vehement dissent in *Allen*.[181] Judge Clinton evinced the primary concern that "the majority opinion is laying down a proposition for admitting testimony of prior sexual activity even broader than any extant before enactment of [the Texas rape shield statute]."[182] In addition to emphasizing the "slippery-slope" of an ad hoc balancing approach, the dissent criticized the majority holding that evidence of the complainant's prior sexual conduct may be admissible to attack the complainant's credibility, noting that proper skepticism existed in the legal community that "sexual activity can be equated with moral character and thus testimonial reliability."[183] Judge Clinton's dissent offers a cogent, modern analysis of the majority's seemingly protective opinion which, in reality, pierces the avowed purpose of rape shield laws.

Allen produces a most paradoxical result. While excluding evi-

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176 *Id.* This interpretation is consistent with the relevancy and "balancing" tests contained in FED. R. EVID. 104 and FED. R. EVID. 403.

177 *Id.* at 930.

178 *Id.* at 932 (citing Bell v. Harrison, 670 F.2d 656, 658 (6th Cir. 1982)).

179 *Id.* (citing Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 54-55 (1977)).

180 *Id.*

181 *Id.* at 937 (Clinton, J., dissenting).

182 *Id.* at 938 (Clinton, J., dissenting).

183 *Id.* at 940 (Clinton, J., dissenting)(citing Comment, *Rape-Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 320 (1979)).

dence of the past sexual history of the complainant in the instant case, the majority opinion severely contracts the prospective scope of the Texas rape shield statute. Recognizing this anomaly, the dissent foregoes the poorly elucidated "balancing" test in order to create, ex ante, a more complainant-protective rape shield law.[184] Judge Clinton, as in his concurrence in *Ex parte Rose*,[185] strives to effectuate the societal concerns underlying the Texas rape shield statute. *Allen* further illustrates the confusion state courts face when engaging in the dialectic of interpreting the limits of rape shield laws. Though the Texas Court of Criminal Appeals placed greater reliance on the legislative history and commentary surrounding the Texas rape shield statute than have other courts, the varying interpretations inevitably lead to an obfuscating series of judicial opinions.

Two more recent opinions by the Court of Appeals of Texas provide minimal insight as to the proper interpretation of the prior Texas rape shield statute. In *Sapien v. State*, the defendant was convicted of the aggravated rape of his daughter.[186] On appeal, the defendant alleged error in the trial court's exclusion of evidence of the complainant's sexual conduct with other children.[187] Without explicit analysis, the Court of Appeals of Texas stated that the Texas rape shield statute prohibited the defendant from using the evidence to show the complainant's promiscuity or to impeach her generally and that the prejudicial effect of such evidence outweighed its probative value.[188] In excluding the evidence in question, the court allowed the complainant the testimonial protection that both the former and current Texas rape shield laws provide for children under the age of fourteen.[189]

At first glance, the *Sapien* court's relaxed application of the "balancing" test signaled an evolving judicial posture aimed at giving greater deference to the mandates of the Texas Legislature. In real-

184 *See supra* notes 181-83 and accompanying text.

185 700 S.W.2d 751 (Tex. Crim. App. 1984)(Clinton, J., concurring).

186 705 S.W.2d 214, 216 (Tex. Ct. App. 1985). The parties stipulated that the defendant's daughter was a child under the age of fourteen.

187 *Id.* at 216. In particular, the defendant alleged that the evidence was relevant and admissible because the state contended that the complainant's credibility was supported by her sexual knowledge. The defendant contended that the excluded evidence would have shown that the complainant's sexual knowledge could have been gained from sources other than the defendant. *Id.*

188 *Id.*

189 *See supra* note 151 and accompanying text. TEX. PENAL CODE § 22.065(d) (Vernon Supp. 1986) excluded the use of evidence of the prior sexual conduct of a child under the age of fourteen to establish promiscuity for impeachment purposes. This exclusion is retained in the text of TEX. R. CRIM. EVID. 412.

ity, the opinion exposed the tribulations courts have experienced when interpreting the Texas rape shield statute. The court genuflects to procedural irregularities for support of its decision in lieu of offering substantive policy statements.[190] The impact of *Sapien*, in light of these distinctions, remains dubious.

The Court of Appeals of Texas continued this uncertain approach in *Lewis v. State*.[191] In *Lewis*, the defendant was convicted of the sexual assault of his fifteen-year-old daughter.[192] The defendant attempted to elicit testimony that the complainant had previously engaged in sexual activity with others.[193] The Court of Appeals upheld the trial court's refusal to admit such tesimony, enunciating a more complainant-protective standard that evidence of sexual conduct is inadmissible unless it tends to resolve an issue in the case.[194]

Given the decision in *Lewis*, Texas courts have moved toward adopting a modern analysis of the purpose of rape shield laws by emphasizing the protection of the privacy of the complainant.[195] Texas' recent promulgation of Rule 412, excluding completely reputation and opinion evidence, emphasizes this factor.[196] This hypothesis, however, ignores the fact that Texas courts have yet to formulate the factors to be considered when balancing the probative value of evidence of past conduct against its prejudicial nature. Though composing a list of this type is difficult, state courts require some type of decision-making guidance. Moreover, neither *Lewis* nor *Sapien*, which were both Court of Appeals of Texas decisions, contains language effectively rebuffing the analyses offered by the Court of Criminal Appeals of Texas in *Ex parte Rose* and *Allen*. The continued lack of a credible analytical framework for addressing the scope and purpose of Texas' former rape shield statute applies to Texas' new rule of evidence and casts doubt on the contention that the lower Texas courts have abandoned their super-legislative analyses in favor of a more protective reading which comports with the modern position adopted by the Texas Legislature. In the face of these continuing questions, the Texas analysis of rape shield laws remains unclear and portends for more judicial confusion until the Supreme Court of Texas addresses the issue.

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190 705 S.W.2d at 217.

191 709 S.W.2d 734 (Tex. Ct. App. 1986).

192 *Id.* at 735.

193 *Id.*

194 *Id.* The Court explicitly stated that unchastity is a defense only when consent is at issue.

195 *See supra* notes 34-46 and accompanying text.

196 *See supra* note 151 and accompanying text.

VIII. The Corrective Nature Of The Judiciary

A. MISSOURI

In comparison with the most recent Texas rape shield statute, Missouri's rape shield law more specifically enumerates situations in which sexual history evidence is admissible.[197] Despite this attempt to summarize the situations calling for admissibility, the Missouri rape shield statute remains textually ambiguous. Section 1 offers a complete prohibition on opinion, reputation, and prior sexual conduct evidence, which is qualified by section 2.[198] The Missouri General Assembly's inability to draft an unambiguous provision has contributed heavily to the confusion Missouri courts have recently exhibited in defining the scope Missouri's rape shield statute.

In *State v. Brown*, the Supreme Court of Missouri first examined the constitutionality of Missouri's rape shield statute.[199] The court noted that "prior to the enactment of the [rape shield law], evidence of a complainant's general reputaton for morality and chastity was held admissible as bearing on the issue of consent but not specific acts of alleged misconduct."[200] Recognizing the normative inconsistency of this proposition, the court rejected the idea that a woman's prior consent is relevant to the question of later consent as a "tired, insensitive and archaic platitude of yesteryear."[201]

Despite this progressive judicial pronouncement, the thrust of the court's analysis in *Brown* proceeded along more traditional

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197 Mo. Ann. Stat. § 491.015 (Vernon Supp. 1987) provides, in pertinent part:

1. In prosecutions under chapter 566, RSMo, or prosecutions related to sexual conduct under chapter 568, RSMo, opinion and reputation evidence of the complaining witness' prior sexual conduct is inadmissible; evidence of specific instances of the complaining witness' prior sexual conduct or the absence of such instances or conduct is inadmissible, except where such specific instances are:
(1) Evidence of the sexual conduct of the complaining witness with the defedant to prove consent where consent is a defense to the alleged crime and the evidence is reasonably contemporaneous with the date of the alleged crime; or
(2) Evidence of specific instances of sexual activity showing an alternative source or origin of semen, pregnancy, or disease;
(3) Evidence of immediate surrounding circumstances of the alleged crime; or
(4) Evidence relating to the previous chastity of the complaining witness in cases, where, by statute, previously chaste character is required to be proved by the prosecution.
2. Evidence of the sexual conduct of the complaining witness offered under this section is admissible to the extent that the court finds the evidence relevant to a material fact or issue.

198 *Id.*

199 636 S.W.2d 929 (Mo. 1982)(en banc), *cert. denied*, 459 U.S. 1212.

200 *Id.* at 933. Earlier courts reasoned, consistent with the position of Dean Wigmore, *see supra* notes 23-26 and accompanying text, that a woman of previous unchaste character was more likely to commit an act of sexual intercourse than a woman who was strictly virtuous. *Id.*

201 *Id.* at 933 (citing Milenkovic v. State, 86 Wis. 2d 272, 272 N.W.2d 320 (1978)).

lines.[202] In focusing initially on the enactment of the statute, the court commented that the Missouri legislature acknowledged the fallacious nature of Wigmore's view when it limited the admissibility of evidence of a rape complainant's prior sexual conduct to the specfic exceptions enumerated in sections 1 and 2.[203] This recognition comports well with a complainant-protective analysis of the purpose of Missouri's rape shield statute.

The court, however, abruptly shifted gears, declaring that the statute created only a "presumption" that evidence of a complainant's past sexual conduct is irrelevant.[204] Furthermore, the court interpreted the generalized exception of section 2 to allow introduction of any evidence that "the court finds . . . relevant to a material fact or issue."[205] This interpretation effectively emasculated the opinion and reputation evidence exclusion included in section 1.[206] The court cited the procedural method for evaluating evidence outside of the presence of the jury as protective of the Missouri rape shield statute's constitutionality.[207] Subsequently, the court, in camera, determined that evidence of the complainant's specific sexual activity was properly excluded.[208]

State v. Brown is a paradigm of the Missouri Supreme Court's legitimate effort to effectuate the legislative intent behind Missouri's rape shield statute. The court, however, falls victim to the ambiguous language of the statute and engages in an ill-fated attempt to balance the competing interests of the complainant and the defendant. In classifying the legislature's dictate as a "presumption," the *Brown* court undermines its progressive attempt to effectively implement the Missouri rape shield law. This shift in philosophy, attributable to the confusing text of the Missouri statute, created a challenge for future Missouri courts.

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202 *Id.* at 933. *See also supra* notes 22-31 and accompanying text.

203 *Id.* at 933. The court explained the legislative intent behind the statute in three concise statements. First, the statute redressed the faulty premise upon which evidence of prior sexual conduct had traditionally been admitted. Second, the legislature recognized that, in most instances, a rape complainant's past conduct has no reasonable bearing upon the issue of consent or credibility. Finally, the legislature attempted to aid effective law enforcement by encouraging victims of rape to report and prosecute such crimes without a threat to expose intimate details of past sexual activity, if any, to the public. *Id.*

204 *Id.*

205 *Id.*

206 *See supra* note 197 and accompanying text.

207 636 S.W.2d at 934. The court advocated the application of a test balancing the probative value of the evidence against its prejudicial effect at an in camera hearing to determine admissibility. *Id.* This accords with MO. ANN. STAT. § 491.015 (3) (Vernon Supp. 1987).

208 *Id.* at 935.

The full impact of this discontinuity reached fruition in *State v. Jones*.[209] In *Jones*, the defendant was convicted of rape and sodomy in the Circuit Court of the City of St. Louis.[210] At an in camera hearing, the trial court denied the defendant's proposal to offer evidence on the issue of consent.[211] On appeal, the defendant argued for the admissibility of the evidence under the generalized exception of section 2 of the Missouri rape shield statute.[212] The Supreme Court of Missouri, clarifying part of the confusion inherent in its *Brown* opinion, held that the general exception of section 2 is directed only at the exceptions set forth in section 1, and, then, only to the extent that the evidence is related to a material fact or issue.[213] By effectively overruling *Brown* to the extent that it diverges from this proposition,[214] the Supreme Court of Missouri edged back toward the complainant-protective dicta contained in the initial portion of *Brown*.[215]

In dissent, Judge Blackmar argued for adherence to *Brown*.[216] The dissent recognized that "the primary purpose of [the Missouri rape shield] statute was to repudiate the evidentiary proposition that a woman who had engaged in prior extramarital intercourse was more likely to consent to sexual activity than a woman of prior chaste' character."[217] Furthermore, Judge Blackmar concluded, without elaboration, that the complainant's sexual history is irrelevant except in unusual cases.[218]

Despite his seemingly dispositive discussion, Judge Blackmar postulated that *Brown* more adequately addressed the confrontation and due process concerns surrounding a statute that deprives a criminal defendant of the opportunity to introduce evidence which is relevant and material in his defense.[219] In support of this position, Judge Blackmar formulated situations in which evidence of the complainant's prior sexual history should be admitted but would

209 716 S.W.2d 799 (Mo. 1986)(en banc).

210 *Id.* at 800.

211 *Id.* The defendant stated that he had had consensual intercourse with the complainant three and one-half to four and one-half months previous to the instant incident. *Id.*

212 *Id.* In support of this contention, the defendant relied on the language of *State v. Brown* that "the statute creates only a presumption that evidence of a victim's prior sexual conduct is irrelevant." *Id.*

213 *Id.*

214 *Id.*

215 *See supra* note 201 and accompanying text.

216 716 S.W.2d at 802 (Blackmar, J., dissenting).

217 *Id.* (Blackmar, J., dissenting).

218 *Id.* (Blackmar, J., dissenting).

219 *Id.* (Blackmar, J., dissenting).

not fall within any of the statutory exceptions.[220] Applying this logic, Judge Blackmar concluded that the repudiation of *Brown* invited constitutional problems.[221]

The dissenting analysis in *Jones* is without merit. First, a constitutional construction of the Missouri rape shield statute is still possible given the vitality of the "balancing" test engaged in under the statutory exception.[222] Secondly, the majority in *Jones* merely repudiates the "presumption" language of *Brown*.[223] Finally, Judge Blackmar's acceptance of the rationale underlying the enactment of Missouri's rape shield statute undermines any need to revert to the protective *Brown* posture.[224] The thrust of his analysis relies on ideas popularized in the outdated Victorian era. Judge Blackmar's opposition to *Jones* appears as an abortive attempt to apply an archaic remnant of the law of evidence.[225]

The Supreme Court of Missouri's opinion in *State v. Jones* stands as a cogent analysis of the modern function of rape shield laws. Despite ambiguous language and a powerful statement in *Brown*, the court admirably attempted to elevate the status of the rape shield law to the level envisioned by the Missouri General Assembly. The result is an effective judicial parsing of an oblique statute through a well-reasoned analysis. Though proponents of the minority view remain, the *Jones* opinion portends an effective summary of the proper function of rape shield laws.

B. PENNSYLVANIA

In 1973, the Pennsylvania General Assembly enacted a rape shield statute similar in structure to the law adopted in Missouri.[226]

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220 *Id.* at 802-03 (Blackmar, J., dissenting). Specifically, Judge Blackmar suggested a scenario in which the defendant claimed that the complainant was a prostitute who, when there was an argument about consideration, alleged rape only after services had been furnished. The dissent argued that in such a situation, contrary to the Missouri rape shield statute, the defendant should be permitted to show that the complainant was a professional prostitute. The dissent also applied a similar analysis to a situation where the complainant is a nymphomaniac. *Id.*

221 *Id.* at 803 (Blackmar, J., dissenting).

222 *See supra* note 207 and accompanying text.

223 716 S.W.2d at 800.

224 *See supra* notes 216-18 and accompanying text.

225 716 S.W.2d. at 804 (Blackmar, J., dissenting). Judge Blackmar would admit a statement of the complainant asking the defendant's sister why the defendant had become involved with his wife. To Judge Blackmar, this inquiry would signify a feeling of possessiveness or a device for revenge. These improper conclusions distort the modern purpose of rape shield laws and the rationale underlying the enactment of the Missouri rape shield statute as discussed *supra* in notes 9-11 and 217-18 and accompanying text. *Id.* (Blackmar, J., dissenting).

226 18 PA. CONS. STAT. ANN. § 3104 (Purdon 1983) provides, in relevant part:

Pennsylvania courts, however, approach this statute in a manner disparate from that of the Missouri judiciary. Consistent with the Missouri statute, Pennsylvania's rape shield law generally prohibits the introduction of evidence of the rape complainant's sexual history.[227] The language of subsection (a) of Pennsylvania's rape shield statute appears to explicitly prohibit the admission of opinion and reputation evidence of the complainant's past sexual conduct.[228] The in camera procedure enunciated in subsection (b), however, casts doubt upon this absolutist proposition.[229] As a result, the Pennsylvania judiciary has interpreted Pennsylvania's rape shield statute as allowing certain types of evidence at trial that the Pennsylvania General Assembly intended to exclude.[230]

The Supreme Court of Pennsylvania first addressed the proper interpretation of Pennsylvania's rape shield statute in *Commonwealth v. Majorana*.[231] In *Majorana*, the complainant alleged that she was raped by one of the codefendants in a car driven by the defendant.[232] Defense counsel sought to introduce evidence that the complainant had engaged in consensual intercourse with the codefendant two hours prior to the alleged incident.[233] The Commonwealth of Pennsylvania, in turn, objected on the ground that the evidence was inadmissible under Pennsylvania's rape shield statute.[234] The trial court sustained the Commonwealth's objection to

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(a) General rule.—Evidence of specific instances of alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

(b) Evidentiary proceedings.—A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file written motion and offer of proof at the time of trial. If. . . the court determines that the motion and offer of proof are sufficient. . . the court shall order an in camera hearing and shall make findings on the record.

227 *Id. See also infra* Table V, app..

228 *Id.*

229 *See supra* note 226 and accompanying text.

230 *See, e.g.*, Commonwealth v. Majorana, 503 Pa. 602, 470 A.2d 80 (1983).

231 503 Pa. 602, 470 A.2d 80 (1983).

232 *Id.* at 605, 470 A.2d at 82.

233 *Id.* at 605-06, 470 A.2d at 82.

234 *Id.*, 470 A.2d at 82. The procedural posture of the case indicates that the factual background includes incidents of sexual activity between the complainant and the defendant. This evidence is admissible under many state rape shield laws. The Pennsylvania rape shield statute, however, limits the admissibility of evidence of prior sexual activity between the complainant and one of the codefendants. *See supra* note 226 and accompanying text. The court, in its analysis, discusses a broader range of relationships involving the complainant. It is the scope of the court's commentary which sheds light on the Pennsylvania approach to relationships involving the complainant and a third party.

any testimony about either the complainant's prior sexual relationship with the codefendant or the events of the day in question.[235] Defense counsel excepted to the trial court's ruling, arguing that the contested testimony was not offered to attack the source of semen in the complainant's vagina.[236]

On appeal to the superior court, the majority upheld the trial court's ruling, stating that " '[t]hey are two separate incidents, whether both, either, or neither in fact occurred . . . . As testimony of a prior and separate incident [the defendant's] testimony was barred by the Rape Shield Law unless the defendants placed consent at issue and filed the 3104(b) motion.' "[237] The superior court also held the evidence inadmissible as an explanation for the source of semen in the complainant's vagina, reasoning that this evidence would also be the result of a prior consensual act.[238] The majority couched these findings in its belief that " 'the *raison d'etre* of rape shield statutes is partially to correct the manner in which our criminal justice system has approached the victim of a sexual assault.' "[239]

The Supreme Court of Pennsylvania reversed the trial court's decision, stating that "[e]vidence which directly contradicts the act or occurrence at issue is not barred by [the rape shield] statute."[240] In its analysis, the court recognized the criminal justice system's historically inappropriate treatment of rape complainants.[241] In repudiating this position, the court commented that legislation throughout the United States limited the admissibility of evidence of a rape complainant's past sexual activities or her character.[242] The court further exclaimed that "rape shield laws are legislative recognitions of the minimal probative value of sexual history and are designed to prohibit . . . the travesty of . . . defense witnesses testifying to the sexual propensities . . . of the complaining witness."[243]

In spite of this lucid commentary, the Supreme Court of Pennsylvania determined that the Pennsylvania General Assembly did

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235 *Id.* at 606, 470 A.2d at 82.

236 *Id.*, 470 A.2d at 82.

237 *Id.* at 606-07, 470 A.2d at 82 (quoting Commonwealth v. Majorana, 299 Pa. Super. 211, 216, 445 A.2d 529, 532 (1982)).

238 *Id.* at 607, 470 A.2d at 82.

239 *Id.*, 470 A.2d at 82 (quoting Commonwealth v. Majorana, 299 Pa. Super. at 216, 445 A.2d at 532).

240 *Id.* at 608, 470 A.2d at 83.

241 *Id.* at 608, 470 A.2d at 83. The court noted that as recently as 1940 the admissibility, on a rape charge, of the complainant's character for chastity or unchastity was generally conceded. *Id.*, 470 A.2d at 83 (citing I J. WIGMORE, EVIDENCE § 62 (3d ed. 1940)).

242 *Id.* at 609 n.7, 470 A.2d at 84 n.7.

243 *Id.* at 608, 470 A.2d at 84.

not intend the rape shield statute to prohibit rebuttal evidence which directly negates the act of intercourse with which the defendant is charged.[244] Applying this rationale to *Majorana*, the court held that the Pennsylvania rape shield statute did not preclude the defendant from introducing evidence explaining the source of semen in the complainant's vagina.[245]

Majorana contains several theoretical and conceptual deficiencies. The *Majorana* court disregards the predicate of the Pennsylvania rape shield statute requiring consent of the complainant to be at issue before evidence about the complainant's past sexual conduct with persons other than the defendant can be admitted.[246] Moreover, the first section of the opinion appears to support the modern conception of the function of rape shield laws.[247] Yet, the court's analysis turns on the conclusion that the evidence in question "directly contradicts the act or occurrence at issue [and] is not barred by the statute."[248] This proposition is grounded in the traditional formulation of evidentiary rules in rape cases. There is no indication, however, that the semen found in the complainant's vagina, even if attributable to an event prior to the encounter in question, contradicts the alleged offense. These analytical shortcomings are inapposite to the court's reasoning that a goal of the Pennsylvania rape shield statute is to exclude "sordid and sometimes fanciful accounts of the complainant."[249] The *Majorana* court's interpretation, therefore, contravenes the "plain meaning" that the Pennsylvania General Assembly ascribed to the rape shield statute.

These conceptual weaknesses were touched upon in dissent by Judge Larsen.[250] In recognizing the majority's textual disregard, Judge Larsen explained that "[t]he language of this statute is clear and unambiguous: the only evidence of a victim's past sexual conduct which may be admitted at trial is evidence of past sexual conduct with the defendant, where consent of the victim is an issue."[251] The dissent noted that, with respect to the alleged rape for which the defendant was being tried, the defendant never attempted to exculpate himself on the grounds that the victim had consented.[252]

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244 *Id.*, 470 A.2d at 84. The court expounded that probative value should be balanced against prejudicial effect in determining admissibility. *Id.*, 470 A.2d at 84.

245 *Id.* at 611, 470 A.2d at 85.

246 *See supra* note 22 and accompanying text.

247 *See supra* notes 34-46 and accompanying text.

248 503 Pa. at 610, 470 A.2d at 84.

249 503 Pa. at 609, 470 A.2d at 84.

250 *Id.* at 612, 470 A.2d at 85 (Larsen, J., dissenting).

251 *Id.*, 470 A.2d at 85 (Larsen, J., dissenting).

252 *Id.* at 613, 470 A.2d at 86 (Larsen, J., dissenting). Judge Larsen, noting that the

Judge Larsen recognized that the evidence sought to be introduced was relevant only to a showing that the semen was the result of an earlier act of allegedly consensual intercourse.[253] In finding that the majority interpretation decimated the purpose of the Pennsylvania rape shield statute, Judge Larsen reasoned that the court's opinion "has . . . taken the first step to . . . allow the evil and harm of introducing evidence of a woman's past sexual conduct to creep back into the courtroom."[254]

The dissenting opinion of Judge Larsen pinpoints the paradoxical result dictated by the majority opinion.[255] The *Majorana* court, while giving cursory approval to the goals promoted by the Pennsylvania rape shield statute, interprets the law in such a manner as to dilute its effectiveness. This analytical inconsistency, whether intended or not, contravenes the intent of the Pennsylvania General Assembly and provides an insufficient level of protection for rape complainants.

The Superior Court of Pennsylvania continued this inappropriate mode of judical review in *Commonwealth v. Black*.[256] In *Black*, the trial court, after an in camera hearing, permitted the defendant, who was the complainant's father, to cross-examine the complainant for the purpose of revealing the complainant's sexual relationship with her fifteen-year-old brother.[257] The Superior Court of Pennsylvania affirmed, holding that the evidence of the sibling relationship might establish that the complainant wanted to punish her father or have him removed so that her brother could return.[258] In *Black*, consent of the complainant was not at issue. The reasoning of the court thus disregards the explicit limitations imposed by the Pennsylvania General Assembly through the enactment of the rape shield statute.[259] By 1985, therefore, the Pennsylvania judiciary had taken significant steps toward emasculating the protection afforded to rape complainants by the Pennsylvania rape shield statute.

One year later, however, the Superior Court of Pennsylvania

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consensual intercourse allegedly occurred hours before the alleged rape, reasoned that the rape shield statute was therefore inapplicable. *Id.*, 470 A.2d at 86 (Larsen, J., dissenting).

253 *Id.* at 613, 470 A.2d at 85 (Larsen, J., dissenting).

254 *Id.*, 470 A.2d at 85 (Larsen, J., dissenting).

255 *See supra* notes 240-49 and accompanying text.

256 337 Pa. Super. 548, 487 A.2d 396 (1985).

257 *Id.* at 551, 487 A.2d at 397-98. The alleged rape was reported three months after the defendant and the complainant's brother argued violently, resulting in the complainant's brother leaving home. *Id.* at 552, 487 A.2d at 397-98.

258 *Id.* at 552, 487 A.2d at 398.

259 *See supra* note 226 and accompanying text.

appeared to recognize this unwarranted expansion of judical review. *Commonwealth v. Berry*[260] involved a defendant convicted of the rape, indecent assault, and corruption of his fifteen-year-old stepdaughter. The defendant contended that the trial court erred in denying his request to cross-examine the complainant concerning her subsequent dating relationship with a man in his early twenties.[261] In denying the defendant's proposed cross-examination, the Superior Court of Pennsylvania found that the instant case did not fall within the parameters of *Black*.[262]

Berry remains a significant departure from the court's perception in *Majorana* of the Pennsylvania rape shield statute. The court in *Berry*, while excluding the evidence of the complainant's prior dating relationship, granted approval to the *Black* court's limitation on the protection of the rape shield law.[263] Furthermore, the application of the "balancing" test in *Berry* establishes that the court considered the admission of the disputed evidence.[264] This position is difficult to reconcile with the language of the Pennsylvania rape shield statute and the Pennsylvania Supreme Court's *Majorana* opinion.[265] Nevertheless, *Berry* signals a drawing back by the Pennsylvania judiciary upon the recognition that the courts were engaging in activities outside of their sphere of responsibility.

The Superior Court of Pennsylvania exhibited further judicial restraint in *Commonwealth v. Clark*.[266] The defendant in *Clark* was convicted of the rape, attempted rape, indecent assault, and simple assault of a sixteen-year-old female.[267] The complainant testified that she did not know what the word "penetration"[268] meant until it was explained to her by the assistant district attorney.[269] The de-

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260 355 Pa. Super. 243, 513 A.2d 410 (1986).

261 *Id.* at 254, 513 A.2d at 415. The defendant specifically argued that *Commonwealth v. Black* relaxed the constraints of the Pennsylvania rape shield law, permitting cross-examination of the complainant on issues of sexual conduct, to impeach, or to show bias, interest, or prejudice. *Id.*, 513 A.2d at 415.

262 *Id.*, 513 A.2d at 415. The court interpreted *Black* to permit evidence of prior sexual conduct to show a "specific bias" or "hostility" toward the defendant or to show the alleged complainant's desire for retribution. In noting that the complainant's dating relationship occurred in 1984, one year following the alleged sexual assaults, the court determined that the inflammatory nature of the evidence outweighed its probative value. *Id.*, 513 A.2d at 415.

263 *See supra* note 262 and accompanying text.

264 *Id.*

265 *See supra* notes 226 and 240-43 and accompanying text.

266 355 Pa. Super. 200, 512 A.2d 1282 (1986).

267 *Id.* at 202-03, 512 A.2d at 1283.

268 "Penetration" is a legal element of the crime of rape. A rape complainant, therefore, is required to establish legal "penetration" in order to procure a conviction.

269 *Id.* at 205, 512 A.2d at 1284.

fendant, relying on statements made to a doctor that the complainant had previously been pregnant, asserted that the complainant should have been aware of the meaning of "penetration."[270] Subsequently, defense counsel contended that the trial court erred in prohibiting the cross-examination of the doctor concerning the statements made by the complainant about her prior pregnancy.[271]

The Superior Court of Pennsylvania concluded that the trial court properly excluded the proposed evidence regarding the complainant's past sexual conduct.[272] The court affirmed the trial court's ruling that the evidence of prior sexual conduct was not relevant to show motive, bias, or to attack the credibility of the complainant.[273] Furthermore, the court determined that the evidence was not relevant to the issue of penetration because the complainant had been informed of the distinction between complete vaginal penetration and the lesser requirements for legally sufficient penetration.[274]

Clark furthers the erroneous interpretation of the Pennsylvania rape shield statute by the Supreme Court of Pennsylvania in *Majorana*. Two caveats, however, leave future interpretations unclear. First, both *Berry* and *Clark* are Superior Court of Pennsylvania decisions. *Majorana*, on the other hand, is an opinion of the Supreme Court of Pennsylvania. It is questionable, therefore, whether the Supreme Court of Pennsylvania will adopt the seemingly more complainant-protect ive analysis of the Superior Court of Pennsylvania. Secondly, both *Berry* and *Clark* continue the "balancing" approach of *Majorana* in situations clearly outside of the scope of the Pennsylvania rape shield statute. Thus, while *Berry* and *Clark* both reach proper determinations, the method of analysis is flawed. In each case, the evidence should have been excluded through the plain language of the Pennsylvania rape shield statute. The implementation of a "balancing" approach contravenes the mandate of the Pennsylvania rape shield statute and leaves a window of opportunity for the admission of evidence that the Pennsylvania General Assembly intended to exclude. The judicial restraint shown by the Superior Court of Pennsylvania may, in reality, be only an ad hoc determination which coincidently comports with the purpose of the Pennsylvania rape shield law.

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270 *Id.*, 512 A.2d at 1284-85.
271 *Id.* at 204, 512 A.2d at 1284.
272 *Id.* at 206, 512 A.2d at 1285.
273 *Id.*, 512 A.2d at 1285.
274 *Id.*, 512 A.2d at 1285.

C. CONNECTICUT

The Connecticut General Assembly, in 1982, enacted an extremely detailed and functional rape shield law.[275] From its inception, Connecticut courts have properly interpreted this statute. Connecticut's rape shield statute attempts to explicitly outline the situations in which evidence of the sexual conduct of the complainant is admissible, while providing sufficient protection to satisfy constitutional concerns.[276] The Connecticut General Assembly's formal recognition of these competing concerns has aided the Connecticut judiciary in the application of the rape shield statute. Though Connecticut courts are still required to determine what evidence is critical to the maintenance of the defendant's constitutional rights, the specificity of the statute, combined with the constitutional rights provision of subsection (4), offers a large degree of symmetry.[277] Given the propriety of the Connecticut General Assembly's efforts, the Connecticut judiciary has responded with a cogent analysis of the function of rape shield laws.

Two recent Appellate Court of Connecticut decisions impart the proper judicial role in interpreting rape shield statutes. *State v. Jones* involved an appeal from a conviction for sexual assault in the first degree.[278] The defendant challenged the trial court's exclusion of a portion of his offer of proof.[279] Specifically, the defendant claimed that the proffered testimony was admissible under subsec-

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275 CONN. GEN. STAT. ANN. § 54-86f (West 1985) provides, in pertinent part:

> In any prosecution for sexual assault. . . , no evidence of the sexual conduct of the victim may be admissible unless such evidence is (1) offered by the defendant on the issue of whether the defendant was, with respect to the victim, the source of semen, disease, pregnancy, or injury, or (2) offered by the defendant on the issue of credibility of the victim, provided the victim has testified on direct examination as to his or her sexual conduct, or (3) any evidence of sexual conduct with the defendant offered by the defendant on the issue of consent by the victim, when consent is raised as a defense by the defendant, or (4) otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights. Such evidence shall be admissible only after a hearing on a motion to offer such evidence containing an offer of proof.

276 *Id.*

277 *Id.*

278 8 Conn. App. 44, 510 A.2d 467 (1986). From the State's evidence, the jury inferred that the defendant and complainant met in a bar. As the complainant exited the bar, the defendant followed her, forced her into his car, and drove the complainant to a park, where he sexually assaulted her. *Id.* at 46, 510 A.2d at 468.

279 *Id.* at 47, 510 A.2d at 468-69. In the absence of the jury, the defendant made an offer of proof of the testimony of Alvin Albert. Albert testified that he had known the complainant for about four years and had had contact with her on about four occasions. Albert stated that her reputation in the community was that "you buy her a drink and then you have full liberty to do whatever you want when she comes out and says, 'Let's go and party.' " He also testified that her reputation for veracity about sexual conduct was negative. *Id.*, 510 A.2d at 468-69.

tion (4) of the Connecticut rape shield statute, which allows the admission of evidence relevant and material to a crucial issue in the case.[280]

Focusing on the defendant's offer of proof, the Appellate Court of Connecticut interpreted the language of the rape shield statute to "permit only specific instances of conduct and prohibit all proof of reputation or personal opinion of the victim's sexual conduct."[281] The *Jones* court further explained that the strong policies of the statute could only be overcome by evidence which did not have the inherent infirmity of reputation or lay opinion evidence.[282]

Jones exemplifies the proper boundaries of state court judicial review. The Appellate Court of Connecticut closely examined both the text and the function of the Connecticut rape shield statute.[283] In determining that the Connecticut General Assembly intended to exclude unreliable reputation evidence, the *Jones* court carefully weighed the protection of the complainant with the constitutional rights of the defendant.[284] The court's ultimate conclusion was guided by the coherent structure of the Connecticut rape shield statute.[285] Connecticut's well-drafted rape shield law, coupled with a judiciary which assumed its proper function, resulted in a decision which comports well with contemporary evidentiary and constitutional concerns.

One month following *Jones*, the Appellate Court of Connecticut extended its complainant-protective analysis in *State v. Daniels*.[286] Following his conviction of sexual assault in the first degree, the defendant asserted that the trial court erred in refusing to allow the

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280 *Id.* at 47, 510 A.2d at 469. *See also supra* note 275 and accompanying text. In particular, the defendant argued that the excluded evidence showed a pattern of behavior of the complainant which corroborated the defendant's testimony that the sexual intercourse was consensual. The defendant also contended that the proffered evidence regarding the complainant's moral character was so critical to her credibility that its exclusion violated the defendant's constitutional rights to confront witnesses and to have a fair trial. *Id.*, 510 A.2d at 469.

281 *Id.* at 48, 510 A.2d at 469 (citing TAIT & LA PLANTE, CONNECTICUT EVIDENCE § 8.3g, 108-09 (Supp. 1985)). The court cited the longstanding judicial skepticism of the reliability of reputation evidence in a fashion consistent with the policy purposes underlying the enactment of the rape shield statute. *Id.*, 510 A.2d at 469.

282 *Id.* 510 A.2d at 469. In *Jones*, the court found that the proffered testimony was so tangentially related, if at all, to the version offered by the defendant, that it did not violate the defendant's constitutional rights. The court also determined that the defendant's final argument, that the offer of proof established the complainant's immoral character and, thus, critically affected her credibility, was without merit. *Id.* at 49, 510 A.2d at 470.

283 *See supra* notes 278-82 and accompanying text.

284 *See supra* note 281 and accompanying text.

285 *See supra* note 275 and accompanying text.

286 8 Conn. App. 190, 512 A.2d 936 (1986).

introduction of evidence of the complainant's prior sexual conduct.[287]

On appeal, the court's analysis again focused on subsection (4) of the Connecticut rape shield statute.[288] Noting that the cross-examination of the complainant spanned a period of two days, the opinion found the inquiry sufficent for compliance with the sixth amendment.[289] Commenting on the probative value of the excluded evidence, the court categorically held that "the fact that the victim may or may not have had prior consensual intercourse with the defendant indicates nothing about a motive to falsely accuse him of forcible sexual intercourse at a later time."[290]

Additionally, the defendant contended that subsection (3) of the rape shield statute, which admits evidence of sexual conduct between the complainant and the defendant when consent is at issue, could not be read to exclude evidence of the prior sexual conduct of the complainant in cases where consent has not been raised as a defense.[291] The court noted that the Connecticut rape shield statute unequivocally states that evidence of prior sexual conduct may be offered only when consent is raised as a defense.[292] In dismissing the defendant's contention, the opinion continued that "consent was not truly an issue in the case."[293] To accept the defendant's position, according to the court, would effectively emasculate the rape shield statute to allow the introduction of evidence of prior sexual conduct whenever a defendant is charged with sexual assault.[294]

In reiterating the policy behind the rape shield law, the Appellate Court of Connecticut declared that the purpose of the statute is

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287 *Id.* at 192, 512 A.2d at 937. The defendant, a twenty-one-year-old male, was convicted by jury of ordering a minor to undress the complainant, ordering the minor to leave the house, and raping the complainant. The defendant attempted to testify that he had had consensual intercourse with the complainant three days prior to the date on which the sexual assault took place. The defendant asserted that the exclusion of such evidence violated his sixth amendment right of confrontation because it would have shown that the complainant was biased and had a motive to falsely accuse the defendant of sexual assault. *Id.* at 193, 512 A.2d at 937-38.

288 *Id.* at 194, 512 A.2d at 938. *See also supra* note 275 and accompanying text.

289 *Id.*, 512 A.2d at 938.

290 *Id.* at 194, 512 A.2d at 938. In affirming the trial court's determination that the testimony the defendant sought to elicit was irrelevant to material issues in the case, the court concluded that the defendant could not complain that his constitutional rights were violated. *Id.*

291 *Id.* at 196, 512 A.2d at 939.

292 *Id.* at 197, 512 A.2d at 939-40.

293 *Id.*, 512 A.2d at 939 (citing State v. Mastropetre, 175 Conn. 512, 400 A.2d 276 (1978)).

294 *Id.* at 196, 512 A.2d at 939.

"specifically to bar or limit the use of prior sexual conduct of an alleged victim of a sexual assault . . . ."[295] The statute, therefore, must be read in such a way to uphold the integrity of the statutory scheme and must be construed to carry out the intent of the legislature.[296] The *Daniels* court concluded that the admission of evidence of the complainant's past sexual conduct would subvert the policy goals of the rape shield statute.[297]

The *Daniels* court extended the complainant-protective scope of the Connecticut rape shield statute to encompass elements of bias and motive, in its holding that evidence of the complainant's prior sexual activity is not probative of her ability to fabricate rape charges.[298] Consistent with the *Jones* court's imputed exclusion of opinion and reputation evidence, the Appellate Court of Connecticut's approach in *Daniels* adheres to the language of the Connecticut General Assembly in fashioning an appropriate balance between competing complainant and defendant interests.[299] This rationale parallels the novel methodology employed by Judge Clinton in his scrutiny of the Texas rape shield statute.[300] Connecticut courts, however, enjoy the guidance of a far more specific rape shield law. As a result, the Connecticut judiciary is absolved from much of the inherent tension in the attempt to formulate a rational balance between the modern function of rape shield laws and the constitutional privileges reserved for defendants. Connecticut courts, therefore, possess the requisite freedom neccessary for effective judicial review in a setting attuned to legislative concerns. *Jones* and *Daniels* exemplify the success of the Connecticut judiciary's and the Connecticut General Assembly's attention to their respective roles.

IX. SYNOPSIS

The five states' rape shield laws surveyed above are representative of the vast array of the provisions in existence today.[301] New Hampshire's rape shield statute falls into the most restrictive category of rape shield laws.[302] Rape shield laws in this grouping give no explicit grant of discretion to state courts.[303] Given this restraint

295 *Id.* at 197, 512 A.2d at 940 (citing State v. Cassidy, 3 Conn. App. 374, 489 A.2d 386 (1982), *cert. denied*, 196 Conn. 803, 492 A.2d. 1239 (1986).
296 *Id.* at 196, 512 A.2d at 939.
297 *Id.* at 197, 512 A.2d at 940.
298 *See supra* note 290 and accompanying text.
299 *See supra* notes 281-82 and accompanying text.
300 *See supra* notes 163-66.
301 *See supra* notes 47-62 and accompanying text.
302 *See supra* note 57 and accompanying text. *See also infra* Table IV, app.
303 *See infra* Table IV, app.

on judicial power, courts find it difficult to reconcile the constitutional privileges of the complainant and the constitutional rights of the defendant.[304] State courts, when perceiving that one of these two competing interests is of paramount importance, contradict the "plain meaning" of the statute in order to impartially administer justice.[305] This judicial super-legislative function produces a wide range of unpredictable results. Rape shield laws in this category, therefore, fail to achieve the optimal allocation of legislative and judicial functions.

At the other end of the spectrum are rape shield laws which liberally admit evidence of the complainant's prior sexual activity and propensity for unchastity under traditional evidentiary standards.[306] These types of laws are exemplified by the Texas rape shield statute which was in effect prior to September 1, 1986, as well as the current Texas rule of evidence.[307] Yet, rape shield laws which grant state courts excessive discretion present many of the same problems as does New Hampshire's restrictive rape shield statute.[308] State courts, given wide discretion in the absence of legislative guidance, undertake amorphous and conflicting analyses.[309] As with restrictive rape shield laws, statutes which provide a vast amount of judicial discretion produce no cognizable trends of decisions.

The most functional rape shield laws are those which fall into the intermediate gradation and which foist judicial discretion upon state courts while providing a substantial amount of statutory guidance.[310] Missouri's rape shield statute provides courts in that state with a semblance of direction.[311] Missouri courts, however, failed to acknowlege this indicator of legislative intent until 1986.[312] Similarly, Pennsylvania's rape shield statute offers a more adequate statement of the intent of the Pennsylvania General Assembly.[313] Yet, the Pennsylvania statute fails to enumerate with sufficient specificity the criteria for admissibility of evidence of the complainant's past sexual activity and propensity for unchastity.[314] In contrast, the

304 *See supra* notes 86-149 and accompanying text.
305 *Id.*
306 *See supra* note 89. *See also infra* Table I, app.
307 *See supra* note 151 and accompanying text.
308 *See supra* notes 150-196 and accompanying text.
309 *Id.*
310 *See infra* Table V, app.
311 *See supra* note 197 and accompanying text.
312 *See supra* note 209 and accompanying text.
313 *See supra* note 226 and accompanying text.
314 *See supra* notes 226-274 and accompanying text.

legislative specificity of the Connecticut rape shield statute provides the requisite guidance for the state courts of Connecticut.[315] Connecticut courts are afforded "directed discretion" when balancing the competing interests of the complainant and the defendant. The result is a series of opinions in Connecticut which most effectively accomplishes the dual goals of rape shield statutes—protecting the rape complainant from being subjected to unnecessary trauma at discovery and in the courtroom and adequately maintaining the constitutional protection of the rights of the defendant.

Rape shield laws which fall into this intermediate gradation hold the most promise as the future paradigm for state enactments. In providing both legislative guidance and in camera hearing procedures, state legislatures provide sufficiently detailed guidance for the judicial "balancing" process. It is this type of rape shield law which strikes the appropriate equilibrium between legislative accountability and delegation of judicial discretion.

X. Conclusion

State courts confront a formidable task when they are forced to interpret poorly-drafted and ambiguous rape shield laws. The linguistic and structural differences among the texts of such provisions often force state judiciaries to impart a great degree of creativity into opinions. Implicit in these analyses is the sound judicial concern for properly effectuating the competing interests of the rape complainant and the defendant. The modern thrust of rape shield laws may infringe upon the due process and confrontation privileges afforded to the defendant. Relying on this tenet, state courts often apply an insufficient depth of analysis while abridging the protection from unnecessary harassment and embarrassment that rape shield laws are designed to provide to complainants. By engaging in this process, however, state judiciaries create a disequilibrium which overprotects the constitutional rights of defendants. By unwittingly falling prey to the unsubstantiated evidentiary assumptions of the Victorian era, these analyses emasculate the legislative intent underlying the enactment of rape shield laws.

In order to prevent this anomalous result, state legislatures and courts must engage in a cooperative venture. First, state legislatures should amend rape shield laws to present a cogent textual account of the function of such provisions. Secondly, state courts must exercise judicial restraint in interpreting rape shield laws. When confonting an ambiguous rape shield law, courts should focus on the

315 *See supra* notes 275 and accompanying text.

purpose of such evidentiary restrictions. Rape shield laws are inherently exclusionary in nature. Judicial opining must recognize this factor and not be drawn into the labyrinth of outdated, chauvinistic concerns. When presented with a facially coherent rape shield law, state courts must strive to effectuate the intent of the statute. The constitutional rights of the defendant, while symmetrically valued, should not be the major focus of the analysis. Emphasis on the defendant often results in unmerited overprotection of the defendant at the expense of the effectiveness of the rape shield law. As with all evidentiary restrictions, a degree of legislative deference is required in judicial construction. Such legislative and judicial cooperation, if employed, will foster an environment which permits rape shield laws to attain their intended goals while concordantly maintaining the valued American protection of the constitutional rights of defendants.

ANDREW Z. SOSHNICK

APPENDIX

TABLE I

STATUTES THAT ADMIT SEXUAL HISTORY EVIDENCE UNDER TRADITIONAL EVIDENCE RULES REQUIRING THAT RELEVANCE OUTWEIGH PREJUDICIAL EFFECT

Statute	Hearing	Test for Admissibility
Kan. Stat. Ann. § 21-3525 (Supp. 1986).	Before trial (motion due ten days before trial unless waived by the court).	Relevant and not otherwise inadmissible.
Mont. Code Ann. § 45-5-511(4) (1985).	Before trial.	None specified.
R.I. Gen. Laws § 11-37-18 (1981).	Before introduction of evidence of sexual conduct with others than the defendant.	None specified.
S.D. Codified Laws § 23A-22-15 (1979).	Before introduction.	Relevance and materiality.
Wyo. Stat. Ann. § 6-2-312(1983).	Before trial (motion due ten days before trial).	Relevance substantially outweighs prejudice.

TABLE II

STATUTES THAT GENERALLY ALLOW SEXUAL HISTORY EVIDENCE BUT REQUIRE A HEARING ON ADMISSIBILITY FOR SOME USES OF THIS EVIDENCE

Statute	Evidence Admissible Without A Hearing	Evidence Admissible Only After A Hearing	Test for Admissibility
Colo. Rev. Stat. § 18-3-407 (Supp. 1986).	Prior or subsequent conduct with the accused; evidence that another committed the act.	Any other evidence when consent is at issue.	Relevant.[a]
Fla. Stat. Ann. § 794.022 (West Supp. 1987).	Past conduct with the accused.	Source of semen, pregnancy, or disease; pattern of conduct indicating consent.	Relevant.[a]
N.Y. Crim. Proc. Law § 60.42 (McKinney 1981).	Specific instances of past conduct with the accused; complainant's prostitution within the past three years; rebuttal of state's evidence of complainant's conduct or of source of semen, pregnancy, or disease.	Any other evidence.	Relevant and admissible in the interests of justice.

[a] Although the statute does not specify that relevance must outweigh prejudicial effect, judges usually apply this balancing test.

TABLE III

STATUTES THAT GIVE THE TRIAL JUDGE GENERAL DISCRETION TO ADMIT SEXUAL HISTORY EVIDENCE AFTER A HEARING, BUT LIMIT SUCH DISCRETION IN CERTAIN CIRCUMSTANCES

Statute	Hearing	Test for Admissibility	Situations when Inadmissible
Alaska Stat. § 12.45.045 (Supp. 1986).	Any time before or after trial.	Relevance not outweighed by prejudice or unwarranted invasion of victim's privacy.	Sexual conduct occurring more than one year before crime (rebuttable presumption).
Cal. Evid. Code § 782 (West Supp. 1987).	Before introduction.	Relevance not outweighed by prejudice.	Some types of conduct offered to show consent, see *infra* Table IV.
Del. Code Ann. § 3508 (1979).[b]	Before introduction.	Relevance not outweighed by prejudice.	Some types of conduct offered to show consent, see *infra* Table IV.
Nev. Rev. Stat. § 48.069 (Michie 1986).[b]	Before introduction.	Relevance not substantially outweighed by prejudice.	Some types of conduct offered to impeach credibility, see *infra* Table IV.
N.J. Stat. Ann. § 2A-84A-32.1 (West Supp. 1987).	Before introduction.	Relevance not outweighed by prejudice or unwarranted invasion of victim's privacy.	Conduct occurring more than one year before crime (rebuttable presumption).
N.D. Cent. Code § 12.1-20-15 (1986).[c]	Before introduction.	Relevance not outweighed by prejudice.	Some types of conduct offered to show consent, see *infra* Table IV.

[b] This statute applies only to evidence to show consent. A companion statute covers evidence offered to impeach the complainant's credibility, see *infra* Table IV.

[c] This statute applies only to evidence offered to impeach the complainant's credibility. A companion statute covers evidence offered on the consent issue, see *infra* Table IV.

TABLE IV

STATUTES THAT GENERALLY PROHIBIT THE INTRODUCTION OF SEXUAL HISTORY EVIDENCE EXCEPT IN LIMITED CIRCUMSTANCES. THERE IS NO JUDICIAL DISCRETION AND NO DISTINCTION BETWEEN THE TYPE OF EVIDENCE

	Conduct With Accused	As Rebuttal If State Raises Issue of Consent	Other
Ala. Code § 12-21-203 (Supp. 1986).	Admissible.	Inadmissible.	None.
Cal. Evid. Code § 1103 (West Supp. 1987).[d]	Admissible.	Admissible.	Evidence may be admissible to impeach credibility, see *supra* Table III.

Del. Code Ann. tit. 11, § 3509 (1979).[d]	Admissible.	Admissible.	Evidence may be admissible to impeach credibility, see *supra* Table III.
Ill. Ann. Stat. ch 38, § 115-7 (Smith-Hurd Supp. 1987).	Admissible.	Inadmissible.	None.
La. Rev. Stat. Ann. § 15:498 (West Supp. 1987).	Admissible.	Inadmissible.	None.
Nev. Rev. Stat. § 50.090 (Michie 1986).[e]	Inadmissible.	Admissible.	Evidence may be admissible to show consent, see *supra* Table III.
N.H. Rev. Stat. Ann. § 632-A:6 (1986).	Admissible.	Inadmissible.	None.
N.D. Cent. Code § 12-1-20-14 (1986).[d]	Admissible.	Inadmissible.	Evidence may be used to impeach credibility, see *supra* Table III.
Okla. Stat. Ann. tit. 22, § 750 (West Supp. 1987).	Admissible.	Admissible.	Sexual conduct of the victim in the presence of the accused.

[d] This statute applies only to evidence offered to show consent. A companion statute covers evidence offered to impeach the complainant's credibility, see *supra* Table III.

[e] This statute applies only to evidence offered to impeach the complainant's credibility. A companion statute covers evidence offered to show consent, see *supra* Table III.

TABLE V

STATUTES THAT GENERALLY PROHIBIT SEXUAL HISTORY EVIDENCE, EXCEPT IN A FEW SPECIFICALLY DEFINED SITUATIONS, AND EVEN THEN ONLY AFTER A HEARING TO DETERMINE ADMISSIBILITY

Statute	Hearing	Test for Admissibility	Absolute Prohibitions	Specific Admissible Provisions
Ark. Stat. Ann. §§ 1810.1-4 (Supp. 1985).	Three days before trial unless good cause is shown.	Relevance outweighs prejudice.	None.	Past conduct with accused, evidence relating to act for which accused, prior conduct with persons other than defendant.
Conn. Gen. Stat. Ann. § 54.86f (West 1985).	At time of motion.	Relevance outweighs prejudice.	None.	Conduct with accused, source of semen, disease, or injury.
Ga. Code Ann. § 38-202.1 (Supp. 1986).	At time of introduction.	None specified.	None.	Past conduct with accused, evidence that supports an inference that the defendant reasonably consented.
Haw. R. Evid. 412 (1983).	Motion due before trial, unless new evidence.	Relevance outweighs prejudice.	Opinion and evidence.	Past conduct with accused, source of semen, or injury.

Idaho R. Evid. 412 (1985).	Motion due five days before trial, unless new evidence.	Relevance outweighs prejudice.	Opinion and reputation evidence.	Past conduct with accused, source of semen, or injury.
Ind. Code Ann. § 85-37-4-4 (West 1986).	Motion due ten days before trial, unless good cause shown.	Relevance outweighs prejudice.	Opinion and reputation evidence.	Past conduct with accused, specific instances of conduct that show another committed the act.
Iowa R. Evid. 412 (1983).	Motion due fifteen days before trial, unless new evidence.	Relevance outweighs prejudice.	Opinion and reputation evidence.	Past conduct with accused, source of semen, or injury.
Ky. Rev. Stat. Ann. § 510.145 (Michie Bobbs-Merrill 1985).	Motion due two days before trial unless good cause shown.	Relevance outweighs prejudice.	None.	Past conduct with accused or evidence relating to act for which accused.
Me. Rev. Stat. Ann. tit 17-A, § 252 (Supp. 1986).	Before introduction.	Relevent.	None.	
Md. Ann. Code art. 27, § 461A (Supp. 1985).	Before trial, unless good cause shown.	Relevance outweighs prejudice.	Opinion and reputation evidence.	Past conduct with accused; source of semen, disease, or pregnancy; evidence that shows the complainant's ulterior motive in accusing defendant; to impeach if state puts complainant's conduct at issue.
Mass. Ann Laws ch. 233, § 21B (Law. Co-op. 1986).	Before introduction.	Relevance outweighs prejudice.	Reputation evidence.	Conduct with accused; source of semen, disease, or pregnancy; recent conduct alleged to be cause of complainant's physical condition or characteristic.
Mich. Comp. Laws Ann. § 750.520j (West Supp. 1987).	Motion due ten days after arraignment, except newly discovered evidence.	Relevance outweighs prejudice.	None.	Past conduct with accused; source of semen, disease, or pregnancy.
Minn. Stat. Ann. § 609.347 (West 1987).	Before trial, unless good cause shown.	Relevance outweighs prejudice.	None.	Past conduct with accused; source of semen, disease, or pregnancy; conduct within past year that shows common scheme or plan, when consent or fabrication is at issue, rebuttal of specific testimony of complainant.

Miss. R. Evid. 412 (1986).	Motion due fifteen days before trial unless new evidence.	Relevance outweighs prejudice.	Opinion and reputation evidence.	Past conduct with accused; source of semen, disease, or pregnancy.
Mo. Ann. Stat. § 491.015 (Vernon Supp. 1987).	Before introduction.	Relevant.	Opinion and reputation evidence.	Statute requires State to prove complainant's chastity.
Neb. Rev. Stat. § 28-321 (1984).	Motion due fifteen days before trial.	Relevant.	None.	Past conduct with accused; source of semen, disease, or pregnancy; pattern of sexual conduct that tends to show consent.
N.C. R. Evid. 412 (Supp. 1985).	Either before or during trial.	Relevant.	Reputation and opinion evidence.	Pattern of distinctive sexual conduct to show consent or defendant's reasonable belief of consent; evidence offered as a basis of expert psychological or psychiatric opinion that complainant fantisized the act.
N.M. R. Evid. 413 (1978).	Before trial.	Relevance outweighs prejudice.	None.	
Ohio Rev. Code Ann. § 2907.02 (Baldwin Supp. 1986).	At least three days before trial, unless good cause is shown.	Relevance outweighs prejudice.	None.	Past conduct with accused; source of semen, disease, or pregnancy.
Ore. Evid. Code, Rule 412 (1981).	Before trial, unless good cause is shown.	Relevant and not otherwise inadmissible.	Opinion and reputation evidence.	Relates to motive or bias of complainant; rebut or explain medical or scientific evidence; constitutionally required to be admitted.
18 Pa. Cons. Stat. Ann. § 3104 (Purdon 1983).	At trial.	Consent at issue and otherwise admissible.	None.	Past conduct with accused.
S.C. Code § 16-3-659.1 (Law. Coop. 1985).	Before introduction.	Relevance outweighs prejudice.	None.	Conduct with accused; source of semen, disease, or pregnancy as rebuttal only; conduct that amounts to adultery used to impeach complainant.
Tenn. Code Ann. § 40-17-119 (1982).	Before introduction.	Relevant to issue of consent.	None.	

Tex. R. Evid. 412 (1986).	Before introduction.	Relevance outweighs prejudice.	Opinion and reputation evidence.	Scientific or medical evidence, conduct with accused when consent is at issue, relates to motive or bias of the alleged victim, is admissible under Rule 609, or is constitutionally required to be admitted.
Vt. Stat. Ann. tit. 13, § 3255 (Supp. 1986).	Before introduction.	Relevance outweighs private character or material evidence and bears on credibility.	Opinion and reputation evidence.	Past conduct with accused; source of semen, disease, or pregnancy; past false rape allegations.
Va. Code § 18-2-67.7 (1982).	Before introduction.	None specified.	Opinion and reputation evidence.	Conduct with accused; source of semen, disease, pregnancy, or injury; rebut evidence introduced by the prosecution.
Wash. Rev. Code Ann. § 9A.44.020 (Supp. 1986).	Before trial (optional for rebuttal evidence).	Relevant to consent, relevance outweighs prejudice, exclusion would result in denial of substantial justice.	To impeach credibility.	Past conduct with accused; to rebut State's evidence of complainant's conduct.
W.Va. Code § 61-8B-12 (Supp. 1986).	Before introduction.	Relevance.	None.	Past conduct with accused; impeach conduct if the complainant first makes sexual conduct an issue at trial.
Wis. Stat. Ann. §§ 971.31, 972.11 (West Supp. 1985).	Before trial.	Relevance outweighs prejudice.	None.	Past conduct with accused; source of semen, disease, pregnancy, or injury; prior untruthful allegation of sexual assault.