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Feature

TIME TO REFORM RAPE SHIELD LAWS
Kobe Bryant Case Highlights Holes in the Armor

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Attorney Pamela Mackey is fighting two battles on behalf of her client, NBA superstar Kobe Bryant and the man accused of sexually assaulting a 19-year-old hotel employee in Eagle County, Colorado. The first battle is in the media; the second is in the courtroom. Strategic arguments in pretrial motions and in the press have already largely won her the first battle. Soon, in what may be the most closely watched criminal trial since the O.J. Simpson case, Mackey may win the second.

One reason underlies Mackey's probable success in both arenas: despite three decades of legal and social reform on behalf of rape victims, the American public remains deeply distrustful of sexually active women who report having been raped by people they know. In the pretrial litigation and publicity, Mackey and the rest of Bryant's public relations team focused on the young woman's lack of sexual chastity. Mackey asked the police detective at the preliminary hearing if the lacerations on the teenager's vagina were “consistent with a person who had sex with three different men in three days.” Mackey also asked the detective, “The accuser arrived at the hospital wearing panties with someone else's semen and sperm in them, not that of Mr. Bryant, correct?” Focusing attention on her sexual activity with third parties puts her sexual virtue on trial and, predictably, finds her guilty.

Mackey's aggressive defense tactics derive from centuries of sexism in rape law that allowed invasive scrutiny of victims' private sexual lives. Until about three decades ago, courts in the United States routinely allowed a rape defendant to elicit evidence regarding a complainant's unchaste reputation or unchaste conduct in an effort to show that she was unworthy of the law's protection.

Lack of chastity was not itself a defense to a rape charge. However, a woman's lack of chastity was thought to speak to two important issues: credibility and consent. Courts believed that unchaste women lie. If a complainant had broken societal mores already by being promiscuous, she was assumed to be more likely to continue to defy those mores by lying as a witness under oath. As a Texas appellate court noted in *Calhoun v. State*, 214 S.W. 335, 339 (Tex. Crim. App. 1919), the possibility that the complainant “was in the habit of bestowing carnal favors indiscriminately upon men ... would certainly have had a very strong bearing upon her credibility as a witness.”

A similar lack of chastity in a man, however, did not imply corruption of his credibility. As the Missouri Supreme Court explained in *State v. Sibley*, 33 S.W. 167, 171 (1895):

> It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman. It is no compliment to a woman to measure her character for truth by the same standard that you do that of man's predicated upon character for chastity. What destroys the standing of the one in all the walks of life has no effect whatever on the standing for truth of the other.

When the corruption of character rationale fell out of favor, courts persisted in admitting a complainant's sexual history under the theory that a complainant who consented to sexual intercourse with others was more likely to have consented to sexual intercourse with the defendant. As the Iowa Supreme Court explained in *State v. Johnson*, 133 N.W. 115, 116 (Iowa 1911), "Of course, a common prostitute may be raped, and one may rape a woman although she be his mistress; but it was not so likely that his act is by force and against her will." Likewise, the Tennessee Supreme Court wrote in *Lee v. State*, 179 S.W. 145, 146 (Tenn. 1915), "although the body of a harlot may, in law, no more be ravished than the person of a chaste woman, nevertheless it is true that the former is more likely than the latter voluntarily to have yielded." As the Illinois Supreme Court explained in *People v. Fryman*, 122 N.E.2d 573, 576, 4 Ill. 2d 224, 229 (Ill. 1954), "In order to show the probability of consent, the general reputation of the prosecutrix for immorality and unchastity is of extreme importance and may be shown."

A woman's lack of sexual purity

Never underestimate the continuing grip of Puritanism on the American heart. Americans are, as a whole, schizophrenic about female sexuality. On the one hand, we appear to celebrate it. On the other hand, we punish it. We want to see females writhing nearly nude on MTV. We just don't think the criminal law should protect the kind of women who would writhe nearly nude on MTV when they are raped, and often we doubt if they even can be raped.

Study after study reveals that the average juror does not like promiscuous women or girls. As David Bryden and Sonja Lengnick discovered, when rape complainants are found to have acted in ways that are contrary to a retrograde model of feminine sexual propriety, jurors acquit their accused rapists by importing the tort doctrines of assumption of the risk and contributory negligence, although neither is a defense to a criminal charge of rape. (*Rape in the Criminal Justice System*. 87 J. ***15** CRIM. L. & CRIMINOLOGY 1194, 1257-62 (1997).)

In an empirical study of jury decision making in rape trials, Douglas Koski pointed out that when small groups are required to render unanimous decisions, as jurors are required to do, they tend to rely on stereotypes to generate consensus. (*Jury Decisionmaking in Rape Trials: A Review & Empirical Assessment*, 38 CRIM. L. BULL. 21, 128 (2002).) One stereotype available to jurors in rape trials is that the woman is to blame because of her sexual past, so an assessment of the alleged victim's character affects the jury's decision on the guilt or innocence of a defendant accused of rape. (*Id*.)

The emergence of rape shield laws

In the 1970s and early 1980s, almost all jurisdictions in the United States adopted some form of rape shield statute to try to prevent jurors from making decisions in rape trials based on stereotypes about complainants' sexual histories. These laws divide into four categories, distinguishable by the manner and degree to which they admit evidence of a woman's sexual history.

Legislated exceptions laws. Twenty-five states have legislated exceptions in their rape shield laws. (ALA. R. EVID. 412 (2004); FLA. STAT. ANN. § 794.022 (2004); GA. CODE ANN. § 24-2-3 (2002); IND. CODE ANN. § 35-37-4-4 (2004); KY. R. EVID. 412 (2003); LA. CODE EVID. ANN. art. 412 (2004); ME. R. EVID. 412 (2003); MD. CRIM. LAW CODE ANN. § 3-319 (2003); MASS. GEN. LAWS ANN. ch. 233, § 21B (2004); MICH. COMP. LAWS ANN. § 750.520j (2003); MINN. STAT. § 609.347 (2003); MO. ANN. STAT. § 491.015 (2004); MONT. CODE ANN. § 45-5-511 (2003); REV. STAT. NEB. ANN. § 28-321 (2003); N.H. REV. STAT. ANN. § 632-A:6 (2003); N.J. STAT. § 2C:14-7 (2004); N.C. GEN. STAT. § 8C-1, R. 412 (2004); OHIO REV. CODE ANN. § 2907.02 (2004); 12 OKLA. STAT. § 2412 (2004); 18 PA. CONS. STAT. ANN. 3104 (2003); S.C. CODE ANN. § 16-3-659.1 (2003); 13 VT. STAT. ANN. § 3255 (2003); VA. CODE ANN. § 18-2-67.7 (2004); W. VA. CODE § 61-8B-11 (2003); WIS. STAT. § 972.11 (2003).) These laws prohibit the admission of evidence of a complainant's sexual history, subject to one or more legislated exceptions. Evidence of a complainant's sexual history offered by the defendant that does not fall within a legislated exception is ostensibly inadmissible. One example is New Hampshire's rape shield law, one of the nation's strictest, which bars evidence of "[p]rior consensual sexual activity between the victim and any person other than" the defendant. (N.H. REV. STAT. ANN. § 632-A:6 (LEXIS 2003).)

***16** Most states with legislated exceptions laws include a number of other exceptions. Legislated exceptions include evidence of prior sexual conduct between the complainant and the accused; evidence of an alternative source of semen, pregnancy, or injury; evidence of a pattern of prior sexual conduct by the complainant; and evidence offered to prove that the accused had a reasonable but mistaken belief in the complainant's consent. In jurisdictions with legislated exceptions rape shield laws, defense attorneys must argue that evidence of the complainant's sexual history falls within a legislated exception or that the law itself is unconstitutional for forbidding it.

Constitutional catch-all laws. Ten states and the District of Columbia have constitutional catch-all rape shield laws. (CONN. GEN. STAT. § 54-86f (2003); HAW. REV. STAT. R. 412 (2003); D.C. CODE § 22-3022 (2004); 725 ILL. COMP. STAT. § 5/115-7 (2004); IOWA R. EVID. 5.412 (2003); MISS. R. EVID. 412 (2004); N.D. R. EVID. 412 (2004); OR. REV. STAT. § 40.210 (2003); TENN. R. EVID. 412 (2003); TEX. EVID. R. 412 (2003); UTAH R. EVID. 412 (2004).) These laws also prohibit evidence of a complainant's sexual history, subject to at least one exception based on the Constitution. The constitutional exception states that evidence of the complainant's sexual history will be admitted if such admission is required by the Constitution. For example, Federal Rule of Evidence 412 states that evidence to prove a rape complainant's "other sexual behavior" or "sexual predisposition" is inadmissible, except: 1) when it is offered "to prove that a person other than the accused was the source of semen, injury or other physical evidence," 2) when it is offered to prove consent and it consists of "specific instances of sexual behavior by the alleged victim with respect to the person accused," or 3) when the exclusion of the evidence "would violate the constitutional rights of the defendant." (FED. R. EVID. 412.) This last provision appears to be a mechanism to protect the rape shield laws from constitutional challenge. In jurisdictions with constitutional catch-all rape shield laws, defense attorneys still argue that evidence of the complainant's sexual history falls within a legislated exception, or they argue that admission of such evidence is mandated by the Constitution under the catch-all provision.

Evidentiary purpose laws. Four states have evidentiary purpose rape shield laws. (CAL. EVID. CODE §§ 782, 1103 (2004); 11 DEL. CODE §§ 3508, 3509 (2004); NEV. REV. STAT. §§ 48.069, 50.090 (2004); REV. CODE WASH. § 9A.44.020 (2004).) These laws determine the admissibility of a woman's sexual history based on the purpose for which the evidence is offered at trial. In California and Delaware, evidence of a complainant's sexual history offered to prove her consent is prohibited, but the same evidence offered to attack her credibility is admissible. Nevada and Washington declare exactly the opposite: evidence of a complainant's sexual history offered to attack her credibility is prohibited, but the same evidence offered to prove her consent is admissible if its relevance is not substantially outweighed by prejudice. In jurisdictions with evidentiary purpose rape shield laws, defense attorneys argue that they seek to admit evidence of the complainant's sexual history for a permissible purpose rather than for an impermissible one.

Judicial discretion laws. Finally, 10 states have judicial discretion rape shield laws. (ALASKA STAT. § 12.45.045 (2004); ARK. CODE ANN. § 16-42-101 (2003); COLO. REV. STAT. § 18-3-407 (2003); IDAHO CODE § 18-6105 (2004); KAN. STAT. ANN. § 21-3525 (2003); N.M. R. EVID. 11-413 (2004); N.Y. CRIM. PROC. LAW § 60.42 (2004); R.I. R. EVID. 412 (2004); S.D. COD. L. § 23A-22-15 (2003); WYO. STAT. § 6-2-312 (2003).) These laws grant judges the discretion to admit or bar evidence of a woman's sexual history, and so do not shield victims in any new way. Like evidentiary purpose laws, these shields are relatively weak. Colorado, the jurisdiction in which Kobe Bryant is alleged to have committed the rape, has such a law. It states:

Evidence of specific instances of the victim's or a witness' prior or subsequent sexual conduct, opinion evidence of the victim's or a witness' sexual conduct, and reputation evidence of the victim's or a witness' sexual conduct shall be presumed to be irrelevant except:

(a) Evidence of the victim's or witness' prior or subsequent sexual conduct with the actor;

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant.

(COLO. REV. STAT. § 18-3-407 (Bradford 2003).)

Colorado, thus, does not prohibit the admission of any evidence. It simply establishes a *presumption* of irrelevance. Evidence of the complainant's sexual history may be admitted as long as the defense can convince the judge that such evidence is relevant, and thereby overcome the statutory presumption. Because nothing is banned under the shield law, Colorado judges are free to make individual assessments about the relevance of each piece of evidence of sexual history, which is not unlike the unbridled discretion they exercised on these matters before the passage of the law in 1975. In jurisdictions with judicial discretion laws, defense attorneys argue that evidence of the complainant's sexual history should be admitted because it is relevant.

Holes in the armor

Rape shield laws have repeatedly failed to deflect character attacks on women who allege rape. Although most rape shield laws appear to bar the admission of a complainant's sexual history except under carefully limited circumstances, their exceptions--both legislated and judicially improvised-- bore holes in the armor, rendering them ineffective protection devices.

Evidence passes through holes created by state legislators who mandate a variety of exceptions in their shield ***17** laws. Evidence also passes through holes created by judges who employ the flexibility afforded them by constitutional catch-all, evidentiary purpose, and judicial discretion laws. Even in legislated exceptions jurisdictions, judges have found cause for new exceptions that the legislature did not authorize. Courts have also exaggerated the scope of the defendants' constitutional rights to admit evidence of complainants' sexual history. To evaluate the number and width of the holes in rape shield laws, one place to start is the arguments Pamela Mackey and the rest of Bryant's defense team made on his behalf in their pretrial motions. The Bryant team advanced multiple theories for the admission of evidence of the young woman's sexual history, and many of those theories mirror the holes in rape shield laws.

A pattern of sexual conduct with third parties. The first type of analysis the defense team advanced to admit evidence of the young woman's sexual history was that her sexual interaction with Bryant was part of a pattern of similar consensual sexual interactions with other men. They argued, “Acts of prior and subsequent sexual activity of the accuser are relevant because of the factual similarity between those acts and the circumstances of the accuser's sexual intercourse with Mr. Bryant.” (Def.'s Mar. 1 Response to Motion to Limit Questioning at 7.) They also argued, “Acts of prior and subsequent sexual activity of the accuser are relevant to show the accuser's knowledge, intent, common plan, pattern, and *modus operandi* with respect to whether she consented to have sexual intercourse with Mr. Bryant.” (*Id.*) These two claims were, in fact, one: the teenager was engaged in a pattern of consensual sexual conduct of which her interaction with Bryant was but one example. Five state rape shield laws (in Florida, Minnesota, Nebraska, North Carolina, and Tennessee) contain a legislated exception for a pattern of sexual conduct with third parties. Additionally, as I will discuss below, judges in a number of other jurisdictions have created a pattern exception to their states' rape shield laws.

This argument amounts to the same old saw: She consented to sex before; this was sex; therefore, she consented again this time. That syllogism may sound odd to modern ears, so it has been updated to: She consented to *a lot* of sex before; this was sex, therefore, she consented again this time. In other words, it is her modus operandi to be sexually loose. This is exactly the kind of character assassination that rape shield laws should prevent. The trial judge in the Bryant case has the discretion to admit this evidence if he is convinced it is relevant because Colorado's rape shield law bars nothing.

Credibility. The second type of analysis the Bryant defense team advanced to admit evidence of the young woman's sexual history was that she was less than forthcoming when questioned about her sexual past and so is less credible as a witness. Bryant's team alleged, “False, inconsistent, and/or deceptive statements and omissions by prosecution witnesses--including the accuser--concerning their sexual relationships are relevant to their credibility.” (*Id.*) The attorneys continued, “Certain evidence of the accuser's subsequent sexual activity is also relevant to the accuser's credibility, because she made statements that are

inconsistent with the physical evidence." (*Id.* at 8.) To the extent that this argument was different than the outdated notion that promiscuous women lie more under oath, the difference appeared to lie here: Even if the teenager's prior or subsequent sexual history itself was ordinarily irrelevant, her attempt to conceal it when questioned now make it relevant to her credibility. If the evidence of her sexual past was presumptively irrelevant, however, her answers to questions about her sexual past were also irrelevant and her attempt to guard herself from those inquiries was but an expression of what the law suggested she was entitled to.

The credibility argument appeared to be a bald attempt to circumvent the presumption of irrelevance that Colorado's rape shield law establishes. It reminds one of the many other arguments defense attorneys have used to try to bootstrap the admission of otherwise excludable evidence of a complainant's sexual history, including mistaken belief in consent. This argument usually begins by conceding that the complainant's sexual history is ordinarily irrelevant. It argues, however, that the defendant heard that the complainant had a reputation for promiscuity and, based on his belief in her loose sexual character, he believed that she consented to sex with him, too. The defendant then argues that he must be able to prove his mistaken belief in her consent and the only way for him to do so is to admit evidence of the complainant's reputation for promiscuity. Four state rape shield laws (in Georgia, New Jersey, North Carolina, and Tennessee) contain an explicit legislated exception for evidence of the complainant's sexual history when the defendant claims a reasonable but mistaken belief in her consent shows up. Additionally, judges in other jurisdictions have imposed a mistaken belief as to consent exception to the prohibition on evidence of sexual history. By this exception the law constructs the unreasonable man--who believes that a woman consents to sex with him because she has a reputation for promiscuity with third parties--as reasonable.

Res gestae evidence. The third type of analysis the Bryant defense team advanced to admit evidence of the young woman's sexual history was that the evidence was res gestae. Bryant's team alleged, "Evidence that the accuser engaged in sexual intercourse within the two days preceding and within less than 15 hours following her encounter with Mr. Bryant is relevant and admissible as res gestae evidence, because it is 'necessary to complete the story of the [alleged] crime for the jury' and 'is admissible to provide the fact-finder with a full and complete understanding of the events surrounding the [alleged] crime."' (*Id.*) The defense argues:

> ***18** [M]ultiple acts of consensual intercourse within 72 hours preceding the physical examination is evidence the jury *must* have to render a fair and informed decision. This is particularly true when the conduct of the accuser is likely to be outside the normal experience for the jury in this case. It is safe to say that sexual intercourse with multiple partners during a 72-hour period is outside the norm.

(Def.'s Jan. 12 Response to Motion in Limine at 14 (emphasis in original).)

The young woman's promiscuity was argued to be so unusual that the jurors would be unable to render an impartial decision on guilt or innocence unless they were fully informed of her sexual history. This argument implied that she was actually the one on trial and her lack of sexual innocence was important to assessing her guilt.

One cannot deny that evidence of the young woman's alleged frequent sex with third parties is interesting. Nor can one deny that the average juror would want to know about it. Rape shield laws, however, are designed to exclude tremendously interesting facts upon which jurors are likely to fixate because those facts are of little probative value to the incident in question and yet are prejudicial to the truth-seeking process.

Judges in some jurisdictions have made new exceptions to their rape shield laws for what they consider to be a complainant's unusual sexual conduct with third parties. In New Hampshire, for example, Justice Souter (then on the New Hampshire Supreme Court) reversed a rape conviction on the basis of an erroneous jury instruction that the "evidence of the complainant's behavior with men other than the defendant in the hours preceding the incident was immaterial, or irrelevant, to the question of the defendant's guilt or innocence." (*State v. Colbath*, 540 A.2d 1212, 1214 (N.H. 1988).) Souter explained, "the jury could have

taken evidence of the complainant's openly sexually provocative behavior toward a group of men as evidence of her probable attitude toward an individual within the group." (*Id*. at 1217.)

In New York, an appellate court reversed a trial judge's decision to exclude some evidence of a complainant's sadomasochistic conduct with third parties. (*People v. Jovanovic*, 700 N.Y.S.2d 156 (N.Y. App. Div. 1999).) The reviewing court echoed the res gestae argument that Bryant's lawyers advanced. It held that the admission of evidence of this sexual history with third parties would have "permitted Jovanovic to effectively place the complainant in a somewhat less innocent, and possibly more realistic, light." (*Id*. at 171.)

Source of semen or injury. The fourth type of analysis the Bryant defense team advanced for the admission of the young woman's sexual history was that it proved another source for the semen or injury found. Bryant's team first alleged that "the accuser was wearing panties, at the time of her examination, containing the semen and sperm of an (as yet) unidentified male compellingly suggests an intervening sexual event." (Def.'s Jan. 12 Response at 10.) This evidence "of the accuser's subsequent sexual activity is relevant ... to show the source or origin of semen." (Def.'s Mar. 1 Response at 8.) If Bryant admitted having had sexual intercourse with the young woman, however, the presence of another man's semen appeared to be irrelevant.

More to the point, Bryant's team argued, "Evidence that the accuser engaged in multiple acts of sexual intercourse in the 72 hours preceding the sexual assault physical examination is relevant to test and rebut the prosecution's expert opinion that the minor abrasions observed on the accuser's posterior fourchette are 'diagnostic' of sexual assault." (*Id*.) This was the best argument the defense team advanced. Many states include an exception to their rape shield laws for evidence that the defendant did not cause the injury alleged to prove force. For example, Connecticut's statute says, in a sexual assault trial, "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." (CONN. GEN. STAT. § 54-86f (2003).)

As I have argued elsewhere, this kind of exception is appropriate and may be constitutionally mandated. Defendants should be able to rebut the claim that they caused the injuries or other evidence of sexual assault on which the prosecution relies. However, judges must be careful to circumscribe the kind of evidence admitted under such a rule. The defendant should have to proffer evidence that the prior sexual act happened during a relevant time frame and that this type of sexual act could have actually caused the injury in dispute.

Sexual conduct with the defendant. Bryant's team also pointed out that the young woman willingly engaged in sexual contact with Bryant in the form of kissing and hugging. Bryant's team argued:

The evidence will show that ... the accuser accepted Kobe Bryant's invitation to enter his room. The undisputed evidence will show that the accuser expected Kobe Bryant "to put a move on her" before she accepted the invitation into his hotel room. The undisputed evidence will show that once inside Kobe Bryant's hotel room, the accuser engaged in conversation about tattoos (hers and the lack of his) and the Jacuzzi. During and after such conversation, she willingly kissed and hugged Kobe Bryant. The evidence will show that all of this conduct was completely consensual. Thus ... based on the accuser's own account, there is substantial evidence of the accuser *consenting* to sexual contact with Defendant.

(Def.'s Jan. 12 Response to Motion in Limine at 6-7 (emphasis in original).)

It was a fair argument and a place of legitimate dispute. The prosecution will insist the young woman had a right to say no to sex after kissing him. The defense will argue that she did not say no.

***19** Whereas evidence of flirting and kissing on the incident in question should be admitted to show context, rape shield laws routinely allow for the admission of all prior sexual history with the defendant, no matter how remote in time or unrelated to the

incident in question. The exception to rape shield laws for prior sexual conduct with the defendant himself appears in all laws in the legislated exceptions and constitutional catch-all categories. Where it is not an exception by statute, judges have created it.

The Department of Justice estimates that 62 percent of adult rapes are committed by prior intimates--spouses, ex-spouses, boyfriends, or ex-boyfriends. (Patricia Tjaden & Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Violence against Women* 44 (2000).) For women raped by prior intimates, shield laws provide little protection. Many believe that rapes that occur after a man and a woman have been previously intimate are less injurious. In fact, however, research indicates that rape by a prior intimate tends to inflict more psychological damage on a victim than does stranger rape. (Bonnie L. Katz, *The Psychological Impact of Stranger Versus Nonstranger Rape on Victims' Recovery*, ACQUAINTANCE RAPE: THE HIDDEN CRIME. 267 (Andrea Parrot & Laurie Bechhofer, eds. 1991).)

I have argued elsewhere that all aspects of the complainant's conduct and communication with the defendant on the instance in question should be admissible; however, prior sexual acts between the parties should not always be admissible. Only prior negotiations between the complainant and the defendant regarding the specific acts at issue or customs and practices about those acts should be admissible. These negotiations, customs, and practices between the parties reveal their legitimate expectations on the incident in question.

Mental health history. Finally, the Bryant defense team advanced the argument that the teenager's mental health history was relevant to her propensity to fabricate an allegation of sexual assault. Bryant's legal team argued that the young woman's prior attempts at suicide and her prior use of an antipsychotic drug made “it more probable that the accuser's allegations are false and are merely a continuation of her pattern of engaging in extreme, dangerous, attention-seeking behavior without regard to its effects on those around her.” (Def.'s Dec. 11 Mot. to Admit Evidence at 10-11.) They continue: “Her behavior and treatment with an antipsychotic drug also makes it more probable that she is not to be believed.” (*Id*. at 11.)

A deep cultural bias exists that women who come forward with allegations of sexual abuse must be “a little bit nutty and a little bit slutty.” as David Brock accused in his 1993 book *The Real Anita Hill*. The notion that women who allege sexual abuse are mentally unstable derives from Sigmund Freud, who asserted in 1901 that women who claim sexual abuse may unconsciously desire it because they are masochistic.

A number of people have asked me how rape shield laws protect the complainant from fishing expeditions in her mental health history. Answer: They do not.

Despite the cultural bias surrounding allegations of sexual abuse and mental instability, rape shield laws do not prevent defense attorneys from attempting to subpoena rape crisis records, therapist records, mental health records, and other evidence of a complainant's mental health history. These kinds of requests have increased lately, as defense teams seek new ways to tarnish the credibility of those who come forward to report having been raped.

During Bryant's trial, when Pamela Mackey tries to trawl through the young woman's sexual history, Colorado's rape shield law, which grants the judge discretion to admit any evidence, may not preclude her from doing so. Whatever salacious information Mackey nets will undermine the claimant's credibility on the stand and may turn the jury against her. It is this legalized fishing expedition that deters most rape victims from reporting their experiences to the police. To be sure, Mackey has had substantial help from Internet snoops and supermarket tabloids that have disseminated the young woman's name, address, telephone number, educational history, alleged sexual proclivities, alleged mental instability, and likeness in the form of multiple photographs. But few women could bear even the average amount of scrutiny of their own imperfect sexual lives that occurs in many routine rape trials without substantial pain. The Bryant case is a signal that it is time to reform rape shield laws to provide victims with real protection at trial.

Further Reading on Rape Shield Laws

• “From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law” by Michelle J. Anderson in the *George Washington Law Review* (volume 70, page 51 (2002)).

• “Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom” by Vivian Berger in the *Columbia Law Review* (volume 77, page 1 (1977)).

• “Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade” by Harriet R. Galvin in the *Minnesota Law Review* (volume 70, page 763 (1986)).

• “‘Unchaste Character,’ Ideology, and the California Rape Evidence Laws” by Leon Letwin in the *Southern California Law Review* (volume 54, page 35 (1980)).

• “Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity” by Abraham P. Ordover in the *Cornell Law Review* (volume 63, page 90 (1977)).

Footnotes

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