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NATIONAL CRIME VICTIM LAW INSTITUTE
Protecting, Enforcing, & Advancing Victims' Rights

Meg Garvin, M.A., J.D., Executive Director
Alison Wilkinson, J.D., Responding to Violence Against Women Project Director
Sarah LeClair, J.D., Legal Publications Director

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Excluding Evidence of Specific Sexual Acts Between the Victim and Defendant Under Rape Shield

Just over 30 years ago, states began passing legislation designed to codify the simple truth that a victim who consented to sexual activities in the past is not more likely to have "consented" to the rape being prosecuted. Today, the Federal Rules of Evidence and the rape shield laws of every state accept this truth as it relates to the victim's prior consent to sexual activities with anyone other than the defendant.[1] Illogically, this simple truth is often abandoned when extended to prior sexual activities between the victim and the defendant. Law and policy support excluding evidence of the victim's sexual history with the defendant under existing rape shield legislation.

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I. What is Rape Shield?

A. History

Until relatively recently, a victim of rape could expect to have every aspect of her sexual past thoroughly examined in open court.[2] The theory was that if the victim had engaged in sexual activity before, she might be predisposed to submit to similar activity on another occasion, thus making it less likely that the victim was raped as opposed to having engaged in consensual sex.[3] Often, the crux of such an examination was no more than a character assassination. Defense attorneys would insinuate that because of the victim's sexual past, she must have enjoyed the rape, or she must have "asked for it" or "wanted it" and was now alleging rape because she was embarrassed at having consented.[4] This practice turned the usual course of legal proceedings on their head. Normally, the focus of legal proceedings is on the defendant's conduct, not the victim's conduct. However, with rape, the focus was on the victim's prior sexual conduct, and her "flawed" character as a result of that conduct. Victims, afraid of being retraumatized by the legal system, stopped reporting rapes. The result was that rape – although on the rise – was one of the most underreported and underprosecuted of crimes.[5]

In the 1960s and 1970s, a movement began to curb the use of victims' past sexual experiences in rape trials. The movement focused both on the end

result – more rapists going free – as well as the legal infirmities of admitting such evidence into trial.[6] Legally, evidence can only be admitted if: (1) it is relevant; and (2) it is more probative than prejudicial. Reformists argued that the evidence was not relevant or probative because evidence of prior sexual experiences is "propensity" evidence – in other words, because the victim said yes before, she was more likely to have said yes on the occasion of the rape.[7] Propensity evidence is generally inadmissible because the fact that someone did something in the past does not mean that person did the same thing on the night in question.[8] Finally, introducing this type of evidence would likely prejudice the jury against the victim and could also embarrass the victim.[9]

As a result of the movement, states began passing rape shield legislation, which limited the introduction of evidence concerning the victim's past sexual behavior. Today, rape shield legislation is codified in the books of every state and in the Federal Rules of Evidence.[10] While still under-reported, when properly enforced, these laws go a long ways toward reducing potential retraumatization of victims of rape.

B. The Basics of Rape Shield

The basic premise of rape shield legislation is that evidence of the victim's past sexual behavior is not relevant evidence to the question of whether a rape occurred. However, rape shield legislation does not create a complete ban on the introduction of a victim's sexual history. States differ in the approach they take to determining whether a victim's sexual history will be admissible under rape shield laws.

By far the most common approach, known as the "Michigan" approach, prohibits introduction of a victim's past sexual behavior unless it falls within statutorily created exceptions.[11] These exceptions commonly include evidence of specific instances of past sexual activity between the victim and the defendant; and evidence of the victim's past sexual activity with another to explain the presence of semen, disease, pregnancy, or other physical results of the rape.[12] Federal Rule of Evidence 412 is similar to the Michigan approach, but also explicitly states that evidence of prior sexual behavior is admissible when the constitutional rights of the defendant would be violated by its exclusion.[13]

A significantly smaller number of states, rather than relying on statutorily listed exceptions, rely instead on the judge's discretion in determining whether such evidence can be admitted.[14] If the evidence is relevant, and its probative value outweighs its prejudicial impact, it may be admitted if other procedural steps are followed. [15] This is known as the "discretionary" approach.

California and a handful of other states follow a third, less common approach, which generally prohibits evidence relating to the victim's consent, but admits evidence relating the victim's credibility after an *in camera*[16] determination of its relevance.[17]

Under any approach, if evidence is irrelevant, or if its probative value is outweighed by its potential for prejudice, it must be excluded. As discussed below in Part II, because there is so little probative value in admitting evidence of a victim's sexual activities with third parties (including the defendant), and because of the risk of prejudice, a victim's sexual past should always be excluded, no matter the jurisdiction.

II. Why Evidence of Prior Sexual Activity with Defendant Should Be Excluded

A thoughtful reading of rape shield statutes should exclude evidence of a victim's sexual history with the defendant. However, courts routinely admit this type of evidence.[18]

As discussed above, in order for evidence to be admitted, it must be relevant, and its probative value must outweigh its prejudicial nature.[19] Evidence of the victim's sexual history with the defendant should thus be inadmissible for the same reason evidence of the victim's sexual history with third parties is inadmissible: it is propensity evidence.[20] While not a majority position, a number of courts have recognized that the fact that the victim had a sexual relationship in the past – even with the defendant – does not make it more likely that she "consented" to the rape.[21] As one court stated "[a]ll that

was relevant regarding sexual relations at this trial was whether the victim consented to the shocking abuses visited upon him on [the day in question]." [22]

Even if there is some marginal relevance in the existence of a prior relationship between the victim and the defendant, any probative value of such evidence is realized by acknowledging the existence of the relationship without going into the details of their sexual relationship. Several courts have recognized this.[23]

Further, preventing introduction of specific instances of sexual conduct lowers the risk of prejudicing the jury against the victim. Several courts have recognized that introducing evidence of the victim's sexual past may cause the jury to believe that the victim is "unrapeable."[24] This risk of prejudice stems from the storied rape myth that only virgins are truly capable of being raped, and those who have consented to sexual activities in the past have "little to complain about."[25]

Depending on the jurisdiction, there may also be federal or state victims' rights laws that favor excluding the evidence. For instance, under the federal Crime Victims' Rights Act, victims have the right to be treated with fairness, and with respect for their dignity and privacy.[26] Many states have constitutional or statutory protections extending the same rights to victims.[27]

Additionally, there are sound policy reasons for excluding evidence of specific instances of sexual conduct between the victim and the defendant. First, to introduce this propensity evidence undermines the victim's self-worth by failing to take into account that the victim may freely choose to say no whenever she wishes. Second, allowing the introduction of evidence of the victim's sexual past may reduce reporting of non-stranger rape because the victim may fear that she will be subjected to embarrassing questioning, or may not even be believed in the first instance.[28]

Finally, excluding evidence of specific instances of the victim's past sexual behavior with the defendant does not, in itself, violate the defendant's Constitutional rights. Courts, including the Supreme Court, have recognized that excluding evidence of prior sexual activity between the defendant and the victim is permissible under rape shield statutes and the Constitution.

Practice Pointers

If you are confronted with a situation in which the defendant is seeking to introduce evidence of specific sexual acts between the victim and defendant, consider arguing that such evidence should be excluded for the following reasons.:

- The evidence has little probative value;
- The evidence would be unduly prejudicial;
- In a jurisdiction following the Michigan approach: because the evidence has little probative value and is unduly prejudicial, there is no need to reach the exceptions to rape shield: the evidence should be excluded;
- In a jurisdiction following the other two approaches: because the evidence has little probative value and is unduly prejudicial, based on a facial reading of the rape shield statute, the evidence should be excluded;

- If applicable, including the evidence would violate governing federal (CVRA) or state constitutional or statutory victims' rights laws;
- Excluding the evidence would not violate defendant's Constitutional rights; and
- Policy strongly favors the exclusion of such evidence.

NCVLI is committed to securing privacy and protection for victims of sexual assault. For additional resources or ideas on how best to protect a victim under your jurisdiction's rape shield laws, please contact us.

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1 Marah DeMeule, *Note: Privacy Protections for the Rape Complainant: Half a Fig Leaf*, 80 N. Dak. L. Rev. 145, 148 (2004).

2 Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 Cath. U. L. Rev. 711, 715 (1995) (describing the state of the law pre-rape shield reform in the 1970s).

3 DeMeule, *supra* n. 1, at 148.

4 Harriet R. Galvin, *Shield Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763, 794 (1986).

5 *Id*. at 795.

6 *Id*. at 797-801.

7 *Id*. at 798-99.

8 *Id*. at 778.

9 *Id*. at 800.

10 DeMeule, *supra* note 1, at 145.

11 DeMeule, *supra* note 1, at 153-54. These states follow the Michigan approach: Ala. Rule Evid. 412; Fla. Stat. Ann. 794.022(2) – (3); Ga. Code Ann. 24-2-3-; Ill. Comp. Stat. Ann. ch. 725 5/115-7; Ind. Code Ann. 35-37-4-4-; Ky. R. Evid. 412; La. Code Evid. Ann. art. 412; Me. R. Evid. 412; Md. Ann. Code 3-319; Mass. Gen. Laws Ann. ch. 233, 21B; Mich. Comp. Laws Ann. 750.520j; Minn. R. Evid. 412; Mo. Ann. Stat. 491.015; Mont. Code Ann. 45-5-511; Neb. Rev. Stat. 28-321; N.H. Rev. Stat. Ann. 632-A:6; N.C. R. Evid. 412; Ohio Rev. Code Ann. 2907.02(D) (Page 2002); 18 Pa. Cons. Stat. Ann. 3104; S.C. Code Ann. 16-3-659.1; Tenn. R. Evid. 412; Vt. Stat. Ann. tit. 13, 3255; Va. Code Ann. 18.2-67-7; W. Va. Code 61-8B-11; Wis. Stat. Ann. 972.11(2), 971.31(11). DeMeule, *supra* note 1, at 154 n. 77.

12 DeMeule, *supra* note 1, at 154. *See also, generally*, Mich. Comp. Laws Ann. 750.520j.

13 Fed. R. Evid. 412.

14 DeMeule, *supra* note 1 at 154. These states follow the "discretionary" model: Alaska Stat. 12.45.045; Ark. Code Ann. 16.42.101; Colo. Rev. Stat. 18-3-407; Idaho Code 18.6105; Kan. Stat. Ann. 21-3525; N.J. Stat. Ann. 2C:14-7; N.M.R. Evid. 413 and N.M. Stat. Ann. 30-9-16; R.I. Gen. Laws 11-37-13; S.D. Codified Laws 23A-22-15; Wyo. Stat. Ann. 6-2-312. *Id*. at 154 n. 82.

15 *See, e.g.*, Ark. Code Ann. 16-42-101(c).

16 An *in camera* review means that a judge will look at the evidence outside the presence of the parties and make a determination as to its admissibility. Only if the judge determines that the evidence is admissible will both parties be permitted to view the evidence.

17 DeMeule, *supra* note 1, at 155. These states follow the California approach: Cal. Evid. Code 782, 1003(b); Del. Code. Ann. tit. 11, 3508, 3509; Miss. Code Ann. 97-3-68, Miss. R. Evid. 412; Nev. Rev. Stat. 48.069, 50.090; N.D. R. Evid. 412; Oka. Stat. Ann. tit. 12, 2412; Wash. Rev. Code Ann. 9A.44.020. DeMeule, *supra* note 1, at 155 n. 84.

18 *See, e.g.*, *United States v. Saunders*, 736 F. Supp. 698, 703 (E.D. Va. 1990) (finding defendant's claim that he had a sexual relationship with the victim to be admissible as bearing on the issue of consent); *Minus v. State*, 901 So. 2d 344, 349 (Fla. Dist. Ct. App. 2005) (allowing evidence of victim's sexual relationship with defendant as probative of consent); *Miller v. State*, 716 N.E.2d 367, 370 (Ind. 1999) (allowing evidence of victim's sexual relationship with defendant under explicit statutory rape shield exception).

19 *See, e.g.*, Fed. R. Evid. 402; 403; Julie A. Seaman, *Triangular Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 Geo. L. Rev. 827, 836 n. 36 (2008) (stating that forty-two states have adopted rules of evidence patterned after the Federal Rules).

20 *See, e.g.*, Fishman, *supra* note 2, at 741 (noting that exclusion of evidence of prior sexual relations with third parties is justified because it has "so little probative value"); Galvin, *supra* note 4, at 778 (noting that the "low probative value of character evidence is outweighed by an array of countervailing considerations").

21 *See, e.g.*, *Goldman v. State*, 9 So. 3d 394, 398 (Miss. Ct. App. 2008) (excluding evidence of victim's prior sexual relationship with the defendant); *State v. Stellawagen*, 659 P.2d 167, 170 (Kan. 1983) ("[A] rape victim's prior sexual activity is generally inadmissible since prior sexual activity, even with the accused, does not of itself imply consent to the act complained of.").

22 *Goldman*, 9 So. 3d at 398 (citing *Fuqua v. State*, 938 So. 2d 277, 283 (Miss. Ct. App. 2006)).

23 *See, e.g.*, *People v. Adair*, 550 N.W.2d 505, 512-13 (Mich. 1996) (allowing generalized evidence of the existence of a sexual relationship between the victim and the defendant, but excluding evidence of specific sexual acts, noting admission of specific evidence would be "highly prejudicial" and its probative value would be "nonexistent"); *Southward v. Warren*, No. 2:08-CV-10398, 2009 WL 6040728, *13 (E.D. Mich. Jul. 24, 2009) (concluding that introduction of evidence that the victim and defendant were married was sufficient and that particular acts were not relevant to the issue of consent); *Joyce v. State*, 474 A.2d 1369, 1375 (Md. Ct. Spec. App. 1984) (excluding evidence of prior instances of group sex, including one instance of group sex involving the defendant, because the probative value was so low and its prejudicial potential so high); *United States v. Ramone*, 218 F.3d 1229, 1236 (10th Cir. 2000) (finding it was not error to limit questioning under rape shield to testimony that the victim and defendant had a prior relationship, she was pregnant, and they lived together).

24 *See, e.g.*, *Southward*, *supra* note 21, 2009 WL 6040728, at *14 (noting the great danger of inflaming the jury by introducing evidence of specific acts of sexual conduct); *In re Pannu*, 5 A.3d 918, 925 (Vt. 2010) (noting that introducing evidence of specific acts of sexual conduct could cause the jury to be "unable to comprehend how such a person could be raped").

25 Ann Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 Nw. U. L. Rev. 914, 957 (1994) ("One might sense that the rape of a virgin is actually a different crime, a notion that ties to a whole syndrome of prejudice about women and rape: that the injury of rape depends on how much the woman has been damaged by sexual experience prior to the rape – that virgins are grievously injured, sexually active women have little to complain about, and some women (e.g., wives of the accused and prostitutes) have not suffered at all.").

26 Crime Victims' Rights Act, 18 U.S.C. 3771(a)(8).

27 Alaska Const. art. I, § 24 ("the right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process"); Conn. Const. art. I, § 8(b)(1) ("the right to be treated with fairness and respect throughout the criminal justice process"); Idaho Const. art. I, § 22 ("the following rights: (1) to be treated with fairness, respect, dignity and privacy"); Ill. Const. art. I, § 8.1(a)(1) ("[t] he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process"); Ind. Const. art. I, § 13(b) ("the right to be treated with fairness, dignity, and respect throughout the criminal justice process"); La. Const. art. I, § 25 ("shall be treated with fairness, dignity, and respect"); Md. Const. art. 47(a) ("shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process."); Mich. Const. art. I, § 24(1) ("the right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process."); Miss. Const. art. III, § 26A ("shall have the right to be treated with fairness, dignity and respect throughout the criminal justice process"); N.J. Const. art. I, P 22 ("A victim of crime shall be treated with fairness, compassion and respect by the criminal justice system."); N.M. Const. art. II, § 24(A)(1) ("the right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process"); Ohio Const. art. I, § 10a ("Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process...."); Okla. Const. art. II, § 34 ("To preserve and protect the rights of victims to

justice and due process, and ensure that victims are treated with fairness, respect and dignity, and are free from intimidation, harassment or abuse, throughout the criminal justice process, any victim or family member of a victim of a crime has the right to know ....") (listing information rights); Or. Const. art. I, § 42(1) ("[T]o accord crime victims due dignity and respect... the following rights are hereby granted....") (listing rights); R.I. Const. art. I, § 23 ("A victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process."); S.C. Const. art. I, § 24(A) ("To preserve and protect victims' rights to justice and due process..., victims of crime have the right to: (1) be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal and juvenile justice process."); Tenn. Const. art. I, § 35 ("To preserve and protect the rights of victims of crime to justice and due process, victims shall be entitled to the following basic rights.... 2. the right to be free from intimidation, harassment and abuse."); Tex. Const. art. I, § 30(a) ("A crime victim has the following rights: (1) the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process."); Utah Const. art. I, § 28(1) ("To preserve and protect victims' rights to justice and due process, victims of crime have these rights, as defined by law: (a) to be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process."); Va. Const. art. I, § 8-A ("[I]n criminal prosecutions, the victim shall be accorded fairness, dignity and respect by the officers, employees and agents of the Commonwealth...."); Wash. Const. art. I, § 35 ("To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights.") (listing rights); Wis. Const. art. I, § 9m ("This state shall treat crime victims ... with fairness, dignity and respect for their privacy.") (taken from Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. Rev. 255, 262 n.19).

28 *See, e.g.*, Jessica D. Khan, *He Said, She said, She Said: Why Pennsylvania Should Adopt Federal Rules of Evidence 413 and 414*, 52 Vill. L. Rev. 641, 648 n. 44 (2007) (listing, among other reasons for not reporting rape, the fear of being "disbelieved" and "blamed"); *Adair*, *supra* n. 21, at 509 (noting that admitting evidence of the victim's past sexual activity discouraged victims from testifying "because they knew their private lives [would] be cross-examined") (internal quotation omitted).

29 *Michigan v. Lucas*, 500 U.S. 145, 153 (1991) (finding it was not a *per se* violation of Sixth Amendment rights to exclude evidence of the defendant's sexual relationship with the victim for failure to comply with Michigan's rape shield statute's notice requirements); *Michigan v. Lucas*, 507 N.W.2d 5, 6 (Mich. Ct. App. 1993) (applying the Supreme Court's decision in *Lucas* and finding that the rape shield statute authorized preclusion of evidence of prior sexual activity between a defendant and a victim in this case).

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