Under the Rape Shield:
A Historical and Comparative Perspective on the Rape Shield Laws
by Denise Roman

"Nearly 30 years ago, I sat in the back of a police car as the Boston cops warned me about what would happen to me if I officially reported that I'd just been raped.

'Are you ready to go out on trial yourself?' they asked.

I was 20 years old at that time. I thought I was the victim. I didn't understand why my life would be put under a microscope."

Susan Estrich, "Rape shield laws aren't foolproof," USA Today, July 7, 2003[1]

The quote above is by syndicated columnist and member of the *USA Today*'s board of contributors, Susan Estrich, a rape survivor. This is proof that female rape victims – whom, in a spirit of solidarity, I call rape survivors – can be found anywhere. They are mothers, sisters, wives, or daughters. They can be you or me.

The evolution and implementation of the Rape Shield Laws in the United States is credited to the Second-Wave feminism of the late 1960s and early 1970s and its Anti-Rape movement which sought to redefine rape. Prior theorizations of rape considered it a sex crime inflicted by pathological men who could not control their sexual impulses. With new concepts of gender and power[2] and difference and equality[3] coming into the feminist discourses of the Second-Wave feminism, rape came to be redefined as a power dynamics whereby gender roles, masculinity and femininity, were (re)enforced in a power hierarchy placing men above women. Thus, rape came to be conceptualized as a means whereby men could socially control women, a form of male violence against women. This view was revolutionary in that, for the first time, it approached rape from the perspective of the raped survivor as a matter of patriarchal domination over women's sexuality.[4]

As a result, by the 1980s, a majority of states changed their laws to include, among others, spousal rape, eliminating the necessity of having a rape witness, changing the age for statutory rape from 10 to 12, changing the definition of consent (especially for cases of submission out of fear, or lack of consent when the survivor had passed out), and Rape Shield Laws which limit the admission of the survivor's sexual history in court as a means to encourage women to report rape and to be able to stand in court with dignity without being afraid that their past could be used as a weapon by the defense to humiliate them, thus inflicting a metaphorical "second rape."

This article focuses on the Rape Shield Laws and their evolution in the United States, one of the pioneers in this field. The article also discusses constitutional and feminist critiques of present Rape Shield Laws, and ends with a comparative perspective throughout the Anglo-American legal space today. Finally, although the Rape Shield Laws can be approached from a variety of discourses, this article engages specifically with a discourse that intersects legal and feminist analyses.

I. A History of the Rape Shield Laws in the United States

In this section I will present two major historical cases that came to demand the imperative of Rape Shield Laws, followed – since we are in California – by a case that brought these laws to this state. Finally, I will discuss a more recent case that involved a celebrity which, nearly 30 years after their implementation, again put the Rape Shield Laws on the front page.

In the famous 1838 *People v. Abbot*, the New York Superior Court of Judicature considered an appeal from a conviction of rape. This case illuminates the way women and femininity had been constructed in 19th century America at the intersection of patriarchy and violence. As such, a woman's past sexual history was considered relevant to her credibility as an alleged survivor of rape because that brought into direct question the notion of consent on a scale that placed the prostitute at one end and the "virtuous

woman" at the opposite end.[5] A virtuous virgin was thought of to be more credible in her accusation of rape than a common prostitute who engaged in sexual activity with men on a daily basis. Thus, the more complex a woman's sexual past, the greater the doubt as to the validity of her assent or lack thereof with regards to the sexual assault. In the notorious words of the Judge Cowen, "Will you not more readily infer assent in the practiced Messalina,[6] in loose attire, than in the reserved and virtuous Lucretia[7]?"[8]

The crux of this case is the notion of consent in that this case creates an alleged automatic inference from the woman's past to her assent. The woman's past chastity thus triggers the mandatory inference of being recognized as a survivor of rape. At the opposite end, the inference from a woman's unchaste past gives the only result of having consented to the sexual assault which thus becomes a mere consensual sexual act.

It is hard to imagine living in this kind of Ibsenian universe, as a woman, a survivor of rape. The truth is, as we shall see later, that this mentality, as it is reflected in corresponding laws, is still prevalent today not only inside English-based legal systems, but also outside of them where the weight of cultural and religious beliefs leaves the majority of women worldwide unprotected against rape and unable to get justice for being raped.

Another notable case from the 19th century is *State v. Sibley* (1895), when the Supreme Court of Missouri considered an appeal from a conviction for rape of a minor.

Lula Hawkins was the daughter of Roxie, Sibley's (the defendant) wife, by a former husband. On July 1st, 1882, when her mother was not at home, the defendant raped her for the first time, and then he repeatedly had intercourse with her, to the point that Lula became pregnant and delivered a stillborn baby in the city of St. Louis where she had gone to be confined. During her pregnancy Sibley gave Lula medicine to produce an abortion.

Sibley denied the accusations, claiming that he was a pillar of his community. However, witnesses testified that the defendant had a bad reputation for chastity and

virtue in general. Though Sibley was convicted, he appealed the ruling, claiming that the impeachment witnesses should not have been allowed to testify to his general reputation for chastity, since, under *State v. Grant* (1883), impeachment by proof of general reputation of promiscuity had been confined to females only.

Judge Burgess delivered the court opinion, stating that a woman's chastity or lack thereof bore directly on her truthfulness while a man's reputation for truthfulness was completely unaffected by promiscuity. Judge Burgess concluded that although the more recent *State v. Rider* (1885) ruled that the impeachment rule applied both to women and men, the rule of law from *State v. Grant*, applying impeachment only to women, governed the case against Sibley. In the words of Judge Burgess:

> 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.[9]

Thus, the judgment was reversed. Nonetheless, in his opinion, Judge Grant dissented from the majority on account of *State v. Rider*, considering that impeachment for chastity should be applied to both men and women.

Second-wave feminism brought the Rape Shield Laws to California as well, as they are now reflected in the California Evidence Code Sections 782 and 1103.

Section 1103 states that:

> (a) In a criminal action, evidence of the character or a trait of character (in the form of opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:

(1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.

(1) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1).

(b) In a criminal action, evidence of the defendant's character for violence or a trait of character for violence (in the form of opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a).

(c)(1) […] for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of those sections, except where the crime is alleged to have occurred in a local detention facility […] or in a state prison […], opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness's sexual conduct, or any of the evidence, is not inadmissible by the defendant in order to prove consent by the complaining witness.

(2) Notwithstanding paragraph (3), evidence of the manner in which the victim was dressed at the time of the commission of the offense shall not be admissible when offered by either party on the issue of consent in any prosecution for an offense specified in paragraph (1), unless the evidence is determined by the court to be relevant and admissible in the interests of justice. The proponent of the evidence shall make any offer of proof outside the hearing of the jury. The court shall then make its determination and at that time, state the reasons for its ruling on the record. For the purpose of this paragraph, "manner of dress" does not include the condition of the victim's clothing before, during, or after the commission of the offense.

(3) Paragraph (1) shall not be applicable to evidence of the complaining witness's sexual conduct with the defendant.

(4) If the prosecutor introduces evidence, including testimony of a witness, or the complaining witness as a witness gives testimony, and that evidence or testimony related to the complaining witness's sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the prosecutor or given by the complaining witness.

(5) Nothing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Section 782."

Section 782, which is more procedural, states that:

"(a) […] if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under section 780, the following procedure shall be followed:

(1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.

(2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing pursuant to paragraph (3). After that determination, the affidavit shall be resealed by the court.

(3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.

(4) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating that evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court […].

The first case to apply the Rape Shield statute in California was the 1976 *The People v. Blackburn*.

Blackburn, the defendant, was charged with the forcible rape of Deborah M. and with kidnapping Deborah and Alfred A. The defendant and three others had accosted Deborah as she was walking with 10-year-old Alfred and kidnapped them, forcing them 500 feet through an alley and then into an abandoned apartment building where the defendant and his companions raped Deborah.

Deborah had been cross-examined at the preliminary hearing where she testified against the defendant. At trial, the prosecution did not place Deborah's chastity in question and she did not testify to existence or lack thereof of past sexual experiences (in spite of her conflicting statements while on preliminary hearing cross-examination and in her testimony. For example, in one instance, Deborah testified that prior to the rape, she was a virgin, in another that, some five or six months prior to her rape, she had sexual relations with her boyfriend in Mississippi. Also, subsequent to the rape, she lived with a 40-year-old man in a motel, but she also denied it at first, then she admitted it.). However, according to California Evidence Code section 782, the defendant moved to introduce evidence of Deborah's past sexual history in order to attack her credibility, claiming that "the sexual proclivity of the complaining witness and her lack of truth and veracity are clearly in question."[10]

The court found the offer of proof insufficient and barred it. The defendant appealed,[11] and the Court of Appeal denied his appeal on the grounds that the basic effect of the 1974 Amendment to California Evidence Code section 1103 was to deny the defendant charged with rape (or a related crime) the right to introduce evidence that the survivor had a previous sexual past.

Judge Thompson held that, among others:

> [the California] Evidence Code makes inadmissible, in a prosecution of rape or a related offense, reputation evidence and evidence of specific instances of the alleged victim's sexual conduct with others in order to prove consent. […] The historical rule allowing evidence may be more a creature of a one-time male fantasy of the 'girls men date and the girls men marry' than one of logical inference.[12]

I take this to be the historical retort Judge Thompson gives to Judge Cowen and Judge Burgess and their binary distinction between Messalina and Lucretia, between the "virtuous virgin" and the "common prostitute," and between unchaste/untruthful women and always-chaste/truthful men.

Finally, in a more recent case involving professional basketball player Kobe Bryant, brought the issue of the Rape Shield Laws to front-page news, followed by a flurry of articles by feminists about these laws' loopholes and failings.

In the 2004 *The People v. Kobe Bryant*, the issue was a trial court's order forbidding media entities from publishing a transcript of in-camera proceedings they had received by mistake from the court itself that contained evidence and arguments about the alleged survivor's sexual conduct before and after her sexual encounter with Kobe Bryant, the defendant. What had happened? On June 24, 2004, the court reporter had sent out the transcripts of the in-camera proceedings, but instead of using the mailing list for the persons authorized to receive transcripts from the in-camera proceedings he used, by mistake, the email list for subscribers to public proceeding transcripts in the case, thus directing this privileged information to seven media recipients.

Although the media protested against the order, mainly on account of infringement of their Free Speech right (the First Amendment to the U.S. Constitution),[13] this case ultimately involved an accidental leak of privileged information that, on account of the international fame of its defendant, brought the Rape Shield Laws in discussion in the Supreme Court of Colorado's decision and in the press nationwide.

Justice Hobbs delivered the court opinion, stating, among others, that:

> Because a defendant may seek to inject irrelevant details about the victim's personal sexual conduct into the case, the Colorado General Assembly has enacted a carefully-crafted judicial mechanism [the Rape Shield Laws] that allows the prosecution and defense – in private, that is

> "*in camera*" – to explore and argue about the relevancy and materiality of evidence tendered to the trial judge for admission at the public trial of the case.[14]

Notwithstanding the court's decision to forbid further publicity of the alleged rape survivor's sexual background, the notion that she was a woman whose past "was at issue," that there was something wrong with her sexual history, that she had engaged with men before and after her sexual encounter with Kobe Bryant became matters of notoriety through rumors and gossip. Susan Estrich even says that it took her less than five minutes on her computer to learn the complainant's name, address, and telephone number and to discover reports of her alleged suicide attempt. Tabloids published parts of her picture and her friends were invited as guests at various host talks on the radio and television.[15]

The survivor of rape was completely compromised. She dropped the case.[16] The Rape Shield failed her.

This brings us to the critiques articulated against the current state of the Rape Shield Laws.

II. Critiques to the Rape Shield Laws

This section explores constitutional and feminist critiques brought to the Rape Shield Laws, as they are enacted today in all the United States states, in the federal system, and in the army.

Constitutional Critiques of the Rape Shield Laws

In general, the critiques to the Rape Shield Laws cite several conditions that weaken its protection. These include: denial of due process, a fair trial, violation of the right to cross-

examination, discrimination between sexes (against men), violation of the privilege against self-incrimination, vagueness of law, and intrusion by the legislature into the judiciary in violation of the separation of powers.

Thus, in *People v. Blackburn*, discussed above, the defendant contended that, by barring the introduction of evidence of the survivor's sexual past, the court violated his constitutional due process right to a fair trial. In its holding, the court argued that this constitutional right does not force the court to admit all kind of evidence that may tend to exonerate the defendant since the sexual past of the victim has little probative value, thus not depriving the defendant of his right to a fair trial.[17]

In the 1979 *Finney v. State*, in Nebraska, the defendant argued that the Rape Shield Laws violated his equal protection under the Fourteenth Amendment because they vindictively discriminated against rape defendants. In its holding, the court stated that, first, rape defendants are not a suspect classification under the law and, second, that the equal protection clause requires only that there be a rational and reasonable basis for the classification, which bears a fair relationship to the statute's purpose. Thus, the Rape Shield Laws are only a legal means to encourage women to report rape and not to be humiliated while on stand.[18]

In the 1978 *State v. Ryan*, in New Jersey, the defendant complained that his being barred from cross-examining the complaining witness about her having intercourse with another man shortly before the alleged rape by the defendant violated his right under the Sixth Amendment Confrontation Clause. In its holding, the court stated that such evidence was of low probative value for the case at hand, which fairly justified its exclusion.[19]

The same argument arose in the 1979 *State v. Gardner*, in Ohio, when the court held that in determining whether the Rape Shield Laws had been unconstitutionally applied, the court had to weigh the probative value of the evidence offered against the state interest protected by the Sixth Amendment (which is to give defendants in a

criminal case the right to cross-examine their accuser). In the case at hand, the evidence excluded was prejudicial and inflammatory, as tending to prove that the complaining witness was a prostitute and had a reputation in the community as a prostitute, which had little probative value for the charged rape and did not infringe the defendant's constitutional rights.[20]

In *Stephens v. Miller* (1994), the court held that the Rape Shield Laws did not infringe on the defendant's constitutional right to testify on his own defense, when he wanted to introduce "his version" of the events, thus excluding his statements that the survivor of rape allegedly liked it "doggy fashion" and switching partners as well as expressions he had allegedly uttered during the sexual intercourse which then angered the victim and made her fabricate the rape accusation. The court excluded these statements about the survivor's alleged sexual desires on account of being inflammatory, embarrassing, and tending only to humiliate her.[21]

The common denominator of all these cases is the notion that the Rape Shield Laws must provide a balance between the defendant's constitutional rights and the survivor's privacy rights. As we have seen, in some states, such as California, the admission of evidence of the survivor's past sexual history is barred completely if it is presumed to prove consent. In other states, as was the case with Kobe Bryant in Colorado, such evidence is conditioned on the defendant's preliminary showing (in an in-camera hearing) that such evidence is relevant and material to the case (see also *People v. MacLeod* (2006), Colorado).[22] Hence, in these states, if evidence of the past sexual history *is* probative the Rape Shield Laws *yield* to the defendant's constitutional rights that assure a full and fair defense (*State v. Ellison* (2003), Connecticut). A defendant's right to cross-examine a witness is not barred by the Rape Shield Laws where the survivor's sexual past is relevant and tends to establish, for example, bias, motive, prejudice (*People v. Davis* (2003), Illinois), or mistaken identity. For example, in the 1985 New York *Latzer v. Abrams* a man convicted of having sex with underage boys was denied his right to cross-examine the boys under the Rape Shield Laws. The superior

court found that the trial court erred since the excluded evidence offered by the defendant showed that it may have been a case of mistaken identity.[23] Also, in the Florida 1991 *Lewis v. State*, a case that prosecuted a man for lewd and lascivious acts upon a child and sexual activity with a child under 18 while having familial or custodial authority, the court found that exclusion of the defendant's right to cross-examination was violated as the defendant intended to show that the victim had fabricated the charges against him to hide from her disapproving mother her own sexual relationship with her boyfriend.[24]

Otherwise, if intended only to harass and humiliate the rape survivor, the witness's sexual past has little probative value and is excluded without violating the defendant's constitutional rights.

Feminist Critiques of the Rape Shield Laws

Legal feminists, like Nancy E. Snow and Michelle J. Anderson, consider that there still are loopholes in the Rape Shield Laws and these critiques can be grouped into three categories: cultural, discursive, and structural. Although they are hereby separated for analytical purposes, they may be combined since the rape, the trial, and the Rape Shield Laws themselves are organically-constituted within cultural, discursive, and structural phenomena.

A cultural critique refers, for example, to the 1989 Florida *State v. Lord*, when the defense was allowed to show the jury that the woman was wearing a tank top and a miniskirt with no underwear. As the jury foreman said, the jury acquitted Lord because they felt the victim had asked for it, "[w]ith that skirt, you could see everything she had. She was advertising for sex."[25] Subsequently, Florida changed its Rape Shield Laws, excluding evidence offered to prove that the rape survivor's manner of dress incited the rape.[26]

Another cultural critique refers to the case when the woman exercises her autonomy and, by acting sexually aggressive, evades the alleged, yet still overwhelming myths about woman's passivity, monogamy, and dependency on men.[27] Thus, in 1983, in *State v. Shoffner*, a North Carolina Court of Appeals ordered a retrial for exclusion of evidence of sexual conduct of the survivor of rape with third parties that allegedly constituted a pattern of prior behavior by the woman similar to the defendant's version of the alleged rape. These pieces of evidence referred to (1) a witness having seen the survivor many times at a club attracting and touching men, (2) evidence of one prior episode of consensual sex of the survivor with the brother of one of the defendants, and (3) evidence by a witness who testified that he saw the survivor at an inn with two men standing in front of her, one of whom was zipping his pants. The Court of Appeals concluded that the woman was the initiator, the "aggressor," in her sexual encounters, that that was her "*modus operandi.*"[28]

Also, in the 1988 New Hampshire *State v. Colbath*, one of the State Supreme Court Justices sanctioned the survivor's "provocative behavior" and "publicly inviting acts" toward a group of men prior to her sexual encounter with the defendant as proof of her sexual proclivity for the alleged rape.[29] As Anderson considers, "a woman's prior pattern of sexual behavior is marginally relevant to her willingness to engage in sexual intercourse generally."[30]

This reminds one of the 1988 movie *The Accused* (Jodie Foster won an Oscar for that role), where the complainant's "questionable character" – she went to a bar and flirted with the men who would later rape her – was used in court to give the assailants lighter sentences, while the rape itself had been accompanied by cheering bystander men.

From a discursive critique point of view, the entire cross-examination is, in essence, patriarchal, and thus prejudicial to the survivor.[31] Cross-examination is:

> …unequal power dynamics of socially structured talk. . . . cross-examination itself allows the defense counsel to attempt to reconstruct the victim's self-presentation and the presentation of her testimony from a

> man's perspective. Defense counsel is free to disconnect elements that were originally united in her testimony, weave together initially disparate elements, recombine, overemphasize, underemphasize, and use innuendo, tone, demeanor, pauses and gestures. The aim is to confuse and discredit the victim's self-presentation before the court as well as her perspective on the incident, thereby shifting the blame from the defendant to the victim. The goal is to paint the victim a liar by making her account look more like the defendant's version of the consensual sex. Thus an account of rape from a woman's viewpoint is made to look like consensual sex from a man's perspective. The subjected account of the woman is 'corrected' and reinterpreted through the subjectivity of a man and then offered to the judge and jury by the defense as 'objective truth' – a value-neutral description of facts.[32]

This is reminiscent of the early 19th century cases previously discussed, as it seems that the power of myths, of meta-discourses, lingers throughout the mass of society in spite of enlightened discourses about femininity, masculinity, patriarchy, and violence that Rape Shield Laws normatively inject into the social fabric, at least since the early 1970s. As Catherine MacKinnon says, "The perspective from the male standpoint enforces a women's definition, encircles her body, circumlocutes her speech, and describes her life."[33]

From a structural critique perspective, Anderson considers that it is wrong to admit prior sexual conduct with third parties in order to prove reasonable but mistaken belief as to consent. It is unreasonable to infer consent from past sexual history with others, which constitutes a break in the Rape Shield – and here the structural critique meets the cultural one – because this way, previously inadmissible evidence can come in on the subterranean male myths and biases about women's accepted form of sexuality.[34] In this vein, prostitutes are almost completely excluded from ever getting justice, especially as the acts of prostitution are illegal and thus may come in as evidence against the survivor of rape. For example, the New Mexico *State v. Johnson*, the rape survivor claimed that Johnson had lured her in his car and drove her to a remote place where he raped her. However, the defendant claimed that that was a consensual act of prostitution

and he wanted to introduce evidence of the complainant's prior acts of prostitution with third parties.[35] As prior convictions for prostitution may come in as admissible evidence, they are extremely prejudicial for the survivor or rape, and their relevance for the case at hand is, as explained before, minimal.

Finally, as Anderson argues in her structural critique, even the prior sexual behavior with the defendant should be excluded from coming in as evidence. Not only are a majority of rapes committed by prior intimate people, such as (ex)boyfriends or (ex) spouses, but also this exception suggests that only rape committed by a stranger is "true" rape, thus excluding an entire category of rapists, the intimate/spousal ones.[36]

While feminists suggest that there should be new Rape Shield Laws providing better protection for the survivors of rape –such as admitting exceptions to the Rape Shield only in instances of determining that the semen, or injury, or disease comes from another source or establishing the complainant's motive, bias, or prejudice in fabricating the rape allegation[37] – others suggest changing the system and creating specialized sex crimes courts.[38] In this author's opinion, creating special, parallel courts is not cost effective and may not be realistically achievable. The population may dislike such a separatist concept and it is not likely that Congress will pass such a burdensome law. There may be more than one solution, and states will have to refine their existing rape Shield Laws at all the levels of analysis discussed here, perhaps starting with redesigning cross-examination as a woman-empowering discourse, not one denying her subjectivity. This way, the survivor's version of the rape would have more weight, would be treated with more respect, and would not be discursively twisted into a consensual act.

But in the meantime, what is the situation with the Rape Shield Laws in countries outside the United States? What is the protection conferred to survivors of rape elsewhere? Are the Rape Shield Laws more restrictive, or more expansive, or are they even available?

III. Comparative Perspective on the Rape Shield Laws

In the United States, the Rape Shield Laws are contained in Federal Rule of Evidence 412 which was originally introduced in 1978 by then member of the House Judiciary Committee, Elizabeth Holtzman.[39]

That rule says that in civil or criminal proceedings evidence of the victim's sexual past behavior or alleged sexual predisposition is generally inadmissible.

The exceptions in criminal cases are:

> Rule 412(b)(1)(A): Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
>
> Rule 412(b)(1)(B): Evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of sexual misconduct offered by the accused to prove consent or by the prosecution; and
>
> Rule 412(b)(1)(C): Evidence the exclusion of which would violate the constitutional rights of the defendant.[40]

As for civil cases, Rule 412 (b)(2) states that:

> [E]vidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only it has been placed in controversy by the alleged victim.[41]

These Federal Rules are reflected in state legislations and their application varies from more restrictive to more expansive Rape Shield Laws. As such, various authors[42] consider that the Rape Shield Laws can be divided into four categories.

The Michigan Rape Shield Laws (the first Rape Shield Laws in the nation, created in 1975, even before F.R.E. 412 which was adopted in 1978),[43] which are applied in 25

other states are located at the most restrictive end of the spectrum. As such, they completely forbid the admission of any evidence of the complainant's sexual history with the exception of the complainant's past sexual conduct with the defendant, for purposes of establishing the origin of semen, pregnancy or disease, evidence of a pattern of prior sexual conduct by the complainant, evidence of bias or motive to fabricate the charge, evidence of prior false accusations of sexual assault by the complainant, and evidence regarding the defendant's reasonable but mistaken belief in the complainant's consent.[44]

On the other hand, the state gives complete discretion to the trial court whether to admit evidence of the complainant's past sexual behavior, using the probative versus the unfairly prejudicial balance test. Judges can thus decide via in-camera hearings the probative value of such evidence before the trial. Texas, along with 11 other states have these kind of permissive Rape Shield Laws. As we have seen before, the lax character of the Rape Shield gives little protection to the survivor of rape, as discussed in Kobe Bryant's case above, and falls prey to old cultural myths and biases of judges, or if such evidence is admitted, to juries of all kinds,[45] about a woman's "chastity" and "truthfulness."

A third group of states combines both the Michigan and Texas approaches and, molded on the F.R.E. 412, excludes the complainant's past sexual history, but subjects the rape survivor's sexual history to certain exceptions and, more importantly, to a "residuary" exception that admits such evidence if constitutionally required or in the interests of justice. Yet, there is no legislative or jurisprudence guidance as to what is deemed to be in the interests of justice.

In the last group, led by California, sexual conduct evidence is divided into two categories: substantive evidence to indicate the survivor's consent (California and Delaware forbid it, Nevada and Washington admit it) and credibility evidence used to attack her believability/veracity (California and Delaware admit it, Nevada and Washington forbid it).[46] However, as Snow says, "evidence does not neatly separate into

these two categories."[47] In addition, credibility evidence may backfire into proving consent while substantive evidence may go toward believability.

Finally, the main distinctions between the F.R.E. 412 and the California Rape Shield Laws contained in Sections 782 and 1103 of the California Evidence Code discussed earlier are: (1) while California law bars only sexual conduct evidence offered *to prove consent*, the federal rule bars all such evidence unless offered to prove that another person was the source of such physical evidence; (2) while California law allows all evidence of sexual conduct with the defendant, the federal rules allow such evidence only *to show consent*; (3) while California law applies only to complaining witnesses (not to pattern witnesses, who testify about other instances of sexual misconduct by the person accused), federal law applies irrespective if the witness is a party to the litigation; (4) while California law explicitly excludes prison prosecutions, the federal law applies in these cases as well.[48]

What is the situation outside the United States?

Canada

In the Canadian case, and under common law which was translated into Canadian Criminal Code Section 142, evidence of a complainant's sexual behavior with the defendant and third parties was easily admissible at a rape trial until 1982. As such, the defendant could introduce evidence of the complainant's unchasteness, impeaching her credibility as a witness, under the old myth (which we have seen before in the case against Sibley) that unchastity is proof of untruthfulness.[49]

In the 1970s, under the influence of women's movements and changing attitudes about sexual behavior, the Canadian Parliament revised section 142 holding it to be prejudicial and discriminatory. In essence, the probative value of the evidence of the complainant's past sexual history would thenceforth be decided upon in an in-camera

hearing. When the Canadian courts applied the statute it did not offer satisfactory protection to the survivors of rape. Thus, in *Forsythe v. The Queen*, the Canadian Supreme Court allowed the complainant, under Section 142, to be compelled as a witness at the in-camera hearing where the admissibility of her past sexual behavior was under scrutiny. The Court's decision came under attack because it had stripped the complainant of the common law privilege of remaining silent. In addition, her credibility had been made into a material issue which was highly prejudicial to her. In response to the critique the Parliament repealed Section 142 altogether, and in 1982, enacted Criminal Code Sections 246.6 and 246.7 (renumbered in 1985 as Sections 276 and 277),[50] which followed the restrictive Michigan Rape Shield Laws model discussed above. Two cases followed, *R. v. Seaboyer* and *R. v. Gayme*, in which the defendants argued the two sections' unconstitutionality. As they had been barred from introducing evidence of the complainant's past sexual behavior they contended that Sections 276 and 277 violated the Canadian Charter or Rights and Freedoms.[51] Ultimately, the Canadian Supreme Court upheld the rights of the complainant to the Rape Shield Laws' protection while the dissenting opinions wished to defend the rights of the accused. The same dichotomy split the Canadian population, which ultimately, called for new legislation.

Thus, in 1991, then Justice Minister Kim Campbell (who, in 1993, would become Canada's 19th Prime Minister and the first woman in this official position) introduced Bill C-49, also known as "No Means No Bill," in the House of Commons, in the midst of vocal opposing reactions. Finally, the Parliament amended Canadian Criminal Code and, with regards to the Rape Shield Laws, produced a revised Section 276 that says:

> (1) [E]vidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
>
> (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
>
> (b) is less worthy of belief.

> (2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines . . . that the evidence
>
> (a) is of specific instances of sexual activity;
>
> (b) is relevant to an issue at trial; and
>
> (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.[52]

The most notable achievement is the barring of evidence of previous sexual conduct *even with the defendant*. However, in spite of this restrictive stipulation the rest of the section gives judges freedom to admit or not evidence of the complainant's past sexual behavior, which in the United States would fall into the most expansive category of Rape Shield Laws (such as those of Texas or Colorado, thus striking down the restrictive Michigan model initially adopted). Remarkably, to this day, Section 276 has not been the target of any claims of unconstitutionality.

New Zealand

In New Zealand, evidence of sexual behavior between the complainant and the defendant is allowed while evidence of such behavior with third parties is excluded, although its admission may be granted by a judge. Thus, Section 44 of the Evidence Act 2006 says:

> "1. In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.

> 2. In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.
>
> 3. In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it."[53]

Like many Rape Shield Laws in the United States, in such states as Texas or Colorado, the New Zealand case provides only a partial shield since admissibility of past sexual behavior of the complainant with third parties can still come in through a judge's in-camera hearing.

Australia

In Australia, the complainant's sexual behavior before the charged rape is restricted in all Australian States and Territories. However, each jurisdiction has specific procedures whereby the admission of evidence of previous sexual behavior may be granted by the court at the request of any interested party. The complainant's reputation is also protected in all states, except for the Northern Territory and Australian Capital Territory. Most importantly, and similar to Canadian laws, the rape survivor's sexual behavior with the defendant is presumed inadmissible.[54]

United Kingdom

In the United Kingdom, the Rape Shield Laws came into being in 2000. Their main holding is that a complainant's past sexual behavior is inadmissible as proof of her consent unless it rests upon four exceptions: the evidence does not infer consent, the

evidence reveals sexual behavior on or about the same time as the sexual act in question, the evidence highlights a pattern of behavior, and the evidence is offered to rebut the prosecution's evidence of sexual history. Importantly, like in California, past sexual behavior with the defendant is not permitted so as to infer consent. However, the House of Lords saw this as violating the right to a fair trial under Article 6 of the European Convention on Human Rights and therefore gave this exception an interpretation that would ultimately permit such evidence to come in where its relevancy to the issue of consent would be so probative that excluding it would produce an unfair trial.[55]

Conclusion

It is hard for this author, who was born and raised in Eastern Europe, not to cheer the achievements of women's rights movements in the Anglo-American legal worlds, at least when it comes to the Rape Shield Laws. On the other hand, this does not mean that there is no room for critique and improvement as indicated by Snow when she raises concerns about "values of fairness, autonomy, privacy, and respect" of women.[56]

If Rape Shield Laws exist, and they protect some women, it is this author's wish to extend a dialogue with women worldwide in the hope that one day the Rape Shield will become a matter of international treatises, such as the 1981 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) if not a matter of local legislations. In this sense, the Rape Shield could become universally particular. There are rape survivors everywhere in the world, not only where the law protects them.

Endnotes

[1] Susan Estrich, "Rape shield laws aren't foolproof," in *USA Today*, February 7, 2003. Available March 24, 2010, at: http://www.usatoday.com/news/opinion/editorials/2003-07-27-estrich_x.htm.

[2] Catherine McKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," in *Signs*, vol. 8, nr. 4, pp. 635-58.

[3] Christine A. Littleton, "Reconstructing Sexual Equality," in Diana Tietjens Meyers, Ed., *Feminist Social Thought: A Reader* (New York: Routledge, 1997), pp. 715-34.

[4] See Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (New York: Simon & Schuster, 1976).

[5] George Fisher, *Evidence* (Thompson West, 2008), 2nd edition, p. 307.

[6] Messalina lived in the 1st century A.D. and was the third wife of the Roman Emperor Claudius. Due to her alleged orgies and great number of lovers, she became a synonym for the vices of womanhood.

[7] Lucretia was a Roman woman whose rape by the King's son led her to commit suicide.

[8] Fisher, p. 307.

[9] Ibid., p. 309.

[10] *People v. Blackburn*, 56 Cal. App.3d 685, 128 Cal.Rptr. 864.

[11] The defendant also introduced several constitutional critiques, such as the Sixth Amendment confrontation clause, which will be discussed later.

[12] *People v. Blackburn*.

[13] In the Court's decision, Justice Binder also dissented from the majority on account of this same constitutional issue.

[14] *The People v. Kobe Bryant*, 94 P.3d 624, 32 Media L. Rep. 1961.

[15] Estrich, "Rape shield laws aren't foolproof."

[16] T.R. Reid, "Case against Kobe Bryant dropped," *The Boston Globe*, September 2, 2004. Available March 20, 2010, at: http://www.boston.com/news/nation/articles/2004/09/02/case_against_kobe_bryant_dropped/.

[17] *People v. Blackburn*.

[18] *Finney v. State* (1979, Ind. App.) 385 NE2d 477.

[19] *State v. Ryan* (1978) 157 NJ Super 121, 384 A2d 570.

[20] *State v. Gardner* (1979) 59 Ohio St 2d 14, 13 Ohio Ops 3d 8, 391 NE2d 337.

[21] *Stevens v. Miller* 13 F.3d 998 (7th Cir.), *cert. Denied,* 513 U.S. 808 (1994), *Fisher*, pp. 333-40.

[22] *People v. MacLeod* , 155 P. 3d 494 (Colo. Ct. App. 2006), *cert. Granted*, 2007 WL 882864 (Colo. 2007).

[23] *Latzer v. Abrams* (1985, ED NY) 602 F Supp 1314, *later proceeding* (ED NY) 615 F Supp 1226.

[24] *Lewis v. State*, 591 So. 2d 922 (Fla. 1991).

[25] Quoted in Nancy E. Snow, "Evaluating Rape Shield Laws. Why the Law Continues to Fail Rape Victims," in Keith Burgess-Jackson, ed., *A Most Detestable Crime. New Philosophical Essays on Rape* (News York: Oxford University Press, 1999), p. 249.

[26] Snow, p. 249.

[27] Ibid., p. 249.

[28] Idem.

[29] Snow, p. 249-250.

[30] Michelle J. Anderson, "Understanding Rape Shield Laws," www.vawnet.org.

[31] Gregory M. Matoesian, cited in Snow, p. 252.

[32] Snow, pp. 252-3.

[33] MacKinnon, p. 636.

[34] Anderson, "Understanding Rape Shield Laws."

[35] Idem.

[36] Idem.

[37] Idem.

[38] Snow, p. 257.

[39] Elizabeth Holtzman with Cynthia L. Cooper. *Who said it would be easy?: one woman's life in the political arena* (Arcade Publishing, 1996), p. 147.

[40] Fisher, p. 85.

[41] Idem.

[42] Such as Nancy E. Snow, Michelle J. Anderson, and also Barbara E. Bergman and Nancy Hollander in their "Rape Shield Laws" in *Warton's Criminal Evidence*, Westlaw. Available February 11, 2010.

[43] Bergman and Hollander, p. 1.

[44] Anderson.

[45] Snow, p. 247.

[46] Snow, p. 247-8, Bergman and Hollander, p. 2, Anderson.

[47] Snow, p. 248.

[48] Professor Ingrid Eagly's Evidence class handout, February 1, 2010.

[49] Mary A. Wagner, "Canadian Rape Shield Statutes," in *Hastings International and Comparative Law Review,* vol. 5, 1993, p. 640.

[50] Wagner, pp. 641-2.

[51] The Canadian Charter of Rights and Freedoms is part of the Constitution Act of 1981, and is similar, although more extensive, than the American Bill of Rights of the United States Constitution. Wagner, p. 645.

[52] Criminal Code, R.S.C., ch. C-46, Section 276, quoted in Wagner, p. 658.

[53] *Improvements to sexual violence legislation – Ministry of Justice – New Zealand*, p. 10. Available March 15, 2010 at: http://www.justice.govt.nz/policy-and-consultation/legislation/sex-industry/improvements.

[54] Ibid., p. 11.

[55] Clare Dyer, "Lords rule rape shield law unfair. Special report: House of Lords," *The Guardian*, May 18, 2001. Available March 23, 2010, at: http://www.guardian.co.uk/uk/2001/may/18/lords.politics.

[56] Snow, p. 260.

Denise Roman, Ph.D., is a Research Scholar with the UCLA Center for the Study of Women since 2002. Denise developed this article during her 2010 LL.M. studies at the UCLA School of Law under the supervision of Professor Christine Littleton. Please send comments to this article to Denise, at denizr@ucla.edu.