University of Miami Law Review

Volume 43 | Number 4 Article 5

3-1-1989

United States v. Shaw: What Constitutes an "Injury" Under the Federal Rape-Shield Statute?

Kethleen Winters

Follow this and additional works at: https://repository.law.miami.edu/umlr

Part of the Evidence Commons

Recommended Citation
Kethleen Winters, *United States v. Shaw: What Constitutes an "Injury" Under the Federal Rape-Shield Statute?*, 43 U. Miami L. Rev. 947 (1989)
Available at: https://repository.law.miami.edu/umlr/vol43/iss4/5

This Casenote is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

United States v. Shaw: What Constitutes an "Injury" Under the Federal Rape-Shield Statute?

I. Introduction 947
II. Historical Overview 951
III. Rape-Shield Reform in the States 957
IV. An Analysis of Rule 412 as Applied in *Shaw* 966
V. Conclusion 979

I. Introduction

James Shaw is presently serving a twenty-five year sentence in a federal penitentiary.[1] Convicted of seven counts of carnal knowledge of his eleven-year-old foster daughter, he is an unlikely candidate for public or political sympathy. The moral repugnance typically elicited from sexual crimes—especially when the rape complainant is a child—however, should not be allowed to mask, in the name of justice, a serious misapplication of the federal rape-shield law.[2]

---

1. United States v. Shaw, 824 F.2d 601 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1033 (1988).

2. Rule 412 of the Federal Rules of Evidence provides:

> (a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion *evidence of the past sexual behavior* of an alleged victim of such rape or assault is not admissible.
>
> (b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, *evidence of a victim's past sexual behavior* other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—
>
> (1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or
>
> (2) admitted in accordance with subdivision (c) and is evidence of—
>
> (A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or
>
> (B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.
>
> (c)(1) If the person accused of committing rape or assault with intent to commit rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial,

Federal Rule of Evidence 412, popularly known as the federal rape-shield law, was the first amendment[3] to the Federal Rules of Evidence, enacted just three years earlier in 1975.[4] The rape-shield law governs the circumstances and procedures to be followed when either the defendant or the prosecutor offers evidence of the complainant's past sexual behavior in a trial for rape or assault with intent to commit rape. Prior to the enactment of this amendment, Federal Rule of Evidence 404(a)(2) governed the introduction of character evidence for any crime victim, including victims of rape.[5]

> if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence related has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.
>
> (2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.
>
> (3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.
>
> (d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

FED. R. EVID. 412 (emphasis added).

3. Pub. L. No. 95-540, 92 Stat. 2046 (1978). This Act resulted in Federal Rule of Evidence 412, the federal rape-shield law, which became effective in trials commencing after November 28, 1978.

4. The Federal Rules of Evidence went into effect on July 1, 1975. *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

5. Rule 404 of the Federal Rules of Evidence provides in relevant part:

> (a) Character evidence generally.
>
> Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> . . . .
>
> (2) Character of victim.
>
> Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

FED. R. EVID. 404.

Under Rule 404(a)(2), it was possible for a defendant accused of rape to present evidence of the complainant's past sexual behavior for the inference that, in light of such past behavior, the sexual act in question was probably consentual and not rape at all.[6] Under the new rape-shield law, complainants are protected from the introduction of this type of irrelevant evidence at trial. In fact, Rule 412 is written as an exclusionary rule; therefore, the accused is absolutely prohibited from introducing evidence of past sexual behavior in the form of reputation or opinion testimony. Although evidence of a complainant's past sexual behavior, other than reputation or opinion evidence, is not absolutely prohibited, it must fit within one of the three exceptions provided in the Rule. The trial judge may allow evidence to be introduced that is constitutionally required,[7] evidence offered by the accused of past sexual behavior between himself and the complainant on the issue of consent,[8] or evidence offered by the accused of past sexual behavior between the complainant and other individuals on the issue of whether the accused was the source of either semen or injury.[9] The specific type of evidence Congress intended to come within the third exception—commonly known as the "injury" exception—is the subject of this Note and will be examined in light of *United States v. Shaw*.[10]

In *Shaw*, the federal government charged the defendant with a ten-count indictment: eight counts of carnal knowledge in violation of 18 U.S.C. §§ 1153 and 2032,[11] and two counts of interstate transportation for immoral purposes in violation of 18 U.S.C. § 2421.[12] After a five-day jury trial in the United States District Court for the District of South Dakota, the jury convicted the defendant of seven counts of carnal knowledge under 18 U.S.C. §§ 1153 and 2032.[13]

In compliance with Rule 412(c)(1), the defendant filed a pretrial written motion, proffering evidence to rebut the government's evidence regarding the condition of the complainant's hymen.[14] The

6. The advisory committee's note states in part: "[A]n accused may introduce pertinent evidence of the character of the victim, as in support of a claim of . . . consent in a case of rape . . . ." FED. R. EVID. 404(a) advisory committee's note, (*reprinted in* 56 F.R.D. 183, 220 (1973).

7. FED. R. EVID. 412(b)(1).

8. *Id.* at 412(b)(2)(B).

9. *Id.* at 412(b)(2)(A).

10. 824 F.2d 601 (8th Cir. 1987).

11. Congress repealed 18 U.S.C. § 2032 in 1986 and replaced it with 18 U.S.C. § 2241(c). Pub. L. No. 99-646, § 87(b), 100 Stat. 3620 (1986).

12. *Shaw*, 824 F.2d at 602.

13. *Id.*

14. *Id.* at 603.

motion asserted that seven young boys would testify that they had sexual intercourse with the complainant, one that he had sexual intercourse with her fifty times.[15] The district court rejected the defendant's motion, ruling as a matter of law that the rupturing of a hymen does not constitute a Rule 412(b)(2)(A) "injury."[16] The Court of Appeals for the Eighth Circuit *held*, affirmed: The condition of a rape complainant's hymenal membrane indicating sexual intercourse, absent some other condition such as a tearing or bruising of the hymen, falls short of establishing an injury so as to trigger the applicability of Rule 412's injury exception.[17] *United States v. Shaw*, 824 F.2d 601 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1033 (1988).

In evaluating the issue raised in *Shaw*, Section II of this Note first provides the reader with a brief overview of the evolutionary process that culminated in the enactment of the federal rape-shield law. A particularly relevant step in this evolution was the adoption of state rape-shield legislation and its impact on the federal statute. To this extent, Section III discusses two approaches taken by state legislators to rape-shield legislation. In addition, Section III highlights inherent weaknesses within the statutes by examining the application of these laws in various state courts. This statutory analysis of state law is an essential link in understanding how Congress intended Rule 412 to be interpreted and applied by the federal courts. Section IV then examines the structure of Rule 412 primarily through an analysis of the Rule's application in *Shaw*. This Section first examines the enactment of Rule 412 and then reviews its passage in relation to the previous rules governing the introduction of character evidence in federal court, as well as in relation to the emerging political trend in the states. Next, pertinent comparisons are drawn between the aforementioned state statutory approaches and the relevant historical information. Finally, Section V concludes that the Eighth Circuit erred in the first federal case to specify the type of evidence an accused may introduce under the "injury" exception. Specifically, the court's analysis failed to recognize the very reason that prompted Congress to enact this special protection for rape complainants—that is, to prohibit the introduction of irrelevant or prejudicial past sexual behavior evidence because it relied on common law notions inferring consent or a lack of credibility. Contrary to the court's interpretation, Congress never meant to exclude highly relevant evidence not relying on such outdated notions.

15. *Id.*
16. *Id.*
17. *Id.* at 605.

II. HISTORICAL OVERVIEW

The social stigma traditionally attached to rape victims[18] should soon dissipate into nothing more than an anachronistic belief grounded in yesteryear's society. To a large extent, credit must be given to the Women's Movement, which seized upon the "crime of rape as a powerful metaphor for the sort of oppression many women found in traditional roles assigned to them in society."[19] The Movement sought to protect the rape complainant from the common and prevalent judicial attitude that accorded probative force to the past sexual behavior of a complaining witness in a prosecution for rape or related offenses. Defense tactics often resulted in pointless and cruel foraging into sexual history, thus subjecting the complainant to needless psychological or emotional abuse.[20]

The efforts of the Women's Movement have culminated in nationwide reform of evidentiary laws applicable to rape prosecutions, commonly referred to as rape-shield laws.[21] Such legislation has obliterated the longstanding common law doctrines that evidence of a complainant's propensity to engage in consentual sexual relations outside of marriage is relevant to infer that she was more likely to have consented to engage in the particular sexual act in question,[22] and that unchastity[23] in women is relevant to address the general

---

18. *See generally* Berger, *Man's Trial, Women's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 7 (1977).

19. 23 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5382, at 516 (1980). For an overview of the reemergence of the Women's Movement during the 1960s see generally J. FREEDMAN, THE POLITICS OF WOMEN'S LIBERATION 44-70 (1975); J. HOLE & E. LEVINE, REBIRTH OF FEMINISM 15-167 (1971). In 1966, the National Organization for Women was formed, which was principally responsible for coordinating much of the rape-law reform lobbying effort. Women who had participated in the President's Conference on the Status of Women and the Civil Rights Movement of the early 1960s led the group. *See* Geis, *Forcible Rape: An Introduction*, in FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER 4 (D. Chappel, R. Geis & G. Geis eds. 1977).

20. *See* Berger, *supra* note 18, at 12-15.

21. For a list of state and federal statutes restricting the admissibility of sexual conduct evidence in rape trials, see Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, app. at 906-07 table 1 (1986). For a review of commentaries on rape-shield laws see generally 23 C. WRIGHT & K. GRAHAM, *supra* note 19, §§ 5381-5393; Berger, *supra* note 18; Letwin, *"Unchaste Character," Ideology, and the California Rape Evidence Laws*, 54 S. CAL. L. REV. 35 (1980); Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90 (1977); Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 198 U. PA. L. REV. 544 (1980).

22. 1 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 62, at 464-66 (3d. ed. 1940); *see also* Comment, *The Rape Victim: A Victim of Society and the Law*, 11 WILLAMETTE L. REV. 36, 40-41 (1974).

23. "Chastity" denotes abstention from premarital or extramarital intercourse. *See* State v. Bird, 302 So. 2d 589, 592 (La. 1974).

credibility of the witness.[24] Of course, evidence of a rape complainant's past sexual behavior is not always irrelevant. The need to introduce highly relevant evidence has been lost amidst the more notorious accounts of how the judiciary not only allowed, but also condoned the introduction of irrelevant, prejudicial evidence against the complainant. Some examples of these instances may clarify this point.

One of the most notorious cases on this subject is *People v. Abbot*,[25] wherein Judge Cowen articulated his view of the rape complainant.[26] First, he distinguished between a woman "who has already submitted herself to the lewd embraces of another, and the coy and modest female severely chaste and instinctively shuddering at the thought of impurity."[27] From this perspective, he then asked: "[A]nd will you not more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia?"[28] Although this case dates back to 1835, Judge Cowen's sentiments have been reiterated through the years and into modern cases. As one contemporary court put it: "The underlying thought here is that it is more probable that an unchaste woman would assent . . . than a virtuous woman."[29] Indeed, as recently as 1970, California explicitly incorporated this notion in its standard "unchaste witness" jury instructions.[30]

Once this general premise was established, defense lawyers readily relied on it to support harsh and insinuating questions, such as whether the woman in fact "asked for it"[31] and whether she

---

24. 1 J. WIGMORE, *supra* note 22, § 63, at 467; *see infra* notes 30-32 and accompanying text.

25. 19 Wend. 192, 195-96 (N.Y. 1838), *quoted in* Berger, *supra* note 18, at 16.

26. *Abbot*, 19 Wend. at 194.

27. *Id.*

28. *Id.*

29. People v. Collins, 25 Ill. 2d 605, 611, 186 N.E.2d 30, 33 (1962), *cert. denied*, 373 U.S. 942 (1963), *quoted in* Berger, *supra* note 18, at 15.

30. *See, e.g.*, former CALJIC No. 10.06 (3d rev. ed. 1970), set forth in Note, *Evidence—Rape Trials—Victim's Prior Sexual History*, 27 BAYLOR L. REV. 362, 368 n.32 (1975). The jury instruction stated:

> Evidence was received for the purpose of showing that the female person named in the information was a woman of unchaste character. A woman of unchaste character can be the victim of a forcible rape but it may be inferred that a woman who has previously consented to sexual intercourse would be more likely to consent again. Such evidence may be considered by you only for such bearing as it may have on the question of whether or not she gave her consent to the alleged sexual act and in judging her credibility.

Id.

31. This concept has been described as "Victim Precipitation" and is applied to cases in which the victim either puts herself in a vulnerable situation (hitchhiking, going to a man's apartment) or retracts from an earlier agreement to have sex. Amir, *Victim Precipitated Forcible Rape*, 58 J. CRIM. L. & CRIMINOLOGY & POLICE SCI. 493, 493-97 (1967).

"enjoyed"[32] the sexual act that formed the basis of her complaint. Some trial court judges even tolerated such defense conduct in cases in which the woman had been brutally beaten.[33] Professor Berger stated in her well-documented commentary on this issue: "Cross-examination by the defense may prove to be extremely grueling .... [A] cold record can never convey counsel's harsh or insinuating tone or expression of utter incredulity."[34]

Notably, at common law, courts only permitted character evidence to be introduced in three distinct situations. First, a defendant could introduce character evidence about himself, albeit subject to cross-examination and rebuttal testimony by witnesses introduced by the prosecution.[35] Second, a defendant could introduce evidence of the victim's bad character, if the defendant was accused of homicide and thereby relied on a theory of self-defense, or if the defendant was accused of rape.[36] Courts otherwise prohibited evidence of a complainant's bad character, introduced to infer that the complainant acted in conformity with such character. The reason for this prohibition was not that such evidence was necessarily irrelevant,[37] but

32. *Cf.* Piercy, *Missoula Rape Poem* (excerpt), in SEXUAL ASSAULT (M. Walker & S. Brodsky eds. 1976) *reprinted in* Berger, *supra* note 18, at 13 n.85 ("There is no difference between being raped and being run over by a truck except that afterward men ask if you enjoyed it.").

33. *E.g.*, Packineau v. United States, 202 F.2d 681 (8th Cir. 1953) (approving use of prior sexual conduct to show consent in a situation in which the defendant brutally beat the victim), *overruled*, United States v. Kasto, 584 F.2d 268, 271-72 (8th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

34. Berger, *supra* note 18, at 13-14.

35. C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 191, at 566-70 (E. Cleary 3d ed. 1984) (The prosecution was limited to rebuttal and cross-examination—there was no independent method to introduce bad character evidence against the defendant.).

36. *Id.* § 191, at 566. Courts allowed defendants who relied on the theory of self-defense in homicide cases to prove that the deceased had a reputation for engaging in violent acts. 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5237, at 399 (1978). These courts believed that the introduction of this evidence enhanced the possibility that the deceased instigated the incident causing his death. *Id.* Interestingly, most courts limited the use of this character evidence to situations in which there existed some additional evidence that the deceased had been the aggressor. *Id.* Today, most courts have expanded the use of victim character evidence to assault cases as well as homicide cases. 1A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 54.1, at 1150 (P. Tillers rev. ed. 1983). Unlike homicide cases, courts did not limit the use of victim character evidence by a defendant relying on a defense theory of consent in a rape case. *Id.* § 62, at 1264 & n.10. Moreover, some courts did not even require a defense based on consent. *See, e.g.*, People v. Degnen, 70 Cal. App. 567, 591, 234 P. 129, 138-39 (1925) (Even though the defendant denied having *any* sexual relations with the complainant, the trial court allowed him to introduce evidence of her past sexual conduct based on the theory that a defendant must be allowed to choose between inconsistent defenses.).

37. C. MCCORMICK, *supra* note 35, § 188, at 554 ("[E]vidence that an individual is the kind of person who tends to behave in certain ways almost always has some value as circumstantial evidence as to how he acted (and perhaps with what state of mind) in the matter

rather that other countervailing considerations outweighed its probative value.[38] The most significant danger in admitting this type of evidence was the potential for jury misuse.[39] Courts feared that juries might be tempted to acquit defendants on the ground that complainants got what they deserved based on their bad character.[40] Although these same concerns were present in homicide cases, common law courts may have perceived a special need to allow this evidence to be introduced when the defendant attempted to prove that the deceased had been the aggressor in the affray.[41] There existed, however, no similar justification for carving out an exception in the case of rape. Courts simply accepted that a woman who engaged in nonmarital sex was not entitled to protection against a jury's misuse of the information.

The third situation, under common law, involved the use of character evidence to help juries decide the crucial issue of a witness' credibility.[42] The general rule, however, strictly limited inquiry to acts that involved the character trait of veracity and prohibited the admission of extrinsic evidence to rebut the witness' testimony.[43] Despite this general mandate, some courts took the position that unchastity in women was relevant, not only on the issue of consent, but also as bearing on the complainant's credibility.[44] As one early case stated: "[S]he could not have ruthlessly destroyed that quality [chastity] upon which most other good qualities are dependent, and for which, above all others, a woman is reverenced and respected, and yet retain her credit for truthfulness unsmirched . . . ."[45] Interestingly, the courts failed to apply this alleged correlation between promiscuity and dishonesty to male witnesses. In *State v. Sibley*,[46] the Missouri Supreme Court succinctly stated that "what destroys the standing of

in question."). Dean Wigmore argued that character evidence should be excluded for policy reasons even though it was usually probative of conduct. *See* 1 J. WIGMORE, *supra* note 22, § 55, at 449-50, § 57, at 454.

38. *See* 1A J. WIGMORE, *supra* note 36, § 54.1, at 1150-51.

39. *Id.*; FED. R. EVID. 404(a) advisory committee's note, *reprinted in* 56 F.R.D. 183, 221 (1973).

40. C. MCCORMICK, *supra* note 35, § 193, at 572.

41. Galvin, *supra* note 21, at 782 & n.90.

42. C. MCCORMICK, *supra* note 35, § 41, at 89.

43. *See, e.g.*, C. MCCORMICK, *supra* note 35, § 41, at 89; *cf.* FED. R. EVID. 608 (Evidence is limited to character for truthfulness or untruthfulness.).

44. Berger, *supra* note 18, at 16; *see, e.g.*, Brown v. State, 50 Ala. App. 471, 474, 280 So. 2d 177, 179 (Ala. Crim. App. 1973); Frady v. State, 212 Ga. 84, 85, 90 S.E.2d 664, 665 (1955); Anderson v. State, 104 Ind. 467, 471, 4 N.E. 63, 65 (1885); Frank v. State, 150 Neb. 745, 753, 35 N.W.2d 816, 822 (1949).

45. State v. Coella, 3 Wash. 99, 106, 28 P. 28, 29 (1891).

46. 131 Mo. 519, 33 S.W. 167 (1895).

[females] in all walks of life has no effect whatever on the standing for truth for [males]."[47]

Although it is beyond the scope of this Note to address all the legal rules applicable to rape cases, it is important to recognize that many of these rules were unique to the crime of rape.[48] Most writers account for this anomaly as the result of a male-dominated legal system which viewed rape as "different"[49] from other crimes because of a set of ingrained historical attitudes about women and sexuality.[50] Professor Berger illustrated this point[51] by quoting *People v. Benson*,[52] in which the court stated: "There is no [other] class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance."[53] Consequently, there existed a general distrust and contempt for the female accuser. Commentators have suggested that this attitude was formalized into a set of legal rules unique to rape cases—the most prominent being the rule allowing the introduction of evidence of the complainant's unchaste conduct to imply consent or to impeach her credibility.[54]

Feminist organizations persuasively argued to state legislators that the decision to engage in nonmarital sexual behavior is no longer at odds with conventional sexual norms.[55] They agreed that it *may*

---

47. *Id.* at 532, 33 S.W. at 171.

48. Galvin, *supra* note 21, at 792-93 n.139. Professor Galvin wrote:

> Other practices unique to rape cases and evincing suspicion and hostility toward the complainant included the following: the requirement that the testimony of the complainant be corroborated by other evidence, . . . special jury instructions voicing Sir Matthew Hale's fears and mandating that "you examine the testimony of the [complainant] with caution," . . . and a requirement unknown to prosecutions for other crimes involving forcible or nonconsentual conduct—proof by the State that the complainant had resisted the attack to the utmost of her physical ability as an objective indication of her nonconsent.

Id. (citation omitted).

49. *See* Berger, *supra* note 18, at 7-10; *see also* 23 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5382, at 508-31.

50. *See* S. BROWNMILLER, AGAINST OUR WILL 16-30 (1975) (describing attitudes toward women and rape through history).

51. Berger, *supra* note 18, at 21.

52. 6 Cal. 221 (1856).

53. *Id.* at 223.

54. *See supra* notes 49-50 and accompanying text; *see also* 1 J. WIGMORE, *supra* note 22, § 200, at 683 (warning of "the evil of putting an innocent man's liberty at the mercy of an unscrupulous and revengeful mistress"); Ploscowe, *Sex Offenses: The American Legal Context*, 25 L. & CONTEMP. PROBS. 217, 223 (1960). Judge Ploscowe advises that "[p]rosecuting attorneys must continually be on guard for the charge of sex offenses brought by the spurned female that has as its underlying basis a desire for revenge or blackmail or shakedown scheme." *Id.*

55. *See generally* Ordover, *supra* note 21, at 96-102.

have been true, in an earlier day, that a woman who would dare to defy society's strict moral standards prohibiting nonmarital sexual behavior would be more likely to have consented in a case of rape.[56] Referring to contemporary research on sexual behavior, however, they demonstrated that the vast majority of young women in today's society engage in consentual sexual relations outside of marriage.[57] Moreover, they demonstrated that women themselves are less likely to label themselves "good" or "bad" according to their sexual habits.[58] Indeed, some chaste women actively seek to lose this status, for fear of being labeled neurotic or unpopular.[59] In summary, these reformers argued that the prevalence of nonmarital sexual activity in today's society rendered such evidence useless as a predictor of human behavior.[60] Similarly, with regard to the use of such evidence to impeach the general credibility of the rape complainant, these advocates emphasized the absurdity of using sexual conduct evidence to impeach only female witnesses, particularly female witnesses in sexual offense cases.[61] Accordingly, they concluded that, in fact, there existed no logical connection between a woman's decision to engage in nonmarital sexual conduct and her propensity to tell the truth.[62] In both instances their arguments rested on the most elementary principles of logic. That is, if the premises are no longer true, then the asserted conclusion is no longer valid. Here the conclusion is relevancy. The premise that engaging in nonmarital sexual behavior makes it more likely that a woman consented to a particular act of

---

56. *See* Note, *Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflection of Reality or Denial of Due Process?*, 3 HOFSTRA L. REV. 403, 414 (1975).

57. A frequently cited study, based on a survey taken in 1972, M. HUNT, SEXUAL BEHAVIOR IN THE 1970'S 16 (1974), found that, of white women between the ages of eighteen to twenty-four, 70% of the unmarried women had experienced intercourse, and 80% of the married women had engaged in premarital relations. *See* Ordover, *supra* note 21, at 100. The study also found that, of the men surveyed, 72% considered premarital sex acceptable for women if they were "in love," and 82% found it acceptable for men if "in love." *Id.* at 101 n.52.

A more recent study proclaims: "It is the exceptional young person who has not had sexual intercourse while still a teenager: Eight in ten males and seven in ten females report having had intercourse while in their teens. Only about four percent of teenagers are married, and about 85 percent had intercourse before marriage . . . ." THE ALAN GUTTMACHER INSTITUTE, TEENAGE PREGNANCY, THE PROBLEM THAT HASN'T GONE AWAY 7 (1981), *quoted in* Note, *Interpreting Missouri's Rape Victim Shield Statute*, 53 UMKC L. REV. 273, 277 n.20 (1985).

58. Berger, *supra* note 18, at 56.

59. *Id.*

60. *See* Ordover, *supra* note 21, at 102; *see also* LETWIN, *supra* note 21, at 59-61.

61. Galvin, *supra* note 21, at 800.

62. *Id.*

sexual intercourse, rather than that she was raped, is no longer true. Therefore, this evidence is no longer relevant to infer consent.

Furthermore, reformers complained that admission of this evidence actually deterred victims from reporting the rape and cooperating with prosecutorial efforts to achieve justice.[63] Victims frequently opted to remain silent when faced with probable harassment and humiliation inflicted by a judicial system that permitted evidence of her previous sexual conduct to be explored, even when not relevant.[64] One commentator stated that a woman is "given the option to bare the most personal parts of [her] life or abandon all hope of legal redress."[65] Faced with such a choice, it is easy to understand how reformers elicited sympathy for the rape complainant's perception that it was she who was on trial, not the defendant.[66]

Law enforcement agencies quickly jumped on the reform "bandwagon."[67] In joining forces with women's groups, police and prosecutors sought to remove obstacles to the apprehension and conviction of offenders. Together, these powerful coalitions pushed reform bills through state legislatures with extraordinary speed and sagacity.[68] Within a span of only six years, from 1974 to 1980, almost every state had passed some form of rape reform legislation.[69] In evaluating where the federal rape-shield rule fits into this evolutionary process of reform and how Congress intended for the rule to be applied, one must maintain a sensitivity to the political climate created by these legislative reform measures that swept through the states.

III. RAPE-SHIELD REFORM IN THE STATES

The lobbying efforts of reformers resulted in intense political pressure on legislators to accept reform measures reflecting a women's

63. One frequently cited statistic estimated that forcible rape occurred at three and one-half to twenty times the reported figure. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 20-22 (1967), *quoted in* Berger, *supra* note 18, at 5. For a critical evaluation of arguments correlating the degree of underreporting and admissibility of the complainant's prior sexual conduct, see 23 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5382, at 499-502.

64. Griffin, *Rape: The All-American Crime*, RAMPARTS, Sept. 1971, at 26, 30-31.

65. *Id.*

66. *See* Berger, *supra* note 18, at 14 n.92; *see also* Commonwealth v. Strube, 274 Pa. Super. 199, 207-08, 418 A.2d 365, 369 (Pa. Super. Ct. 1979).

67. Galvin, *supra* note 21, at 797. For a thorough discussion of the "politics" of rape-shield legislation, see 23 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5382, at 495; NAT'L INST. OF L. ENFORCEMENT AND CRIM. JUST., U.S. DEP'T. OF JUST., FORCIBLE RAPE, AN ANALYSIS OF LEGAL ISSUES 46-47 (1978).

68. 23 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5382, at 493 n.5.

69. Galvin, *supra* note 21, at 768 n.17, app. at 906 table 1.

right to sexual independence and equality.[70] Indeed, drafters of rape reform legislation faced a formidable task—"to bring the legal rules governing rape cases in line with those in all other criminal cases and thereby shift the rape trial's focus from an inquiry into the complainant's moral worth to a determination of the defendant's culpability."[71] Considering the complexity and careful balancing of interests required in restructuring the laws governing the prosecution of any crime, it is not surprising that the resultant rape-shield laws varied widely in scope and in procedural detail.[72] This is especially true in view of the relatively short time in which states enacted such legislation. Between 1974 and 1980, almost every state had enacted some type of rape-reform legislation. Moreover, nearly half the states had enacted reform legislation by the time Congress enacted Federal Rule of Evidence 412 in 1978.[73]

Professor Harriett R. Gavin categorized the state statutes into four distinct conceptual approaches to rape-shield legislation.[74] She referred to these as the Michigan, Texas, Federal, and California approaches.[75] This Note primarily focuses on the Michigan and Texas approaches because Rule 412 is a compromise between these two statutory schemes.[76] The Michigan statute and the statutes of twenty-five states to date that are modeled after it[77] represent the restrictive end of the statutory spectrum. Texas, and its eleven followers, chose an almost diametrically opposed approach to the problem[78] and therefore represent the permissive end of the spectrum. These distinct conceptualizations reflect the difficulty drafters faced in attempting to balance the state's interest in protecting the complainant's privacy against the rape defendant's constitutional right to defend himself.

Michigan enacted the first rape-shield statute in 1974.[79] Persuaded by reformers' fears that rape-shield laws could amount to mere lip-service if judges were given *any* discretionary powers in

70. *Id.* at 767 & n.10.

71. Galvin, *supra* note 21, app. at 904.

72. *See id.* app. at 908-16 tables 2-5 (tables compare state statutory requirements and exceptions).

73. *See* Ireland, *Rape Reform Legislation: A New Standard of Sexual Responsibility*, 49 U. COLO. L. REV. 185, 198 n.70 (1978).

74. Galvin, *supra* note 21, at 773.

75. *Id.*

76. *Id.* at 775.

77. *Id.* app. at 906 table 1 (list of statutes following the Michigan approach).

78. *Id.* app. at 907 (list of statutes following the Texas approach).

79. *See* 1974 Mich. Pub. Acts 266, at 1025, 1028-29 (codified as amended at Mich. Comp. Laws Ann. § 750.520j (West Supp. 1988)).

applying the new laws,[80] the drafters wrote the statute in an exclusionary form.[81] That is, the statute prohibits the introduction of sexual conduct evidence, subject to certain enumerated exceptions. All of the state statutes modeled after this approach are written in this form and differ only as to the listed exceptions.[82] These statutes effectively divest trial judges of their discretion in determining the relevancy or probative value of sexual conduct evidence that specifically does not come within a statutory exclusion.[83] Instead, these legislators have been described as attempting to "anticipate precisely those circumstances in which sexual conduct evidence will be critical to the presentation of a defense."[84]

A survey of the variety of conclusions reached on this question by various state legislators adopting this exclusionary approach, however, reflects a lack of consensus among state lawmakers concerning the circumstances under which such evidence must be admitted to accommodate the needs of the accused.[85] This lack of consensus may stem from a basic misperception of the exact wrong that rape-reform legislation attempts to correct.[86] Specifically, legislators failed to focus on the need to exclude evidence of a rape complainant's past sexual behavior *only* when its relevance relied on the invidious common law notions that a woman's consent to sexual relations with one man implies either consent to relations with others or a lack of credibility. This conclusion is further supported by the case law developed in applying these statutes.[87] Specific examples are highlighted in this Note subsequent to a review of the various statutory exceptions chosen and the frequency of their inclusion in these Michigan-type statutes.

The only common exception to all Michigan-type statutes is that

---

80. *See* Amsterdam & Babcock, *Proposed Position on Issues Raised by the Administration of Laws Against Rape: Memorandum for the ACLU of Northern California, reprinted in* Galvin, *supra* note 21, at 812 n.239 ("We are . . . loath to leave determinations of general 'relevancy' to judges who are too frequently male and too frequently imbued with unreal and insensitive attitudes toward women's sexual attitudes and experiences.").

81. *See supra* note 79. Michigan's rape-shield statute provides in relevant part: "(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct *shall not be admitted* . . . unless . . ." *Id.* (emphasis added).

82. For a list of various exceptions in statutes following the Michigan approach see Galvin, *supra* note 21, app. at 906 table 1.

83. *Id.* at 773.

84. *Id.*

85. *Id.* app. at 906 table 1.

86. *Id.* at 812 & n.239.

87. For an in-depth analysis evaluating cases decided under various rape-shield statutes, see *id.* at 812-903.

they all permit the introduction of past sexual behavior evidence between the complainant and the accused.[88] At least, under these circumstances, legislators have reached a consensus that the defendant's need to introduce evidence of the complainant's past sexual behavior must prevail. More importantly, and at the heart of the matter, this type of evidence could never be introduced to infer that consent with one implies consent with others, but rather is probative of the complainant's state of mind toward the particular defendant.[89] The disarray of additional exceptions among these statutes indicates that legislators missed this crucial distinction. Five states have no additional exceptions.[90] Of the twenty remaining states, fifteen allow the defendant to "introduce evidence of specific instances of sexual conduct between the complainant and individuals other than [the accused] to prove that such other individuals were the source of certain physical consequences of the alleged rape."[91] In addition all fifteen states allow the defendant to rebut evidence that a medical examination conducted shortly after the alleged rape revealed the presence of semen in the complainant's vagina for the inference that the defendant was the source of such semen.[92]

Exceptions for other physical consequences, however, are not consistent. Seven of these fifteen states limit the admissibility of physical consequence evidence to instances that provide an alternative explanation for the existence of pregnancy or disease.[93] The remaining states add the exception of injury, or alternatively allow the defendant to introduce evidence in explanation of "all physical consequences."[94] In addition to this disparity between the type of physical consequence evidence excepted, there are at least eight more categories of exceptions scattered throughout these twenty statutes.[95] The following analysis of selected judicial applications of these restrictive

88. Seven of these statutes, however, explicitly limit the evidence to the issue of consent. *See id.* at 818 n.263.

89. *See* Berger, *supra* note 18, at 58-59. Professor Vivian Berger wrote:

> The inference from past to present behavior does not, as in cases of third party acts, rest on highly dubious beliefs about "women who do" and "women who don't" but rather relies on common sense and practical psychology. Admission of the proof "supplies the accused with a circumstance making it probable that he did not obtain by violence what he might have secured by persuasion . . . ."

Id. (quoting Bedgood v. State, 115 Ind. 275, 279, 17 N.E. 621, 623 (1888)).

90. Galvin, *supra* note 21, at 814 n.245.

91. *Id.* at 818-19. For a list of these statutes, see *id.* at 819 n.265.

92. *See supra* note 82.

93. *Id.*

94. *Id.*

95. *Id.*

statutes illustrates the principal flaws inherent in these statutory schemes.

In many instances, courts ignored the clear mandate of the statute by refusing to apply the statute to the particular circumstances of the case. For example, in *Shockley v. State*,[96] the Tennessee Court of Criminal Appeals was asked to determine the constitutionality of denying the defendant the opportunity to rebut the prosecution's evidence alleging that the defendant impregnated the complainant as a result of rape.[97] The defendant denied ever having intercourse with the complainant and sought to prove that the complainant had had sexual relations with another person during the time in question.[98] Tennessee has one of the five Michigan category statutes that only allows an exception for evidence of prior sexual conduct between the complainant and the accused.[99] Relying on the statute, the trial court prohibited the defendant from introducing any evidence of the complainant's prior sexual behavior.[100]

The appellate court reversed, but at the same time held the statute constitutionally sound.[101] The court concluded that the legislature intended the statute "to eliminate the unjustified besmirching of a woman's reputation by examining her prior sexual activities when such testimony is of highly dubious relevance to the issue of her later consent or her credibility."[102] The court correctly focused on the defendant's purpose for introducing evidence of past sexual conduct. In doing so, it was determined not to apply the statute to this case because the defendant's purpose for introducing evidence did not come within the uses that the legislature intended to prohibit. The court believed that applying the statute in these circumstances would result in denying the defendant due process of law.[103]

Other courts have gone so far as to rewrite the applicable rape-shield statute, in order to accommodate the accused's need to introduce evidence of the complainant's past sexual conduct when relevant. In *State v. LaClair*,[104] the New Hampshire Supreme Court scrutinized that state's rape-shield statute. In *LaClair*, the defendant attempted to exculpate himself by establishing that the complainant

96. 585 S.W.2d 645 (Tenn. Crim. App. 1978).
97. *Id.* at 648.
98. *Id.* at 648-50.
99. *See supra* notes 88-90 and accompanying text.
100. Tenn. Code Ann. § 40-17-119 (1982).
101. *Shockley*, 585 S.W.2d at 651.
102. *Id.*
103. *Id.*
104. 121 N.H. 743, 433 A.2d 1326 (1981).

had sexual relations with another person the day preceding the rape which accounted for the presence of semen found in her vagina.[105] Although the New Hampshire statute had no provision for the introduction of evidence to rebut physical consequences,[106] the New Hampshire Supreme Court allowed the evidence to be introduced.[107]

The New Hampshire Supreme Court decision in *LaClair* reaffirmed its earlier interpretation of the statute in *State v. Howard*.[108] In *Howard*, the court interpreted the legislative intent of the statute as protecting rape complainants from "unnecessary embarrassment, prejudice and courtroom procedures that only serve to exacerbate the trauma of the rape itself."[109] The court determined that the statute could not withstand a constitutional attack, unless the court interpreted it as allowing, on a case-by-case basis, a rape defendant to demonstrate to the court that due process requires admitting sexual conduct evidence when its probative value outweighs its prejudicial effect.[110]

The Michigan Court of Appeals addressed a similar problem in *People v. Mikula*.[111] This case is particularly appropriate to our analysis of the federal rape-shield statute as applied in *United States v. Shaw*.[112] The Michigan statute allowed the accused to introduce sexual conduct evidence establishing "the source or origin of semen, pregnancy, or disease, but not the causes of other physical consequences of rape, namely injury."[113] The complainant was a young child who had been medically examined six months after the alleged rape.[114] The prosecution introduced a doctor's testimony that the girl's hymenal membrane was not intact and that her vagina was

105. *Id.* at 746, 433 A.2d at 1329. The specific facts of *LaClair* are particularly remarkable. In *LaClair*, doctors examined the rape complainant on the evening of the alleged rape. *Id.* at 747, 433 A.2d at 1329. At the trial, the attending physician testified that he found nonmotile sperm in the complainant's vagina. *Id.*, 433 A.2d at 1329. In response, the defendant attempted to rebut the inference that he was responsible for the presence of this sperm by introducing evidence that he had normal sperm motility and by arguing that motile sperm only remains motile in the vagina for a maximum of twelve hours. *Id.*, 433 A.2d at 1329. In spite of the introduction of this evidence, the trial court refused to allow the defendant to rebut the inference that he was the source of semen. *Id.* at 746, 433 A.2d at 1328.

106. N.H. Rev. Stat. Ann. § 632-A:6 (1986). The New Hampshire statute states in part that "prior consensual sexual activity between the victim and any person other than the actor shall not be admitted into evidence in any prosecution under this chapter." *Id.*

107. *LaClair*, 121 N.H. at 746-48, 433 A.2d at 1329-30.

108. 121 N.H. 53, 426 A.2d 457 (1981).

109. *Id.* at 57, 426 A.2d at 459.

110. *Id.* at 58-59, 426 A.2d at 460-61.

111. 84 Mich. App. 108, 112, 269 N.W.2d 195, 197 (1978).

112. 824 F.2d 601 (8th Cir. 1987).

113. Mich. Comp. Laws Ann. § 750.520j(F)(b) (West Supp. 1988).

114. *Mikula*, 84 Mich. App. at 112, 269 N.W.2d at 197.

unusually open for a child of her age.[115] The defendant sought to prove that the complainant had engaged in sexual activity with a fourteen-year-old boy several months prior to the alleged incident, in order to rebut the inference that he was responsible for her physical condition.[116] The Michigan Court of Appeals found that the legislature did not intend to limit the accused to eliciting evidence regarding only those physical consequences specifically enumerated in the statute.[117] Again, by focusing on the defendant's purpose for introducing the evidence, the court found that the statute did not control.[118] The court specifically stated that the proof in this case "has no more potential for harassment of a complainant than proof of the origin of one of the conditions expressly included in the statute."[119]

The foregoing examples illustrate how judges struggled with restrictive statutory language, in order to admit highly relevant evidence they believed crucial to an adequate defense. Although this may appear to fly in the face of rape-shield statutes, in fact, introduction of this evidence, specifically limited to the issue of identity, as opposed to consent or credibility, does no violence to the policies underlying the rape-shield laws. Violence occurs when the evidence is prejudicial or irrelevant, not when it is highly relevant. Thus, legislators did not need to distinguish between the type of physical consequence a defendant could rebut. This is true because a defendant's only purpose in rebutting evidence alleged to be a physical consequence of rape is to deny having a sexual encounter with the complainant—consentual or otherwise. Nevertheless, even under these circumstances, the prejudicial effect of introducing evidence of the complainant's past sexual behavior may outweigh its probative value. As written, however, these restrictive statutes do not allow judges to make this type of determination. The flaw of inflexibility inherent in these statutes stems from an attempt to protect the rape complainant from the biased views of a male-dominated judiciary.[120] Ironically, this is the same reason legislatures enacted the statutes in the first place.

Not all states, however, approach the problem with such skepticism. In fact, the states following the Texas approach base their rape-shield statutes on judicial discretion.[121] Some view this approach as

115. *Id.*

116. *Id.* at 111, 269 N.W.2d at 197.

117. *Id.* at 114, 269 N.W.2d at 198.

118. *Id.*, 269 N.W.2d at 198.

119. *Id.*

120. *See supra* notes 48-54 and accompanying text.

121. *See* Berger, *supra* note 18, at 69; Galvin, *supra* note 21, at 876.

nothing more than a reminder to the trial judge that sexual conduct evidence is not admissible, unless the defendant proves the relevancy in that particular case according to the traditional standards of balancing probative value against the prejudicial effect to the complainant.[122] Such determination of relevancy, however, must be made at an in-camera proceeding prior to the offering of the evidence.[123] Proponents of this approach contend that this provision reconciles the competing interests between the complainant's privacy interests and the acccused's constitutional right to confront his accuser.[124] On the other hand, critics echoing the rationale underlying the Michigan-type statutes doubt the ability of judges to shed their previously held notions about women and sexuality and to heed the intended message from legislators, without being forced to do so through substantive restrictions.[125]

Interestingly, case law reflects a keen understanding and sensitivity to the legislative intent.[126] Two such cases suffice to demonstrate this point. In *People v. Mckenna*,[127] the Colorado Supreme Court held:

> The basic purpose of [the statute] is one of *public policy*: to provide rape and sexual assault victims greater protection from humiliating and embarrassing public "fishing expeditions" into their past sexual conduct, without a preliminary showing that evidence thus elicited will be relevant to some issue in the pending case. The statute represents one means chosen by the general assembly to overcome the reluctance of victims of sex crimes to report them for prosecution.[128]

---

122. *See* Note, *Forcible Rape: The Law in Texas*, 9 TEX. TECH. L. REV. 563, 577 (1978).

123. Galvin, *supra* note 21, app. at 912 table 3.

124. For example, the policy adopted by the Board of Directors of the American Civil Liberties Union states in part that:

> [C]areful application by trial judges of the proper standards of relevance of testimony, control of cross-examination and argument, and elimination of prejudicial instructions unique to rape and similar cases could do much to preserve rape complainants from unnecessary imposition upon their rights to sexual privacy, without detracting from the fairness of the trial.

Policy of the American Civil Liberties Union, adopted February, 1976, *quoted in* Herman, *What's Wrong With the Rape Reform Laws?*, 3 CIV. LIBERTIES REV. 60, 63 (Dec. 1976-Jan. 1977); *see also* People v. Mckenna, 196 Colo. 367, 373-74, 585 P.2d 275, 279 (1978) (en banc) (in-camera hearing balances victim's privacy interest against defendant's right to introduce relevant evidence); State v. Green, 163 W. Va. 681, 687-93, 260 S.E.2d 257, 261-64 (1979) (discussing the variety of rape-shield laws and recommending that the legislature adopt provision for in-camera hearing).

125. *See* Berger, *supra* note 18, at 71.

126. For a review of several cases decided under the Texas approach, see Galvin, *supra* note 21, at 880-81.

127. 196 Colo. 367, 585 P.2d 275 (1978).

128. *Id.* at 371-72, 585 P.2d at 278 (emphasis in original).

One would expect the facts of *State v. Romero*[129] to elicit any repressed bias toward female unchastity, if the critics' fears of this statutory scheme are taken seriously. In *Romero*, the defendant sought to introduce evidence that the victim was a prostitute.[130] The New Mexico Court of Appeal upheld the trial court's exclusion of this evidence in the absence of a defense claim that the sexual act in question had been an agreed-upon act of prostitution.[131] The court stated that, "[i]t is not the province of the jury to pass moral judgment on the victim, and the court should remove the temptation to do so whenever possible."[132]

Professor Galvin points out, however, that a survey of the case law applying the Texas-type statutes may not portray an accurate picture of the judiciary's response.[133] If trial judges applying these permissive statutes continue to admit irrelevant and prejudicial sexual conduct evidence, therefore causing rape defendants to go free, such cases will go unreported because of the state's inability to appeal a finding of not guilty,[134] and because of the nearly universal prohibition against interlocutory appeals from evidentiary rulings in criminal cases.[135]

The preceding overview of state legislative approaches to rape-shield statutes does not include a discussion of the California approach.[136] This Note is not attempting to conduct a general survey of rape-shield laws, but rather it attempts to analyze those state statutes that can provide valuable insight for an interpretation of the federal rape-shield statute as applied in *Shaw*. To that extent, the California approach is not relevant to our discussion.[137]

---

129. State v. Romero, 94 N.M. 22, 606 P.2d 1116 (N.M. Ct. App. 1980).

130. *Id.* at 25, 606 P.2d at 1119.

131. *Id.* at 26, 606 P.2d at 1120.

132. *Id.*

133. Galvin, *supra* note 21, at 879.

134. *Id.*; *see* 23 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5382, at 496-97.

135. Galvin, *supra* note 21, at 879. *See, e.g.*, 28 U.S.C. § 1291 (1982); 3 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 26.2(a), at 182-87 (1984).

136. For a list of statutes following the California approach, see Galvin, *supra* note 21, app. at 907 table 1.

137. Under this approach, evidence of past sexual conduct is separated into two broad categories. Galvin, *supra* note 21, at 775. If the defendant offers the evidence to prove consent by the complainant, then it is categorized as substantive. *Id.* On the other hand, if the defendant offers the evidence to impeach the complainant's credibility, then it is categorized as credibility evidence. *Id.* States following this approach will exclude a specific category of evidence. *Id.* Professor Galvin criticizes this type of legislation because the two categories are not mutually exclusive. *Id.* As a result, in any particular case, the statutory prohibition can be circumvented. *Id.*

IV. AN ANALYSIS OF RULE 412 AS APPLIED IN *SHAW*

Understandably, the *Shaw* court had little legislative history to which it could turn for guidance in applying Rule 412. Moreover, because Congress drafted Rule 412 without the advice and expertise of an advisory committee,[138] the court did not have available an authority often relied on for interpreting federal rules. The fact that very few rape trials are heard in federal court further compounded the problem, and therefore little or no case law had developed under the new amendment.[139] *Shaw*, in fact, was the first case to address the injury exception issue. Therefore, the court was faced with a less than straight forward task in interpreting and applying Rule 412's injury exception. Unfortunately, the court allowed the absence of advisory committee notes and case law to hinder, rather than to facilitate, its understanding of the type of injuries that should fall within the Rule's exception. The following analysis of the court's rationale illustrates this criticism.

The *Shaw* court cited *United States v. Kasto*[140] as support for its conclusion that Congress intended to exclude all physical consequence evidence other than semen and injuries evidenced by a cut, bruise, or the like.[141] In *Kasto*, decided only three weeks before Congress enacted Rule 412,[142] the United States Court of Appeals for the Eighth Circuit overruled the longstanding doctrine adopted in *Packineau v. United States*[143] that prior sexual behavior with others is generally relevant on the issue of consent and credibility.[144] The *Kasto* court expressed the view that both logic and human experience dictate that this evidence should not be admissible because its probative value is outweighed by its highly prejudicial effect.[145] Moreover, the court distinguished between evidence that may be relevant and thus

138. 23 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5381, at 483.

139. Federal courts' jurisdiction to hear rape cases is limited to situations in which an alleged rape occurs within the areas of special maritime and territorial jurisdiction of the United States or an Indian Reservation. *See* 18 U.S.C. § 2241 (1986). Only forty-two defendants were tried in federal courts on rape charges. H.R. 14666, 94th Cong., 2d Sess. 3 (1976); 23 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5381, at 484 n.4.

140. 584 F.2d 268 (8th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

141. *Shaw*, 824 F.2d at 605-08.

142. The United States Court of Appeals for the Eighth Circuit decided the *Kasto* opinion on September 18, 1978. *Kasto*, 584 F.2d at 268. The House of Representatives passed Rule 412 on October 10, 1978, and the Senate passed the Rule on October 12, 1978. 23 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5381, at 484-85. Congress signed Rule 412 into law on October 30, 1978. *Id.*

143. 202 F.2d 681 (8th Cir. 1953).

144. *Kasto*, 584 F.2d at 270-72.

145. *Id.* at 270-71. Federal Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair

sufficiently probative to warrant admission and evidence of unchastity directed solely to establishing bad moral character and impinging credibility, which is never relevant or admissible.[146] In referring to relevant evidence of past sexual behavior, the court held that, when "the evidence is explanative of a physical fact which is in evidence at trial, such as the presence of semen, pregnancy, or the victim's physical condition indicating intercourse,"[147] the trial court should balance its probative value against any unfair prejudice that may result to the complainant and admit the evidence accordingly.[148]

The *Shaw* court construed Congress' enactment of Rule 412 in the wake of *Kasto* as a denouncement of the rule applied in that case.[149] The court reasoned that "Congress could have done nothing and allowed the courts to be guided by *Kasto*."[150] Instead, the court explained that "Congress chose . . . to enact the Rule 412 injury exception and prohibit past sexual behavior evidence in numerous situations where such evidence would be highly probative."[151] At first blush, the court seems to have correctly applied a basic principle of statutory construction: When Congress passes legislation on a point of law already established by case law, absent evidence to the contrary, it is reasonable to infer that Congress meant to amend or overrule this case law. The court, however, erred in applying this principle to this specific legislation. A review of the circumstances surrounding the Rule's passage reveals that the court relied on the unsupportable premise that Congress would not have passed Rule 412 if it had been satisfied with *Kasto*.

In passing Rule 412, Congress responded to a political need rather than a practical one. The few number of rape cases tried in federal court suggested that abuse of rape complainants was not a major problem facing Congress. Rather, the Senators and House Representatives eagerly demonstrated their support for progressive rape-shield legislation, a popular political issue. Regardless of the *Kasto* holdings, Rule 404(a)(2) simply did not look like a rape-shield law. Rule 412 did, and irrespective of its limited jurisdictional effect, it showed Congress' approval of those states that had already enacted

---

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

146. *Kasto*, 584 F.2d. at 271-72 nn.2-3.

147. *Id.* at 271 n.2.

148. *Id.* at 271-72.

149. *Shaw*, 824 F.2d at 606-07.

150. *Id.* at 606.

151. *Id.*

some type of reform legislation[152] and provided a model for those states that had yet to enact a rape-shield law. President Carter expressly stated this notion upon signing the bill into law: "This bill provides a model for state and local revision of criminal and case law."[153] In fact, Congress' intent in enacting Rule 412 is quite compatible with *Kasto*, as evidenced by the fact that the *Kasto* court supported its decision by referring to the same literature used by reform organizations to lobby Congress for the passage of the Rule.[154] The *Kasto* court adopted the essential position of the rape-reform movement—that the admissibility analysis should focus on the purpose for which the accused offered the evidence.

As a general rule, for purposes of consent and credibility, evidence of past sexual behavior should be excluded.[155] At the same time, such evidence should be admitted when highly probative and offered for other purposes, such as identity.[156] If Rule 412 is to produce results in accordance with the movement responsible for its creation,[157] the *Shaw* decision must be overruled and the Rule construed consistently with the *Kasto* holding. The alternative is the illogical results reached in *Shaw*, which bar highly probative evidence for no justifiable reason. Of course, Congress did not follow the *Kasto* framework by casting Rule 412 exclusively in the form of judicial discretion, thus adopting a strict Texas-type approach.[158] Instead, Congress seemingly accepted the notion that, without guidance, judges might not exercise their discretion to protect rape complainants from the introduction of irrelevant or prejudicial past sexual behavior evidence.[159]

As originally proposed, Rule 412 followed the exclusionary form of the Michigan-type statutes, but was not identical to the Michigan statute itself.[160] Judicial discretion was thus limited to determining if proffered evidence of past sexual behavior properly came within a listed exception and if its probative value outweighed any resultant

152. Over half the states had already passed some type of rape-shield legislation. Berger, *supra* note 18, at 32; 23 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5238, at 411.

153. *See infra* note 198 and accompanying text.

154. *Kasto*, 584 F.2d at 271 n.1. In fact, the *Kasto* court cited several authors used as support within this Note: Professors Ordover and Berger. *Id.*

155. *Id.* at 271-72.

156. *Id.*

157. *See supra* note 154.

158. *See supra* notes 121-25 and accompanying text.

159. *See supra* note 125 and accompanying text.

160. H.R. 408, 95th Cong., 1st Sess. (1977), *reprinted in* 23 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5238, at 411 n.7. *See also* MICH. STAT. ANN. § 28.788(10) (Callaghan 1982) ("Evidence of specific instances of sexual activity showing the source of origin of semen, pregnancy, or disease.").

prejudice. Like the other restrictive statutes, there existed one category that excepted evidence of sexual conduct between the complainant and the accused.[161] A second category excepted sexual conduct evidence between the complainant and others when necessary for the accused to rebut an inference that he was the source of semen, disease, pregnancy, or injury.[162]

For purposes of this discussion, Congress made two significant alterations before the bill ultimately passed. First, the final version added a third category of exception to the general prescription against introducing evidence of past sexual behavior. Specifically, such evidence could be admitted if deemed by the judge to be constitutionally required.[163] This broadly stated exception allows the judiciary to retain some discretionary powers not otherwise available under the previous draft. Second, Congress struck "pregnancy" and "disease" from the previously listed circumstances that allowed the introduction of evidence pertaining to past sexual behavior between the complainant and others.[164]

At this point, it is important to realize that, by the time the House introduced the amended bill in the next congressional session, at least one state rape-shield statute had been in effect for up to four years.[165] Significantly, courts interpreting the Michigan-type statutes had already engaged in creative judicial legislation, in order to admit highly relevant past sexual behavior evidence that the accused had not offered for the inference of consent or for purposes of credibility.[166] These restrictive statutes were labeled as underinclusive and in jeopardy of violating defendants' constitutional rights to due process of law.[167] Some states had even resorted to amending these newly enacted statutes in response to the developing case law.[168]

---

161. H.R. 408, 95th Cong., 1st Sess. (1977), *reprinted in* 23 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5238, at 411 n.7.

162. *Id.*

163. FED. R. EVID. 412(b)(1). Interestingly, Congress even restricted this section to evidence other than opinion or reputation testimony. Presumably, Congress determined that opinion or reputation testimony pertaining to a complainant's past sexual behavior could never be constitutionally required.

164. *Id.* at 412(b)(2)(B).

165. The Michigan legislature enacted the Michigan rape-shield law on August 12, 1974. *See supra* note 79. Congress enacted Rule 412 on October 30, 1978. *See supra* note 142.

166. *See supra* notes 97-119 and accompanying text.

167. *See* Galvin, *supra* note 21, at 775.

168. *See* Act of June 24, 1983, ch. 83-258, § 1, 1983 Fla. Laws 1315, 1315-16 (amending Act of June 6, 1977, ch. 77-104, § 237, 1977 Fla. Laws 245, 329) (codified as amended at FLA. STAT. ANN. § 794.022-20 (West Supp. 1985)); Act of Mar. 28, 1983, Pub. L. No. 322, § 1, 1983 Ind. Acts 1966, 1966-68 (amending Act of May 5, 1981, Pub. L. No. 298, § 6, 1981 Ind. Acts 2314, 2389-90) (codified as amended at IND. CODE ANN. § 35-37-4-4(b)(3) (Burns 1985); Act of July 27, ch. 822, § 1(5)(a), 1977 Or. Laws 863, 864 (amending Act of May 20, 1975, ch. 176,

In contrast, Texas-type statutes allow judicial discretion to admit evidence at trial, without declaring the law invalid or bending the rigid legislative terms to cover the circumstances presented.[169] At the same time, however, such unrestrained discretion arguably could allow the judge to bypass the policy protections intended by the legislature. Accordingly, these statutes are criticized as not providing sufficient protection for rape complainants against irrational and biased rulings and thus are termed overinclusive.[170]

By amending the original bill to include key features of each model, Congress avoided the underinclusiveness of the Michigan approach and the overinclusiveness of the Texas approach.[171] Like the Michigan approach, Rule 412 is drafted in an exclusionary format, thus creating a presumption that past sexual behavior evidence is not admissible. Yet the Rule provides several exceptions that permit the introduction of sexual conduct evidence considered indisputably relevant to an effective defense. This feature is also characteristic of the Michigan approach; however, by using a general "injury" exception, Rule 412 avoids the need to list each specific injury—hence avoiding the obvious pitfall of omitting a necessary but unforeseen exception. Finally, like the Texas approach, Rule 412 contains a catchall provision that authorizes the trial judge to exercise judicial discretion in determining when nonexcepted sexual conduct evidence must be admitted on constitutional grounds. Congress has made a significant statement by grounding judicial discretion in constitutional terms—trial courts are not to use such limited discretionary powers as a back door to introduce evidence otherwise prohibited. Instead, Congress intended this provision to be used in "those infrequent circumstances"[172] not adequately provided for by the Rule's specific exceptions. It follows then that "injury" should be broadly interpreted. This makes sense if the phrase "those infrequent circumstances" is correctly interpreted as being limited to "unexpected and idiosyncratic cases."[173] In contrast, cases involving evidence of physical consequences allegedly resulting from rape, for example, disease, pregnancy, and the condition of the complainant's hymen are neither infrequent, unexpected or idiosyncratic. Therefore, when the statute is

§ 2(4), 1975 Or. Laws 219, 219) (codified as amended at OR. REV. STAT. ANN. § 40.210) (1984)).

169. *See supra* notes 121-28 and accompanying text.

170. *See supra* note 125 and accompanying text.

171. *See* Berger, *supra* note 18, at 33; Galvin, *supra* note 21, at 775.

172. 124 CONG. REC. H11944, daily ed., October 10, 1978 (remarks of Representative Mann).

173. 23 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5387, at 564.

read as a whole, it is evident that the *Shaw* court's interpretation of Rule 412's injury exception is shortsighted.

This conclusion is supported by an analysis of the Eighth Circuit's attempt to define injury by resorting to its "common meaning."[174] The court has placed great emphasis on the expert testimony of several doctors who described the physiological process that results in a female's hymenal membrane losing its intactness.[175] The court has concluded that, since this process is not really a rupture, as doctors once commonly believed, but rather a stretching out of the membrane—a physiological accommodation—it does not constitute an injury.[176] Specifically, the court held: "The absence of all these indicia, [cuts, scratches, bruises, blood, scars, injury to the vaginal canal, or tears that may have healed], however, strongly suggests that while the condition of [the complainant's] vaginal area may have changed, she was not injured."[177] The court therefore suggested that the "commonly understood meaning"[178] of injury is limited to cuts, scratches, bruises, and the like.[179]

The court, however, failed to explain the basis for its conclusion that this is the common meaning of the word. In fact, one does not need to look any further than an ordinary dictionary to question this assumption. Injury is defined as "the act or result involving impairment or destruction of right, health, freedom, soundness, or loss of something of value."[180] In the context of rape, the loss of an intact hymen is both a destruction of right and freedom, as well as, a loss of something of value. Moreover, courts uniformly have held that a "legal injury" occurs when one violates the legal right of another or inflicts an actionable wrong.[181] Indeed, if a rape victim brings a civil action for battery,[182] it is noteworthy that the victim will have no difficulty in meeting the criteria for bodily harm. According to the Restatement (Second) of Torts, "bodily harm is any physical impair-

174. United States v. Shaw, 824 F.2d 601, 608 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1033 (1988).

175. *Id.* at 604-05.

176. *Id.* at 605.

177. *Id.*

178. *Id.* at 608.

179. *Id.*

180. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1164 (1970).

181. BLACK'S LAW DICTIONARY 924 (4th ed. 1968).

182. RESTATEMENT (SECOND) OF TORTS § 13 (1977). Regarding battery, the Restatement (Second) of Torts provides:

> Battery: Harmful Contact
>
> An actor is subject to liability to another for battery if
>
> (a) he acts intending to cause a harmful or offensive contact with the

ment of the condition of another's body."[183] Physical impairment, in turn, results "if the structure or function of any part of the other's body is *altered* to any extent even though the alteration causes no other harm."[184] The *Shaw* court readily admitted that the complainant's vaginal area may have "*changed*,"[185] thus meeting the necessary criteria for bodily harm.

Up to this point, we have seen that such a "change"[186] sufficiently establishes bodily harm in a civil action and comes well within both a legal and lay definition of injury. Moreover, the court's conclusion that, "even if this physical condition was the result of sexual intercourse, it is not an injury"[187] contradicts the substantive theory underlying the crime of statutory rape. Statutory rape is based on the legislative determination that sexual intercourse with a girl below a proscribed age results in such a detriment and violation to her well-being that consent is irrelevant.[188] Yet the court ruled that the medical evidence presented by the prosecution "may describe a physiological accommodation, but falls short of establishing an injury."[189] Is it not this physiological accommodation against which young girls are meant to be protected? The court's position would be understandable if the discussion was related to the normal physiological process that occurs after sexual intercourse between willing and competent participants. To this extent, the stretching of the hymenal membrane is not an injury, but a normal result of the sexual act. This, however, presupposes that the sexual act involved a normal interaction. Since intercourse resulting from rape and statutory rape, by definition, is not a normal interaction, the natural consequences that follow are not normal. The limited meaning the court assigned to injury, in the context of rape or related offenses, is therefore inconsistent with the substantive crime.

The court conceded that, as a consequence of assigning this restrictive definition to the injury exception, there could be numerous situations in which past sexual behavior evidence, although highly

---

person of the other or a third person, or an imminent apprehension of such a conduct, and

(b) a harmful contact with the person of the other directly or indirectly results.

Id.

183. *Id.* at § 15.

184. *Id.* at § 15 comment a (emphasis added).

185. *Shaw*, 824 F.2d at 605 (emphasis added).

186. *Id.*

187. *Id.*

188. 18 U.S.C. §§ 1153, 2032 (1982).

189. *Shaw*, 824 F.2d at 605.

probative, will nevertheless be prohibited.[190] The court based this ruling on the compromise Congress reached in enacting Rule 412[191]—that is, the compromise of balancing the competing interests of "the defendant's need to introduce relevant evidence . . . [against] the complainant's interest in not having her sexual history publicly disclosed and society's concomitant interest in having rapes reported and effectively prosecuted."[192] The court concluded that, in arriving at this compromise, "Congress distinguished between physical consequences that are injuries and those that are not, [and therefore] did not select a point based solely on relevancy considerations at which to draw the line of admissibility."[193]

Remarkably, in focusing on Congress' attempt to balance competing interests, the court failed to consider the fundamental structure of the Rule. Consider the court's reasoning: Congress opted to restrict the definition of injury to physical consequences evidenced by a scratch, cut, bruise, or the like; consequently, all other physical consequences, such as pregnancy and disease, are categorically excluded from the exception. The court conceded that, although all physical consequences are highly probative, Congress created this distinction in order to balance competing interests. The court, however, ignores the fact that subsection (c)(3) of Rule 412[194] specifically provides for the exclusion of relevant evidence, if the accused cannot establish that the probative value of the evidence outweighs the danger of unfair prejudice. Thus it was not necessary for Congress to purposely exclude highly probative evidence in order to balance the interests between the parties. Instead, section (c)(3) allows the court to determine, on a case-by-case basis, if relevant evidence is more prejudicial to the complainant than helpful to the accused. Furthermore, this result comports with the underlying purposes of rape reform by excluding only irrelevant or prejudicial evidence of past sexual behavior. Conversely, the court's interpretation summarily excludes highly probative evidence, even though the defendant is not relying on the prohibited purposes of consent or credibility.

The court's rationale is similar to that underlying an evidentiary privilege. A privilege bars the admission of relevant evidence, thereby suppressing the truth in the interest of furthering policies of social importance extrinsic to the fact-finding process.[195] In contrast, rape-

---

190. *Id.* at 607.
191. *Id.* at 606-07.
192. *Id.* at 606.
193. *Id.* at 607.
194. FED. R. EVID. 412(c)(3).
195. GRAHAM, EVIDENCE TEXT, RULES, ILLUSTRATIONS AND PROBLEMS, 800 (1983).

shield laws exclude irrelevant and prejudicial evidence that does nothing but taint the fact-finding process.[196] There is no reason to infer that Congress intended to create a privilege on behalf of the complainant that would result in exclusion of highly probative evidence. The aim of rape-shield legislation is to exclude irrelevant or prejudicial evidence because it results in humiliation, harassment, and needless embarrassment for the complainant.[197] Hence, in order to protect the complainant, a privilege is not necessary; rather, it is necessary to exclude past sexual behavior evidence when offered for the prohibited purpose of consent or credibility. This view is reflected in President Carter's statement upon signing the bill into law:

> [This bill] is designed to end the public degradation of rape victims and, by protecting victims from humiliation, to encourage the reporting of rape.
>
> There is no question that victims of rape and other sex crimes, predominantly women, are reluctant to report these crimes. Too often rape trials have been as humiliating as the sexual assault itself. By restricting testimony on the victim's prior sexual behavior to that *genuinely relevant to the defense*, the rape victim's act will prevent a defendant from making the victim's private life the issue in the trial.[198]

As a result, the *Shaw* court went too far in its evaluation of how the statute would benefit the rape complainant. As President Carter stated, Congress did not intend to exclude testimony "genuinely relevant to the defense,"[199] in order to protect the complainant. Furthermore, introduction of genuinely relevant testimony does not violate the policies underlying rape-shield legislation and therefore need not be excluded in order to protect the complainant.

Alternatively, the court supports its interpretation of the injury exception by addressing a statement made by the bill's sponsor Representative Holtzman.[200] Referring specifically to subsection (b)(2)(A) of Rule 412, she explained that this subdivision allows the admission of evidence of the victim's past sexual conduct when "the evidence rebuts the victim's claim that the rape caused *certain* physical consequences, such as semen or injury."[201] The court pointed to Holtzman's "such as" language and found that this statement supported its

196. Galvin, *supra* note 21, at 887.

197. *Id.*

198. 14 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1902 (October 30, 1978) (emphasis added).

199. *Id.*

200. *See* 124 CONG. REC. 34,913 (1978).

201. *Id.* (emphasis added).

conclusion that Congress intended the injury exception to cover only limited, enumerated physical consequences.[202]

At this point, the court's reasoning goes awry. In attempting to explain away the suggestions that the "such as" language is only illustrative of other "physical consequences" and therefore could include a ruptured hymen, the court admitted that Representative Holtzman's statement amounted to a mere reiteration of her previous statement concerning the original draft.[203] The court explained that, in her first statement she discussed the four listed exceptions of semen, pregnancy, disease, or injury and, in doing so, abbreviated her remarks to semen or injury.[204] The court implied that it is therefore evident that she did not mean to include a ruptured hymen, but did mean to include pregnancy and disease.[205]

The problem here is that the court cannot have it both ways. If Representative Holtzman merely reiterated an earlier statement, then the same meaning must be assigned to both of them. The court, however, claims on the one hand that "such as semen or injury" was short for semen, pregnancy, disease or injury, and thus "such as" should not be interpreted to include other physical consequences,[206] specifically a ruptured hymen. On the other hand, the court claims that the same statement evidences the intent that *only* semen or injury be included in the exception and not pregnancy and disease.[207] The court then explains away the "such as" language by referring back to the argument that it merely amounted to an abbreviated remark—that is, Holtzman actually meant semen, pregnancy, disease or injury. This argument is circular and cannot support the claimed proposition.

Indeed, the court's reasoning supports the opposite point of view. When Representative Holtzman discussed the amended bill, she reiterated the same statement that she had made when she discussed the original bill. It is reasonable to infer from this that she did not think the new bill rendered a substantive change requiring her to amend her statement. Instead, since her first statement was clearly illustrative, it follows, that by reiterating it, she meant it to remain illustrative. Pregnancy and disease therefore would not be excluded, but included among other possible physical consequences constituting an injury. This point is further supported by the fact that only pregnancy and

202. *Shaw*, 824 F.2d at 607.
203. *Id.* at 607 n.7.
204. *Id.*
205. *Id.*
206. *Id.* at 607.
207. *Id.*

disease can feasibly be brought under a general injury exception. Since semen clearly could not, Congress separately retained it.

The court next points out that Representative Holtzman's statement included the phrase "*certain* physical consequences,"[208] thus indicating that she did not mean *all* physical consequences.[209] If Congress only intended certain physical consequences to fall within the Rule's exception, then surely this category must include those physical consequences that can only occur as a result of sexual intercourse. Instead, the *Shaw* court decided that a broken nose exemplifies the type of physical consequence that constitutes an injury.[210] This type of injury, however, can be the result of an infinite number of occurrences that have no connection to a sexual crime. In contrast, the court determined that the physical consequence of an eleven-year-old girl's stretched hymenal membrane did not constitute an injury,[211] even though this condition could have resulted only from sexual intercourse. Furthermore, if evidence of a broken nose is to be relevant at a rape trial, two inferences must be made: one, that the defendant in fact caused the injury, and two, that the defendant caused the injury during the commission of a sexual crime. For a minor's ruptured hymen to be relevant at a rape trial, the only inference necessary is that the defendant directly caused the hymen to rupture. Therefore, the court, in effect, has excluded from the definition of injury those physical consequences immediately related to proof of a sexual crime. At the same time, the court has included within the meaning of injury those physical consequences only tenuously connected, if at all, to an act of sex. This absurd result is directly related to the court's lack of insight in interpreting the Rule's language and its origin.

Finally the *Shaw* court reasoned that calling the physical condition of a complainant's hymenal membrane an "injury" would contradict Congress's intention to subject Rule 412 to stringent temporal limitations.[212] In support of this conclusion, the court cited Representative Mann's statement,[213] in which he indicated that courts should consider, among other facts and circumstances, the amount of time that has lapsed between the alleged prior act and the rape charged.[214] Representative Mann concluded that, "[t]he greater the lapse of time, . . . the *less likely* it is that such evidence will be

208. *Id.* (emphasis in original).
209. *Id.*
210. *Id.* at 606.
211. *Id.*
212. *Id.* at 607-08.
213. *Id.* at 607.
214. *Id.*

admitted."[215]

The court interpreted Mann's statement to mean that Congress meant to restrict subsection (b)(2)(A) of Rule 412 to only those physical consequences that could be rebutted by evidence limited to sexual activity occurring a short time—probably a few days—before the alleged rape.[216] Thus the court concluded that Congress must have deleted pregnancy and disease from the final bill because they are "both consequences that can be caused by sexual activity occurring many months in the case of 'pregnancy,' and possibly many years, in the case of 'disease,' before the alleged rape."[217] Similarly, the court reasoned that the condition of a complainant's hymen is a consequence that could have been caused by sexual activity occurring a substantial amount of time before the alleged acts, and therefore that it should not be included in the injury exception.[218] Instead, "only when the evidence establishes an injury—such as a cut, bruise, or tear—that was sustained reasonably close in time to the alleged rape,"[219] should the exception be triggered.

The court's analysis is problematic. First, the strict temporal limitation suggested by the court is difficult to reconcile with the "common meaning"[220] assigned to injury in another section of the court's opinion. In that section, the court lists "tears that may have healed, or scars"[221] as properly coming within the "common meaning" of injury.[222] Evidence to rebut the presence of a scar, however, cannot be limited to sexual activity occurring within a few days of the alleged rape. This is true because scars generally cannot form within a few days. Thus the court's own analysis is internally inconsistent.

The court further stated that pregnancy is a consequence that can originate many months before the alleged rape, and that therefore the defendant feasibly can offer evidence of sexual activity with others during those months.[223] In that circumstance, however, the government would not be claiming that the defendant impregnated the complainant as a result of the rape. In order to prove the source of a pregnancy, allegedly the result of rape, the defendant necessarily would be restricted to offering evidence of sexual activity occurring

215. *Id.* (quoting 124 CONG. REC. 34,913 (1978)) (emphasis added).
216. *Id.*
217. *Id.*
218. *Id.* at 608.
219. *Id.*
220. *Id.*
221. *Id.* at 605.
222. *Id.* at 608.
223. *See id.* at 607-08.

within a few weeks before or after the act in question. The court, however, was under the impression that the defendant would be able to utilize up to a nine-month span to introduce evidence of past sexual activity.

The situation is somewhat different if the complainant claims that she contracted a venereal disease from the defendant. In this case, evidence can be offered to prove the complainant contracted the disease many years earlier. Thus this is the type of problem that can be resolved by applying Representative Mann's temporal restriction.[224] Similarly, the condition of a hymenal membrane, at issue in *Shaw*,[225] falls into this category. If no other evidence exists to limit the time in question, such as previous medical examinations, then arguably the defendant can attempt to introduce evidence of past sexual behavior starting from day one. The court, however, has failed to recognize that the defendant can also attempt to prove the existence of these physical consequences by offering proof of sexual activity between the complainant and another during the relevant time in question. Thus Representative Mann's statement[226] could just as reasonably be interpreted as a warning: the greater the lapse of time between the alleged prior act and the rape charged, the less probative the evidence will be and thus the less likely that such evidence will be admitted.

For example, evidence offered by the accused to prove the source of a venereal disease contracted by the complainant could be testimony by Witness *X* who claims he had sexual intercourse with the complainant two days prior to the date of the charged rape. Witness *X* may also have medical testimony to substantiate that he in fact had the disease. Introduction of this evidence is highly probative and no more prejudicial to the complainant than if the accused introduced Witness *X*'s testimony as proof of the source of semen. On the other hand, if the accused offered the testimony of Witnesses *X*, *Y* and *Z* that two, three, and four years ago they had sexual intercourse with the complainant and therefore could have transmitted a venereal disease to her at that time, then this evidence clearly would lack sufficient probative value to outweigh the prejudicial effect to the complainant. Thus the evidence would be excluded under subsection (c)(3) of the Rule. Therefore, there is no reason to construe Representative Mann's statement as an indication that Congress meant entirely to exclude physical consequences that could be proved by past sexual

224. *See supra* note 213 and accompanying text.
225. *Shaw*, 824 F.2d at 601.
226. *Id.* at 607.

behavior occurring a considerable time before the alleged rape. On the contrary, the point to be learned from Representative Mann's statement[227] is that evidence of a rape complainant's past sexual behavior will not be admitted unless it is highly probative. Once again, this interpretation is consistent with the underlying purposes of rape reform.

V. CONCLUSION

Congress enacted the federal rape-shield law, Federal Rule of Evidence 412, to prevent the traditional abuse directed at a complainant of rape or a related offense. The abuse resulted from the continued application of a rule of evidence that no longer served its purpose. The issue raised sensitive political issues resulting in a radical nationwide reform movement, each state attempting to meet quickly the reformers' demands to abolish this overtly sexist and biased practice in the courts. Subsequent case law, however, reflected various problems with the different approaches taken by legislatures. It has been demonstrated that, in many instances, courts resorted to redrafting the applicable statute, while others held the statute unconstitutional as applied. In addition, state legislatures reacted by amending the statutes.

By the time Congress passed Rule 412 many of these problems already had begun to surface. Thus Congress was in a good position to prevent the glaring weaknesses that threatened the state statutes from crippling the federal statute. One major defect plaguing the exclusionary statutes was the inability of the trial judge to exercise any discretion in determining the relevancy of past sexual behavior evidence. Congress addressed the problem in two ways. First, a special provision was incorporated in Rule 412 that allows for the introduction of past sexual behavior evidence if deemed constitutionally required. Second, Congress choose to use a general "injury" exception for introducting past sexual behavior evidence offered by the defendant to rebut evidence of physical consequences resulting from the alleged rape. By including a general "injury" exception, Congress avoided the danger of omitting a necessary exception. At the same time, trial judges are not forced to decide these cases on constitutional terms. The Eighth Circuit's decision in *United States v. Shaw*[228] essentially deletes these corrective measures from the statute. The result: exclusion of highly probative evidence critical to allowing the

227. *See supra* note 213 and accompanying text.
228. 824 F.2d 601 (8th Cir. 1987), *cert. denied,* 108 S. Ct. 1033 (1988).

accused to properly defend himself, thereby violating his right to due process of law.

KATHLEEN WINTERS