EXCEPTIONS TO RAPE SHIELD LAWS

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ABSTRACT

Almost all states and the federal government have statutes designed to protect sexual assault victims from harassing and intimidating questions regarding their past sexual experiences and reputations for chastity. During the Kobe Bryant's sexual assault preliminary hearing, Bryant's attorney was accused of violating Colorado's rape shield statute when she asked whether the alleged victim's reported injuries could have been caused by having sex with three men in a short period of time. Bryant's attorney was immediately attacked for attempting to smear the victim and violating Colorado's rape shield statute. Unknown to many persons, all rape shield statutes have exceptions; and some exceptions are constitutionally required. A complete ban on questions regarding victims' past sexual experiences would violate defendants' Sixth Amendment right to confront the evidence against them and the Fourteenth Amendment right to due process of law of the U. S. Constitution. The authors discuss the right to confrontation, including a table that shows the exceptions for all states and the federal government.

Pressed by advocates for women's issues, numerous state legislatures and Congress passed laws limiting the type of information that defense attorneys could explore in sexual assault trials (Bayliff 2003; Young 2002). The view was that many sexual assault victims were reluctant to report sexual assault and testify in court because some defense attorneys were asking questions about their sexual history and clothing at the time of the alleged assault (Katz 2003). Thus, numerous women thought that this problem had been resolved because almost all states have passed what is frequently called rape shield laws or modified their laws regarding admissible evidence (Call, Nice & Talarico 1991; Spohn & Horney 1991).

Advocates for rape shield laws were shocked and angry when the attorney for basketball star Kobe Bryant asked a state witness during Bryant's preliminary hearing whether the alleged victim's injury was consistent with a woman having sex with three different men in consecutive days (Bayliff 2003). Eagle County Court Judge Fred Gannett halted the preliminary hearing and ordered the attorneys into his chambers (*"Bombshell question clears court"* 2003). Numerous commentators and advocates vilified the defense attorney as going over the line and violating Colorado's rape shield law (CBSNews.Com 2003;*"Prosecutors Say Kobe's Defense is Smearing Accuser"* 2003). When the proceedings commenced again, the defense attorney continued with her questions regarding whether the injuries could have been caused by the alleged victim having sex with other men. Because the attorney was allowed to continue with this question, it signaled that the question was not improper (Post 2003).

This situation involving Kobe Bryant's attorney signals further that rape shield laws contain exceptions which must be because of the Sixth Amendment right to confrontation. A complete ban on questions about a rape victim's sexual history would violate the U.S. Constitution and many state Constitutions because defendants have a constitutional right to confront the evidence against them.

Although the issue of rape shield laws has been discussed extensively in the literature, these papers are found mostly in law review journals. For example, a search of LEXIS/NEXUS legal database shows that 581 articles that have been published in the last ten years with the term rape shield in them. In the social work database, there is 1 article and it is a criminal justice article. The sociological abstracts database shows 9 articles. Of this 9, 1 was a dissertation, 3 were from the social sciences, and 5 were from legal journals. The psychological abstracts database shows 6 articles. For the most part, lay professionals in the social sciences do not read law review journals because law review journals are written by and for law students, law professors, judges, and attorneys. A review of the reference pages of the paltry number of articles on rape shield laws in the social sciences indicates that an article on rape shield laws in a social science journal is sorely needed. This is especially the case given that the criminal case against Kobe Bryant was ultimately dropped and critics have attributed the dismissal to mistakes by the judge, including his ruling that portions

Table 1: Exceptions to Rape Shield Laws

States	Synopsis of Exceptions
Alabama	If past sexual behaviors directly involved the participation of the accused.
Alaska	Any evidence that is relevant and the probative value of the evidence is not outweighed by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of privacy of the complaining witness.
Arizona	If evidence is relevant and is material to a fact in issue in the case and that the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence and if the evidence is one of the following: 1. evidence of the victim's past sexual conduct with the defendant. 2. evidence of specific instances of sexual activity showing the source of semen, pregnancy, disease or trauma; 3. evidence that supports a claim that the victim has a motive in accusing the defendant of the crime; 4. evidence offered for the purpose of impeachment when the prosecutor puts the victim's prior sexual conduct in issue; and 5. evidence of false allegations of sexual misconduct made by the victim against others.
Arkansas	If relevant to a fact in issue, and its probative value outweighs its inflammatory or prejudicial nature.
California	The judge weighs the proffered evidence under the admissibility guidelines set out in California law which requires the weighing of prejudicial effect versus probative value.
Colorado	Evidence of the victim's or witness' prior or subsequent sexual conduct with the actor; evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or any similar evidence of sexual intercourse offered for the purose of showing that the act or acts charged were or were not committed by the defendant.
Connecticut	(1) Offered by the defendant on the issue of whether the defendant was, with respect to the victim, the source of semen, disease, pregnancy or injury, or (2) offered by the defendant on the issue of credibility of the victim, provided the victim has testified on direct examination as to his or her sexual conduct; (3) any evidence of sexual conduct with the defendant offered by the defendant on the issue of consent by the victim, when consent is raised as a defense by the defendant; (4) otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights.
Delaware	If the evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant.
District of Columbia	The evidence is constitutionally required to be admitted or shows past sexual behavior under circumstances where consent is an issue in the case before the court.
Florida	If the evidence may prove that the defendant was not the source of the semen, pregnancy, injury, or disease or when consent by the victim is at issue, such evidence may be admitted if it is first established to the court...that such evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent.
Georgia	If the past sexual behavior directly involved the participation of the accused and finds that the evidence expected to be introduced supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution.
Hawaii	If 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 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 sexual assault is alleged.
Idaho	Evidence of specific instances of sexual behavior where such is constitutionally required or involves persons other than the accused and bears upon the issue of the source of semen or injury or involves the accused and bears upon the issue of consent.
Illinois	If the evidence is relevant and the probative value of the evidence outweighs the danger of unfair prejudice.

of the alleged victim's sexual behavior immediately before and after the encounter with Kobe Bryant.

For these reasons, the purpose of this paper is first to discuss rape shield laws and present in tabular form rape shield laws exceptions in all states and the federal government. The process for deciding whether a victim's sexual history would be admissible at trial will then follow. Critical to understanding the exceptions in rape shield laws is the Right to Confrontation within the Sixth Amendment to the U.S. Constitution, which also will be discussed. The authors end with some discussions and thoughts about rape shield statutes.

A FEW RAPE SHIELD STATUTES

Most states have similar rape shield laws and similar processes for determining whether evidence about an alleged rape victims' sexual history will be admitted. (Please see Table 1). Many states' exceptions permit defendants to introduce evidence regarding past relationships with a victim when the defense is consent or to show that the defendant was not the source of pregnancy, disease, or injury to the victim (Winters 1989). Before such evidence may be admitted or a witness questioned, defendants must, prior to trial, proffer, supported by affidavits, of the evidence that they intend to offer. The judge conducts a hearing *in camera* (i.e., in chambers) and decides which questions, if any, may be asked. A judge may find that some evidence about a victim's sexual history is legally admissible, but may bar its admission at trial because the prejudicial nature of the evidence outweighs its probative value. Further, not all evidence is admissible in a trial. Only relevant evidence is admissible, which is evidence that shows whether a purported fact is more or less probable (*Colorado v. Harris* 2002).

Colorado's exceptions permit a defendant to present evidence of the victim's or witness's prior or subsequent sexual conduct with the defendant. An additional exception permits evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or *any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant* [Emphasis by Authors] (Colorado Revised Statute 18-3-407). Citing Colorado rape shield law, the Supreme Court of Colorado reinstated a sexual assault conviction because there existed an issue of fact of who was responsible for an injury—the defendant or the woman's boyfriend (*Colorado v. Harris* 2002).

Kobe Bryant was accused of causing an injury. Thus, Bryant's attorney had a right to, as the statute states, refute and challenge,

> *any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant.* (Colorado Revised Statute 18-3-407)

Bryant's attorney was not attempting to assert that if someone else caused the injury, then Kobe was not guilty. The attorney appeared to have been challenging the nurse's assertion that the woman was injured during a sexual assault.

THE RIGHT TO CONFRONTATION

The Sixth Amendment to the United States Constitution provides that in "all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." The Court has stated that confrontation includes the right to challenge witnesses in an adversarial process (*Washington v. Texas* 1967). As with much of American jurisprudence, the genesis of most American legal concepts is rooted in the Common Law that developed in England. However legal historians tend to disagree over the exact meaning of many of these legal concepts, including the Confrontation Clause, and what they were designed to prevent. As Justice Thomas wrote, "there is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean" (*White v. Illinois* 1992 359).

One conservative guess of what the Confrontation Clause was designed to prevent was the legal practices that occurred in the sixteenth century in England. During that period, the magistrates interrogated prisoners and witnesses prior to trials. These interrogations were essentially for the courts, then, to learn the details of cases. When witnesses were interrogated, the prisoners were not present. When the trials were conducted, the proof of the crimes was provided by the reading of depositions, confessions of accomplices, letters, or affidavits. Often to no avail,

Table 1: Exceptions to Rape Shield Laws Continued

States	Synopsis of Exceptions
Indiana	If the evidence of (1) the victim's or a witness' past sexual conduct with the defendant; (2) which in a specific instance of sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded; or (3) that the victim's pregnancy at the time of trial was not caused by the defendant and is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.
Iowa	Relevant evidence that has any tendency to make the existence of any fact that is or consequence to the determination of the action more probable than it would be without the evidence. However, all relevant evidence is not admissible and is subject to a balancing test regarding whether its probative value is outweighed by its prejudicial or inflammatory effect.
Kansas	Evidence that is relevant, which the judge determines to be relevant.
Kentucky	If (1) evidence of 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; (2) evidence of 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 an offense is alleged; or (3) any other evidence directly pertaining to the offense charged.
Louisiana	If (1) evidence of past sexual behavior with persons other than the accused, upon the issue of whether or not the accused was the source of semen or injury; provided that such evicence is limited to a period not to exceed seventy-two hours prior to the time of the offense, and further provided that the jury be instructed at the time and in its final charge regarding the limited purpose for which the evidence is admitted; or (2) evidence of past sexual behavior with the accused offered by the accused upon the issue of whether or not the victim consented to the sexually assaultive behavior.
Maine	(1) Evidence, other than reputation or opinion evidence, of sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with the respect to the alleged victim, the source of semen or injury; or (2) evidence, other than reputation or opinion evidence of sexual behavior with the accused offered by the accused on the issue of whether the alleged victim consented to the sexual behavior with respect to which the accused is charged; (3) evidence the exclusion of which would violate the constitutional rights of the defendant.
Maryland	(1) If the evidence is relevant; (2) the evidence is material to a fact in issue in the case; (3) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and (4) the evidence (i) is of the victim's past sexual conduct with the defendant; (ii) is a specific instance of sexual activity showing the source of semen, pregnancy, disease, or trauma; (iii) supports a claim that the victim has an ulterior motive to accuse the defendant of the crime; or (iv) is offered for impeachment after the prosecutor has put the victim's prior sexual conduct in issue.
Massachusetts	Evidence of the victim's sexual conduct with the defendant or evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristic, or condition of the victim.
Michigan	Evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source of origin of semen, pregnancy, or disease.
Minnesota	(1) Evidence of the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue (in order to find a common scheme or plan, the judge must find that the victim made prior allegations of sexual assault which were fabricated); and (2) evidence of the victim's previous sexual conduct with the accused.
Mississippi	Constitutionally required to be admitted and 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, pregnancy, disease, or injury; or 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 a sexual offense is alleged; or false allegations of past sexual offenses made by the alleged victim at any time prior to the trial.

prisoners demanded that their accusers be present in court and state their charges to the prisoners' faces. For example, in 1603, charges were leveled against Sir Walter Raleigh for treason, a capital offense. The primary evidence against Sir Walter Raleigh was that of an alleged co-conspirator, who was later reported to have been induced by torture to implicate. Raleigh was locked in the London Tower for 12 years (*White v. Illinois* 1992).

Through the years, the U.S. Supreme Court has decided cases in which the contention was that defendants' right to confront their accusers was denied. These cases have involved homicide or murder cases, but more recently child sexual abuse cases, in which the courts have permitted hearsay evidence as exceptions to the right to confrontation (*Maryland v. Craig* 1990). Normally, hearsay is not permitted in a trial, but there are some exceptions, such as dying declarations and reports given to medical personnel.

While the Justices agree that hearsay is admissible in some cases, some Justices take a literal reading of the Confrontation Clause and that it specifically guarantees a defendant's right to be confronted in court with the *witnesses* against him or her. The U.S. Supreme Court has ruled that a child sexual assault victim may testify out of the courtroom and that this does not violate a defendant's right to confront his or her accuser (*Maryland v. Craig* 1990). The Court ruled that confrontation was assured when the defendant could communicate with her attorney and help the attorney to ask questions of the victim, thus fully confronting him. In one case, the defendant was a day care owner who was accused of sexually abusing some of the children in her care. She was subsequently convicted and sentenced to a prison term (*Maryland v. Craig* 1990).

According to the Court, it had never ruled that the Confrontation Clause guaranteed criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial. Rather, the central concern of the Confrontation Clause is to ensure the reliability of evidence against criminal defendants by subjecting the evidence to rigorous examination within the context of the adversarial process before the trier of fact. This means defendants' right to confrontation is assured by personal examination, which includes requiring the witnesses to testify under oath, cross-examination by the defense counsel or the defendants, and giving the jury the opportunity to observe the demeanor of all the witnesses, including the defendants, even if they do not testify (*Maryland v. Craig* 1990).

In a very rare coalition, Justice Scalia, one of the more conservative Justices on the U.S. Supreme Court, joined the more liberal Justices in the minority opinion in denouncing what the majority had done to the Confrontation Clause in *Maryland v. Craig* (1990). Justice Scalia wrote,

> seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion. The Sixth Amendment provides, with unmistakable clarity, that 'in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.' The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court. (*Maryland v. Craig* 1990 pp 860-861)

In one U.S. Supreme Court decision, the Court ruled unanimously that a Texas man was denied due process of law because a Texas statute forbade a codefendant from testifying for the defendant in a trial. The State could call a codefendant as a state witness against the accused, but not the accused for his or her defense. The U.S. Supreme Court held that such a rule violated both the Sixth Amendment and the Fourteenth Amendment. The Court noted that the codefendant's testimony was relevant, material, and vital to the defense (*Washington v. Texas* 1967).

While the U.S. Supreme Court ruled in a case involving a defendant's Sixth Amendment right to put on evidence relevant, material, and vital to the defense, other courts have ruled that a defendant's Sixth Amendment right to confront the evidence against him or her is violated by the trial court restricting the defense of cross examination designed to produce relevant, material, and vital evidence (*Washington v. Texas* 1967).

The U.S. Supreme Court has only ruled in a couple of cases involving the right to confrontation as it conflicts with rape shield laws.

Table 1: Exceptions to Rape Shield Laws Continued

States	Synopsis of Exceptions
Missouri	(1) Evidence of the sexual conduct of the complaining witness with the defendant to prove consent where consent is a defense to the alleged crime and the evidence is reasonably contemporaneous with the date of the alleged crime; or (2) evidence of specific instances of sexual activity showing alternative source of semen, pregnancy or disease; (3) evidence of immediate surrounding circumstances of the alleged crime; or (4) evidence relating to the previous chastity of the complaining witness in cases, where, by statute, previously chaste character is required to be proved by the prosecution.
Montana	Evidence of the victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease which is at issue in the prosecution.
Nebraska	(a) Evidence of past sexual behavior with persons other than the defendant, offered by the defendant upon the issue whether the defendant was or was not, with respect to the victim, the source of any physical evidence, including but not limited to, semen, injury, blood, saliva, and hair or (b) evidence of past sexual behavior with the defendant when such evidence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged if it first established to the court that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.
Nevada	Evidence that is relevant, which the judge determines to be relevant.
New Hampshire	The evidence is constitutionally required; or the evidence relates to past sexual relations with the alleged by others than the accused, and the evidence is offered by the accused on the issue of the source of semen or injury with respect to the alleged victim; or the evidence relates to past sexual behavior between the accused and the alleged victim, and is offered by the accused upon the issue of consent.
New Jersey	If the court finds that evidence offered by the defendant regarding the sexual conduct of the complaining witness is relevant, and that the probative value of the evidence offered is not outweighed by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the complaining witness.
New Mexico	The evidence is material to the case and that its inflammatory or prejudicial nature does not outweight its probative value.
New York	(1) The evidence proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; (2) proves or tends to prove that the victim has been convicted of an offense....within three years prior to the sex offense which is the subject of the prosecution; or (3) rebuts evidence introduced by the people of the victim"s failure to engage in sexual intercourse, oral sexual contact, anal sexual conduct or sexual contact during a given period of time; or (4) rebuts evidence introduced by the people which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or (5) is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interest of justice.
North Carolina	Unless (1) such behavior was between the complainant and the defendant or (2) is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or (3) is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or (4) is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.
North Dakota	(1) Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or toher physical evidence; (2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct, offered by the accused to prove consent or by the prosecution; and (3) evidence the exclusion which would violate the constitutional rights of the defendant.

In one case, a White female claimed that two African American men who had given her a ride sexually assaulted and sodomized her twice. The men stated that the woman consented to sex and concocted the rape charges to protect an affair that she was having with another African American male. At that time, both the woman and her lover were married, but by the time the case came to trial, the woman and her lover were living together. The defendants wanted to cross examine the woman about her living arrangement, especially after she testified under oath that she lived with her mother. Based on the exceptions in Kentucky's rape shield law, the trial judge ruled that the woman's living arrangement might prejudice the jury against her—a White woman living with an African American man. The men were acquitted of some charges, but one defendant was convicted of sodomy and given 10 years. The Kentucky appellate court agreed with the trial judge in restricting cross-examination of the woman. But the U.S. Supreme Court reversed, ruling that the right to confrontation includes the right to cross-examination. The Court ruled that the defendant was entitled to show that the woman had a motive to lie and that her lying on the witness stand regarding living with her mother unfairly prevented the defense from showing that the victim has a habit of lying or a tendency to lie (*Olden v. Kentucky* 1988).

In another U.S. Supreme Court case, the issue was more of a technical case involving a defendant's failure to provide notice of his intent to question an alleged rape victim, who was an ex-girl friend, about their past sexual relationship. The defendant's defense was one of consent, but the judge, in a bench trial, refused to accept such testimony because the Michigan statute had not been followed. A Michigan appellate court ruled that a per se rule restricting testimony about a prior sexual relationship between an accused and victim was unconstitutional. However, the U.S. Supreme Court reversed the Michigan court, holding that a strict ruling that preclusion of evidence is unconstitutional contradicts its jurisprudence regarding the Sixth Amendment and the right to confrontation (*Michigan v. Lucas* 1991).

In a case from the Tenth Circuit Court of Appeals, *United States of America v. Beday* (1991), the Court ruled that a defendant charged with sexual abuse of a child was unfairly convicted because cross examination about a previous sexual abuse of the child was restricted. The defendant, Beday, was charged with sexual abuse of his girlfriend's child and abusive sexual contact with a child due to injuries sustained by the child. The couple and the child all slept in the same bed. The mother stated she saw the defendant on top of her daughter, and the defendant claimed that he was too drunk to remember anything. Several months before the incident with Beday, another adult pled guilty to sexual abuse and this adult was said to have had sexual intercourse with the child more than once. Because the prosecution emphasized the injuries to the child as having been caused by Beday although a physician testified in a pretrial hearing that he could not state when the injuries were caused, the defendant was prevented from eliciting information from the child victim and also from testing whether the child was clear as to who did what to her.

COMMENTS AND DISCUSSIONS

Although rape shield laws enjoy wide public support, a few critics, including feminist critics, have pointed out problems with these laws. For example, Tilley (2002), a feminist, argued that all rape shield laws should be abolished because they were based on faulty logic and do not advance feminists' goals to change the public discussion over female sexuality. Particularly, Tilley stated that the notion to exclude women's sexual history in a sexual assault trial was based on a chauvinistic model of juries, which consisted of all men and their oppressive views of female sexuality. She stated that contemporary juries tend to be mixed with women making up a substantial number of jurors. In Tilley's view, a discussion of a woman's sexual history would not necessarily lead to fewer sexual assault convictions. Tilley believes that mixed gendered juries could discuss frankly the connection between sexual history and consent and still convict a defendant.

Most criticisms of rape shield laws center on unfairness in sexual assault against defendants, preventing them from confronting the evidence against them, giving juries distorted pictures, and impeding a defendant from showing that a victim may have a motive to lie. A female newspaper columnist recounted a series of cases in which excluded evidence about victims' sexual practices mis-

Table 1: Exceptions to Rape Shield Laws Continued

States	Synopsis of Exceptions
Ohio	Unless the evidence involves the origin of semen, preganancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and itsinflammatory or prejudicial nature does not outweigh its probative value.
Oklahoma	(1) Specific instances of sexual behavior if offered for a purpose other than consent, including proof of the source of semen, pregnancy, disease or injury; (2) false allegations of sexual offenses; or (3) similar sexual acts in the presence of the accused with persons other than the accused which occurs at the time of the event giving rise to the sexual offense alleged.
Oregon	Evidence that relates to the motive or bias of the alleged victim; is necessary to rebut or explain scientific or medical evidence offered by the state; or is otherwise constitutionally required to be admitted.
Pennsylvania	Evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.
Puerto Rico	(1) Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; (2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and (3) evidence the exclusion of which would violate the constitutional rights of the defendant.
Rhode Island	Notice must be given if the accused plans to offer evidence that the victim engaged in sexual behaviors with others.
South Carolina	Evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source of semen, pregnancy, or disease about which evidence has been introduced previously at trail is admissible if the judge finds that such evidence is relavant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value; evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness may not be excluded.
South Dakota	Evidence of a victim's prior sexual encounters may be admitted if the trial court finds that it is relevant and material to a fact at issue in the case.
Tennessee	Evidence required by (1) the Tennessee or United States Constitution; (2) offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has or presented evidence as the victim's sexual behavior, and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim; or (3) if the sexual behavior was with the accused; on the issue of consent; or (4) if the sexual behavior was with persons other than the accused; (i) to rebut or explain scientific or medical evidence; or (ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters; or (iii) to prove consent if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the accused's version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented.
Texas	Evidence that is necessary to rebut or explain scientific or medical evidence offered by the State; that relates to the motive or bias of the alleged victim; that is constitutionally required to be admitted and its probative value outweighs the danger of unfair prejudice.
Utah	(1) Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of the semen, injury, or other physical evidence; (2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered: (A) by the accused to prove consent; or (B) by the prosecution; and (3) evidence the exclusion of which would violate the constitutionally rights of the defendant.

led juries regarding what occurred between the defendants and them. In one case, the victim and defendant had a previous sexual relationship that included biting, but the defendant was not allowed to show that this behavior was common between them (Young 2002). LaTesta (1998) was particularly critical of rape shield statutes that prevented defendants from showing a victim may have a motive to lie. In one case, LaTesta related a case of a man accused of sexual assault by a 10-year-old girl. The defendant stated that he caught the young girl having sex with his 14-year-old son and told her that he intended to tell her mother. However, the trial court ruled that the defense's reference to this contention created a mistrial. The defense appealed and an Oregon court ruled that the rape shield law in which the mistrial was based was an error and violated the defendant's right to confront. Thus, a second trial was barred (*State v. Jalo* 1976).

Although one case decided by the Georgia Supreme Court did not involve Georgia's rape shield law, it showed where allowing the defense to bring in a victim's sexual history would be constitutionally required. The case involved an 18-year-old African American male who the jury believed had consensual sex with an almost 16-year-old white female. They were caught having sex on school grounds, and the defense contended that the girl fabricated the sexual assault charge because she was afraid of her father, a Ku Klux Klansman. The jury acquitted the defendant of rape, statutory rape, aggravated assault, sexual battery, and false imprisonment. The charge on which the jury reluctantly convicted, according to interviews with jurors later, was aggravated child molestation, which carried a sentence of 10 years with no chance for probation, parole, or pardon. According to the instructions given to the jury, the jury must convict the defendant of aggravated child molestation if the child was under 16 years old, and the sex resulted in an injury to the child. The injury in this case was that the girl purported to be a virgin and lost her virginity during the consensual sex with the defendant, as the jury concluded. If the girl was not a virgin and had sex with other boys, then the defendant would be entitled to introduce this evidence of previous sexual intercourse because the charge was based on her being a virgin and losing her virginity (Gregory 2004).

Another situation illustrates how a defendant should be able to ask an alleged victim about a past sexual assault but might be prevented from doing by rape shield statutes. First, bias and prejudice are always explorable during cross examination as part of the right to confrontation (*Pointer v. Texas* 1965). As one Oklahoma court stated, witness bias is always relevant and impeachment evidence which establishes bias is always relevant (*Mitchell v. State of Oklahoma* 1994). For example, suppose a young woman is sexually assaulted by someone of a different race and as a result develops a deep hatred for all males of that race. She tells friends, relatives, and therapists that she hates all men of that race. Later, she accuses a person of that race of robbery. At trial, information comes to the defense about a sexual assault involving this woman and her deep hatred for men of the race of the defendant. A defense attorney would engage in malpractice if he or she chose not to cross examine the witness about her bias and the cause for this bias. A rape shield statute that forbids any questions about a past rape would likely violate the defendant's Sixth Amendment right to cross examine the accuser. Sexual assault is the only crime where this shield exists. If a minority person killed a White store clerk and wounded a White customer, the customer's bias against the defendant's race or ethnicity would be explorable in any subsequent trial.

CONCLUSION

No one disputes that some aspects of a victim's sexual history should be irrelevant in a sexual assault trial. Some defendants who have been convicted have contended that the pendulum has gone too far. Justice Carrigan of the Supreme Court of Colorado wrote that evidence of a rape victim's sexual history may be relevant and material in certain cases and a total ban on this history would indeed violate a defendant's right to confrontation (*Colorado v. McKenna* 1978). Although Justice Carrigan seemed to suggest that the pendulum could swing too far, the exceptions in Colorado's rape shield statute provide a good balance. However, as this paper suggests, society, or the public, is very close to going too far because it seems to want absolute, ironclad rape shield laws. Rape shield laws serve a useful purpose, but they should not become shields prevent-

Table 1: Exceptions to Rape Shield Laws Continued

States	Synopsis of Exceptions
Vermont	Evidence of prior sexual conduct of the complaining witness shall not be admitted; provided, however, where it bears of the credibility of the complaining witness or it is material to a fact at issue and its probative value outweighs its private character, the court may admit (1) evidence of the complaining witness' past sexual conduct with the defendant; (2) evidence of specific instance so the complaining witness' sexual conduct showing the source of origin of semen, pregnancy or disease; (3) evidence of specific instances of the complaining witness' past false allegations of violations of this chapter.
Virgin Island	(1) Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; (2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and (3) evidence the exclusion of which would violate the constitutional rights of the defendant.
Virginia	(1) Evidence of specific instances of sexual behavior by alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence; (2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and (3) evidence the exclusion of which would violate the constitutional rights of the defendant.
Washington	Evidence that the perpetrator and the victim have engaged in sexual intercourse with eacch other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.
West Virginia	Evidence of the victim's past sexual conduct with the defendant... and as to the victim's prior sexual conduct with persons other than the defendant, where the court determines at a hearing out of the presence of the jury that such evidence is specifically related to the act or acts for which the defendant is charged and is necessary to prevent mainfest injustice.
Wisconsin	(1) Evidence of the complaining witness past conduct with the defendant; (2) evidence of specific instances of sexual conduct showing the source of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered; (3) evidence of prior untruthful allegations of sexual assault made by the complaining witness.
Wyoming	The probative value of the evidence substantially outweighs the probability that its admission will create prejudice...and this section does not limit the introduction of evidence as to prior sexual conduct of the victim with the actor.
Federal Government	(1) Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; (2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and (3) evidence the exclusion of which would violate the constitutional rights of the defendant.

ing fairness and justice for the accused.

REFERENCES

Bayliff CJ. 2003. Preposterous, humiliating questions about a victim's sexual history are often irrelevant. Rocky Mountain News.com. October 18. Retrieved December 16, 2003 from, http://rockymountainnews.com/drmn/opinion/article.

Bombshell Question Clears Court. 2003. *Vail Daily*. Vailalive.com. October 9. Retrieved December 16, 2003 from, http://www.vaildaily.com/apps/pbcs.dll/article?AID=/20031009/NEWS/310090101&rs=2.

Call JE, DC Nice, & SM Talarico. 1991. An analysis of the state rape shield laws. *Social Science Quarterly 72* 774-788.

CBSNEWS.com. 2003. Graphic details at Bryant hearing. October 11. Retrieved January 18, 2004 from, http://www.cbsnews.com/stories/2003/10/11/national/main577622.shtml.

Colorado v. Harris 43 P. 3d 221. CO 2002.

Colorado v. McKenna. 585 P.2d 275. CO 1978.

Colorado Revised Statute 18-3-407.

Gregory L. 2004. Romans rally in Atlanta for Marcus Dixon. *Rome News-Tribune* January 21. Retrieved January 21, 2004 from, http://209.41184.21/partners/680/public/news520264.html.

Katz N. 2003. Rape shield law: what you need to know. *Women's Issues*. Retrieved December 16, 2003 from, http://womensissues.about.com/cs/rap1/a/aarapesieldlaw.htm

LaTesta RK. 1998. Rape shield statutes and the admissibility of evidence tending to show a motive to fabricate. *Cleveland State Law Rev 46* 489-510.
Maryland v. Craig. 497 U. S. 836. 1990.
Michigan v. Lucas. 500 U. S. 145. 1991.
Mitchell v. State of Oklahoma. 884 P.2d 1186. 1994.
Olden v. Kentucky. 488 U. S. 227. 1988.
Pointer v. Texas. 380 U. S. 400. 1965.
Post L. 2003. Colorado ruling and Bryant's case; Cases on evidence of prior sex acts could spell trouble for the defense. *National Law Journal*, October 20 6.
Prosecutors Say Kobe's Defense is Smearing Accuser. 2003. *Fox News Channel*. October 15. Retrieved December 16, 2003 from, http://www.foxnews.com/story/
Spohn C & J Horney. 1991. The law's the law but fair is fair: rape shield laws and officials' assessment of sexual history. *Criminology 29* 137-161.
State v. Jalo. 557 P.2d 1359. Or. 1976.
Tilley CC. 2002. A feminist repudiation of the rape shield laws. *Drake Law Rev 51* 45-80.
United States v. Beday. 937 F.2d 515. 10th Cir. 1991.
Washington v. Texas. 388 U. S. 14. 1967.
White v. Illinois. 502 U. S. 346. 1992.
Winters K. 1989. United States v. Shaw: what constitutes an injury under the federal rape-shield statute? *U Miami Law Rev 43* 947-980.
Young C. 2002. Excluded evidence: the dark side of rape shield laws. Reason Online. Retrieved December 16, 2003 from, http://reason.com/0202/co.cy.excluded.shtml.