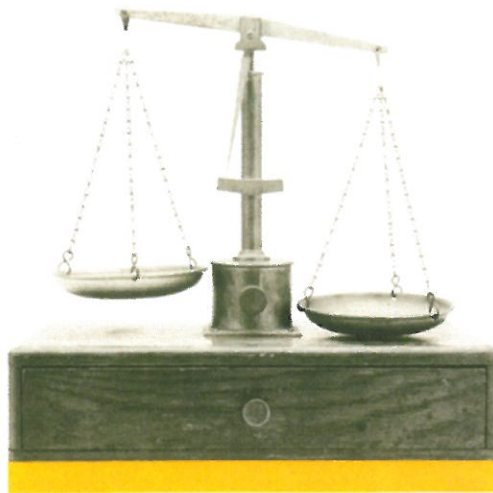


The Legal Scholar: Rape Shield Laws and Civil Cases

By *Annie Rotner*



Rape shield laws place limits on the introduction of evidence of a victim's sexual history. According to the National Center for Victims of Crime, "every state and the District of Columbia has a rape shield law that applies in criminal cases, but only a few extend such laws to civil cases."¹ While the Federal Rules of Evidence do give some protection to sexual assault victims in civil cases, most states have not followed suit.² Because the civil justice system is such an important option for victims of crime, and because less is at stake for a defendant in a civil case than in a criminal case—i.e., financial penalties as opposed to restricted personal liberty—states should amend their rape shield laws to provide victims at least as much protection in civil cases as they are afforded in criminal cases.

In general, rape shield laws bar the introduction of opinion and reputation evidence regarding a rape victim's sexual history. Evidence of specific sexual conduct by the victim is also usually deemed irrelevant, unless "it is direct evidence of the source of injury, semen, pregnancy, or disease that may be at issue in the case, or relates to specific sexual conduct with the defendant."³ These prohibitions help prevent prejudicial information about a victim's sexual history from unduly influencing the jury.⁴

First introduced in the 1970s during the women's movement, rape shield laws were heralded by organizations such as the American Bar Association and the National Organization for Women as a way of countering stereotypes regarding female sexuality and women's role in society.⁵ Proponents of the laws argued that "[e]mbedded within rape law . . . was an informal . . . normative command that women maintain an ideal of sexual abstinence in order to obtain legal protection"⁶ Rape shield laws were—and still are—necessary to prevent moral judgments on women's sexual lives because, historically, laws dealing with rape "portrayed consent to sexual intercourse as a kind of temporally unconstrained permission that could be imprecise as to act and even transferable to other people. Consent to sexual intercourse under certain circumstances lacked temporal constraints: at common law, a woman could not accuse her husband of raping her."⁷ Rape shield laws are part of an effort to ensure that consent to sexual intercourse is limited to a specific act and not transferable to others. These laws also help spare victims the additional trauma of testifying about their sexual history and aim to increase rape reporting, prosecution, and conviction.⁸

Opponents of rape shield laws generally argue that the laws can violate defendants' Sixth Amendment right to confront the witnesses against them and that a victim's history may indeed be relevant to the issue of consent.⁹ However, such concerns are addressed by the fact that every rape shield law contains exceptions allowing evidence of specific instances of a victim's past sexual conduct to be admitted during a trial.

Villanova law professor Michelle Anderson notes that rape shield laws "divide roughly into four categories, distinguishable by the manner and degree to which they admit evidence of a woman's sexual history: (1) the legislated exceptions category . . . ; (2) the constitutional catch-all category; (3) the judicial discretion category; and (4) the evidentiary purpose category."¹⁰ According to Anderson, laws that fall within the legislated exceptions approach include:

the admission of evidence of prior sexual conduct between the complainant and the accused; evidence of an alternative source of semen, pregnancy, or injury; evidence of a pattern of prior sexual conduct by the complainant; evidence of bias or motive to fabricate the sexual assault; evidence offered to prove that the accused had a reasonable but mistaken

belief in the complainant's consent; and evidence of prior false accusations of sexual assault by the complainant.¹¹

The constitutional catch-all category contains similar exceptions, but Anderson adds to this list laws that include an exception for the admission of sexual history evidence if that evidence is deemed constitutionally necessary by a judge.¹² Judicial discretion laws, on the other hand, give judges complete discretion to admit or exclude evidence of a woman's sexual history.¹³ Finally, evidentiary purpose laws, as Anderson defines them, determine admissibility by looking at the purpose for which the evidence is being offered.¹⁴

It makes as much sense—if not more—to apply rape shield laws in civil cases as it does to apply them in criminal cases. If defendants are found liable in civil cases, they can only be subject to monetary sanctions. In a criminal case, on the other hand, a defendant's personal liberty can be at stake. (This is not to downplay the hardships that can be imposed by a civil case's financial judgment. However, such judgments are qualitatively different from years of incarceration.) Recounting one's sexual history in response to public, hostile questioning can be just as traumatic, and just as irrelevant, in a civil case as it is in a criminal case. Similarly, protection against pervasive stereotypes concerning women's sexuality is just as important and necessary in a civil suit as it is in a criminal prosecution.

The states with statutes that permit the application of rape shield laws in civil cases include, but are not necessarily limited to, California,¹⁵ Colorado,¹⁶ Hawaii,¹⁷ Louisiana,¹⁸ Maine,¹⁹ Massachusetts,²⁰ New Jersey,²¹ and Wisconsin.²² The California statute, for example, states in part:

(a) In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of plaintiff's sexual conduct, or any of such evidence, is not admissible by the defendant in order

to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium.

(b) Subdivision (a) shall not be applicable to evidence of the plaintiff's sexual conduct with the alleged perpetrator.²³

The statute also provides for the limited admissibility of such evidence for purposes of cross-examination and impeachment.

In addition to these statutes, some state courts have held that the protections offered to victims in criminal proceedings should be available to victims bringing civil suits as well. Unfortunately, many other courts have reached the opposite conclusion. The inconsistency with which courts apply rape shield laws in civil cases hurts victims, leaving them unable to safely predict whether their sexual histories will be scrutinized in open court.

In *Barnes v. Barnes*, a case in which a child brought a civil suit against her father for rape and assault, the Supreme Court of Indiana held that the trial court erred in using the Indiana Rape Shield Statute to exclude defense evidence and to limit cross-examination of the plaintiff and her experts.²⁴ The court observed that the statute was not enacted to apply in civil cases.²⁵ However, a subsequent case, *Sears Roebuck & Co. v. Manuilov*,²⁶ noted that *Barnes* came before the adoption of the Indiana Rules of Evidence, and specifically Indiana Evidence Rule 403, which authorizes trial courts to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.²⁷ Therefore, although the Indiana rape shield statute does not expressly apply in civil cases, courts may still exclude evidence of a victim's sexual history under Rule 403. Despite this positive development, such a case-by-case application of the evidentiary rule cannot give rape victims the level of predictability that many would hope for before deciding to pursue a civil case.

The civil justice system is a powerful option for crime victims. Unlike the criminal justice system—in which a case is brought on behalf of the state and is

ultimately controlled by a prosecutor—the civil system allows a victim to control a case and to hold the perpetrator personally accountable. With the lower burden of proof in a civil case—a preponderance of the evidence as opposed to proof beyond a reasonable doubt—such accountability is easier to achieve. But victims will not be able to fully realize the potential of the civil justice system until rape shield laws and other evidentiary rules provide at least as much protection for a victim pursuing a civil action as one involved in a criminal prosecution.

Finally, the public policy embodied in rape shield laws for criminal cases is equally applicable in civil actions. It is in the interest of justice that victims of sexual assault come forward and hold perpetrators accountable. Nobody should be dissuaded from pursuing justice for fear of being humiliated by having to testify about irrelevant sexual history. This is true whether the case is in criminal or civil court. **W**

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1. National Center for Victims of Crime, FAQ: Rape Shield Laws, at http://www.ncvc.org/ncvc/main.aspx?dbID=DB_FAQ:RapeShield1a_ws927 (last accessed Dec. 2, 2004).

2. FED. R. EVID. 412.

3. National Center for Victims of Crime, *supra* note 1.

4. *Id.*

5. See Cristina Carmody Tilley, *A Feminist Repudiation of the Rape Shield Laws*, 51 Drake L. Rev. 45, 49-51 (2002) (discussing the history of rape shield laws).

6. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. L. Rev. 51, 53 (2002).

7. *Id.*

8. Tilley, *supra* note 5, at 53.

9. *Id.* at 52-53.

10. Anderson, *supra* note 6, at 81.

11. *Id.* at 82-83.

12. *Id.* at 84.

13. *Id.*

14. *Id.*

15. CAL. EVID. CODE § 1106 (2004).

16. COLO. REV. STAT. 13-25-131(2004).

17. HAW. REV. STAT. § 412 (2003).

18. I.A. CODE EVID. Ann. art. 404 (2004).

19. ME. R. REV. RULE R. 412 (2003).

20. MASS. GEN. LAWS, ch. 233, § 21B (2004).

21. N.J. STAT. ANN. § 2A:61B-1(d) (2004).

22. WIS. STAT. § 972.11 (2002).

23. Cal. Evid. Code § 1106 (2004).

24. 603 N.E.2d 1337, 1343-1345 (Ind. 1992).

25. *Id.* at 1343.

26. 742 N.E.2d 453, 457 (Ind. 2001).

27. IND. R. EVID. 403 (2004).