

## CONSENT V. CREDIBILITY: THE COMPLICATIONS OF EVIDENTIARY PURPOSE RAPE SHIELD STATUTES

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*In an effort to combat the problem of prosecuting rape in the United States today, nearly all states have developed some form of a rape shield law, whereby a victim's sexual past cannot be used as evidence in the courtroom. Further investigation shows, however, that this is anything but true and clear. A victim's sexual past can sometimes be brought up, if cleverly argued, based on certain exceptions found in a given state. In particular, California's approach to enforcing this statute comes with problems for both the accused and the alleged victims, inevitably rendering rape shield law ineffective.*

### INTRODUCTION

The issue of rape in the United States has become an increasingly sensitive, yet crucial topic in courtrooms today. A number of challenges befall the alleged victims in rape cases involving mental and psychological fear, proving the act actually occurred in a common battle of “he said, she said,” and reliving the event before a judge, lawyers, and a filled courtroom. In the 1970s, with the momentum of feminism and a more liberal ideology in general gaining acceptance, important measures were pressed upon U.S. legislatures. Throughout this time, law enforcement agencies assisted in pushing for a number of “rape shield laws,” whereby an alleged victim’s sexual past could not be brought into evidence in the courtroom. The first rape shield statute was passed in Michigan in 1974, and by 1976 over half of the states had enacted some form of a rape shield statute. Presently, only one state in the U.S. – Arizona – does not have a rape shield law.

### OBJECTIVES/DESIGN

Rape shield laws strike at the heart of both due process and victim protection – both important aspects in upholding the integrity of U.S. courtrooms. Legislators took these factors into account while constructing the rape shield laws as they stand today. One such objective was to reverse the conception that use of a complainant’s general sexual reputation as evidence was admissible to infer consent and also to attack credibility (*Summitt*). An additional purpose of such statutes was “to protect rape victims from degrading and embarrassing disclosure of intimate details about their private lives” (*Summitt*). Another aim was that rape shield laws would “encourage rape victims

to come forward and report the crimes and testify in court” while offering this protection into personal sexual past (*Summitt*). Finally, but not least importantly, the statute should not conflict with the Constitution, thus protecting the Sixth Amendment rights of alleged offenders (161). Since rape shield laws differ across states, scholars observe four different approaches to implementing rape shield law. These different approaches imply different executions, as well as different evaluations, from the judges and juries in such cases.

The four approaches are the following: the Michigan, or *legislative exception* approach; the New Jersey, or *judicial discretion* approach; the Federal, or *constitutional “catch-all”* approach; and finally the California, or *evidentiary purpose* approach. All have their own strengths and weaknesses, yet collectively they have resulted in confusion and inefficiency in prosecuting rape. For the purposes of this paper, I will examine only the California approach, looking at two cases along the way to illustrate the challenges that are faced with such a vaguely defined methodology. The California approach highlights the faulty implementation of rape shields laws across the United States. As will be further explained, what appears to be a fairly straightforward methodology in effect actually turns into something much more confusing. Similar types of complications surprisingly arise in all four approaches, and California’s style is one of the most conflicting.

## ISSUE

Rape shield laws as they stand now are not serving their intended objectives. There is a general sense of confusion and misguidance across the country as to how to correctly enforce this law, as judges are left with undefined scripts in deciding upon the conflicting viewpoints of this controversial legislation. The struggle involves balancing due process, and at the same time, protecting the victims’ testimony and identity. So far, judges have discretion that may or may not apply to the current standards, thereby potentially compromising both parties in the courtroom. Further refinement of rape shield laws, and preferably one which all states can adhere to, would address the important concept of rape in a serious manner and ideally result in more just and successful prosecution.

This paper will present the California approach to implementing the rape shield law and the additional states that follow this general design, as well as the relevant commentary and criticism regarding this type of approach. I will introduce these problems in addition to supplying two cases where rape shield laws were of particular significance, briefly describing the judicial balancing in each case. At the end of the report, I will also raise problems and a number of questions that may help in the development of a new, more straightforward policy in the future.

## IMPLEMENTATION

### CALIFORNIA – EVIDENTIARY PURPOSE

California was the first of four states that have come to follow this particular way of implementing rape shield laws in the courtroom. This method is unique in that it divides past sexual history into two categories: 1) evidence that goes toward proving the defense of consent, and 2) evidence offered to attack the credibility of the accuser (Wallach 497). Though the original idea of rape shield laws was to discount the past sexual history of the alleged victims, this approach manipulates such a stance, allowing certain poorly defined exceptions.

The four states that fall within this alternatively known *evidentiary purpose approach* determine the admissibility of a woman's sexual history based on the purpose for which the evidence is offered at trial. In California and Delaware, a complainant's sexual history offered to prove her consent to sexual intercourse with the defendant is prohibited, but the same evidence offered to attack her credibility is admissible (Anderson 3). In Nevada and Washington, the standard is exactly the opposite: a complainant's sexual history offered to attack her credibility is prohibited, but the same evidence offered to prove her consent to sexual intercourse with the defendant is admissible (Anderson 3).

### GENERAL PROBLEM

Besides each pair of states handling the matter in completely contradictory manners, there are inherent problems with justifying the use of rape shield laws in either style. Critics of the California approach argue that the statute is basically ineffective if a trial court rules that the submitted evidence attacks credibility rather than proves consent, or vice versa in the states of Nevada and Washington (Wallach 497). The statute does not do a sufficient job of distinguishing between the evidence that proves consent and that which proves credibility. In essence, evidence that attacks credibility and evidence that proves consent are actually "functional equivalents" (497). Defendants can thus claim that evidence of the victim's past sexual history falls in the category for which their state has an exception.

The following cases will illustrate the inherent problems with the rape shield law as it applies to these states, and the confusion that causes so many rape case verdicts to attract so much negative attention. The first, *Fowler v. Sacramento County*, deals with the acceptance of consent over credibility in California. The second, *Summitt v. State*, takes issue with credibility over consent in Nevada.

**CASE STUDIES***FOWLER V. SACRAMENTO COUNTY*

In the recent case of *Fowler v. Sacramento County*, the defendant, Jeff Fowler, was charged with sexual assault and annoying or molesting a minor. He was later convicted of the latter charge against the victim in violation of California Penal Code §647.6 following a jury trial in which he was restricted from cross-examining the victim. The primary issue in cross-examining the accuser was her involvement in two prior incidents in which she alleged that other men had molested her.

The victim accused the defendant of engaging in a sexually explicit conversation with her, as well as applying lotion to her person inappropriately, whereby the defendant allegedly applied the lotion to the subject's breasts, nipples, back and thighs (*Fowler*).

The defendant denied these claims, stating that the alleged "sexually explicit" conversation was initiated when the victim's father informed Fowler that the victim was engaging in inappropriate behavior with her step-brothers, and that he was only trying to "counsel" her. Fowler also acknowledged applying the lotion to the victim's lower legs, arms and possibly her shoulders and back, but denied having touched her thighs, groin, stomach, breasts or nipples (*Fowler*).

The trial court granted the State's motion to reject the cross-examination of the alleged victim. It first explained that there was no "indication" that she actually overreacted or lied in the prior incidents and that the facts of the prior accusations were "very dissimilar" from those here. It then weighed the evidence pursuant to California Evidence Code § 352 against the facts that its introduction "would consume an inordinate amount of court time," "would be extremely confusing to this jury," and "would be significantly more prejudicial than it would be probative" (*Fowler*). Without the cross-examination, Fowler had little else to rely on in his defense and he was found guilty.

On appeal, the judges concluded that the proffered cross-examination would have been relevant to the jury's decision in evaluating the victim's credibility or reliability and that the absence of this process violated Fowler's Sixth Amendment right to confrontation. They further stated the trial court's decision to take into account the factors of waste of time, confusion of the issues, and prejudice was "unreasonable" (*Fowler*). Finally, because the victim's testimony was crucial to the State's case, which, in any event, was not strong, they concluded that the error had substantial and injurious effect or influence in determining the jury's verdict.

The appellate court reversed the district court's order denying Fowler's petition for a writ of habeas corpus and remanded the case for issuance of a conditional writ.

**EVALUATION OF *FOWLER***

Examining this case, it is fair to say that the appellate case provided a legitimate argument for reversing the decision. They did, in fact, abide by the rape shield statute in California, acknowledging that while the victim's consent had no relevancy in the case, her credibility could have been examined according to past sexual experiences, specifically prior incidents that occurred years before. Having this knowledge may have allowed the alleged victim to fabricate the story.

The problem is that the trial court had no exact guidelines to abide by in weighing the probative weight of the potential cross-examination. They did hold a hearing, and thought that in evaluating the time and effort it would take into account, as well as the prejudice of hearing such an argument, the cross-examination would not be justified. In their eyes, the cost of allowing this process would have undermined the rape shield law's intentions. The appellate court did not see it this way.

***SUMMITT V. STATE***

In the landmark case of *Summitt v. State*, the trial court originally found defendant Vernon Summitt guilty of two counts of sexual assault. Summitt was allowed to appeal based on the argument that the district judge erred in excluding testimony centered about a prior similar sexual experience of the victim.

At the jury trial, Summitt sought to introduce evidence of a prior sexual experience of the victim, which included intercourse, fellatio and the fondling of the victim's genitalia. The prior assault had occurred two years before the crime at issue, in the same trailer park, and involved the same victim and her nine-year-old girlfriend, who was also a witness in the *Summitt* case. Summitt offered the testimony to show that the young victim had prior independent knowledge of similar acts which constituted the basis for the present charge. In this case, the evidence was inadmissible, and Summitt was found guilty (*Summitt*).

The Supreme Court of Nevada determined that such evidence was relevant to dismiss the complainant's credibility in that it could establish that she had the means and ability to fabricate the charge. To uphold the constitutionality of the statute, the court held that, despite the prohibition on evidence offered to impeach the complainant's credibility, the accused must be afforded the opportunity to demonstrate to the trial judge that the probative value of such credibility evidence outweighs its prejudicial effect in a particular case.

**EVALUATION OF *SUMMITT***

Although the credibility provisions of the Washington and Nevada rape shield statute are very restrictive, their consent provisions suffer from the opposite defect (Galvin 902). Because there are no substantive limitations

on evidence offered to prove consent, there is always the risk that judges will too readily assume that prior consensual sexual activity makes consent on the occasion in question more likely. The lack of any restrictions on the exercise of discretion in this area is cause for some concern.

Although Nevada carries the policy of not allowing evidence that attacks the credibility of the victim, they allowed it in the case of *Summitt*. Why? It was their argument that the defendant should have been given the opportunity to present the evidence and then have it weighed for probative weight. A hearing to evaluate this – as in the case of *Fowler* – never took place. In this regard, inconsistency is not only found in the law itself, but also in the procedure to enforce it.

## CONCLUSION

The above cases show the fine line between evidence proving consent and evidence impeaching credibility. This is the flaw in the California approach. The discretion given to the trial judge, without specific guidelines, is unfair and risks violating a defendant's constitutional rights, as well as undermining the legislative intent of the statute – the protection of the victim.

The California approach to rape shield legislation suffers from ambiguity regarding which uses of sexual conduct evidence are intended to be prohibited. Different states using this general approach have adopted reverse formulations of the conflict between consent and credibility, which demonstrates the confusion evidenced in the aforementioned cases. As the case law illustrates, the categories of consent may be proven and credibility may be attacked in either a benevolent or an offensive fashion, which causes the crack in the system we see today.

It should be apparent at this point that there is a serious problem with how rape shield laws are being enforced. Sometimes the courts stand by the legislated exceptions, sometimes they do not. Sometimes they take into account the probative weight of evidence, sometimes they do not. There is no clear-cut way to decide on these matters, and this causes unrest in rape trials, further complicating the hopes of receiving a fair trial for both sides. Particularly for rape victims, the lack of certainty and agreement as apparent in these cases perpetuates the fear and hostility of pursuing a rape case, seeing as how an alleged victim's prior sexual history may or may not be admitted based on the judge's uninformed guidance.

The challenge of implementing rape shield laws in general is hard enough to enforce given the wide parameters of each state's laws. However, when adding the complications of these four approaches, it is apparent that there is a major problem facing rape statute law.

What can be done about this situation? Should a rape shield law even exist if it can easily be circumvented by a rights argument? What would throwing out the rape shield law do to the U.S. judicial system? To apply so

many exceptions and conditions to the law further complicates judges' ability to decipher what may be relevant and not. It seems that if all but one state are willing to accept some form of rape shield law, then this country should be willing to compromise as to a more uniform decision on how to enforce it. By separating the law into four different approaches, the aim of prosecuting rape in the United States will never be successful, as it will depend primarily on where the trial occurs, and additionally who is trying the case. It is clear that rape shield laws, particularly those employing the aforementioned approach, are in desperate need of reform.

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