THE GLEN RIDGE TRIAL: NEW JERSEY'S CUE TO AMEND ITS RAPE SHIELD STATUTE

*Linda Robayo**

I. Introduction

"Hanging out" after school, maybe "shooting some hoops":

* B.A., Psychology, Boston College, 1989; J.D., Seton Hall University School of Law, anticipated June 1995.

these carefree activities are enjoyed by teenagers nationwide. Ann Jones,[1] although not your typical teenager, was just hanging around in Carteret Park, located in Glen Ridge, New Jersey.[2] She was playing basketball when she was approached by an acquaintance.[3] Christopher Archer, a peer and neighborhood boy, put his arm around her and promised her a date with his brother Paul if she would accompany him to meet some friends.[4] Ann, somewhat reluctantly, agreed.[5]

---

[1] "Ann Jones" is a pseudonym. The victim's name shall remain anonymous.

[2] PETER LAUFER, A QUESTION OF CONSENT—INNOCENCE AND COMPLICITY IN THE GLEN RIDGE RAPE CASE 8 (1994). Glen Ridge is located seven miles away from Newark, one of the most poverty-stricken cities in the state of New Jersey. *Id.* at 12. The upper-middle class town of Glen Ridge is studded with large homes and picturesque lawns. *Id.* at 13.

[3] *Id. See also* Christopher Kilbourne, *Glen Ridge Trial Set to Begin, Will Break Legal Ground*, N.J. RECORD, Oct. 14, 1992, at A1 (describing the prosecution's contention that Christopher Archer led the victim to the basement where she was forced or coerced into performing various sexual acts).

[4] *See* Kilbourne, *supra* note 3, at A1. Ann Jones, Christopher Archer, and the Scherzer twins attended the same Glen Ridge kindergarten class. LAUFER, *supra* note 2, at xvii. When Ann Jones was five years old, the Scherzers and other neighborhood boys convinced her to eat dog feces. *Id.* at xviii. When Ann Jones was eleven years old, she attended a Glen Ridge summer tennis camp. *Id.* There, Christopher Archer joined other Glen Ridge kids in taunting Ann by calling her "retard" and "stupid." *Id.* As a little girl, Ann was the only one to obey a command to eat mud shaped to resemble a chocolate bar. *Id.* Later, as a teenager, Ann attended special classes in West Orange but played on the Glen Ridge basketball and softball teams. LAUFER, *supra* note 2, at 28. Her reputation as being retarded was well known to all the Glen Ridge kids, including the defendants. *Id.* at xviii. In fact, one Glen Ridge teenager stated, "[y]ou didn't hear [Ann Jones's] name without the word retarded attached to it for years. Everybody knew that." *Id.* at 31. *See also* Christopher Kilbourne, *Glen Ridge Victim's Testimony Called Key*, N.J. RECORD, Nov. 9, 1992, at A1 (describing how the Glen Ridge rapists lured their victim to the basement because "they knew they could get away with it").

[5] LAUFER, *supra* note 2, at 8. A classmate of the defendants described them as "the big group in school." *Id.* at 32. "They got the girls. Maybe that's what it all comes down to. They got the girls." *Id.* The classmate goes on to say:

> The main thing was they were the one group that you couldn't just get in with if you wanted to. I mean if you wanted to get in with the druggies, you did drugs. You could get in with the druggies. If you wanted to get in with the smart people, I mean you can't just be smart, but you could hang out with those kids if that's what you wanted to do. The people in the band, you could hang out with them if that's what you wanted to do. But these guys, they had to pick you to hang out with them. You couldn't just, if you wanted to, you couldn't just say, 'Hey, I'm going to hang out with the Scherzers.' People thought they were jerks, but when you're that age even if you think someone is a jerk, you could still be jealous of them. They acted like they owned the school and they had the girls.

A young woman normally might not be so easily persuaded. Ann, however, had an I.Q. of 64.[6] Her social and intellectual capacities were equivalent to that of an eight year old.[7] Thus, Ann believed that if she did as Christopher asked, she would actually date his brother Paul.[8] This meant she could shed the outcast image that had dogged her since early childhood.[9] She did not expect, however, to be led to a basement with chairs arranged to resemble a movie theater.[10]

Ann was then led to a couch where she was persuaded to remove her clothing and perform oral sex on one of the neighborhood boys.[11] Christopher Archer, amidst the boys' laughter, encouraged Ann by yelling, "Go further! Go further!"[12] Her peers instructed her to masturbate herself, and she complied.[13] The young men continued their cheers while members of their group

---

Id.

The defendants' classmate further described their demeanor as they dominated the school grounds: "They looked like they were *it*." *Id.* The victim, swayed by the defendants' popularity and her need to fit in socially, followed Christopher Archer to the Scherzer home. *Id.* at 8, 48-49. The victim later stated, "It was romantic because he had his arm around me." *Id.* at 8. This statement reveals the emotions felt by the victim in being approached by Christopher Archer, emotions she had probably previously only dreamed about. This is the author's own determination.

6 *See* Wendy Lin, *Rape Victim Was "Childlike,"* NEWSDAY, Mar. 17, 1993, at 35 (stating that the victim, aged seventeen at the time of the attack, could not figure out what coins made up one dollar nor could she take public transportation by herself); *A Real Sickness Behind Glen Ridge's Gang Rape*, N.J. RECORD, Mar. 18, 1993, at B6 (stating how the Glen Ridge victim thought the United States was comprised of only five states and how she could not cut a pie in half) [hereinafter *A Real Sickness*].

7 *See A Real Sickness*, *supra* note 6, at B6.

8 *Id.* The victim relayed to Essex County Prosecutor Robert Laurino that she lingered at the Scherzer house after the attack in hopes that the date would still occur. *Id.*

9 Christopher Kilbourne, *Psychiatrist Defends Glen Ridge Accuser*, N.J. RECORD, Jan. 6, 1993, at A3.

10 LAUFER, *supra* note 2, at 9.

11 *Id. See also* William Glaberson, *Assault Case Renews Debate on Rape Shield Law*, N.Y. TIMES, Nov. 2, 1992, at B1, 6 (supporting the fact that the issue was not whether the incident had occurred but whether the victim had consented).

12 LAUFER, *supra* note 2, at 9. The young men also surrounded the victim while literally cheering her on. Christopher Kilbourne, *What Really Happened in the House on Lorraine Street?*, N.J. RECORD, Sept. 6, 1992, at A31, 36. Additionally, the perpetrators goaded the victim and one another with their mocking shouts of encouragement, even calling the victim a "whore" as the assault was in progress. Christopher Kilbourne, *Grand Jury Names Four Teens -Indictments Handed Up in the Glen Ridge Sex Case*, N.J. RECORD, May 23, 1990, at A1, 14.

13 LAUFER, *supra* note 2, at 9.

covered a broomstick, a baseball bat, and a wooden stick with plastic bags and vaseline.[14] These objects were then used to rape Ann.[15] Their shouts of encouragement changed to, "Put it up further!"[16] When they were done, they told Ann she could leave.[17] Before she left, however, they threatened to tell her mother about what had occurred and said she would be expelled from school if she revealed anything.[18] Ann believed their threats just as she had believed the promise of the date.[19] She later testified in court that she waited in the basement after the assault had ended hoping the "date" would still occur.[20]

Unlike rape victims who are attacked by strangers, Ann was raped by her peers.[21] She did not stop the incident because she did not want to alienate the young men whom she considered her friends.[22] These "friends," however, bragged about their conquest throughout the Glen Ridge High School.[23] Amidst the rumors, fifteen days after the assault, the Glen Ridge High School principal called the police and subsequent criminal investigations led to a trial.[24]

---

14 LAUFER, *supra* note 2, at 9-10. *See also* Laurie Goodstein, *Girl's Low IQ At Issue in Assault Trial: Defendant's Argue Sex was Consensual*, WASH. POST, Oct. 25, 1992, at A3 (reciting the objects with which the victim was penetrated).

15 LAUFER, *supra* note 2, at 10.

16 *Id.*

17 *Id.* at 11.

18 *Id.*

19 Eileen Herbert Jordan, *My Love Cannot Protect Her*, REDBOOK, July 1993, at 35.

20 *Id. See also* LAUFER, *supra* note 2, at 41 (explaining that Ann viewed the date as acceptance into the normal social group).

21 LAUFER, *supra* note 2, at 150.

22 *Id.* at 20. After the prosecutor, Robert Laurino, finished his direct examination of Ann Jones, he asked her, "Are those boys still your friends, the four boys?" *Id.* at 126. She replied, "Sort of," and Laurino asked, "What do you mean sort of?" *Id.* "I mean I still care about them." *Id.* The victim also testified in court that she did not attempt to prevent the rape because "she didn't want to hurt their feelings." Christopher Kilbourne, *Glen Ridge Accuser Takes Witness Stand - Describes Sex Acts to Packed Courtroom*, N.J. RECORD, Dec. 10, 1992, at A1.

23 LAUFER, *supra* note 2, at 20.

24 *Id.* at 19. The rape occurred on March 1, 1989. Ann kept silent for three days before confiding in her swimming coach. Less than a week after the assault, Ann's mother was informed by a social worker of what had occurred. *Id.* at 20. Ann's mother did not initially believe what she heard, causing the social worker to feel no obligation to inform the Glen Ridge High School officials or the police. Meanwhile, there were rumors of the incident in which Ann was being portrayed as a willing participant. LAUFER, *supra* note 2, at 27. It is believed that at least one teacher heard and ignored the rumors. *Id.* at 20. It was during the middle of March that the de-

During the judicial proceedings, Ann was actually on trial.[25] This occurred despite the severity of the defendants' actions, which led to convictions of first-degree aggravated sexual assault, second and third-degree conspiracy to commit criminal sexual conduct, and second-degree attempted sexual assault.[26] Ann was victimized twice: first, by the rape; then by the defense attorneys' circumvention of New Jersey's rape shield statute.[27] The judge allowed them to introduce into evidence Ann's past sexual conduct to demonstrate her consent to the March 1989 incident.[28] One defense attorney[29] reverted to the pre-rape-reform strategy by saying in his opening statement that "girls will be girls and there are some girls who are Lolitas."[30] This tactic was permitted because the judge

---

fendants' classmate, Charles Figueroa, reported to school officials the defendants' wishes that he join them for a "second session" with the victim. *Id.* The defendants requested he videotape the next event.

That was Mr. Figueroa's second attempt to apprise the school officials of what had occurred - his first was days after the assault. *Id.* at 21. Mr. Figueroa, the unsung hero in this tale, told news reporters of the skepticism he faced when initially reporting the incident to school authorities. LAUFER, *supra* note 2, at 21. During Figueroa's second report to school officials, he was advised not to tell police about the defendants' request that he videotape any future attacks on the victim. On March 22, three weeks after the rumors and gossip began, the high school principal claimed he first heard of the incident and "dutifully" called the police ten minutes later. *Id.* Laufer recounts that there was a fifteen-day delay between the first time a Glen Ridge high school teacher heard about the incident and the first call the high school principal made to the police. A retired New Jersey Superior Court judge was hired and paid $5,000, based upon a recommendation by a Glen Ridge school board attorney, to conduct an investigation into the school's handling of the charges against the students. The judge, in his report exonerating the school of any blame, wrote that it was absurd to lay the responsibility at the doorstep of the school. LAUFER, *supra* note 2, at 21. He also wrote that it was the responsibility of the victim's parents to contact the police. *Id.*

25 *See infra* notes 224-30 and accompanying text.

26 *The Accused, the Accusations, The Glen Ridge Trial: An Overview,* N.J. RECORD, Mar. 17, 1993, at A9.

27 The Rape shield statute is one which restricts or prohibits the use of evidence respecting the chastity of the victim of a rape or other sexual offense. BLACK'S LAW DICTIONARY 1376 (6th ed. 1991). *See infra* notes 186-207 and accompanying text for a discussion on New Jersey's rape shield statute.

28 LAUFER, *supra* note 2, at 64-66.

29 LAUFER, *supra* note 2, at xii. Michael Querques, defendant Kevin Scherzer's lawyer, is in private practice in Orange, New Jersey. *Id.*

30 Christopher Kilbourne, *Defense Blames Accuser's Mom: Fiery Summation in Glen Ridge Case,* N.J. RECORD, Feb. 10, 1993, at A5. Querques referred to a supposed correlation between a woman's breast size and her sexual appetite. Tracy Schroth, *"Lolita" Defense Risky in Glen Ridge Sex Trial,* 132 N.J.L.J., Nov. 2, 1992, at 1, 28. He described the victim as a "full-breasted, full-blown young lady who liked to see the joy on a boy's

ruled that evidence of the victim's past sexual conduct was necessary to conduct a fair trial.[31]

Despite the circumvention of the New Jersey rape shield statute, the attackers were found guilty of first-degree crimes.[32] The prosecution's triumph was quickly undermined by the judge's sentence mandating that the rapists serve time in a "campus-like complex for young offenders."[33] Judge Cohen, explaining his decision, said that he did not want the defendants to spend unnecessary time incarcerated if their convictions were overturned on appeal.[34]

---

face when he ejaculates and hungered for sex the way a starving person hungers for food." *Id.* at 28. Querques also compared a young man's sexual appetite to a "switch that 'goes off' and must be immediately satisfied" while attributing the defendants' actions to "out-of-control hormones and a society obsessed with sex." *Id. See also* Christopher Kilbourne, *Protestors: "Lolita Excuse Won't Work"*, N.J. RECORD, Oct. 25, 1992, at A3 (depicting how Querques' remarks sparked a demonstration where approximately 200 people marched through Glen Ridge shouting, "Boys will be boys, men will be men, that excuse won't work again").

31 LAUFER, *supra* note 2, at 64. An Essex County Superior Court judge determined in a preliminary hearing what evidence would be permitted to circumvent the rape shield law. Robert Hanley, *Judge Rules Sexual History is Admissible in Trial*, N.Y. TIMES, Aug. 29, 1992, § 1, at 21. He stated "that the need to protect the woman was outweighed in this case by the right of the defendants to a fair trial," and "[the] [b]edrock in our system of justice is the constitutional right to a fair trial." *Id.* The judge believed it was crucial for the jury to hear about the victim's sexual history to unravel the differing issues: the prosecution's argument that she was mentally defective and incapable of consenting to the acts involved in the assault, and the defense's contention that she willingly participated and clearly understood what occurred. *Id.* at 21, 25.

32 Robert Hanley, *Three Are Sentenced to Youth Center over Sex Abuse of Retarded Girl*, N.Y. TIMES, Apr. 24, 1993, § 1, at 1. Christine McGoey, coordinator for the Essex County NOW chapter, expressing relief over the verdict stated, "The jury said 'no, this woman is not going to be blamed for this.' Boys can't just be boys." Carol Ann Campbell, *Guilty Verdicts Bring Tears But No Outbursts*, N.J. RECORD, Mar., 17, 1993, at A8.

33 *Id.* Their sentence could run as long as fifteen years, but also as short as twenty-two months. The judge ruled that the convicted sexual abusers could remain free on bail while seeking relief through the appellate courts - a process that could take an indeterminate number of years. *Id.*

34 *Id.* Two legal measures are used to determine whether convicted criminals can remain free on bail while appeal actions are attempted. Hanley, *supra* note 31, at 1. First, whether they "posed serious threats to the community," and second, "whether they had 'substantial' legal grounds to ask a higher state court to overturn their convictions." *Id.* The judge, in support of his decision, referred to the New Jersey Appellate Court's overturning of Margaret Kelly Michael's sexual assault conviction for which she spent almost five years in prison without bail until her appeal was heard. *Id.* at 28. *See also* Robert Hanley, *Revocation of Bail Sought in Glen Ridge Abuse Case*, N.Y. TIMES, May 15, 1993, § 1, at 24 (describing how the National Organization of Women delivered a box of 4,000 signed, pre-printed postcards to New Jersey's Supreme Court criticizing the judge's lenient sentences).

The following claims are among the few that may be included in a future appeal:

The dredging of the victim's past sexual conduct at the trial greatly resembled the tactics used prior to the enactment of rape shield laws. As of the early 1970s, a defendant accused of rape was free to submit evidence of a female sexual assault victim's reputation and past sexual history to refute the charges against him.[35] Rape shield laws, however, were enacted as a result of the Women's Liberation Movement during the 1970s.[36] These laws were designed to prevent defendants from using a victim's past sexual conduct as a means of refuting a rape accusation.[37] The laws, however, varied nationwide; some offered the victim protection while infringing on the defendants' opportunity to present evidence, while others granted state judicial systems great latitude in determining the relevancy of such evidence.[38]

Four types of rape shield statutes have evolved.[39] These four approaches vary in their extent to restrict the introduction of past sexual history evidence.[40] New Jersey's rape shield statute at the time of the Glen Ridge trial embodied a lenient approach by allowing the judge wide discretion in admitting evidence of a victim's past sexual conduct.[41]

---

the Superior Court judge should have declared a mistrial after discovering that a juror led his colleagues in a prayer session for the victim; when Glenn D. Goldberg, an Essex County assistant prosecutor, sang the "Sounds of Silence" by Simon & Garfunkel he violated the defendants' right to remain silent since they did not testify at the trial; the joint trial deprived the defendants of a fair trial since they were tainted by the evidence brought out about all of them. Christopher Kilbourne, *Defense Lawyers Say State's Errors Warrant New Trial*, N.J. RECORD, Mar. 17, 1993, at A9.

35 Ann Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, 25 LOY. L.A. L. REV. 757 (1992).

36 Andrew Z. Soshnick, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. CRIM. L. & CRIMINOLOGY 644, 647 (1987).

37 James G. McGuinness, *Montana's Rape-Shield Statute: No Time to Waste!*, 52 MONT. L. REV. 125, 127 (1991).

38 *Id.* at 142-46. McGuiness recommends two approaches for current rape shield statutes to combat these problems. *Id.* at 142. One, courts should elevate their state interest in protecting the victim above defendants' right to confront a witness. They can justify their actions by stating rape is separate from other criminal proceedings since the legislature has enacted separate statutes for rape. *Id.* at 143. Two, statutes should be complex and elaborate in listing their exceptions to the ban on inadmissible past sexual conduct, as this would eliminate all foreseeable problems regarding the admissibility of such information. *Id.* at 142.

39 *See* Galvin, *infra* note 130, at 871-903.

40 *Id.*

41 *Cf.* Lani Anne Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1115 (1993).

The 1992 Glen Ridge trial exposed the weaknesses of New Jersey's rape shield statute.[42] This note will describe the four types of rape shield statutes while focusing on the four provisions of New Jersey's new rape shield law. This note will also discuss how traditional male-female socialization contributes to date and gang assault.

II. Background Information on Rape

A. *Why Does Rape Occur?*

Rape is not a biological function.[43] Various researchers state that men do not rape instinctively.[44] Our society must acknowledge that rape is not a genetically programmed action, but rather that we have produced rapists through our own socialization.[45]

Since ancient times, laws did not protect the rape victim.[46]

---

42 LAUFER, *supra* note 2, at 64. A. 2085, as a response to the Glen Ridge trial, was introduced in the 1993 legislative session. *See infra* note 211 and accompanying text. The bill, however, did not progress past the Senate. *Id.* It was reintroduced in the 1994 Legislative session as A. 677 and was signed into law on August 11, 1994. Ivette Mendez, *Shielding the Victim*, STAR LEDGER, Aug. 12, 1994, at A1, 13.

43 SUSAN BROWNMILLER, AGAINST OUR WILL 12-13 (1975). Brownmiller's book illustrates that no trained zoologist to her knowledge has ever observed animals raping in their natural habitat. *Id.* at 12. In monkey society, for example, the male cannot mate without the female's invitation and cooperation. *Id.* at 13. A student of animal behavior stated that "[i]n monkey society there is no such thing as rape, prostitution, or even passive consent." *Id.* TIMOTHY BENEKE, MEN ON RAPE - WHAT THEY HAVE TO SAY ABOUT SEXUAL VIOLENCE 10 (1982) quotes anthropologist Peggy Reeves Sanday who states that a harmonious society is usually rape-free. Sanday claims that violence is socially, and not biologically, programmed. Rape is not an inherent male tendency. It is, instead, the avenue through which men, conditioned with violence, find social expression. Men who are socialized to respect life and women do not violate a woman's life. *Id.*

44 ROBIN WARSHAW, I NEVER CALLED IT RAPE—THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE 92 (1988). This study explains how male beliefs in macho dogma are indoctrinated by other men such as uncles, coaches, grandfathers, and pop stars, to name a few, through verbal and nonverbal cues. Such cues teach boys that it is acceptable to be selfish and self-centered about sex and to view women as objects from whom sex is taken. *Id.*

45 *See infra* notes 52-128 and accompanying text The primitive male eventually discovered that due to his genitalia he was a natural predator and could dominate women. BROWNMILLER, *supra* note 43, at 16. Women, fearing violation from these same men, began to look to them for protection. *Id.* This pattern established male dominance. *Id.*

46 BROWNMILLER, *supra* note 43, at 17. Brownmiller delineates the primitive custom of "bride capture." *Id.* Men, through this custom, took title to females via rape. This method was an acceptable means of securing a wife and existed in England until

Specifically, women have been viewed as the property of men.[47] Although women had been traditionally regarded as property, the occurrence of a rape, ironically, enabled the victim and her family to acquire property.[48] A rapist in thirteenth century England, for example, could lose his life and have his property given to the victim.[49] The rape victim's father, however, could force her to marry her rapist if doing so would increase the family fortune.[50] A woman's individual worth was not a consideration because she was valued only if she was chaste, and then only for whatever wealth such chastity could amass.[51]

Unfortunately, modern male-female socialization has its roots in these customs.[52] Obviously, women and men have been socialized differently.[53] As girls, many women are taught to be demure and lady-like.[54] Young girls learn, from their mothers' example,

---

the late 15th century. Also, in ancient Hebrew culture, virgins were bought and sold for fifty pieces of silver. *Id.* at 19. This price represented a man's title to her chastity. *Id.* at 19-20. This was evidenced by the fact that only virgins could be sold while non-virgins were given away as concubines. A man could also atone for his raping of a virgin by paying the money to her father. She had no right to refuse the offer. *Id. See also* MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR 48 (1989) (explaining how in Islamic cultures the custom of "purdah" incorporates the donning of a heavy burka which covers the women from head to toe and results in the complete isolation and segregation of women as dictated by men).

47 BROWNMILLER, *supra* note 43, at 19. Moreover, during biblical times, Moses received a commandment against "the coveting of thy neighbor's wife" which was included in the same category as "thy neighbor's house, his field, his servant, ox, and ass." *Id.* Moses, however, did not receive "[t]hou shalt not rape" as one of the Ten Commandments. *Id.*

48 *Id.* at 25. This procedure was condoned by England's "King and Church" because, by accepting the rapist and his property, a woman was redeemed for having lost her chastity. *Id.*

49 *Id.*

50 *Id.* The victim would be dissuaded from marrying her rapist if doing so was not advantageous to the "domain of Church and King." *Id.*

51 *See infra* notes 54-66 and accompanying text.

52 This note refers to "male-female socialization" as a means to describe behavioral patterns imposed on an individual based on gender. This note does not assume all people are reared in this manner. It does, however, seek to recognize the dangers that have arisen because some segments of society have adhered to certain male-female restrictions when raising children.

53 *See infra* notes 54-66 and accompanying text. Additionally, rape can be viewed as a product of the learned relationships between men and women. BART DELIN, THE SEX OFFENDER 94 (1978). Many young boys learn that aggression and violence are indicative of virility and masculinity, while young girls learn to play "hard-to-get." *Id.* These behavior patterns are believed to perpetuate a "rape society." *Id.*

54 A "lady" is defined as "a woman of good social position, a woman of polite and

that women should serve men.[55] This duty is further entrenched into the psyche of young women through the careers traditionally chosen by and for women.[56] Girls are often encouraged to enter service-oriented fields, such as nursing or teaching.[57] Boys, conversely, see through various examples that their futures have no limitations.[58]

The encouragement toward ladylike behavior typically begins in early childhood.[59] Young girls are not often encouraged to play rough games or sports.[60] Some girls, as a result, do not realize that it is acceptable and sometimes necessary to engage in socially aggressive behavior.[61] If these girls had learned to experience such behavior, they might have attempted to fight off potential attackers instead of being helpless victims.[62]

Boys, however, learn from an early age that women, mothers, and sisters in particular, tend to serve them and their fathers.[63]

---

kindly behavior." OXFORD AMERICAN DICTIONARY 495 (Heald Colleges ed. 1980). The term "ladylike" is defined as "polite and suitable for a lady." *Id.* This behavior is characterized by quiet, caring, friendly, gentle, neat, kind, non-threatening conduct. ANDREA PARROT, PH.D., COPING WITH DATE RAPE & ACQUAINTANCE RAPE 42 (1993).

55 PARROT, *supra* note 54, at 42. Boys are rarely taught to cook, sew, and clean properly. These tasks fall primarily to girls, who later bestow them on the men in their lives. *Id.* at 42-43.

56 *Id.* at 43.

57 *Id.*

58 PARROT, *supra* note 54, at 45. Boys grow up seeing the most influential example available verifying their limitless futures: they learn that only boys are President of the United States. In fact, it was not until 1984, when Geraldine Ferraro ran for Vice President of the United States, that girls could entertain the possibility of being Vice President. *Id.* That was the last time when a woman received such intense media recognition in the political arena until Hillary Rodham Clinton did, almost 10 years later. This is the author's own determination.

59 PARROT, *supra* note 54, at 44.

60 *Id.* Girls, for example, are often taken to ballet, swim, and gymnastic classes. Boys, on the other hand, are urged toward football, baseball, wrestling, and hockey. *Id.* *See also* GORDON & RIGER, *supra* note 46, at 54 (illustrating how women are rarely taught to fight or to run fast, but instead are taught feminine behavior, thus increasing the differences between the sexes and the possibility of appearing weak to a potential rapist).

61 PARROT, *supra* note 54, at 44.

62 BROWNMILLER, *supra* note 43, at 402. *See also* GORDON & RIGER, *supra* note 46, at 54 (citing to statistics revealing that 63% of women believe they are physically weaker than both the average male and female, while only 28% felt they were better or equal in overall speed and strength when compared to the average woman). These statistics indicate that many women perceive themselves as physically weak and, as a result, may experience a greater fear of rape in their daily lives. *Id.*

63 PARROT, *supra* note 54, at 45.

Boys are encouraged to engage in rough sports and are even praised when they undergo painful physical contact with others.[64] Boys learn that their future success depends on their achievements in their chosen careers.[65] The success of young women, however, may be measured by whom they marry.[66] Society's disparate attitudes toward males and females establish the grounds for acquaintance, date, and gang acquaintance rape.

B. *Rape—It Is Not Always by a Stranger*[67]

Acquaintance, date, and gang acquaintance rape are often not viewed as real rape, or stranger rape.[68] This belief stems from society's acceptance of traditional male aggression and female passivity.[69] Male aggression is channeled into social and sexual

---

64 *Id.*

65 *Id.* at 43-44.

66 *Id.* at 44.

67 PARROT, *supra* note 54, at 25. Stranger rape is premeditated. It is usually a means for the rapist to degrade and overpower the victim. *Id.*

68 Steven I. Friedland, *Date Rape and the Culture of Acceptance*, 43 FLA. L. REV. 487, 488-89 (1991). *Stranger rape*, rape committed by a stranger, is usually thought of as "real rape," while the various forms of rape committed by an assailant known to the victim often do not receive the same amount of sympathy and moral outrage. *Id.* (emphasis added). The Glen Ridge victim experienced gang acquaintance rape. LAUFER, *supra* note 2, at 55. PARROT, *supra* note 54, at 23-24 defines the following:

> *Acquaintance rape* is forced sexual intercourse (or other sexual act) that occurs between two people who know each other. The relationship can be any acquaintanceship, including a date, teacher/student, friend of the family, friend, employer/employee, husband/wife, doctor/patient. Date rape is only one form of acquaintance rape. . . .
>
> *Date rape* is forced sexual intercourse (or other sexual act) that occurs between a dating couple or while on a date.
>
> *Gang rape* is forced sexual intercourse by more than one assailant. The victim may be unconscious from drinking and may not even know she is being raped. She may have consented to have sex with one man, and be forced by more.

Id.

Note that more than 50% of reported rapes occur by rapists known by their victims. LINDA FAIRSTEIN, SEXUAL VIOLENCE—OUR WAR AGAINST RAPE 129 (1993). Also, only 12%, or one out of eight, of all stranger or acquaintance rape cases result in convictions. Elaine D'Aurizio, *The Burden of Proof*, N.J. RECORD, Feb. 7, 1993, at L1.

In an acquaintance rape situation, so long as the defense can create doubt, then an acquittal results. *Id.* Society still believes the victim is responsible: it is argued that "[s]he shouldn't have driven him home . . . gone to his room . . . invited him into her apartment . . . kissed him . . . taken a drink." *Id.* at L1, 5.

69 Friedland, *supra* note 68, at 492. Males conforming to the aggressive male stereotype tend to take social and sexual initiatives. When interacting with females, sexual

domination.[70] Society's acceptance of such domination permits men to believe that women are objects from whom sex is taken.[71] This acceptance is further promulgated by the media—past and present.[72] The media, through movies and television, merges sex, coercion, force, and alleged passion into a complete, enticing package.[73]

---

pursuit may take a competitive form wherein the male seeks to attain his goal of sexual relations. This male stereotype permits men and society to accept unwanted male sexual aggression directed toward a provocative female. *Id.* at 495. In effect, the female's allure is viewed as a weapon, while the unwanted sexual aggression is accepted as self-defense. *Id.* at 495-96.

This phenomenon may be explained by the fact that girls are influenced both directly and indirectly by parents, teachers, playmates, and pop culture role models to be "passive, weak, and opinionless." WARSHAW, *supra* note 44, at 53. Boys, on the other hand, may be taught by the male figures in their lives (coaches, fathers, pop stars, for example) to be self-centered and single-minded about sex, to view women as objects from whom they can take sex instead of equals with whom they can communicate. *Id.* at 92. Additionally, it is boys who usually ask girls out on dates and they usually initiate sexual activity. Boys also learn that even if girls resist their sexual advances, they may succeed through persistence and cajoling. These differences allow some boys and men to feel physically and socially stronger than girls and women. *Id.*

70 Friedland, *supra* note 68, at 492. *See also* Maureen A. Pirog-Good & Jan E. Stets, VIOLENCE IN DATING RELATIONSHIPS 171 (1989) (citing the following as "risk factors" for date rape: a male's initiating and taking a dominant role during the date, miscommunication regarding sex, male acceptance of traditional sex roles).

71 Friedland, *supra* note 68, at 492. *See also* PIROG-GOOD & STETS, *supra* note 70, at 171 (stating that the person who initiates the date, pays for the date, and provides the transportation is usually male and has more power to plan the date around activities leading to sexual aggression).

72 PARROT, *supra* note 54, at 46. Parrot describes various popular movies and television shows promoting male-female stereotypes. For example, in the epic drama *Gone With The Wind*, Rhett carried a struggling Scarlett to bed and raped her. She was, however, deliriously happy the next morning. This, Parrot states, sent the message that women really want sex and can be forced because men are only giving them what they had wanted all along. Parrot also recounts a 1980s story featured in the soap opera *General Hospital*, in which Luke raped Laura and they later married. Parrot claims this sent the message that once Laura experienced Luke's sexual prowess, she married him to have continuous pleasure. *Id.*

73 WARSHAW, *supra* note 44, at 95. Warshaw, for example, describes a scene from the 1980s movie, *Saturday Night Fever*, that launched John Travolta and disco to new heights. Tony (John Travolta) asked the lead actress if he could walk her home. *Id.* She refused and he turned away. She turned, while walking in the opposite direction, and called out, "You shouldn't have asked, you should've just done it!" *Id.* The message sent to males is that asking could lead to rejection. Warshaw also depicts a 1987 *Moonlighting* episode which centered on David and Maddie's first sexual encounter. WARSHAW, *supra* note 44, at 96. The viewers had waited two years for this climactic moment. The two, instead of a mutually loving encounter, engaged in a bitter feud during which Maddie slapped David, called him a "bastard," and he called her a "bitch." *Id.* They then fell to the floor, breaking furniture and knocking over any-

C. *Teens, Sex, and Acquaintance Rape*

Teenage males and females are generally confused about their self-esteem and sexuality.[74] This, along with the media's depiction of male-female relationships, may increase the likelihood of acquaintance rape.[75] Teenagers, in fact, are the most susceptible age-group to committing and being victimized by acquaintance rape.[76] Parents, in addition to the media, share the responsibility for this phenomenon.[77]

Some parents, for example, fear their sons being homosexual more than they do their being sexually promiscuous.[78] This fear may present a tremendous barrier to parents' ensuring that their sons grow into kind, sensitive, and caring men.[79] Many men, as a result, believe that sexual conquests are synonymous with masculinity.[80]

---

thing in their way. They struggled on the floor before surrendering to their unbridled passion. This sent the message to males of all ages that women want violence and degradation when having sex. *Id.* at 96.

74 PARROT, *supra* note 54, at 37. Parrot states that "[teenagers] struggle through their relationships hoping to do the right thing, without knowing what the right thing is or how to accomplish it." *Id.*

75 *Id.* Teenagers often do not know what to do in a sexual situation. *Id.*

76 *Id.* at 36. Parrot cites the following reasons as responsible: young women lack experience regarding sexual encounters; teenagers today tend to have more freedom, thus encountering sexual situations earlier in life than did their parents; very few rules exist to govern teen dating; and teenagers receive conflicting messages from clergy, parents, peers, and the media. *Id.* High school sex education classes, instead of alleviating teens' sexual confusion, may succeed in augmenting their level of uncertainty. Nancy Gibbs, *How Should We Teach Our Children About Sex?*, TIME, May 24, 1993, at 60-61. Such classes often fail to address students' emotions and opinions. *Id.* School administrators fail to realize that films on biological reproduction and birth control methods do not address such problems as date rape and unwanted sexual pressure. *Id.*

77 Gibbs, *supra* note 76, at 62. Gibbs, quoting pediatrician Karen Hein of Albert Einstein College of Medicine in New York City, writes, "Adults have one foot in the Victorian era while kids are in the middle of a world-wide pandemic." *Id.* Hein describes sex education as being "only about vaginas, ovaries and abstinence - not about intimacy and expressing feelings." *Id.*

78 *Id.* at 64. Gibbs also refers to Manhattan social worker Joy Fallek's observation that some boys fear they might be gay if they have not had sex by age sixteen. *Id.*

79 *Id.* For example, Gibbs describes how some parents do not permit their young boys to watch the television show *Mr. Rogers* because they fear the boys will emulate his gentle manner. *Id.*

80 *See* Beneke, *supra* note 43, at 13. Beneke cites to popular male argot comparing sexual encounters with sport or object-like references. *Id.* For example, "[s]ex [as] a game: 'I hope I *score* tonight'; 'I *struck* out with her.'" *Id.* "Sex [as] being serviced by a woman: 'She wouldn't *put out for me.* She *did it for him* but she wouldn't *do it for me.*'"

Most young women, on the other hand, are still told to wait until marriage before experiencing sexual intercourse.[81] Also, the patriarchal double standard continues to dominate our society: it is acceptable for a male to have frequent sexual encounters with multiple partners, but this is not acceptable for a female.[82] Young women who choose to be sexually active may be considered "sluts."[83] Young men, loyal to the double standard, may believe that young women have forfeited their right to choose; if they exercise their sexual freedom, they must do so with them.[84] This attitude is the cornerstone of acquaintance, date, and gang acquaintance rape.[85]

The statistics surrounding acquaintance and date rape are startling: rape victims know their attackers in eighty-four percent of the cases.[86] Fifty-four percent of the rapes happen on dates.[87] Acquaintance and date rape is the most under-reported sexual assault crime.[88] This is because, despite the feminist movement, gender-neutral statutes, and great strides toward gender-equality, our culture still tends to equate masculinity with sexual dominance.[89]

Id. "Sex [as] triumph: 'I really *put it to her*! I really *stuck it to her!*'" *Id.* Women are objects: "She's a cute *thing*; Show me your *stuff*; Check *that* out; How would you like *some of that?*" *Id.* These statements reinforce mens' masculinity because they reduce women to sub-individual levels. *Beneke, supra* note 43, at 13.

81 Gibbs, *supra* note 76, at 63. In fact, 60% of parents tell their daughters to remain chaste until marriage, while less than half demand the same of their sons. *Id.*

82 Michelle Stacey, *Bad Boys*, SEVENTEEN, Nov. 1993, at 124, 127. Myriam Miedzian, author of BOYS WILL BE BOYS: BREAKING THE LINK BETWEEN MASCULINITY AND VIOLENCE, is quoted by Gibbs, *supra* note 76, at 64 as stating, "The irony is that the sexual revolution pressured girls into accepting sex on boys' terms."

83 The term "slut" is defined as "a slovenly woman; an immoral woman, a prostitute." OXFORD AMERICAN DICTIONARY 862 (Heald Colleges ed. 1980).

84 Stacey, *supra* note 82, at 127.

85 BENEKE, *supra* note 43, at 30. Beneke also illustrates a common male mentality: A woman, appropriating freedoms normally belonging to a man, is at fault when raped. *Id.* Beneke states that many men believe this is analogous to going out in the rain without an umbrella and catching cold. *Id.*

86 Marcia G. Pfeiffer, *Date Rape: The Reality*, 17 S.U. L. REV. 283, 284 (1990). An attacker known by the victim often gains control over the victim by winning her trust. FAIRSTEIN, *supra* note 68, at 132.

87 Pfeiffer, *supra* note 86, at 284. This figure indicates that acquaintance rape is more common than "left-handedness," heart attacks, and alcoholism. *Id.*

88 *Id.* This under-reporting occurs because many teenage women fear parental disapproval. WARSHAW, *supra* note 44, at 125. They may also believe that they are to blame for the incident.

89 Beth Weinhouse, *Young But Not Innocent: A Shocking Report on Kids Who Rape*, REDBOOK, Apr. 1990, at 135, 137. A 1988 poll of 1,700 Rhode Island junior high

It is this sexual dominance that can lead to gang acquaintance rape.[90] Gang rape differs from individual acquaintance rape.[91] Gang rape serves to reinforce a man's masculinity within a group.[92] An individual acquaintance/date rapist seeks, instead, to claim his due.[93]

Gang acquaintance rape has been blindly condoned by a society that still adheres to the maxim that boys must "sow their wild oats" as a passage into manhood.[94] This is what occurred in Glen Ridge, New Jersey.[95] The Glen Ridge rapists bragged about their adventure and called their victim a whore, while parents and school officials conveniently ignored the situation.[96] The Glen Ridge rapists, moreover, selected their victim carefully: she was un-

---

school students yielded the following results: 25% of the boys said they believe a man has the right to rape a woman if he spends money on her during a date; 50% of the students, both male and female, believed that a woman seductively dressed, walking alone at night, "asks" to be raped. *Id.* at 137.

90 *See* PARROT, *supra* note 54, at 24.

91 WARSHAW, *supra* note 44, at 101. Men committing gang rape probably would not do the same on an individual level. *See also* Weinhouse, *supra* note 89, at 137 (quoting Michael Kimmel, Ph.D., professor of sociology, State University of New York at Stony Brook, who states, "Alot of gang rape takes place when there's one guy who wants to prove he's a man and five guys who are terrified of being thought of as less than one").

92 WARSHAW, *supra* note 44, at 101. A young man's identity becomes submerged into that of the group. Stacey, *supra* note 82, at 126. He may feel that rejecting the prospect of rape will cause the group to doubt his masculinity. *Id.*

93 PARROT, *supra* note 54, at 25. Parrot states that in a date rape the man has been planning sex and when he is rejected, he overpowers his victim to get the sex he feels he deserves. *Id.*

94 WARSHAW, *supra* note 44, at 102. Warshaw claims that gang rape has traditionally been viewed as less perverse than individual rape. This is due to the assumption that gang rape is a masculinity test that would be abnormal to fail. *Id. See also* Christopher Kilbourne, *Teens' Acts "Stupid, Not Criminal" - Two Lawyers Sum Up Glen Ridge Defense*, N.J. RECORD, Feb. 11, 1993, at A3 (quoting Alan Zegas' closing argument during which he, as the defense attorney for Bryant Grober, stated that Grober and the other defendants were merely going through a "rite of passage" and "[a]t age seventeen, adolescents have curiosity about their bodies, about sex," "[t]heir male hormones are at their peak. . . . It can be, for adolescents, a time of experimentation, it can be a time of mistakes and indiscretion"). Zegas also said, "What happened down there can best be described as a very brief moral indiscretion." *Id.*

95 WARSHAW, *supra* note 44, at 102. Researchers have noted that, similar to the Glen Ridge case, forced fellatio and demands that the victim masturbate herself occur twice as often than in individual rape situations. *Id.*

96 *See* Laufer, *supra* note 2, at 20-21. Laufer recounts that there was a fifteen-day delay between the first time a Glen Ridge high school teacher heard about the incident and the first call the high school principal made to the police. *Id.* at 21; *see also supra* note 24 and accompanying text.

popular, considered unattractive, and easily flattered by their attention.[97] There was, however, another factor which added to the violative nature of the Glen Ridge rape: the convicted rapists were all athletes.[98]

Masculine affirmation within a group is not the only contributing factor to gang acquaintance rape: male socialization also dictates how a gang member views the victim.[99] In addition, athletics may cause those involved to deem rape acceptable because in their minds the act of rape is immunized and overcome by the familiar feelings of power, control, and strength.[100] Athletes are charged with acquaintance and gang acquaintance sexual assaults at a much higher rate than non-athletes.[101] Athletic organizations are

---

97 WARSHAW, *supra* note 44, at 103. Gang acquaintance rapists choose victims that are often nearly or totally incapacitated. *Id.* The victims are usually drunk, under the influence of drugs, or, as in the Glen Ridge case, mentally impaired. *Id.* A classmate of the Glen Ridge rapists, interviewed by Laufer, expressed the following:

> I think that for some reason men everywhere are taught to believe, or believe, that if a woman is inferior to them they have a right to do whatever they want with her sexually. They seem to think that's what comes with it. Just knowing the way guys at school talk about girls that are less attractive or girls that aren't considered, you know, the top girls, just the attitude they have towards them. . . [j]ust that they have a right to do anything they want sexually toward them and afterward . . . say anything about that person.

LAUFER, *supra* note 2, at 29.

98 LAUFER, *supra* note 2, at 18. The rapists played football for Glen Ridge High School and were on the baseball team during the time of the sexual assault. Laufer also depicted certain circumstances contributing to the violative nature of the Glen Ridge rape: the young men tended to use their parents' homes much like fraternity houses in a college setting; during the attack, the Scherzer grandmother was upstairs, oblivious to the rape; their freedom from authority permitted them to combine "the macho evils of out-of-control sports teams with the perversions of institutionalized fraternity house rape scenarios." *Id.* at 194.

99 *See supra* notes 52-85 and accompanying text regarding male socialization and its role in acquaintance rape.

100 *See* BROWNMILLER, *supra* note 43, at 290. Brownmiller describes Genghis Khan, the leader of the 13th century Mongol conquest, as stating, "A man's highest job in life is to break his enemies, to drive them before him, to take from them all the things that have been theirs, to hear the weeping of those who cherished him, to take their horses between his knees, and to press in his arms the most desirable of their women." *Id.* Brownmiller believes this statement typifies the "heroic" rapist who views women as a warrior's "booty." *Id.* She also adds that "[w]e owe a debt to Genghis for expressing so eloquently the direct connection between manhood, achievement, conquest, and rape." *Id; see* PARROT, *supra* note 54, at 63-70; WARSHAW, *supra* note 44, at 110-15; LAUFER, *supra* note 2, at 186-96.

101 PARROT, *supra* note 54, at 63.

founded on physical aggression.[102] Athletic groups, moreover, demand loyalty and reinforce this unity by fostering feelings of superiority.[103] Athletes tend to view gang rape as group sex and as an additional means to strengthen their ties to the group.[104] These manifestations are nurtured by society's treatment of athletes.[105] Athletes, in addition to probably having received classic male socialization,[106] are the recipients of many social and financial privileges.[107]

The indoctrination into this privileged clique begins early in an athlete's high school career.[108] High school athletes, as young teenagers, may develop a sense of superiority, entitlement, and a sense of immunity to rules and norms.[109] This occurs because many athletes are not penalized for flouting authority.[110] This lenient treatment can harm an adolescent.[111] Adolescence is a time when values, morals, and discipline are developed.[112] Adolescent athletes given special treatment may not learn that there are consequences to breaking rules.[113]

---

102 WARSHAW, *supra* note 44, at 112.

103 *Id.*

104 *Id.* at 113. It is interesting to note that after the Glen Ridge rapists completed the assault, they gathered together, putting their hands on top of one another's, in a manner similar to that of athletes before a big game, making a secret pact not to reveal what had occurred. LAUFER, *supra* note 2, at 11; Kilbourne, *supra* note 22, at A16.

105 Id. *See also* Kathy Barret Carter, *Justice Turns Blind Eye to Violence Against Women*, 134 N.J.L.J. 584, June 14, 1993, at 20 (stating how our culture endorses aggressive, violent behavior from males, especially when such conduct is manifested through sports; male athletes receive college scholarships, professional contracts paying millions of dollars, and have many women making themselves available to them).

106 *See supra* notes 52-85 and accompanying text.

107 Peggy O'Crowley, *Out of Bounds - A Pattern of Sex-Assault Cases Points to Athletes*, N.J. RECORD, July 1, 1990, at L1, L3.

108 Anastasia Toufexis, *Sex and the Sporting Life: Do Athletic Teams Unwittingly Promote Assaults and Rapes?*, TIME, Aug. 6, 1990, at 76.

109 O'Crowley, *supra* note 107, at L3.

110 *Id.* O'Crowley demonstrates how young athletes are put on a pedestal by both their peers and authority figures. Athletes, afforded leniency when having broken rules, tend not to develop the discipline necessary to respect regulation and act properly within their boundaries. *Id.*

111 *Id.* The adolescent may fail to learn the simple concept that if he or she does something wrong, punishment or reprimands will ensue. O'Crowley, *supra* note 107, at L3.

112 *Id.*

113 *Id.* Athletes may learn that they can negotiate around rules instead of understanding that rules are meant to be followed. Parents bear the brunt of the responsi-

Athletes, believing rudimentary guidelines are easily transgressed, may think the same of social rules.[114] This belief is solidified by the good grades, money, sex, and drugs that tend to accompany athletic success.[115] Also, school officials and parents tend to condone errant behavior, in and outside the classroom, because these young men produce both tangible and intangible benefits for the school and town.[116]

Deviant teen sexual behavior in Lakewood, California has also been condoned by parents, peers, and the media where a group of high school athletes, dubbing themselves the *Spur Posse*,[117] were accused of molesting and date raping girls as young as ten years of age.[118] These teen athletes, in the spirit of competition, estab-

---

bility for such behavior. Peggy O'Crowley, *An Education In Sensitivity*, N.J. RECORD, July 1, 1990, at L1, L5. Mark Cameron, a Ridgewood, New Jersey psychotherapist who was a football linebacker for Princeton University and co-captain of his Connecticut high school football team, stated, "As athletes, we were accorded special status [in college]. I know because I was on the team, I was special. . . ." *Id.* Dr. Cameron, when speaking of his parents, said, "[T]hey never let me forget I had responsibilities like everyone else, that I still had to do the dishes, cut the lawn, get good grades." *Id.* Many parents revel in the glory of having a popular, even locally famous athlete as their child. This can cause their notions of parental responsibility to be skewed. As a result, parents may not demand accountability or discipline their child. *Id.*

114 *See* Toufexis, *supra* note 108, at 76. Toufexis explains how athletes partaking in the "group" mentality may believe rules are for others, not for heroes. *Id.* Also, athletes tend to take more risks involving drinking, drugs, and sexual conquests. O'Crowley, *supra* note 113, at L5.

115 *Id.* Colleges and universities, seeking to recruit high school athletes, also bestow advantages upon these young men. O'Crowley, *supra* note 107, at L3. Women are used to entice teen athletes by escorting them around the college campuses. *Id.* This practice leads athletes to believe that women and athletic recognition are part of the same package. *Id.*

116 O'Crowley, *supra* note 107, at L3. Glen Ridge, New Jersey is a town accustomed to athletic glory. LAUFER, *supra* note 2, at 18. In the 1960s, for example, they produced a University of Virginia football captain who went on to play professional football for the both the Baltimore Colts and the Minnesota Vikings. In 1989, the year the assault occurred, the high school's baseball and basketball teams were state champions. These victories contributed to the school financially, but also to the town's sense of civic pride; a pride that glosses over gang acquaintance rape. Glen Ridge's pride, however, may have been unfounded. Tom Junod, *Ordinary People*, SPORTS ILLUSTRATED, Mar. 29, 1993, at 68. Junod depicts the Glen Ridge rapists as "small-time jocks," and "marginal talents," who probably would not have succeeded in a larger town (Glen Ridge has a population of 7,000). *Id.* Their football team, in fact, had only won one game in 1987 and two in 1988 (one by forfeit). *Id.*

117 It is important to note that this group was named in honor of the San Antonio Spurs: a basketball team. Jill Smowlowe, *Sex with a Scoreboard*, TIME, Apr. 5, 1993, at 41.

118 Suzanne Fields, *Rape as Sport: The Culture is at the Root*, INSIGHT, May 3, 1993, at 19.

lished a point system tabulating their sexual conquests.[119] The "Posse" bragged that their highest scoring member had amassed sixty-six points.[120]

The *Spur Posse* gang, despite members' arrests,[121] received mixed signals of approbation from friends, parents, and society. One member, for example, appeared on the television shows *Inside Edition* and *Jenny Jones*.[122] Many of the boys' parents, additionally, supported their sons' actions while blaming the young women involved.[123] Some of their peers, as a result of the "Posse" members' newfound fame, treated them as heroes.[124] This acceptance and approval has effectively given young men, athletes in particular, license to violate their peers. Lakewood High School, in response to the *Spur Posse* scandal, planned several information sessions on date rape and sexual harassment.[125] Unfortunately, the seminars were only made available to female students.[126] It is this type of socialization that reinforces young women's status as victims.[127]

The Glen Ridge and Spur Posse incidents serve as strong reminders that traditional male-female stereotypes continue to domi-

---

119 *Scoring Points Privately: The Notorious Spur Posse Boys Continue to Date and Talk*, PEOPLE WEEKLY, Dec. 27, 1993, at 127 [hereinafter *Scoring Points Privately*].

120 *See* Smowlowe, *supra* note 117, at 41; *see also* Bill Hewitt, *The Body Counters*, PEOPLE WEEKLY, Apr. 12, 1993, at 34-35 (stating that one Spur Posse gang member bragged how every girl at Lakewood High School wanted to "make it" with an athlete or a popular guy).

121 *See* Hewitt, *supra* note 120, at 35. Hewitt stated that nine members were arrested but eight were later released. One member, however, was charged with committing lewd conduct. *Id.*

122 *See Scoring Points Privately*, *supra* note 119, at 127. This young man claimed the notoriety improved his dating life. *Id.*

123 *See* Smowlowe, *supra* note 117, at 41. Smowlowe quoted one Spur Posse father as saying that "[n]othing my boy did was anything any red-blooded American boy wouldn't do at his age." *Id.* The mother of the same boy stated, "Those girls are trash." *Id.* Another mother was quoted as saying "[w]hat can you do? It's a testosterone thing." *Id.*

124 *See* Smowlowe, *supra* note 117, at 41. The girls who had complained, meanwhile, were labelled "sluts." *Id.*

125 *Id.*

126 *Id.*

127 The author of this note believes that the girls attending the Lakewood High School seminars are receiving the message that they, not young men, are solely responsible for the prevention of date/acquaintance rape. If they attend the sessions and later suffer date/acquaintance rape, they are likely to react with denial, dissociation, and self-blame. *See* WARSHAW, *supra* note 44, at 54 (describing how women are "safe" victims because they are taught to be kind, responsible, gentle, and nonthreatening).

nate the way society views sexual assault. Rape shield laws were established because these stereotypes have governed our society for many generations. These laws, however, have not provided a complete solution.[128]

III. The Development of Rape Shield Statutes

Rape shield laws[129] were enacted to reverse the established common-law doctrine[130] which allowed a defendant, charged with the crime of rape, to submit details of the victim's past sexual conduct.[131] This evidence of the complainant's[132] "character for unchastity" [133] served as a means of denying the rape and claiming the act involved was consensual.[134]

Rape law reform began with the Women's Movement of the 1960s.[135] Several important events spurred this movement.[136]

---

128 *See generally* Althouse, *supra* note 35 (demonstrating how rape-shield laws fail if judges, juries, and victims cannot alter their "reasoning processes," which do not emanate from evidence rules, and how, despite a rule's mandate that evidence have "probative value" and not cause "unfair prejudice," it is the human mind, which is subject to prejudice, that decides what is relevant).

129 *See* the general definition of rape shield statutes, *supra* note 27.

130 Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765 (1986). Galvin refers to the FED. R. EVID. 404(a)(2) Advisory Committee note which stated, "an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of . . . consent in a case of rape . . . ." *Id.* at 766 n.7. Galvin also referred to the CAL. EVID. CODE § 1103 Law Revision Commission note (West 1966) which stated, "[I]t is well settled that in a rape case the defendant may show the unchaste character of the prosecutrix by evidence of prior voluntary intercourse in order to indicate the unlikelihood of resistance on the occasion in question." *Id.*

131 Charles P. Nemeth, *Character Evidence in Rape Trials in Nineteenth Century New York: Chastity and the Admissibility of Specific Acts*, 6 WOMEN'S RTS. L. REP. 214, 219 (1980). The 1838 case of People v. Abbot, 19 Wend. 192 (Sup. Ct. 1838) established, through dictum, what would be deemed law by jurists all over the country. In *Abbot*, Justice Cowen supported the admissibility of any evidence regarding a woman's reputation for chastity because such evidence went to a material element of the crime - consent. *Id.*

132 Throughout this note the word "defendant" will refer to an individual of the male gender while the word "complainant" will refer to an individual of the female gender. No discrimination is intended.

133 The term "chaste" is defined as "virgin, celibate; not having sexual intercourse except with the person to whom one is married." OXFORD AMERICAN DICTIONARY 141 (Heald Colleges ed. 1980).

134 *See* Galvin, *supra* note 130, at 766.

135 *Id.* at 791. The term "women's movement" is defined as: "a movement urging the liberation of women from domestic duties and from a subordinate role in society." OXFORD AMERICAN DICTIONARY 1073 (___ ed. 1980). Women played a key role in

Betty Friedan wrote *The Feminine Mystique* in 1963.[137] Next, Title VII of the Civil Rights Act was passed proposing equal opportunities for women in 1964.[138] Additionally, the National Organization for Women (NOW) was founded in 1965.[139] Amidst this emotionally charged atmosphere, the time was ripe for rape legislation reform.

Prior to the enactment of rape shield laws, many myths and misconceptions about women, their sexuality, and rape were woven into evidentiary rules.[140] Women, supporting the feminist movement, claimed that Victorian misconceptions governed male views of women and their sexuality.[141] Examples of these early misconceptions included a man's belief that a vindictive woman would falsely accuse an innocent man of rape,[142] and that a woman's chastity was her greatest virtue.[143] Furthermore, American society throughout the twentieth century valued men as the better of the two sexes.[144] The feminist movement claimed that these predominant views led to the evidence rules' incorporation of the premise that a woman's chastity, or lack thereof, was relevant both in proving the accused's guilt and the victim's consent, and in attacking the victim's credibility.[145] These misconceptions colored the way

---

lobbying for reforms in the law of rape. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 3 n.12 (1977). The women's movement was part of considerable grass roots lobbying in the state legislatures with national coordination provided by the NOW National Task Force on Rape. Leigh Bienen, *Rape III*, 6 WOMEN'S RTS. L. REP., 170, 171 (1980). The movement progressed from speak-outs and conferences to community outreach programs, rape crisis centers with twenty-four hour hot lines, rape legislation study groups to write model codes and work with legislators and anti-rape projects in conjunction with hospital emergency wards. BROWNMILLER, *supra* note 43, at 397. Brownmiller further notes how none of this was suggested or furthered by men. *Id.*

136 William E. Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, 5 YALE J.L. & HUMAN. 265, 318 (1993).

137 *Id.*

138 *Id.*

139 *Id.*

140 James A. Vaught & Margaret Henning, *Admissibility of a Rape Victim's Prior Sexual Conduct in Texas: A Contemporary Review and Analysis*, 23 ST. MARY'S L.J. 893, 901 (1992).

141 *Id.* "Victorian" is defined as "prudish." OXFORD AMERICAN DICTIONARY 1036 (Heald Colleges ed. 1980).

142 Vaught & Henning, *supra* note 140, at 901.

143 *Id.* The feminist movement fought the myth held by men that only abnormal women experienced sexual desires. *Id.* at 902.

144 *Id.*

145 *Id.* at 902. Feminists argued that evidentiary rules were discriminatory since evi-

all people, including lawyers, judges, legislators, and jurors viewed women, wrote legislation, and conducted activities in the courtroom.[146]

The Movement further maintained that, because the legal system was male dominated, rape was regarded as different from other physical assault crimes due to the biases and prejudices men harbored toward women and their sexuality.[147] Instructions warning juries that women tended to lie when making rape accusations pervaded American courts until the 1970s.[148] Women's groups, therefore, as a result of growing indignation, lobbied for the intro-

---

dence of a woman's sexual conduct was admissible to impeach a woman's credibility, but the same was not admissible to a impeach a man's credibility. *Id.* at 903.

146 *Id.* at 904. *See also* Julie Taylor, *Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson*, 10 HARV. WOMEN'S L.J. 59, 89-90 (1987) (illustrating how police control the progression of rape victim's cases: police initially determine if a case is either "founded" or "unfounded"; a rape charge is deemed "founded" if the police believe the victim was actually raped, while a charge determined "unfounded" is dropped and receives no further police attention and will not be prosecuted). Note that "unfounded" police decisions may be a direct result of male socialization. *See supra* notes 52-128. Alice Vachss, in her book entitled SEX CRIMES: TEN YEARS ON THE FRONT LINES PROSECUTING RAPISTS AND CONFRONTING THEIR COLLABORATORS 90 (1993), depicted how in 1993 "good" victims are still favored when prosecutors are determining which cases to pursue (assuming the case was deemed "founded" by the police). Vachss states:

> In New York City, [g]ood [v]ictims have jobs (like stockbroker or accountant) or impeccable status (like a policeman's wife); are well-educated and articulate, and are, above all, presentable to a jury: attractive - but not too attractive, demure - but not pushovers. They should be upset - but in good taste - not so upset that they become hysterical.

Id.

Fairstein also supports Vachss' contention that modern jurors still judge rape victims. *See supra* note 68, at 134. She states that a victim's use of alcohol, use of drugs, practice of staying out late, and going to bars is viewed harshly. *Id.* Most significantly, despite rape-shield laws, victims who are known to be sexually active are viewed as being of "questionable moral character" by jurors. *Id.*

147 *See* Galvin, *supra* note 130, at 791.

148 Cynthia Ann Wicktom, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 401 n.18 (1988). Sir Mathew Hale, Lord Justice of the King's Bench from 1671-1676, instructed that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." *Id.* *See also* Barbara Fromm, *Sexual Battery: Mixed-Signal Legislation Reveals Need For Further Reform*, 18 FLA. ST. U. L. REV. 579, 591 (1991) (illustrating how a female victim faces harassment, humiliation, and disbelief due to societal stereotypes); Kathy Mack, *Continuing Barriers to Women's Credibility: a Feminist Perspective on the Proof Process*, 4 CRIM. L.F. 327, 336 (1993) (describing how less than two percent of rape complaints are false).

duction of rape reform legislation.[149]

IV. Legislative History of Rape Shield Statutes

In 1978, Representative Elizabeth Holtzman[150] introduced the Privacy Protection for Rape Victims Act of 1978, declaring that female rape victims undergo intense humiliation in the court room.[151] Representative Holtzman pointed out that judges, lawyers, and juries placed victims under intense scrutiny regarding their past sexual history and their mores.[152] Rape, as a result of this degradation, was a critically under-reported crime in the late 1970s.[153] Representative Holtzman's views were staunchly supported by the National Organization for Women.[154]

Michigan was the first state to enact a rape shield statute.[155]

---

149 *See* Bienen, *Rape III*, *supra* note 135, at 171.

150 Rep. Holtzman was the sponsor of the federal rape shield bill. *See infra* notes 152-54 and accompanying text.

151 *See* Galvin, *supra* note 130, at 764 (citing Pub. L. No. 95-540, 92 Stat. 2046, which resulted in FED. R. EVID. 412, the federal rape shield law, effective November 28, 1978).

152 *Id. See also* Sakthi Murthy, *Rejecting Unreasonable Sexual Expectations*, 79 CAL. L. REV. 541, 554 n.76 (1991) (describing how Rep. Holtzman stated that evidence of a victim's prior sexual encounters was irrelevant to the issue of whether the victim consented at a particular time with a particular person). *But see* FAIRSTEIN, *supra* note 68, at 134 (describing how juries still tend to judge victims harshly if alcohol consumption, drug use, late-night partying, and the frequenting of bars is involved). Most significantly, promiscuous victims are often viewed as being of "questionable moral character." *Id.* Note that Fairstein's book was published in 1993, fifteen years after the enactment of the federal rape shield law.

153 *See* Murthy, *supra* note 152, at 551 n.78, 553.

154 Mary Ann Largen, on behalf on NOW, stated:

> We submit that the victims of rape undergo at least two assaults—the rape itself and its prosecution. We further submit that the rape, for many victims, is the least traumatic of the two. From the moment the victim reports the rape to the authorities, to the moment of decision as to the defendant's guilt or innocence, the victim is subjected to prolonged questioning on all her prior sexual activities and numerous innuendos that she somehow incited the assault and is in no position to complain. The legal relevance of such treatment is not easily explainable to these victims, nor to any right-minded citizen.

Privacy of Rape Victims: Hearings on H.R. 14666 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong., 2nd. Sess. 36 (1976).

155 MICH. COMP. LAWS ANN. § 750.520(j) (West 1991). Michigan's rape shield statute became effective April 1, 1975. *Id. See* Leigh Bienen, *Rape II*, 3 WOMEN'S RTS. L. REP. 90, 112-13 (1978) (analyzing the Michigan statute as it was originally written in 1975); *see also* Berger, *supra* note 135, at 3 n.12 (describing how the Michigan Women's Task Force on Rape, a group of non-lawyers, initiated a comprehensive revision

During the middle and latter parts of the 1970s, however, more than half the states had followed Michigan's lead and enacted their own rape shield laws.[156] Today, all but three states have rape shield

---

of that state's laws on sexual conduct, and Virginia Nordby, a then part-time instructor at the University of Michigan Law School, wrote the preliminary draft of the statute). The Michigan statute as of 1994 reads in pertinent 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 under sections 520(b) to 520(g) unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source of semen, pregnancy, or disease.

Subsection (2), which is not pertinent to this note, describes procedural standards for submitting evidence. MICH. COMP. LAWS ANN. § 750.520(j) (West 1991).

156 *See* Leigh Bienen, *Rape IV*, 6 WOMEN'S RTS. L.REP. 1 (1980); Daniel Lowery, *The Sixth Amendment, The Preclusionary Sanction, and Rape Shield Laws: Michigan v. Lucas, 111 S. Ct. 1743 (1991)*, 61 CINN. L. REV. 297, 309-10 n.76 (1992).

The following is a list of the current rape shield statutes and evidence codes listed according to the year that the state passed its first rape shield laws:

1974: CAL. EVID. CODE § 782 (West Supp. 1994); FLA. STAT. ANN. § 794.022 (West Supp. 1994); MICH. COMP. LAWS ANN. § 750.520(j) (West 1991); MINN. STAT. ANN. § 609.347 (West Supp. 1994); OHIO REV. CODE ANN. § 2907.02 (C)-(F) (Page 1993 Supp.).

1975: ALASKA STAT. § 12.45.045 (1991); ARK. CODE ANN. § 16-42-101 (Michie 1994); COLO. REV. STAT. ANN. § 18-3-407 (West 1990); CONN. GEN. STAT. ANN. § 54-86f (West 1985); DEL. CODE ANN. tit. 11, §§ 3508, 3509 (1992); HAW. REV. STAT. § 626-1, R. 412 (1992 Supp.); IND. CODE ANN. § 35-37-4-4 (Burns 1986); N.M. STAT. ANN. § 30-9-16 (Michie 1993); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992); N.D. CENT. CODE §§ 12.1-20-14, 15 (1985); OKLA. STAT. ANN. tit. 12, § 2412 (West 1993); OR. REV. STAT. § 40.210 (1993); WASH. REV. CODE ANN. § 94.44.020(2)-(4) (West 1985); WIS. STAT. ANN. §§ 972.11(2), 971.31(11) (West 1985 & Supp. 1993).

1976: GA. CODE ANN. § 24-2-3 (Michie Supp. 1994); KAN. ANN. § 21-3525 (1988); KY. REV. STAT. ANN. § 422A.0412 (Michie/Bobbs-Merrill Replacement 1992); MD. ANN. CODE art. 27, § 461A (1992 Replacement Volume); N.J. STAT. ANN. § 2C:14-7 (West 1993); 18 PA. CONS. STAT. ANN. § 3104 (1983); W. VA. CODE § 61-8B-11(a)(b) (1992).

1977: ALA. CODE § 12-21-203 (1986); IDAHO CODE § 18-6105 (1987); MASS. GEN. L. ch. 233, § 21B (1986); MISS. CODE ANN. §§ 97-3-68 (1994); MO. ANN. STAT. § 491.015 (1994 Supp.); NEB. REV. STAT. § 28-321 (1989); NEV. REV. STAT. §§ 48.069, 50.090 (Michie 1986); N.C. GEN. STAT. § 8C R.412 (1986); S.C. CODE ANN § 16-3-659 (Law. Co-op. 1985); VT. STAT. ANN. tit. 13, § 3255 (Supp. 1993); WYO. STAT. § 6-2-312 (1988).

1978: FED. R. EVID. 412; ILL. ANN. STAT. ch. 38, para. 115-7 (Smith-Hurd 1990); S.D. CODIFIED LAWS ANN. § 23A-22-15 (1988).

1979: MONT. CODE ANN. § 45-5-511 (1993); N.H. REV. STAT. ANN.§632-A:6 (1993 Supp.); R.I. GEN. LAWS § 11-37-13 (1993 Supp.).

statutes.[157] All the rape shield statutes were enacted with the intention of protecting the sexual assault victim's personal sexual conduct and history from interrogation.[158] These statutes, despite such honorable intentions, often prove to be inadequate because they allow the admissibility of a rape victim's sexual history in varying degrees.[159]

1981: VA. CODE ANN. §§ 18.2-67.7 (Michie 1988).

1983: IOWA R. EVID. 412; ME. R. EVID. 412.

1989: LA. CODE EVID. ANN. art. 412 (West 1994); IOWA R. EVID. 412; ME. R. EVID. 412; TEX. R. CRIM. EVID. 412.

Bienen, *Rape IV*, *supra* 1-60.

Arizona and Utah are the only states that have not enacted rape shield statutes. Lowery, *supra*, at 309-10 n.76. Arizona, however, has judicially created the equivalent of a rape shield statute through case law. The court in State *ex rel.* Pope v. Superior Court, 545 P.2d 946, 952-53 (quoting State v. Greer, 533 P.2d 389, at 391 (1975)) (Ariz. 1976) stated:

> Such evidence has little or no relationship to either the ability of the prosecuting witness to tell the truth under oath or her alleged consent to the intercourse. Any relevance that may exist is outweighed by its inflammatory effect. Its use could easily discourage prosecutions for rape; it is distracting, and it may so prejudice the jury that it would acquit even in the face of overwhelming evidence of guilt.

Id.

The court further stated:

> We recognize there are certain limited situations where evidence of prior unchaste acts has sufficient probative value to outweigh its inflammatory effect and require admission. These would include evidence of prior consensual sexual intercourse with the defendant or testimony which directly refutes physical or scientific evidence, such as the victims alleged loss of virginity, the origin of semen, disease or pregnancy.

Id. *See also* State of Arizona v. Stuck, 739 P.2d 1333, 1336 (Ariz. 1987) (following the *Pope* decision).

Tennessee repealed its rape shield statute in 1991. Lowery, *supra*, 309-10 n.76. Tennessee's rape shield law was repealed by Acts 1991, ch. 273, § 34. TENN. CODE ANN. § 40-17-119 (1990). It was replaced by TENN. R. EVID. 412 which is applied instead of TENN. R. EVID. 404(a)(2). *See* The *Advisory Commission Comments [1991]* TENN. CODE ANN. R. 412 (1994).

157 They are Utah, Arizona, and Tennessee. Lowery, *supra* note 156, at 309-10 n. 76. *But see* McGuiness, *supra* note 37, at 127 n.9 (explaining how Utah and Arizona do not have rape shield laws; both states protect rape victims through case law). *See* State v. Oliver, 760 P.2d 1071 (Ariz. 1988) and State v. Suarez, 736 P.2d 1040 (Utah App. 1987). *Id.*

158 *See* Lowery, *supra* note 156, at 310.

159 *See generally* Galvin, supra note 130 (providing a thorough and extensive review of the four types of rape shield statutes).

V. *The Four Types of U.S. Rape Shield Statutes*

A. *The Michigan Approach*

Twenty-three states follow the Michigan approach.[160] This approach prohibits the admissibility of all previous sexual conduct evidence with the exception of: 1) evidence of the victim's past sexual conduct with the actor, and 2) evidence of specific instances of sexual activity showing the source of semen, pregnancy, or disease.[161] Judges in these states, as a result, have little discretion when determining the admissibility of evidence because they must adhere to these two statutory exceptions.[162] The Michigan approach on its face appears to be the perfect solution: it eliminates all investigation into a woman's past sexual history.[163] However, constitutional questions are raised by a strict application of a Michigan-type rape shield statute due to its tendency to deprive a defendant of the opportunity to present all pertinent factual evidence.[164]

---

160 Lowery, *supra* note 156, at 313 n.88. The following states follow the Michigan approach: Alabama, Florida, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Carolina, Ohio, Pennsylvania, South Carolina, Vermont, Virginia, West Virginia, and Wisconsin. *See also*, Galvin, *supra* note 130, at 908 (illustrating in a table and chart format a statutory comparison of all the Michigan-type rape shield statutes as of 1986); Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Law*, 50 OHIO ST. L.J. 1245, 1248 nn.23-25 (1989) (offering a comparison of ten rape shield statutes following the Michigan approach).

161 *See* MICH. COMP. LAWS ANN. § 750.520 (j)(1)(b), *supra* note 155. These two exceptions provide judges with strict guidelines when reviewing prior sexual conduct evidence. Lowery, *supra* note 156, at 313. The goal is to eliminate any evidence that does not specifically comport with these two exceptions. *Id.* The risk of any irrelevant past sexual conduct being admitted into evidence is entirely eliminated. *Id.*

162 Lowery, *supra* note 157, at 313. *But see* Leo A. Farhat & Richard C. Kraus, *Michigan's "Rape-Shield" Statute Questioning The Wisdom of Legislative Determination of Relevance*, 4 COOLEY L. REV. 545, 552-54 (1987) (demonstrating how the statute's exclusionary nature fails to address circumstances when past sexual conduct evidence may be useful for showing bias, motive for fabrication, prior false accusations, and the defendant's state of mind).

163 Lowery, *supra* note 156, at 313.

164 *Id.* at 316-17. Many adjudicators argue that rape shield laws infringe on a defendant's Sixth Amendment right to confront his or her accuser. J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 589 (1980).

B. *The Federal Approach*[165]

Six states have adopted the federal rape shield approach.[166] These states have attempted to combine both the strictness of the Michigan statute with the discretionary aspect of the New Jersey law.[167] Such statutes include a catch-all provision that seeks to avoid the "underinclusiveness" of the states following Michigan's statutory scheme.[168] The federal rape shield statute generally prohibits all reputation or opinion evidence of a rape victim's sexual

---

165 FED. R. EVID. 412, entitled *Sex Offense Cases; Relevance of Victim's Past Behavior,* states in pertinent part:

> (a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.
>
> (b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A to title 18, United States Code, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible unless such evidence other than reputation is—
>
> (1) . . . is constitutionally required to be admitted; or
>
> (2) . . . 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 such offense is alleged.

Id. (procedural sections omitted). Murthy, *supra* note 152, at 554 n.76. *See generally* Carol DiBattiste, *Federal and Military Rape Shield Rules: Are They Serving Their Purpose?*, 37 NAVAL L. REV. 123 (1988)(providing an outstanding review of the federal rape shield statute).

166 Lowery, *supra* note 156, at 314 n.90. The following states and the military have adopted the federal approach: Connecticut, Georgia, Hawaii, Iowa, New York, and Oregon. *Id.*

167 Lowery, *supra* note 156, at 313. In Michigan, for example, unless a defendant meets one of the three criteria of the statute, all past sexual conduct evidence is inadmissible. *Id.* Many have argued this unduly infringes upon a defendant's Sixth Amendment right to confront his accuser. Robin Rubrecht Dill, *Who Needs a Rape Shield When the Opponent's Weapons Have Been Seized?*, 17 OKLA. CITY U. L. REV. 727-28, 732 (1992). Conversely, New Jersey pays deference to a defendant's Sixth Amendment right to a fair trial by allowing a judge the discretion to determine if past sexual conduct evidence is necessary to a fair trial. *See infra* notes 186-93 and accompanying text. The federal rape shield law, however, seeks to strike a balance between Michigan and New Jersey. *See infra* notes 168-78 and accompanying text..

168 Galvin, *supra* note 130, at 774-75. States adopting this approach generally prohibit prior sexual conduct evidence subject to specific exceptions. *See infra* notes 169-72 and accompanying text. This general prohibition, however, is undermined by the constitutional loophole provided in the statutory language. *See supra* note 165. The

history.[169] Rule 412, however, establishes three exceptions where such evidence is admissible: 1) when the evidence is constitutionally required to be admitted;[170] 2) when the evidence is of past sexual behavior with persons other than the accused, offered by the accused to prove whether the accused was the source of semen or injury;[171] and 3) when evidence of past sexual history with the accused is offered by the accused to show consent.[172]

The second and third exceptions protect a sexual assault victim much like the Michigan statute.[173] Additionally, the third provision limits the defendant's ability to submit evidence of the victim's prior sexual conduct with third parties like the Michigan statute.[174] However, the constitutional provision[175] may not protect a sexual victim and could permit judicial bias.[176] This risk is great because the constitutional provision was never defined by Congress.[177] The clause, to this date, remains ambiguous.[178]

C. *The California Approach*

At least six other states follow California's[179] rape shield law.[180] The main component of this approach is the prohibition of evi-

---

constitutional provision does not provide any guidance as to what criteria must be met, thus leaving this decision to judges' discretion. Galvin, *supra* note 130, at 886-90.

169 FED. R. EVID. 412(a), *supra* note 165.

170 FED. R. EVID. 412(b)(1), *supra* note 165.

171 FED. R. EVID. 412(b)(2)(A), *supra* note 165.

172 FED. R. EVID. 412(b)(2)(B), *supra* note 165.

173 MICH. COMP. LAWS ANN. § 750(j)(a) and (b), *supra* note 155. *See also* Lowery, *supra* note 156, at 314 (offering a comparison of the Federal and Michigan-type statutes: The federal statute is similar to Michigan's in all aspects except for the constitutional provision of FED. R. EVID. 412(b)(1)).

174 FED. R. EVID. 412(b)(2)(B), *supra* note 165.

175 FED. R. EVID. 412(b)(1), *supra* note 165.

176 Galvin, *supra* note 130, at 802-08. The basic premise underlying rape shield statutes is that a victim's past sexual conduct is irrelevant to determine consent on one particular occasion. *Id.* at 798, 806. The Sixth Amendment does not mandate the admissibility of irrelevant evidence. *Id.* at 806. Essentially, a defendant should not be able to raise this defense if evidence has been deemed irrelevant. *Id.* at 806-07. Judges, however, tend to admit this evidence if the issue relates to a victim's consent or if the defendant seeks to prove the accuser was a third party. *Id.* at 807. Galvin posits that these two circumstances create less of a prejudicial effect than general evidence pertaining to chastity. *Id.*

177 *See* DiBattiste, *supra* note 165, at 128.

178 *Id.* at 130.

179 CAL. EVID. CODE § 1103(b) (Deering 1994) states in pertinent part:

> (1) . . . Opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of such evi-

dence relating to a witness' consent while admitting evidence relating to a witness' credibility.[181] The California approach generally prohibits prior sexual history to prove consent unless it relates to "evidence of the complaining witness' sexual conduct with the defendant."[182] Such evidence, however, may be admitted to attack

---

dence, is not admissible by the defendant in order to prove consent by the complaining witness.

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

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

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

Id.

CAL. EVID. CODE § 782 (West 1994), entitled *Sexual offenses; evidence of sexual conduct of complaining witness; procedure for admissibility,* states in pertinent part:

(a) In any prosecution under Section 261, 264.1, 286, 288, 288A, 288.5, or 289 of the penal code, or for assault with intent to commit, attempt to commit, or conspiracy to commit any crime defined in any of those sections, except where the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4 or in a state prison, as defined in Section 4504, if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780, the following procedure shall be followed:

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

Murthy, *supra* note 152, at 555-56 n.76.

180 Lowery, *supra* note 156, at 314 n.91. These states are: Delaware, Mississippi, Nevada, North Dakota, Oklahoma, and Washington. *Id.*

181 CAL. EVID. CODE §§ 782 and 1103(b), *supra* note 179. California's rape shield statute mandates that a defendant cannot submit prior sexual history evidence unless the sexual conduct has occurred between himself and the complainant. Turkheimer, *supra* note 160, at 1250. The defendant may, however, avoid the issue of consent and introduce the same prior sexual conduct evidence if it is to impeach the complainant's credibility. *Id.*

182 CAL. EVID. CODE § 1103(b), *supra* note 179. Also, this section of California's rape shield statute is similar to the FED. R. EVID. § 412(b)(2)(B), *supra* note 165, and Michigan's § 750(j)(1)(2), *supra* note 155. This section of the California Code enables a defendant involved in an acquaintance rape situation to introduce prior sexual conduct evidence. This is the author's own determination.

the complainant's credibility.[183] The relevancy of evidence offered to impeach a complainant's credibility is solely within the judge's discretion.[184] Critics assert that California's rape shield law is rendered virtually ineffective when a court finds evidence attacking a woman's credibility rather than consent.[185]

D. *The New Jersey Approach*[186]

Ten states have enacted rape shield statutes similar to that of

---

183 Galvin, *supra* note 130, at 894.

184 *Id.* at 894. The admissibility of evidence attacking the witness's credibility is admitted in a fashion similar to that of the New Jersey approach. Hence, the California approach provides a loop-hole through which a defendant can introduce evidence of a victim's prior sexual conduct with himself and third parties. *Id.* at 896. Galvin, *supra* note 130, at 896-99 describes People v. Randle, 130 Cal. App. 3d 286, 181 Cal. Rptr. 746 (1982), where third party evidence regarding victim's past act of soliciting sex for money was deemed admissible for disproving credibility.

185 Galvin, *supra* note 130, at 896 states:

> That consent and credibility are in many cases functionally equivalent raises the possibility that evidence of past sexual conduct prohibited by the 'consent' provision may enter through the 'credibility' door . . . . Thus, the loop-hole created by the ambiguous credibility provision threatens to undermine the very purpose of the [rape shield statute].

Id.

186 N.J. STAT. ANN. § 2C:14-7, prior to the enactment of A. 677, read in full as follows:

> a. In prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, or endangering the welfare of a child in violation of N.J.S.A. § 2C:24-4, evidence of the victim's previous sexual conduct shall not be admitted nor reference made to it in the presence of the jury except as provided in this section. When the defendant seeks to admit such evidence for any purpose, he must apply for an order of the court before the trial or preliminary hearing, except that the court may allow the motion to be made during trial if the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence. After the application is made, the court shall conduct a hearing in camera to determine the admissibility of the evidence. If the court finds that evidence offered by the defendant regarding the sexual conduct of the victim is relevant and that the probative value of the evidence offered is not outweighed by its collateral nature or by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim, the court shall enter an order setting forth with specificity what evidence may be introduced and the nature of the questions which shall be permitted, and the reasons why the court finds that such evidence satisfies the standards contained in this section. The defendant may then offer evidence under the order of the court.
>
> b. In the absence of clear and convincing proof to the contrary, evidence

New Jersey.[187] These states provide judges with much freedom in determining when prior sexual conduct evidence is admissible.[188] A defendant, in states following this approach, can succeed in introducing into evidence a broad range of sexual history if the judge deems it relevant.[189] In such situations the victim is often placed at the mercy of the trial judge's personal views.[190] However, New Jersey's approach does not suffer from constitutional attack as often as the Michigan statute because of the ability of New Jersey judges to adjudicate each case on an individual basis.[191] Judicial discretion, despite the consideration afforded to defendants' right

---

of the victim's sexual conduct occurring more than 1 year before the date of the offense charged is presumed to be inadmissible under this section.
c. Evidence of previous sexual conduct shall not be considered relevant unless it is material to negating the element of force or coercion or to proving that the source of semen, pregnancy, or disease is a person other than the defendant. For the purposes of this section, "sexual conduct" shall mean any conduct or behavior relating to sexual activities of the victim, including but not limited to previous or subsequent experience of sexual penetration or sexual contact, use of contraceptives, living arrangement and life style.

N.J. STAT. ANN. § 2C:14-7 (West Supp. 1991).

187 Lowery, *supra* note 156, at 313 n.88. The ten states are: Alaska, Arkansas, Colorado, Idaho, Kansas, New Mexico, Rhode Island, South Dakota, Texas, and Wyoming.

188 *See* Galvin, *supra* note 130, at 876-83. Professor Harriet Galvin called this the "untrammeled judicial discretion" approach. *Id.* at 876. She used this label because any past sexual conduct evidence was admissible upon a judge's determination if its probative value outweighed its prejudicial effect. The judge, moreover, made this determination without any legislative guidance. Elizabeth M. Davis, *Rape Shield Statutes: Legislative Responses to Probative Dangers*, 27 J. URB. CONTEMP. L. 271, 287 (1984).

189 Galvin, *supra* note 130, at 876. For example, in *State v. Ryan*, 384 A.2d 570 (N.J. Super. 1978), a New Jersey case, the trial court excluded evidence of specific acts with third parties to prove consent or impeach the complainant's credibility. Davis, *supra* note 188, at 287. This indicates that any evidence pertaining to a victim's past sexual conduct with defendant or any evidence related to the issue of consent could be deemed relevant. This would deny a victim any rape shield protection if a judge's broad discretion permitted such information into evidence. *Id.*

190 Fromm, *supra* note 148, at 599. Fromm focused on the gender bias and prejudice experienced by victims in the courtroom. It is ironic, however, that, despite the New Jersey rape shield statute's broad judicial discretion, New Jersey was the first state to establish a task force to study gender bias in the courts. The study found that the victim, instead of the defendant, was the one under judicial scrutiny. The task force revealed that a court tended to focus on the victim's attire, conduct, her friends, and lifestyle rather than on the defendant's actions during the incident in question. *Id.* at 599 (quoting Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, TRIAL 28, 30 (Feb. 1990)).

191 *Compare* the Michigan statute, *supra* note 155, *with* the New Jersey statute's inherent judicial discretion. In states following the Michigan approach, judges have absolutely no discretion and must adhere to the strict statutory guidelines. However, in

to a fair trial, places claimants in the same position they were in prior to the enactment of rape shield laws.[192] As such, a victim would not be protected from intrusion into her sexual past.[193]

VI. The Legislative History of New Jersey's Rape Shield Law: New Jersey's First Rape Shield Law

On August 26, 1976, New Jersey's first rape shield statute became effective.[194] The statute, providing broad judicial discretion, had one explicit limitation: it did not permit the introduction of any evidence of a victim's past sexual conduct that occurred prior to one year before the date of the charge.[195] The statute, however, offered the claimant no further protection than did New Jersey's

---

New Jersey, judges may rely solely on their discretion in determining whether evidence is relevant.

192 *See infra* notes 197-207.

193 *See* Galvin, *supra* note 130, at 878.

194 N.J. STAT. ANN. § 2A:84-32.1-.2 (West 1994), the state's first rape shield law, stated as follows:

> In prosecutions for the crime of rape, assault with intent to commit rape, and breaking and entering with intent to commit rape, evidence of the complaining witness' previous sexual conduct shall not be admitted nor reference made to it in the presence of the jury except as provided in this act. When the defendant seeks to admit the evidence for any purpose, he may apply for an order of the court at any time before or during the trial or preliminary hearing. After the application is made, the court shall conduct a hearing in camera to determine the admissibility of the evidence. If the court finds that evidence offered by the defendant regarding the sexual conduct of the complaining witness is relevant, and 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, the court shall make an order stating what evidence may be introduced and the nature of the questions which shall be permitted. The defendant may then offer evidence under the order of the court.
>
> In the absence of clear and convincing proof to the contrary, evidence of the complaining witness' sexual conduct occurring more than 1 year before the date of the offense charged is presumed to be inadmissible under this act.

Id.

195 The statute reads as follows: "Unless clear and convincing proof is made, evidence of the complaining witness' sexual conduct occurring more than 1 year before the date of the offense charged is presumed to be inadmissible." N.J. SENATE JUDICIARY COMM., STATEMENT TO S. 1134, 197TH LEG., 1ST SESS. (Feb. 19, 1976). *But see* Galvin, *supra* note 130, at 879 (stating that despite the statute's one-year limitation, it "lack[ed] any explicit prohibition of any form of any sexual conduct evidence for any purpose").

first rape law enacted in 1796.[196]

A. *The 1979 Rape Shield Law—A Response to the Women's Movement*[197]

New Jersey's first rape shield statute[198] was not repealed when the New Jersey Code of Criminal Justice became effective in 1979. It did, however, undergo several changes in becoming N.J. STAT. ANN. § 2C:14-7.[199] First, the term "rape" was replaced by "sexual assault."[200] Second, in the 1976 statute[201] a defendant could apply

---

196 The Crimes Act of 1796 N.J. LAWS Mar. 28, 1796, § 8, [1821] N.J. REV. LAWS (Pennington) 246, New Jersey's first recorded rape law, read as follows:

> [A]ny person, who shall have carnal knowledge of a woman, forcibly and against her will, or who shall aid, abet, counsel, hire, cause or procure any person or persons, to commit the offence; or who, being of the age of fourteen years, shall unlawfully and carnally know and abuse any woman child, under the age of ten years, with or without her consent, shall, on conviction, be adjudged guilty of a high misdemeanor, and be punished by fine and solitary imprisonment at hard labor, for any term not exceeding fifteen years.

Leigh Bienen, *Rape I*, 3 WOMEN'S RTS. L. REP. 45, 47 (1976).

Bienen, in comparing the 1976 and 1796 rape laws, sought to emphasize how the 1976 statute's broad judicial discretion was akin to the 1796 law's language of "forcibly and against her will." *Id.* at 47. Consent, in both statutes, was an issue that could be refuted by past sexual conduct evidence. *Id.*

197 S. 738, known as the NOW bill, was adopted in 1979 as part of the New Jersey Code of Criminal Justice. The 1979 rape shield statute was codified as § 2C:14-7. The new statutory provisions covering rape were formulated by a coalition of feminist groups assisted by the National Organization of Women (NOW) National Task Force on Rape. The NOW bill was modeled after the 1976 Philadelphia Center for Rape Concern Model Sex Offense Statute. Leigh Bienen, *Rape II*, 3 WOMEN'S RTS. L. REP. 90 (1977). The drafters of the Philadelphia Center's Model Statute intended to exclude any language contrary to rape victims' interests. *State in the Interest of M.T.S.*, 129 N.J. 422, 440 (1992) (quoting Bienen, *Rape III*, 6 WOMEN'S RTS. L. REP. 170, 207 (1980)). The drafters wanted to "normalize" the law. *Id.* A speaker from the New Jersey Coalition Against Rape stated, "We are no longer saying rape victims are likely to lie. What we are saying is that rape is just like other violent crimes." *M.T.S.*, 129 N.J. at 440 (quoting Stuart Marques, *Women's Coalition Lauds Trenton Panel: Tough Rape Law Revisions Advance*, STAR LEDGER, May 10, 1978, at 1)).

198 N.J. STAT. ANN. § 2A:84-32.1-.2, *supra* note 194.

199 *See* N.J. STAT. ANN. § 2C:14-7, as it existed prior to the enactment of A. 677, *supra* note 186. The 1979 version, although virtually identical to the current statute, differed in the following ways: 1) in subsection (a) the word "or" in the second line between "aggravated sexual contact" and criminal sexual contact was not yet stricken; 2) in subsection (a), the phrase "or endangering the welfare of a child in violation of N.J. STAT. ANN. § 2C:24-4" was not in the 1979 statute; and 3) in subsection (a), toward the middle, the word "by" after the term "collateral nature" was not in the 1979 version. *See infra* note 208 for the 1988 revision.

200 The definition of "rape" as "carnal knowledge of a woman against her will" re-

for a court order permitting introduction of evidence of the victim's sexual conduct at any stage of the trial.[202] The 1979 version varied this requirement by mandating that a defendant apply for a court order *before* the trial or preliminary hearing.[203] Third, the 1979 law placed stricter guidelines on the manner in which a judge may admit sexual conduct evidence once it was deemed admissible.[204] Fourth, and most important, was the addition of subsection (c) to the language of the 1976 version.[205] This subsection set forth the standards for determining relevancy and it defined sexual conduct.[206] New Jersey's rape shield legislation still failed to fully

---

mained as such until the enactment of the 1979 rape shield law, which defined "rape" as "sex-neutral aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, and lewdness." N.J. STAT. ANN. § 2C:14-7 (West 1984). In fact, all the states' rape shield statutes effective as of 1980 are gender-neutral. Bienen, *Rape IV*, *supra* note 156, at 35. *Compare* the language of New Jersey's original statute, N.J. STAT. ANN. § 2A:84A-32.1-.2 *with* N.J.STAT. ANN. § 2C:14-7, prior to the enactment of A. 677, *supra* notes 194 and 186. Changing the term "rape" to "sexual assault" served two functions: one, it shifted the focus from the issue of the victim's consent since, by nature, a person does not consent to assault; and two, it broadened the traditional meaning from one of vaginal-penile intercourse to include oral and anal penetration and sexual penetration with objects. Ronald J. Berger et al., *The Dimensions of Rape Reform Legislation*, 22 LAW & SOC'Y REV. 329, 331 (1988).

201 N.J. STAT. ANN. § 2A:84-32.1-.2, *supra* note 194.

202 *Id.* A defendant can currently, and prior to the enactment of A. 677, only submit a complainant's history as evidence before the trial begins. N.J. STAT. ANN. § 2C:14-7(a), *supra* note 186.

203 N.J. STAT. ANN. § 2C:14-7, prior to the enactment of A. 677, *supra* note 186. Note that the court will allow a motion for an order to be made during the trial if it deems evidence as "newly discovered" and if it could not have been obtained earlier through the exercise of due diligence. *Id.*

204 *See* the 1976 version of New Jersey's rape shield law, *supra* note 194 (stating: "the court shall make an order stating what evidence may be introduced and the nature of the questions which shall be permitted"). *But see* the 1979 version, *supra* note 186 (stating: "the court shall enter an order setting forth with specificity what evidence may be introduced and the nature of the questions . . . and the reasons why the court finds that such evidence satisfies the standards contained in [the] section").

205 N.J. STAT. ANN. § 2C:14-7(c), *supra* note 186. This subsection, although its drafters sought to create guidelines for the judges in determining relevance, created the loop-hole through which defendants could admit past sexual conduct into evidence: all they had to do was say the complainant consented or that they did not use force and the evidence could be admitted. *See infra* notes 231-37 and accompanying text.

206 *Id.* N.J. STAT. ANN. § 2A:84-32.1, the 1976 statute, *supra* note 194, established a standard of simple "relevancy." The term in the 1976 version of New Jersey's rape shield statute was not defined in any manner nor was any guidance offered to judges regarding its interpretation. *Id.* N.J. STAT. ANN. § 2C:14-7(c), however, stated that evidence of a victim's past sexual conduct would not be considered relevant unless it was "material to negating the element of force or coercion or to proving that the

protect rape victims despite these valiant attempts to protect the sexual assault victim.[207]

B. *The 1994 Amendments*[208] *and the Glen Ridge Trial*

The much-publicized Glen Ridge case infuriated various members of New Jersey's community.[209] A. 2085[210] sponsored by then-

---

source of semen, pregnancy, or disease is a person other than the defendant." *See supra* note 186.

207 *See supra* note 205 and accompanying text.

208 In 1988, § 2C:14-7 was amended. The 1988 changes, with the exception of subsection (a), are not pertinent to the discussion of this note. The following language was added to subsection (a): "or endangering the welfare of a child in violation of N.J. STAT. ANN. § 2C:24-4." These changes were the result of A. 641. The Assembly Judiciary Committee Statement read, in pertinent part, as follows:

> This committee substitute excludes certain information regarding a child's past history of abuse, sexual experimentation, or sexual conduct from a jury's consideration when the child is the complaining witness in a prosecution for sexual assault, aggravated sexual assault, criminal sexual contact, aggravated criminal sexual contact or endangering the welfare of a child.

N.J. SENATE JUDICIARY COMM., STATEMENT TO A. 641, 203TH LEG., 1ST SESS. (May 15, 1988).

209 Christine Schaack McGoey, *When Regular Guys Rape: The Trial of the Glen Ridge Four*, ON THE ISSUES, Fall 1993, at 14. McGoey demonstrated that despite the fact that the defendants were tried as adults and convicted of first-degree crimes, the judge sentenced them as "Young Adult Offenders." *Id.* McGoey further stated that this occurred because the judge did not view the defendants as a danger to society. McGoey also stated, "It is hard to imagine [the judge] designing such a sentence if the defendants were not privileged, white males. The lesson from the Glen Ridge case is simple: As long as rape myth controls rape trials, rapists will walk free. Judges, if not jurors, will see to it." *Id.* Allysa Krauss, a trial consultant with the National Jury Project, which assists and advises trial attorneys in selecting juries, states, "You have to ask, is the defendant an insider or outsider? Is the victim an insider or outsider? How does the defendant fit into the social status of the community? Is there a general trend to want to protect him?" D'Aurizio, *supra* note 68, at L5.

A defendant's physical appearance drastically sways juries in acquaintance rape cases. FAIRSTEIN, *supra* note 68, at 135. This occurs because the myth that rapists are physically unattractive, uneducated, and from a lower socioeconomic class pervades jurors' perceptions, causing many to think, "He doesn't look like he'd have to force someone to have sex with him." *Id.* The accused often benefits from the stereotype of the "young, white, popular student with a promising future." D'Aurizio, *supra* note 68, at L5. It is apparent that this played a large role in the judge's permitting the Glen Ridge defendants to remain free on bail. McGoey, *supra*, at 14. Minorities, however, are not afforded such leniency since they are not perceived to have much of a future anyway. D'Aurizio, *supra* note 68, at L5.

The Glen Ridge defense was able to circumvent the rape shield statute and introduce the victim's past sexual history into evidence. *See supra* notes 27-31. This was accomplished by raising the issue of consent as demonstrated. *See supra* note 205. A representative from NOW claimed that the court, by admitting this evidence, sent the

Assemblywoman Harriet Derman (R-Middlesex)[211] and introduced on December 14, 1992 was a direct response to the Glen Ridge Trial in Essex County.[212] The bill stalled in the Senate in June of

---

message that it cared more about the athletes on trial than it did the victim. LAUFER, *supra* note 2, at 80. NOW believed that the court implied that the victim, being mentally impaired, did not possess a life or reputation as important as those of the rapists. *Id.* An Essex County prosecutor stated he was "shocked and appalled" by the "lenient treatment afforded to convicted rapists." *Id.* at 6-7. An Assistant Essex County prosecutor claimed that, by allowing the rapists to remain free on bail, the court supported the "boys will be boys" attitude prevalent throughout the trial. *Id.* at 7. Evelyn Nieves, *Sentences in Sex Assault Divide Glen Ridge Jurors*, N.Y. TIMES, Apr. 25, 1993, at A48 (quoting juror Patrick Parker, a truck driver from Irvington, N.J., as saying, "What I feel I really can't put into words. To me, it felt like what we did was for nothing," and when pondering what the sentences said about justice - whether the same decision would have been reached if the white middle-class suburban defendants were black, poor, and from the inner-city, he responded, "I know the answer, [n]ow I want to put it behind me").

210 N.J JUDICIARY LAW AND PUBLIC SAFETY COMMITTEE, STATEMENT TO A. 2085 BEFORE THE ASSEMBLY, 205TH LEG., 2ND SESS. (JUNE 3, 1993) [hereinafter STATEMENT ON A. 2085].

211 Harriet Derman is now the New Jersey Commissioner of Community Affairs. Then-Assemblywoman Derman's assistant informed the author of this note that Derman was "furious" at the events occurring in the Essex County Courthouse. The inception of A. 2085 occurred when the Essex County NOW office was besieged by telephone calls protesting the victim's treatment at the beginning stages of the Glen Ridge trial. Relayed by Christine McGoey, Coordinator of the Essex County Chapter of NOW, during a telephone inquiry on Sept. 23, 1993. NOW instituted a "court watch" and even organized a Suburban Protest March which attracted over four hundred participants. *Id.* Assemblywoman Derman, who was already infuriated by the daily accounts of the trial in the local media, contacted the Essex County NOW office. *Id.* Thus, A. 2085 had its commencement as a "community effort." *Id.* On June 21, 1993 it passed the Assembly Judiciary, Law and Public Safety Committee. N.J. LEGIS. INDEX, Vol. 80, No. 9 (Nov. 15, 1993), at 72. Three days late it was received in the Senate. *Id.*

The Committee's statement dated June 3, 1993 was as follows:

> Although the "rape shield law" currently places restrictions on a defendant's ability to introduce evidence of the rape victim's past sexual conduct, the committee believes that these restrictions fall short of protecting the victim's right to privacy. The inadequacy of the current rape shield provision was borne out by events at the recent Glen Ridge sexual assault trial, where the defendants were allowed to bring in evidence of the developmentally disabled victim's past history and discuss it, in great detail, in open court. The committee feels such evidence is irrelevant.

See STATEMENT ON A. 2085, *supra* note 210.

212 STATEMENT ON A. 2085, *supra* note 210. *See also* Robert Hanley, *Judge Rules Sexual History Is Admissible In Trial*, N.Y. TIMES, Aug. 29, 1992, at A21 (stating that "[t]he judge said one reason for his admitting the woman's sexual history was the state's reliance on it to bolster its arguments before the grand jury and in pretrial hearings that she was mentally defective and had shown in previous sexual encounters that she was incapable of understanding them or exercising her right to say no to them").

1993.[213] It was reintroduced in January of 1994 as A. 677.[214] It passed the Assembly on January 27, 1994 and went to the Senate on the thirty-first of that month.[215] The Senate Judiciary Committee passed the bill on June 13, 1994.[216] Then, on August 11, 1994 the bill was signed into law.[217] New Jersey's revised rape shield statute has four major provisions which serve to tighten judicial discretion and limit the admissibility of evidence.[218]

C. *Relevancy—The Heightened Standard*[219]

The amendment to N.J. STAT. ANN. § 2C:14-7(a) heightens the standards with which a judge must comply when determining the relevancy of sexual history evidence.[220] Any evidence, prior to the 1994 revision, could be deemed admissible if the court found it relevant.[221] The revised statute requires a court to find the evidence "highly material" before it can be admitted.[222] Also, its pro-

---

213 Michelle Ruess, *Assembly Oks Bill on Rape Trial Privacy*, N.J. RECORD, Jan. 28, 1994, at A3.

214 A. 677 was sponsored by Assemblywoman Joanna Gregory-Scocchi (R-Middlesex) and Assemblyman James Warsh (R-Middlesex). N.J. LEGIS. INDEX, Vol. 81, No. 9 (Oct. 6, 1994), at 59. The Assembly Judiciary, Law and Public Safety Committee issued a statement identical to the one issued regarding A. 2085, *supra* note 210.

215 *Id.*

216 *Id.*

217 Chapter 95, 1994. *Id.*

218 *See* Statement on A. 2085, *supra* notes 210, 211.

219 The following amendments to subsection (a) are pertinent to this note:
1) the phrase "and highly material and meets the requirements of subsections (c) and (d) of this section" would be added between the phrases, "sexual conduct of the victim is relevant" and "and that the probative value. . . ."
2) The phrase "is not outweighed by" would be removed from between the phrases "probative value of the evidence offered" and "its collateral nature" and would be replaced by the phrase "substantially outweighs."
Id.
The following is a list of A. 677's amendments to N.J. STAT. ANN. § 2C:14-7(a) which are not the focus of this note: 1) the word "or" before the phrase "or endangering the welfare of a child" would be omitted. 2) after the cite to statute N.J. STAT. ANN. § 2C:24-4 the phrase "or the fourth degree crime of lewdness in violation of subsection (b) of N.J. STAT. ANN. § 2C:14-4" would be added. 3) the word "he" would be replaced by the term "defendant" where the statute currently states: "he must apply for an order."

220 *See* STATEMENT ON A. 2085, *supra* note 210.

221 BLACK'S LAW DICTIONARY 1291 (6th ed. 1991) defines the term *relevant* as, "relevancy of evidence refers to its probative value in relation to the purpose for which it is offered."

222 *See* the 1994 amendments to N.J. STAT. ANN. § 2C:14-7(a), *supra* note 219; *see also*

bative value must "substantially" outweigh both its collateral nature and the "probability for prejudice, confusion, or invasion of privacy."[223]

During the Glen Ridge trial, for example, the victim was portrayed as a dangerous, sinister temptress.[224] Witnesses were questioned about details of her private life.[225] The prosecution had to prove the defendants had knowledge that the victim either did not consent, or because of mental incompetence she could not consent.[226] Despite the fact that the evidence was later explained,[227]

BLACK'S LAW DICTIONARY, *supra* note 221, at 976 (defining *material evidence* as "evidence which is material to the question in controversy, and which must necessarily enter into the consideration of the controversy and which by itself or in connection with other evidence is determinative of the case").

223 The relevance standard is heightened because the terms "highly material" and "substantially outweighs" also apply to the other two revised sections of the statute, thereby making them stronger. *See* N.J. STAT. ANN. § 2C:14-7(c) and (d), *infra* notes 231-70.

224 McGoey, *supra* note 209, at 13.

225 *Id.* For example, the defense raised such questions as, "Did she ever talk about boys or about sex?"; "Did she swear?"; "Did she smoke cigarettes?"; "Did she display immoral behavior?" In addition, the defense counsel was permitted to admit evidence that the Glen Ridge victim had been expelled from school for sexual misconduct, had bared her chest in school, and had sex in a school tower. *Id.* Also, the judge, within the parameters of his discretion, permitted the defense lawyer to introduce evidence that the victim had been sexually active since she was twelve. *Id.*

226 Christopher Kilbourne, *Rape Trial Break Gives Both Sides Time for Strategy: Glen Ridge Accuser Testifying,* N.J. RECORD, Dec. 12, 1992, at A3. The Glen Ridge jury considered the 1991 New Jersey State Supreme Court's interpretation of "mentally defective" in *State v. Olivio* regarding consent and sexual assault. Tracy Schroth, *Glen Ridge Jury to Decide the Meaning of "No,"* 132 N.J.L.J., Dec.21, 1992, at 8. In State v. Olivio, 123 N.J. 550 (1991), the Court held that the prosecution must show that the victim did not comprehend the distinctively sexual nature of the act or was incapable of saying "no." *Id. Olivio* ruled that it was no longer sufficient to show that the victim did not understand the consequences of the act. The Court found the former standard too vague and an infringement of mentally impaired peoples' rights. In New Jersey, under *Olivio,* the prosecution has the burden of proving the victim's mental incapacity and that the defendants had knowledge of her incapacity to consent. Judith A. Zirin, *What if it Were Glen Ridge, N.Y.?,* 209 N.Y.L.J., Apr. 7, 1993 at 1, 6. In New York, however, under the New York State Penal Law § 130.10, the prosecution's claim that a victim could not consent due to mental incapacity is an affirmative defense to be proven by the defendant. *Id.* at 6. Thus, in New York the defendant must show that, at the time of the offense, he or she did not know of the facts or conditions responsible for such incapacity to consent. *Id.*

227 Kilbourne, *supra* note 227. During the trial, the victim's mother testified that like a small child her daughter had difficulty removing pullovers without the tee shirt underneath lifting. *Id.* The "sex in the school tower" turned out to be a touch. *Id.* A counselor explained that the victim had never been expelled: she was transferred because she needed special classes. *Id.*

the judge deemed this evidence relevant to establish whether or not the victim consented to the alleged sexual contact.[228] The judge in the Glen Ridge trial, using his discretion, admitted the evidence to afford the defendants a fair trial.[229] Had the revised statute been enacted, the judge would have found the evidence inadmissible because it was not *highly material.*[230]

D. *The Issue of Consent: New Jersey's Loophole*[231]

The rape shield statute applied during the Glen Ridge trial permitted evidence of past sexual conduct because the defense raised the issue of consent.[232] A defendant could submit evidence regarding any aspect of a victim's past sexual conduct with any other individual to show that the victim consented to the defendant's own sexual conduct.[233] The new law, however, mandates that evidence of a victim's sexual conduct with a third party be inadmis-

---

228 McGoey, *supra* note 209, at 11.

229 LAUFER, *supra* note 2, at 64. *See also* Russ Bleemer, *Glen Ridge Trial Shows Rape Shield Law's Foibles,* 133 N.J.L.J., Mar. 22, 1993, at 33 (discussing how the rape shield statute applied in the Glen Ridge trial gave the judge great discretion in balancing the victim's right to privacy and the defendants' constitutional right to a fair trial).

230 *See* telephone conversation with McGoey, *supra* note 211; *see also* Statement on A. 2085, *supra* note 210 (referring specifically to the Glen Ridge trial and how it revealed the inadequacies of New Jersey's rape shield statute).

231 A. 677 amends N.J. STAT. ANN. § 2C:14-7(c) to read as follows:

> Evidence of previous sexual conduct *with persons other than the defendant which is offered by any lay or expert witness* shall not be considered relevant unless it is material to [negating the element of force or coercion or to] proving [that] the source of semen, pregnancy, or disease [is a person other than the defendant].

Id.

The matter enclosed in brackets is omitted in the revised law. The underlined material is the statute's new language. P.L. 1994, Chapter 95, approved Aug. 11, 1994.

232 N.J. STAT. ANN. § 2C:14-7, prior to the enactment of A. 677, *supra* note 186. The statute permitted the admission of previous sexual conduct evidence if that evidence could be shown to be "material to negating the element of force or coercion." *Id.* Coercion is defined as "compulsion; constraint; compelling by force or arms or threat." BLACK'S LAW DICTIONARY 258 (6th ed. 1991). Thus, according to BLACK'S, the N.J. statute permitted a judge to find evidence relevant if a defendant sought to prove he did not use force or threats.

233 Statement on A. 677 by the Assembly Judiciary, Law and Public Safety Committee, 206th N.J. Leg., 1st Sess. (Jan. 20, 1994) [hereinafter *Statement on A. 677*]. This can be accomplished simply by asserting a defense against his use of force or coercion. The new law removes this language and curbs a defendant's ability to raise this defense, thus shifting the focus from the victim's actions to the defendant's. N.J. STAT. ANN. § 2C:14-7(c) as amended, *supra* note 231.

sible "unless it is material to the source of semen, pregnancy, or disease."[234] The removal of the phrase "negating the element of force or coercion" eliminates the loophole through which the Glen Ridge defense was able to admit the claimant's past sexual history.[235]

The new rape shield law, in addition, amends subsection (c) by prohibiting any evidence of prior sexual conduct presented "by any lay or expert witness."[236] This provision would have prevented the Glen Ridge defense lawyers from eliciting the sexually explicit, often irrelevant, testimony of doctors, psychiatrists, and school counselors.[237]

E. *The "Reasonable Person" Enters the Law*[238]

The new statute also adds an entirely new subsection. This

---

234 The changes to subsection (c) bring the New Jersey statute more in line with the corresponding section of the Michigan rape shield statute. MICH. COMP. LAWS ANN. § 750(j)(1)(b), *supra* note 155.

235 This part of the bill was strongly supported by Essex County NOW. *See* telephone conversation with McGoey, *supra* note 211. With the removal of this phrase, a defendant will no longer be able to hide behind a consent defense in order to submit a victim's past sexual history as evidence. *Id.* Christine McGoey, a Coordinator for the Essex County Chapter of NOW, believes the "'consent' exception to the rape shield law evolved from myths that unchaste women would not tell the truth and would have sex with anyone at anytime." Christopher Kilbourne, *After Ordeal in Basement Assault in the Courtroom*, N.J. RECORD, Mar. 21, 1993, at A10. She stated, "We know that's not true, we know that sexually active women can tell the truth. We know that sexually active women don't have sex with everybody. But those two myths have shaped the law." *Id.*

236 *See* the amendments to N.J. STAT. ANN. § 2C:14-7(c), *supra* note 231.

237 *See* examples of questions asked of third-party witnesses during the Glen Ridge trial, *supra* note 225; *see also* LAUFER, *supra* note 2, at 47 (describing how a Glen Ridge trial defense attorney asked the state's expert witness, a psychiatrist who had examined the witness, if the victim had expressed enjoyment at seeing naked boys in the locker room). Another defense attorney asked the psychiatrist if she was aware of the various sexual encounters the victim had allegedly experienced. *Id.*

238 A. 677 adds subsection (d) to the statute. It states:

> Evidence of the victim's previous sexual conduct with the defendant shall be considered relevant if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.

See Statement on A. 677, *supra* note 233.

The Senate Judiciary Committee amended the original language of the Assembly draft which reads as follows:

> Evidence of the defendant's previous sexual conduct with the victim shall be relevant only if the previous sexual conduct with the victim could lead

provision resulted from the case of *State of New Jersey in the Interest of M.T.S.*,[239] which tackled the issue of "acquaintance rape."[240] Prior

---

the defendant to reasonably believe that the sexual conduct complained of occurred with what a reasonable person believed to be affirmative and freely given consent.

See N.J. Senate Judiciary Comm., Statement before the Assembly, 205th Leg., 1st Sess. (June 2, 1994) [hereinafter *Senate Statement*]. The author of this note finds that the Senate Committee's amendment shifts judicial scrutiny from the victim's state of mind and past actions to those of the defendant. The Senate Amendment mandates that a defendant's knowledge of the circumstances at the time of the offense be examined to see if they rise to the reasonable person standard. *See Senate Statement, supra.* The language of the bill, prior to the Senate Amendments, would have resulted in a defendant putting forth the victim's past sexual conduct to determine if the defendant could have reasonably believed the conduct complained of was consensual [author's own determination]. This would have been a direct circumvention of the rape shield law's purpose: to avoid having such information discussed in court to prove consent. *Id.*

239 129 N.J. 422, 444 (1992). The court in *M.T.S.* held that:

> [T]he standard defining the role of force in sexual penetration must prevent the possibility that the establishment of the crime will turn on the alleged victim's state of mind or responsive behavior. [A]ny act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault.

Id.

The defendant in *M.T.S.* was a seventeen-year-old male living with the fifteen-year-old victim and her family. *Id.* at 425. The victim testified that during the night in question, while en route to the bathroom, she saw the defendant and walked past him. *Id.* at 426. She returned to her room and fell back asleep. *Id.* She stated that she awoke to find the defendant vaginally penetrating her. *Id.* The defendant then, according to the victim, left her bed after she slapped him and told him to extricate himself. *Id.* The defendant, on the other hand, testified that he and the complainant were very good friends. *Id.* at 427. He also stated that she permitted him to kiss her on more than one occasion. *Id.* He claimed that on the night in question, when the complainant walked to the bathroom, they kissed. *Id.* Afterwards, they went to her bedroom where they engaged in consensual intercourse. *Id.*

The trial court ruled in favor of the victim, but the appellate court reversed. *Id.* at 425. The appellate court found that "nonconsensual penetration does not constitute sexual assault unless it is accompanied by some level of force more than that necessary to accomplish the penetration." *M.T.S.*, 129 N.J. at 425 (quoting 247 N.J. Super. 254 (1991)). The appellate court acknowledged, however, that its holding was "anomalous" because it recognized that "a woman has every right to end [physically intimate] activity without sexual penetration." 129 N.J. at 449. The appellate court also stated that "[e]ven the force of penetration might . . . be sufficient if it is shown to be employed to overcome the victim's unequivocal expressed desire to limit the encounter." *Id.*

The New Jersey Supreme Court, however, disagreed with the appellate court's assessment that the only way a woman can refuse sexual contact is through an "unequivocal expressed desire to end the activity." *Id.* at 450. This, the Supreme Court stated would "import into the sexual assault statute the notion that an assault occurs

to the *M.T.S.* ruling, New Jersey defendants found guilty of acquaintance rape could circumvent a state rape shield statute by claiming that they mistakenly believed the victim had consented.[241] This defense was validly asserted through subsection (c) of the former rape shield statute.[242] An attorney could persuade a judge of the necessity to admit plaintiff's past sexual history into evidence to establish consent, as occurred in Glen Ridge.[243]

The New Jersey Supreme Court held that no force in addition to that required for sexual penetration is required to commit the crime of rape.[244] *M.T.S.* revolutionized rape law by shifting the court's focus from the victim to the defendant.[245] This was accomplished through the Court's holding that a defendant may be found guilty of sexual assault if he or she commits an act of sexual penetration without believing, as a reasonable person would, that the complainant had freely given affirmative consent to the penetration.[246] The *M.T.S.* holding also states that, even if the parties to

---

only if the victim's will is overcome, and thus to reintroduce the requirement of nonconsent and victim-resistance as a constituent material element of the crime." *Id.*

240 *See* the definition of "acquaintance rape," *supra* note 68. A judge and jury face difficulties of proof when the accused and the complainant are not strangers. George E. Dix, *"Date Rape" Cases Call for New Definition of Consent*, 133 N.J.L.J., Apr. 19, 1993, at 17. Consent, in such a case, becomes the central issue. *Id.* at 34. The defendant may assert complainant's lack of verbal and physical resistance as evidence to refute the rape charge. *Id.* This may be enough to acquit the accused, since he may not be proven guilty beyond a reasonable doubt. *Id.* This dilemma occurs often, since approximately one half of all victims know their attacker. Fromm, *supra* note 148, at 597. Note, however, that as of November, 1994, this figure was as high as two-thirds. Cindi Leive, *The Final Rape Injustice*, GLAMOUR, Nov. 1994, at 198-99.

241 *See* Murthy, *supra* note 152, at 543.

242 N.J.STAT. ANN. § 2C:14-7(c), *supra* note 186. The language of the former statute which stated that "evidence of previous sexual conduct shall not be considered relevant unless it is material to negating the element of force or coercion,. . . ." is easily manipulated. *Id.*

243 LAUFER, *supra* note 2, at 64. An Essex County Superior Court judge in the Glen Ridge case determined in a pre-trial hearing that the protection afforded the victim in New Jersey's rape shield statute was secondary to the defendants' right to a fair trial. The judge allowed the interrogation into the past sexual history because the prosecution's main argument centered around the victim's mental disabilities and her inability to refuse to participate in the sexual acts in question. He decided that the defendants had the right to use such information to refute the prosecutions allegations that they knew of her incapacities and to prove that she was able to consent. *Id.*

244 Jennifer Trucano, *Force, Consent, and Victims' Rights: How the State of New Jersey In Re M.T.S. Reinterprets Rape Statutes*, 38 S.D. L. REV. 203, 204 (1993).

245 *See supra* notes 238-39.

246 *Id. But see* Cheryl Siskin, *The "Resistance Not Required" Statute and "Rape-Shield Law" May Not Be Enough - Commonwealth v. Berkowitz*, 66 TEMPLE. L. REV. 531 (1993)

the action are not strangers, nonconsensual sex is rape.[247] This holding is crucial to the issue of acquaintance rape because it urges future courts to focus only on the incident in question and whether

(illustrating *Com. v. Berkowitz*, 609 A.2d 1338 (Pa. Super. 1992), and its ruling that a rape cannot occur unless there is greater proof of "forcible compulsion" than penetration against a woman's articulated will). In May of 1992, the Pennsylvania Supreme Court interpreted state legislation to mean that a felony could not be committed if a man penetrated a woman while she repeatedly said "no." *Id.* at 532. In *Berkowitz*, an East Stroudsberg University sophomore went to meet her boyfriend at his dormitory's lounge on April 19, 1988. *Berkowitz*, 609 A.2d at 1339. Since she arrived early, she went to the defendant's room located in the same building to look for his roommate. In her friend's room, she met Robert Berkowitz with whom she was acquainted. *Id.* at 1339. He asked her to stay, sit on the bed, and give him a back rub. 609 A.2d at 1340. She declined, but stayed and sat on the floor to talk.

During the trial the victim testified that she did not agree to the backrub because she did not trust the defendant. After talking for a few minutes, Berkowitz straddled the young woman's hips, untied her sweatpants, then removed her underwear from one leg. *Id.* at 1340. Berkowitz then penetrated her vaginally with his penis. *Id.* He claimed at the trial that the conduct was mutual, while she stated she verbally resisted. *Id.* at 1340-41. The young woman stated that she could not prevent the penetration due to Berkowitz's full bodyweight pinning her down. *Id.* at 1340. Both, however, testified that the young woman said "no" during the encounter. *Berkowitz*, 609 A.2d at 1340. After the incident, the victim dressed, ran from the room, and found her boyfriend. *Id.* at 1340. The boyfriend, seeing that she was crying, asked if she had been raped. *Id.* at 1350. Prior to the trial, the defendant filed a motion, according to the state's rape-shield law, seeking to introduce into evidence the young women's previous contacts with the defendant and information about her reputation for fighting with her boyfriend about her alleged past infidelities. *Id.* at 1342. The defense argued that, through the young woman's sexual history, they could establish that she had a motive to lie regarding whether she consented to sex with Berkowitz so her boyfriend would not believe she had been unfaithful. *Id.* at 1349. The trial court permitted the defendant to submit evidence regarding prior contacts between him and the young woman along with general evidence of her fighting with her boyfriend prior to the incident. *Id.* at 1351. The court, however, did not permit into evidence specific details of the fights or of the woman's reputation. *Berkowitz*, 609 A.2d at 1351.

After being found guilty of rape, Berkowitz appealed and was acquitted. *Id.* at 1352. The court also remanded his indecent assault charge, instructing the trial court to permit into evidence information regarding the alleged victim's fights with her boyfriend about her alleged infidelities. *Id.* The court, on remand, reversed the defendant's indecent assault charge because it concluded that the trial court misconstrued the rape shield law by precluding evidence that the alleged victim had a motive to fabricate the charges. *Id.* at 1348. *Berkowitz* finally held that a man cannot be charged with rape if the evidence of force is "not inconsistent with consensual intercourse" and that a defendant can introduce evidence of a woman's fights with her boyfriend about supposed infidelities or her prior sexual conduct with any third party to bolster the defense's theory that she had a motive to lie regarding her conduct with the defendant. *Id.* at 1338. This holding has, in effect, created an exception to the rape-shield statute in contradiction to Pennsylvania's legislative intent, without legislative guidance. *See* Siskin, *supra*, at 534.

247 *See* Trucano, *supra* note 244, at 202.

the defendant could have reasonably believed, based on what the defendant knew at the time, that the complainant had consented.[248] This should keep the complainant's past sexual history with the defendant from judicial and public scrutiny.

Finally, New Jersey's rape shield statute, with the addition of subsection (d), protects a sexual assault victim acquainted with her attacker.[249] Two very controversial cases and Georgia's rape shield statute influenced the drafting of subsection (d).[250] In *Doe v. United States*,[251] the Fourth Circuit Court of Appeals confronted the "constitutionally required" clause of the federal rape shield statute.[252] The victim in *Doe* appealed a pre-trial order that allowed the admission of evidence of her general reputation, sexual habits, and past sexual encounters.[253] The *Doe* court ultimately excluded

---

248 *Id.* at 221. The "reasonable person" standard, however, leads to the assumption that society judges words and actions by comparing them to a putative person's, which reflects equally those of both females and males. Robin D. Weiner, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143, 147 (1983). Weiner claims that due to different norms among males and females, what is "reasonable" to a man is not always so to a woman. *Id.* at 148. She also claims that the "reasonable person" standard's "basic flaw" is that there is not a single perspective from which this standard arises. *Id.* at 149. The "reasonableness," therefore, will vary drastically in how it is assessed. *Id.* Weiner asks, "Will the standard be judged from the defendant's actions, the victim's conduct, or the defendant's view of the victim's behavior?" *Id.* Furthermore, Weiner notes that this standard may differ according to the judge's or jury's views of what constitutes "reasonableness." *Id. But see* Remick, *supra* note 41 (advocating that consent be delineated through a clear verbal standard where "no" means "no" and "yes" means "yes," and where a lack of verbal communication regarding consent would result in a presumption that consent was not granted).

249 *See* Dix, *supra* note 240, at 35 (stating: "*M.T.S.* held [that] the prosecution must show that a reasonable person would not have believed that the other party was affirmatively and freely giving permission"). Subsection (d) ensures that a defendant would not be able to rely on his previous sexual experience with the complainant in order to assert that he believed she consented to the particular incident in question unless he, as a reasonable person, believed she had freely given affirmative consent. N.J. STAT. ANN. § 2C:14-7(d), *supra* note 238.

250 Copies of Doe v. United States, 666 F.2d 43 (4th Cir. 1981) and Hardy v. State, 285 S.E.2d 547 (Ga. App. 1981), along with the Georgia rape shield statute, GA. CODE ANN. § 24-2-3(a) (Michie 1982 & 1993 Supp.), were received by the author of this note from former Assemblywoman Derman's office. In addition, Ricki Jacobs, former member of the Commission on Sex Discrimination in the Statutes, Trenton, New Jersey, verified the significance of these cases and the Georgia statute to the drafting of A. 2085 during a telephone conversation on Sept. 27, 1993.

251 666 F.2d 43 (4th Cir. 1981). *See also* Murthy, *supra* note 152, at 542-43 (presenting a thorough account of the *Doe* case).

252 *Id. See also* FED. R. EVID 412(b)(1), *supra* note 165.

253 DiBattiste, *supra* note 165, at 130. In *Doe*, 666 F.2d at 45, defendant Donald Robert Black was accused of rape. He was a soldier who claimed the victim often

this evidence.[254] However, it admitted into evidence telephone conversations between the defendant and the victim in addition to the testimony of third-party witnesses.[255]

The *Doe* court ruled that the defendant's beliefs were relevant to the issue of his intent.[256] The court, in admitting this evidence, circumvented Rule 412's constitutional analysis and applied Rule 403's general relevancy test.[257] It reasoned that this evidence was admissible when offered solely to demonstrate the accused's state of mind.[258] The court also contended that since Rule 412 did not discuss an accused's state of mind, the issue could be analyzed under Rule 403.[259] Thus, the Federal rape shield statute failed to protect the *Doe* victim from the defendant's claim that he "thought" she consented.[260]

In fashioning subsection (d), the New Jersey legislature also reviewed Georgia's rape shield statute.[261] Prior to its 1989 revision,[262] Georgia's rape shield statute[263] failed to protect the victim

---

visited his barracks although he himself was not acquainted with her. *Id.* at 47. He made a pre-trial motion to admit evidence of the victim's sexual past. *Id.* at 45. The district court ruled that Black could introduce such evidence. *Id.* The victim appealed and the United States Court of Appeals affirmed. *Id.* The Court of Appeals stated, "There is no indication . . . that this evidence was intended to be excluded when offered solely to show the accused's state of mind." *Doe*, 666 F.2d at 48. Additionally, the district court in *Doe* permitted the following people to testify on behalf of the defendant: the victim's former landlord, a social worker, a sexual partner of the victim, and two people who claimed to be aware of the victim's reputation for promiscuity. *Id.* at 46-47. Black was permitted to present as evidence testimony of several telephone conversations he had with the victim, the fact that several men had told him the victim was promiscuous, and that he had read a love letter she had written to another man. *Id.* at 47.

254 *See* DiBattiste, *supra* note 165, at 131; *see also Doe*, 666 F.2d at 47-48 (illustrating how the court stated that Rule 412 and the U.S. Constitution forbade the admittance of irrelevant evidence).

255 *Id.*

256 *See supra* note 251.

257 DiBattiste, *supra* note 165, at 132.

258 *Id.*

259 *Id.*

260 *See generally* DiBattiste, *supra* note 165. This is the same argument utilized by the Glen Ridge defense attorneys. LAUFER, *supra* note 2, at 66-72. The defense argued that the defendants could not have known that the victim was incapable of consenting to the sex acts. *Id.* at 49. The Glen Ridge victim's sexual history, in a manner similar to the *Doe* victim, was exposed to determine the defendants' state of mind regarding her ability to say "no." *Id.* at 64.

261 GA. CODE ANN. § 24-2-3(a) (Michie 1982 & 1993 Supp.).

262 The *Hardy* case occurred prior to the 1989 amendments. GA. CODE ANN. § 24-2-3(a) (Michie 1982 & 1993 Supp.), with its 1989 revisions, reads in pertinent part:

of a gang rape by members of a college fraternity as demonstrated in *Hardy v. State*.[264] The *Hardy* court found the evidence of the victim's sexual history admissible to support the defense of mis-

---

(a) In any prosecution for rape, evidence relating to the past sexual behavior of the complaining witness shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or other witnesses, except as provided in this Code section. For the purposes of this Code section, evidence of past sexual behavior includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress, general reputation for promiscuity, unchastity, or sexual mores contrary to the community standards.

(b) In any prosecution for rape, evidence relating to the past sexual behavior of the complaining witness may be introduced if the court, following the procedure described in subsection (c) of this Code section, finds that 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.

Id.

The 1989 amendment, effective July 1, 1989, substituted "and finds" for "or finds" near the middle of subsection (b).

263 *See supra* notes 165-66. Georgia's rape shield statute, GA. CODE ANN. § 24-2-3 (Michie 1982), follows the federal approach. *Id.*

264 285 S.E.2d 547 (Ga. Ct. App. 1981). In *Hardy*, three members of Morris Brown College's varsity football team were indicted for the crime of rape. *Id.* at 458. The victim, a sophomore at the college, was a majorette. She had scored very poorly on an accounting test, and her teacher suggested she seek help from one of the defendants. The defendant agreed, said he would like to be paid, and they decided to meet in his dormitory room to study. The defendant's dorm was known as the "football dorm." *Id.* Normally, female visitors were permitted between 7 p.m. to 10 p.m. in the college's dormitories. The "football dorm," however, had no such regulations because it was apparently understood that such visits were not tolerated during the football season. *Id.* at 548. Once she arrived, she had the defendant paged and he came down from the third floor to meet her.

The victim, upon seeing that the assignment for the following day was complicated, asked if she could copy the defendant's homework to take back to her room. The defendant's roommate came in while the victim was copying the work and began flicking the lights on and off. The two young men left the room, returned, and said that a cash payment was not necessary, because they wanted something else. One of the young men turned off the lights and threw the victim on the floor. *Id.* at 549. She was screaming when her "tutor" brought in a third friend. *Id.* One of the young men put a hand over mouth, turned on some loud music, and while two of them held her down, they took turns raping her. After the assault, the victim left the room in tears, only to find a jeering crowd of football players in the hallway. The three defendants, however, testified that the victim, not having cash to pay for the accounting lesson, smiled and said, "We'll think of something." *Id.* at 549. Once in the room, they claimed that the victim joined one of the defendants on his bed and they began talking about sex. Two defendants claimed that the victim began having sex with the third, while they looked on and were "shocked." *Id.* They all claimed that consensual

taken belief of consent.[265]

Following the 1989 revision,[266] the statute permitted evidence to be introduced only if the prior sexual activity involved the defendant *and* "plausibly support[ed] his reasonable mistake defense."[267] Had the revised statute been applied in *Hardy*, the evidence would have been excluded since it did not involve the defendant and it could not have supported an "inference that the accused could have reasonably believed that the victim consented to the conduct complained of in the prosecution."[268]

Despite the 1989 revision to the Georgia rape shield statute, New Jersey's revised statute is even stronger, since a New Jersey defendant must pass a higher threshold.[269] Specifically, in addition to proving that he or she engaged in prior sexual activity with the victim, the defendant must also demonstrate that the prior activity led him or her to believe that the alleged assault occurred "with what a reasonable person would believe to be affirmative and freely given permission."[270]

---

sex with all three of them followed. They also stated that she only began crying upon being jeered by the crowd outside the room.

In addition to hearing the intimate details of the victim's sexual history, the jury was also informed about her use of birth control, her past dates and boyfriends, and the number and circumstances of her prior sexual experiences. *Id.* at 551. The defendants, however, merely reiterated their version of the events in question which was bolstered by the testimony of their teammates and fraternity brothers. In addition, their coaches and mothers testified as to their academic success and church attendance. The defendants were acquitted of the rape charge, but were charged with simple battery. *Id.* at 547. They appealed, but the appellate court affirmed. *Id.* at 552. The appellate court, in affirming the simple battery charge, essentially permitted the defendants to convince the jury that the victim consented to the sex acts but not to the three centimeter laceration of her vagina and the profuse bleeding that resulted. *Id.* at 552.

265 Murthy, *supra* note 152, at 562; *see also Hardy*, S.E.2d at 550 (stating that "[p]roof of prior consent . . . may be admitted to allow the jury to weigh . . . the probability of consent with respect to an entire class of 'unchaste' women when the court finds that the accused could have *reasonably* believed that the complaining witness consented to the conduct") [italics in original].

266 GA. CODE ANN. § 24-2-3, *supra* note 262.

267 *Id. See also* Murthy, *supra* note 152, at 562 (providing an in-depth analysis of Georgia's rape shield statute and of the *Hardy* case).

268 Murthy, *supra* note 152, at 562 n.121. In *Hardy*, the jurors were "allowed to scrutinize in intimate detail not just the matter of previous sexual intercourse on the part of the prosecutrix, but her use of birth control, her past dates and boyfriends, and the number and circumstances of her prior sexual experiences." *Id.*

269 This is the author's own determination.

270 N.J. STAT. ANN. § 2C:14-7(d), *supra* note 238. *See also* Zirin, *supra* note 226 (com-

F. *The Reinstatement of the Physician/Patient Privilege*[271]

Finally, the new rape shield law adds the term "gynecological records"[272] to the definition of "sexual conduct."[273] The term "gynecological records" would prevent future defense attorneys from invading a victim's private medical records.[274] For example, in the Glen Ridge case, the judge admitted into evidence the victim's use of oral contraceptives.[275] Under the revised statute, it is hard to imagine that the Glen Ridge victim's gynecological records would be deemed "highly material."[276] Furthermore, the fact that such evidence was deemed admissible violated the former rape shield statute because this type of information was prohibited under § 2C:14-7(c).[277]

---

paring New York and New Jersey laws: in New Jersey the prosecution must prove consent; while in New York this would be an affirmative defense to be proven by the defendant); Norman M. Hobbie, *Defending Sexual Assault and Sexual Contact Cases - A Sampling of Fundamental Issues*, 159 N.J. ST. B. ASS'N 32 (1994) (stating how, despite the fact that the defense must provide evidence of consent, it does not have the burden of proving consent).

271 This privilege protects communications between a physician and a patient in the course of their professional relationship from disclosure unless consent is given by the patient. BARRON'S LAW DICTIONARY 352 (3d ed. 1991).

272 N.J. STAT. ANN. § 2C:14-7(e) (West Supp. 1991) states:

> For the purposes of this section, "sexual conduct" shall mean any conduct or behavior relating to sexual activities of the victim, including but not limited to previous or subsequent experience of sexual penetration or sexual contact, use of contraceptives, *gynecological records*, living arrangement and lifestyle.

Id. The emphasized material is the proposed addition. The rest of the text is presently contained in § 2C:14-7(c), *supra* note 231. *See* A. 2085, *supra* note 210; *see also* Peter M. Hazleton, *Rape Shield Laws: Limits on Zealous Advocacy*, 19 AM. J. CRIM. L. 35, 45 (1991) (illustrating how in a 1990 Florida case, an attorney obtained an acquittal on a rape charge by showing the jury victim's lacy white miniskirt worn without underwear; causing the Florida legislature to amend its rape shield law to exclude evidence of a victim's dress to prove it incited the assault).

273 *See* N.J.STAT. ANN. § 2C:14-7(c) prior to the enactment of A. 677, *supra* note 186 and § 2C:14-7(e), *supra* note 272.

274 *See* Statement on A. 2085, *supra* note 210-11.

275 McGoey, *supra* note 209, at 13. McGoey recounted how, despite the fact that the victim's mother explained her daughter's use of birth control pills for her daughter and how she hid them in her food after her vulnerability to sexual assault became apparent, the jury heard the defense present this as evidence of the victim's consent and promiscuity. *Id.*

276 *Id.* at 13.

277 *See* the former text of § 2C:14-7(c), *supra* note 186. Subsection (c) defined the term *sexual conduct* for purposes of determining relevancy, in pertinent part, as follows: "[S]exual conduct shall mean any conduct or behavior relating to . . . use of contraceptives, living arrangement and life style." *Id.*

VII. Conclusion

The Glen Ridge trial served as a sharp reminder to New Jersey citizens that rape shield laws fail when they allow sexual assault victims to experience discrimination and bias in the courtroom. Although its goal is to rein in judicial discretion, the revised statute does not altogether succeed. The clause in § 2C:14-7(a), mandating that evidence be "highly material," and "that the probative value of evidence offered substantially outweighs its collateral nature," is still subject to judicial interpretation. A judge need only decide that evidence is highly material and that its probative value substantially outweighs the danger to the victim's privacy for any evidence to be deemed admissible. Although the statute places greater restrictions on judicial discretion, these restrictions may only be effective if bias and traditional stereotypes toward women do not dominate the judge's personal views. This is a risk each victim will continue to face in the courtroom despite the enactment of A. 677.

The removal of the loophole formerly contained in § 2C:14-7(c), which permitted the Glen Ridge defendants to publicly examine the victim's past sexual history in the courtroom, is, however, a coup for all New Jersey women. A third party witness or a defendant can no longer use a victim's past sexual history with anyone other than the defendant to establish the victim's consent. This section of the statute should operate similarly to Michigan's, since absolutely no judicial discretion is permitted. This, at least, guarantees women that their past relationships will not be publicly exposed.

New Jersey's revised rape shield statute, unfortunately, does contain the potential for total failure. The reasonable person standard embodied in § 2C:14-7(d) is completely dependent upon judicial discretion. A judge can admit any past sexual history into evidence to determine if the defendant's knowledge at the time of the alleged assault led him or her to reasonably believe the victim consented. This provision leaves the victim at the complete mercy of the judge's personal views, despite the shift in focus from the victim's state of mind to that of the defendant. A defendant's knowledge at the time of the alleged assault, if deemed highly material, could cause the exposure of the victim's past sexual history to explain the "reasonableness" of the defendant's actions.

The revised statute succeeds only where the language, like the Michigan rape shield law, states its specific limitations: §2C:14-7(e) forbids judicial examination into a victim's gynecological records; and § 2C:14-7(c) limits evidence of the victim's previous sexual conduct with a third party unless it is to prove the source of semen, pregnancy, or disease. These revisions eliminate judicial discretion, while the others merely redirect it.

New Jersey's new rape shield statute is an improvement upon the previous versions. Judges will be forced to read the language of the *M.T.S.*[278] decision and to analyze the progression of women's rights delineated therein. Although not eliminated, judicial discretion will at least be subject to some restrictions. If at least one judge separates himself or herself from bias and sexual stereotypes, then A. 677 will pave the way toward gender equality in the courtroom. This is an undeniable success.

---

[278] *M.T.S.*, 129 N.J. 422 (1992).