STEPHENS V. MILLER: RESTORATION OF THE RAPE DEFENDANT'S SIXTH AMENDMENT RIGHTS

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INTRODUCTION

On March 17, 1987, in Blackford County, Indiana, Lonnie Stephens went out for an evening of drinking with his friend David Stone. On the way home, Stone dropped Stephens off at Melissa Wilburn's trailer home. At this point, the facts of the case begin to vary dramatically depending on whom you ask.[1] However, Wilburn was allowed to tell her side of the story in the courtroom; Lonnie Stephens was not.[2]

Wilburn's account of the evening began with Stephens arriving at her trailer uninvited. Wilburn said she was sleeping on the couch when Stephens entered the trailer and made sexual advances toward her. Wilburn claimed that she rejected Stephens' advances and told him to leave. She stated that she screamed for her sister, who was sleeping in the next room, but her sister did not respond to her cries for help. Wilburn asserted that Stephens threw her on the couch, got on top of her, held her arms, and covered her mouth when she tried to scream. Wilburn also stated that Stephens unfastened his pants and tore her shirt and bra, but she was able to push him off and avoid the impending rape.[3]

Wilburn was allowed to recount the evening of March 17 with great detail during her testimony. However, when Lonnie Stephens told his side of the story to the jury, he was not able to report several details that were critical to his theory of defense. The only facts that Stephens was able to include in his account of the evening were that he asked Stone to drop him off at the trailer because he was invited there by Wilburn.[4] After arriving, Stephens claimed that he and Wilburn began to kiss and engage in foreplay until they decided to have sexual intercourse. During this consensual intercourse, Stephens made certain statements that angered Wilburn. Stephens claimed that his statements motivated Wilburn to invent the story about the attempted rape in order to exact revenge.

Stephens was not able to educate the trier of fact as to the critical content of those statements because the prosecution successfully objected to admission of the evidence on the grounds that it involved past sexual activity of the victim and was, therefore, precluded by Indiana's rape shield statute.[5] In an offer of proof, Stephens testified that he and Wilburn

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1. Stephens v. Miller, 13 F.3d 998, 1000 (7th Cir. 1994).
2. *Id.*
3. *Id.*
4. *Id.*
5. Stephens v. Miller, 989 F.2d 264, 267 (7th Cir. 1993). Indiana's rape shield statute provides, in pertinent part:

(a) In a prosecution for a sex crime as defined in IC 35-42-4:

(1) Evidence of the victim's past sexual conduct;

(2) Evidence of the sexual conduct of a witness other than the accused;

(3) Opinion evidence of the victim's past sexual conduct;

(4) Opinion evidence of the past sexual conduct of a witness other than the accused;

(5) Reputation evidence of the victim's past sexual conduct; and

(6) Reputation evidence of the past sexual conduct of a witness other than the accused;

were engaged in intercourse "doggy fashion" when Stephens said to her, "Don't you like it like this? . . . Tim Hall said you did."[6]

Lonnie Stephens was found guilty of attempted rape and sentenced to twenty years in prison.[7] The Indiana Supreme Court affirmed the trial court decision, 3-2.[8] Stephens was denied habeas corpus relief by the United States District Court for the Northern District of Indiana.[9] On appeal, the United States Court of Appeals for the Seventh Circuit granted Stephen's petition for a writ of habeas corpus,[10] holding that "Stephens' Sixth Amendment right to testify on his own behalf guarantees him the right to tell a jury a full account of his version of the incident . . . in order to properly balance the credibility and believability of both Stephens' and Wilburn's testimony."[11] A motion for a hearing en banc was filed and so ordered on June 9, 1993.[12] On January 6, 1994, the eleven-member panel handed down a 6-5 decision that upheld Indiana's rape shield law by affirming the trial court's exclusion of the evidence relating to the contents of the conversation between Stephens and Wilburn.[13] This 6-5 split demonstrates the tension surrounding rape shield laws in the Seventh Circuit and begs the United States Supreme Court to grant a writ of certiorari.

The purpose of this Note is to examine the legal and social dynamics of the current applications of rape victim shield statutes. This examination concludes that the enactment of rape shield statutes has not made the prosecution of rape more fair or less traumatic for the parties involved. To the contrary, this legislation has displaced the inequity onto the rape defendant and his[14] Sixth Amendment rights. Part I will discuss the social, political, and legal factors that inspired rape shield legislation. Part II will explore the contemporary application of the balancing test that weighs state and victim interests against the defendant's Sixth Amendment rights. Part III examines *Stephens v. Miller* and questions whether the balancing test employed by the courts results in a constitutional application of rape shield statutes. Finally, Part IV explores possible arguments that the United States Supreme Court should, and possibly will, employ when reviewing the constitutional implications of the balancing test implicated by rape shield statutes.

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may not be admitted, nor may reference be made to this evidence in the presence of the jury, except as provided in this chapter.

IND. CODE § 35-37-4-4 (1989).

6. *Stephens*, 989 F.2d at 266.

7. Stephens v. State, 544 N.E.2d 137, 138 (Ind. 1989).

8. *Id.* at 140.

9. Stephens v. Morris, 756 F. Supp. 1137, 1138 (N.D. Ind. 1991).

10. *Stephens*, 989 F.2d at 264, 269 (7th Cir. 1993).

11. *Id.* at 268-69.

12. *Id.* at 269.

13. Stephens v. Miller, 13 F.3d 998 (7th Cir. 1994).

14. For purposes of this article, reference to the rape defendant will imply the male rape defendant, while reference to the rape victim will imply the female rape victim.

I. THE DEVELOPMENT OF RAPE SHIELD STATUTES

Rape victim shield statutes are currently in force in nearly all state[15] and federal jurisdictions.[16] These statutes exclude reputation or opinion evidence of the past sexual behavior of the alleged victim.[17] This broad exclusion is limited when the evidence

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15. Versions of the rape victim shield laws exist in nearly all fifty states. *See* ALA. CODE § 12-21-203 (Supp. 1986); ALASKA STAT. § 12.45.045 (1990); ARK. CODE ANN. § 16-42-101 (Michie Supp. 1994); CAL. EVID. CODE. § 782, 2 1103 (Bancroft & Whitney Supp. 1990); COLO. REV. STAT. § 18-3-407 (1990); CONN. GEN. STAT. ANN. § 54-86f (West 1989); DEL. CODE ANN. tit. 11, §§ 3508, 3509 (1989); FLA. STAT. ANN. § 794.022 (West Supp. 1990); GA. CODE ANN. § 24-2-3 (Supp. 1989); HAW. REV. STAT. § 626-1, Rule 412 (1986); ILL. REV. STAT. ch. 38, para. 115-17 (1990); IND. CODE § 35-37-4-4 (Smith-Hurd 1989); KAN. STAT. ANN. § 21-3525 (Supp. 1988); MD. CODE ANN. CRIMES AND PUNISHMENTS art. 27 § 461A (Supp. 1990); MASS. ANN. LAWS ch. 233, § 21B (Law. Co-op. 1990); MICH. COMP. LAWS. ANN. § 750.520j (West Supp. 1990); MINN. STAT. ANN. § 609.347 (West 1990); MO. REV. STAT. § 491.015 (1989); MONT. CODE ANN. § 45-5-511(2) (1989); NEB. REV. STAT. § 28-321 (1984); NEV. REV. STAT. ANN. §§ 48.069, 50.090 (Michie 1989); N.H. REV. STAT. ANN. § 632-A:6 (1989); N.J. STAT. ANN. § 2A:84A-32.1 (West Supp. 1990); N.M. STAT. ANN. Rule 11-413 (1978); N.Y. CRIM. PROC. LAW § 60.42 (Consol. 1990); N.C.R. EVID. 412 (Supp. 1985); N.D. CENT. CODE § 12.1-20-14 (1989); OHIO REV. CODE ANN. § 2907.02(D) (Baldwin Supp. 1990); OKLA. STAT ANN. tit. 12, § 2412 (West Supp. 1994); OR. EVID. CODE 412 (Purdon 1981); 18 PA. CONS. STAT. ANN. § 3104 (1990); R.I. GEN. LAWS § 11-37-13 (1989); S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. 1990); S.D. CODIFIED LAWS ANN. § 23A-22-15 (Supp. 1990); TEX. R. CRIM. EVID. 412 (1986); VT. STAT. ANN. tit. 13, § 3255 (1990); VA. CODE ANN. § 18.2-67.7 (Supp. 1990); WASH. REV. CODE. ANN. § 9A.44.020 (West 1990); WIS. STAT. § 972.11 (1987); WYO. STAT. § 6-2-312 (1989).

16. FED. R. EVID. 412.

17. Federal Rule of Evidence 412 typifies the content of rape victim shield statutes:

Rule 412. Sex Offense Cases; Relevance of Victim's Past Behavior

(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 of 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 or opinion evidence is—

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of—

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.

[Subsection (c) gives the procedural requirements for admitting evidence pursuant to subsection (b).]

Id.

addresses the victim's consent or when the Constitution so requires.[18] The rape shield statute, in its various forms,[19] has emerged in reaction to the social and legal atmosphere that for centuries has made the female rape victim either too fearful to prosecute or, if she did decide to prosecute, made her regret that decision. The evidentiary rules in place before 1975 with regard to rape prosecutions created an environment in which the victim was forced to endure a double victimization.[20] First, a female rape victim was exposed to the physical and emotional crises incurred by the rape and the ensuing recovery from the assault. Second, female victims were forced to face the trauma that the criminal justice system inflicted upon them. The system permitted the wholesale admission of evidence pertaining to the victim's sexual history, sexual reputation, and appearance. In effect, the courtroom served as a tribunal for determining the chastity of the victim and whether she may have deserved what had happened to her.

While this scenario may seem unjust and outrageous today, there were two justifications for the procedures that were in place during these rape trials. First, the patriarchal social model espoused by the prominent eighteenth century jurist, Matthew Hale, described rape as "an accusation easily to be made and hard to be proved and harder to be defended by the party accused though never so innocent."[21] This statement suggests that the legal community took its cue from the social climate of the time. Since society believed that the men who were called upon to defend rape charges suffered from the stigma of having been accused, not to mention the annoyance of having to refute the charges, the legal world also operated under these conceptions. According to society, as well as the legal community, the male defendant's burden superseded the injury that a female victim may have suffered from the attack.

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18. Constitutional Amendments, in pertinent part, that are possibly implicated by evidence preclusion involved in applying rape shield statutes:

Amendment VI [1791]

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

Amendment XIV [1868]

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

19. For discussion of individual rape shield statutes by jurisdiction, see Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980) (different jurisdictional treatments of rape shield laws hinder the admissibility of evidence pertaining to an alleged victim's sexual history).

20. *See generally* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985).

21. DEBORAH L. RHODE, JUSTICE AND GENDER 248 n.50 (1989) (citing SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1847)).

The second justification for the procedures that disfavored female victims is illustrated by the female psychological model that was based upon "crude Freudian analysis"[22] and adopted by John Wigmore, the author of the most significant treatise on evidence written in the twentieth century.[23] The Freudian position asserts that females desire and perhaps fantasize about forced sex.[24] Legal scholars during this period promoted this position by allowing the assumption that female rape victims send mixed signals to their attackers.[25] In fact, Wigmore stated that it was probable for women to invent rape accusations and it was "easy for some neurotic individuals to translate their fantasies into actual beliefs and memory falsifications."[26] This position gave rise to the notion that females were socialized to say "no, no, no" even when they meant "yes, yes, yes."[27] These justifications created an environment in which female rape victims stood little chance of successfully prosecuting a rape and an even smaller chance of avoiding the trauma that the criminal justice system imposed upon prosecuting victims. In essence, the social justifications and female psychological explanations served to abdicate the legal community, as well as society at large, by wrapping the female victim in guilt and shame with regard to her prior sexual activity and sexual reputation.

The early common law definition of rape that emerged from this social and political backdrop required that (1) a man's sexual intercourse, (2) be with a woman, (3) other than his wife, (4) against her will.[28] This common law tradition allowed certain inferences to operate among the jurors when they considered a rape case. First, by introducing evidence that the victim's sexual history demonstrated incidents of promiscuity or unchastity, the jury was allowed to infer that since the victim consented to sexual intercourse in the past, she consented to sexual intercourse in the case at bar.[29] Second, by introducing evidence that the victim's appearance at the time of the attack was indecent or erotic, the jury could infer that the victim must have asked for the sexual assault.[30] This transferred the blame from the attacker to the victim. Furthermore, the second inference may have collapsed into the first by allowing a jury to believe that the victim was unchaste because of her appearance, and this assumed unchastity could lead to the assumption that she consented to sexual intercourse in a particular case.

This set of assumptions may be considered a blight on our legal tradition. In reality, however, this sentiment is not that far removed from contemporary courtroom reasoning. In 1989, a rape defendant was acquitted on charges that he had kidnapped and sexually assaulted a woman at knifepoint.[31] When the jurors were questioned following the verdict,

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22. *Id.* at 247.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* (quoting JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 744 (1970)).
27. *Id.*
28. *Id.* at 246.
29. *Id.* at 245.
30. *Id.*
31. Barbara Fromm, *Sexual Battery: Mixed-Signal Legislation Reveals Need for Further Reform,* 18 FLA. ST. U. L. REV. 579, 579 (1991).

one claimed that "[s]he asked for it . . . she was advertising for sex."[32] Another juror concurred by saying "we felt she was up to no good [by] the way she was dressed."[33] This reasoning is a product of the social and psychological justifications discussed above, as well as the assumptions that the common law allowed the jury to make. The case spurred rape shield legislation in that state the following year,[34] but it is the underlying issue of protecting victims' rights that has driven the nation to overhaul its evidentiary position with regard to rape prosecutions.

The Violence Against Women Act of 1993 is an updated version of the legislation that President Carter signed into law in 1978 in response to the need for protection of victims' rights.[35] The Act strives to eradicate the traditional misconceptions about the crime of rape. One telling example of this effort is found in the section entitled *Equitable Treatment Of Rape Cases*[36] which addresses the difficulties in obtaining convictions for rape. These difficulties stem from the traditional legal definition of rape and the evidentiary requirements involved. The traditional version of rape involved a chaste, helpless victim and a violent, brutal stranger.[37] This rape paradigm perpetuated the difficulties involved in prosecuting rape cases that did not conform to the traditional scenario. The Violence Against Women Act is aimed at the prosecution of the types of rape that do not conform to the rape paradigm. The Act compels a state to certify that "its laws and policies treat sex offenses committed by offenders who are known to, cohabitants of, social companions of, or related by blood or marriage to, the victim no less severely than sex offenses committed by offenders who are strangers to the victim."[38] The status of the sex offenders given attention by the Act illustrates the purpose of the Act. Because these types of people are capable of committing rape, they deserve no less punishment under the law than the brutal stranger. The Act cites these people in an effort to dismantle the common law rape paradigm and equalize the judicial approach to all rape cases. The evolution of the philosophy surrounding the social, political, and legal approach to rape cases has permeated rape shield legislation, as well as the case law that upholds rape shield statutes.

II. The Application of Rape Shield Statutes

The rule of law that emerged in response to both the inequality that rape victims faced in the past and the onslaught of national attention to rape victims' rights,[39] is one that simply lets the scales of justice fall in favor of the victim. This evolution is not remedial; it only creates a different victim. Nevertheless, the United States Supreme Court has found that rape shield statutes, on their face, are not necessarily unconstitutional. The last time the

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32. *Id.* at 579 n.2.
33. *Id.* at 579 n.3.
34. *Id.* at 579-80, referring to Fla. Stat. ch. 794.022 (1993).
35. 123 Cong. Rec. H.R. 408 (1977).
36. H.R. 1133, 103rd Cong., 1st Sess. § 114 (1993).
37. Rhode, *supra* note 21, at 245.
38. H.R. 1133, *supra* note 36.
39. Henderson, *supra* note 20, at 949-50.

Supreme Court addressed the constitutional issues implicated by rape shield legislation was in the 1991 case of *Michigan v. Lucas*.[40]

In *Lucas*, the Court noted that a criminal defendant's right to testify is not unlimited but "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[41] The Court reviewed a statutory exception to Michigan's rape shield statute that allows a rape defendant to introduce evidence of his own past sexual conduct with the victim, provided that he file a motion for a hearing to determine the admissibility of the proffered evidence within ten days of his arraignment. The defendant in *Lucas* failed to meet this notice-and-hearing requirement and argued that preclusion of the proffered evidence violated his constitutional rights under the Sixth Amendment.[42] The Court, therefore, was not faced with the intricate constitutional problems involved in applying Michigan's rape shield statute, but was asked only to deal with the constitutionality of its procedural content.

In *Lucas*, the Court clearly and consciously defined (1) the victim's interest in precluding the evidence, (2) the State's interest in precluding the evidence, and (3) the defendant's interest in admitting the evidence. The Court stated that the statute is a valid legislative determination that a rape victim deserves protection from the harassment and unnecessary invasions of privacy that would occur by admitting evidence of her past sexual conduct.[43] The State's interest in precluding the evidence is similar to the victim's in that it strives to protect the victim from these humiliations and encourages the public to report sexual assault crimes. The State, by insuring that the victim's exposure to the criminal justice system will not traumatize her any more than the attack itself, believes more victims will report the incidence of the crime. The Court also recognized the defendant's interest in exercising his Sixth Amendment right "to confront adverse witnesses and present a defense."[44]

The Court assigned a test that instructs trial judges, when faced with these competing interests in the adversarial setting, to balance the rival interests and determine which interests should be preserved at the inevitable expense of the other interests. "'[T]rial judges retain wide latitude' to limit reasonably a criminal defendant's right to cross-examine a witness 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'"[45]

By ordering this type of analysis, the Court constitutionally approved the legitimacy of the victim's and state's interests in inspiring rape shield legislation. The Court found that rape shield legislation is not unconstitutional on its face. However, not once did the Court offer constitutional approval of the *application* of rape shield statutes in general or in specific factual situations. The Court stated that "[t]he sole question presented for our review is whether the legitimate interests served by [state rape shield requirements] . . . can ever justify precluding evidence of a prior sexual relationship."[46] It answered by stating "[t]he Sixth

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40. 500 U.S. 145.

41. *Id.* at 149 (quoting Rock v. Arkansas, 483 U.S. 44, 55 (1987) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973))).

42. *Id.* at 146-47.

43. *Id.* at 149-50.

44. *Id.* at 149.

45. *Id.* at 149 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)).

46. *Id.* at 151.

Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system."[47] Therefore, the Court's holding allows states to enact legislation that may limit a defendant's Sixth Amendment rights, but the Court did not speak to the constitutionality of the application of the legislation that the states enact.

The *Lucas* balancing test[48] is consistent with a body of case law that has developed in the state courts and the federal circuits. The majority rule generally upholds the constitutionality of rape shield statutes and employs a balancing test similar to the one described in *Lucas*. Nearly all the states that have enacted rape shield statutes can offer case law upholding the constitutionality of those laws.[49] Most of those states also apply the *Lucas* balancing test.[50]

This national endorsement of the rape shield statutes does not end in state tribunals. Most of the federal circuit courts carefully adhere to the nationally favored policy that rape shield statutes are constitutional. Once a court commits to this premise, the method of applying the statute is most likely to be a version of the *Lucas* balancing test.

The Fourth Circuit upholds the constitutionality of the purpose behind the rape shield statute by relying on legislative history. In *Doe v. United States*,[51] the appeals court held that "reputation and opinion evidence of the past sexual behavior of an alleged victim was excluded because Congress considered that this evidence was not relevant to the issues of the victim's consent or her veracity."[52]

The Sixth Circuit, in *United States v. Niece*,[53] held that the applicability of the rape shield statute is clearly within the discretion of the trial court.[54] This holding is consistent with the *Lucas* holding, which applied the rape shield statute by using the balancing test and placed final authority in the discretion of the trial court.[55]

The Tenth Circuit steadfastly adheres to the *Lucas* principles. The court has determined that "Congress performed its own balancing test and adopted a per se rule that evidence of a victims [sic] past sexual behavior with third parties is never more probative than prejudicial on the issue of consent."[56] The Ninth Circuit depended on *Lucas* in ruling that

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47. *Id.* at 152 (quoting United States v. Nobles, 422 U.S. 225, 241 (1975)).

48. *Id.* at 149.

49. *See, e.g.*, State v. Howard, 426 A.2d 457 (N.H. 1981); State v. Fortney, 269 S.E.2d 110 (N.C. 1980); State v. Blue, 592 P.2d 897 (Kan. 1979); State v. Green, 260 S.E.2d 257 (W. Va. 1979); Marion v. State, 590 S.W.2d 288 (Ark. 1979); Roberts v. State, 373 N.E.2d 1103 (Ind. 1978); State v. Ryan, 384 A.2d 570 (N.J. Super. Ct. App. Div. 1978); State v. Herrera, 582 P.2d 384 (N.M. Ct. App. 1978); People v. Mandel, 403 N.Y.S.2d 63 (N.Y. App. Div. 1978), *rev'd on other grounds*, 401 N.E.2d 185 (N.Y. 1979); Smith v. Commonwealth, 566 S.W.2d 181 (Ky. Ct. App. 1978); People v. McKenna, 585 P.2d 275 (Colo. 1978); People v. Blackburn, 128 Cal. Rptr. 864 (Cal. Ct. App. 1976).

50. *See supra* note 49.

51. 666 F.2d 43 (4th Cir. 1981).

52. *Id.* at 48.

53. No. 93-5011, 1993 U.S. App. LEXIS 27327, at *1 (6th Cir. Oct. 19, 1993).

54. *Id.* at *18.

55. Michigan v. Lucas, 500 U.S. 145, 149 (1991).

56. United States v. Galloway, 937 F.2d 542, 551 (10th Cir. 1991) (Seymour, J., concurring), *cert. denied*, 113 S.Ct. 418 (1992).

even though evidence is relevant, "it may properly be excluded if its probative value is outweighed by other legitimate interests."[57]

This consistency among the states, as well as the circuits, is called into question by the Seventh Circuit. The closeness of the vote in *Stephens v. Miller*[58] draws attention to the question of whether a constitutional violation occurs by the preclusion of evidence relevant to a defendant's theory of defense.

III. Questioning the Balancing Test

The turbulence this issue creates is epitomized in *Stephens v. Miller*.[59] This case provides a timely example of the tension between state rape shield statutes, the manner in which they are administered, and the proscription of a defendant's Sixth Amendment liberties. As discussed above,[60] the procedural history of *Stephens* illustrates the struggle between state and local sentiment to uphold rape shield statutes and the national liberty interest in enforcing the Constitution. The Circuit Court of Blackford County convicted Lonnie Stephens of attempted rape and sentenced him to twenty years in prison.[61] The trial court applied the majority rule balancing test[62] in favor of the victim. However, the Indiana Supreme Court did not apply the rape shield statute as readily. The Indiana Supreme Court split 3-2.[63] The majority arrived at its decision without addressing the question of whether the rape shield statute is inherently constitutional.[64] However, the issue is not whether the statute itself is constitutional, nor whether the purpose of the statute is constitutionally valid. Rather, the issue is whether the application of the statute denies a defendant his Sixth Amendment rights. The Indiana Supreme Court avoided this tough question.

Instead, the majority prolonged the life of the rape shield statute by avoiding the possible constitutional problems with its application. Stephens asserted that by applying the statute mechanistically, presumably under an assumption that the victim's interests outweigh the defendant's interests, his constitutional right to present a complete defense was violated.[65] Stephens requested that the statements he made to the victim regarding her past sexual activity be viewed as a type of res gestae exception to the proscription of hearsay testimony.[66] That is, Stephens claimed that the statements were not offered to demonstrate aspects of the victim's past sexual conduct, but as a means of relating the facts as they affected Stephens' defense. Presumably, the statements he made to the victim were the turning point in the sexual activity where the victim allegedly withdrew her consent. This information is critical to Stephens' theory of defense that he and the victim were initially engaged in consensual

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57. Wood v. Alaska, 957 F.2d 1544, 1551 (9th Cir. 1992).

58. 13 F.3d 998 (7th Cir. 1994). *See supra* notes 1-13 and accompanying text.

59. 13 F.3d 998.

60. *See supra* introductory text and notes 1-13.

61. *See supra* note 7.

62. *See supra* note 13.

63. *See supra* note 8.

64. Stephens v. State, 544 N.E. 2d 137, 139 (Ind. 1989).

65. *Id.*

66. *Id.* Stephens asked for a res gestae exception even though the exception he really sought was more akin to Sixth Amendment implications of presenting exculpatory evidence.

sexual intercourse and that something angered the victim enough for her to withdraw her consent and fabricate the charge of attempted rape. In response to Stephens' request that the court allow this type of exception to the wholesale preclusion of the victim's past sexual conduct, the court stated that "approval of such an exception would open the door for evading the statute entirely."[67] This answer does not sufficiently address the liberty interests at stake. In order to deprive a defendant of the right to present a complete defense and confront his accuser, the court must give a better reason than the "floodgates" argument that it offers.

Although the Supreme Court in *Lucas* found a particular rape shield statute constitutional on its face and the purpose of rape shield statutes, in general, constitutionally valid,[68] a ruling that finds exception with application of the statute would not necessarily go against the *Lucas* holding. Justice DeBruler's dissent for the Indiana Supreme Court in *Stephens* is based on the argument that the statute and the purpose of the statute can be constitutionally valid, but the result of its application may violate the Constitution.[69] Justice DeBruler stated that "[t]he purpose of the rape shield statute is a good and legitimate one. However, the defendant has the right to be heard in court and to give his version of the events upon which the state relies for conviction."[70] The tenor of this argument plays on the oldest sanction this country knows. Justice DeBruler simply asked that the judicial system be true to the foundation on which it was built. The dissent noted that the constitutional right that Stephens seeks to protect is "the right of the accused to be heard in the tribunal."[71] The dissent insists that this right is "among the most sacrosanct and most essential to a fair determination of guilt."[72] Justice DeBruler concluded his opinion with the following declaration:

> Such right is, I believe, paramount in this situation, and the interest served by the rape shield statute must give way so as to permit the defendant to speak his piece under oath in front of the trier of fact with regard to the events transpiring at the time of the offense which serve the interests of the defense in any rational way.[73]

This near-death experience for the rape shield statute in the Indiana Supreme Court set the scene for a tumultuous ride throughout the habeas corpus appeals process. The Federal District Court for the Northern District of Indiana,[74] after carefully defining the interests that would be used to conduct the balancing test, determined that the trial judge applied the rape shield statute appropriately: "The trial judge tried to carefully and moderately apply the rape shield statute by allowing the petitioner to testify to all events that he alleged occurred that evening."[75]

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67. *Id.*
68. Michigan v. Lucas, 500 U.S. 145 (1991).
69. *Stephens*, 544 N.E.2d 137, 141 (DeBruler, J., dissenting).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. Stephens v. Morris, 756 F. Supp. 1137 (N.D. Ind. 1991).
75. *Id.* at 1142.

This was the first time in the procedural history of this case that a court examined the application of the statute rather than its constitutional aspects as a piece of legislation, or the constitutionality of its underlying policy. However, the federal district court did not discuss the constitutional aspects of the application that it endorsed. Without this discussion, one cannot be certain that the court is addressing the critical issue of whether the application of the rape shield statute is constitutional, or whether the court confuses that issue with the constitutionality of the statute itself. The district court cited several cases to support its denial of a writ of habeas corpus, but all of the cases to which it referred addressed the constitutionality of the statute and the policies supporting it instead of the constitutionality of its application.[76] The district court relied heavily on *Chambers v. Mississippi*[77] to support the constitutionality of the trial court's ruling in *Stephens*.[78] However, the federal district court used *Chambers* to show that the statute and its supporting policies are constitutional. It stated that "the right of a petitioner to present relevant and competent evidence is not absolute and may bow to accommodate other legitimate interests in the criminal trial process."[79] The court further stated that "[i]n balancing the competing interest underlying Indiana's Rape Shield Statute and the constitutional policies favoring petitioner's right to testify, this court must first closely examine the justification of the state interest."[80]

These statements clearly show that the court focused on the constitutional legitimacy of the interests and policies involved, rather than the actual application of the statute with regard to these competing interests. After determining that the principal reasons for the rape shield statutes are constitutional, the court immediately declared that "[t]he state's interest of protecting the victim was carefully balanced with the petitioner's constitutional right to testify."[81] The court makes a leap from the constitutionality of the statute's purpose to the constitutionality of the application of the statute and the effect on the defendant's Sixth Amendment rights. This analysis omitted the crucial step of deciding the issue of application. Consequently, the court denied the defendant's request for a writ of habeas corpus.[82]

Seven months later, a panel of three judges sitting by designation for the Court of Appeals for the Seventh Circuit, held that the application of rape shield statutes violated the defendant's Sixth Amendment right to testify on his own behalf.[83] The panel ruled that "[a]n accused in a criminal trial has a right to offer testimony in support of his defense, including

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76. *Id.* (citing Hughes v. Matthews, 576 F.2d 1250, 1258 (7th Cir. 1978) (citing Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (holding that the right of the petitioner to present relevant and competent evidence is not absolute and may bow to accommodate other legitimate interests in the criminal trial process); Moore v. Duckwork, 687 F.2d 1063, 1065 n.2 (7th Cir. 1982) (noting the lack of doubt that Indiana has a legitimate interest in encouraging victims of sex offenses to report the crime, free of fear of being harassed or humiliated when put on the stand); and Thomas v. State, 471 N.E.2d 681 (Ind. 1984) (reasoning that rape shield statutes shield victims' past sexual conduct and keep them from feeling that they are on trial))).

77. 410 U.S. 284 (1973).

78. *Stephens*, 756 F. Supp. at 1142.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1143.

83. Stephens v. Miller, 989 F.2d 264 (7th Cir. 1993).

his own testimony."[84] The panel went on to explain all of the constitutional implications of this ruling. First, the right to testify in one's own defense arises out of the Fourteenth Amendment's protection against deprivation of liberty without due process of law.[85] Second, the Compulsory Process Clause of the Sixth Amendment guarantees the accused the opportunity to face his accuser.[86] Third, the Sixth Amendment Compulsory Process pertains to the states via the Fourteenth Amendment.[87] Fourth, the Fifth Amendment guards against compelled testimony.[88] This examination illustrates the panel's careful consideration of the constitutional ramifications of applying the rape shield statute.

The trial court, the Indiana Supreme Court majority, and the federal district court did not examine this critical issue closely enough. A careful inspection would have produced a showing that previous applications of the rape shield statute began with the assumption that since the statute is constitutional on its face and because the policies behind it are constitutional,[89] then it must also be constitutionally permissible to begin the balancing test with a presumption that the victim's interest will always outweigh the defendant's interest. From this presumption, the defendant is forced to show that his interest so far outweighs the victim's interest that he can overcome the presumption in favor of the victim *and* still tip the balance in favor of his interest. This application would clearly violate the Constitution.

Up to this point in the litigation, no court had addressed this issue. Even the dissent at the state supreme court level did not address this issue fully. The Indiana Supreme Court dissent recognized that by not letting the accused testify on his own behalf, his Constitutional rights were violated. However, the constitutional relationship to the application of the rape shield statute was never explored. On January 6, 1994, the Seventh Circuit Court of Appeals, sitting en banc, handed down a 6-5 decision that affirmed the federal district court's denial of Stephens' petition for writ of habeas corpus.[90] The majority decided that since Stephens was able to partially testify as to what happened on the night in question and because he was permitted to say that he said something to Wilburn that angered her, this was enough to preserve the defendant's constitutional rights.[91] In fact, the majority stated that "[t]he Constitution requires no more than this."[92] The en banc panel's decision suggests that the presumption in favor of the victim is so strong that even the Constitution can not trump it. For justification, the majority reasoned that "[t]he jury was entitled to credit Wilburn's story, discount Stephens' account, and return a guilty verdict."[93] Ordinarily this would be true. Applying the rape shield statute, however, alters the perspective from which this assumption is made. The jury is entitled to credit the victim's story and discount the defendant's story provided that both parties start on equal footing when telling their account

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84. *Id.* at 268 (citing Rock v. Arkansas, 483 U.S. 44 (1987) and Chambers v. Mississippi, 410 U.S. 284 (1973)).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*; *See* U.S. CONST. amend. V.

89. *See supra* notes 39-50 and accompanying text.

90. Stephens v. Miller, 13 F.3d 998, 998-99 (7th Cir. 1994).

91. *Id.* at 1002.

92. *Id.*

93. *Id.* at 1002-03.

of the incident. The rape shield statute currently operates to ensure that the victim starts with an advantage when presenting evidence to the jury with its wholesale preclusion of certain portions of the defendant's testimony. In order for the defendant to prevail, he must introduce evidence that overcomes the advantage the victim has, plus offer enough additional evidence to tip the balance in his favor. It is this initial inequality that renders application of the rape shield statute unconstitutional, not the underpinning of the policies of the statute which are aimed at protecting the victim from harassment and embarrassment. The trial court in *Stephens v. Miller* never considered this portion of the analysis.

Judge Flaum's concurrence[94] came close to this issue by looking to the Supreme Court for guidance on how to apply the balancing test in rape shield cases.[95] He concluded that the Court has not offered a clear standard for determining when a victim's interest outweighs the accused's interest.[96] Nevertheless, Judge Flaum tried to infer such a standard. This inference was derived from the Court's recent cases involving rape shield statutes and Sixth Amendment jurisprudence.[97] The problem with this approach is that the question of the constitutionality of application will not be answered every time the Seventh Circuit analyzes rape shield cases. In fact, the court has never addressed this particular issue concerning rape shield statutes. Judge Flaum was led to the conclusion that the legal trend denies the defendant unchecked freedom to present evidence.[98] Again, this analysis misses the crucial point as to the appropriate time to ask the necessary constitutional question. It is meaningless to consider constitutional issues after the balancing test has been performed, or even while the balancing test is taking place. Rather, the constitutional issue as to whether the parties have equal chances to prevail in the litigation arises at the starting point of the analysis. Courts too often by-pass this question and prematurely treat the issue of balancing the competing interests involved. This creates a situation that forces a defendant to build a defense without the essential tools he needs.

The dissenting opinions to the en banc majority recognized the constitutional violation in the *Stephens* case.[99] Judge Cummings' dissent announced the constitutional need for an even footing between victim and defendant from the outset of the presentation of evidence:

> [T]he desire to shield rape victims from harassment must yield in certain cases to another vital goal, the accused's right to present his defense. Sending the innocent to jail, or depriving the guilty of due process, is not a price our Constitution allows us to pay for the legitimate and worthy ambition to protect those already victimized from additional suffering.[100]

This statement illustrates Judge Cummings' acknowledgment of the constitutionality of the rape shield statutes and the constitutionality of the policies behind them. However, he recognizes that the constitutional application of the statute presents a different issue altogether. In order to apply the law without violating the Constitution, it is imperative not

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94. *Id.* at 1003 (Flaum, J., concurring).
95. *Id.* at 1004.
96. *Id.*
97. *Id.* at 1004-05.
98. *Id.*
99. *Id.* at 1009-25 (Cummings, J., Cudahy, J., Coffey, J., Ripple, J., dissenting).
100. *Id.* at 1010.

to place one party at an advantage over another party before the trial begins. Judge Cummings implies that this inequality occurs with the application of rape shield statutes because of the social and political pressure to make amends for the suffering and humiliation that rape victims have already endured.

The *Stephens* litigation epitomizes the tension that is mounting on the issue of the constitutional consequences of unqualified application of rape shield statutes. In light of the sophisticated procedural history of the *Stephens* case, the time has arrived for the United States Supreme Court to resolve this issue.[101] If the High Court does grant Stephens a writ of certiorari, then it must consider several arguments regarding the future of the current model of the rape shield statute. However, if the Court does not grant Stephens' request, another defendant will certainly emerge and require the Court to address this issue.

IV. Arguments Pertinent to a Constitutional Review of Rape Shield Statutes by the Supreme Court

The Supreme Court will examine a number of arguments when considering the constitutional issue implicated in the application of the rape shield statute. These arguments justify the need to place victims and defendants on equal footing before balancing their competing interests.

A. *Textualist Argument*

The structure of the textualist argument is built on the Constitution and the undeniable content of the Sixth and Fourteenth Amendments. The Fourteenth Amendment, in concert with the Sixth Amendment guarantees a criminal defendant compulsory process for obtaining witnesses in his favor[102] in order to avoid depriving him of life, liberty, or property without due process of law.[103] These amendments are interpreted to afford the criminal defendant the right to testify in his own defense.[104] However, the Court has ruled that a criminal defendant's right to testify is not unlimited.[105] This contrary holding creates the tension between the state and the victim's interests and the rape defendant's interests.

The textualist argument operates to prevent the Court from arriving at the point where it must administer the balancing test in order to determine whether evidence will be admitted. The most important supporter of this argument is Justice Scalia, who wrote a strong textualist dissent in *Maryland v. Craig*, a case which dealt with the defendant's Sixth Amendment right to compulsory process.[106] In *Craig*, the sharply divided Court called for a continuation of the balancing test between the State's interests and the defendant's interests.[107] However,

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101. *See supra* notes 1-13 and accompanying text. *See generally* Barb Albert, *Appeals Court Upholds State's Rape Shield Laws*, INDPLS. STAR, Jan. 8, 1994, at A1 (reporting that Stephens' attorney plans on asking the Supreme Court to hear the case).

102. *See supra* note 11.

103. *See supra* note 11.

104. Michigan v. Lucas, 500 U.S. 145, 149 (1991).

105. *Id.* at 152 (citing Taylor v. Illinois, 484 U.S. 400 (1988)).

106. Maryland v. Craig, 497 U.S. 836 (1990) (Scalia, J., Brennan, J., Marshall, J., Stevens, J., dissenting).

107. *Id.* at 860-61 (holding that the Sixth Amendment did not categorically prohibit a child witness in a child abuse case from testifying outside the defendant's physical presence using one-way circuit television).

Scalia argued that the Sixth Amendment provides, with unmistakable clarity, that a criminal defendant has the right to confront the witness against him.[108] Scalia asserted that "[t]he purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court."[109]

The thrust of Scalia's argument soundly applies to the situation surrounding the enactment of rape shield statutes. The purpose of rape shield statutes works to change the social and political beliefs about rape and to effect changes in the substantive legal definition coupled with the methods used to prosecute the crime.[110] This legal evolution is a perfect example of the changing tide of policy interests that are pursued by statutory law. In order for Constitutional rights to remain inviolate, the document must take precedence over the prevailing social and political thought. Otherwise, no citizen is secure in the notion that his or her rights and obligations are absolute, but rather he or she must live in fear of being stereotyped as a member of the group that is currently receiving social and political disfavor.

B. *Truth-Finding Argument*

The truth-finding argument relies on the idea that certain rights exercised in a criminal proceeding are truth-impairing rights while others are truth-furthering rights.[111] Truth-impairing rights are those that withhold relevant evidence from the trier of fact during the guilt-innocence phase of the criminal proceeding.[112] An example of a truth-impairing right is the Fifth Amendment privilege against self-incrimination.[113] The Court has held that in order to purify the guilt-innocence phase of adjudication, truth-impairing rights must be interpreted strictly.[114] Truth-impairing rights are construed narrowly to further the quest for truth in a criminal proceeding. Therefore, it would be logical to assume that truth-furthering rights would be encouraged by the Court and the interpretation of such rights would be liberal. However, this is not the case.

A truth-furthering right is one that, in theory, purifies the guilt-innocence phase of criminal adjudication by arming the trier of fact with a more complete version of the truth. This type of right can hardly be considered as running counter to society's interest in fair adjudication. Examples of truth-furthering rights include the right to present exculpatory evidence, the right to confront adverse witnesses, and the right to have guilt proven beyond a reasonable doubt.[115] The Court attaches importance to truth-furthering rights, but only after considering other countervailing interests involved in the proceeding. For example, the interests of the victim and the State are weighed against the defendant's rights to further the truth by presenting exculpatory evidence. This application inhibits the Court's pursuit of truth and fair adjudication in the criminal proceeding.

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108. *Id.* at 861 n.3.

109. *Id.*

110. *See supra* note 35 and accompanying text.

111. Tom Stacy, *The Search For Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1370-71 (1991).

112. *Id.*

113. *Id.* at 1371 n.6.

114. *Id.* at 1370 n.5.

115. *Id.* at 1371 n.6.

This inconsistency has significant implications when considering the purpose of the criminal justice system and doctrines upon which it was founded. One of the founding principles of the justice system is that a defendant is innocent until proven guilty. From this dogma flowed the concept that the gravest mistake that the justice system could make would be to wrongly punish an innocent person. With this integrity, the courts tried cases and administered procedures that would advance this priority. However, the modern courtroom is no longer built on the foundation of innocent until proven guilty.

Judge Ripple's dissent to the Seventh Circuit en banc majority alludes to this betrayal. He states that "[t]oday's decision will no doubt be hailed as a very 'contemporary' one. However, the correctness of a ruling by Judges of the Third Article is not measured by whether it is 'contemporary' but by whether it protects the basic constitutional values that undergird our political and legal order."[116] When writing of the decision in *Stephens*, Ripple opined that the majority's holding "condones an injustice that raises the distinct possibility that an innocent person has been convicted of a most heinous crime."[117] This statement is faithful to the anchoring principles of our Constitution, while the modern application of rape shield statutes has created an environment in which truth-furthering rights are strangled. The consequences of such a situation could result in destruction of this nation's most revered presumption of innocence.

C. *Judicial Dishonesty Argument*

The United States Supreme Court should also address the frightening frequency with which the lower courts have denied the existence of a Sixth Amendment violation when the defendant is not able to present exculpatory evidence. Blind adherence to a state statute is not a sufficient confrontation with the constitutional issues that are implicated by application of rape shield statutes. For example, the courts in *Stephens* justified their rulings in favor of the victim by declaring that the trial court properly balanced Stephens' right to testify with the State and the victim's interest in precluding the evidence.[118]

The court is simply not honest with itself by ignoring the constitutional violation. The court would be more honest if it admitted that, although there may be a violation, the facts of the case reveal that the violation is either harmless or not weighty enough to overcome the harm to the victim. However, the court never enters into this analysis. This avoidance creates the constitutional violation in applying an otherwise constitutional rape shield statute.

D. *Redefining Competing Interests Argument*

Another consideration for the Court in determining the constitutionality of the application of rape shield statutes is the method of defining the interests that are involved in the balancing test.[119] The balancing test will not yield constitutional results unless the quantities being measured are determined constitutionally. Therefore, one must examine the derivation of the state and victim's interests, as well as defendant's interests. The case law is clear that the victim's interests include protection from harassment and embarrassment.

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116. Stephens v. Miller, 13 F.3d 998, 1019 (7th Cir. 1994).

117. *Id.*

118. *Id.* at 1002.

119. Michigan v. Lucas, 500 U.S. 145, 149 (1991).

The victim is also able to count on the governmental interests of encouraging the reporting of sex offenses and gaining convictions.[120]

However, the case law does not suggest that the rape defendant has that same privilege. The rape defendant's interests are located in his ability to exercise his constitutional rights in order to preserve his liberty. But, the case law indicates that these rights are not absolute and may be infringed upon when legitimate governmental interests so require.[121] Moreover, he is not able to include, in the calculation of his interest, society's interest in preserving individual liberty by holding the rape defendant's constitutional rights inviolate. This becomes a grave miscalculation when one considers society's growing interest in relying on the legal definition of consensual and non-consensual sexual intercourse, as well as the need for future rape defendants to be able to predict the consequences of their behavior. This inequality harms rape defendants, as well as society at large. Without recognizing this element on the side of the defendant, the victim is almost assured of prevailing at trial.

E. *Other Considerations*

If the Court upholds the application of the rape shield statute in *Stephens*, then it will allow other social and political problems to persist in addition to the legal spill-over from the constitutional issue. First, since the statute precludes evidence offered by the rape defendant, he is placed in a weaker position than the victim in terms of ability to present a case. This procedure is the result of a choice made by the statute, via the legislature, in favor of the victim. This choice, in effect, discriminates against the rape defendant. The discrimination is not necessarily harmful until the preclusion impedes the defendant from constructing his defense. When this occurs, the choice becomes harmful. The discrimination that is inflicted upon the defendant could be justified by the suffering and harmful discrimination that the female victim has encountered for centuries in search of a fair rape trial. However, this argument contradicts the purpose espoused by the rape shield statute to bring equality to the courtroom during rape trial proceedings.[122] Displacing the harm from the victim onto the defendant does not entirely fulfill the mission of the statute. Moreover, it does not seem fair to "punish" an individual defendant for systematic problems.

The Court could solve this problem by leveling the playing field in terms of the admissibility of the evidence that the defendant offers. Both parties should be allowed to fully tell their own side of the story as it is relevant to the issues in the case. In pursuit of purifying the guilt-innocence phase of the criminal proceeding, as well as equalizing the process, the Court could allow for special instructions as to what the jury should consider and what relative weight the jury should give to this evidence. But by no means should the jury be prevented from hearing the whole story.

Another problem that would persist if the Court upholds the existing application of the rape shield statute is the perpetuation of gender stereotypes. In the quest for a fair and less traumatic rape trial for victims, the rape shield statute was intended to eradicate the traditional misconceptions of rape[123] which held that victims were "asking for it" or

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120. *Id.* at 146.

121. *Id.* at 152-53.

122. *See supra* note 35.

123. *See supra* notes 31-34 and accompanying text.

"advertising for it."[124] However, by precluding evidence, the legislature is endorsing the stereotype or misconception that the powerless, dependent, female victim needs protection from the barbaric, primitive, male attacker. To assert that there might be a better way of equalizing the genders may be naive; however, protectionist legislation does not cure the evil of inequality. Instead, it produces resentment and further controversy.

These social and philosophical considerations may play into the Court's final decision; however, the reality is that they probably will not make much difference. Nevertheless, these types of inquiries will remain after the Court pronounces its ruling. These are the issues that individual members of society must square with their own value systems and the ideology of their daily lives. Rape is a problem that has endured throughout history. Once again society has arrived at a point in its existence where it must articulate its position on the issue.

CONCLUSION

The social and political dynamics that have shaped the twentieth century have certainly had a radical effect on rape shield legislation. These statutes, although noble in purpose and constitutional in theory, are applied in a way that is unconstitutional. The balancing test announced in *Lucas* deceives our Sixth Amendment jurisprudence by pretending that the rape defendant has an equal chance to prevail at trial because his interests are being considered. In reality, legislatures have created a presumption in favor of the rape victim that is so strong that even our Constitution can not overcome it.

While it is easy to see why rape shield legislation emerged, it is distressing to contemplate the far- reaching effects of the statutes. Rape shield statutes call into question the constitutional foundation upon which the criminal defendant builds a defense.

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124. *See supra* notes 31-34 and accompanying text.