Title
Under the Rape Shield: Constitutional and Feminist Critiques of Rape Shield Laws

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Author
Roman, Denise

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Nearly 30 years ago, I sat in the back of a police car as the Boston cops warned me about what would happen to me if I officially reported that I’d just been raped.

‘Are you ready to go out on trial yourself?’ they asked.

I was 20 years old at that time. I thought I was the victim. I didn’t understand why my life would be put under a microscope.


This quote from syndicated columnist and member of USA Today’s board of contributors is proof that female rape victims—whom, in a spirit of solidarity, I call rape survivors—can be found anywhere. They are mothers, sisters, wives, or daughters. They can be you or me.

The evolution and implementation of rape shield laws in the United States is credited to the second-wave feminism of the late 1960s and early 1970s and its anti-rape movement, which sought to redefine rape. Prior theorizations of rape considered it a sex crime inflicted by pathological men who could not control their sexual impulses. With new concepts of gender and power and of difference and equality coming into the feminist discourses of the second-wave feminism, rape came to be redefined as a power dynamic whereby gender roles, masculinity and femininity, were (re)enforced in a power hierarchy placing men above women. Thus, rape came to be conceptualized as a means whereby men could socially control women, a form of male violence against women. This view was revolutionary in that, for the first time, it approached rape from the perspective of the raped survivor as a matter of patriarchal domination over women’s sexuality.
By the 1980s, a majority of states changed their laws to include spousal rape, elimination of the necessity of having a witness to rape, change of the age for statutory rape from 10 to 12, change to the definition of consent (especially for cases of submission out of fear or lack of consent when the survivor had passed out), and rape shield laws, which limit the admission of the survivor’s sexual history in court as a means to encourage women to report rape and to be able to stand in court without being afraid that their past could be used as a weapon by the defense to humiliate them.

This article discusses constitutional and feminist critiques of present rape shield laws in the United States, and ends with a comparative perspective throughout the Anglo-American legal space today. Finally, although the rape shield laws can be approached from a variety of discourses, this article engages specifically with a discourse that intersects legal and feminist analyses.

CONSTITUTIONAL CRITIQUES

In general, the critiques to the rape shield laws cite several conditions that weaken its protection. These include denial of due process, a fair trial, violation of the right to cross-examination, discrimination between sexes (against men), violation of the privilege against self-incrimination, vagueness of law, and intrusion by the legislature into the judiciary in violation of the separation of powers.

In People v. Blackburn, the defendant contended that by barring the introduction of evidence of the survivor’s sexual past, the court violated his constitutional due process right to a fair trial. In its holding, the court argued that this constitutional right does not force the court to admit all kind of evidence that may tend to exonerate the defendant since the sexual past of the victim has little probative value, thus not depriving the defendant of his right to a fair trial.\(^5\)

In the 1979 Finney v. State, in Nebraska, the defendant complained that his being barred from cross-examining the complaining witness about her having intercourse with another man shortly before the alleged rape by the defendant violated his right under the Confrontation Clause of the Sixth Amendment. In its holding, the court stated that such evidence was of low probative value for the case at hand, which fairly justified its exclusion.\(^7\)

The same argument arose in the 1979 State v. Gardner, in Ohio, when the court held that in determining whether the rape shield laws had been unconstitutionally applied, the court had to weigh the probative value of the evidence offered against the state interest protected by classification under the law and, second, that the equal protection clause requires only that there be a rational and reasonable basis for the classification, which bears a fair relationship to the statute’s purpose. Thus, the rape shield laws are only a legal means to encourage women to report rape and not to be humiliated while on stand.\(^6\)

In the 1978 State v. Ryan, in New Jersey, the defendant complained that his being barred from cross-examining the complaining witness about her having intercourse with another man shortly before the alleged rape by the defendant violated his right under the Confrontation Clause of the Sixth Amendment. In its holding, the court stated that such evidence was of low probative value for the case at hand, which fairly justified its exclusion.\(^7\)
the Sixth Amendment (which is to give defendants in a criminal case the right to cross-examine their accuser). In the case at hand, the evidence excluded was prejudicial and inflammatory, as tending to prove that the complaining witness was a prostitute and had a reputation in the community as a prostitute, which had little probative value for the charged rape and did not infringe the defendant’s constitutional rights.8

In Stephens v. Miller (1994), the court held that the rape shield laws did not infringe on the defendant’s constitutional right to testify on his own defense, when he wanted to introduce “his” version of the events, thus excluding his statements that the survivor of rape allegedly liked it “doggy fashion” and switching partners, as well as expressions he had allegedly uttered during the sexual intercourse that angered the victim and made her fabricate the rape accusation. The court excluded these statements about the survivor’s alleged sexual desires on account of being inflammatory, embarrassing, and tending only to humiliate her.9

The common denominator of all these cases is the notion that the rape shield laws must provide a balance between the defendant’s constitutional rights and the survivor’s privacy rights. As we have seen, in some states, such as California, the admission of evidence of the survivor’s past sexual history is barred completely if it is presumed to prove consent. In other states, as was the case with Kobe Bryant in Colorado, such evidence is conditioned on the defendant’s preliminary showing (in an in-camera hearing) that such evidence is relevant and material to the case (see also People v. MacLeod (2006), Colorado).10 Hence, in these states, if evidence of the past sexual history is probative, the rape shield laws yield to the defendant’s constitutional rights that assure a full and fair defense (State v. Ellison (2003), Connecticut). A defendant’s right to cross-examine a witness is not barred by the rape shield laws where the survivor’s sexual past is relevant and tends to establish, for example, bias, motive, prejudice (People v. Davis, 2003, Illinois), or mistaken identity. For example, in the 1985 New York Latzer v. Abrams, a man convicted of having sex with underage boys was denied his right to cross-examine the boys under the rape shield laws. The superior court found that the trial court erred since the excluded evidence offered by the defendant showed that it may have been a case of mistaken identity.11 Also, in the Florida 1991 Lewis v. State, a case that prosecuted a man for lewd and lascivious acts upon a child and sexual activity with a child under 18 while having familial or custodial authority, the court found that exclusion of the defendant’s right to cross-examination was violated as the defendant intended to show that the victim had fabricated the charges against him to hide from her disapproving mother her own sexual relationship with her boyfriend.12

Otherwise, if intended only to harass and humiliate the rape survivor, the witness’s sexual past has little probative value and is excluded without violating the defendant’s constitutional rights.

Feminist Critiques
Legal feminists, such as Nancy E. Snow and Michelle J. Anderson, consider that there still are loopholes in the rape shield laws and these critiques can be grouped into three categories: cultural, discursive, and structural. Although they are hereby
separated for analytical purposes, they may be combined since the rape, the trial, and the rape shield laws themselves are organically constituted within cultural, discursive, and structural phenomena.

A cultural critique refers, for example, to the 1989 Florida *State v. Lord*, when the defense was allowed to show the jury that the woman was wearing a tank top and a miniskirt with no underwear. As the jury foreman said, the jury acquitted Lord because they felt the victim had asked for it, “[w]ith that skirt, you could see everything she had. She was advertising for sex.” Subsequently, Florida changed its rape shield laws, excluding evidence offered to prove that the rape survivor’s manner of dress incited the rape.

Another cultural critique refers to the case when the woman exercises her autonomy and, by acting sexually aggressive, evades the alleged yet still overwhelming myths about woman’s passivity, monogamy, and dependency on men. Thus, in 1983, in *State v. Shoffner,* a North Carolina Court of Appeals ordered a retrial for exclusion of evidence of sexual conduct of the survivor of rape with third parties that allegedly constituted a pattern of prior behavior by the woman similar to the defendant’s version of the alleged rape. These pieces of evidence referred to (1) a witness having seen the survivor many times at a club attracting and touching men, (2) evidence of one prior episode of consensual sex of the survivor with the brother of one of the defendants, and (3) evidence by a witness who testified that he saw the survivor at an inn with two men standing in front of her, one of whom was zipping his pants. The Court of Appeals concluded that the woman was the initiator, the “aggressor,” in her sexual encounters, that that was her “modus operandi.”

Also, in the 1988 New Hampshire *State v. Colbath,* one of the State Supreme Court Justices sanctioned the survivor’s “provocative behavior” and “publicly inviting acts” toward a group of men prior to her sexual encounter with the defendant as proof of her sexual proclivity for the alleged rape. As Anderson considers, “a woman’s prior pattern of sexual behavior is marginally relevant to her willingness to engage in sexual intercourse generally.”

This reminds one of the 1988 movie *The Accused* (for which Jodie Foster won an Academy Award for Best Actress), where the complainant’s “questionable character”—she went to a bar and flirted with the men who would later rape her—was used in court to give the assailants lighter sentences, while the rape itself had been accompanied by the cheering of bystander men.

From a discursive critique point of view, the entire cross-examination is, in essence, patriarchal, and thus prejudicial to the survivor. Cross-examination is:

...unequal power dynamics of socially structured talk. . . . cross-examination itself allows the defense counsel to attempt to reconstruct the victim’s self-presentation and the presentation of her testimony from a man’s perspective. Defense counsel is free to disconnect elements that were originally united in her testimony, weave together initially disparate elements, recombine, overemphasize, underemphasize, and use innuendo, tone, demeanor, pauses and gestures. The aim is to confuse and discredit the victim’s self-presentation before
the court as well as her perspective on the incident, thereby shifting the blame from the defendant to the victim. The goal is to paint the victim a liar by making her account look more like the defendant’s version of the consensual sex. Thus an account of rape from a woman’s viewpoint is made to look like consensual sex from a man’s perspective. The subjected account of the woman is ‘corrected’ and reinterpreted through the subjectivity of a man and then offered to the judge and jury by the defense as ‘objective truth’—a value-neutral description of facts.20

This viewpoint is reminiscent of arguments from early nineteenth-century cases, as it seems that the power of myths, of meta-discourses, lingers throughout the mass of society in spite of enlightened discourses about femininity, masculinity, patriarchy, and violence that rape shield laws normatively inject into the social fabric, at least since the early 1970s. As Catherine MacKinnon says, “The perspective from the male standpoint enforces a women’s definition, encircles her body, circumlocutes her speech, and describes her life.”21

From a structural critique perspective, Anderson considers that it is wrong to admit prior sexual conduct with third parties in order to prove reasonable but mistaken belief as to consent. It is unreasonable to infer consent from past sexual history with others, which constitutes a break in the rape shield—and here the structural critique meets the cultural one—because this way, previously inadmissible evidence can come in on the subterranean male myths and biases about women’s accepted form of sexuality.22 In this vein, prostitutes are almost completely excluded from ever getting justice, especially as the acts of prostitution are illegal and thus may come in as evidence against the survivor of rape. For example, the New Mexico State v. Johnson, the rape survivor claimed that Johnson had lured her into his car and drove her to a remote place where he raped her. However, the defendant claimed that that was a consensual act of prostitution and he wanted to introduce evidence of the complainant’s prior acts of prostitution with third parties.23 As prior convictions for prostitution may come in as admissible evidence, they are extremely prejudicial for the survivor of rape, and their relevance for the case at hand is, as explained before, minimal.

Finally, as Anderson argues in her structural critique, even prior sexual behavior with the defendant should be excluded from coming in as evidence. Not only are a majority of rapes committed by a prior intimate partner, such as a former boyfriend or spouse, but also this exception suggests that only rape committed by a stranger is true rape, thus excluding an entire category of rapists.24

While feminists suggest that there should be new rape shield laws providing better protection for the survivors of rape—such as admitting exceptions to the rape shield only in instances of determining that the semen, or injury, or disease comes from another source or of establishing the complainant’s motive, bias, or prejudice in fabricating the rape allegation25— others suggest changing the system and creating specialized sex crimes courts.26 Creating special, parallel courts is not cost effective and may not
be realistically achievable. The population may dislike such a separatist concept and it is not likely that Congress would pass such a burdensome law. There may be more than one solution, and states will have to refine their existing rape shield laws at all the levels of analysis discussed here, perhaps starting with redesigning cross-examination as a woman-empowering discourse, not one that denies her subjectivity. This way, the survivor’s version of the rape would have more weight, would be treated with more respect and would not be discursively twisted into a consensual act.

CONCLUSION

As someone who was born and raised in Eastern Europe, I find it hard not to cheer the achievements of the women’s rights movements in the Anglo-American legal worlds, at least when it comes to the rape shield laws. On the other hand, there is room for critique and improvement— as indicated by Snow when she raises concerns about the “values of fairness, autonomy, privacy, and respect” of women.27

If rape shield laws exist and they protect some women, it is my wish to extend a dialogue with women worldwide in the hope that one day the rape shield will become a matter of international treaties, such as the 1981 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW, if not a matter of local legislations. In this sense, the rape shield could become universally particular. There are rape survivors everywhere in the world, not only where the law protects them.

Denise Roman has been a CSW Research Scholar since 2002. She received her Ph.D. in Political Science from York University in 2002 and her Master in Law degree from UCLA in 2010. She has taught Women’s Studies classes at UCLA, UC Irvine, and CSU Long Beach. Her monograph, Fragmented Identities: Popular Culture, Sex, and Everyday Life in Postcommunist Romania, was published in 2007. This essay is an excerpt from an article Roman developed during her studies at the UCLA School of Law under the supervision of Professor Christine Littleton. The complete article is available on the CSW site at the California Digital Library. Please send comments to denizr@ucla.edu.

ENDNOTES

5. People v. Blackburn
15. Ibid., p. 249.