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Minnesota's Rape Shield Law: A Sword for Prosecutors; A Blow to Defendants' Constitutional Rights

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**MINNESOTA’S RAPE SHIELD LAW: A SWORD FOR
PROSECUTORS; A BLOW TO DEFENDANTS’
CONSTITUTIONAL RIGHTS**

Christina Zauhar* and Trent Jonas**

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I. INTRODUCTION

In the United States, so-called rape shield laws date back to the 1970s. These laws limit the type of evidence a criminal defendant may introduce with respect to an alleged victim in criminal sexual conduct cases. The purpose of such laws is to afford criminal sexual conduct victims “heightened protection against surprise, harassment, and unnecessary

invasions of privacy.”¹ In 1974, Michigan became the first state to enact a rape shield law,² followed in the same year by Iowa,³ Florida⁴ and California.⁵ By 1998,⁶ all fifty states and the federal government⁷ had some form of rape shield law on their books.⁸ Minnesota enacted its first version of a rape shield law in 1975.⁹ Since its enactment, Minnesota’s rape shield law¹⁰ has been amended several times and recodified.¹¹

In the years since they were enacted, many states’ rape shield laws have been challenged on several legal bases, most commonly as infringements of defendants’ rights under the Fifth¹² and Sixth Amendments¹³ to the United States Constitution,¹⁴ which guarantee fair trials, the right to a complete

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¹ Michigan v. Lucas, 500 U.S. 145, 150 (1991).

² MICH. COMP. LAWS § 750.520j (2019).

³ See IOWA R. EVID. 5.412.

⁴ See FLA. STAT. § 794.022(2) (2019).

⁵ See CAL. EVID. CODE §§ 782, 1103(c)(2).

⁶ See ARIZ. REV. STAT. § 13-1421; UTAH R. EVID. 412 (Utah (1994) and Arizona (1998) were the last two states to enact rape shield laws).

⁷ FED. R. EVID. 412.

⁸ See Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119, 121 (1999).

⁹ See 1975 Minn. Laws 1244.

¹⁰ MINN. STAT. § 609.347 (2019); See also MINN. R. EVID. 412.

¹¹ See State v. Kobow, 466 N.W.2d 747, 750 n.2 (Minn. Ct. App. 1991), *review denied* (Minn. Apr. 18, 1991) (holding the rape shield law was originally codified as Rule 404(c) in the Minnesota Rules of Evidence, however, effective January 1, 1990, the rule was amended and redesignated as Rule 412 of the Minnesota Rules of Evidence).

¹² U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .”).

¹³ U.S. CONST. amend. VI (“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 . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”).

¹⁴ The mandates of the Fifth and Sixth Amendments apply to the states through the incorporation doctrine and the due process clause of the Fourteenth Amendment. See *Rabe v. Washington*, 405 U.S. 313, 315 (1972); *Benton v. Maryland*, 395 U.S. 784, 787 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968); *Washington v. Texas*, 388 U.S. 14, 18 (1967); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966); *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

defense, and the right to confront adverse witnesses.¹⁵ Minnesota courts have long recognized the constitutional implications that invoking rape shield holds for a defendant charged with criminal sexual conduct.¹⁶ Yet, despite the courts' acknowledgment of these constitutional pitfalls, they have consistently and overwhelmingly found that an alleged victim's interest in shielding his or her previous sexual conduct outweighs a defendant's constitutional right to present a complete defense and to confront adverse witnesses.¹⁷ In some cases, courts have allowed their approach in applying rape shield to slip beyond the boundaries of statutory language and, intentionally or not, expanded the scope of the law to include acts that would appear excluded by the plain language of the statute. Although the Minnesota Supreme Court has waded into the waters of rape shield a handful of times since the turn of the twenty-first century, it is apparent from lower courts' decisions that application of rape shield has become no less muddled and one-sided than it was in the 1980s.¹⁸ In fact, over the last twenty-five years, Minnesota's law has become more of a sword in the hands of prosecutors, hacking away at defendants' ability to mount a defense, than a shield to protect alleged victims' sexual history from scrutiny.

This article will argue that, while rape shield laws serve a legitimate and important purpose in protecting victims from unnecessary and embarrassing disclosures, in the current climate of “#metoo” revelations and college tribunals that do not adhere to constitutional or evidentiary safeguards, it is more important than ever to ensure that defendants' Fifth and Sixth

¹⁵ See *Rabe*, 405 U.S. at 315 (mandating the Fifth and Sixth Amendments apply to the states through the incorporation doctrine and the due process clause of the Fourteenth Amendment); see also *Benton*, 395 U.S. at 787; *Duncan*, 391 U.S. at 148; *Washington*, 388 U.S. at 18; *Miranda*, 384 U.S. at 467; *Pointer*, 380 U.S. at 405; David Haxton, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219 (1985).

¹⁶ See *State v. Friend*, 493 N.W.2d 540, 545 (Minn. 1992) (explaining that rape shield laws limit the admission of evidence of a victim's prior sexual conduct and the right to present evidence will require admission of evidence otherwise excluded by rape shield laws).

¹⁷ See *State v. Caswell*, 320 N.W.2d 417, 419 (Minn. 1982) (stating that when determining whether to admit evidence of the victim's prior sexual conduct, courts balance the state's interest in guarding the victim's privacy against the accused's constitutional rights under rape shield laws).

¹⁸ See *State v. Wenthe*, 865 N.W.2d 293, 306–07 (Minn. 2015) (“The State should not have introduced evidence indicating that A.F. was sexually inexperienced . . . and the district court abused its discretion by allowing it to do so. The rape-shield law applies equally to evidence offered by the prosecution and the defense [as per Minnesota Statutes section 609.347, subdiv. 3 (2019)].”); see, e.g., *State v. Calbero*, 785 P.2d 157, 161–62 (Haw. 1989); *People v. Sandoval*, 552 N.E.2d 726, 730–31 (Ill. 1990); *State v. Gavigan*, 330 N.W.2d 571, 576 (Wis. 1983).

Amendment rights are preserved in criminal court proceedings. While the language of Minnesota's rape shield law may pass constitutional muster, the consistent manner in which courts have applied rape shield to infringe on defendants' due process and confrontation rights is constitutionally suspect. Moreover, courts appear to have expanded application of rape shield beyond the language of the statute itself and have yet to be meaningfully challenged for doing so.¹⁹ Thus, the time has come for either appellate courts or the Minnesota Legislature to examine the application of rape shield and offer more precise guidance to lower courts to ensure that defendants receive a fair trial, are afforded the opportunity to present a complete defense, and are given a meaningful opportunity to confront the witnesses against them.

II. RAPE SHIELD IN MINNESOTA: MINN. STAT. § 609.347 AND MINN. R. EVID. 412

Minnesota's rape shield statute and corresponding rule of evidence provide, in pertinent part, that:

In a prosecution under [statutes prohibiting criminal sexual conduct],²⁰ evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order under the procedure provided in subdivision 4.²¹ The evidence can be admitted only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature and only in the circumstances set out in paragraphs (a)²² and (b)²³.

¹⁹ See *State v. Lipe*, No. A18-1985, 2019 WL 4745325 (Minn. Ct. App. Sept. 30, 2019). When such a challenge has been presented, appellate courts have declined the invitation. See, e.g., *id.* (declining to address appellant's challenge to construe the rape shield law as not applicable to subsequent sexual conduct).

²⁰ See MINN. STAT. §§ 609.342-609.3451, 609.3453, 609.365 (2019).

²¹ MINN. STAT. § 609.347, subdiv. 4(a). "A motion shall be made by the accused at least three business days prior to trial, unless later for good cause shown, setting out with particularity the offer of proof of the evidence that the accused intends to offer, relative to the previous sexual conduct of the victim."

²² MINN. STAT. § 609.347, subdiv. 3(a)(i)-(ii). "When consent of the victim is a defense in the case, the following evidence is admissible: (i) evidence of the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue. In order to find a common scheme or plan, the judge must find that the victim made prior allegations of sexual assault which were fabricated; and (ii) evidence of the victim's previous sexual conduct with the accused."

²³ MINN. STAT. § 609.347, subdiv. 3(b). "When the prosecution's case includes evidence of semen, pregnancy, or disease at the time of the incident or, in the case of pregnancy, between

For the evidence to be admissible under paragraph (a), subsection (i), the judge must find by a preponderance of the evidence that the facts set out in the accused's offer of proof are true. For the evidence to be admissible under paragraph (a), subsection (ii) or paragraph (b), the judge must find that the evidence is sufficient to support a finding that the facts set out in the accused's offer of proof are true, as provided under Rule 901 of the Rules of Evidence.²⁴

Courts have characterized the Minnesota rape shield statute as “serv[ing] to emphasize the general irrelevance of a victim’s sexual history, not to remove relevant evidence from the jury’s consideration.”²⁵ This description of rape shield is generous because it is an ideal characterization of how the law should work if it were applied consistently and with the appropriate counterbalancing of defendants’ constitutional rights. The idealistic depiction of rape shield in *Wenthe* and other cases fails to reflect how the law has been applied in Minnesota courts to the detriment of defendants.

Rape shield “is not a law in the same sense as laws prohibiting theft [or other crimes].”²⁶ Rather, it is a legislative limitation of a citizen’s Sixth Amendment right to confront and cross-examine opposing witnesses.²⁷ To the extent that it hinders a defendant’s ability to mount a complete defense, rape shield also places a limitation on a defendant’s due process right to a fair trial.²⁸ In spite of creating a law that courts have clearly recognized as a curtailment of a defendant’s constitutional rights, it is presumed that “[t]he legislature does not intend to violate the Constitution of the United States or of [Minnesota].”²⁹ Therefore, rather than simply striking down rape

the time of the incident and trial, evidence of specific instances of the victim’s previous sexual conduct is admissible solely to show the source of the semen, pregnancy, or disease.”

²⁴ See MINN. STAT. § 609.347, subdiv. 3 (2019); see also MINN. R. EVID. 412(1) (“In a prosecution for acts of criminal sexual conduct, including attempts or any act of criminal sexual predatory conduct, evidence of the victim’s previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order under the procedure provided in rule 412. Such evidence can be admissible only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature . . .”).

²⁵ *State v. Wenthe*, 865 N.W.2d 293, 306 (Minn. 2015) (quoting *State v. Crims*, 540 N.W.2d 860, 867 (Minn. Ct. App. 1995), *review denied* (Minn. Jan. 23, 1996)) (internal citations omitted).

²⁶ *State v. Carroll*, 639 N.W.2d 623, 628 (Minn. Ct. App. 2002), *review denied* (Minn. May 15, 2002).

²⁷ *Id.*

²⁸ *Id.* at 627.

²⁹ MINN. STAT. § 645.17(3) (2019).

shield as unconstitutional, courts have been forced to enunciate a balancing test that purports to protect a defendant's constitutional rights in the face of rape shield. Citing the Minnesota Supreme Court's opinion in *Friend*, the Minnesota Court of Appeals explained:

In ruling on a defendant's offer of [evidence that may be prohibited under rape shield], the trial court considers the defendant's constitutional rights, Minn. R. Evid. 403 and 412, and the rape shield statute In the event of a conflict, the defendant's constitutional rights require admission of evidence excluded by the rape shield law.³⁰

Although the *Friend* balancing test appears to hold paramount a defendant's constitutional rights, it has been a rare case, indeed, in which a court of any level has found that either rape shield or Minnesota Rule of Evidence 403 has conflicted with such rights.³¹ Rule 403, which corresponds with the federal rule of the same number, provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.³²

Thus, even if evidence of an alleged victim's conduct may otherwise be admissible under rape shield, a defendant must also overcome the burden of proving that such evidence is more probative than prejudicial before it can be introduced. Beyond proving the probative value of proffered evidence, a defendant bears the further burden of demonstrating that such evidence is truthful.³³ The court of appeals offered the following explication in *State v. Davis*: "The Constitution will tolerate a rule or statute requiring the trial court to make a threshold finding of veracity as a predicate to the admission of a criminal defendant's highly probative, but exceedingly prejudicial evidence."³⁴ Hence, under current Minnesota law: (1) evidence of an alleged victim's previous sexual conduct must be more probative than prejudicial; (2) a court must find a defendant's proffer of such evidence to be truthful; and (3) the evidence must fall within one of the recognized exceptions to rape shield.

³⁰ *Crimis*, 540 N.W.2d at 866 (citing *State v. Friend*, 493 N.W.2d 540, 545 (Minn. 1992)).

³¹ *Carroll*, 639 N.W.2d at 623.

³² MINN. R. EVID. 403.

³³ *State v. Kobow*, 466 N.W.2d 747, 751 (Minn. Ct. App. 1991), *review denied* (Minn. Apr. 18, 1991).

³⁴ *State v. Davis*, 546 N.W.2d 30, 35 (Minn. Ct. App. 1996), *review denied* (Minn. May 21, 1996).

In addition to those contained in the statute, several exceptions to rape shield have been carved out in caselaw: when exclusion of evidence would conflict with the defendant's constitutional rights; exculpatory evidence when the defendant denies contact with the complainant; evidence of a complainant's predisposition to fabricate charges; evidence of a source of a complainant's sexual knowledge other than the defendant; or the evidence does not relate to "sexual conduct" due to the young age of the complainant.³⁵

III. EXCEPTIONS TO RAPE SHIELD

A. *Statutory Exceptions*

The rape shield statute contains a few enumerated exceptions to its own mandate that apply in very limited circumstances.³⁶ In cases where consent of the victim is at issue, the defense may present "evidence of the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue, relevant and material to the issue of consent."³⁷ In order to prove a common scheme or plan existed under this exception, however, "the judge must find that the victim made prior allegations of sexual assault which were fabricated."³⁸ In other instances where the defendant alleges that the complainant consented, he or she may present "evidence of the victim's previous sexual conduct with the accused."³⁹

A final statutory exception exists in cases where the prosecution intends to introduce evidence of "semen, pregnancy, or disease."⁴⁰ In such cases, a defendant's ability to introduce evidence to bolster his or her version of events is limited only to specific instances of the complainant's previous sexual conduct that may offer alternative sources for the semen, a pregnancy that occurred between the time of the alleged incident and the trial, or a disease that was present at the time of the alleged offense.⁴¹

Absent these enumerated exceptions, the mandate of rape shield appears absolute: "[E]vidence of the victim's previous sexual conduct shall

³⁵ See *infra* Part III.

³⁶ MINN. STAT. § 609.347 (2018).

³⁷ MINN. R. EVID. 412(1)(A)(i).

³⁸ MINN. STAT. § 609.347, subdiv. 3(a)(i) (2019).

³⁹ MINN. STAT. § 609.347, subdiv. 3(a)(ii); MINN. R. EVID. 412(1)(A)(ii).

⁴⁰ MINN. STAT. § 609.347, subdiv. 3(b) (2019); MINN. R. EVID. 412(1)(B).

⁴¹ MINN. STAT. § 609.347, subdiv. 3(b); MINN. R. EVID. 412(1)(B).

not be admitted nor shall any reference to such conduct be made in the presence of the jury.”⁴² As noted earlier, however, such an absolute limitation on a defendant’s ability to mount a complete defense or confront witnesses runs afoul of the United States and Minnesota Constitutions.⁴³ Courts have, therefore, carved an exception to the law when rape shield conflicts with a defendant’s constitutional rights.

B. Exclusion of Evidence Under Rape Shield Would Conflict With a Defendant’s Constitutional Rights

A defendant’s due process rights and protections under the Sixth Amendment may require a court to admit evidence otherwise barred by Minnesota Rule of Evidence 412 and Minnesota Statutes, section 609.347. The Minnesota Court of Appeals explained as much in *Carroll*: “In certain cases the due process clause, the right to confront accusers, or the right to present evidence will require admission of evidence otherwise excluded by the rape shield law.”⁴⁴ In such cases, then, despite the statute’s absolute language, the rape shield law must give way to a defendant’s rights.

Although the broad mandate of the state’s rape shield law appears unyielding in its black letter form, Minnesota courts have held that:

[e]very criminal defendant has a right to fundamental fairness and to be afforded a meaningful opportunity to present a complete defense. The Due Process Clauses of the Federal and Minnesota Constitutions require no less. The right to present a defense includes the opportunity to develop the defendant’s version of the facts, so the jury may decide where the truth lies. The Confrontation Clauses of the Federal and Minnesota Constitutions serve the same purpose, affording a defendant the opportunity to advance his or her theory of the case by revealing an adverse witness’s bias or disposition to lie.⁴⁵

Therefore, the scope of rape shield is, in fact, limited to the extent that it may conflict with the constitutional rights of a defendant in a criminal sexual conduct case. To this end, “Minnesota appellate courts have recognized that [evidence of an alleged victim’s previous sexual conduct] is

⁴² MINN. STAT. § 609.347, subd. 3; see MINN. R. EVID. 412(1).

⁴³ MINN. CONST. art. I, § 6; see *supra* notes 12–15 and accompanying text.

⁴⁴ *State v. Carroll*, 639 N.W.2d 623, 627 (Minn. Ct. App. 2002), *review denied* (Minn. May 15, 2002); see also *State v. Friend*, 493 N.W.2d 540, 545 (Minn. 1992) (citing *State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986)) (“In certain cases the due process clause, the right to confront accusers, or the right to present evidence will *require* admission of evidence otherwise excluded by the rape shield law.”) (emphasis added).

⁴⁵ *State v. Crims*, 540 N.W.2d 860, 865 (Minn. Ct. App. 1995), *review denied* (Minn. Jan. 23, 1996) (internal citations and punctuation omitted).

also admissible *in all cases in which admission is constitutionally required* by the defendant's right to due process, his right to confront his accusers, or his right to offer evidence in his own defense."⁴⁶

Given the numerous judicial statements regarding the importance of protecting a defendant's constitutional rights and courts' apparent willingness to eviscerate rape shield should it conflict with such rights, one struggles to see how rape shield has not been overturned as unconstitutional. Minnesota courts, however, see rape shield and the Constitution as existing harmoniously, even though the courts have acknowledged that "a rule that excludes material evidence for reasons of policy will, by definition, run afoul of defendants' fundamental rights."⁴⁷

The court of appeals explained this apparent contradiction thusly: "[W]e conclude the rape shield statute serves to emphasize the general irrelevance of a victim's sexual history, not to remove relevant evidence from the jury's consideration Viewed from this perspective, the statute's relationship with the Constitution becomes one of harmony not tension."⁴⁸

The court perceives harmony between rape shield and the Constitution "because it serves to remind the bench that the victim's sexual history is normally irrelevant in a sexual assault prosecution."⁴⁹ The fact that a statute is a reminder for a concept of which judicial notice has already been taken seems an insufficient reason not to strike down a law that "by definition run[s] afoul of defendants' fundamental rights."⁵⁰

The *Crimis* court went on to state that "evidence of sexual activity with third persons cannot withstand a Rule 403 weighing unless special circumstances enhance its probative value."⁵¹ Even in the absence of rape shield, then, unless a defendant can show that a "victim's sexual history is relevant to the facts at bar," it is a "form of character evidence that simply is not admissible under the normal rules of evidence."⁵² The "special" circumstances identified by the *Crimis* court include "situations in which the evidence explains a physical fact in issue at trial, suggests bias or ulterior motive, or establishes a pattern of behavior *clearly* similar to the conduct at issue."⁵³

⁴⁶ State v. Olsen, 824 N.W.2d 334, 340 (Minn. Ct. App. 2012), *review denied* (Minn. Feb. 27, 2013) (emphasis added) (internal citations omitted) (citing *Benedict*, 397 N.W.2d at 341).

⁴⁷ *Crimis*, 540 N.W.2d at 867.

⁴⁸ *Id.* (citations omitted).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 868.

⁵² *Id.*

⁵³ *Id.* (citing United States v. Kasto, 584 F.2d 268, 271 n.2 (8th Cir. 1978)).

Despite courts' recognition of the potential for rape shield to conflict with the constitutional rights of defendants, they rarely, as will be argued later, find such conflict to exist.⁵⁴ One of the few exceptions to rape shield regularly applied by courts, however, is when evidence of previous sexual conduct can exonerate a defendant who denies having had contact with the complainant.⁵⁵

C. Exculpatory Evidence When a Defendant Denies Contact With a Complainant

In cases where an individual's defense against criminal sexual conduct charges rests on the premise that the defendant did not have sexual conduct with the alleged victim, courts will allow evidence of the complainant's sexual conduct to the extent that it excludes the defendant as a perpetrator of the offense.⁵⁶ As the Minnesota Court of Appeals put it, "Where the defendant claims to have had no contact with the complainant, we do not think rule 404(c)(1) [now 412]⁵⁷ was intended to bar the admission of evidence which is 'directly relevant to negate the act with which the defendant is charged.'"⁵⁸ Rather, according to the court, the goal of rape shield "is to limit evidence of the complainant's unrelated prior sexual conduct when consent is raised as a defense."⁵⁹ The exculpatory evidence exception applies even in cases where "[i]t is clear" that the evidence a defendant seeks to introduce is "not admissible under the limited exceptions" outlined in the language of the rape shield statute itself or Rule 412.⁶⁰

In enunciating this exception to rape shield, the *Hagen* court cited to a Washington Court of Appeals opinion that held, essentially:

[W]here the defendant denies any sexual contact with the victim, yet the post-rape medical tests show evidence of a recent sexual contact, then all recent sexual contacts which could account for

⁵⁴ *Infra* Part IV.

⁵⁵ See *infra* Section II.C.

⁵⁶ State v. Hagen, 391 N.W.2d 888, 891 (Minn. Ct. App. 1986), *review denied* (Minn. Oct. 17, 1986).

⁵⁷ MINN. R. EVID., 404(c) (renumbered to MINN. R. EVID. 412). See *supra* note 11.

⁵⁸ *Hagen*, 391 N.W.2d at 891 (quoting Commonwealth v. Majorana, 470 A.2d 80, 81 (Pa. 1983)).

⁵⁹ *Id.* (citing State v. Larson, 389 N.W.2d 872 (Minn. 1986)).

⁶⁰ *Id.*

those testing results become highly relevant on the issue of defendant's responsibility for the crime.⁶¹

The rationale for the exculpatory evidence exception was stated succinctly by a panel of the Minnesota Court of Appeals in a recent, unpublished opinion: “[T]he rape-shield law was not intended to bar the admission of exculpatory evidence of DNA testing of semen indicating that it was ‘most probably not’ [the defendant’s, and defendant] claimed that he had no contact with the complainant.”⁶² Similarly, the court of appeals has held that evidence establishing a complainant’s fabrication of charges may not be barred by the rape shield laws.

D. Evidence of a Complainant’s Predisposition to Fabricate Charges

As with evidence that exculpates a defendant when he or she denies having contact with an alleged victim, courts should admit evidence that tends to establish a complainant’s propensity to fabricate an allegation despite the broad prohibitions of Rule 412 and section 609.347. In 1989, the Minnesota Court of Appeals opined that “evidence not fitting the two exceptions of Rule 404(c)⁶³ nonetheless may be admissible under recent Minnesota Supreme Court decisions which recognized that the admission of certain evidence may be constitutionally required.”⁶⁴ Thus, any evidence tending to establish a complainant’s predisposition to fabricate criminal sexual conduct charges should be admitted unless its potential for unfair prejudice outweighs its probative value.⁶⁵ In addition, evidence about a complainant’s knowledge regarding sexual matters may also be admitted in spite of rape shield’s bar.⁶⁶

E. Evidence of a Complainant’s Source of Sexual Knowledge Other Than the Defendant

In certain cases, the prosecution may allege that a complainant is so young or otherwise inexperienced that his or her source of sexual knowledge could only have come from the perpetrator of the offense or

⁶¹ *Hagen*, 391 N.W.2d at 892 (citing *State v. Cosden*, 568 P.2d 802, 806 (Wash. Ct. App. 1977)).

⁶² *State v. Morales*, No. A15-0101, 2016 WL 456791, at *3 (Minn. Ct. App. Feb. 8, 2016), *review denied* (Minn. Apr. 27, 2016).

⁶³ MINN. R. EVID. 404(c) (renumbered to MINN. R. EVID. 412). *See supra* note 11.

⁶⁴ *State v. Kroshus*, 447 N.W.2d 203, 204 (Minn. Ct. App. 1989), *review denied* (Minn. Dec. 20, 1989) (citing *State v. Caswell*, 320 N.W.2d 417, 419 (Minn. 1982)).

⁶⁵ *Id.*

⁶⁶ *Id.* at 205.

offenses against the complainant.⁶⁷ In such cases, a defendant should be permitted, despite the prohibition of rape shield, to introduce “[e]vidence tending to establish a source of knowledge of or familiarity with sexual matters . . . in cases where the jury might otherwise infer that the defendant was the source.”⁶⁸ This is because “sexual history evidence ‘establish[es] a source of knowledge or familiarity with sexual matters in circumstances in which lack of knowledge is the likely inference to be drawn by the fact finder.’”⁶⁹

Recently, however, the Minnesota Supreme Court intimated that this particular rape shield exception is limited. In *Wenthe*, the court noted that “a complainant’s source of [sexual] knowledge becomes relevant only when the defendant asserts that the complainant fabricated the sexual conduct.”⁷⁰

Wenthe is the Minnesota Supreme Court’s most recent opinion addressing rape shield in any detail, and the court’s statement creates some overlap between the source of sexual knowledge and fabrication exceptions to the rule.⁷¹ The court initially recognized the exception related to an alleged victim’s propensity to fabricate charges in *Caswell*.⁷² Several years later in the *Benedict* decision, the court recognized the “sexual knowledge exception.”⁷³ In its *Kroshus*⁷⁴ opinion, the court of appeals appears to have continued its treatment of these exceptions as separate and distinct from one another. One could imagine a scenario in which a complainant’s source of sexual knowledge would be relevant even absent completely fabricated charges. For example, in cases where the complainant’s memory or ability to identify the defendant is in question, other evidence of his or her sexual knowledge may be relevant to demonstrate that the defendant was not the source of such knowledge.⁷⁵ The question of sexual knowledge is one that often arises in cases involving minor alleged victims, as children presumably would not have the same level or type of sexual knowledge that an adult would.⁷⁶ When examining the source of knowledge or “sexual” experience

⁶⁷ See, e.g., *id.*

⁶⁸ *Id.* (citing *State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986)).

⁶⁹ *State v. Wenthe*, 865 N.W.2d 293, 307 (Minn. 2015) (quoting Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 866 (1986)).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See *State v. Caswell*, 320 N.W.2d 417, 419 (Minn. 1982).

⁷³ See *Benedict*, 397 N.W.2d at 341.

⁷⁴ *State v. Kroshus*, 447 N.W.2d 203, 204 (Minn. Ct. App. 1989).

⁷⁵ See, e.g., *State v. Woods*, No. A10-1076, 2011 WL 2302105, at *9 (Minn. Ct. App. June 13, 2011).

⁷⁶ See, e.g., *Bean v. State*, 432 S.W.3d 87, 94 (Ark. Ct. App. 2014); *State v. Jones*, 43 N.E.3d 833, 854 (Ohio Ct. App. 2015).

in young complainants, it is important to examine whether the behavioral evidence a defendant is trying to introduce is sexual conduct per se.⁷⁷ If such behavior is not sexual conduct, then it should not be barred by rape shield.

F. The Evidence Does Not Relate to “Sexual Conduct” Due to the Young Age of the Complainant

It is common for children to engage in anatomical exploration with themselves or other children. In fact, sexual exploration is a normal behavior for children under the age of ten.⁷⁸ However, under the law, sexual intent is required before behavior can be deemed sexual in nature.⁷⁹ Minnesota law implies that children under the age of ten cannot form criminal intent—therefore, these children cannot engage in criminal sexual conduct under the law.⁸⁰ This is presumably an extension of the common law defense of infancy, under which children were presumed unable to form the requisite intent to commit a crime.⁸¹ Because a child under ten cannot legally form sexual intent, childhood exploration cannot be called “sexual history” or the type of “sexual conduct” proscribed by the rape shield law.

In Minnesota, courts have defined “sexual intent” with the phrase’s common usage: “[A]n act is committed with sexual intent when the actor perceives himself to be acting based on sexual desire or in pursuit of sexual gratification.”⁸² Moreover, the need for establishing sexual intent in conjunction with the offense behavior is “to avoid criminalizing contact that is accidental or that serves an innocuous, non-sexual purpose.”⁸³ Thus, establishing requisite sexual intent “negates the possibility of an innocent explanation such as accidental touching or touching in the course of caregiving.”⁸⁴

When a case involves a young complainant with a history of touching him or herself and/or other children, it would be difficult for the State to

⁷⁷ Jeanette R. Buttrey, *Michigan's Rape-Shield Statute and the Admissibility of Evidence that A Child Complainant Has Been Previously Molested*, 15 T.M. COOLEY L. REV. 391, 392-93 (1998).

⁷⁸ William N. Friedrich et al., *Normative Sexual Behavior in Children: A Contemporary Sample*, 101 PEDIATRICS 9 (1998).

⁷⁹ State v. Austin, 788 N.W.2d 788, 792 (Minn. Ct. App. 2010), *review denied* (Minn. Dec. 14, 2010).

⁸⁰ Cf. *In re S.A.C.*, 529 N.W.2d 517, 520 (Minn. Ct. App. 1995) (discussing the inability of minors under the age of ten to form criminal intent for the purposes of prosecution).

⁸¹ MINN. STAT. § 609.055 (2018).

⁸² *Austin*, 788 N.W.2d at 792.

⁸³ *Id.*

⁸⁴ State v. Vick, 632 N.W.2d 676, 691 (Minn. 2001).

demonstrate that such behavior was done out of “sexual desire or in pursuit of sexual gratification.”⁸⁵ For this reason, sexual exploration or horseplay among children under the age of ten is simply not sufficient to “negate . . . the possibility of an innocent explanation.”⁸⁶ In contrast, similar contact between an adult and a child would likely eliminate any possibility of an innocent explanation. Because a minor complainant cannot be legally capable of forming sexual intent,⁸⁷ within the context of Minnesota’s criminal sexual conduct statutes, including rape shield, childhood sexual exploration cannot be considered “previous sexual conduct.”⁸⁸ Thus, in cases where a minor complainant has a history of engaging in explorational sexual behavior that is similar to the offense conduct with which a defendant is later charged—for example, a child who initiated exploratory touching with other children and then attempted to engage in the same behavior with an adult—the complainant’s previous pattern of behavior should not be excluded by rape shield.

IV. THE RAPE SHIELD LAW HAS BEEN APPLIED AND EXPANDED TO THE DETRIMENT OF DEFENDANTS’ RIGHTS UNDER THE CONSTITUTION

Despite the numerous exceptions to rape shield and the law’s already-broad sweep, courts have rarely seen fit to favor a defendant’s constitutional rights over the rule’s evidentiary prohibitions.⁸⁹ Moreover, in at least two opinions, appellate courts appear to have stretched the law’s proscription against evidence of “previous” sexual conduct to include evidence of subsequent sexual conduct.⁹⁰ Prosecutors and courts have thus applied rape shield in manners that hobble a defendant’s constitutional right to present a complete defense.

A. Courts Regularly Fail to Adequately Weigh a Defendant’s

⁸⁵ *Austin*, 788 N.W.2d at 792.

⁸⁶ *Vick*, 632 N.W.2d at 691.

⁸⁷ MINN. STAT. § 609.055 (2018).

⁸⁸ MINN. STAT. § 609.347, subdiv. 3 (2018).

⁸⁹ Helim Kathleen Chun & Lindsey Love, *Rape, Sexual Assault, and Evidentiary Matters*, 14 GEO. J. GENDER & L. 585, 593 (2013).

⁹⁰ *See infra* note 102.

Constitutional Rights

As noted previously, a defendant's constitutional rights must be considered when a court determines whether to bar evidence under the rape shield law.⁹¹

In ruling on a defendant's offer of [evidence that may be prohibited under rape shield], the trial court considers the defendant's constitutional rights, Minn. R. Evid. 403 and 412, and the rape shield statute... In the event of a conflict, the defendant's constitutional rights require admission of evidence excluded by the rape shield law.⁹²

And yet, among the more than 450 Minnesota cases citing section 609.347 as of January 2020, the vast majority upheld application of rape shield—often in spite of lengthy discussions regarding a defendant's rights to a fair trial under the United States and Minnesota Constitutions.⁹³ In the Minnesota appellate cases that address the constitutional rights of a defendant in the face of rape shield, courts have overwhelmingly decided against the defendant.⁹⁴ Moreover, in cases where courts make only a passing mention of the need to address the rights of a defendant whose proffered evidence has been excluded by rape shield, the judges routinely rule in favor of exclusion and find no violation of either the United States or Minnesota Constitution.⁹⁵

Hundreds of Minnesota appellate cases that address rape shield have made apparent that courts are willing to dismiss defendants' fundamental due process rights out-of-hand and exclude entire categories of evidence, solely because the proffered evidence is excluded by an arbitrarily-applied law that "by definition, run[s] afoul of defendants' fundamental rights."⁹⁶ The dearth of cases in which a defendant's right to confront witnesses and present a complete defense was held to outweigh the application of rape shield makes this clear. On one rare occasion in which an appellate court reversed a district court's application of rape shield because it violated a

⁹¹ See *supra* Section III.B. See also U.S. CONST. amend. V, VI; MINN. CONST. art. I, § 6.

⁹² *State v. Crims*, 540 N.W.2d 860, 866 (Minn. Ct. App. 1995) (citing *State v. Friend*, 493 N.W.2d 540, 545 (Minn. 1992)). See also *State v. Carroll*, 639 N.W.2d 623, 627 (Minn. Ct. App. 2002).

⁹³ See, e.g., *State v. Enger*, 539 N.W.2d 259, 262 (Minn. Ct. App. 1995).

⁹⁴ See, e.g., *State v. Wenthe*, 865 N.W.2d 293, 306–07 (Minn. 2015); *Crims*, 540 N.W.2d at 866; *Friend*, 493 N.W.2d at 545. *But see Carroll*, 639 N.W.2d at 627 (reversing the lower court's decision to allow the victim to use the rape shield laws to avoid cross-examination).

⁹⁵ See, e.g., *State v. Hernandez*, No. A17-0187, 2018 WL 4558151, at *1 (Minn. Ct. App. Sept. 24, 2018).

⁹⁶ *Crims*, 540 N.W.2d at 867.

defendant's right to present a complete defense,⁹⁷ the decision was later reversed by the Minnesota Supreme Court, which held that the lower court's abuse of discretion in applying rape shield to exclude the evidence was harmless error.⁹⁸

B. Courts Have Applied Rape Shield Beyond the Plain Language of the Statute

As noted previously,⁹⁹ the plain language of the rape shield statute bars only “. . . evidence of the victim's *previous* sexual conduct.”¹⁰⁰ In no place does the statute's language proscribing evidence refer to complainants' conduct occurring after the alleged offense.¹⁰¹ Although no Minnesota appellate court has explicitly held that rape shield applies to subsequent conduct, at least two cases imply, in *dicta*, that courts may be willing to apply rape shield to subsequent conduct.¹⁰² Moreover, West Publishing's “Notes of Decisions” affiliated with section 609.347 fuels this fire by including one of the two decisions under the editorial heading “subsequent sexual conduct.”¹⁰³

Yet, in the two decisions that may loosely be construed as having addressed subsequent sexual conduct, neither court directly referred to subsequent sexual conduct, nor was the issue raised by any party.¹⁰⁴ In *Olsen*, the Minnesota Court of Appeals examined the relevance of a clinic visit made by the complainant after the alleged offense conduct occurred.¹⁰⁵ Although it did so in the context of a rape shield ruling under section 609.347, the court did not make a specific ruling on the applicability of the law to the clinic visit.¹⁰⁶ In fact, neither the appellant nor the respondent addressed the issue of subsequent sexual conduct in their briefs.¹⁰⁷ Without expressly holding as much, however, the appellate court's eventual affirmation of the lower court's evidentiary ruling implied that rape shield

⁹⁷ *Wenthe*, 865 N.W.2d at 235 (Minn. Ct. App. 2014) (“the district court abused its discretion in precluding appellant from introducing evidence of [the complainant]’s sexual history”), *rev'd*, 865 N.W.2d 293 (Minn. 2015).

⁹⁸ *Id.* at 308.

⁹⁹ See *supra* section IV at ¶ 1.

¹⁰⁰ MINN. STAT. § 609.347, subd. 3 (2018) (emphasis added).

¹⁰¹ *Id.*

¹⁰² See *State v. Olsen*, 824 N.W.2d 334, 340 (Minn. Ct. App. 2012); *State v. Crims*, 540 N.W.2d 860, 865-67 (Minn. Ct. App. 1995).

¹⁰³ See MINN. STAT. § 609.347 (2019).

¹⁰⁴ See *Olsen*, 824 N.W.2d at 340; *Crims*, 540 N.W.2d at 865-67.

¹⁰⁵ See *Olsen*, 824 N.W.2d at 340.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

would apply to subsequent sexual conduct.¹⁰⁸ In its holding, the *Olsen* court relied on *Crims*, a case that also appears to imply that evidence of a complainant's subsequent sexual conduct is precluded by rape shield.¹⁰⁹

Similar to the *Olsen* panel, the court in *Crims* examined the relevance of the defendant's proffered evidence and not a challenge to the timing of the complainant's sexual conduct *vis-à-vis* the timing of the offense conduct.¹¹⁰ Nevertheless, the *Crims* opinion created an implication that rape shield could be applied to exclude evidence of prostitution that occurred after the time of the defendant's alleged offense.¹¹¹ Rather than ruling that such evidence was excluded by rape shield, the court held that, "[w]hen unconnected to a pattern of pre-existing behavior, such evidence is remote and uninformative about the events underlying the rape charge."¹¹² Even so, *Minnesota Statutes Annotated* saw fit to include *Crims* in the "Notes of Decisions" regarding section 609.347's applicability to "subsequent sexual conduct," creating the dangerous potential for inference of a judicially-created expansion of rape shield's plain language.¹¹³ In at least one instance, without citing to any authority, a district court explicitly found that rape shield applies to subsequent sexual conduct.¹¹⁴

However, applying rape shield to a complainant's subsequent sexual conduct flies in the face of the statute's clear wording. The statute's plain language reads "previous"—not "subsequent" and not "prior."¹¹⁵ "When a statute is completely silent on a contested issue, [courts] do not look beyond the statutory text to discern its meaning unless there is an 'ambiguity of expression' – rather than a failure of expression."¹¹⁶ There is no ambiguity here; rather, absence of the word "subsequent" and the choice of the word "previous" is either a clear meaning or a failure of expression.

¹⁰⁸ *Id.* at 341.

¹⁰⁹ *Id.* at 340.

¹¹⁰ *See State v. Crims*, 540 N.W.2d 860, 865–67 (Minn. Ct. App. 1995).

¹¹¹ *Id.* at 867.

¹¹² *Id.* at 869.

¹¹³ *See* MINN. STAT. § 609.347, note 10.

¹¹⁴ *See State v. Lipe*, 10-CR-17-706 (Carver County) (Jun. 12, 2018), index no. 58, *aff'd*, No. A18-1985, 2019 WL 474532 (Minn. Ct. App. Sept. 30, 2019). In reaching its conclusions on the relevance of the evidence, the district court considered the rape shield statute and Rule 412, concluding that the "Rule has been applied to prior and subsequent sexual contact." It then found, without further reviewing the evidence or permitting further discovery, that the evidence was irrelevant under Rule 403. *Id.*

¹¹⁵ *See* MINN. STAT. § 609.347, subd. 3 (2018); MINN. R. EVID. 412.

¹¹⁶ *Toyota-Lift of Minn., Inc. v. Am. Warehouse Sys., LLC*, 886 N.W.2d 208, 214 (Minn. 2016) (quoting *State Farm Mut. Auto. Ins. Co. v. Lennartson*, 872 N.W.2d 524, 532 (Minn. 2015) (quoting *Rohmiller v. Hart*, 811 N.W.2d 585, 590 (Minn. 2012))).

The legislature either saw fit to omit such language or overlooked it when drafting section 609.347, but it cannot be implied in the statute by the courts. A court “cannot supply that which the legislature purposely omits or inadvertently overlooks.”¹¹⁷ In fact, the interpretive canon *expressio unius est exclusion alterius*—“expression of one thing is the exclusion of another”¹¹⁸—creates the presumption that the legislature’s omission of “subsequent” or “prior” was, indeed, “by deliberate choice, not inadvertence.”¹¹⁹ This presumption becomes even stronger “when, as in this case, a statute is uncommonly detailed and specific.”¹²⁰

The *expressio unius* canon applies to “associated groups and series”¹²¹ Here, section 609.347 does not define “previous sexual conduct” with respect to its prohibition in subdivision 3.¹²² However, later, in subdivision 5, the same statute clearly differentiates between “previous” and “subsequent” sexual conduct when it prohibits certain jury instructions.¹²³ The plain language of the statute is unambiguous: “Previous” means previous—and *not subsequent*—to the relevant offense conduct. Thus, judicial application of rape shield to bar evidence of a complainant’s subsequent conduct is not only improper, it violates a defendant’s right to present evidence that is material and favorable to his or her theory of the case.¹²⁴

Even if use of the word “previous” in section 609.347 and Rule 412 is somehow ambiguous, the *in pari materia* canon sheds some light on what the legislature intended by its choice of the word previous.¹²⁵ The *in pari materia* canon “allows two statutes with a common purpose and subject matter to be construed together to determine the meaning of ambiguous statutory language.”¹²⁶ The purpose and “rationale for the canon is that related statutes, although separate, should be considered as one systematic body of law.”¹²⁷

¹¹⁷ State v. Wenthe, 865 N.W.2d 293, 304 (Minn. 2015) (quoting *Wallace v. Comm’r of Taxation*, 289 Minn. 220, 230, 184 N.W.2d 588, 594 (1971)).

¹¹⁸ State v. Smith, 899 N.W.2d 120, 123 (Minn. 2017) (quoting State v. Caldwell, 803 N.W.2d 373, 383 (Minn. 2011)).

¹¹⁹ *Id.* at 123 (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003)).

¹²⁰ *Id.* at 123–24.

¹²¹ *Id.* at 123.

¹²² See MINN. STAT. § 609.347, subdiv. 3 (2018).

¹²³ See MINN. STAT. § 609.347, subdiv. 5(b) (2018).

¹²⁴ See State v. Crims, 540 N.W.2d 860, 866 (Minn. Ct. App. 1995) (collecting cases).

¹²⁵ State v. Thonesavanh, 904 N.W.2d 432, 437 (Minn. 2017) (quoting State v. Lucas, 589 N.W.2d 91, 94 (Minn. 1999)).

¹²⁶ *Thonesavanh*, 904 N.W.2d at 437 (quoting *Lucas*, 589 N.W.2d at 94).

¹²⁷ *Id.* at 437–38 (quoting State v. Bolsinger, 221 Minn. 154, 160, 21 N.W.2d 480, 486 (1946)).

Minnesota Statutes, section 609.3455, like section 609.347, addresses criminal sexual conduct and is separated from the rape shield statute by only two short, interceding sections. Thus, “they share the necessary common purpose and subject matter for application of the *in pari materia* canon.”¹²⁸ The plain language of section 609.3455 provides that a “previous sex offense conviction” means that the “offender was convicted . . . ***before the commission of the present offense.***”¹²⁹ By analogy, “previous sexual conduct” would mean conduct which occurred “before the commission of the present offense.” In contrast, a “*prior* sex offense conviction” means conviction of a “sex offense before . . . [being] convicted of the present offense.”¹³⁰ Had the legislature intended to exclude evidence of sexual conduct that occurred subsequent to the charged conduct within the meaning of section 609.347, it could have done so by using the word “subsequent” in addition to “previous,” or by using the word “prior” instead of “previous.” Yet, the legislature did no such thing.

When the legislature’s intent is clear from the statutory language, statutory construction requires only a reading of the statute’s plain meaning.¹³¹ Application of the *in pari materia* and *expressio unius* canons dictates that the legislature’s use of the word “previous” and its plain meaning—“before commission of the present offense,”—is presumed to be by deliberate choice.¹³² Therefore, neither section 609.347 nor Rule 412 can be applied to exclude evidence of a complainant’s conduct that occurred ***after*** the date that an alleged offense was committed. Any inferences that may be drawn from *Crims* or *Olsen* regarding rape shield’s application to subsequent conduct must be disregarded, as neither case made such an explicit holding;¹³³ and if they had, such holdings would have contradicted the clear language that the legislature used in crafting Minnesota’s rape shield law.¹³⁴

¹²⁸ *Id.* at 438 (holding that theft and robbery share a common purpose and subject matter for application of the canon).

¹²⁹ MINN. STAT. § 609.3455, subdiv. 1(f) (2018) (emphasis added).

¹³⁰ MINN. STAT. § 609.3455, subdiv. 1(g) (2018)

¹³¹ *State v. Leathers*, 799 N.W.2d 606, 608 (Minn. 2011).

¹³² *See State v. Smith*, 899 N.W.2d 120, 124 (Minn. 2017) (“the presence of a detailed and exhaustive list of ‘prior impaired driving conviction[s]’ creates a presumption that the omission of any criminal statutes, such as the criminal-vehicular-operation statute under which Smith was convicted in 2005, was due to deliberate choice, not inadvertence”).

¹³³ *State v. Olsen*, 824 N.W.2d 334 (Minn. Ct. App. 2012); *State v. Crims*, 540 N.W.2d 860 (Minn. Ct. App. 1995)

¹³⁴ MINN. STAT. § 609.347 (2018).

V. CONCLUSION

Rape shield laws clearly serve an important purpose in the legal system, and Minnesota's version, codified in section 609.347 and rule 412, is no exception. Rape shield laws not only prevent irrelevant, prejudicial evidence from being considered by a jury, they also protect complainants' reputations and safeguard them from victim-blaming.

Courts have recognized, however, that rape shield laws represent a significant curtailment of a defendant's constitutional rights to confront witnesses and to present a complete defense. For this reason, Minnesota courts have carved out exceptions to rape shield's broad prohibitions. An exception that applies in every case is the need to balance the application of rape shield against a defendant's constitutional rights. Although the need to do so is widely recognized, the balance very rarely falls in favor of the defendant's rights. When rape shield is invoked, the evidence that prosecutors seek to ban is almost always excluded.

In the climate of recent times, a simple accusation of criminal sexual conduct—with little or no evidence—can upend a defendant's entire life. While the social movement favoring increased belief of accusations of sexual assault is undoubtedly important to societal growth, courts must remain neutral and reasoned in their application of the Constitution for the protection of accused persons against the immense powers of the government in criminal proceedings. Therefore, it is more important than ever for courts of law to consider the safeguards that the United States and Minnesota Constitutions offer criminal defendants. Due process is a guarantee, not an option.

The manner in which rape shield has been applied to exclude evidence in Minnesota frequently appears to reflect an abundance of caution on the part of courts, perhaps from a desire not to upset prosecutors or complainants and their families, rather than a legitimate balancing of rape shield's purpose against the interests of justice and defendants' constitutional rights. Moreover, this overwhelming tendency among courts to favor rape shield's proscriptions over a defendant's constitutional rights has created the inference that rape shield may be applied beyond the plain language of section 609.347 and Rule 412. Instead of offering "heightened protection against surprise, harassment, and unnecessary invasions of privacy,"¹³⁵ in Minnesota, rape shield has become a means for prosecutors to remove critical evidence in violation of the constitutional rights of defendants while courts stand by in complicity.

¹³⁵ *Michigan v. Lucas*, 500 U.S. 145, 150 (1991).

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