CONSTITUTIONAL LAW—SEX, LIES AND RAPE SHIELD STATUTES: THE CONSTITUTIONALITY OF INTERPRETING RAPE SHIELD STATUTES TO EXCLUDE EVIDENCE RELATING TO THE VICTIM’S MOTIVE TO FABRICATE

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INTRODUCTION

Rape shield statutes prevent criminal defendants from introducing evidence at their trials about the sexual assault victim’s sexual history. These exclusionary statutes are controversial because of the strong competing interests involved. On one side, the sexual assault victim has a privacy interest. Rape shield statutes prevent an accused from examining embarrassing and humiliating details from the victim’s sexual history in the accused’s trial. By excluding this evidence, proponents of rape shield statutes believe that rape shield statutes encourage women to report sexual assaults and help to eliminate gender bias in the courtroom.

On the other hand, rape shield statutes may exclude evidence

1. In this Note, the words victim and alleged victim will be used interchangeably.
2. For example, the Massachusetts Rape Shield Statute states:
   Evidence of the reputation of a victim's sexual conduct [and] ... [e]vidence of specific instances of a victim's sexual conduct ... shall not be admissible [in a sexual assault proceeding] except [as] evidence of the victim's sexual conduct with the defendant or evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristic, or condition of the victim; provided, however, that such evidence shall be admissible only after an in camera hearing.

3. See, e.g., Stephens v. Miller, 13 F.3d 998, 1002-03 (7th Cir.) (en banc) (acknowledging both the legitimate interests of rape shield statutes and the accused’s right to present testimony in his own behalf), cert. denied, 115 S. Ct. 57 (1994). See infra notes 129-36 and accompanying text for a discussion of Stephens.
4. Id. See also Ann Althouse, The Lying Woman, the Devious Prostitute and Other Stories from the Evidence Casebook, 88 NW. U. L. REV. 914, 972-73 (1994) (mentioning that rape shield statutes are enacted to protect a sexual assault victim’s privacy interests); Tanya Bagne Marcketti, Note, Rape Shield Laws: Do They Shield the Children?, 78 IOWA L. REV. 751, 755 (1993) (rape shield statutes “protect the victim’s legitimate expectation of privacy”); Sakthi Murthy, Comment, Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim’s Sexual History to Show the Defendant’s Mistaken Belief in Consent, 79 CAL. L. REV. 541, 551 (1991) (noting one of the rape shield statute’s purposes is to protect the privacy of victims).
6. Harriet R. Galvin, Shielding Rape Victims in the State and Federal Courts: A
vital to the accused’s defense. Such exclusions could compromise the accused’s right to a fair trial by preventing consideration of evidence which may tend to show that the sexual assault victim fabricated the charges against the accused. When the victim’s motive to fabricate is related to her sexual history, it becomes difficult to fulfill the objectives of rape shield statutes without infringing upon the defendant’s right to examine the victim’s motive to fabricate.

This Note considers the issue of whether courts should interpret rape shield statutes to exclude evidence relating to the victim’s motive to fabricate when that evidence incorporates the victim’s prior sexual conduct. Part I discusses the background of both the accused’s right to present testimony examining a witness’s motive to fabricate and rape shield statutes. Part II.A weighs the interests protected by rape shield statutes against the defendant’s right to examine a witness’s motive to fabricate in light of United States Supreme Court precedent. Part II.A concludes that Supreme Court precedent prevents courts from interpreting rape shield statutes to exclude sexual history evidence when it relates to the victim’s motive to fabricate. However, Part II.B discusses how courts can use


7. See, e.g., Stephens, 13 F.3d at 1002-03. See also Steven I. Friedland, Date Rape and the Culture of Acceptance, 43 FLA. L. REV. 487, 516 (1991) (stating that the right to cross-examine victim for motive to lie may be an innocent accused’s last hope); Lisa Hamilton Theilmeyer, Note, Beyond Maryland v. Craig: Can and Should Adult Rape Victims Be Permitted to Testify by Closed-Circuit Television?, 67 IND. L.J. 797, 813 (1992) (“Prohibiting criminal defendants accused of rape from introducing evidence available to defendants on trial for any other crime clearly implicates the confrontation clause.”).

8. See Ferguson v. Georgia, 365 U.S. 570, 582 (1961) (citing JAMES F. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 442, 444 (1882)). Noted criminal law authority, Sir James Stephen, said: “I am convinced by much experience that questioning, or the power of giving evidence is a positive assistance, and a highly important one . . . .” Id. See infra note 15 for a discussion of Ferguson.

9. A motive to fabricate in the context of sexual assault is evidence that suggests a victim might be lying about the occurrence of the sexual assault. See Stephens, 13 F.3d at 1002-03 (considering the defendant’s contention that the victim invented the sexual assault charges against the defendant because the defendant had made vulgar statements which incorporated the victim’s sexual history). See also United States v. Payne, 944 F.2d 1458, 1469 (9th Cir. 1991) (holding that “[t]he right to confront witnesses includes the right to . . . show their possible bias or self-interest in testifying,” but that the defendant’s evidence was not relevant to the victim’s motive to fabricate), cert. denied, 503 U.S. 975 (1992); United States v. Nez, 661 F.2d 1203, 1206 (10th Cir. 1981) (noting that the motive to fabricate is always a proper subject for examination although the defendant could not characterize the evidence as such for the first time on appeal).
existing rules of evidence to dull the effect of this conclusion on rape shield statutes.

I. BACKGROUND

This part discusses the background of the sexual assault defendant’s and victim’s conflicting rights. Part I.A discusses the origin and evolution of the defendant’s right to present witnesses in his or her own behalf. Particularly, this section focuses on the United States Supreme Court’s recognition of the defendant’s right to examine a witness’s motive to fabricate. Part I.B examines the history of rape shield statutes by considering legislative and judicial treatment of rape shield legislation.

A. The Right to Present Testimony and the Right to Examine a Witness’s Motive to Fabricate

1. Evolution of the Right to Present Testimony

The Sixth Amendment’s Compulsory Process Clause guarantees to the accused the right to present witnesses in his own behalf.\(^{10}\) In federal cases, the Sixth Amendment can be used to enforce this right.\(^{11}\) In state cases, the right to present witnesses is guaranteed by the Fourteenth Amendment Due Process Clause, which the United States Supreme Court has concluded incorporates the Sixth Amendment Compulsory Process Clause.\(^{12}\) Included in the defendant’s right to present witnesses in his or her own behalf is the privilege to testify in one’s own behalf.\(^{13}\) This has not always been the case.\(^{14}\)

In sixteenth century England, prisoners were allowed to argue

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10. U.S. CONST. amend. VI. The Sixth Amendment states: “In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” Id.

11. See, e.g., Rock v. Arkansas, 483 U.S. 44, 62 (1987) (holding Arkansas’s rule that hypnotically refreshed testimony is inadmissible per se violates the criminal defendant’s right to testify in his or her own behalf). See infra notes 31-36 and accompanying text for a discussion of Rock.


13. Rock, 483 U.S. at 52. See infra notes 31-36 and accompanying text for a discussion of Rock.

14. Nix v. Whiteside, 475 U.S. 157, 164 (1986) (“The right of an accused to testify in his defense is of relatively recent origin. Until the latter part of the preceding century, criminal defendants . . . were considered to be disqualified from giving sworn testimony . . . .”).
directly with the king’s counsel.\textsuperscript{15} However, prisoners did not have the right to call witnesses or retain counsel.\textsuperscript{16} In seventeenth-century England, criminal defendants were first granted the right to present witnesses in their own behalf.\textsuperscript{17} After this change, the accused was no longer allowed to testify in his or her own behalf because he or she was considered to be an interested party and incapable of delivering competent testimony.\textsuperscript{18}

The practice of disqualifying the accused as a witness began to erode in the United States when, in 1859, Maine enacted the first statute allowing criminal defendants to testify during trials for certain offenses.\textsuperscript{19} Later, in 1864, Maine enacted the first comprehensive statute in the “English-speaking world” that empowered criminal defendants to testify in all trials regardless of the offense.\textsuperscript{20} Congress enacted a similar federal statute in 1878.\textsuperscript{21}

The United States Supreme Court attacked the common-law disqualification rule in \textit{Washington v. Texas}.\textsuperscript{22} In \textit{Washington}, the Court interpreted two Texas statutes that had the joint effect of excluding the testimony of a co-participant in the appellant’s murder trial.\textsuperscript{23} The co-participant’s testimony was essential to the accused’s defense in his murder trial.\textsuperscript{24} Without the excluded testimony, the appellant was convicted.\textsuperscript{25}

In reversing the appellant’s conviction, the Supreme Court held that the accused’s right to have compulsory process for obtaining witnesses in his or her favor is incorporated in the Due Pro-

\textsuperscript{15} Ferguson v. Georgia, 365 U.S. 570, 573-74 (1961). In Ferguson, the United States Supreme Court, while examining a Georgia statute which was the last United States state statute to disqualify criminal defendants from testifying in their own behalf, discussed the history of the right to present testimony in one’s own behalf. \textit{Id.} at 571-86. Ultimately, the Court did not strike down the Georgia statute because the defendant did not raise the issue of the statute’s constitutionality. \textit{Id.} at 596.

\textsuperscript{16} \textit{Id.} at 573-74 (citing 1 JAMES F. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 326, 350 (1882)).

\textsuperscript{17} \textit{Id.} at 574.

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} \textit{Id.} at 577.

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} 18 U.S.C. § 3481 (1994). The current federal statute, which is substantively the same as the original federal statute, states: “In trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness.” \textit{Id.}

\textsuperscript{22} 388 U.S. 14 (1967).

\textsuperscript{23} \textit{Id.} at 16-17. Read together, the two Texas statutes prevented a person charged as an accomplice from testifying as a witness in favor of his partner. \textit{Id.} at 16.

\textsuperscript{24} \textit{Id.}

\textsuperscript{25} \textit{Id.}
cess Clause of the Fourteenth Amendment. In so deciding, the Court applied the test of whether the Sixth Amendment Compulsory Process Clause is "fundamental and essential to a fair trial." The Washington Court further stated that "[t]he right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense . . . . This right is a fundamental element of due process of law." However, the Court did not have an opportunity to determine whether defendants have a right to testify in their own behalf because it was not faced with that issue.

After Washington, the United States Supreme Court repeatedly stated in dicta that criminal defendants have a right to testify in their own behalf. However, the Court did not squarely confront the issue of whether a defendant could testify in his own behalf until Rock v. Arkansas. In Rock, the United States Supreme Court considered the Arkansas Supreme Court's adoption of a rule that hypnotically-refreshed testimony is inadmissible per se. The Court held that Arkansas's inadmissible per se rule violated the criminal defendant's right to testify in his own behalf. In so holding, the Court stated that the criminal defendant's right to testify in his or her own behalf has three textual sources in the Constitution: the Fourteenth Amendment Due Process Clause; the Sixth Amendment Compulsory Process Clause; and as a "necessary corollary" to

26. Id. at 17-18.
27. Id. at 18 n.6 (quoting Gideon v. Wainwright, 372 U.S. 335, 342 (1963)).
28. Id. at 19. However, the defendant's right to present witnesses in his own behalf may be abridged if other legitimate interests exist and preventing the defendant's proffered testimony is not "arbitrary or disproportionate to the purposes . . . [it was] designed to serve." Rock v. Arkansas, 483 U.S. 44, 55-56 (1987).
29. E.g., Faretta v. California, 422 U.S. 806, 819 n.15 (1975) (right to testify in one's own behalf is essential to due process); Harris v. New York, 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to testify in his own defense. . . .").
31. Rock, 483 U.S. at 45.
32. Id. at 62. Exclusion of hypnotically-induced testimony implicates the right to testify in one's own behalf because the defendant, if allowed, would have testified to what was in his mind. See id. at 56-61.
the Fifth Amendment privilege against self-incrimination.\textsuperscript{33}

The Supreme Court also held in \textit{Rock} that the defendant's right to testify in his or her own behalf has limitations.\textsuperscript{34} The Court emphasized that the right to testify in one's own behalf may give way to other legitimate interests.\textsuperscript{35} However, in abridging the defendant's right to testify in his own behalf, "restrictions ... may not be arbitrary or disproportionate to the purposes they are designed to serve."\textsuperscript{36}

Through time, the courts have recognized the defendant's right to present relevant testimony. This right now includes the privilege to testify in one's own behalf.\textsuperscript{37} However, the Supreme Court has also recognized that the defendant's right to present relevant testimony may be abridged by other legitimate interests in the criminal process. Courts may restrict the defendant's right if favoring other legitimate interests is neither arbitrary nor disproportionate to the detrimental effect on the defendant.\textsuperscript{38}

\begin{itemize}
  \item \textsuperscript{33} \textit{Id.} at 51-53. The right to testify in one's own behalf is one of the rights "essential to due process of law in a fair adversary process." \textit{Faretta v. California}, 422 U.S. 806, 819 n.15 (1975) (holding that the trial court violated the appellant's Sixth Amendment rights by forcing the appellant to accept a state-appointed public defender). In addition, the right to have compulsory process for obtaining witnesses guaranteed by the Sixth Amendment must logically include the accused's right to testify for himself. \textit{Rock}, 483 U.S. at 52. Finally, the Fifth Amendment's prohibition against compelled testimony must necessarily encompass the right to testify if the defendant so desires. \textit{Harris v. New York}, 401 U.S. 222, 229-30 (1971) (Brennan, J., dissenting) (holding defendant's statement, which was inadmissible due to state's failure to satisfy procedural safeguards, was admissible to attack the defendant's credibility, provided it was proven sufficiently trustworthy). The Fifth Amendment's privilege against self-incrimination "is fulfilled only when an accused is guaranteed the right 'to remain silent unless he chooses to speak.'" \textit{Id.} (quoting \textit{Malloy v. Hogan}, 378 U.S. 1, 8 (1964)).
  \item \textsuperscript{34} \textit{Rock}, 483 U.S. at 55. The Supreme Court had previously held that "[i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." \textit{Chambers v. Mississippi}, 410 U.S. 284, 302 (1973) (trial court's strict application of common-law rule against impeaching one's own witness, coupled with exclusion of testimony that should have been admissible under hearsay exception as a declaration against interest, violated appellant's due process rights).
  \item \textsuperscript{35} \textit{Rock}, 483 U.S. at 55-56. For example, there is no constitutional right to present perjurious testimony. \textit{United States v. Dunnigan}, 507 U.S. 87, 95 (1993) (increasing sentence for obstruction of justice did not violate criminal defendant's right to testify in his own behalf).
  \item \textsuperscript{36} \textit{Rock}, 483 U.S. at 55-56.
  \item \textsuperscript{37} \textit{Id.} at 51; \textit{Nix v. Whiteside}, 475 U.S. 157, 164 (1986).
  \item \textsuperscript{38} \textit{Rock}, 483 U.S. at 55-56.
\end{itemize}
2. Importance of the Right to Present Testimony About a Witness's Motive to Fabricate

In *Davis v. Alaska*\(^{39}\) and *Olden v. Kentucky*\(^{40}\) the United States Supreme Court recognized that the right to examine a witness's motive to fabricate is a critical part of the defendant's right to present evidence on his own behalf.\(^{41}\) In *Davis*, the petitioner was charged with and convicted of burglary and grand larceny.\(^{42}\) One of the key witnesses in the trial was a juvenile who was on probation for burglary. The juvenile witness stated that he saw the petitioner with another man outside a blue Chevrolet sedan near the location of a safe that the petitioner allegedly stole.\(^{43}\) The prosecutor sought a protective order to shield the juvenile witness from references to his juvenile record. The petitioner objected to the protective order. He stated that he only intended to introduce proof of the juvenile's record to show that the juvenile witness identified the petitioner out of fear that his probation might be adversely affected if he did not.\(^{44}\)

\(^{39}\) 415 U.S. 308, 319-21 (1974) (holding that the trial court should not have prevented the defendant from introducing a juvenile witness's prior criminal activity under a juvenile record-protection statute, because referring to the record was necessary to show that the witness had a motive to fabricate). For a discussion of *Davis*, see Leo A. Farhat & Richard C. Kraus, *Michigan's "Rape-Shield" Statute: Questioning the Wisdom of Legislative Determinations of Relevance*, 4 COOLEY L. REV. 545, 553-54 (1987) (stating that sexual history evidence that implicates victim's motive to fabricate should be admissible under *Davis*); H. Lane Kneedler, *Sexual Assault Law Reform in Virginia—A Legislative History*, 68 VA. L. REV. 459, 495 n.139 (1982) (noting rape shield cases rely on *Davis* to allow defendants to examine victim's motive to fabricate); Alice Susan Andre-Clark, Note, *Whither Statutory Rape Laws: Of Michael M., the Fourteenth Amendment, and Protecting Women from Sexual Aggression*, 65 S. CAL. L. REV. 1933, 1986 (1992) ("[T]he state's interest in protecting the witness [from exposure to sexual history evidence] may be stronger than in *Davis*... In rape cases, the victim may face a painful public exposure of her relationship with the defendant as well as her recent sexual history.").


\(^{41}\) *Olden*, 488 U.S. at 227; *Davis*, 415 U.S. at 320.

\(^{42}\) *Davis*, 415 U.S. at 308, 320-21.

\(^{43}\) Id. at 309-10.

\(^{44}\) Id. at 311.
The judge granted the motion for the protective order pursuant to an Alaska statute that prohibited the introduction of a juvenile's record in court.\(^{45}\)

After the Alaska Supreme Court affirmed the petitioner's conviction, the United States Supreme Court granted certiorari.\(^{46}\) The Supreme Court reversed and remanded the case, finding that the trial judge had violated the petitioner's Sixth Amendment right to confront adverse witnesses.\(^{47}\)

The Court recognized that Alaska had valid interests in protecting the confidentiality of a juvenile's records. The Court noted that the state's interests included: preventing impairment of the juvenile's rehabilitation process; ensuring that the juvenile did not lose employment opportunities; preventing the juvenile from committing further delinquent acts; and allowing the juvenile to testify free from embarrassment and without damage to his reputation.\(^{48}\)

Recognizing these laudable interests, the Court stated that the "policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."\(^{49}\)

In *Olden v. Kentucky*,\(^{50}\) the United States Supreme Court further noted the importance of the defendant's right to effectively cross-examine a witness for bias. In *Olden*, the petitioner, along with a friend, was indicted for kidnapping, rape and forcible sodomy. The petitioner sought to introduce evidence that the victim, who was white, had a motive to fabricate because she did not want to risk the chance that the black man with whom she was living would discover her infidelity.\(^{51}\)

\(^{45}\) *Id.*

\(^{46}\) The Court considered the issue of:

> [W]hether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status . . . when such an impeachment would conflict with a State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency.

*Id.* at 309.

\(^{47}\) *Id.* at 320-21.

\(^{48}\) *Id.* at 319-20.

\(^{49}\) *Id.* at 320. The Court also stated that "[t]he partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Id.* at 316 (quoting 3A John Henry Wigmore, Evidence in Trials at Common Law § 940, at 755 (Chadbourn rev. ed. 1970)).

\(^{50}\) 488 U.S. 227 (1988) (per curiam).

\(^{51}\) *Id.* at 229-30. The inference suggested by the petitioner is that the victim would rather her lover believe that she was raped than believe she engaged in a volun-
dence that the white victim was living with a black man. The court specifically held that Kentucky's rape shield statute did not bar the evidence. However, the trial court held that the potential prejudice in allowing evidence of an interracial living relationship outweighed the probative value of the evidence. Subsequently, the petitioner was convicted of the forcible sodomy charge.

The United States Supreme Court reversed and held that the trial court's decision to exclude the evidence of the victim's living relationship violated the petitioner's Sixth Amendment Confrontation Clause rights. In so holding, the Supreme Court relied heavily upon its earlier decision in Davis v. Alaska. The Court noted that preventing a criminal defendant from questioning a witness to show bias violates the defendant's Confrontation Clause rights. The Court stated that "speculation as to the effect of jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the victim's] testimony."

Davis and Olden show that the Supreme Court considers the right to examine witnesses about their motive to fabricate to be highly important in protecting the defendant's due process rights. Neither the privacy interests similar to those protected by juvenile record shield statutes nor interests with speculative benefits can justify preventing a defendant from examining a witness's motive to fabricate.

tary affair with the petitioner because there would be less of a chance that he would end their relationship. See id.
52. Id. at 230.
53. Id.
54. Id. at 230-31. Allowing evidence of the couple's interracial living relationship might have lead a prejudiced juror to make a decision on an improper basis. Id. at 232.
55. Id. at 230.
56. Id. at 231.
57. Id. (citing Davis v. Alaska, 415 U.S. 308 (1974)).
58. Id. More specifically, the Court noted that it had recently affirmed Davis in Delaware v. Van Arsdall, 475 U.S. 673 (1986), where it stated: [A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors... could appropriately draw inferences relating to the reliability of the witness."
Id. at 680 (quoting Davis, 415 U.S. at 318).
59. Olden, 488 U.S. at 232.
60. Davis, 415 U.S. at 320.
61. Olden, 488 U.S. at 232.
B. Rape Shield Statutes and a Victim’s Motive to Fabricate

1. History of the Rape Shield Statute

The rape shield statute is a relatively recent creation. At common law, the accused in a sexual assault trial was permitted to show that the victim was unchaste by “inquiring into a victim’s extramarital, consensual sexual relations.” One of the reasons behind this rule was that unchaste women were considered dishonest. Further, supporters of the common-law doctrine allowing evidence of the victim’s extramarital sexual relations justified the doctrine by stating that a woman’s unchaste character is probative on the issue of whether the woman consented to sex on a particular occasion.

In the early 1970s, feminist organizations and law enforcement agencies argued that allowing the accused to introduce evidence about the victim’s sexual history was unjustifiable. They argued that: (1) sexual morality had changed since the adoption of the common-law doctrine which allowed evidence about the victim’s unchaste character; (2) exclusionary laws are needed to protect “complainants from a ‘second rape’ in the courtroom”; and (3) rape shield laws would attempt to balance “gender-bias in the determination of consent.”

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62. Galvin, supra note 6, at 765 n.3. Michigan enacted the first rape shield statute in 1974. Id.

63. Richard A. Wayman, Note, Lucas Comes to Visit Iowa: Balancing Interests Under Iowa’s Rape-Shield Evidentiary Rule, 77 IOWA L. REV. 865, 869-70 (1992) (discussing the history of rape shield statutes). See also Alison Ray Bunch, Rape Shield, Survey of Developments in North Carolina and the Fourth Circuit, 1993, 72 N.C. L. REV. 1777 (1994) (“before the advent of rape shield laws, the moral character of victims ... was often an issue”).

64. Cheryl Siskin, Note, No. The “Resistance Not Required” Statute and “Rape Shield Law” May Not Be Enough—Commonwealth v. Berkowitz, 609 A.2d 1338 (Pa. Super. Ct.) (per curiam), alloc. granted, 613 A.2d 556 (Pa. 1992), 66 TEMP. L. REV. 531, 557 (“rape shield law was enacted to quell the myth that unchaste women were liars”).

65. Galvin, supra note 6, at 808.

66. Wayman, supra note 63, at 871.

67. Id. at 871-72. “Research indicated the vast majority of young women ... engaged in consensual sexual relations outside of marriage, and men found this behavior normal and acceptable.” Id. (citations omitted).

68. Lara English Simmons, Note, Michigan v. Lucas: Failing to Define the State Interest in Rape Shield Legislation, 70 N.C. L. REV. 1592, 1604 (1992) (discussing the movement to eliminate the common-law doctrine allowing evidence of a woman’s unchaste character). Proponents of rape shield laws argue that victims suffer embarrassment and humiliation, causing psychological damage to the victim’s self-esteem. Id.

69. Id. This is a problem particularly when a sexual assault victim reacts passively rather than resisting. Id. at 1604-05.
As a result of the rape law reformers' efforts, Michigan enacted the first rape shield statute in 1974. By 1978, over thirty states had adopted rape shield statutes. In 1978, Congress followed suit by enacting Federal Rule of Evidence 412, which provides generally that evidence of an alleged victim's sexual history is inadmissible. Despite this general rule, Rule 412 allows evidence of: specific instances of the victim's past sexual conduct with the accused to show that the victim consented; specific instances of the victim's sexual conduct with a person other than the accused when introduced to show that the accused was not the source of semen or injury; and specific instances of the victim's sexual conduct when the Constitution requires it to be admitted. In addition, Rule 412 requires the accused to make a written motion, at least fifteen days before the trial, to offer evidence under one of the aforementioned exceptions. Thereafter, the judge must conduct a hearing in his chambers to determine whether the evidence is admissible.

Congress's principal purpose in enacting Rule 412 was to end the "degrading and embarrassing disclosure of intimate details about" the victims' private lives. Further, President Jimmy Carter felt that the law would be helpful in encouraging women to report rapes by ending the public degradation and humiliation of rape victims. Congress recognized that allowing defendants to examine

70. Galvin, supra note 6, at 765 n.3.
72. Fed. R. Evid. 412. Rule 412 states:
(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible. (b) . . . evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless . . . (1) admitted in accordance with . . . (c)(1) and (c)(2) and is constitutionally required . . . ; or (2) admitted in accordance with . . . (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 . . . the source of semen or injury; or (B) past sexual behavior with the accused. . . .

75. Fed. R. Evid. 412(b)(1).
76. Fed. R. Evid. 412(c)(1).
77. Fed. R. Evid. 412(c)(2).
79. Statement by President Carter on Signing H.R. 4727 into Law, Protection for
the victim's sexual history contributed to the fact that rape is the least reported crime.80

Since Congress enacted Rule 412, all but two states have enacted rape shield statutes.81 Rape shield statutes generally fall into one of four categories.82 The first category is the Michigan model, which about half of the states follow.83 The Michigan model generally excludes all evidence of a victim's sexual history, but allows limited exceptions to this rule.84 The second model for rape shield
statutes is the Arkansas model.\textsuperscript{85} The Arkansas model provides for an in camera hearing, at which the judge weighs the probative value of admitting the evidence of the victim’s sexual history against the likelihood and degree of prejudice.\textsuperscript{86}

The third species of rape shield statute is modeled after Federal Rule of Evidence 412.\textsuperscript{87} Like the Michigan model, the federal model renders evidence of an alleged victim’s sexual history inadmissible, subject to limited exceptions.\textsuperscript{88} However, the federal model differs from the Michigan model in that it contains a broad exception for instances where prohibiting the accused from introducing evidence of the victim’s sexual history would violate the accused’s constitutional rights.\textsuperscript{89} The final type of rape shield statute is the California model.\textsuperscript{90} The California model allows evidence of the alleged victim’s sexual history to be introduced for certain instances of sexual activity showing the source or origin of semen, pregnancy, or disease.” § 750.520j(1)(a), (b). However, to allow sexual history evidence under one of these exceptions, the judge must first find that the “evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.” § 750.520j(1).


\textsuperscript{88} \textit{Fed. R. Evid. 412}. For a discussion of the exceptions to the rape shield statutes modeled after Rule 412, see \textit{supra} notes 73-75 and accompanying text.

\textsuperscript{89} \textit{Fed. R. Evid. 412}.

sues, but not for others.\textsuperscript{91}

Although the Supreme Court has never expressly declared any of the foregoing rape shield models constitutional, the Court implicitly approved rape shield statutes in \textit{Michigan v. Lucas}.\textsuperscript{92} In \textit{Lucas}, the defendant was charged with rape. He failed to provide written notice within ten days of the trial that he intended to present evidence about the victim’s sexual conduct as required by the Michigan rape shield statute under a statutory exception.\textsuperscript{93} At trial, the court denied the defendant’s request to admit evidence about the alleged victim’s sexual history, since he had not satisfied the notice requirement. Subsequently, the judge, in a bench trial, found the defendant guilty.\textsuperscript{94}

The Michigan Court of Appeals reversed the judge’s decision. It ruled that Michigan’s notice-and-hearing requirement violated the Sixth Amendment per se.\textsuperscript{95} On writ of certiorari, the Supreme Court found that the notice-and-hearing requirement was not unconstitutional per se, and remanded the case to the Michigan Court of Appeals for a determination of whether the requirement was unconstitutional under the circumstances.\textsuperscript{96}

The Court recognized that a defendant’s Sixth Amendment rights may be restricted by other legitimate interests, so long as such restrictions are neither arbitrary nor “‘disproportionate to the purposes they are designed to serve.’”\textsuperscript{97} The court emphasized that Michigan’s rape shield statute is such “a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.”\textsuperscript{98} In so holding, the Supreme Court implicitly approved the constitutional-

\begin{itemize}
\item \textsuperscript{91} See \textit{Cal. Evid. Code} §§ 782, 1103(b) (West Supp. 1995). See \textit{supra} note 90 for a discussion of the issues for which evidence of the victim’s sexual history can be introduced.
\item \textsuperscript{92} 500 U.S. 145, 149-51 (1991) (notice provision of the Michigan rape shield statute is not contrary to the Sixth Amendment per se because it is consistent with the purpose of rape shield statutes). For law review treatment of \textit{Lucas}, see Jack M. Morgan, Jr., Note, \textit{Michigan v. Lucas: Rape Shields, Criminal Discovery Rules, and the Price We Pay in Pursuit of the Truth}, 1993 \textit{Utah L. Rev.} 545 (1993); Simmons, \textit{supra} note 68, at 1592.
\item \textsuperscript{93} \textit{Lucas}, 500 U.S. at 147.
\item \textsuperscript{94} \textit{Id.} at 147-48.
\item \textsuperscript{95} \textit{Id.} at 148. The Michigan Court of Appeals declared that Michigan’s notice-and-hearing requirement served no useful purpose and was insufficient to justify interference with the criminal defendant’s Sixth Amendment compulsory process rights. \textit{Id.}
\item \textsuperscript{96} \textit{Id.} at 153.
\item \textsuperscript{97} \textit{Id.} at 149, 151 (quoting \textit{Rock v. Arkansas}, 483 U.S. 44, 56 (1987)).
\item \textsuperscript{98} \textit{Id.} at 149-50.
\end{itemize}
ity of rape shield statutes.99

2. Case Law in Opposition to Courts Interpreting Rape Shield Statutes to Exclude Evidence About the Victim’s Motive to Fabricate

Several courts have confronted the issue of the accused’s right to present relevant testimony about the victim’s sexual history as it relates to the victim’s motive to fabricate sexual assault charges.100

99. Id. Although the Supreme Court did not expressly approve rape shield statutes, it is a reasonable inference to believe that the Court would have found that rape shield statutes were constitutional if faced with that issue. The Supreme Court noted that a legitimate interest may restrict a defendant’s right to present relevant testimony so long as such a restriction is neither arbitrary nor disproportionate to its designated purpose. Id. at 149, 151 (quoting Rock v. Arkansas, 483 U.S. 44, 55 (1987)). Further, the court held that Michigan’s rape shield statute served the legitimate interest of protecting rape victims from “surprise, harassment, and unnecessary invasions of privacy.” Id. at 149-50. Therefore, one can argue that rape shield statutes can restrict the defendant’s right to present evidence as long as such a restriction is neither arbitrary nor disproportionate to its designated purpose. See also B.J. George, Jr., United States Supreme Court 1990-1991 Term: Criminal Procedure Highlights, 36 N.Y.L. SCH. L. REV. 535, 552-54 (1991) (discussing the constitutionality of rape shield legislation in light of Lucas); Sloan K. Banfield, Casenote, Judicial Manipulation of Michigan’s Rape Shield Act?: People v. Wilhem, 9 COOLEY L. REV. 497, 505 (1992) (noting that the Lucas Court found rape shield statute’s notice requirement to serve the legitimate state interest of protecting against surprise, harassment, and undue delay); Christopher B. Reid, Note, The Sexual Innocence Inference Theory as a Basis for the Admissibility of a Child Molestation Victim’s Prior Sexual Conduct, 91 MICH. L. REV. 827, 837-38 (1993) (quoting Lucas for the point that rape shield statutes are not unconstitutional simply because they prevent the defendant from introducing relevant evidence).

100. United States v. Payne, 944 F.2d 1458, 1469 (9th Cir. 1991) (holding that, although “[t]he right to confront witnesses includes the right to . . . show their possible bias or self-interest in testifying,” the defendant’s evidence was not relevant to the victim’s motive to fabricate), cert. denied, 112 S. Ct. 1598 (1992); United States v. Nez, 661 F.2d 1203, 1206 (10th Cir. 1981) (noting that the motive to fabricate is always a proper subject for examination, although the defendant could not characterize the evidence as such for the first time on appeal); United States v. Williams, 37 M.J. 352, 359-60 (C.M.A. 1993) (holding that newly discovered evidence relating to the victim’s motive to fabricate would have been admissible); Lewis v. State, 591 So. 2d 922, 926 (Fla. 1991) (the lower court erred in excluding evidence because it was introduced to show that the victim had a motive to fabricate); State v. Parker, 730 P.2d 921, 925 (Idaho 1986) (victim’s motive to fabricate is always an issue, and exclusion of evidence about the victim’s belief that she was pregnant was erroneous); White v. State, 598 A.2d 187, 193-94 (Md. Ct. Spec. App. 1991) (evidence of victim’s sexual history offered to show that victim had a motive to fabricate was not related to her possible motive to fabricate); Commonwealth v. Joyce, 415 N.E.2d 181, 186-87 (Mass. 1981) (evidence of prior acts may be relevant to show motive to fabricate in certain circumstances as in this case where victim had previously been arrested for prostitution and might have lied to avoid arrest); People v. LaLone 437 N.W.2d 611, 621 (Mich. 1989) (Archer, J., concurring in part) (trial court did not err in excluding evidence of victim’s sexual history as it related to her motive to fabricate because such motive could be sufficiently established by other
All of these courts have recognized that the defendant has a right to cross-examine a witness about her motive to fabricate. Many of these courts have held that the policy interests behind rape shield statutes cannot justify restricting the defendant’s right to examine the victim’s motive to fabricate. In fact, United States courts of appeals have held that the defendant may introduce relevant sexual history evidence to examine a victim’s motive to fabricate. However, these cases refused to allow the defendant to introduce the evidence on alternative grounds. Therefore, this section discusses other federal and state cases that better support the view that courts should not interpret rape shield statutes to exclude evidence showing the victim’s motive to fabricate.

Courts that interpret rape shield statutes to allow sexual history evidence related to the victim’s motive to fabricate recognize the potentially devastating nature of motive to fabricate evidence. In *United States v. Williams*, the Court of Military Appeals held that the military judge did not consider the defendant’s Sixth Amendment rights when it denied the defendant’s motion to reopen the case on grounds of newly discovered evidence. The defendant sought to introduce newly discovered evidence that the victim had been involved in an extramarital affair and had fabricated the rape charges against the defendant to prevent her lover from discovering her further infidelity. This discovery could have caused him to end his relationship with her.

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101. See, e.g., Payne, 944 F.2d at 1469; Nez, 661 F.2d at 1206; Williams, 37 M.J. at 360; Lewis, 591 So. 2d at 925; Parker, 730 P.2d at 925; White, 598 A.2d at 192-93; Joyce, 415 N.E.2d at 186; LaLone, 437 N.W.2d at 621; Rogers, 642 A.2d at 934-35; Jalo, 557 P.2d at 1362; Winfield, 301 S.E.2d at 21.
102. See, e.g., Nez, 661 F.2d at 1206; Williams, 37 M.J. at 360; Lewis, 591 So.2d at 925; Parker, 730 P.2d at 925; Joyce, 415 N.E.2d at 186-87; Jalo, 557 P.2d at 1362; Winfield, 301 S.E.2d at 21.
103. See Payne, 944 F.2d at 1466-69; Nez, 661 F.2d at 1206.
104. Payne, 944 F.2d at 1469 (defendant’s proffered evidence was not relevant to the victim’s motive to fabricate); Nez, 661 F.2d at 1206 (defendant precluded from raising issue for first time on appeal).
105. E.g., Williams, 37 M.J. at 360-61.
107. Id. at 361.
108. Id. at 355.
One of the judge’s reasons for excluding the evidence was that it would not have been admissible under the military rape shield statute.\(^{109}\) In partial reliance upon *Olden v. Kentucky*, the Court of Military Appeals held that the military judge abused his discretion by denying the defendant’s request to present evidence relating to the victim’s motive to fabricate.\(^{110}\) It reasoned that had the judge allowed the evidence, it would have had a devastating impact upon the victim’s credibility.\(^{111}\)

Courts also realize that the accused’s defense could be compromised if he is not allowed to examine a witness’s motive to fabricate by introducing sexual history evidence.\(^{112}\) In *Commonwealth v. Joyce*,\(^{113}\) the Supreme Judicial Court of Massachusetts held that the trial court improperly excluded evidence about the alleged victim’s motive to fabricate.\(^{114}\) The police found the alleged victim and the accused naked outside a car in a vacant parking lot.\(^{115}\) At trial, the defendant wanted to introduce evidence that the alleged victim had been found in similar situations on two prior occasions that resulted in her arrest for prostitution.\(^{116}\) The defendant sought to introduce this evidence to show that the alleged victim might have lied to avoid more trouble with the police.\(^{117}\)

The trial judge held that evidence of the alleged victim’s arrests for prostitution was barred by the Massachusetts rape shield statute.\(^{118}\) In reversing the trial judge’s decision, the Supreme Judicial Court of Massachusetts stated that rape shield statutes cannot be interpreted to abridge the defendant’s right to show motive or bias.\(^{119}\) The court stressed that “the right to cross-examine a complainant in a rape case to show a false accusation may be the last refuge of an innocent defendant.”\(^{120}\)

Courts usually employ the reasoning of *Olden v. Kentucky* and *Davis v. Alaska* in interpreting rape shield statutes to allow sexual

\(^{109}\) *Id.* at 359.


\(^{111}\) *Williams*, 37 M.J. at 360-61.


\(^{114}\) *Id.* at 187.

\(^{115}\) *Id.*

\(^{116}\) *Id.*

\(^{117}\) *Id.*

\(^{118}\) *Id.* at 184.

\(^{119}\) *Id.* at 186.

\(^{120}\) *Id.*
history evidence related to the victim’s motive to fabricate.\textsuperscript{121} In \textit{Lewis v. State},\textsuperscript{122} the Florida Supreme Court held that the trial court erred by excluding evidence that was offered to show that the victim accused the defendant, her stepfather, of sexual assault to stop him from telling the victim’s mother about her sexual activity with a third person.\textsuperscript{123} The Florida Supreme Court cited \textit{Olden v. Kentucky} and \textit{Davis v. Alaska} in support of its holding.\textsuperscript{124} The court stated that rape shield statutes “must give way to the defendant’s constitutional rights.”\textsuperscript{125}

\textit{Williams, Joyce,} and \textit{Lewis} illustrate the types of reasons courts use to exclude sexual history evidence related to the victim’s motive to fabricate. Courts interpret rape shield statutes to allow sexual history evidence related to the victim’s motive to fabricate because: motive to fabricate evidence can have a devastating effect on the victim’s credibility; it is necessary to the accused’s defense; and the reasoning of \textit{Olden} and \textit{Davis} support the defendant’s right to examine a victim’s motive to fabricate.

3. Case Law in Support of Courts Interpreting Rape Shield Statutes to Exclude Evidence About the Victim’s Motive to Fabricate

\textit{Williams, Joyce,} and \textit{Lewis} exemplify the reasoning that courts employ to hold that rape shield statutes cannot restrict the defendant’s right to examine a witness’s motive to fabricate.\textsuperscript{126} However, other courts exclude evidence of a victim’s sexual history when introduced for the purpose of showing that the victim had a motive to fabricate.\textsuperscript{127}


\textsuperscript{122} 591 So. 2d 922 (Fla. 1991).

\textsuperscript{123} Id. at 923.

\textsuperscript{124} Id. at 925.

\textsuperscript{125} Id.


\textsuperscript{127} See, e.g., Stephens v. Miller, 13 F.3d 998, 1002 (7th Cir.) (en banc), cert. denied, 115 S. Ct. 57 (1994); Wood v. Alaska, 957 F.2d 1544, 1550 (9th Cir. 1992) (fact that victim posed nude for magazines and acted in pornographic movies did not show that she had a motive to fabricate); United States v. Payne, 944 F.2d 1458, 1469 (9th Cir. 1991) (holding sanitized version of story involving victim’s punishment for episode of “heavy petting” and resulting motive to fabricate was enough to satisfy the defendant’s right to confront adverse witnesses), cert. denied, 112 S. Ct. 1598 (1992); Wright v. State, 513 A.2d 1310, 1314-15 (Del. 1986) (no sufficient factual basis to show that victim had
Courts that exclude sexual history evidence even when it relates to the victim's motive to fabricate find that the policies of rape shield statutes and the fact that defendants can usually establish the victim's motive without sexual history evidence justify such exclusions.\textsuperscript{128} In \textit{Stephens v. Miller},\textsuperscript{129} the victim and the accused told two entirely different stories about what had occurred on the night of the alleged attempted sexual assault.\textsuperscript{130} In the accused's version, he claimed that the victim fabricated the charge of rape because statements that he made angered her. The defendant asserted that he and the victim were engaged in "doggy fashion" sexual intercourse.\textsuperscript{131} During this alleged sexual act, the defendant asked the alleged victim if she enjoyed sex in that manner and the defendant indicated that a friend told the defendant that she did. In addition, the defendant claimed that he commented about switching partners.\textsuperscript{132} The defendant claimed these statements angered the alleged victim so much that she withdrew her consent to the sexual intercourse and fabricated the attempted rape charges.

The United States Court of Appeals for the Seventh Circuit quoted \textit{Michigan v. Lucas} in declaring that rape shield statutes serve the legitimate interest of protecting the victim from "surprise, motive to fabricate based on her possible fear that she was pregnant from sexual intercourse with her boyfriend on the previous day), \textit{aff'd}, 616 A.2d 1215 (1992); Snyder v. State, 410 S.E.2d 173, 176 (Ga. Ct. App. 1991) (trial court did not commit error in refusing to admit evidence about the victim's sexual history introduced to show that the victim had a motive to lie); People v. Hodges, 636 N.E.2d 638, 640 (Ill. App. Ct.) (evidence that victim lied to prevent husband from discovering adulterous lifestyle was irrelevant to her alleged motive to fabricate, because person who wished conduct to go unnoticed would not draw attention to self by telling the police about it), \textit{appeal denied}, 622 N.E.2d 1217 (Ill. 1993); State v. Zuniga, 703 P.2d 805, 809-10 (Kan. 1985) (fact that victim was pregnant by man other than husband was not relevant to her possible motive to fabricate, since she had received a tubal ligation and had no way to know that she was pregnant at the time of the offense); White v. State, 598 A.2d 187, 193 (Md. 1991) (holding that evidence that victim had previously offered sex for drugs was not reasonably related to her motive to fabricate); People v. LaLone, 437 N.W.2d 611, 617 (Mich. 1989) (Archer, J., concurring in part) (court's exclusion of evidence that stepfather's punishment of victim for sex-related incidents for purpose of showing motive to fabricate did not violate rights of confrontation).

\textsuperscript{128} \textit{Stephens}, 13 F.3d at 1002.

\textsuperscript{129} 13 F.3d 998 (7th Cir.) (en banc), \textit{cert. denied}, 115 S. Ct. 57 (1994).

\textsuperscript{130} \textit{Id.} at 1000-01. The victim claimed that she awoke in the living room of her trailer and found the defendant standing by the front door. \textit{Id.} at 1000. The victim further claims that thereafter, the defendant tried to force himself on the victim. Before he was able to remove his pants, the victim broke free and ran to a room occupied by her sister and brother-in-law. The defendant then fled the apartment. \textit{Id}.

\textsuperscript{131} \textit{Id.} at 1000.

\textsuperscript{132} \textit{Id}.
harassment, and unnecessary invasions of privacy." The court concluded, therefore, that rape shield statutes may restrict the defendant's right to present testimony if such a restriction is neither arbitrary nor disproportionate to its intended purpose.

The court of appeals noted that the trial court allowed the defendant to testify that he had said something to the victim which had angered her. In addition, the court of appeals emphasized that the proposed testimony was the "kind of generalized inquiry into the reputation or past sexual conduct of the victim" that causes the precise type of embarrassment and public denigration that rape shield statutes were enacted to prevent. In light of these findings, the court of appeals held that the trial court's decision to restrict the proposed evidence was neither arbitrary nor disproportionate to the rape shield statute's designated purposes.

Other courts exclude motive to fabricate evidence on relevancy grounds. In People v. Hodges, the Appellate Court of Illinois also excluded evidence about the victim's sexual history as it related to the victim's motive to fabricate. The defendant sought to introduce evidence that the victim had previously failed to pursue charges against a man whom the victim claimed had raped her. The defendant's theory behind his desire to introduce this evidence was that the victim had falsely accused the other man and the defendant in order to hide her adulterous lifestyle from her husband who was serving in the armed forces.

The court relied upon the doctrine of relevance to exclude the defendant's proffered evidence. The court did not accept the defendant's argument that the rape charges were part of the victim's scheme to hide her sexual relations from her husband. It reasoned that "an individual who wishes for something to go unnoticed usually does not call attention to it."


135. Stephens, 13 F.3d at 1002.

136. Id. at 1002-03.


139. Id. at 640.

140. Id.

141. Id.

142. Id.

143. Id.
Stephens and Hodges illustrate the types of reasons that courts use to interpret rape shield statutes to exclude evidence relating to the victim's motive to fabricate. Courts interpret rape shield statutes to exclude evidence relating to the victim's motive to fabricate because: it is necessary to accomplish the goals of rape shield statutes; sometimes the defendant can establish the victim's motive to lie without referring to the sexual history evidence; and sometimes the sexual history evidence is not probative on the issue of the victim's motive to lie.

II. Analysis

Criminal defendants generally have the right to present relevant testimony in their own behalf. In fact, the right to present relevant testimony in one's behalf is a "fundamental element of due process of law." This includes the right to examine a witness's motive to fabricate.

However, the criminal defendant's right to present relevant testimony in his or her own behalf may be limited by other legitimate interests so long as the restriction is neither arbitrary nor disproportionate to the purpose the restriction was designed to serve. Shielding rape victims from "surprise, harassment, and unnecessary invasions of privacy" caused by the criminal defendant's unjustified examination of the victim's sexual history represents such a legitimate interest. Thus, the pertinent inquiry in resolving this conflict is whether the benefit gained by advancing the interests of rape shield statutes is arbitrary and disproportionate when compared to the detrimental effect on the defendant's right to examine a witness's motive to fabricate.

Part A.1 of this section weighs the privacy interests protected by rape shield statutes against the defendant's right to examine a witness's motive to fabricate. Part A.2 balances the effect that rape shield statutes have on encouraging women to report sexual as-


saults against the defendant’s rights to examine a witness’s motive to lie. Part A.3 weighs the rape shield statutes’ role in balancing gender bias in the court room against the defendant’s right to examine the witness’s motive to fabricate. Part A.4 considers all of these factors together. In addition, Part A.4 concludes that, generally, interpreting rape shield statutes to exclude evidence relating to the victim’s motive to fabricate is arbitrary and disproportionate to the interests they were designed to serve. Part B of this section discusses how courts can use existing rules of evidence to dull the effect that this conclusion has on rape shield statutes.

A. Weighing the Competing Interests

1. Privacy Interests Versus Defendant’s Constitutional Rights

The United States Supreme Court held in Davis v. Alaska that the restriction upon the defendant’s right to cross-examine a witness about the witness’s motive to fabricate was disproportionate to its intended purpose. In Davis, the intended purpose in restricting the defendant’s proffered evidence was to protect the confidentiality of a juvenile witness’s criminal record. The Supreme Court listed some of the privacy interests protected by juvenile-record protection statutes. First, they prevent impairment of the juvenile’s rehabilitation process. In addition, juvenile-record protection statutes ensure that the juvenile will not lose employment opportunities. Also, they discourage juveniles from committing further crimes. Finally, juvenile-record protection statutes allow a juvenile to testify free from embarrassment and without loss to her reputation.

Much like the privacy interests balanced by the Supreme Court in Davis, rape shield statutes protect the privacy interests of the

150. Davis, 415 U.S. at 320.
151. Id. at 319-20.
152. Id. at 319.
153. Id.
154. See id. The Court did not elaborate on exactly how juvenile-record protection statutes discourage a juvenile from committing future acts. A reasonable inference is that if you do not remind a juvenile that he has acted like a criminal, he is more likely to behave like a law abiding citizen.
155. Id.
Courts and legislatures have found that rape shield statutes protect the privacy interests of sexual assault victims. Rape shield statutes accomplish this goal by helping to end the "degrading and embarrassing disclosure of intimate details" about the victims' private lives. In this way, rape shield statutes prevent the victim from suffering any unnecessary psychological damage or loss of self esteem. One writer has gone as far as saying that the privacy interest advanced by rape shield statutes is necessary to protect the victim from suffering a second rape on the witness stand during trial. Both rape shield statutes and juvenile-record protection statutes preserve the privacy rights of the respective parties. The United States Supreme Court held in Davis v. Alaska that the privacy interests advanced by juvenile record protection statutes could not justify restricting the defendant's right to examine a witness's motive to fabricate. Therefore, Davis seems to control the resolution of this issue. However, before deciding that Davis controls, one must determine that the privacy interests protected by rape shield statutes and juvenile record-protection statutes are sufficiently similar.

Rape shield statutes might protect more important privacy interests than juvenile-record protection statutes for several reasons. First, rape trials are very traumatic for the victim. Attacks on the victim's credibility by way of sexual history evidence, evidence about her clothes, evidence about her demeanor around the defendant, and similar evidence can make the victim feel like she is on trial. Rape shield statutes attempt to eliminate the prospect of

158. 124 Cong. Rec. 34,913 (1978) (statement of Rep. Mann). See also Lucas, 500 U.S. at 149-50 (rape shield statute is "a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy").
159. Simmons, supra note 68, at 1604.
160. Id.
162. Davis, 415 U.S. at 320.
163. Id.
165. See Leslie Griffin, The Lawyer's Dirty Hands, 8 Geo. J. Legal Ethics 219, 229 (1995) (noting that the victims are usually on trial in rape cases); Alinor C. Sterling,
the victim becoming the defendant in the trial.\textsuperscript{166} By protecting the victim's sexual privacy, the whole process may be less traumatic for her.\textsuperscript{167}

The privacy interests of rape shield statutes may also be more important because of the legality of the conduct involved. Juvenile record protection statutes protect examination of illegal behavior. Alternatively, rape shield statutes protect behavior that is either not contrary to the law or not enforced. While committing a crime is widely recognized as wrong, engaging in sexual conduct is socially acceptable. Examining a rape victim's sexual history may make her feel like she has done something wrong by having sex. Since rape shield statutes prevent the examination of legitimate behavior which may have the effect of illegitimizing the behavior, rape shield statutes may encompass a more important privacy right.

In addition, the privacy interests protected by rape shield statutes may be more important because the victim's conduct is generally not already public knowledge. Although juvenile criminal proceedings are closed to the public, the juvenile witness's conduct has been examined by others in some sort of forum.\textsuperscript{168} Further, the police must have investigated the juvenile witness's behavior before he or she could be prosecuted.

Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women's Clothing in Rape Trials, 7 YALE J.L. & FEMINISM 87, 123-24 (1995) (discussing rape law reform and evidence regarding a woman's clothes); Rachel M. Capoccia, Note, Piercing the Veil of Tears: The Admission of Rape Crisis Counselor Records in Acquaintance Rape Trials, 68 S. CAL. L. REV. 1335, 1344 (1995) ("it appeared to most observers that the rape victim was the one on trial rather than the defendant").

166. Newell H. Blakely, Article IV: Relevancy and Its Limits, 30 Hous. L. REV. 281, 478-79 (1993) ("Much of the momentum leading to nearly universal implementation of rape shield laws was the concern that the vast majority of sexual assaults suffered by women went unreported partly because of victims' fears that they themselves would be placed on trial by the defense."); David P. Leonard, The Federal Rules of Evidence and the Political Process, 22 FORDHAM URB. L.J. 305, 329 (1995) ("rape shield laws were intended to end the practice of putting victims on trial").

167. Richard D. Friedman, Evidentiary Rules and Rulings: The Role of Treatises, 25 LOY. L.A. L. REV. 885, 885-86 (1992) ("rape shield laws not only keep out evidence of great potential prejudice and dubious probative value, but also protect the privacy of complaining witnesses [and] limit the possibility of a renewed trauma") (footnotes omitted); Lisa M. Dillman, Note, Stephens v. Miller: Restoration of the Rape Defendant's Sixth Amendment Rights, 28 IND. L. REV. 97, 113 (1994) ("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 which held that victims were 'asking for it . . .'").

On the other hand, the rape victim was never tried or investigated for her prior sexual behavior because it is not a crime or it is not enforced. Since the victim's sexual history is more private than the juvenile's criminal behavior, her interest in protecting that information may be more important. In the foregoing ways, the privacy interests protected by rape shield statutes may be more important than the privacy interests protected by juvenile-record protection statutes.

However, the privacy interests protected by rape shield statutes are more similar than dissimilar to the privacy interests protected by juvenile-record protection statutes. Both statutes exclude information that the party in question would rather remain unknown. If the information becomes known, the party in question would be embarrassed and humiliated in front of, at a minimum, a courtroom of people. The adjudication of the juvenile's conduct does not change the fact that he or she does not want that information to be disseminated.

In addition, just because rape trials are traumatic for rape victims does not make the privacy interests protected by rape shield statutes more important. The very nature of rape trials makes them traumatic for the victim. She has to recall all of the intricate details of a devastating event. A rape victim will probably not be substantially less traumatized if the defense is allowed to examine only her sexual conduct that is relevant to the victim's motive to fabricate.

Moreover, juvenile record-protection statutes serve privacy interests that rape shield statutes do not serve. First, juvenile record-protection statutes ensure that juveniles do not lose job opportunities. Exposure of a juvenile's criminal behavior at trial might lead to discrimination by employers. In addition, exposure of a juvenile's criminal history may impair his or her rehabilitation process.

Further, there may be a greater public stigma attached to being a criminal than having participated in sexual conduct. Society is

170. Lucas, 500 U.S. at 149-50; Davis, 415 U.S. at 320.
171. See supra note 164.
173. Id.
now more accepting of a woman's sexual conduct outside of marriage. But members of society still do not want a criminal living next door to them.

For these reasons, the privacy interests protected by rape shield statutes and juvenile record-protection statutes are substantially similar. The United States Supreme Court held in Davis that the privacy interests protected by juvenile record protection statutes cannot justify restricting a defendant's right to examine a witness's motive to fabricate. Therefore, the privacy interests protected by rape shield statutes also cannot justify restricting the defendant's right to examine evidence of a victim's sexual history when it relates to her motive to fabricate.

2. Encouraging Women to Report Crimes Versus the Defendant's Constitutional Rights

In addition to their goal of protecting privacy interests, legislatures enacted rape shield statutes to encourage women to report sexual assaults. Encouraging sexual assault victims to report their attackers is critical because of the magnitude of the sexual assault problem. Approximately one out of every five adult women in the United States has been the victim of some form of sexual assault. Of these sexual assault victims, the FBI estimates that only ten percent report their attackers to the police.

Further, recent polls show that a surprisingly high percentage of college-aged men would rape a woman if they knew that they would escape prosecution. If women continue to under-report...
sexual assaults, more men will feel that they can escape the consequences of their criminal behavior.\textsuperscript{181} As a result, these men will not be deterred from sexually assaulting women.\textsuperscript{182} However, the Supreme Court's holding in \textit{Olden v. Kentucky} may possibly prevent the "encouraging women to report sexual assaults" rationale as a justification for restricting the defendant's right to examine a witness's motive to fabricate.\textsuperscript{183} In \textit{Olden}, the Supreme Court held that the speculative benefit of excluding evidence that the white victim was living with a black man could not justify restricting the defendant's right to examine a witness's motive to fabricate.\textsuperscript{184} Since the Supreme Court seemed to emphasize the term "speculative benefits," it would seem that any interest with a speculative benefit cannot justify abrogating the defendant's right to examine a witness's motive to fabricate.

There is nothing speculative about the impact that rape shield statutes have on protecting the victim's privacy rights.\textsuperscript{185} However, the value of rape shield statutes in encouraging women to report sexual assaults is speculative at best.\textsuperscript{186} There is no statistical evidence that rape shield statutes have actually been successful in encouraging women to report sexual assaults.\textsuperscript{187} In fact, there is

\begin{itemize}
  \item[181.] Franklin E. Zimring & Gordon J. Hawkins, \textit{Deterrence} 87 (1973) ("If the command of a legal system were not reinforced with the threat of punishment, many individuals would see no basis for believing that the legal system really meant what it said.").
  \item[182.] Id.
  \item[184.] Id. at 231-32.
  \item[186.] Ronet Bachman & Raymond Paternoster, \textit{A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?}, 84 J. Crim. L. & Criminology 554, 556 & nn.9-10 (1993). The authors of one book conducted an "interrupted time-series analysis for data before and after rape law reforms were implemented in Michigan." \textit{Id.} at 556 n.9. The study found that the number of reported sexual assaults had not risen in Michigan since rape law reforms took effect. \textit{Id.} (citing Jeanne C. Marsh, \textit{et al.}, \textit{Rape and the Limits of Law Reform} (1982)).
  \item[187.] Id.
\end{itemize}
evidence that rape shield statutes have had no effect on encouraging women to report sexual assaults.\textsuperscript{188} It could be argued that more time must pass before it can be determined whether rape shield statutes have encouraged women to report sexual assaults. However, rape shield statutes have existed for twenty years.\textsuperscript{189} If rape shield statutes have not encouraged women to report their attackers in the first twenty years of their existence, then it is reasonable to assume that their impact on reporting sexual assaults will continue to be negligible in the future.

In addition, allowing a limited exception for sexual history evidence that would tend to show the victim's motive to fabricate will probably not affect any woman who would be encouraged by a rape shield statute to report a sexual assault. It is unlikely that many members of the public would even realize that a motive to fabricate exception to rape shield statutes exists.\textsuperscript{190} If victims do not know that a motive to fabricate exception exists, its existence can have no effect on the victim's decision of whether to report a sexual assault.

Further, under \textit{Olden}, the very fact that this issue is arguable means that \textit{Olden} controls.\textsuperscript{191} \textit{Olden does not} require courts to favor the defendant's right to examine a witness's motive to fabricate \textit{only} if the other legitimate interest serves \textit{no} benefit.\textsuperscript{192} Instead, \textit{Olden} allows a defendant to examine a witness's motive to fabricate if the conflicting interest has \textit{speculative benefits}.\textsuperscript{193} For these reasons, the fact that legislatures enacted rape shield statutes to encourage women to report sexual assaults cannot justify restricting the defendant's right to examine a witness's motive to fabricate.

\begin{itemize}
\item \textsuperscript{188} \textit{Id.}
\item \textsuperscript{189} Galvin, \textit{supra} note 6, at 765 n.3.
\item \textsuperscript{191} See \textit{Olden v. Kentucky}, 488 U.S. 227, 231 (1988) (per curiam). The Supreme Court stated that interests with \textit{speculative} benefits cannot justify restricting the defendant's right to examine a witness's motive to fabricate. The word "speculative" means "not established by demonstration." \textsc{webster's third new international dictionary} 2189 (3d ed. 1976). Therefore, if something is arguable, it cannot be established by demonstration. See \textit{supra} notes 50-59 and accompanying text for a discussion of \textit{Olden}.
\item \textsuperscript{192} \textit{Olden}, 488 U.S. at 231.
\item \textsuperscript{193} \textit{Id.}
\end{itemize}
3. Helping to Eliminate Gender Bias Versus Defendant’s Constitutional Rights

Legislatures also enacted rape shield statutes hoping that they would help eliminate gender bias in the determination of whether a sexual assault occurred. Gender bias results from the fact that men have different “perceptions of the quality and nature of consent” to sexual intercourse. This is especially true given the fact that women are socialized “to react passively to male sexual aggression.”

The precedential value of Olden in dismissing gender bias as a justification for restricting the defendant’s right to examine a witness’s motive to fabricate is particularly strong. In Olden, the United States Supreme Court held that “speculation as to the effect of jurors’ racial biases cannot justify exclusion of cross-examination” of the witness’s motive to fabricate. Here, we are concerned with the speculative nature of the juror’s gender biases. If gender bias is substantially similar to the type of racial bias that the Court considered in Olden, then gender bias cannot be a justification for restricting the defendant’s right to examine the victim’s motive to fabricate.

Gender and racial biases are nearly identical for purposes of the Olden analysis. First, both gender and racial bias have been prevalent for centuries. In addition, there is no way of knowing for sure whether jurors have either a gender or racial bias or what effect that bias will have on their decisions. Further, prosecutors

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195. Simmons, supra note 68, at 1604.

196. Id.

197. Olden, 488 U.S. at 231 (holding speculation as to the effect racially-related evidence had on juror’s racial bias could not justify restricting the defendant’s right to examine a witness’s motive to fabricate).

198. Id. at 232.

199. A bias is a “prepossession with some object or point of view [such] that the mind does not respond impartially to anything related to this object or point of view.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 211 (3d ed. 1976).

have both the opportunity and motive to exclude people who have either gender or racial biases if such a bias will have an effect on a juror's decision. Thus, there are other protections against such bias, but bias of some sort is basically unpreventable.

These material similarities between gender and racial biases show that Olden must apply equally to claims of possible racial and gender bias. The Olden Court recognized that the speculative benefit of excluding evidence that may create a possible jury bias could not justify restricting the defendant's strong interest in examining a witness's motive to fabricate. Therefore, the rape shield statute's interest in helping to eliminate gender bias in the courtroom cannot justify restricting the defendant's right to examine the victim's motive to fabricate.

4. Weighing All of the Interests

Courts should not interpret rape shield statutes to exclude sexual history evidence relevant to the victim's motive to fabricate. The Supreme Court held in Rock v. Arkansas that courts may not abridge the accused's constitutionally protected right to present evidence in his or her own behalf if such a restriction would be arbitrary or disproportionate to the purposes it was designed to serve. The purpose of rape shield statutes is to protect the privacy rights of sexual assault victims, to encourage sexual assault victims to report their attackers and to eliminate gender bias in the courtroom. Davis v. Alaska and Olden v. Kentucky exemplify that restricting a defendant's right to examine a witness's motive to fabricate to advance the interests protected by rape shield statutes would be arbitrary and disproportionate to the purposes they are designed to serve.

The privacy interests protected by rape shield statutes are substantially similar to the privacy interests protected by juvenile record-protection statutes that the Supreme Court considered in Davis.

201. Olden, 488 U.S. at 231-32.
205. Simmons, supra note 68, at 1604-05.
In *Davis*, the Supreme Court held that the policy interests protected by juvenile-record protection statutes must give way to the defendant's right to examine a witness's motive to fabricate. Both juvenile record-protection statutes and rape shield statutes prevent the examination of information that the party in question would prefer to remain unknown. In addition, both the juvenile witness and the rape victim will be humiliated and embarrassed if this information is made public. Despite any nominal differences between rape shield statutes and juvenile record protection statutes, the privacy interests protected by both statutes are essentially the same. Therefore, *Davis* rejects the rape shield law's privacy interest rationale as a grounds for restricting the defendant's right to examine the victim's motive to fabricate.

In addition, the fact that legislatures enacted rape shield statutes to encourage women to report sexual assaults is similar to the interest considered by the Supreme Court in *Olden v. Kentucky*. In *Olden*, the Supreme Court held that the speculative benefit of excluding evidence that the white victim was living with a black man could not justify restricting the defendant's constitutionally protected right to examine a witness's motive to fabricate. Likewise, the benefit of rape shield statutes in encouraging women to report sexual assaults is speculative at best. Studies reveal that there has not been an increase in the number of reported sexual assaults since rape shield statutes took effect. The United States Supreme Court has already held in *Olden* that interests with speculative benefits cannot be used to restrict the defendant's right to examine a witness's motive to fabricate. Therefore, the fact that legislatures adopted rape shield statutes to encourage women to re-

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207. *Davis*, 415 U.S. 308. See *supra* notes 39-49 and accompanying text for a discussion of *Davis*.


211. *See* *supra* notes 39-49 and accompanying text for a discussion of *Davis*.


215. *Id.*

port sexual assaults cannot justify preventing the defendant from examining a sexual assault victim's motive to fabricate.

Finally, rape shield statutes' interest in eliminating gender bias in the courtroom does not justify restricting the criminal defendant's right to examine a witness's motive to fabricate. The *Olden* Court held that "speculation as to the effect of jurors' racial biases cannot justify" excluding evidence relating to the witness's motive to fabricate.\(^{217}\) The reasoning of *Olden* applies equally to gender bias. It is impossible to know exactly how evidence of a victim's sexual history—which is limited to that which is relevant and probative on the issue of the victim's motive to fabricate—will effect the jurors' gender biases. Therefore, the fact that legislatures enacted rape shield statutes to help eliminate gender bias cannot justify restricting the defendant's right to examine a witness's motive to fabricate.

Although neither *Davis* nor *Olden* specifically involved rape shield statutes, other cases such as *United States v. Williams*,\(^{218}\) *Commonwealth v. Joyce*,\(^{219}\) and *Lewis v. State*\(^{220}\) have recognized the holdings in *Davis* and *Olden* as encompassing the policy considerations protected by rape shield statutes.\(^{221}\) *Davis* and *Olden* reject all three types of interests protected by rape shield statutes as justifications for abrogating the defendant's right to examine a witness's motive to fabricate.\(^{222}\) Therefore, courts should not interpret rape shield statutes to automatically exclude sexual history evidence relative to the victim's motive to fabricate.

B. Finding a Middle Ground

It may appear that recognizing a motive to fabricate exception to rape shield statutes would allow every criminal defendant to introduce potentially damaging sexual history evidence about the vic-

\(^{217}\) *Olden*, 488 U.S. at 232.


\(^{220}\) 591 So. 2d 922 (Fla. 1991). See supra notes 122-25 and accompanying text for a discussion of *Lewis*.


\(^{222}\) See supra part II.A.1-II.A.3 for a discussion of how *Davis* and *Olden* reject the interests protected by rape shield laws as justifications for restricting the defendant's right to examine a witness's motive to fabricate.
tim by stating that the witness had a motive to fabricate. However, this should not be the result because courts have tools for precluding evidence that is of little or no probative value and that presents a serious risk of misuse.

First, courts can exclude evidence on relevancy grounds. For example, Federal Rule of Evidence 402 declares that irrelevant evidence is inadmissible. Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than . . . without the evidence." Therefore, courts always have the option of excluding sexual history evidence that does not actually bear on an issue of consequence to the case.

Admittedly, relevance is a fairly easy standard to meet. However, courts can also exclude sexual history evidence under probative value-prejudicial impact balancing tests (probative value weighing tests). For example, Federal Rule of Evidence 403 allows courts to exclude relevant evidence if the probative value of the evidence "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." Therefore, when the sexual history evidence does not have a strong tendency to show that the victim may have lied, courts may be able to properly exclude the sexual history evidence under probative value weighing tests.

There are a number of circumstances in which courts may be able to properly exclude sexual history evidence under a probative value weighing test. For example, a court probably could exclude sexual history evidence if it has a low probative value and there is a danger that the evidence will establish that the victim is promiscuous.

227. Fed. R. Evid. 403. Rule 403 provides that "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." Id.
228. Id.
ous. Although, society has generally accepted that women have sex outside of marriage, if a woman has had sex with several men, some fact-finders may believe that she is promiscuous. Many people think that promiscuous women are unlikely to refuse a male's advances. Therefore, a strong danger arises that juries will be improperly influenced by motive to fabricate evidence which shows that the woman is promiscuous.

In addition, courts may be able to exclude sexual history evidence if it has a low probative value and the evidence adds nothing new to the issue in light of non-sexual evidence. One of the grounds under which courts can exclude relevant evidence is needless presentation of cumulative evidence. If the sexual history evidence adds absolutely nothing new to the issue in light of non-sexual history evidence, then allowing the sexual history evidence is needless presentation of cumulative evidence. There may be other situations in which the judge can use a probative value weighing test to exclude sexual history evidence. However, the issue is less clear when the evidence becomes more probative, less dangerous, and fewer alternative pieces of evidence that show the victim's motive to lie exist.

*United States v. Payne* exemplifies how courts can employ a combined relevance and probative value weighing test to exclude sexual history evidence. In *Payne*, the defendant, who was the victim's step-father, claimed that the trial court erred in failing to admit evidence that he found the victim "in a state of partial undress engaged in heavy petting with a boy." The defendant claimed the evidence established a motive to fabricate because the victim wanted to retaliate for being punished.

In *Payne*, the United States Court of Appeals for the Ninth Circuit used a combined relevance and probative value weighing test to exclude sexual history evidence relating to the victim's motive to fabricate. The court reasoned that the evidence was "minimally (if at all) probative" because the victim's first claim of molestation occurred more than seven months after the defendant disciplined her for the episode of heavy petting. In addition, the

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230. *See* FED. R. EVID. 403.
232. *Id.* at 1468.
233. *Id.* at 1468-69.
234. *Id.* at 1468-70.
235. *Id.* at 1469.
court reasoned that since the trial court allowed the defendant to testify that he punished the victim for an incident, describing the sexual nature of the incident added nothing new to the victim's motive to lie.236 Given these findings, the court held that the trial court properly excluded the sexual conduct evidence. If courts employ this type of relevance and probative value weighing analysis, they can eliminate most of the fraudulent claims made under the motive to fabricate exception.

Even with these built-in safeguards, some sexual assault defendants will be able to satisfy the relevancy and probative value weighing tests and improperly introduce sexual history evidence by saying that it is related to the victim's motive to fabricate. This is unfortunate. However, Davis v. Alaska and Olden v. Kentucky show that the defendant's constitutional right to examine a witness's motive to fabricate cannot be restricted by the privacy interests237 and the interests of speculative value238 that rape shield statutes protect.

CONCLUSION

The defendant has the right to present relevant testimony in his own behalf. This includes the right to examine the alleged victim for bias and a possible motive to fabricate. This right is certainly not unyielding and may be abridged by other legitimate interests. However, restricting the defendant's right to present relevant testimony about the victim's motive to fabricate cannot be arbitrary or disproportionate to the purposes the restriction is designed to serve.

Rape shield statutes serve the legitimate interest of protecting sexual assault victims from such things as public humiliation and unfair invasions of privacy. By protecting the privacy interests of the victim, the proponents of rape shield statutes also hoped to encourage sexual assault victims to report sexual assaults to the police. In addition, rape shield statutes are also designed to eliminate or reduce gender bias in the court room. By serving such legitimate interests, courts may interpret rape shield statutes to exclude evidence of a victim's motive to fabricate if such an exclusion is neither

236. Id.


arbitrary nor disproportionate to the purposes they are designed to serve.

However, the United States Supreme Court’s rulings in *Davis v. Alaska* and *Olden v. Kentucky* hold that the interests protected by rape shield statutes cannot justify restricting the defendant’s right to examine a witness’s motive to fabricate. Therefore, courts must admit the sexual history evidence relating to the victim’s motive to fabricate. Sexual history evidence must, however, first pass the relevancy and probative value balancing tests before courts must admit such evidence. In some cases, a defendant may in bad faith introduce sexual history evidence notwithstanding relevancy and probative value-prejudicial impact tests. Although permitting some defendants to make bad faith allegations undermines the effectiveness of rape shield statutes, this result is required by the Supreme Court’s holdings in *Davis v. Alaska* and *Olden v. Kentucky*.

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