

RAPE SHIELD, NOT RAPE FORCE-FIELD: A TEXTUALIST  
ARGUMENT FOR LIMITING THE SCOPE OF THE FEDERAL RAPE  
SHIELD LAW

Uriel Hinberg\*

INTRODUCTION

Before the passage of Rape Shield laws, the American legal system severely mistreated female rape victims.<sup>1</sup> When the issue of consent was contested, evidence of the woman’s “unchaste” character could be presented as evidence that she did indeed consent.<sup>2</sup> Some jurisdictions even allowed a woman’s general credibility to be impeached with evidence of her “unchastity.”<sup>3</sup> Rape Shield laws, both the Federal Rape Shield Law (the “Rule” or “FRE 412”)<sup>4</sup> and state analogues,<sup>5</sup> put an end to these practices by instituting general prohibitions, subject to limited exceptions, against admitting evidence of a victim’s past sexual behavior.<sup>6</sup> But Rape Shield laws, many of which are written broadly, have been the targets of fierce criticism too.<sup>7</sup> Perhaps the most troubling aspect of Rape Shield laws is their potential to exclude relevant evidence that

---

\*Uriel Hinberg is a *juris doctor* candidate at the Georgetown University Law Center, with expected graduation in 2021. He is a Featured Online Contributor for Volume 57 of the *American Criminal Law Review*.

1. See generally 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:77 (4th ed.); 23 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5372 (2d ed.); GEORGE FISHER, EVIDENCE 318–25 (3d ed. 2013).

2. See MUELLER & KIRKPATRICK, *supra* note 1. Possibly the most notorious example of this approach is Judge Cowen’s rhetorical question in *People v. Abbot*: “[Will] you not more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia?” 19 Wend. 192, 195 (N.Y. Sup. Ct. 1838).

3. See MUELLER & KIRKPATRICK, *supra* note 1. Representative of this approach—shocking to the modern ear—is this judicial proclamation: “It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth . . . while it does that of a woman.” *State v. Sibley*, 33 S.W. 167, 171 (Mo. 1895).

4. FED. R. EVID. 412.

5. For a compilation of state Rape Shield Statutes, see RAPE SHIELD STATUTES, <https://ndaa.org/wp-content/uploads/NCPCA-Rape-Shield-2011.pdf>.

6. See generally Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986).

7. See, e.g., Rosanna Cavallaro, *Rape Shield Evidence and the Hierarchy of Impeachment*, 56 AM. CRIM. L. REV. 295 (2019) (noting possible constitutional issues with Rape Shield Laws); Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. J. L. & GENDER 183, 205–215 (detailing numerous complaints with Rape Shield Laws, including from the perspective of victims, from the perspective of defendants, from the feminist perspective, and from the perspective of minorities).

might help exonerate a defendant.<sup>8</sup> Even after the passage of Rape Shield laws, courts must admit evidence if its exclusion would violate the defendant's constitutional right to present a complete defense.<sup>9</sup> In the absence of clearly-defined rules, however, courts have struggled to define the parameters of this right.<sup>10</sup> Working with an amorphous case-by-case standard,<sup>11</sup> courts are hard-pressed to reliably protect this right.<sup>12</sup>

This piece will make a textualist argument for an important limitation to the FRE 412: that the Rule's reach is limited to evidence of sexual behavior or sexual predisposition that is presented for the purpose of proving the truth of those matters.<sup>13</sup> Part I will demonstrate that this limitation is embedded in the plain meaning of the statute. Part II will provide an example of a case in which this limitation would be instructive. Part III will introduce the view of an advocate for this limitation to the Rule and will argue that, contrary to the view of this advocate, an amendment to the Federal Rules of Evidence is not necessary to effectuate this sensible limitation. The piece will conclude with a concession that this analysis is limited to cases that are governed by the Federal Rules of Evidence and to jurisdictions that have adopted provisions that are functionally equivalent to FRE 412.<sup>14</sup> The language of many other state rape shield laws, by contrast, is not amenable to the same textual analysis. For this limitation to apply in those jurisdictions, the existing rules would

---

8. See Cavallaro, *supra* note 7, at 298–99; Galvin, *supra* note 6, at 802–08; David S. Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM & MARY L. R. 1, 14–46 (1976).

9. This right, which includes the right to cross-examine witnesses and to present exculpatory evidence, is protected either by the Compulsory Process Clause of the Sixth Amendment or by the Due Process Clause of the Fourteenth Amendment. See, e.g., *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). The Federal Rape Shield Law contains an express provision that allows for the introduction of otherwise excludable evidence when exclusion would violate the defendant's constitutional rights, FED. R. EVID. 412(b)(C), but even without this provision, the Federal Rules of Evidence would have to yield to constitutional requirements, as no federal statute can violate the Constitution. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.33 (5th ed. 2012).

10. This struggle is on vivid display in the *Stephens v. Miller* case, discussed *infra* Part III; see also Galvin, *supra* note 6, at 883–93.

11. See Capers, *supra* note 7, at 206–07 (describing the FRE 412's "constitutional catch-all exception" as "amorphous, malleable, and subjective").

12. See Galvin, *supra* note 6, at 886 ("[W]ithout a clear mandate from the Supreme Court stating when a rule of evidence must yield to the accused's [S]ixth [A]mendment right to offer proof in support of a defense, the catch-basin provision offers no guidance to trial courts deciding what evidence meets the statutory standard.")

13. This piece was inspired in large part by an article by Professor Bennett Capers, *supra* note 7. While Professor Capers advocates for this limitation to FRE 412 on policy grounds, this piece focuses on the textualist argument for the limitation.

14. See KY. R. EVID. 412(a)(1)–(2); N.D. R. EVID. 412(a)(1)–(2); UTAH R. EVID. 412(a)(1)–(2); GUAM CODE ANN. Tit. 6, Appx. A, Rule 412(a)(1)–(2); MIL. R. EVID. 412(a)(1)–(2).

indeed have to be amended. It is possible, however, that raising awareness about this plain interpretation of the rules could help influence state legislatures to adopt such amendments.

## I. THE PROPER READING OF THE FEDERAL RAPE SHIELD LAW

A cursory reading of FRE 412 yields this understanding: Evidence of a victim’s sexual behavior or sexual disposition is inadmissible in proceedings involving sexual misconduct except in three situations:<sup>15</sup> (1) where excluding the evidence would violate the defendant’s constitutional rights;<sup>16</sup> (2) where evidence of the victim’s sexual behavior with respect to the person accused of sexual misconduct is offered by the defendant to prove consent or is offered by the prosecution;<sup>17</sup> and (3) where evidence of specific instances of a victim’s sexual behavior is offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence.<sup>18</sup>

A closer reading of FRE 412 reveals that the category of evidence that is governed by the general prohibition, and to which the three limited exceptions apply, is smaller than it first appears. The rule makes inadmissible “evidence offered *to prove that a victim engaged in other sexual behavior*” and “evidence offered *to prove a victim’s sexual predisposition*.”<sup>19</sup> The Rule does not say that “evidence that a victim engaged in other sexual behavior” or “evidence of a victim’s sexual predisposition” is inadmissible.<sup>20</sup> Rather, the Rule refers to a particular subset of such evidence—evidence offered to *prove* sexual behavior or sexual predisposition.

The import of this word choice is clear: The scope of the Rule is limited to evidence that (a) deals with the victim’s sexual behavior or sexual predisposition and (b) is offered for the truth of those matters. Evidence that tends to prove the victim’s sexual behavior or sexual predisposition but is offered for some other purpose is beyond the purview of the Rule.

The correctness of this reading is made clear by two other instances in which the Federal Rules of Evidence speak of evidence offered “to prove” a specific matter: character evidence and hearsay. In both those

---

15. FED. R. EVID. 412(a).

16. *Id.* 412(b)(1)(C).

17. *Id.* 412(b)(1)(B).

18. *Id.* 412(b)(1)(A).

19. *Id.* 412(a)(1)–(2) (emphasis added).

20. Interestingly, an earlier proposed version of the statute spoke of “evidence of sexual behavior” and did not include the language “to prove.” See WRIGHT & MILLER, *supra* note 1, § 5371 n. 20 and § 5374. This appears to bolster that argument that the words of the statute mean what they appear to mean.

instances, it is well-established and uncontroversial that the Rules' scope is limited to evidence offered for a specific purpose.

FRE 404 governs the admissibility of character evidence.<sup>21</sup> It states: "Evidence of a person's character or character trait is not admissible *to prove that on a particular occasion the person acted in accordance with the character or trait.*"<sup>22</sup> It is well-established that this language forbids the use of character evidence solely for the purpose of creating a propensity inference, namely, that a person's past behavior tends to show that the person acted in that very way in the case at bar.<sup>23</sup> It is true that 404(b), which deals with a particular subset of character evidence, uses similar scope-limiting language and nevertheless goes on to enumerate specific permitted uses.<sup>24</sup> That is best understood, however, as a case where the Rule writers decided to make explicit what would in any case have been true.<sup>25</sup>

The second place where the Federal Rules discuss evidence offered "to prove" a specific matter is Rule 801.<sup>26</sup> It defines hearsay as an out-of-court statement that "a party offers in evidence *to prove the truth of the matter asserted in the statement.*"<sup>27</sup> These words are understood as providing an important limitation on the hearsay ban:<sup>28</sup> out-of-court statements that are offered for any other purpose are not banned as hearsay.<sup>29</sup> Thus, an out-of-court statement may be offered (1) to prove the statement's impact on a listener,<sup>30</sup> (2) if the statement has a legal effect independent of its truth,<sup>31</sup> or (3) to impeach a witness's in-court testimony.<sup>32</sup>

All the above is settled evidence doctrine. The takeaway should be just as clear: when the Federal Rules of Evidence speak about using a type of evidence to prove a specific matter, the Rules mean to limit their scope to the use of the evidence for a specific purpose, and to the exclusion of any other purpose. Therefore, when FRE 412 speaks of banning evidence offered "to prove that a victim engaged in other sexual behavior," it means

---

21. FED. R. EVID. 404.

22. *Id.* 404(a) (emphasis added).

23. *See, e.g.*, FISHER, *supra* note 1, at 157; *see also* 22B WRIGHT & MILLER, *supra* note 1, § 5236.

24. FED. R. EVID. 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.")

25. *See* FISHER, *supra* note 1, at 157.

26. FED. R. EVID. 801.

27. *Id.* 801(c) (emphasis added).

28. FED. R. EVID. 802 sets forth the general rule that hearsay is inadmissible.

29. *See* FED. R. EVID. 801 advisory committee's note to Rule 801(a)–(d)(1)(A); *see also* 30B WRIGHT & MILLER, *supra* note 1, § 6718 (2018 ed.).

30. *See* FISHER, *supra* note 1, at 380–81.

31. *Id.* at 381–82.

32. *Id.* at 382.

precisely what it says, that evidence is covered by the Rape Shield Law only if it is offered to prove that the victim engaged in sexual behavior. If it is offered for any other purpose, the Rape Shield Law does not apply.

## II. APPLYING THE PROPER UNDERSTANDING

An example of where this distinction might have been instructive is *Stephens v. Miller*.<sup>33</sup> As in many sexual assault cases, the stories of the complainant and the defendant differed wildly. The complainant alleged that Stephens attempted to rape her.<sup>34</sup> Stephens countered that the two of them had been engaged in consensual sex when he said something that infuriated the complainant, prompting her to stop the encounter and to accuse Stephens of attempted rape.<sup>35</sup> More specifically, Stephens claimed that they were “doing it doggy fashion,” whereupon Stephens indelicately remarked, “don’t you like it like this? ... [Our mutual acquaintance] said you did.”<sup>36</sup> This, Stephens claimed, angered the complainant, leading her to fabricate attempted rape charges.<sup>37</sup>

Looking to Indiana’s Rape Shield Law,<sup>38</sup> the state trial court forbade the introduction of Stephens’ statements into evidence.<sup>39</sup> Instead, the court only allowed Stephens to offer that he had said “something” that infuriated the complainant.<sup>40</sup> The jury, limited to this generic statement, convicted Stephens of attempted rape.<sup>41</sup> Stephens ultimately filed for a writ of habeas corpus in federal court, claiming that the exclusion of his statements violated his constitutional right to testify in his own defense. His appeal was heard by the Seventh Circuit, sitting en banc.<sup>42</sup> Illustrating the difficulty involved with determining whether the exclusion of evidence violates a defendant’s constitutional right to present a complete defense, the court issued a dizzying array of opinions—the opinion of the court,<sup>43</sup> two concurrences,<sup>44</sup> and four dissents.<sup>45</sup> By the slimmest of margins, the court decided that Stephens’ constitutional rights had not been violated when the trial court limited Stephens’ description of what

---

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

34. *Id.* at 1000.

35. *Id.*

36. *Id.*

37. *Id.*

38. IND. CODE § 35-37-4-4.

39. *Stephens*, 13 F.3d at 1000.

40. *Id.* at 1001.

41. *Id.*

42. *Id.* at 998.

43. *Id.* at 1000.

44. *Id.* at 1003, 1007.

45. *Id.* at 1009, 1011, 1017, 1019.

happened to the nondescript, “I said *something* that made her really, really angry.”<sup>46</sup>

This confusion is to be expected when analysis of a defendant’s constitutional right to a complete defense is governed by amorphous, indeterminate balancing tests.<sup>47</sup> Under a proper reading of the Federal Rules of Evidence, however, this case may have come out differently. As Professor Bennett Capers points out,<sup>48</sup> Stephens’ statements were not offered to prove that the complainant had prior relations with a mutual acquaintance and that she had expressed to that acquaintance a penchant for a certain type of sex. Rather, Stephens’ statements were offered for the purpose of showing why the complainant had become so angry with him. In other words, they were offered to demonstrate the effect of the statement on the complainant. Because the Federal Rules of Evidence, according to their plain meaning, do not bar evidence of a victim’s sexual behavior unless offered for the truth of the matter, evidence of Stephens’ statements would have been admissible under the Federal Rules of Evidence, and he would have had the opportunity to present a complete defense.

### III. A DEFENSE OF THE PROPER READING

Professor Capers, while advocating for the above-mentioned limitation to Rape Shield laws on policy grounds, suggests that an amendment to the Federal Rules of Evidence might be necessary to effectuate this limit. First, Capers argues, this is not a clear cut case of statutory interpretation, particularly in light of the Advisory Committee’s notes to Rule 412, which appear to support a broader reading of the Rule.<sup>49</sup> Second, even if the narrower reading of the Rule is the proper one, it is not how the Rule has been understood by the authors of the foremost treatises on Evidence.<sup>50</sup> And third, courts have not interpreted the Rule like this.<sup>51</sup> Each of these arguments merits some pushback.

Professor Capers downplays the force of the plain meaning of the Rule. Although there is disagreement as to how much interpretive weight

---

46. *Id.* at 1003.

47. *See supra* text accompanying notes 10–12.

48. Capers, *supra* note 7, at 215–19. The Note simply says, “Rule 412 seeks to achieve [the above-mentioned objectives] by barring evidence relating to the alleged victim’s sexual behavior or alleged sexual disposition, whether offered as substantive evidence or for impeachment,” FED. R. EVID. 412 advisory committee’s note to 1994 amendment to Rule 412, without mentioning that the evidence needs to be introduced “to prove” sexual behavior or disposition.

49. *Id.* at 220 n. 234.

50. *Id.*

51. *Id.*

should be given to the Advisory Committee,<sup>52</sup> all seem to agree that where the language of the Rules is clear, it should trump contrary indications in the Advisory Committee note.<sup>53</sup> Thus, although the language of the Advisory Committee note might suggest a broader reading, the clear wording of the statute ought to prevail.

Professor Capers notes that “treatises take a similar view.”<sup>54</sup> He quotes one of the foremost evidence treatises as saying, “FRE 412(a) imposes a general prohibition against evidence of an alleged victim’s ‘other sexual behavior’ or ‘sexual predisposition.’”<sup>55</sup> While Professor Capers’ point about this particular language is arguably correct, it is not the case that treatises uniformly overlook or reject the narrower reading of 412(a). To wit, Miller & Wright expressly adopts the narrower reading:

“Evidence” is excluded by Rule 412(a) only if it is “offered to prove” sexual behavior or predisposition. In the Preliminary Draft the equivalent provision read “evidence of” behavior and predisposition. The difference is that something may be “evidence of” behavior or predisposition even if it is not “offered to prove” it. For example, evidence that a rape-murder victim was wearing a low-cut, short red dress the night of the crimes might be “evidence of” her sexual predisposition but it is not “offered to prove” sexual predisposition if, for example, the defendant offers it to show that the woman in a blue dress who was seen in his car that night was not the victim. Rule 412 would not bar this use of the evidence, which could be admitted under the doctrine of multiple admissibility accompanied by a limiting instruction under Federal Rule of Evidence 105.<sup>56</sup>

Finally, Professor Capers cites several cases to support his proposition that courts have adopted a broader reading of Rule 412,<sup>57</sup> but those cases do not actually support the proposition.

---

52. See FISHER, *supra* note 1, at 4–5 (noting that the significance of the Advisory Committee’s note that accompanies each rule is “a matter of some dispute”).

53. See *Williamson v. United States*, 512 U.S. 594, 602 (1994) (“Without deciding exactly how much weight to give the Notes in this particular situation . . . we conclude that the policy expressed in the Rule’s text points clearly enough in one direction that it outweighs whatever force the Notes may have.”)

54. Capers, *supra* note 7, at 220 n. 234.

55. MUELLER & KIRKPATRICK, *supra* note 9, § 4.32.

56. WRIGHT & MILLER, *supra* note 1, § 5374.

57. Capers, *supra* note 7, at 220 n. 234.

Professor Capers first cites *United States v. Knox*.<sup>58</sup> There, the complainant accused Knox, a friend of her boyfriend, of raping her.<sup>59</sup> Knox claimed that it was reasonable for him to believe that the complainant had consented.<sup>60</sup> To bolster this claim, Knox wanted to introduce evidence of the complainant's past sexual behavior.<sup>61</sup> The military court, applying Rule 412 of the Military Rules of Evidence,<sup>62</sup> forbade the introduction of this evidence.<sup>63</sup> The U.S. Air Force Court of Military Review upheld the lower court's decision.<sup>64</sup> This, Professor Capers argues, proves that the military court did not subscribe to the narrower reading of FRE 412. For had it done so, the court would have allowed the evidence, which was introduced not for the truth of the matter, but as evidence of the defendant's state of mind.

Even if the narrower reading of the Rule would permit evidence of the victim's past sexual behavior to be admitted in order to prove the defendant's state of mind regarding consent,<sup>65</sup> the court's decision does not demonstrate a rejection of the narrower reading. The complainant did not claim that she was awake and did not consent; rather, she claimed that she was asleep when the defendant began having intercourse with her.<sup>66</sup> Given this fact pattern, the court rightly noted that if the fact finders credited the complainant's version, there was no "true possibility of mistake."<sup>67</sup> The court therefore concluded that evidence of the complainant's past sexual behavior was wholly irrelevant, introduced for no other purpose than to "portray an alleged rape victim as a bad person who got no more than she deserved."<sup>68</sup>

In *United States v. Duran*,<sup>69</sup> the prosecutor, in apparent violation of FRE 412, asked the complainant on direct examination about the existence of a child of hers.<sup>70</sup> The defense did not object to this question or move for a mistrial.<sup>71</sup> Before cross-examination, however, the defense requested permission to ask the complainant about the child's paternity to rebut the inference that the defendant was the child's father.<sup>72</sup> Because the question pertained to evidence of past sexual behavior, the court

---

58. *United States v. Knox*, No. ACM 28628, 1992 WL97157 (A.F.C.M.R. Apr. 20, 1992).

59. *Id.* at \*1.

60. *Id.* at \*2.

61. *Id.* at \*5.

62. MIL. R. EVID. 412. This rule is identical to FRE 412.

63. *Knox*, 1992 WL97157 at \*5.

64. *Id.*

65. See *infra* text accompanying notes 76–83.

66. *Knox*, 1992 WL97157 at \*1.

67. *Id.* at \*5.

68. *Id.*

69. *United States v. Duran*, 886 F.2d 167 (8th Cir. 1989).

70. *Id.* at 168.

71. *Id.* at 169.

72. *Id.* at 168.



disallowed the question under Rule 412.<sup>73</sup> On appeal, the Eighth Circuit affirmed the lower court's ruling.<sup>74</sup>

This was not a case where evidence of past sexual behavior was being offered for a different purpose. It is true that the defense was not interested in the past sexual behavior per se; it wanted to establish that the defendant was not the child's father. But establishing that required establishing that someone else was the father, which unavoidably implies past sexual behavior. Even under the narrower reading of the Rule, cases in which the defendant seeks to prove the complainant's sexual behavior for some collateral reason are certainly covered. According to the narrower reading, evidence that tends to prove prior sexual activity may be admitted only for a purpose that does not depend on whether or not the sexual activity occurred.

Professor Capers also cites two cases from the Fourth Circuit: *Doe v. United States*<sup>75</sup> and *United States v. Saunders*.<sup>76</sup> *Doe*, in which the court appears to have adopted the narrower reading of the Rule, is identified by Professor Capers as an outlier case.<sup>77</sup> *Saunders*, by contrast, is cited as proof of the Fourth Circuit's repudiation of its holding in *Doe* and of the court's embrace of the broader reading of FRE 412.<sup>78</sup>

Both cases involved the propriety of using evidence of a complainant's prior sexual behavior to support the defendant's contention that he had a reasonable belief that the complainant had consented to sexual relations. In *Doe*, the court admitted evidence of the defendant's knowledge of the victim's past sexual behavior as being relevant to the issue of consent, rejecting the argument that such evidence is barred under FRE 412.<sup>79</sup> In *Saunders*, by contrast, the court did not allow the defendant to introduce evidence that he knew the alleged victim was a "skeezer"<sup>80</sup> to corroborate his claim that he believed the alleged victim had consented.<sup>81</sup>

At first glance, the issue in both cases was whether to adopt the narrow or broad reading of FRE 412. In both cases, the defendant was not introducing the evidence for the truth of the matter, only as evidence of his state of mind at the time of the alleged assault. What matters, then, is not whether the prior sexual activity happened, but whether the defendant believed that it did and whether this provided him with grounds for a reasonable belief that the complainant consented.

---

73. *Id.*

74. *Duran*, 886 F.2d at 170.

75. *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981).

76. *United States v. Saunders*, 943 F.2d 388 (4th Cir. 1991).

77. Capers, *supra* note 7, at 220 n. 234.

78. *Id.*

79. *Doe*, 666 F.2d at 48.

80. "Skeezer" refers to "a prostitute who trades sex for drugs." *Saunders*, 943 F.2d at 389.

81. *Id.* at 389, 391.

This is not necessarily the proper interpretation of these cases. A closer reading of the *Saunders* decision reveals that the court was not rejecting the narrower reading of Rule 412. Rather, the *Saunders* court was saying that even if evidence of prior sexual behavior is usually admissible when not offered for the truth of the matter, using proof of the defendant's knowledge of the complainant's prior sexual behavior to show a reasonable belief in consent is different. The rationale for this distinction is quite understandable. One of the primary wrongs rape shield laws sought to correct was the practice of inferring a women's consent from her consent to past sexual relations.<sup>82</sup> Because the rape shield laws reject the validity of this inference, it follows that a defendant's belief that a complainant consented should be rejected as per se unreasonable if based on the complainant's prior "unchaste" behavior. This sensibility is reflected in the language of the *Saunders* court, which remarked that "it is unreasonable for a defendant to base his belief of consent on the victim's past sexual experiences with third persons . . . ."<sup>83</sup> Thus, the *Saunders* court's rejection of *Doe*'s holding does not indicate a general rejection of the narrower reading of FRE 412, only a rejection of the claim to a reasonable belief of consent when that belief is based on the complainant's prior sexual behavior with other people.

#### CONCLUSION

This piece made a textualist argument for limiting the scope of FRE 412 to cases in which evidence of sexual behavior or sexual predisposition is being offered for the truth of those matters. The piece also analyzed a case in which this limitation might have been instructive. Finally, the piece defended this understanding of FRE 412 against the contention that the consensus of courts and scholars has been inconsistent with this understanding.

It must be noted that the analysis in this piece is limited to those jurisdictions in which the Federal Rules of Evidence govern and to those jurisdictions that have adopted Rape Shield Laws that track FRE 412. Many states have adopted broader language, which simply speaks of excluding "evidence of sexual behavior,"<sup>84</sup> without the scope-limiting language of FRE 412. In such states, recognition of the distinction between evidence offered for the truth of the matter and evidence offered for some other purpose appears to depend on legislative amendment. Perhaps, though, greater awareness of the proper understanding of the

---

82. *See supra* text accompanying notes 5–6.

83. *United States v. Saunders*, 943 F.2d 388, 392 (4th Cir. 1991).

84 This is true, for example, of Indiana's Rape Shield Statute, which was the binding law in *Stephens v. Miller*, discussed above. IND. CODE § 35-37-4-4. Thus, the Seventh Circuit was correct to disregard the fact that the evidence was not being offered "for the truth of the matter" and in focusing its analysis on whether excluding the evidence violated the defendant's constitutional rights.

Federal Rule will increase the chances of such amendments being enacted.