

RE-EXAMINING MOTIONS TO COMPEL PSYCHOLOGICAL EVALUATIONS OF SEXUAL ASSAULT VICTIMS

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INTRODUCTION

Rape and sexual assault cases have caused controversy in the courts for some time.¹ In the words of seventeenth century British jurist Sir Matthew Hale, “[i]t must be remembered, that [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.”² That Hale’s words were once used as part of a jury instruction³ demonstrates that the legal complexity of this issue has often led to tension between the rights of victims and defendants.⁴ Most victims of sexual assault are women; this fact can bring about unique issues regarding the female psychology and, more importantly, the male or societal understanding thereof.⁵ When the victim is a child, society may rashly deem

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¹ See Vivian Berger, *Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 11–20 (1977) (delineating the problems inherent for women in the system).

² *Rice v. State*, 217 N.W. 697, 699 (Wis. 1928) (quoting 1 SIR MATTHEW HALE, PLEAS OF THE CROWN 634 (1678)); see also *Wilcox v. State*, 78 N.W. 763, 764 (Wis. 1899) (“Courts are therefore reluctant to sustain such convictions, unless the testimony and surrounding circumstances are quite clear, and decisive of guilt.”).

³ See Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 664 n.1 (1998).

⁴ For an article concerning the same topic as this Note, from the opposite point of view, see Judith Greenberg, Note, *Compulsory Psychological Examination in Sexual Offense Cases: Invasion of Privacy or Defendant’s Right?*, 58 FORDHAM L. REV. 1257, 1257–58 (1990).

⁵ Amy M. Buddie & Arthur G. Miller, *Beyond Rape Myths: A More Complex View of Perceptions of Rape Victims*, SEX ROLES: J. RES., Aug. 2001, at 1 (“Because most rape victims are women, men feel different from this particular group of victims and are thus more likely to endorse rape myths” such as the myth that there are no rapes within marriages.); see also Tera Jckowski Peterson, Comment, *Distrust and Discovery: The Impending Debacle in Discovery of Rape Victims’ Counseling*

him or her too immature to comprehend what has happened and to tell the truth.⁶ Some defendants ask the courts to order complainants in these cases to undergo psychiatric testing⁷—as recommended by Dean Wigmore⁸—so as to ascertain which witnesses have filed charges “for purposes of blackmail and revenge, or as a result of fantasy, or as symptoms of psychosis.”⁹ State caselaw is split as to whether a court can compel such testing, and if so, under what circumstances.¹⁰ The Supreme Court is unlikely to decide this issue, having denied certiorari in recent cases.¹¹

These examinations are justified as necessary to safeguard a defendant's right to due process of law,¹² but they can also

Records in Utah, UTAH L. REV. 695, 706, 712–14 (2001) (discussing state laws regarding the use of psychiatric records in discovery); Tess Wilkinson-Ryan, Comment, *Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant*, 153 U. PA. L. REV. 1373, 1373 (2005) (noting the belief in some circles that “some women falsely accuse men of rape because, either intentionally or inadvertently, they have confused a sexual fantasy with a violent crime”).

⁶ See *In re Michael H.*, 602 S.E.2d 729, 734 (S.C. 2004) (“Cases involving child victims present special concerns that weigh in favor of allowing judicial discretion to order psychological evaluations.”); Jeffrey P. Bloom, *Post-Schumpert Era Independent Interviews and Psychological Evaluations of Child Witnesses*, 10 S.C. LAW. 40, 42 (1998) (referring to child witnesses as a type of “evidence” that can become “tainted” and thus should be examined by defense like any other piece of evidence).

⁷ As the cases and scholarly articles cited throughout this piece vary on terminology, this Note uses the terms “psychological” and “psychiatric” interchangeably.

⁸ See *Ballard v. Superior Court*, 410 P.2d 838, 846 (Cal. 1966) (“A number of leading authorities have suggested that in a case in which a defendant faces a charge of a sex violation, the complaining witness, if her testimony is uncorroborated, should be required to submit to a psychiatric examination.” (citing 3 WIGMORE, EVIDENCE § 924a (1940))), *superseded by statute*, 1980 Cal. Stat. 63 (codified as amended at CAL. PENAL CODE § 1112 (West 2007)), *as recognized in* *People v. Haskett*, 640 P.2d 776 (Cal. 1982).

⁹ *State v. Maestas*, 207 N.W.2d 699, 700 (Neb. 1973).

¹⁰ This Note will frame the issue as between states that do allow motions to compel psychological evaluations and states that do not, but the issue has been framed differently by some courts. For example, there exists a judicial three-way split between states that do not allow motions to compel psychological evaluations, states that grant the defendant an absolute right to an evaluation of the witness, and states that give trial judges discretion to grant the motion. See *State v. Gregg*, 602 P.2d 85, 88–91 (Kan. 1979).

¹¹ *E.g.*, *In re Michael H.*, 602 S.E.2d 729, 734 (S.C. 2004). At least one federal court, however, has argued from other precedents relating to juveniles that it is doubtful that the Supreme Court would approve of compulsory examination of child victims. See *Gilpin v. McCormick*, 921 F.2d 928, 931 (9th Cir. 1990).

¹² See *infra* notes 99–105 and accompanying text.

seriously infringe on a complainant's rights. Even when victims voluntarily seek post-rape counseling from mental health professionals, if such persons voice doubt about the veracity of their stories, victims are left feeling "violated and re-raped."¹³ These feelings are compounded when a victim is ordered to undergo an examination at the bequest of the accused rapist—backed by a judge¹⁴—for the sole purpose of determining credibility.

This is especially disturbing because the system for these examinations lacks sufficient protections for victims. In a traditional cross-examination, a witness is legally protected from "questions which go beyond the bo[u]nds of proper cross-examination merely to harass, annoy or humiliate,"¹⁵ but no such protection exists during a compulsory psychiatric examination.¹⁶ This raises privacy concerns, exacerbated by the lack of doctor-patient confidentiality for court-ordered evaluations.¹⁷ There are also no guidelines for other protections that traditionally apply to witnesses, such as the right to have counsel present and the right to refuse to answer questions.¹⁸ These issues have even made requesting the examinations an ethical problem for some attorneys.¹⁹

Despite these concerns, some jurisdictions provide that a trial court has the power to order a complaining witness to undergo a psychological examination in a criminal case.²⁰ They

¹³ Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence*, 14 VIOLENCE & VICTIMS 3, 3 (1999), available at <http://www.musc.edu/vawprevention/research/victimrape.shtml>.

¹⁴ The judge generally does not have the power to *force* the complainant to cooperate—only the power to order the examination—"but the ordinary witness does not know this and will be fearful of refusing to do so." *State v. Looney*, 240 S.E.2d 612, 627 (N.C. 1978). The sanctions for not cooperating are severe, however, and include being banned from testifying. *Id.*

¹⁵ *Alford v. United States*, 282 U.S. 687, 694 (1931).

¹⁶ See *Looney*, 240 S.E.2d at 626–27; J.G. Bangle & L.A. Haage, Comment, *Psychiatric Examinations of Sexual Assault Victims: A Reevaluation*, 15 U.C. DAVIS L. REV. 973, 986 (1982).

¹⁷ See Bangle & Haage, *supra* note 16, at 987 n.77.

¹⁸ See *Looney*, 240 S.E.2d at 626–27.

¹⁹ See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 6–7 (1975) (stating that invoking procedures to get a "rape victim[] to submit to a psychiatric examination" is an obligation that is "morally objectionable" for some defense lawyers and something a lawyer might "thoroughly disapprove" in other contexts).

²⁰ See, e.g., *Braham v. State*, 571 P.2d 631, 640 (Alaska 1977) ("It is within the

are typically requested and granted in sexual assault cases.²¹ As there is no brightline standard for when an examination may be ordered,²² the trial judge generally has discretion to grant a motion for such an examination if the defendant demonstrates a “compelling need”—for example, a lack of corroborating evidence.²³ Because the standard at trial in most states is the judge’s discretion, the standard on appeal is customarily whether the trial judge abused this discretion.²⁴ This is a difficult standard to prove.²⁵

Despite the burden that defendants must shoulder to obtain such an examination and the difficult reversal standard, other states have nevertheless banned the practice.²⁶ These states emphasize the victim’s dignity and privacy rights and uphold those rights as outweighing any benefit to criminal defendants.²⁷

discretion of the trial court whether to order a psychiatric examination of the mental condition of a witness.”); *Koerschner v. State*, 13 P.3d 451, 454 (Nev. 2000) (outlining the power to compel child victims to submit to examination); *Forbes v. State*, 559 S.W.2d 318, 321 (Tenn. 1977) (“[I]n any case involving a sex violation, the trial judge has the inherent power to compel a psychiatric or psychological examination of the victim, where such examination is necessary to insure a just and orderly disposition of the cause.”); *State v. Delaney*, 417 S.E.2d 903, 906 (W. Va. 1992) (“[T]he decision whether to require a psychiatric evaluation prior to determining a child’s capacity to testify is within the trial court’s discretion.”); *Greenberg*, *supra* note 4, at 1258 (supporting the view that the defendant should have the right to an evaluation of the complainant at the trial court’s discretion).

²¹ See *Bangle & Haage*, *supra* note 16, at 990; see also *Ballard v. Superior Court*, 410 P.2d 838, 846 (Cal. 1966) (“The courts in this state, however, in cases not involving sex violations, have rejected psychiatric testimony as to the mental or emotional condition of a witness for purposes of impeachment.”), *superseded by statute*, 1980 Cal. Stat. 63 (codified as amended at CAL. PENAL CODE § 1112 (West 2007)), as recognized in *People v. Haskett*, 640 P.2d 776 (Cal. 1982).

²² The standards for granting an examination vary considerably. See *infra* text accompanying notes 48–54.

²³ See, e.g., *Koerschner*, 13 P.3d at 454.

²⁴ See, e.g., *Braham*, 571 P.2d at 640 (finding no error).

²⁵ See *In re Michael H.*, 602 S.E.2d 729, 734 (S.C. 2004) (“[The] special concerns [for compelling a witness to submit to the examination] weigh in favor of complainants and thereby suggest judges would rarely order psychological evaluations.”).

²⁶ See, e.g., *State v. Looney*, 240 S.E.2d 612, 626 (N.C. 1978) (“To require a witness to submit to a psychiatric examination, by a psychiatrist not selected by the witness, is much more than a handicap to the party It is a drastic invasion of the witness’ own right of privacy.”); *State ex rel. Holmes v. Lanford*, 764 S.W.2d 593, 594 (Tex. 1989) (holding no compulsory examinations as to child victims); *Nobrega v. Commonwealth*, 628 S.E.2d 922, 926 (Va. 2006) (holding that even a demonstration of “compelling need” is not enough to overcome the complainants’ privacy rights).

²⁷ See *State v. Horn*, 446 S.E.2d 52, 53 (N.C. 1994); *Looney*, 240 S.E.2d at 626 (calling examinations “humiliating”).

Even California—which wrote the “seminal case” supporting compulsory examination²⁸—has statutorily banned the practice. The 1966 case of *Ballard v. Superior Court*²⁹ reasoned that a compulsory evaluation was essential because:

[A] woman or a girl may falsely accuse a person of a sex crime as a result of a mental condition that transforms into fantasy a wishful biological urge. Such a charge may likewise flow from an aggressive tendency directed to the person accused or from a childish desire for notoriety.³⁰

This language represents an outdated and misogynistic way of thinking—one that focuses on the victim, not the crime. The case was ultimately superseded in 1981³¹: California Penal Code section 1112 reads, in pertinent part, that “the trial court shall not order any prosecuting witness, complaining witness, or any other witness, or victim in any sexual assault prosecution to submit to a psychiatric or psychological examination for the purpose of assessing his or her credibility.”³²

This Note posits that there should be an analogous federal statute—intended to inspire greater unanimity among states—forbidding federal courts from compelling complainants to undergo psychiatric examinations in sexual assault cases, whether the complainant is a child or an adult. Such a statute is necessary because the practice not only deters the reporting of sex crimes³³ and undermines the victim’s right to privacy,³⁴ but also because there is a lack of uniform standards across states.³⁵ A statute that addresses these issues by disallowing the practice in the federal system would not abridge a defendant’s rights—constitutional or otherwise.³⁶ Moreover, like rape shield statutes and similar laws, this ban would represent a positive social stride

²⁸ See *In re Michael H.*, 602 S.E.2d at 733 n.5.

²⁹ 410 P.2d 838 (Cal. 1966), *superseded by statute*, 1980 Cal. Stat. 63 (codified as amended at CAL. PENAL CODE § 1112 (West 2007)), *as recognized in* *People v. Haskett*, 640 P.2d 776 (Cal. 1982).

³⁰ *Id.* at 846. When confronted with language like this, it is easy to see why the case is no longer good law.

³¹ See *People v. Anderson*, 22 P.3d 347, 369 (Cal. 2001) (indicating that the *Ballard* line of authority was superseded by statute).

³² CAL. PENAL CODE § 1112 (West 2007).

³³ See *infra* Part I.B.

³⁴ See *infra* Part I.C.

³⁵ See *infra* Part I.A.

³⁶ See *infra* Part II.

against the negative and anachronistic views of sexual assault victims inherent in compulsory psychological examinations.³⁷

Part I of this Note examines the necessity of the ban, including an analysis of why various judicial tests and standards currently in place are insufficient, a look at the deterrent effect of compelled examination, and an explanation of how compulsory psychological tests deny a victim's rights. Part II addresses the concerns implicit in creating a federal statute comparable to that enacted in California. Such a statute would not abridge defendants' rights because the court has no inherent power to authorize examinations and because the statute banning compulsory examinations in federal courts would pass constitutional muster. Such a ban, moreover, would fit into the scheme of existing laws that protect sex-crime complainants and witnesses. Ultimately, banning compulsory examinations would help eliminate negative perceptions of sexual assault victims.

I. NECESSITY OF THE BAN

A. *Lack of Unanimity*

1. Lack of Standards Led to Unjust Application in the *Ballard* Era

Even in permitting compelled examinations in sexual assault cases, the *Ballard* court noted some of the problems inherent in the practice.³⁸ These included, among other things, a psychiatrist using unacceptable techniques, a partisan psychiatrist clouding the issues, and an inordinate reliance by jurors on the psychiatrist's assessment of witness credibility.³⁹ The court nonetheless believed that the possibility of "sympathy-arousing" victims spinning believable tales—and subjecting "unattractive" defendants to undeserved convictions—outweighed these problems.⁴⁰ The court noted in dicta that

³⁷ Rape shield statutes protect a victim's privacy by disallowing evidence of his or her sexual history in a sexual assault case. *See supra* text accompanying notes 122–29.

³⁸ *See Ballard v. Superior Court*, 410 P.2d 838, 846 (Cal. 1966), *superseded by statute*, 1980 Cal. Stat. 63 (codified as amended at CAL. PENAL CODE § 1112 (West 2007)), *as recognized in People v. Haskett*, 640 P.2d 776 (Cal. 1982).

³⁹ *See id.* at 848 n.10.

⁴⁰ *See id.* at 846.

testimony of the psychiatrist-examiner was admissible not only to impeach credibility, but also to resolve character issues; for example, psychiatric character testimony could help to prove consent if at issue in a rape case.⁴¹ Ultimately, the court reached what it considered a “middle ground,” requiring defendants to establish only two criteria to prevail on a motion to compel: lack of corroborating evidence and the possibility that the complainant’s mental or emotional condition might affect her credibility.⁴²

Considering the lenient standards set by the court, it comes as no surprise that so-called “*Ballard* motions” were unevenly and overinclusively applied in California.⁴³ Some counties granted them more often than others,⁴⁴ sometimes compelling examinations to assess witness credibility in cases where there appeared to be corroborating evidence—for instance, where police had witnessed the defendant on top of the victim in a bed while holding a gun or in a bathroom stall unzipping a child victim’s pants.⁴⁵ Such cases demonstrate that the “compelling need” standard,⁴⁶ in California at least, was not always construed by trial judges in a logically—and morally—appropriate fashion. If even those victims whose ordeals were witnessed by police needed to have their stories “corroborated” through psychiatric examinations, one can infer that California courts continued to adhere to the groundless and anachronistic view that sex crime victims are inherently unreliable.

2. The Lack of Uniform Standards Across States Is Similarly Problematic

Some states continue to use *Ballard*’s “compelling need” as a standard,⁴⁷ with the results often just as damaging as those in

⁴¹ See *id.* at 846 n.7. The Federal Rules of Evidence allow for evidence of a witness’s general character or specific acts that demonstrate character. FED. R. EVID. 405.

⁴² See *Ballard*, 410 P.2d at 849.

⁴³ See Bangle & Haage, *supra* note 16, at 981.

⁴⁴ See *id.* at 981 n.42.

⁴⁵ See *id.* at 981 n.46.

⁴⁶ See *Ballard*, 410 P.2d at 849 (“[D]iscretion should repose in the trial judge to order a psychiatric examination of the complaining witness in a case involving a sex violation if the defendant presents a compelling reason for such an examination.”).

⁴⁷ See, e.g., *Avery v. State*, 129 P.3d 664, 671 (Nev. 2006) (citing lack of corroboration and a reasonable basis for believing complainant’s emotional state affects her veracity as the elements of compelling need). These elements are nearly

Ballard itself. Considering compelling need alone—without taking into account victim-protective factors—subjugates a victim. One of the *Ballard* elements is simply that the defense question the effect of the victim's emotional or mental condition upon her veracity; this element continues to be part of the test for compulsory examination in some states.⁴⁸ It is clearly a very low burden to meet, as all the defense needs to do is raise the issue. The other element—lack of corroborating evidence supporting the victim's story⁴⁹—appears to be a more concrete and just way to determine compelling need, yet it has not proven as such in its application.

In fact, the lack of corroborating evidence standard has proven as poor a barometer of necessity in recent years as it had during the *Ballard* era. There are generally no strict guidelines defining “corroborating evidence.” In a 1999 case, the Court of Appeals of Kansas favored a psychological examination of an eleven-year-old victim, even though the trial court had found that a medical examination showing injuries consistent with force to vaginal and anal areas constituted corroborating evidence.⁵⁰ In 2003, however, another Kansas ruling held that a letter written by a seven-year-old victim detailing sexual abuse *could* comprise corroborating evidence.⁵¹ And lack of corroborating evidence is not only an imprecise standard, but an unnecessary one. Where there is a true lack of such evidence, numerous safeguards already protect the defendant—it would be difficult to get an indictment at all, and if one is obtained, the jury should be trusted to acquit.⁵²

Other courts consider different guidelines and methods—which often vary considerably—in determining whether to order examinations. In Arizona, for example, judges have sole and “practically unlimited” discretion to decide whether children

identical to those found in *Ballard*. See *supra* text accompanying note 42.

⁴⁸ See *Koerschner v. State*, 13 P.3d 451, 454 (Nev. 2000).

⁴⁹ See, e.g., *id.* at 454; *State v. Gregg*, 602 P.2d 85, 91 (Kan. 1979).

⁵⁰ See *State v. Bourassa*, 15 P.3d 835, 838, 843 (Kan. Ct. App. 1999).

⁵¹ See *State v. Price*, 61 P.3d 676, 679–80 (Kan. 2003). The letter written by the child even stated “I lie sometimes and I am a big lying ratty big old pig. I ask God very much to help me. I have bad problems with lying.” *Id.* at 679.

⁵² See *United States v. Dildy*, 39 F.R.D. 340, 344 (D.D.C. 1966) (“If the government presents a case without corroboration, the case fails. If the Government is able to present corroboration, there is much less need for the mental examination.”).

under the age of ten should be examined.⁵³ Other appellate courts, however, have attempted to set firmer guidelines, the realization of which would presumably eradicate problems such as those that arose in California following *Ballard*.⁵⁴ Some allow court-ordered evaluations to stand if certain reasonableness factors are met, including age of the complainant, remoteness in time from the incident, degree of intrusiveness and humiliation, physical effects, and “other relevant considerations.”⁵⁵ Such tests should be praised insofar as the reasonableness of granting the evaluation is considered from the point of view of the victim’s well-being; but given the track record of courts when ordering examinations, this test still seems too broad. Other tests are even more flawed, arising out of a perspective unfavorable to the victim, with elements such as whether the victim demonstrates mental instability, whether the victim demonstrates a lack of veracity, whether similar charges by the victim against others are proven to be false, whether the defendant’s motion for a psychological evaluation of the victim appeared to be a fishing expedition, whether anything unusual resulted following the questioning of the victim’s understanding of telling the truth, and whether there are any other reasons why the victim should be evaluated.⁵⁶ It is troubling that different courts can have completely different approaches, some far less considerate towards victims than others. This broad spectrum means that victims in some states arbitrarily suffer more for their choice to report and prosecute sex offenses. A ban on compulsory examinations in the federal courts would serve as an example for the states and encourage them to adopt similar measures.

B. Deterrent Effect

The reason that the lack of national unanimity is such a critical issue is that allowing compulsory examination deters victims from reporting sex crimes; a federal ban would instill awareness in sex victims that their rights are highly valued,

⁵³ See *State v. Jerousek*, 590 P.2d 1366, 1371 (Ariz. 1979). In one case, the judge and attorneys for both sides questioned the child in the judge’s chambers, and it was on this basis that the judge made the decision whether to order an examination. *Id.* Although in that case an examination was not ordered, it is troubling that a judge, someone untrained in psychology, could have that much power.

⁵⁴ See *supra* Part I.A.1.

⁵⁵ See *State v. Ramos*, 553 A.2d 1059, 1062 (R.I. 1989).

⁵⁶ See *Price*, 61 P.3d at 681–82.

making them less hesitant to come forward.⁵⁷ Laws are intended to deter criminals,⁵⁸ but they can certainly deter victims as well; this is especially true with crimes like sexual assault, where the victim often faces a considerable amount of scrutiny, feeling like he or she has been “put on trial.”⁵⁹ Not surprisingly, scholars have called the prosecution of a sex crime a “second assault” of a victim.⁶⁰ Some courts reason that victims—especially children—will not be deterred by the possibility of having to submit to an evaluation, since it is not something they normally consider before reporting a crime.⁶¹ To the contrary, adult victims certainly consider the humiliation involved in reporting a rape, if not the actual possibility of a psychological examination.⁶² While children may not understand the ramifications of reporting a crime, they usually do not call the police on their own; they tell a trusted adult.⁶³ Concerned parents may indeed choose not to

⁵⁷ See David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1195 (1997) (noting that rape victims often do not come forward to report their rapes because they fear the justice system at every level, from being interrogated by overbearing police to facing vicious character attacks should the case go to trial).

⁵⁸ See Mark D. Yochum, *The Death of a Maxim: Ignorance of the Law Is No Excuse (Killed by Money, Guns and a Little Sex)*, 13 ST. JOHN'S J. LEGAL COMMENT. 635, 635–37 (1999) (outlining the argument that since ignorance of the law is no excuse for committing a crime, laws must be clear so they can serve as effective deterrents).

⁵⁹ See Berger, *supra* note 1, at 12–14 (providing an excerpt of a cross-examination in a rape trial where the complainant was grilled in order to determine whether the alleged rape was in fact consensual sex). In the past, some states held resistance by the victim to be a statutory element of rape, effectively meaning the victim had to do enough to fight off the rapist to prove she had been raped. *Id.* at 8; see also David J. Giacopassi & Karen R. Wilkinson, *Rape and the Devalued Victim*, 9 LAW & HUM. BEHAV. 367, 369 (1985) (noting that rape was the only crime whose elements required such extreme resistance).

⁶⁰ Patricia Yancey Martin & R. Marlene Powell, *Accounting for the “Second Assault”: Legal Organizations’ Framing of Rape Victims*, 19 LAW & SOC. INQUIRY 853, 856 (1994) (citing data wherein women who went ahead with rape prosecution had more psychological trauma six months after the rape than those who chose not to prosecute).

⁶¹ See *Abbott v. State*, 138 P.3d 462, 469 (Nev. 2006); *In re Michael H.*, 602 S.E.2d 729, 734 (S.C. 2004).

⁶² See *State v. Fortney*, 269 S.E.2d 110, 116 (N.C. 1980). See generally Fiona E. Raitt & M. Suzanne Zeedyk, *Rape Trauma Syndrome: Its Corroborative and Educational Roles*, 24 J.L. & SOC’Y 552, 555 (1997) (listing the emotions felt by victims immediately after a rape, including fear, humiliation, and embarrassment).

⁶³ In most of the cases cited in this Note, the child victims told their parents first. See, e.g., *Abbott*, 138 P.3d at 465 (describing how the victim allegedly ran into her mother’s room to tell her that her step-father had touched her private parts immediately after the incident); *In re Michael H.*, 602 S.E.2d at 730 (explaining how

report a crime if they feel that their children will be subjected to psychological examinations, perhaps causing their child to dwell on the issue, even for years after the initial trauma.⁶⁴

Forcing a victim—especially a child—to undergo an evaluation suggests to that person that “the law” assumes they are lying. This is a dangerous idea for victims who already tend to feel dejected, humiliated, and who often suffer from low self-esteem.⁶⁵ Institutionalizing—and thereby confirming—the victim’s fears by compelling psychological evaluations will thwart the prosecution of past and future sex offenders. It is notable that in California, the number of victims reporting rapes has more than doubled since the statutory ban on *Ballard* motions in 1981, suggesting that there was indeed a deterrent effect when the motions were allowed.⁶⁶

Furthermore, even when a victim chooses to report a crime, an order to compel an examination may deter him or her from continuing with the case. If the choice is to submit to a psychological examination and testify or do neither, many victims will select the latter.⁶⁷ Without such testimony, the case may not be able to go forward—the victim is often the sole witness of a sex crime.⁶⁸ Psychological examinations are even more likely to cause this outcome than physical examinations, because the need for the former is understood less by the public as normally incident to a rape prosecution as, for instance, collecting DNA evidence.⁶⁹

the victim’s mother explained to him what rape was after they watched a news story, prompting him to tell her that his uncle had “done that to me before”).

⁶⁴ See Jane Dever Prince, *Competency and Credibility: Double Trouble for Child Victims of Sexual Offenses*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 113, 128 (2004).

⁶⁵ See Tom Luster & Stephen A. Small, *Sexual Abuse History and Problems in Adolescence: Exploring the Effects of Moderating Valuables*, 59 J. MARRIAGE & FAM. 131, 133 (1997) (finding that victims whose mothers believed their sexual abuse stories were less likely to suffer from depression).

⁶⁶ See CRIMINAL JUSTICE STATISTICS CTR., CAL. OFFICE OF ATT’Y GEN., CRIMES 1952–2004, at 100–01 tbl.1 (2004), <http://caag.state.ca.us/cjsc/publications/candd/cd04/tabs/1.pdf>.

⁶⁷ See *People v. Mills*, 151 Cal. Rptr. 71, 74 (Cal. Ct. App. 1978) (holding that orders to compel do not force victims to be evaluated, but simply open them up to sanctions, including not being allowed to testify).

⁶⁸ See Troy Andrew Eid, Comment, *A Fourth Amendment Approach to Compulsory Physical Examinations of Sex Offense Victims*, 57 U. CHI. L. REV. 873, 876 (1990).

⁶⁹ DNA evidence is usually collected at the time the crime is reported. See Martin & Powell, *supra* note 60, at 884–85 (describing how police officers take victims to the hospital to collect evidence).

It is important to distinguish psychological evaluations from physical examinations, as some commentators argue that the harm to a victim's dignity caused by the former pales in comparison to that of undergoing a physically invasive examination.⁷⁰ Such physical exams, however, possess benefits that psychological evaluations do not; they also avoid the harm inherent in psychological examinations. Some medical experts, for example, find that a post-rape examination benefits a victim by ensuring that proper treatment for injuries as well as prophylaxis against sexually transmitted diseases and pregnancy are obtained.⁷¹ Additionally, the physical examination is less likely to insult the victim and to create feelings of low self-esteem and humiliation, because its purpose is not to test the victim's truthfulness, but rather to collect the evidence required for conviction.⁷² For many victims, the lingering feelings caused by the sexual assault are worse than the assault itself, so a psychological examination could exacerbate the most traumatic part of the experience.

Victims are a cog in the wheel of the criminal justice system; only through their coming forward and participating in the process can a criminal be prosecuted and all ends of justice be served. It is in society's best interest, then, to protect the sexual assault victim's dignity, both because the victim is benefiting society and because this encourages others to report these kinds of crimes. Of course, protecting a victim's dignity is important not only for the purpose of promoting prosecution, but also due to the trauma it can cause an individual victim.⁷³ Unlike a civil plaintiff, the complainant in a criminal case will not directly benefit from its outcome through the awarding of damages. While civil cases implicate personal matters between two parties, criminal cases involve condemnation by society at large.⁷⁴ A victim thus benefits society by reporting rape, almost always at a

⁷⁰ See Greenberg, *supra* note 4, at 1261. *But see* Eid, *supra* note 68, at 873–74 (arguing that even physical examinations should not be compelled by courts).

⁷¹ See Martin & Powell, *supra* note 60, at 885.

⁷² See *id.*

⁷³ See *United States v. Benn*, 476 F.2d 1127, 1131 (D.C. Cir. 1972) (“[T]he trauma that attends the role of complainant to sex offense charges is sharply increased by the indignity of a psychiatric examination.”).

⁷⁴ See Nathan Roth, *Factors in the Motivation of Sexual Offenders*, 42 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 631, 632–33 (1952).

great personal cost.⁷⁵ And the conviction of a guilty rapist is particularly good for society, since rapists and child molesters typically exhibit high recidivism rates.⁷⁶

C. *The Victim's Right to Privacy*

Sound public policy requires that a victim feel comfortable throughout a prosecution, from reporting the crime to testifying at trial.⁷⁷ Psychological examination is not often—if ever—an issue in the prosecution of offenses like assault and battery the way it is in a rape case.⁷⁸ This suggests that courts agree with Wigmore's assertion that there is something inherently unreliable about a person who reports a sex crime.⁷⁹ The

⁷⁵ See generally *United States v. Dildy*, 39 F.R.D. 340, 343 (D.D.C. 1966) (discussing the trauma and embarrassment a complaining sexual assault witness undergoes on the state's behalf).

⁷⁶ See Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, 3 PSYCHOL. PUB. POL'Y & L. 33, 40 (1997).

⁷⁷ Consider this passage from the well-known Susan Estrich article, *Rape*:

Did I realize what prosecuting a rape complaint was all about? They tried to tell me that "the law" was against me. But they didn't explain exactly how. And I didn't understand why. I believed in "the law," not knowing what it was.

.....
I learned, much later, that I had "really" been raped. Unlike, say, the woman who claimed she'd been raped by a man she actually knew, and was with voluntarily. Unlike, say, women who are "asking for it," and get what they deserve. I would listen as seemingly intelligent people explained these distinctions to me, and marvel; later I read about them in books, court opinions, and empirical studies. It is bad enough to be a "real" rape victim. How terrible to be—what to call it—a "not real" rape victim.

Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1088 (1986).

⁷⁸ See *Ballard v. Superior Court*, 410 P.2d 838, 848–49 (Cal. 1966) (stating that motions to compel are applicable only in sexual assault cases), *superseded by statute*, 1980 Cal. Stat. 63 (codified as amended at CAL. PENAL CODE § 1112 (West 2007)), *as recognized in* *People v. Haskett*, 640 P.2d 776 (Cal. 1982). There is a notion that complainants in rape cases are somehow "special" and different from complainants in other criminal cases. Lack of consent is the essence of what criminalizes rape, so historically, elements of force and lack of resistance have come to be a part of rape law, causing it to be more victim-focused than crimes such as assault. See Berger, *supra* note 1, at 7–8. Some courts, however, are trying to move away from this notion that rape victims are inherently different. See *Gilpin v. McCormick*, 921 F.2d 928, 931 (9th Cir. 1990) (disagreeing that the testimony of children is inherently unreliable); *People v. Davis*, 283 N.W.2d 768, 769 (Mich. Ct. App. 1979) ("Credibility is an issue in every case, and there is no showing beyond Dean Wigmore's outmoded psychological theories that sex offenses warrant greater scrutiny of the complainant.").

⁷⁹ See *supra* note 8.

potential damage of that view is more than just an affront to a single complainant's personal dignity—it can have severe societal repercussions. It was not long ago that rape victims were practically treated as criminals by society,⁸⁰ and there still remain some similarly negative attitudes today.⁸¹

In making the rape victim feel comfortable about bringing charges, the right to privacy is paramount. An order to compel an evaluation has been found to be a “drastic” infringement on this right, with potential repercussions for a witness's reputation and career.⁸² And while an adult may refuse an examination⁸³—subject to certain sanctions that will make it difficult to bring a case⁸⁴—child victims in protective custody may be unable to decide for themselves.⁸⁵ This outcome is inconsistent with the fact that the right to privacy has been held fundamental by the Supreme Court.⁸⁶

⁸⁰ Having “resistance” be an element of rape puts undue focus on the victim, causing her to feel like she has been put on trial. *See* Berger, *supra* note 1, at 8; *supra* note 59 and accompanying text.

⁸¹ When basketball star Kobe Bryant was arrested on a rape charge, society condemned not Bryant, but the prosecutor and the alleged victim, whose name and address were posted on the internet, which resulted in at least two people being charged with death threats against her. *See* Alice Vachss, *The Charge of Rape, the Force of Myth*, WASH. POST, Nov. 2, 2003, at B02. Those in support of Bryant pointed out that he was married to a beautiful woman, was a good basketball player, and that he seemed “nice.” *Id.* People have trouble believing a beloved celebrity could commit a violent crime. *See* Peter Arenella, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1236 (1996); Megan Reidy, *Comment, The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a “Fair Trial”?*, 54 CATH. U. L. REV. 297, 330–32 (2004) (suggesting that celebrity defendants have an advantage because they can bias the juror pool in their favor by portraying themselves in a positive light and using the media to attack the victim). In order to uphold the defendant as innocent in a case like Bryant's, where DNA evidence proved that there was intercourse between him and the complainant and a gynecological examination showed signs of force, the defendant's supporters must then place the onus on the victim—for example, by arguing that the forcible entry was caused by sex with another man around the same time as consensual sex with Bryant occurred, which tends to portray the victim as promiscuous and feeds into the notion that “slut[s] cannot be raped.” *See* Vachss, *supra*.

⁸² *See* State v. Looney, 240 S.E.2d 612, 626 (N.C. 1978).

⁸³ *See* United States v. Rouse, 111 F.3d 561, 567 (8th Cir. 1997).

⁸⁴ *See* Looney, 240 S.E.2d at 627 (noting that a witness who refuses a psychological examination may not be permitted to testify).

⁸⁵ *See* Rouse, 111 F.3d at 567.

⁸⁶ *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (finding that privacy is a right inherent in the First, Third, Fourth, Fifth, and Ninth Amendments).

II. THE BAN WOULD NOT VIOLATE DEFENDANTS' RIGHTS

A. *The Court Has No Explicit Power to Compel*

The defendant does not have the right to a compulsory psychological examination of a complaining witness because there is no such definitive power vested in the courts. Some courts, in fact, reason that in the absence of a statute specifically creating such authority, it is wrong to assume that such power exists.⁸⁷ These states operate under the belief that a carefully worded statute would allow for more protections for victims,⁸⁸ so their courts do not have the discretionary power to grant such requests. Other courts posit the alternative: Since no statute specifically disallows the practice, judges indeed have the discretion to grant such motions.⁸⁹ The federal statute proposed in this Note would be a substantial step toward uniformity by disallowing the practice in every federal court throughout the United States.

Rule 35 of the Federal Rules of Civil Procedure states that “[t]he court where the action is pending may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination”⁹⁰ This rule obviously has

⁸⁷ See *Wedmore v. State*, 143 N.E.2d 649, 654 (Ind. 1957) (holding no power or authority to compel); *State v. Horn*, 446 S.E.2d 52, 53 (N.C. 1994) (“[A] trial judge has neither statutory authority nor discretionary power to compel an unwilling witness to submit to a psychiatric examination.”); see also *United States v. Dildy*, 39 F.R.D. 340, 342 (D.D.C. 1966) (“But when the witness refuses to submit to such examination, there is ‘a great dearth of authority’ affording the court the power to compel her.”).

⁸⁸ See *Looney*, 240 S.E.2d at 627.

⁸⁹ Cf. *Forbes v. State*, 559 S.W.2d 318, 320 (Tenn. 1977) (noting that no statute authorizes examinations in the state, yet finding that there is a power to order one for compelling reasons).

⁹⁰ FED. R. CIV. P. 35(a). The full text reads:

Rule 35. Physical and Mental Examination of Persons

(a) Order for an Examination.

(1) *In General*. The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) *Motion and Notice; Contents of the Order*. The order: (A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and (B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or

no bearing on motions to compel in criminal cases,⁹¹ and there are very good reasons why no analogous power exists in the Federal Rules of Criminal Procedure.⁹² Unlike in the civil context, a complaining witness or victim in a criminal case is not a party.⁹³ This is a very important distinction since a party to a civil action can generally drop or settle the case if an examination is ordered and he or she is too uncomfortable with complying. Complaining witnesses in criminal sexual assault cases, on the other hand, can be sanctioned for lack of compliance; sanctions include having to pay fines,⁹⁴ having the jury informed of their refusal and thus allowing it be considered in deliberations,⁹⁵ being held in contempt of court,⁹⁶ and having their testimony held inadmissible.⁹⁷ Because of these serious consequences, courts should not be able to order examinations without express statutory authority.

B. *The Ban Poses No Constitutional Problems*

A ban on compulsory examinations would not abridge any of a defendant's constitutional rights. The Fifth Amendment Due Process and Sixth Amendment Confrontation Clause rights can be upheld even without granting defendants this tool for discrediting complainants.⁹⁸ In passing a ban, Congress would

persons who will perform it.

Id.

⁹¹ See *Dildy*, 39 F.R.D. at 342.

⁹² *Id.* (suggesting that the lack of such power "bespeaks an intended omission").

⁹³ *State v. Little*, 861 P.2d 154, 159 (Mont. 1993) (holding that victims cannot be compelled into either medical or psychological evaluations because they are not parties); see also *Gilpin v. McCormick*, 921 F.2d 928, 931 (9th Cir. 1990).

⁹⁴ See *Greenberg*, *supra* note 4, at 1267.

⁹⁵ *Id.*

⁹⁶ See *United States v. Proffitt*, 498 F.2d 1124, 1130 (3d Cir. 1974).

⁹⁷ See *State v. Looney*, 240 S.E.2d 612, 627 (N.C. 1978).

⁹⁸ Additionally, the fact that the vast majority of sexual assault cases involve male defendants and female complainants, see *Buddie*, *supra* note 5, at 1, would not in itself make the statute prejudicial towards men and thus implicate the Equal Protection Clause. See *People v. Armbruster*, 210 Cal. Rptr. 11, 13 (Cal. Ct. App. 1985). In California, for example, the ban to enforce examinations was enacted "to ameliorate an intolerably invasive discovery practice utilized principally, if not exclusively, in the prosecution of sex offenses." *Id.* at 13 (perceiving no arbitrariness in the enactment of said statute). In light of how easily *Ballard* motions were granted in some instances in California, it would be fair to say—in that state at least—that the equal protection rights of victims forced to undergo examinations were more thoroughly compromised than those of criminal defendants when such motions were denied. See *supra* text accompanying notes 42–44.

send a strong message that, while a defendant's rights are important, they will not be favored to the exclusion of those of a victim.

1. Procedural Due Process

Proponents of compulsory psychological evaluation argue that because the penalties for sex crimes are so steep,⁹⁹ there should be especially stringent rules meant to protect a defendant.¹⁰⁰ Federal courts have gone in the opposite direction, however, focusing more on victims' rights. Even Federal Rule of Evidence 413—which makes evidence of a sexual assault defendant's history of similar offenses admissible¹⁰¹—survives Fifth Amendment scrutiny.¹⁰² A Fifth Amendment due process argument implicates protection against rules that deprive defendants of "life, liberty, or property."¹⁰³ The right to assess a victim's credibility through a judicially-compelled psychiatric examination is hardly fundamental to protecting these rights—while courts indeed must take the utmost care to protect innocent defendants, rape accusations are no more likely to be fabricated than accusations of any other crime.¹⁰⁴ As such, federal caselaw demonstrates that a psychological evaluation of a complaining witness is not required by the Fifth Amendment,¹⁰⁵ and that the denial of a motion to compel does not implicate a "fundamental fairness essential to the very concept of justice."¹⁰⁶

⁹⁹ The death penalty for rape of an adult woman was held unconstitutional by the Supreme Court in *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

¹⁰⁰ See *Abbott v. State*, 138 P.3d 462, 470 (Nev. 2006).

¹⁰¹ FED. R. EVID. 413(a). Character evidence is not generally admissible "for the purpose of proving action in conformity therewith on a particular occasion . . ." FED. R. EVID. 404(a).

¹⁰² *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998); see also Francis P. King, *Rules of Evidence 413 and 414: Where Do We Go from Here?*, 2000 ARMY LAW. 4, 8.

¹⁰³ See U.S. CONST. amend. V; *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

¹⁰⁴ See Bryden & Lengnick, *supra* note 57, at 1195.

¹⁰⁵ See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."). This Fifth Amendment right is applied to states via the Fourteenth Amendment. See U.S. CONST. amend XIV, § 1. Federal courts have held that compulsory psychological examinations are not necessary for constitutional due process. See *Gilpin v. McCormick*, 921 F.2d 928, 931 (9th Cir. 1990).

¹⁰⁶ *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)) (creating a standard for denial of

Typical cross-examination is sufficient to weed out dishonest witnesses.¹⁰⁷ The jury is the ultimate judge of credibility.¹⁰⁸ Although expert witnesses are generally not allowed to testify directly as to whether a complainant is lying, they can testify as to whether they believe that a complainant was sexually assaulted or whether a child victim is competent to understand the oath—both of which have the functional effect of telling the jury that a complainant is lying.¹⁰⁹ The witness oath and cross-examination are still powerful tools that aid the jury in making its determinations.¹¹⁰

There are additional solutions that preserve defendants' due process rights without subjecting complainants to the harms of compelled evaluations. Availability of prior medical or psychological records can render independent witness evaluations unnecessary.¹¹¹ Furthermore, where a victim suffered from previous mental problems, the court can admit the testimony of an expert with personal knowledge of the victim.¹¹² This is a reasonable compromise, given that it rests on a foundation of demonstrating the pre-existence of mental competency issues.¹¹³

due process); *see also* United States v. Rouse, 111 F.3d 561, 568 (8th Cir. 1997) (holding that declining an order to compel is not an abuse of discretion that meets the standard).

¹⁰⁷ *But see In re Michael H.*, 602 S.E.2d 729, 734 (S.C. 2004) (“[C]ross-examination of a complainant who is incompetent to testify, a condition that could be established through a psychological evaluation, would be wholly ineffective in protecting a defendant’s right to a fair trial. A complainant who is incompetent to testify may not fully understand or convey the implications of his or her psychological condition on cross examination.”).

¹⁰⁸ *See* People v. Davis, 283 N.W.2d 768, 769 (Mich. Ct. App. 1979); State v. Looney, 240 S.E.2d 612, 627 (N.C. 1978) (“The jury is the lie detector in the courtroom.” (quoting United States v. Barnard, 490 F.2d 907, 912 (1998))); State v. Walgraeve, 412 P.2d 23, 24 (Or. 1966) (holding that the *Ballard* court’s concerns that the jury’s province to evaluate the credibility of witnesses would be compromised by having the expert witness who did the evaluation testify as to credibility were valid, and affirming the denial of a motion to compel).

¹⁰⁹ *See* Prince, *supra* note 64, at 122–23.

¹¹⁰ *See* People v. Michael M., 162 Misc. 2d 803, 808, 618 N.Y.S.2d 171, 176 (Sup. Ct. Kings County 1994).

¹¹¹ *See* State v. Garay, 453 So. 2d 1003, 1006 (La. 1984).

¹¹² *See* People v. Baier, 73 A.D.2d 649, 650–51, 422 N.Y.S.2d 734, 735–36 (2d Dep’t 1979).

¹¹³ *See* Commonwealth v. Shearer, 894 A.2d 793, 795 (Pa. 2006) (“[A] court-ordered psychological examination should never be the starting point for such a determination.”); Commonwealth v. Alston, 864 A.2d 539, 548 & n.4 (Pa. 2004) (holding that the record must establish a credibility issue before an evaluation can

Proponents of independent evaluations argue, specifically in cases involving children, that it helps to identify those most susceptible to suggestion.¹¹⁴ They reason that a child who is asked the same question more than once may feel pressure to give a “new” or different answer the second time.¹¹⁵ This logic begs the question as to why having another examination, ordered by the defendant, would not make children susceptible to believing that they gave the wrong answers in previous evaluations. A better approach, then, is to allow expert witnesses to testify as to childrens’ susceptibility to suggestion, letting the jury decide whether the child witness in fact told the truth.¹¹⁶ This would shield the defendant from victim suggestibility while also protecting the victim from an evaluation.

2. Confrontation Right

The Sixth Amendment right to confront an accuser would similarly not bar a federal law against compulsory examination.¹¹⁷ The complainant still has to testify and submit to cross-examination, so there is adequate opportunity for confrontation without forcing an examination.¹¹⁸ The purpose of the Confrontation Clause is not to give criminal defendants free reign to exploit every possible angle for discrediting a witness, but rather to ensure that the jury has the opportunity to see a witness, judge a witness’s demeanor, and assess a witness’s credibility.¹¹⁹ Thus, when the defense is arguing that a child victim has been unduly influenced, it is sufficient to question the child about such influence during cross-examination and question the persons who have allegedly influenced the child.¹²⁰ Even where the psychological examination would give the defense information useful for purposes other than assessing a

be ordered).

¹¹⁴ See Bloom, *supra* note 6, at 42–45 (describing suggestive procedures that may taint a child victim’s testimony).

¹¹⁵ See *id.* at 43.

¹¹⁶ See *People v. Michael M.*, 162 Misc. 2d 803, 809–10, 618 N.Y.S.2d 171, 177 (Sup. Ct. Kings County 1994).

¹¹⁷ See U.S. CONST. amend VI.

¹¹⁸ See *Gilpin v. McCormick*, 921 F.2d 928, 932 (9th Cir. 1990) (stating that cross-examination is enough to satisfy the right to confront); Bangle & Haage, *supra* note 16, at 985–86 (distinguishing psychiatric evaluation from cross-examination).

¹¹⁹ See *Douglas v. Alabama*, 380 U.S. 415, 419 (1965).

¹²⁰ See *State ex rel. Holmes v. Lanford*, 764 S.W.2d 593, 594 (Tex. App. 1989).

victim's credibility, the Ninth Circuit Court of Appeals has held that it is not necessary to compel examination under the Sixth Amendment.¹²¹

An analogy is properly drawn between the law proposed in this Note and rape shield laws, which protect victims from intrusion into their sexual history.¹²² In *Virgin Islands v. Scuito*,¹²³ the Third Circuit stated that to compel a victim to submit to an evaluation actually comes close to violating Rule 412 of the Federal Rules of Evidence, the federal rape shield law.¹²⁴ The court affirmed an earlier decision holding that an evaluation would violate the "spirit" of Rule 412.¹²⁵ The Rule states, in pertinent part, that neither "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior" nor "[e]vidence offered to prove any alleged victim's sexual predisposition" shall be admissible "in any civil or criminal proceeding involving alleged sexual misconduct . . ."¹²⁶ While evidence of a victim's sexual history could be construed as admissible under other Rules,¹²⁷ public policy reasons—including

¹²¹ See *Gilpin*, 921 F.2d at 932 (upholding the lower court's decision denying the motion that would allow defendant's attorney to confront victims with evidence that they did not suffer Rape Trauma Syndrome in order to strengthen the defendant's argument that no rape ever occurred).

¹²² See *State v. Clontz*, 286 S.E.2d 793, 796–97 (N.C. 1982) (holding that it would be against the public policy inherent in the rape shield statutes to allow unnecessary intrusion into the victim's privacy in the form of a compelled psychological evaluation).

¹²³ 623 F.2d 869 (3d Cir. 1980).

¹²⁴ *Id.* at 874; see also FED. R. EVID. 412.

¹²⁵ *Scuito*, 623 F.2d at 875; *State v. Fortney*, 269 S.E.2d 110, 116 (N.C. 1980) ("Part of the reluctance of victims to report and prosecute rape stems from their feeling that the legal system harasses and humiliates them.").

¹²⁶ FED. R. EVID. 412(a)(1)–(2). The exceptions to this are the following:

- (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
- (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
- (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

FED. R. EVID. 412(b)(1).

¹²⁷ The Federal Rules of Evidence permit the accused to raise pertinent character traits about the victim. Since the definition of "relevant" in the Federal Rules is very lenient, consisting of evidence having *any* tendency to make a fact probable, the fact that a woman has ever consented to sex in the past could be considered relevant on the issue of whether she consented to sex with a defendant. See FED. R. EVID. 401. *But see* Orenstein, *supra* note 3, at 684 (suggesting that since

protecting the victim from degradation, humiliation, and unfair prejudice—took precedence in the enactment of Rule 412.¹²⁸ For these reasons, the Rule has survived attacks by critics who believe it violates the Sixth Amendment.¹²⁹

Rape shield statutes are not the only laws designed to protect the privacy and dignity of witnesses. Criminal records of witnesses are not discoverable for purposes of impeachment.¹³⁰ As to the issue of witness credibility, lie detector tests are largely inadmissible.¹³¹ In 1990, Florida passed a law prohibiting evidence of the clothing a victim was wearing when raped,¹³² in response to a Georgia case in which the jury acquitted a defendant who allegedly raped a woman at knifepoint—because the victim supposedly “asked for it” by wearing a miniskirt and tank top.¹³³ The above demonstrates that there are occasions when legislatures should justifiably intervene on behalf of victims’ rights; rape defendants would certainly prefer to be able to submit evidence of a victim’s promiscuity or sexualized wardrobe,¹³⁴ but this does not mean that their rights are compromised when lawmakers limit such evidence. Allowing compelled examinations to assess credibility undermines the import of such beneficial legislation.

CONCLUSION

There is no need for the law to render bringing a rape case especially difficult or discouraging for the victim—contrary to

men are not fungible, such evidence has little probative value).

¹²⁸ See Orenstein, *supra* note 3, at 684 (presenting the justifications for Rule 412).

¹²⁹ See, e.g., J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 545 (1980) (arguing that some rape shield laws are unconstitutional).

¹³⁰ See *United States v. Riley*, 657 F.2d 1377, 1389 (8th Cir. 1981); *United States v. Taylor*, 542 F.2d 1023, 1026 (8th Cir. 1976).

¹³¹ Martin & Powell, *supra* note 60, at 881 (pointing out that they are only admissible in court when both the prosecution and defense stipulate to it, which is rare). Some prosecutors, however, use them to assess victims’ credibility in deciding whether to go ahead with the case. *Id.* This is yet another example of how the justice system demonstrates an institutionalized skepticism of sexual assault victims. Some law enforcement officials report feeling anger at complainants whose lies may come to embarrass them in court, and one reported threatening alleged victims with jail time as soon as they report a rape. *Id.*

¹³² See *id.* at 854 n.1.

¹³³ See *id.* at 854.

¹³⁴ Jurors were “repeatedly” shown the “sexy” outfit over the eight-day trial. *Id.*

popular belief, false reports of rape do *not* have a higher incidence than false reports of other crimes.¹³⁵ The ethics charges against and subsequent disbarment of the prosecutor in the recent Duke rape case for withholding exculpatory evidence¹³⁶ may undermine the public's faith in this fact, but such cases are newsworthy because they are the exception, not the rule.¹³⁷ As society slowly comes to realize this, the law is moving toward increased legislation that protects the dignity of sexual assault victims.

Motions to compel are gross invasions of complainants' privacy—they send a distorted message that a defendant's rights are more important than those of a victim. A federal statute banning this practice would be a progressive act, reinforcing the policy interest in protecting the dignity and privacy of crime victims. That these motions generally arise only in sexual

¹³⁵ See Bryden & Lengnick, *supra* note 57, at 1195.

¹³⁶ The North Carolina State Bar filed a complaint against District Attorney Michael B. Nifong for making "improper commentary" and engaging in "dishonesty, fraud, deceit or misrepresentation." See David Barstow & Duff Wilson, *Prosecutor in Duke Sexual Assault Case Faces Ethics Complaint from State Bar*, N.Y. TIMES, Dec. 29, 2006, at A1. The full 17-page complaint can be viewed on the internet. TheSmokingGun.com, Ethics Rap for Duke Prosecutor, <http://www.thesmokinggun.com/archive/years/2006/1228062bar1.html> (last visited Feb. 6, 2008). Nifong was disbarred on June 16, 2007. See Duff Wilson, *Judge Says He Will Suspend Durham Prosecutor Immediately*, N.Y. TIMES, June 19, 2007, at A0.

¹³⁷ Society generally does not say that victims are probably lying when they say they were attacked in a non-sexual manner, or that they should have resisted more, even though false charges of rape are comparable to false charges of other violent crimes, with about two percent of cases proving false. See Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1028 (1991). That many rape cases do not go forward all the way to prosecution—often because of victims being deterred by fears of humiliation and harassment, something the federal ban advocated by this Note seeks to reduce by example and in practice—may confuse the public and lead them to believe that more rape victims are liars than the evidence suggests. *Id.* at 1028–29. In the Duke case, even before the evidence of Nifong's dishonesty was made public, but after a physical examination of the victim—an exotic dancer—revealed evidence consistent with blunt force trauma, Jonathan D. Glater & Duff Wilson, *Files from Duke Rape Case Give Details but No Answers*, N.Y. TIMES, Aug. 25, 2006, at A1, media pundits like Rush Limbaugh and Tucker Carlson referred to the complainant as a "ho[]" and a "crypto-hooker," Lynne Duke, *The Duke Case's Cruel Truth; Hateful Stereotypes of Black Women Resurface*, WASH. POST, May 24, 2006, at C01, suggesting that as a stripper, the woman consented to sexual relations simply by entering the private party held by the Duke lacrosse team. Though these pundits may have felt vindicated when the Nifong ethics charges came to light, such attitudes are extremely harmful to society, and evidence laws can reduce them. See Orenstein, *supra* note 3, at 664 ("[E]ven the procedural law of evidence[] affects how rape influences the general tenor of social belief.").

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assault cases promotes harmful attitudes about victims that further alienate and deter them from reporting crimes. Instead of continuing to allow such harm, the federal government—and hopefully every state, in turn—should embrace the enlightened attitude evident in *State v. Looney*: “We perceive no sound basis for distinction, in this matter, between cases involving sex offenses and cases involving other crimes, between male and female witnesses, youthful and adult witnesses, complaining witnesses and other witnesses, witnesses for the State and witnesses for the defendant.”¹³⁸

¹³⁸ 240 S.E.2d 612, 626 (N.C. 1978).