

IS A RAPE SHIELD LAW DESIRABLE FOR CHINA?

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Table of Contents

I. INTRODUCTION.....	86
II. RAPE IN CHINA.....	87
A. Official Statistics of Rapes in China.....	87
B. Dark Figures of Rapes in China.....	89
III. PROBLEMS BEHIND RAPE IN CHINA.....	91
A. Social Biases.....	91
B. Male Sexual Entitlement.....	92
C. Low Reporting Rate.....	93
D. Insufficient Legal Regulation.....	93
IV. RAPE SHIELD LAWS IN THE U.S.....	94
A. Rape in the United States.....	94
B. Federal Rape Shield Law.....	94
C. Its Practical Effects.....	96
V. RAPE SHIELD LAW FOR CHINA.....	97
A. Rape Shield Law's Value for China.....	97
B. China's Current Rules are Insufficient.....	101
VI. A RAPE SHIELD LAW FOR CHINA.....	103
A. Different Trial Systems are not Obstacles.....	103
B. Re-design a Rape Shield Law for China.....	104
VII. CONCLUSIONS.....	106

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Abstract

Due to conservative social views and the private nature of the offense, rape remains a rarely reported crime, with a high “dark figure” of unreported cases in China. Social biases as well as insufficient legal regulation contributed to this problem. The U.S. once faced a similar situation: the prevalence of rapes, low reporting rate, social biases against victims and massive intrusion into victim’s privacy. The establishment of a rape-shield law helped reduce sexual assaults and fight social biases. Though China and the U.S. have different legal mechanisms, China still has the necessity and possibility of building a similar law. For China, a rape shield law will help protect victims’ privacy, encourage reporting, regulate judicial proceedings and raise social awareness. Such law generally forbids the use of victim’s sexual history in rape cases, but it allows prior sexual history between the victim and defendant, and non-sexual character evidence to be beneficial at the present stage. With better protection, it can also encourage more victims to testify in court, which in return could promote defendants’ rights to confrontation.

I. INTRODUCTION

Rape infringes upon women’s right to sexual behavior.¹ In China, the attitude towards sex is relatively conservative and people tend to judge women’s sexuality harshly. There is an old Chinese saying: “Death by starvation is preferable to loss of chastity.”² Rape in China involves complex factors: legal relations, social influence, and evidence verification all bear some special features. The law of rape stresses social values and sets the protection of women’s safety as crucial social goals. The study of rape in China can thus contribute to developing legal reforms that can help reduce sexual assaults on women and bring benefit to our society.

This paper will first look at the official rape statistics in China. It reveals that rape cases registered by Public Security Organs (China’s police departments) are about 30,000 per year, a number relatively small compared to other crimes. However, due to conservative social views and the private nature of the offense, it remains rarely reported, with a high “dark figure” of unreported rapes.

¹ See ZHANG MINGKAI (张明楷), XINGFA XUE (刑法学) [CRIMINAL LAW] 867–68 (5TH ED. 2016).

² See CHENG HAO & CHENG YI (程颢、程颐), ER CHENG QUANSHU YI SHU ER SHI ER (二程全书·遗书二十二).

To get a better understanding of the real situation, this paper will look into a study by United Nations focusing on the prevalence of sexual assaults in several Asia-Pacific countries. The research results show that in China, one in five men admitted having committed rape, and nearly one in five women admitted being victim. The United Nations' survey, along with other surveys, shows the prevalence of rape in China is greater than what official statistics reveal.

This paper will study reasons behind the prevalence of rape in China: the social biases, the male sexual entitlement, the unwillingness of victims to report, and the insufficient legislation. To change this situation, it is important to learn from other countries' successful practice. The U.S. faced a similar situation from the 1970s to the early 1990s. The U.S. responded by revising rape shield law, at whose center is the basic concept that the rape victim's sexual history is generally inadmissible in sexual assault cases. This paper will analyze those problems in China and the U.S., and will assess the possibility for passing a rape shield law in China.

To this end, this paper used 'rape' as the cause of action and searched on *China Judgments Online* to see how victims' sexual histories were used in courts. Due to the high dark figure and the use of victims' sexual histories in courts, it is necessary for China to have a rape shield law. Meanwhile, there are many differences between the two countries' legal systems, so revising the rape shield law according to China's needs will help implement the law and curb the crime in China.

II. RAPE IN CHINA

Rape in China bears some special features. First, the law defines the victim as a female, unlike in other countries such as the U.S. or UK, in China, the law limits sexual assault victims to female. There are other statutory rules concerning sexual misbehaviour against males in China. Second, rape is considered a uniquely private crime due to the relatively conservative nature of Chinese society.

A. Official Statistics of Rapes in China

The official statistics of rapes released in China are incomplete at the moment: The *China Statistical Yearbook* recorded the number of criminal cases registered by the Public Security Organ from 1997 to 2015, and included other kinds of sexual assaults.

Table 1 Criminal Cases Registered in Public Security Organs 1997 to 2015³

Years	Total	Homicide	Injury	Robbery	Rape	Trafficking Women or Children	Theft	Fraud	Smuggling	Currency Related Crimes	Others
1997	1613629	26070	69071	141514	40699	6425	1058110	78284	1133	5422	186901
1998	1986068	27670	80862	175116	40967	6513	1296988	83080	2301	6654	265917
1999	2249319	27426	92772	198607	39435	7257	1447390	93192	1205	10047	331988
2000	3637307	28429	120778	309818	35819	23163	2373696	152614	1993	15863	575134
2001	4457579	27501	138100	352216	40600	7008	2924512	190854	1784	5780	769224
2002	4337036	26276	141825	354926	38209	5684	2861727	191188	1149	5238	710814
2003	4393893	24393	145485	340077	40088	3721	2940598	193665	1178	3151	701537
2004	4718122	24711	148623	341908	36175	3343	3212822	205844	955	2315	741426
2005	4648401	20770	155056	332196	33710	2884	3158763	203083	925	1858	739156
2006	4744136	17973	162458	315682	32553	2565	3216293	218726	974	1814	775098
2007	4807517	16119	167207	292549	31883	2378	3268670	239698	1107	1755	786151
2008	4884960	14811	160429	276372	30248	2566	3399600	273763	1042	1345	724784
2009	5579915	14667	172840	283243	33286	6513	3888579	381432	1200	4758	793397
2010	5969892	13410	174990	237258	33696	10082	4228369	457350	1105	1565	812067
2011	6005037	12013	165098	202647	33336	13964	4259482	484813	1350	688	831646
2012	6551440	11286	163620	180159	33835	18532	4284670	555823	1575	2194	1299746
2013	6598247	10640	161910	146193	34102	20735	4506414	676771	1853	768	1038861
2014	6539692	10083	140709	111187	33417	16483	4435984	785306	2083	899	1003541
2015	7174037	9200	132242	86747	29948	9150	4875561	1049841	2199	992	978157

In these cases, rape accounts for only a small percentage of all types of cases: from 2.52 percent in 1997 to 0.42 percent in 2015. The total number of criminal cases collected by the Public Security

³ Liu Hong (刘洪) et al. eds., *Gong'an Jiguan Li'an De Xingshi Anjian ji Goucheng* (公安机关立案的刑事案件及构成) [*Criminal Cases filed by Public Security Organs and Their Compositions*], in *ZHONGGUO TONGJI NIANJIAN 2016* (中国统计年鉴2016) [China Statistical Yearbook 2016].

Organ has increased rapidly from 1,613,629 in 1997 to 7,174,037 in 2015, while the number of rape cases decreased slightly over the years from 40,699 in 1997 to 29,948 in 2015. From the statistics above, it seems that rape is not a prevalent offense in China.

The statistics are collected according to the number of rape cases accepted by courts every year. According to the *Law Yearbook of China* the estimated number is around 22,900 per year.⁴ The conviction rate of all criminal cases is over 99 percent in 2015,⁵ although for rape cases, the complete official statistics have not yet been disclosed. Only one news article suggests an estimate. “From 2013 to 2015, courts all around the country heard about 66,736 rape cases, in which 62,551 offenders were convicted.”⁶ setting the conviction rate of rape is around 93.7 percent: lower than the average conviction rate.

B. Dark Figures of Rapes in China

Due to the sensitive nature of rape, dark figures are bound to be high. One reason is that many victims are unwilling to report. Another reason is that cases collected by the Public Security Organ cannot represent the whole picture of the crime in China, and some police departments have an “open secret”: they won’t put a case on record until it is solved.⁷ For this reason, it is hard to trace a case.

In such a context, dark figures are inevitable and an acceptable way to estimate the prevalence of rape is through conducting surveys, with a sample of a certain number of people. Despite the limitations of this method -- sample choice, sample size, survey design and so on -- it could help understand the real situation better.

In 2013, the United Nations released a survey on men’s use of violence and women’s victimization in several Asia-Pacific countries.⁸ The survey in China was conducted in Eixian County⁹.

⁴ Sun Wanzhong (孙琬锺) *et al.* eds., *Xingshi Shenpan Yi* (刑事审判(一)) [*Criminal Trial I*], in *ZHONGGUO FALU NIANJIAN* (中国法律年鉴) [*LAW YEARBOOK OF CHINA*] 118-20 (2002) (the average number is an estimate number based on data 2002-2015’s Law Yearbook of China provided).

⁵ ZHUGE PINGPING (诸葛平平) *et al.* eds., *Zhongguo Falu Nianjian* (中国法律年鉴) [*LAW YEARBOOK OF CHINA*] 1297 (2016).

⁶ Zuigaofa Jiang Yanjiu Zhiding Fan Jiabao Fa Sifa Jieshi (最高法院将研究制定反家暴法司法解释) [The Supreme Court Will Study the Formulation of Judicial Interpretations Regarding Anti-Domestic Violence], *ZHONGHUA QUANGUO FEN LIANHEHUI* (中华全国妇女联合会) [*CHINESE WOMEN’S LEAGUE*], http://www.women.org.cn/art/2016/3/9/art_22_13375.html (last updated Mar. 9, 2016).

⁷ Xu Haibo(徐海波), *Gong'an Jiguan Xingshi Li'an Zhidu Yanjiu* (公安机关刑事立案制度研究) [*Research on Public Security Bureau Criminal Filing System*] 14 (Mar. 4, 2012) (unpublished J.M. thesis, Shandong University).

⁸ EMMA FULU *ET AL.*, WHY DO SOME MEN USE VIOLENCE AGAINST WOMEN AND HOW CAN WE PREVENT IT 11–21 (2013), available at <https://www.api-gbv.org/resources/why-men-use-violence/> (last visited Dec. 10, 2017).

⁹ WANG XIANGXIAN, FANG GANG & LI HONGTAO, RESEARCH ON GENDER-BASED VIOLENCE AND MASCULINITIES IN CHINA: QUANTITATIVE FINDINGS 7–8 (2013),

Among those male interviewees, 21.8% admitted to having either attempted or committed sexual offences in their lifetime: including forcing sexual intercourse, attempting, gang rape, and taking advantage of women when they were intoxicated or drugged¹⁰. In the survey, 17.9% of women admitted having been raped¹¹, with only 25% of the offenders bearing legal consequences¹². In comparison with other Asia-Pacific countries, the situation looks grim: Papua New Guinea reports the highest rate— 62.4%, with China ranking second at 22.2%, which is higher than Cambodia's 20.4%, Sri Lanka's 14.5%, and Bangladesh's 14.1% in rural areas.¹³ On average, 32.5% of the offenders were arrested and 22.9% were imprisoned, while in China the numbers are thinned down to 24.9% arrests and 15.6% convictions.¹⁴

In *Sexual Behavior and Relation in Contemporary China*, when asked: "Have you ever had sex against your will (including within marriage)?", 25% of female interviewees said yes while 1.5% of women admitted ever being threatened, beaten or forced to perform sexual intercourse: this data represents 6,300,000 Chinese women may have been victimized.¹⁵ Currently there are many other surveys concerning the prevalence of sexual assaults in China being carried out¹⁶: the data collected highlight the fact that rape in China is a more severe problem than it seems to be at first glance. A high dark figure

http://www.partners4prevention.org/sites/default/files/resources/china_quantitative_executive_summary.pdf (A sample of 1103 women and 1017 men aged from 18 to 49 were chosen through multi-stage random selection. Eixian was not chosen randomly but because it can help complete this complicated survey and can represent China's general situation. To protect the privacy of interviewees, the real name of the county is not published. According to the 2010 National Population Census, Eixian's population was 1,400,000, of which 89% resided in rural areas, and the majority of the population was Han. According to the 2010 National Economic Census, the average annual income in Eixian was 21,000 yuan per person for urban residents and 11,000 yuan for rural residents, which was a little higher than the average national level).

¹⁰ *Id.* at 27.

¹¹ *Id.* at 27.

¹² *Id.* at 29.

¹³ FULU ET AL., *supra* note 8, at 40.

¹⁴ FULU ET AL., *supra* note 8, at 45.

¹⁵ PAN SUIMING (潘绥铭), DANGDAI ZHONGGUOREN DE XINGXINGWEI HE XINGGUANXI (当代中国人的性行为 and 性关系) [SEXUAL BEHAVIOR AND RELATION IN CONTEMPORARY CHINA] 304 (2004).

¹⁶ Disanqi Zhongguo Funü Shehui Diwei Diaocha Ketizu (第三期中国妇女社会地位调查课题组) [Project Group of the Third Survey on the Status of Chinese Women], *Disanqi Zhongguo Funü Shehui Diwei Diaocha Zhuyao Shuju Baogao* (第三期中国妇女社会地位调查主要数据报告) [Executive Report of the 3rd Survey on the Status of Chinese Women], FUN YANJIU LUNCONG (妇女研究论丛) [COLLECTION WOMEN'S STUD.] 5, 14 (2011). The All China Women's Federation and the National Bureau of Statistics conducted a survey in 2010. They invited over 29000 people to participate in the survey and received 26171 valid questionnaires (51% were women): "24.7% of married women have been maltreated by their spouses in different ways, including humiliation, abuse, physical assault, physical restraint, financial restraint, sex without consent, etc." [hereinafter *Survey on the Status of Chinese Women*].

and low reporting rate mask the crime's prevalence. In the meantime, the arrest rate and conviction figures are comparatively small.

III. PROBLEMS BEHIND RAPE IN CHINA

There are mainly three problems. First, the surveys prove that sexual offences are more prevalent than it seems to be. The second is the low reporting rate. The United Nations' survey shows only 8% of victims reported to the police.¹⁷ Lastly, in China, the arrest and imprisonment rates are low, undercutting the deterrence of the law. There are four main reasons behind these problems.

A. Social Biases

From a historical perspective, Chinese society is deeply influenced by traditional biases and takes women's sexual autonomy lightly. A survey shows that in China, previously, 61.3 percent of men while only 3.8 percent women did. The difference lies not in sexual needs, but in the notion that women are "passive subjects" during intercourse and thus dare not cross the line.¹⁸

"Chastity" is, historically speaking, the product of patriarchal society: it is a concept used to oppress women, and it still carries influence in China's society. In the past, women were subordinate to men and considered as property: raping a woman was seen as damaging a man's property.¹⁹ In the Yuan Dynasty, the law provided "those who rape a married woman shall be sentenced to death; those guilty of rape of a woman without a husband shall be beaten with wooden staves 170 times"²⁰. The drastic difference between the punishments for raping a married woman and an unmarried one emphasize on the protection of males' property. Meanwhile, a woman's chastity had a significant influence on inheritance, as "female chastity is required to ensure ... the issuance of property through patrilineage. ... Patrilinear culture required chastity so as to ensure the direct transmission of inheritance."²¹ Hence, society in the past held in high regard women's chastity.

¹⁷ FULU ET AL., *supra* note 8, at 71.

¹⁸ PAN, *supra* note 15, at 297. Sample size: around 5,000 interviewees. Sample size: around 5,000 interviewees.

¹⁹ Katherine M. Schelong, *Domestic Violence and the State: Response to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. REV. 79, 85-87 (1994).

²⁰ Wei Dong (魏东) & Ni Yonghong (倪永红), *Qiangjianzui De Wenhua Xue Fenxi* (强奸罪的文化学分析) [On the Cultural Analysis of Rape], 10 GUOJIA JIANCHAGUAN XUEYUAN XUEBAO (国家检察官学院学报) [J. NAT'L PROSECUTORS C.] 33, 33 (2002).

²¹ Joy Kyunghae Lee, *The Commodification of Virtue: Chastity and the Virginal Body in Richardson's "Clarissa"*, 36 (1), EIGHTEENTH CENTURY: THEORY INTERPRET 38, 45 (1995); MICHAEL MCKEON, *THE ORIGINS OF THE ENGLISH NOVEL 1600-1740* 157 (Baltimore eds., JHU Press 2002).

Today, women's status is significantly improved; however, outdated ideas still plague people. In an online survey, when asked "What would you do if you find out that your girlfriend had sex before," 19.2percentmale interviewees chose "break up with her" and 46.5percent chose "I will be bothered by this situation."²² People's attitude towards chastity is still traditional to some extent. Besides, people's attitudes towards sex are generally more liberal in urban areas than in rural areas. to rape victims, on the one hand, people show sympathy towards, rape victims; on the other hand, some people still secretly discriminate against rape victims. Rape victims have to endure humiliating remarks as well as bitter experience²³. Being a victim of sexual assault can affect relationships, marriages, employments and social reputation for years.²⁴ Meanwhile, our society tends to blame women for being raped. This is highlighted in cases of sexual assault: a woman's history of being raped may be taken as proof of her consent to the "rape", or may be evidence of her being a prostitute.²⁵ If a victim dresses provocatively, acting flirtatious, drinking or using drugs, people would think she was at fault; even being socially active, going out at night, going to unsafe places would be considered indiscreet²⁶.

B. Male Sexual Entitlement

Male sexual entitlement is a critical reason behind rape. In the United Nations' survey of rapists, most men choose "sexual entitlement" as their motive, believing "men are owed sex on account of their maleness,"²⁷ and some others use rape as a way to express anger or as punishment. Male sexual entitlement and their physical ability to force women to submit have made rape a common crime. As Katherine Baker wrote, ordinary men—not only perverted men—rape. Rape is not just about sex; it is a means of control and revenge. If men know they will not be punished, more men will

²² Xiang Chuanjun (项传军), *Jiulinghou Daxuesheng Xingxinli Zhuangkuang De Diaocha Yanjiu* (90后大学生性心理状况的调查研究) [*Investigation about Sexual Mentality of 90s' College Students*], ZHONGGUO JIANKANG XINLIXUE ZAZHI (中国健康心理学杂志) [CHINA J. HEALTH PSYCHOL.] 129, 130 (2012). 2980 sophomores from a University in Guangdong Province participated in the survey.

²³ Wei & Ni, *supra* note 20.

²⁴ Yao Jianlong (姚建龙), *Dui Woguo Shouli Zhencao Sunhai Peichang'an De Fali Pingxi* (对我国首例贞操损害赔偿案的法理评析) [*An analysis of the legal theory of the first case of compensation for chastity in China*], FAXUE (法学) [L. SCI.] 79, 80 (2001).

²⁵ Tang XX Qiangjian An (唐XX强奸案) [Defendant Tang's Rape Case] (Chinalawinfo), Mar. 31, 2014, Yunnansheng Honghe Hanizu Yizu Zizhizhou Zhongji Renmin Fayuan (云南省红河哈尼族彝族自治州中级人民法院) [Interm People's Ct. of the Honghe Hani & Yi Autonomous Prefecture of the Honghe, Yunnan] [hereinafter *Tang's Case*] (Tang was convicted by the court).

²⁶ Chenmou Qiangjian An (陈某强奸案) [Defendant Chen's Rape Case] (Chinalawinfo), Aug. 18, 2014, Zhejiangsheng Xinchangxian Renmin Fayuan (浙江省新昌县县人民法院) [Xinchang People's Ct., Zhejiang] (Chen was convicted by the court).

²⁷ WANG, FANG & LI, *supra* note 9, at 28.

rape.²⁸ The same is true in China. *The Third Survey on Social Status of Women in China* showed sex without consent is common in marriage. Some men ignore their wives' sexual autonomy and coerced them to have sexual intercourse.²⁹ Men think they have sexual rights, especially to their wife. They can have sex even without consent. Sexual entitlement makes some men ignore women's wishes and do whatever they want to fulfill their sense of sexual entitlement.

C. Low Reporting Rate

In China, many rape victims are not aware of their rights. Especially in cases of acquaintance rape, some victims do not even realize they have been offended. Meanwhile, many women are affected by traditional biases and regard being raped as shameful. Besides, many victims are unwilling to report due to social pressure and the humiliation they have to suffer in the judicial process.³⁰ Rape is a painful experience which most victims want to keep private because exposing it would have an enormous impact on their lives. Social pressures would unduly burden them. Lastly, fear of retaliation from the offender has made some victims remain silent.

D. Insufficient Legal Regulation

China has not established comprehensive evidence rule dealing with rape cases. Insufficient legal protection has made victims unwilling to report or testify, thus making it even harder to find out the truth. Without legal protection, the victim's sexual history will be dug out and introduced as evidence against her in courts. This would set back the judicial system in several ways: the first is that fewer victims will be willing to report due to the possible exposure of their privacy; the second is that fewer victims will testify in court. They use written testimony in court and leave the defense with no one to confront or cross-exam. And insufficient legal regulation fails to raise social awareness. Instead of using legal reform to fight cultural bias and encourage victims to defend their rights, Chinese society has accepted the unwillingness of most women to report. To end the vicious cycle, we need to build rules to help protect victims' privacy, advocate defendants' rights and raise social awareness.

²⁸ Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 613 (1997).

²⁹ Survey on the Status of Chinese Women, *supra* note 16.

³⁰ Yang Jiehui (杨杰辉), *Bei Qishi De Beihairen: Xingshi Susong Zhong De Qiangjian'an Beihairen* (被歧视的被害人: 刑事诉讼中的强奸案被害人) [*Discriminated Victims: Victims in Rape Cases within the scope of criminal procedural*], XINGSHI FA PINGLUN (刑事法评论) [CRIM.L. REV.] 391, 403 (2012).

IV. RAPE SHIELD LAWS IN THE U.S.

There are complicated reasons behind rape. Laws that help reduce rapes and encourage victims to report are of great importance. The U.S. sets a good example of decreasing rapes and protecting rape victims through legal reform, from whose efforts China can borrow valuable ideas to solve its own problems.

A. Rape in the United States

From the 1970s to the early 1990s, rape became a far more prevalent crime in the U.S. According to the Federal Bureau of Investigation's *Uniform Crime Report*, the estimated number of sex offences known to law enforcement increased rapidly from 51,400 in 1973 to 106,014 in 1993.³¹ The Bureau of Justice Statistics' survey showed that from 1980, "the number of prisoners sentenced for violent sexual assault other than rape increased by an annual average of nearly 15 percent—faster than any other category of violent crimes and faster than all others except drug trafficking."³² In 1990, more women in America were raped than at any other time in history. The number of reported rapes exceeded 100,000 for the first time.³³ The number of rapes was increasing in America while the rate of reporting stayed low. The Senate Judiciary Committee's 1990 report showed that only 7 percent of rape cases against females were reported. Meanwhile, the reporting rate for robbery was 53 percent, assault 46 percent, and burglary 53 percent. The Senate committee contacted more than half of all rape crisis centers in the country: The numbers they gathered were higher than the official figures. These figures challenged the idea that the rape rate is increasing because more women are reporting.³⁴

B. Federal Rape Shield Law

In 1994, Congress passed the *Violence against Women Act*, in which lawmakers revised FRE 412, which became what we now call

31 *Uniform Crime Reporting Statistics*, BUREAU OF JUST. STAT., <https://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm> (last updated Jan. 26, 2017) (choose "United States-Total" in column a; Choose "Number of violent crimes" in column b; choose "1973" to "1993" in column c, and click "Get Table" to search).

32 LAWRENCE A. GREENFELD, AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT: SEX OFFENSES ANTI OFFENDERS (Jan. 1997), <http://www.bjs.gov/content/pub/pdf/soo.pdf> (lasted visited Dec. 10, 2017).

33 US Senate, Committee on the Judiciary, *Violence against Women: Victims of the System: Hearing on S.15. Before the Comm. on the Judiciary*, 102nd Cong. 196 (1991), <http://library.niwap.org/wp-content/uploads/2015/VAWA-Lghist-SenateI-4.9.91.pdf> (lasted visited Dec. 10, 2017).

34 *Id.* at 194–96. (For example, in 1990, Louisiana reported an increase in rapes of 0.3%, while the state rape crisis center reported an increase of 39%; Michigan reported a 4.7% increase, while the rape crisis center reported a 36% increase.)

the “Federal Rape Shield Law”. Today, the rule prohibits “(1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim’s sexual predisposition.”³⁵ The basic concept of rape shield laws is that “lawyers could no longer question the motives of a complainant or her lack of consent to intercourse by introducing evidence of her sexual history or her sexual reputation.”³⁶ The prosecutor does not shoulder the burden of proof of a victim’s sexual character, for the victim’s sexual history is generally inadmissible according to rape shield law. If the defense intends to offer evidence under 412(b), certain procedures must be followed.³⁷ Rape shield laws are part of the character evidence rules. FRE 404(a) (1) prohibits the admission of a person’s character “to prove that on a particular occasion the person acted in accordance with the character trait.”³⁸ However, before the establishment of rape shield law, character evidence rules permit a victim’s sexual history. Rape shield law ended the conflict between the admission of a victim’s sexual history and the core spirit of character evidence rules. Along with FRE403, evidence rules reduce unfair prejudice against a victim’s sexual history.³⁹ The Congress hoped this rule would protect victims’ privacy, encourage reporting, decrease rapes, increase convictions and change social biases.

There is a concern about the rape shield law: the possible violation of the defendant’s Sixth Amendment rights. It is clear that the law limits what the defendant can use; however, this does not necessarily render this rule unconstitutional. First, excluding a victim’s sexual history is consistent with the spirit of *Federal Rules of Evidence*. A victim’s sexual history is not closely relevant to her credibility and sexual history is not equal to present consent. Also, sexual reputation is not the reputation for truthfulness or untruthfulness. Thus, it is not the reputation or opinion evidence allowed by FRE 608 that impeach a victim’s credibility.⁴⁰ Meanwhile, according to FRE403, its probative value is generally outweighed by unfair prejudice. Second, defendant’s rights can be balanced with other values in criminal procedure. In *Delaware v. Van Arsdall*, the court stated: “trial judges retain wide latitude...to limit reasonably a criminal defendant's right to cross-examine a witness ...based on concerns about, among other things, harassment,

³⁵ FED. R. EVID. 412.

³⁶ Peter M. Hazelton, *Rape Shield Laws: Limits on Zealous Advocacy*, 19 AM. J. CRIM. L. 35, 36–37 (1991).

³⁷ FED. R. EVID. 412.

³⁸ FED. R. EVID. 404.

³⁹ FED. R. EVID. 403.

⁴⁰ FED. R. EVID. 608.

prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."⁴¹ The Supreme Court reasoned in *Michigan v. Lucas*: rape shield law "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy."⁴² Third, there are several exceptions that protect the defendant's rights. FRE 412 allows two specific exceptions; besides, it permits "evidence whose exclusion would violate the defendant's constitutional rights."⁴³ Judges still have leeway to admit certain evidence if it is necessary to protect the defendant's rights.

C. Its Practical Effects

After implementing the law for years, rapes in the U.S. did decrease. First, "from 1995 to 2005, the total rate of sexual violence committed against U.S. female residents aged 12 or older declined 64 percent from a peak of 5.0 per 1,000 females in 1995 to 1.8 per 1,000 females in 2005."⁴⁴ (Including completed, attempted, or threatened rape or sexual assault.) Second, reporting rates changed. The Bureau of Justice's report states that in 1995 28 percent of rapes or sexual assaults against females were reported. It rose to a peak of 59 percent in 2003. Between 2004 and 2010, the number went up and down. In 2010, the rate stood at around 32 percent.⁴⁵ Third, the rape shield law influenced social ideas. From 1994 to 2010, among reported rape cases, victims' self-reporting rate increased from 50 percent to 64 percent.⁴⁶ This increase reflected victims' willingness to resort to authority. There were more reports of rapes committed by intimates as well.⁴⁷ Due to the complexity of analyzing factors that influence the crime rate, this paper will not try to prove a direct correlation between the decrease of rapes and the rape shield law. However, given the legislative aims of the rape shield law, the decreased rape numbers and the increased reporting rates after its implementation, we can safely and reasonably presume that the law has helped reduce rapes in the U.S.

⁴¹ *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

⁴² *Michigan v. Lucas*, 500 U.S. 145 (1991).

⁴³ FED. R. EVID. 412.

⁴⁴ Michael Planty *et. al*, *Female Victims of Sexual Violence, 1994-2010*, BUREAU OF JUST. STAT. (2016), <https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> (last visited Dec. 9, 2017).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ For more details, see *NCVS Victimization Analysis Tool*, BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm?ty=nvat> (last visited Dec. 9, 2017).

V. RAPE SHIELD LAW FOR CHINA

A. Rape Shield Law's Value for China

To understand whether China should adopt a rape shield law, we should first analyze whether the U.S. and China face similar problems. Then we can discuss the possibility and necessity of making a Chinese rape shield law.

Rape in the U.S.: from the 1970s to the early 1990s, rape became increasingly prevalent in the U.S. with low reporting rate and high dark figure clouding the society. Behind these problems were society's biases against rape. Moreover, victims' sexual histories were used to attack their credibility or prove consent.⁴⁸ The prosecutor sent the defendant to a criminal trial, while the defense sent the victim to a moral trial. Hence rape victims faced humiliation in the judicial process.⁴⁹ The rape shield law was adopted to help reduce the invasion of victims' privacy. It stops arguments about the low probative value of certain evidence, thus saving judicial resources.

These issues are also challenging China; some might be even more severe. Chinese society is deeply influenced by traditional values: people's attitude towards sex is more conservative than in many western countries, and the society judges women's unchaste character more harshly. It is common to see the defense attack a victim's sexual history in court,⁵⁰ which may unduly influence judges and people's jurors.

To get a better understanding of how the parties use women's sexual histories or characters in rape cases, I searched for cases involving women's sexual reputations on *China Judgments Online*. China has very subtle and not unified expressions for women's sexual reputation. I chose "rape" as a cause of action and used the following keywords: "sexual lifestyle" (作风) (33 search results), "chaste" (检点) (7 search results), "sexual relationship" (男女关系) (87 search results), "lascivious" (随便) (61 search results), "self-disciplinary sexual lifestyle" (正派) (6 search results), "reputation" (名声) (40 search results). I found 29 cases concerning the use of victims' sexual histories or characters. In 15 cases, the defense attacked victims' sexual histories; none of those victims appeared or testified in court. In other 14 cases, victims' good reputation or chastity were supported by evidence; two victims appeared in court

⁴⁸ SUSAN ESTRICH, *REAL RAPE* 5 (1988).

⁴⁹ Vivian Berger, *Man's trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 13-14 (1977).

⁵⁰ *Tang's Case*, see *supra* note 26.

(case 8 and case 11 in the table below), and one victim testified in court (case 11).⁵¹

Table 2 Cases Concerning Victims' Sexual Reputations/
Histories

No.	Case Number	Victims' Sexual Reputations/ Histories Mentioned in the Judgments
1	(2014) 红中刑二终字第 26 号	It is prostitution. The victim is lascivious.
2	(2015) 秀刑初字第 380 号	The victim has an unchaste reputation.
3	(2013) 靖刑初字第 3 号	<i>The victim has a chaste reputation.</i>
4	(2015) 新刑初字第 0141 号	The victim's occupation suggests that she might be a prostitute.
5	(2014) 东刑初字第 1210 号	The victim has an unchaste reputation.
6	(2014) 紫刑初字第 00043 号	<i>There is no bad comment concerning the victim's chastity.</i>
7	(2015) 汀刑初字第 30 号	<i>There is no bad comment concerning the victim's chastity.</i>
8	(2015) 双刑初字第 262 号	<i>There is no bad comment concerning the victim's chastity.</i>
9	(2016) 陕 1024 刑初 89 号	<i>There is no bad comment concerning the victim's chastity.</i>
10	(2015) 旬阳刑初字第 00012 号	<i>There is no bad comment concerning the victim's chastity.</i>
11	(2017) 苏 06 刑终 65 号	<i>The victim is decent and chaste.</i>
12	(2015) 渭中刑一终字第 00045 号	The defendant heard that the victim was a

⁵¹ The cases were collected on Zhongguo Caipan Wenshu Wang (中国裁判文书网) [CHINA JUDGMENTS ONLINE], <http://wenshu.court.gov.cn/> (last visited Dec.8, 2017). For readers' reference, in these 29 cases, all defendants are convicted. This is hardly surprising for that the standard for prosecution is pretty high and the overall conviction rate of criminal cases is around 99%. Article 172 of CPL states: "When a People's Procuratorate considers that the facts of a criminal suspect's crime have been ascertained that the evidence is reliable and sufficient and that criminal suspect shall be subject to criminal liability it shall make a decision to initiate a prosecution and shall, in accordance with the provisions for trial jurisdiction, initiate a public prosecution in a People's Court." This standard is very close to courts' conviction standard. So if a case can pass Public Security Organ's investigation, People's Procuratorate's review and finally reach the court, the Prosecution usually has a very solid case. However, though in 15 cases victims' chastity or reputations were attacked; only in 4 cases courts addressed this issue.

		lascivious woman.
13	(2014)鄂黄冈刑终字第 00059 号	<i>There is no bad comment concerning the victim's chastity.</i>
14	(2014)陇刑一初字第 24 号	The victim has an unchaste reputation.
15	(2016)鲁 17 刑终 451 号	The victim has an unchaste reputation, she has many lovers.
16	(2017)川 15 刑终 140 号	<i>The victim is a decent woman with chaste reputation.</i>
17	(2015)本县刑初字第 00148 号	<i>The victim is a decent woman with chaste reputation.</i>
18	(2015)黔义刑初字第 00431 号	<i>The victim is a decent woman with chaste reputation.</i>
19	(2016)苏 0111 刑初 712 号	The victim has an unchaste reputation.
20	(2012)浙温刑终字第 671 号	The victim's unchaste behaviors lead the defendant on.
21	(2015)红中刑二终字第 12 号	The victim's a lascivious woman. On that day her unchaste behaviors lead the defendant on.
22	(2016)粤 04 刑终 445 号	The victim's unchaste behaviors lead the defendant on.
23	(2015)秦刑终字第 236 号	The victim is the mistress of another man.
24	(2014)万刑初字第 173 号	The victim seems like a lascivious woman.
25	(2016)赣 0732 刑初 10 号	Another man said the victim is a lascivious woman and he has had sex with her before.
26	(2015)衢江刑初字第 442 号	<i>The victim is not a lascivious woman.</i>
27	(2014)绍新刑初字第 210 号	The victim seems like a lascivious woman.
28	(2014)穗中法刑一终字第 192 号	<i>The victim is an innocent woman and she is not a lascivious woman.</i>
29	(2014)赣中刑再终字第 1 号	<i>The victim has a self-disciplinary sexual lifestyle.</i>

In China's rape trials, the defendant usually attacks the victim's sexual history/character. Rape victims rarely attend court proceedings, especially when their sexual histories are attacked. Allowing the defense to attack women's sexual character or introduce women's sexual histories in court makes victims less willing to come up testifying in court and pursue justice. Meanwhile, these factors would infringe upon the defendant's right to a fair trial in return. Therefore, providing comprehensive evidence rule for rape case is necessary in China.

Then we will turn to the next question: is a rape shield law consistent with China's legal practice and can such a law fit into China's legal system? China once had a rule similar to a rape shield law. The Supreme Court of the People's Republic of China, Supreme People's Procuratorate and Ministry of Public Security released a document in 1984 stating that "It is prohibited to use women's sexual lifestyle/reputation to decide whether it is against women's will in rape cases. Forcible sex with women with unchaste reputation/sexual history also constitutes rape."⁵² However, this rule was abolished along with all other rules in that document in 2013. Whether China is prepared to launch a new law or not is still unclear. In practice, if the defense attacks victims' sexual history/reputation, the prosecution would object on the ground of irrelevance and the court will take it into consideration. In "Defendant Qin's rape trial," the defendant raised the issue that the victim is a prostitute. However, the court clearly reasoned in its written judgment that "[e]very woman has sexual autonomy, the right to decide her sexual behavior. Her occupation, reputation or sexual history shall not influence her legal rights ... Without consent, no one can forcibly have sex with her ... The victim's moral character does not change the nature of defendant's behavior. Hence, the defendant's argument that the victim is a sex worker is inadmissible in court."⁵³ From the examples

⁵² Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Gong'anbu Yinfa Guanyu Dangqian Banli Qiangjian Anjian Zhong Juti Yingyong Falü De Ruogan Wenti De Jieda De Tongzhi (最高人民法院、最高人民检察院、公安部印发《关于当前办理强奸案件中具体应用法律的若干问题的解答》的通知) [Notice of the Sup. People's Ct., Sup. People's Proc. & Ministry of Public Security on Issuing Explanations on Several Issues concerning the Application of Law in the Trial of Cases regarding Crimes of Rapes] (promulgated by Sup. People's Ct., Sup. People's Proc. & Public Security Organ, Apr. 26, 1984, effective Apr. 26, 1984, invalidated Jan. 18, 2013) (Chinalawinfo). This document is abolished by Decision of the Supreme People's Court and the Supreme People's Procuratorate on Abolishing Some Judicial Interpretations and Documents of a Judicial Interpretation Nature that Were Formulated and Issued from January 1, 1980 to June 30, 1997. However, "Jieda" (Answer) does not belong to any specific category of formal judicial interpretations, so the nature of this document should be considered as "documents of a judicial interpretation nature." Before it was abolished, some courts cited this document.

⁵³ Qinmou Fan Qiangjianzui An (秦某犯强奸罪案) [Criminal Ruling on Defendant Qin's Rape Case] (Chinalawinfo), May 15, 2015, Jiangsusheng Wuxi Gaoxin Jishu Kaifaqu Renmin Fayuan (江苏省无锡高新技术产业开发区人民法院) [Wuxi Gaoxin Jishu Kaifaqu People's Ct., Jiangsu].

above, we can see a woman's sexual history or her reputation has weak relevance in rape cases. However, China is not a case law country; rules are needed to regulate all cases. Though China's evidence rules are unsystematic at present, there are rules regulating evidence, such as relevancy. With the relevancy requirement, a rape shield law can function well to some extent and the law in return will make the irrelevancy of sexual history more clear. Besides, China is building its own evidence rules step by step, adding a brick will help build a wall. Building a well-rounded evidence rule to regulate rape cases can help clarify our legal practice.

B. China's Current Rules are Insufficient

There are two issues that need to be considered before reaching a conclusion whether China needs a rape shield law: the first is that cases involving state secrets or private affairs of individuals shall not be heard in public; the second is that victims rarely attend court trials. Some people think those two elements are sufficient to protect rape victims; thus, it is unnecessary to adopt a rape shield law in China. Do they provide enough protection?

First, the clause "private affairs of individuals shall not be heard in public" should not block the influence of sexual history evidence on judges. Article 183 of the *Criminal Procedure Law of the People's Republic of China* indicates, "Cases of first instance in a People's Court shall be heard in public. However, cases involving state secrets or private affairs of individuals shall not be heard in public."⁵⁴ Rape cases involving private affairs of individuals and thus they shall not be heard in public. This rule helps reduce victims' psychological pressure and protect their privacy. Nevertheless, this rule only protects victims from external scrutiny. It cannot achieve other aims of rape shield law; it cannot, for example, keep the victim's sexual history evidence from judges and thus cannot terminate improper influences this evidence could have left on judges'. Therefore, this rule cannot achieve rape shield law's aims.

The other matter concerns victims' role in court as witnesses. According to an empirical study by Professor Yanyou Yi, in practice, the percentage of court appearances of witnesses is only around 25 percent in China.⁵⁵ The rate is low compared to the U.S. In the U.S., if a rape victim refuses to testify in court, the case is very likely to be dismissed. However, in China, rape victims rarely testify in court.

⁵⁴ Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law of] (promulgated by the Nat'l People's Cong., Mar. 14, 2012, effective Jan. 1, 2013) (Chinalawinfo).

⁵⁵ Yi Yanyou (易延友), *Zhengren Chuting Yu Xingshi Beigaoren Duizhiquan De Baozhang* (证人出庭与刑事被告人对质权的保障) [Witnesses' Court Appearances and Guaranteeing the Right of Defendants in Criminal Cases to Confrontation], 31 Soc. Sci. China 36, 36 (2010).

There is even a “tradition” of not notifying victims of attending trials. A 1982 legal document stated, “[i]f rape victims are unwilling to attend trials, courts can choose not to notify them.”⁵⁶ This rule was not abolished until 2013.⁵⁷ Therefore, they do not have to face offenders and see their sexual history exposed. It seems sufficient to protect victim’s privacy. As a result, there is no need to adopt a rape shield law.

In fact, it is wrong to reason in that way. First and foremost, when evidence is in dispute, witness testifying in court should become a routine rather than an exception. It is wrong to use this abnormal phenomenon as an excuse to refuse legal reform. Meanwhile, China is proposing a more “trial-centric” criminal process, which requires building well-rounded rules concerning witness cross-examination and increasing witnesses’ testify rate in court.⁵⁸ Adopting a rape shield law can be a part of evidence rules regulating cross-examination. Also, without their sexual history being attacked, victims will have less concerns about testifying in court. Second, a rape shield law will help advocate defendants’ right to confrontation in China. In the U.S., rape shield law limited what the defense can use and defendants’ right to confrontation. However, it is a different scenario in China. Without a rape shield law, the defense’s introduction of victims’ sexual history in court would invade victims’ privacy. Without sufficient legal protection, this would make victims unwilling to testify. From those cases in *China Judgments Online* we can see that when a victim’s sexual character was attacked, she is more reluctant to appear in court. Victims use written testimony and leave the defense no witness to confront. A rape shield law would provide better court proceeding and evidence

⁵⁶ Zuigao Renmin Fayuan & Zuigao Renmin Jianchayuan Guanyu Shenli Qiangjian Anjian Yinggai Shengzhong Chuli Beihairen Chuting Wentu De Tongzhi (最高人民法院、最高人民检察院关于审理强奸案件应慎重处理被害人出庭问题的通知) (Notice of the Sup. People’s Ct., Sup. People’s Proc. on Cautiously Handling the Issues of Victims’ Appearance in Court When Trailing Crimes of Rapes) (promulgated by Sup. People’s Ct. & Sup. People’s Proc., Nov. 1, 1982, effective Nov. 1, 1982, invalidated Jan. 18, 2013) (Chinalawinfo).

⁵⁷ Zuigao Renmin Fayuan & Zuigao Renmin Jianchayuan Guanyu Feizhi 1980.01.01-1997.6.30 Qijian Zhifa De Bufen Sifa Jieshi He Sifa Jieshi Xingzhi Wenjian De Jueding (最高人民法院、最高人民检察院关于废止1980年1月1日至1997年6月30日期间制发的部分司法解释和司法解释性质文件的决定) [Decision of the Sup. People’s Ct. and Sup. People’s Proc. on Abolishing Some Judicial Interpretations and Documents of a Judicial Interpretation Nature that Were Formulated and Issued from January 1, 1980 to June 30, 1997] (promulgated by Sup. People’s Ct. & Sup. People’s Proc., Dec. 19, 2012, effective Jan. 18, 2013) (Chinalawinfo).

⁵⁸ Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan, Gong’anbu, Guojia Anquan Bu, Sifa Bu Guanyu Tuijin Yi Shenpan Wei Zhongxin De Xingshi Susong Zhidu Gaige De Yijian (最高人民法院、最高人民检察院、公安部、国家安全部、司法部《关于推进以审判为中心的刑事诉讼制度改革的意见》) [Opinions of the Supreme People’s Court, the Supreme People’s Procuratorate and the Ministry of Public Security on Advancing the Reform of the Trial-Centered Criminal Procedure System] (promulgated by Sup. People’s Ct., Sup. People’s Proc., Public Security Organ, Ministry of State Security & Ministry of Justice Oct. 10, 2016).

rules, which could advocate defendant's right to confrontation in return. Last but not least: a rape shield law applies to all criminal procedures including investigation, prosecution, and court trial. Even if very few victims testify in court, it can still function in other proceedings.

VI. A RAPE SHIELD LAW FOR CHINA

After studying the nature of rape and the problems in China and the U.S., we can conclude that China needs a rape shield law. However, given that the judicial systems are drastically different between China and the U.S., is it possible for China to make a rape shield law? How can we revise the rape shield law according to China's need?

A. Different Trial Systems are not Obstacles

One of the reasons behind evidence rules, including rape shield laws, is the need to limit what the jury can hear. In the U.S., most criminal cases, if not resolved by plea bargains, are tried by juries. Unlike professional judges, jurors are nonprofessionals of law; they come from all walks of life and decide cases with their common sense. The downside is that they may not evaluate evidence properly. There are issues jurors may think they know very well, while in fact, they can reach wrong conclusions. For example, witness identification. Jurors may believe they are able to evaluate this issue properly with their common sense. However, according to scientific studies, witness identification can be very tricky, especially when it comes to cross-racial identification. The environment, lighting, memory, eyesight and misguidance by police all can affect the outcome of identification.⁵⁹ Thus, sophisticated evidence rules are needed to regulate what jury can hear. Rape shield law is established to avoid confusing central issues, wasting time and the probable unfair prejudice it might cause. In China, since there is no jury system, is a rape shield law still desirable?

The answer is yes. The U.S. has the jury system and China has the people's juror system (people's assessors system). The people's juror system also allows non-professional social representatives to try cases and act like judges. People's jurors can decide facts as well as law application in trial.⁶⁰ Usually, people's jurors would joined by at least one professional judge to form a tribunal. People's jurors trial, deliberate and decide the case along with professional judges

⁵⁹ State v. Guilbert, 306 Conn. 218 (2012).

⁶⁰ Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (promulgated by the Nat'l People's Cong. Mar. 14, 2012, effective Jan. 1, 2013) art. 178 (Chinalawinfo).

(except that they cannot be the head of the tribunal). Biases and limitations may plague people's jurors as well. Thus, the Chinese and American trial systems are more similar than they appear to be.

There is one more important question that needs answering before we draw our conclusion – are rape shield laws still necessary for trial without the jury?

America has bench trials, and other countries have various forms of judge-alone trials. Judges are considered to be sophisticated legal professionals with abundant legal knowledge and experience; they should be very discreet with character evidence. Hence, it seems that those problems occurring in jury trials should not be problematic in judge trials. So is it still necessary to apply rape shield laws in judge trials?

To answer this question, only one thing is to be considered—should we trust a man or trust the rule? If we have complete confidence in judges, believing they can treat those materials without bias, then no rape shield laws are needed in judge trials. However, it is very hard to trust them completely. In other words, we cannot guarantee that all judges can treat victim's sexual history sensibly without any bias. If we are not sure that all judges assume impartial view and treat them unbiasedly, then we should resort to the rule. Rules are stable, and they can overcome human weakness to some extent. Judges, just like jurors, are living in the same society, influenced by the same social views. It is very hard to say that judges will not have those biases that ordinary jurors have. Thus, it is safer to rely on rules.

When we implement rape shield laws in judge trials, a concern arises: if the judge presiding over the evidential hearing is also the trial judge of the case, even if the evidence did not enter the trial, the judge still heard that information. As a consequence, the function to keep victim's sexual history from the judge is compromised. Even if the evidence is excluded later, it cannot be estimated what influence it had on a judge. To solve this problem, some courts adopt a system in which the hearing judge is not the trial judge. One judge presides over the evidential hearing and another judge try the case. In this way, if a hearing judge ruled the evidence inadmissible, the trial judge will no longer consider that evidence. Therefore, there is no influence on trial judge's independent evaluation.

B. Re-design a Rape Shield Law for China

FRE 412 limits the use of victim's sexual behaviors and predispositions in court with several exceptions : “(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen,

injury, or other physical evidence; (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and (C) evidence whose exclusion would violate the defendant's constitutional rights."⁶¹ Besides, different states set up various exceptions. Hence, I will make several proposals for China's rape shield law.

To begin with, evidence that is essentially not about sexual history/reputation shall be admissible. For one, just like FRE 412 (b) (1) (A) does not prohibit evidence to prove "the source of semen, injury, or other physical evidence." This type of evidence appears to concern sex, but it is not attacking the victim's sexual character in nature. First, its purpose is not to prove the victim's consent or attack the victim's credibility by using her sexual history; thus it is not prohibited by evidence rules. Second, it has high probative value and strong relevance. It is closely related to proving defendant's guilt or innocence. Third, it is relatively easy to verify. Therefore, most states and federal courts allow this exception. Another exception is that a prior false accusation made by the victim shall be admissible. A prior false sexual assault accusation made by the victim is not using victim's sexual history to prove her character. It is using objective facts to prove the victim's lack of credibility. It concerns a victim's truthfulness rather than her lifestyle. Thus, it should be admissible. In China, we should consider allowing evidence that is not associated with sexual character.

Prior sexual history between the victim and defendant shall be admissible. Oliver Wendell Holmes, Jr. once said: "The life of the law has not been logic: it has been experience."⁶² Combining experience with the law is crucial. Allowing prior sexual history between the victims and defendant is also based on experience. The relations between those two parties convey valuable information, which could provide judges and people's jurors with a better understanding of the case. Without such information, judges and people's jurors may reach wrong conclusions, which would bring injustice to the defendant. Meanwhile, since prior sexual history is known to both parties, its surprise effect on the prosecutor can be minimal. In China, prior sexual history between the victim and defendant is also admissible. I used "sexual relationship" "lovers" etc. as keywords to search on *China Judgments Online*, and the primary search comes back with more than 60 rape cases referred to their prior sexual history. In those cases, more victims attend trials, and many victims chose to show their forgiveness towards

⁶¹ FED. R. EVID. 412.

⁶² OLIVER W. HOLMES JR, *THE COMMON LAW* 1 (2d ed.1923).

defendants.⁶³ Thus, when building China's rape shield law, we should consider allowing this evidence.

At present, China still does not have comprehensive evidence rules concerning rape cases. The victim's sexual history is mainly used to prove her consent or attack her credibility. Therefore, China's rape shield law should keep the core spirit with limited exceptions and make victim's sexual history generally inadmissible. However, it should allow prior sexual history between victims and defendants, and admit evidence that is essentially not associated with sexual character. We should be very cautious and skeptical about additional exceptions. In this way, China can learn other situations through legal practice and do not cripple rape shield law before it being accepted by our legal practice.

VII. CONCLUSIONS

Rape oppresses and paralyzes women for being women. Due to social biases, many women become "silence lambs". In China, social biases, patriarchal thoughts, and inadequate legal protection make rape a crime with high dark figures. China needs to reject biased social views and build well-rounded rules. The U.S.'s rape shield law has very positive effects on reducing rapes, protecting victims' privacy and encouraging reporting. China is facing similar challenges as the United States. A rape shield law would offer more protection to victims, encourage reporting, support victims to appear and testify in court, which in return would advocate defendants' right to confrontation. Considering China's legal practice, we should first keep the core spirit of rape shield law which makes victim's sexual history generally inadmissible, while allowing prior sexual history between victims and defendants and admit evidence that is not essentially associated with sexual character. China should be very cautious and skeptical about other exceptions at the present stage.

⁶³ For more details, see CHINA JUDGMENTS ONLINE, <http://wenshu.court.gov.cn/>. (last visited Dec 8, 2017).