

ARTICLE: From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law

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### Introduction

Rape law has been a site for the moral condemnation of women who have not led sexually chaste lives. n1 The law traditionally insisted that the sexual history of a woman who alleged that she was raped was relevant to the truth of her allegation. n2 A chaste woman was considered more likely to have resisted the defendant's sexual advances and to have lodged a legitimate [\*53] claim of rape. n3 By contrast, an unchaste woman was considered more likely to have succumbed willingly to the defendant's sexual advances and to have lied about it later. n4 Embedded within rape law, therefore, was an informal, though powerful, normative command that women maintain an ideal of sexual abstinence in order to obtain legal protection, a directive I call the "chastity requirement" in rape law. n5

This chastity requirement derived from the distorted normative vision of consent to sexual intercourse that was ingrained in rape law. Historically, rape law portrayed consent to sexual intercourse as a kind of temporally unconstrained permission that could be imprecise as to act and even transferable to other people. Consent to sexual intercourse under certain circumstances lacked temporal constraints: at common law, a woman could not accuse her husband of raping her. n6 Vows given at the marital altar meant a woman legally consented to her husband's sexual advances for the rest of her life. n7 In other words, once a woman lost her chastity to her husband, his sexual transgressions were no longer rape. n8

Consent was also often thought to be imprecise as to act: consent to nonpenetrative sexual intimacies with a man meant functional consent to sexual intercourse with him. n9 Once a woman had engaged in other sexual behavior with the defendant, courts became sympathetic with the argument that he had every reason to believe that she consented to sexual intercourse with [\*54]

him. n10 As the Iowa Supreme Court put it in 1911, a complainant's previous "voluntary sexual relations with the defendant, may and should have been considered as substantive proof of the fact that, whatever the act done it was with the consent of the prosecutrix." n11

Consent was also, in practice and effect, transferable to other parties: if a woman consented to sexual intercourse with men to whom she was not married, she was deemed indiscriminate in her sexual life. As a result, her sexual consent lost its differentiated and unique nature and she was considered to have functionally consented to sex with others. A rape defendant was able to question a complainant in detail about her prior sexual behavior, looking for evidence that she failed to personify a model of sexual modesty. These questions allowed the defendant to suggest that the complainant was routinely unchaste and "asking for it" on the night in question. "Isn't it true that you have acted lewdly with other men in the late hours at bars when you were in a drunken state?" n12 "Isn't it true that you have been known to kiss men at public parties?" n13 "Isn't it true that you have had sexual intercourse many times before with a number of different men?" n14 Having been unchaste with other men before was enough to suggest functional consent to sexual intercourse with the defendant himself.

This traditional conception of consent to sexual intercourse - temporally unconstrained permission that was nonspecific as to act and transferable to others - shaped the chastity requirement in rape law. The law often required a woman to be sexually virtuous, engaging in no significant sexual behavior outside the scope of marriage, before it would protect her if she were raped (by someone other than her husband). Women heard the rules: If you want the criminal law to vindicate you if you are raped, you better have led an unsullied sexual life. By having been unchaste with the defendant or others before, you assumed the risk that men would sexually violate you.

About a quarter of a century ago, rape shield laws emerged on the legal landscape to curtail the excesses of the chastity requirement. They circumscribed defendants' abilities to cross-examine rape complainants about their sexual histories and to proffer evidence on the same matter. In the late 1970s and early 1980s, almost all jurisdictions in the United States adopted some form of rape shield statute. n15 Legislators concluded that it was illogical to assume that the complainant consented to sexual intercourse with the defendant, [\*55] or was more likely to lie under oath, simply because she had previously consented to sexual intercourse with someone else.

Despite the advances wrought by the passage of rape shield laws, the chastity requirement survived in a modified form. All rape shield laws admitted evidence of the sexual history between the complainant and the defendant himself. n16 Many of them admitted evidence of the sexual history between the complainant and third parties as well. n17 In 1977, Professor Abraham Ordover posited in the Cornell Law Review the kind of prior sexual behavior that should remain admissible, despite the passage of rape shield laws. n18 If a sexual encounter that was alleged to have been rape "represented merely one more episode in a long history of promiscuity" in the complainant's life, her sexual history should be admitted. n19 Rape law, as well, continued to condemn rape complainants for their sexual history when it involved promiscuity with the defendant or with others. Although not imposing a full chastity requirement, laws often enforced one in a modified form, what I call the "promiscuity prohibition." Cases managed to slip past rape shields when they involved women previously intimate with the defendant, women who frequented bars to attract new sexual partners, prostitutes, or other women deemed similarly promiscuous. n20

Although most rape shield laws are worded in such a way as to appear to bar the admission of a rape complainant's sexual history except under limited and carefully defined circumstances, their

exceptions routinely gut the protection they purport to offer. For example, Federal Rule of Evidence 412 states that evidence to prove a rape complainant's "other sexual behavior" or "sexual predisposition" is inadmissible, n21 except: (1) when it is offered "to prove that a person other than the accused was the source of semen, injury or other physical evidence," n22 (2) when it is offered to prove consent and it consists of "specific instances of sexual behavior by the alleged victim with respect to the person accused," n23 or (3) when the exclusion of the evidence [\*56] "would violate the constitutional rights of the defendant." n24 Throughout this Article, I will set aside the first exception - the admission of evidence to prove that a person other than the accused is the source of semen or injury - because I support it. n25 This narrow exception is appropriate, especially when misidentification of the perpetrator is a common evidentiary issue in stranger rape cases. n26

This Article focuses, instead, on my dispute with the second and third exceptions to the federal shield (and to analogous state shields), as these exceptions render the armor defective. The second exception - the admission of sexual history with the defendant - cracks the shield because men with whom the complainant has been previously intimate commit 26% of all rapes. n27 The third exception - the admission of evidence when its exclusion would violate the defendant's constitutional rights - often crumbles what is left of the shield because courts routinely misinterpret and exaggerate the scope of the defendant's constitutional right to inquire into the complainant's sexual history, particularly when the complainant is deemed promiscuous with the defendant or others. n28 Despite the passage of rape shield laws, then, many of the sexual norms behind the chastity requirement continue to control courts' evaluations of the relevance of a complainant's sexual history today.

Rape shield laws were designed to protect rape victims from the public exposure of their private sexual lives at trial. n29 What became Federal Rule of Evidence 412, for example, was passed as a bill entitled the "Privacy Protection for Rape Victims Act." n30 Floor debates focused on how traumatic it was for women to have to discuss their private sexual lives in public, rather than on the unfairness of measuring rape complainants against a yardstick of sexual morality. n31 A concern for sexual privacy paved the way for courts in the future to look with disdain on those women who fail to keep their sexual lives private. It allows courts today to impose a promiscuity prohibition on those rape complainants who have substantial reputations for sexual activity. n32 Retrograde notions of sexual propriety thereby continue to confound rape cases in which the complainant's sexual history is disputed.

Rape law has been wrong to help create, perpetuate, and enforce moral judgments on women's sexual lives. To do so is unrelated to the law's truth-seeking function. Women deserve to have the criminal law vindicate them when they are raped, even if they have been previously unchaste or promiscuous with the defendant or with others. By engaging in significant sexual behavior, a woman should not have to assume the risk that men will violate [\*57] her sexual autonomy. It should not matter whether a woman is a virgin or a so-called "whore" before the law: she deserves to be treated with legal respect, regardless of her sexual past. It is time for rape law to reject both the ancient chastity requirement and the modern promiscuity prohibition and to replace them both with what I call a "sexuality license," one that affords women the ability to be sexual without subjecting themselves to negative legal consequences when they are raped. A sexuality license would refuse to draw damaging inferences about a woman based solely on her sexual history.

Foundational to this sexuality license is a better normative vision of consent to sexual intercourse. According to the New Jersey Supreme Court, consent is the "affirmative and freely-

given permission of the victim to the specific act of penetration." n33 Consent is thus specific as to act. Professor Stephen Schulhofer adopts a similar approach, but clarifies that sexual consent is also temporally constrained. He defines consent in the following manner: "at the time of the act of sexual penetration there are actual words or conduct indicating affirmative, freely given permission to the act of sexual penetration." n34 I would emphasize additionally that consent to sexual intercourse with one person is not transferable to another person. Examples illustrate each of these three principles. A woman may choose to engage in [\*58] numerous acts of sexual intercourse for years, and then pledge to become a "Born Again Virgin." n35 A girl may choose to engage in oral sex with her boyfriend, but not vaginal intercourse. A woman may choose to engage in sexual intercourse with four different men, and not the fifth. Consent to sexual intercourse is, therefore, temporally constrained permission that is specific as to act and nontransferable to other people.

This Article proposes a New Rape Shield Law to enshrine the sexuality license and the finer normative vision of consent that undergirds it. This New Rape Shield Law would admit evidence of the complainant's sexual conduct and sexual communication with the defendant on the instance in question. It would, however, bar direct or opinion evidence of the complainant's sexual conduct or sexual communication prior or subsequent to the instance in question. This evidentiary ban would include conduct and communication with third parties as well as conduct and communication with the defendant.

The New Rape Shield Law would authorize three important exceptions to what would otherwise be a general ban. First, evidence that might prove that there is an alternative source for the semen, pregnancy, disease, or injury of the complainant would be admissible under the statute. This evidence is crucial because it may explain the physical evidence of sexual penetration and force, two of the elements of the crime of rape.

Second, evidence of negotiations between the complainant and the defendant regarding how consent will be conveyed between them and evidence of negotiations between the complainant and the defendant regarding specific sexual acts that are at issue would also be admissible under the New Rape Shield Law. Nonconsent is another element of the crime of rape, and evidence of these kinds of negotiations may illuminate what the complainant consented to as well as what the defendant reasonably believed that she consented to.

Third, evidence that might prove that the complainant is biased or had a motive to fabricate a charge of rape would also be admissible under the New Rape Shield Law. Pursuant to the Confrontation Clause of the Sixth Amendment to the United States Constitution, the defendant must be given the opportunity to prove that the complainant is biased. n36 Other than these three exceptions, evidence of a complainant's prior sexual conduct or sexual communication with third parties or with the defendant should be excluded.

Part I of this Article offers a fresh historical account of the chastity requirement in rape law. It begins with biblical rape law, which required a victim to be a virgin in order to obtain legal protection against a sexual transgression. Part I then follows the evolution of this ancient law into a chastity requirement embedded in the foundations of English common law. It traces the chastity imperative in English common law to the early rape laws in this country. After discussing the general contours of the chastity requirement in [\*59] the United States, Part I specifically analyzes chastity evidence in appellate rape cases from 1900 to 1975. A central strategy for rape defendants during this time was to employ the chastity requirement to impugn their complainants' credibility as

witnesses and to bolster the claim that they consented to the acts of sexual intercourse alleged to have been rapes.

Part II of this Article describes the legal changes that were enacted in the 1970s in response to the excesses of the chastity requirement. Almost all jurisdictions in the United States enacted rape shield laws in order to limit the defendant's opportunity to admit evidence of a complainant's sexual history in a rape case. These rape shields fall into four categories: (1) legislated exceptions laws; (2) constitutional catch-all laws; (3) judicial discretion laws; and (4) evidentiary purpose laws. Part II identifies the laws in each category, noting the differences between them, and asks why the rules of these categories conflict with one another. To answer this question, Part II proceeds to analyze the legislative history of Federal Rule of Evidence 412, the federal rape shield law, to divine the rationale for its passage. Like most rape shield laws, Rule 412 was designed to protect the sexual privacy interests of rape victims rather than to abolish the chastity requirement. With this rationale, rape shield laws vary in their assessments of the kind of prior sexual activity that is sufficiently private to warrant protective exclusion from trial.

Part III of this Article looks at the issue from the 1970s to the present. It analyzes the ways in which rape shield laws have failed to protect women fully from the harsh requirements of the chastity requirement and its modern incarnation, the promiscuity prohibition. In particular, Section III.A discusses four legislated exceptions to rape shield laws that categorically admit certain evidence of a complainant's sexual history: (1) evidence of a prior pattern of sexual behavior with third parties; (2) evidence of prior sexual behavior with third parties that would prove that the defendant harbored a reasonable but mistaken belief as to consent; (3) evidence of prior prostitution with third parties; and (4) evidence of the complainant's sexual history with the defendant. In critiquing appellate cases that fall within each of these exceptions, Section III.A concludes that the disputed evidence is insufficiently relevant to warrant categorical admission and is so unduly prejudicial as to warrant exclusion, except under extraordinary circumstances.

In order to further illuminate the limitations on the protection rape shield laws offer victims, Section III.B discusses two judicially imposed exceptions that admit a complainant's sexual history despite the strictures of formal law. The first, the admission of evidence of prior sadomasochistic sexual behavior with third parties, comes from the belief that those who engage in such behavior are sexually promiscuous. The second, the admission of evidence of prior public sexual behavior with third parties, derives from reformers' focus on the protection of the private sexual lives of rape victims. In analyzing cases that fall within these two exceptions, Section III.B concludes that the disputed evidence is likewise insufficiently relevant to warrant categorical admission and is so unduly prejudicial as to warrant exclusion, except under extraordinary circumstances.

Part IV of this Article articulates a theory for the proper evaluation of evidence of a rape complainant's sexual history. It argues that rape law must [\*60] reject the chastity requirement and the promiscuity prohibition and, instead, adopt the paradigm of the sexuality license. The law should not automatically draw negative legal inferences from a woman's previous sexual conduct or sexual communication, even if the woman has been promiscuous with the defendant or with others. A woman should have the license to be sexual without opening herself up to sexual assault. Underlying this notion of the sexuality license is a normative vision of sexual consent that is temporally constrained, specific as to that act, and nontransferable to others. This normative vision of consent appropriately circumscribes what evidence of a complainant's sexual history should be admissible under rape shield laws.

Part V proposes a model statute that will implement the sexuality license I advance. The New Rape Shield Law would admit evidence of the complainant's sexual conduct or sexual communication on the instance in question. It would, however, bar the complainant's prior or subsequent sexual conduct or sexual communication with the defendant or others, with three exceptions: (1) evidence offered to prove an alternative source of semen, pregnancy, disease, or injury; (2) evidence of negotiations between the complainant and the defendant regarding specific sexual acts at issue or evidence of negotiations between the complainant and the defendant about how to convey consent; or (3) evidence offered to prove bias or motive to fabricate. Part V then discusses the way that the New Rape Shield Law would work in the cases previously analyzed in the Article and the reasons that it would appropriately exclude evidence that was wrongly admitted. Finally, Part V argues that the new statute is fair because it excludes irrelevant and prejudicial evidence while it admits relevant and nonprejudicial evidence.

Part VI of this Article defends the constitutionality of the New Rape Shield Law. It reviews scholars' constitutional objections to prior rape shield laws and surmises their likely constitutional objections to this New Rape Shield Law. It analyzes Supreme Court jurisprudence on the Confrontation and the Compulsory Process Clauses of the Sixth Amendment and concludes that neither poses a constitutional impediment to the New Rape Shield Law. It also argues why, under Supreme Court jurisprudence, a concern for the sexual privacy of rape victims, or the trauma they face testifying, is a less compelling governmental interest than is a concern for the prejudice to the truth-seeking process caused by the admission of complainants' prior sexual behavior.

### I. The Chastity Requirement

This Part shows how ancient law imposed a requirement that a female had to be a virgin before raping her could be classified as an illegal act. It traces the way that this virginity requirement transformed into a chastity requirement that became embedded in the early English common law that was adopted by the English colonies in this country. It then analyzes specifically the evidentiary role that a complainant's chastity played in American rape law from 1900 to 1975. Reported appellate cases during that time reveal that a woman's prior sexual behavior, or lack of chastity, was relevant evidence of her lack of credibility as a witness and her propensity to consent to sexual intercourse with others and with the defendant.

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#### A. The Virginity Requirement and English Common Law

When Biblical dictates formulated legal norms, exacting standards of female chastity determined whether an instance of rape was an offense, and if so, to what extent it would be punished. The lineage of the chastity requirement can be traced back to the Hebrew Scriptures. These scriptures comprise the first five books of the Old Testament of the Bible, known as the Torah. n37 The Torah, understood to be God's revelation to Moses at Mount Sinai, is the written law of the people of Israel. n38 Many rape statutes and legal interpretations of rape law have made reference to Deuteronomy, the fifth book of the Torah, for authority. n39 Deuteronomy declared that the rape of a virgin was a civil offense but did not proscribe or punish other kinds of rape. n40

In Deuteronomy, female virginity was not only important in rape, but was also crucial in marriage. n41 Deuteronomy required a girl to be a virgin on her wedding night. n42 If a man accused his new wife of not being a virgin, then her parents had to "bring forth" to the elder men of

the city "the tokens of the damsel's virginity," which was the sheet stained with blood from her first experience of sexual intercourse. n43 If the parents could not prove that their [\*62] daughter was a virgin at marriage, then "the men of her city shall stone her with stones that she die: because she has wrought folly in Israel, to play the whore in her father's house." n44

Similar to the rules of Deuteronomy, the Mishnah, a book of legal rules compiled by Jewish sages, indicated that during the second century of Roman Palestine, rape remained a crime only when the complainant was a virgin. n45 The Mishnah included rules governing the impact of virginity on bride price, n46 a man's redress if his bride was not a virgin, n47 and the father's right to financial compensation from a man who violated his virginal daughter. n48

The Mishnah also revealed the burgeoning importance of class status on rape law. The class of the two relevant actors, the father and the rapist, determined the amount of compensation for the rape of a virgin: "Everything follows the social standing of the man who inflicts the disgrace and the man who suffers it." n49 The Mishnah clarified that there was no fine to be paid for the rape of a female proselyte (a new convert to Judaism), a former captive, or a former slave girl who was older than three, because each was assumed to be unchaste. n50

In twelfth century England, virginity likely remained a requirement before the sexual violation of a woman would be considered rape. n51 Although Glanvill, a justicar of Henry II, was not explicit about whether rape required the complainant to be virginal, his treatise suggested as much by indicating that the girl who was forcibly raped had to go "to the nearest vill and there show to trustworthy men the injury done to her, and any effusion of blood there may be and tearing of her clothes." n52 The "effusion of blood" echoed the "tokens of virginity" that parents of brides were supposed to be able to produce to prove their daughters' chastity in Deuteronomy. n53

[\*63] By 1275, the ravishment of both "Maidens" (virgins) and "any other Woman" could be rape, according to the first and second Statutes of Westminster under Edward I. n54 Punishments for each kind of crime, however, were different. The "rape of a virgin" was a felony punishable by the removal of the offender's eyes and testicles, "because when a virgin is deflowered, she loses a member," her hymen, "and therefore the deflowerer should be punished in that member with which he has offended." n55 The loss of eyes and testicles, however, "does not follow in the case of every female, although she should be overpowered by violence." n56 For the rape of nonvirgins, "grave corporeal punishment follows, but nevertheless without the loss of life or of members." n57 One category of rapists at that time and for years thereafter suffered no punishment at all: husbands who raped their wives. In an oft-quoted passage, Sir Matthew Hale explained, "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract his wife hath given up herself in this kind unto her husband, which she cannot retract." n58

Early English common law mirrored Deuteronomy's concern with lost virginity. When a virgin was raped, she had to cry out to the "neighboring vills, and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress." n59 At any subsequent trial, the loss of the complainant's virginity remained the key issue. n60 [\*64] In the case of the gang rape, for example, punishment of the first man who raped a virgin differed from that meted out to the second or third man. n61 The rule was thusly explained, "to deflower a virgin and to have connection with her after she has been deflowered, the same punishment does not follow each act." n62 This early English common law formed the basis of rape law in the English colonies of North America.

## B. The Chastity Requirement in America

The first groups of English immigrants who settled in America developed their own legal system founded extensively on the common law of their homeland. From the mid-1600s through the 1700s, colonial definitions of rape in Massachusetts, n63 Rhode Island, n64 New Haven, n65 Connecticut, n66 and New Hampshire n67 did not explicitly require the virginity of the complainant; however, many of these codes made reference to Deuteronomy.

Under colonial law, rape would only be legally redressed if the complainant had modeled herself on an ideal of sexual virtue and feminine modesty. A woman who brought a charge of rape on her own was automatically suspected of being too independent, and perhaps not worthy of legal protection. n68 The man in charge of the woman's sexuality, either her father or husband, was expected to raise the accusation for her because women should "not be so bold." n69

[\*65] Puritan doctrine at the time led many colonists to fear sexual desire because they believed it was sinful. n70 Because men often held women responsible for these sinful, sexual feelings, women became associated with negative stereotypes such as "sexual temptresses." n71 By the 1700s, however, commercialism and the preservation of property loosened Puritan control over the moral and political spheres of colonial society. n72 As America continued in a secular direction, women lost the religious stigmas that had previously stereotyped them as temptresses. Despite this shift, however, the chastity requirement remained constant. By the late eighteenth century, libertinism n73 came to define the culture of masculinity in the United States, and afforded men a [\*66] broad sexual license. n74 As men became libertine rakes, white women became idealized as the protectors of society's morals; they were considered "virtuous, pure, innocent, not sexual and worldly." n75

Historian Nancy Cott coined the term "passionless" to describe the chastity and sexual control that defined white womanhood in the late eighteenth and early nineteenth centuries. n76 Chaste and modest women, revered for their morality, enjoyed the protection of the law. n77 Women who were [\*67] thought to be deviant - "lusty, independent, or otherwise outside of polite society" - however, were legitimate sexual prey. n78 In order to obtain a successful rape conviction:

Men had to be despicable cads, unfit for citizenship, and women had to demonstrate their extreme helplessness and dependence on upstanding male citizens. Women who appeared too assertive or self-reliant did not display the requirements of a good woman - dependence and innocence. n79

If women were too independent or unchaste, their chances of winning a conviction were slim. n80 Simply being out alone was enough to make the jury believe that a woman was "out to gratify her passions." n81 Additionally, crimes of upper class men against lower class women or women of color were tolerated - if the accuser was of lower status than the defendant, acquittal was nearly certain. n82

The paradigm of female virtue during this time had its roots in the racial caste system. n83 As society idealized white women as "passionless," it became [\*68] more eager to label Black women as "sexual heathens" or "sexual savages." n84 In the eighteenth and nineteenth centuries, Black women were stereotyped as "jezebels" and "sexual temptresses." n85 Black women were not the only ones who could not meet the ideal of white female chastity. Women of other races, slaves, indentured servants, and Native Americans, n86 as well as "outsiders" [\*69] such as "rebellious



women," were also by definition unchaste and therefore subject to sexual abuse without legal redress. n87

In the nineteenth century, two major goals in rape jurisprudence arose: to continue to protect white female chastity when a rape complainant embodied it; n88 otherwise, to protect men from false accusers. n89 By 1874, the New York Court of Appeals made clear that a complainant's sexual history was relevant and admissible evidence in a rape trial to clarify the issue of her chastity. n90

### C. The Evidentiary Function of Chastity from 1900-1975 in the United States

A review of the reported appellate rape cases n91 from 1900 through 1975 in the United States indicates that courts allowed a rape defendant to elicit two types of evidence regarding a woman's sexual history in order to protect himself against accusations from undeserving women. The first was evidence of a woman's unchaste reputation. n92 The second was evidence of a woman's unchaste conduct, which included unchaste conduct with the defendant, unchaste conduct with other men, and nonsexual conduct that implied a lack of chastity. n93

Evidence of a woman's unchaste reputation, as perceived by other members of the community, n94 was routinely admitted throughout this time. n95 The [\*70] reputation did not have to be accurate to be admissible. n96 Some courts conflated the analysis of unchaste reputation with unchaste conduct, n97 while [\*71] other courts recognized a distinction between them. n98 A number of courts preferred unchaste reputation evidence to evidence of unchaste conduct because the latter tended to create collateral issues that consumed judicial resources. n99 As a result, several courts admitted only unchaste reputation evidence, n100 while others admitted both unchaste reputation and unchaste conduct. n101

Courts also divided on the admission of evidence of a rape complainant's prior unchaste conduct with third parties. Some courts admitted evidence of those unchaste acts n102 and others courts did not. n103 When courts admitted [\*72] evidence of unchaste conduct, defendants elicited the evidence via the testimony of those men with whom the woman had previous intimacies, n104 via the testimony of parties who claimed to know of her sexual history, n105 via medical testimony that she failed to maintain an intact hymen, n106 or via cross-examination of the complainant herself. n107

[\*73] The complainant's prior unchaste conduct with the defendant himself has always been admitted. n108 As the Supreme Court of Tennessee put it in 1915, "acts of sexual intercourse may always be proven between the prosecutrix and the defendant upon a trial for common-law rape prior to the alleged offense." n109 Prior unchaste conduct with the defendant was thought to indicate consent to the intercourse alleged to have been rape. n110 Some courts also thought that, if there had been previous intercourse between the defendant and the complainant, the defendant could reasonably believe that he could have intercourse with the complainant again, and thus he lacked the requisite mens rea for the crime of rape. n111 As a Texas appellate court put it in 1908, "if by the previous course of conduct between appellant and the girl, the jury should believe there had been intercourse between [the complainant and defendant] ... it would tend to solve the question of his intent." n112

[\*74] Nonsexual conduct that supposedly implied the woman's unchaste character was also introduced in rape trials from 1900 to 1975. n113 Evidence that a woman consumed alcohol or drugs, n114 enjoyed tobacco products, n115 traveled alone late at night, n116 befriended women of

ill repute, n117 possessed condoms, n118 uttered profane language in public or in the company of men, n119 or even, as a white woman, associated with people of color n120 was offered to prove a woman's unchaste character. During the 1900s, the law evolved from the admissibility of this kind of evidence to its general inadmissibility. Courts concluded that, although this nonsexual conduct could indicate "immoral choices," it did not prove a woman's lack of sexual chastity. n121

Lack of chastity itself did not constitute a formal defense to a rape charge. n122 However, a woman's lack of chastity went to two issues: credibility [\*75] and consent. First, courts presumed that if a woman was unchaste, she had broken societal mores already and so was significantly more likely to continue to defy those mores by lying as a witness under oath. n123 The notion that a lack of chastity made a witness less credible was not gender neutral. Lack of sexual chastity in men did not imply any corruption of their character for truth-telling. n124 As the Missouri Supreme Court explained:

It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman. It is no compliment to a woman to measure her character for truth by the same standard that you do that of a man's predicated upon character for chastity. What destroys the standing of the one in all the walks of life has no effect whatever on the standing for the truth of the other. n125

Courts applied to rape complainants in particular the presumption that unchaste women lie. In 1953, the United States Court of Appeals for the Eighth Circuit explained, for example, the complainant's "story of having been raped would be more readily believed by a person who was ignorant of any former unchaste conduct on her part than it would be by a person cognizant of the unchaste conduct defendants offered to prove against her." n126 Sexual ignorance, therefore, was a virtue that made a rape complaint more credible. Sexual knowledge, the forbidden fruit that identified female sin, made a rape complaint less credible.

Independent of the character for truth issue, courts also presumed that, if a complainant had prior sexual experience, she was more likely to have consented to sexual intercourse with the defendant himself on the instance in question. n127 The complainant's consent would negate the criminal element of [\*76] [\*77] nonconsent and, according to some courts, would even negate the element of force. n128 In 1911, the Iowa Supreme Court explained, "Of course, a common prostitute may be raped, and one may rape a woman although she be his mistress, but it was not so likely that his act was by force and against her will." n129 Likewise, in 1915, the Tennessee Supreme Court wrote, "although the body of a harlot may, in law, no more be ravished than the person of a chaste woman, nevertheless it is true that the former is more likely than the latter voluntarily to have yielded." n130 Thus, while the woman's lack of chastity was not a formal defense to rape, it was a particularly effective functional defense.

[\*78] Until the 1920s, evidence of a woman's lack of chastity was predominately used to establish her lack of credibility as a witness. n131 As a Texas appellate court noted in 1919, the possibility that the complainant "was in the habit of bestowing carnal favors indiscriminately upon men ... would certainly have had a very strong bearing upon her credibility as a witness." n132 In the 1920s, however, some courts shifted away from the use of chastity evidence for the purpose of tainting a complainant's credibility as a witness and toward the use of such evidence to establish the complainant's actual consent to sexual intercourse with the defendant. n133 A California court in 1921 noted the shift: "evidence of the unchastity of the prosecutrix is admissible as bearing on the

question of consent, but evidence of her moral delinquency is inadmissible as affecting her general credibility as a witness." n134 By 1970, few jurisdictions continued to allow evidence of a woman's lack of chastity to establish her lack of credibility as a witness. n135

[\*79] While the admission of a woman's lack of chastity remained constant from 1900 to the 1970s, minor limitations arose. For example, courts began to limit evidence of a woman's unchaste character when the defendant did not plead the defense of consent, n136 especially when his defense was based on alibi. n137 Additionally, some courts began to limit the admission of a complainant's [\*80] lack of chastity to cases in which consent was a plausible defense. n138 If a defendant had severely beaten a woman, for example, consent was implausible and, therefore, evidence of her unchaste character became inadmissible. n139 Despite these limitations, however, cases continued to impose harsh scrutiny on a woman's sexual life when consent was thought to be a plausible defense. n140 In the 1970s, legislators responded to the excesses of the chastity requirement with rape shield laws designed to render the sexual history of rape complainants less important at trial. n141

## II. Rape Shield Laws Respond to the Chastity Requirement

In the 1970s the movement for women's social and political equality flourished in this country. n142 Women's rights activists focused their efforts on changing the status of women legally. The quest for women's legal equality positively affected many areas of the law, from establishing heightened constitutional scrutiny for sex-based discrimination n143 to establishing that sexual harassment violates women's civil rights. n144 The women's movement also spurred state and federal legislators to examine the powerful but unnamed chastity requirement in rape law. n145 Legislatures began to impose rape shield laws to restrict rape defendants from admitting evidence of complainants' private sexual lives. n146 By the early 1980s, almost every jurisdiction in this country had passed some form of rape shield law. n147

Part II analyzes the types of rape shield laws that passed during that time. It divides the rape shield laws into four categories and shows how these categories are contradictory. In search of a rationale for this incoherence, Part II then analyzes the legislative history of the federal rape shield law. It [\*81] divines the purposes behind the passage of that law and finds, not a rejection of the chastity requirement, but an affirmation of its crucial aspects. Part II then concludes that the various rape shield laws' failure to repudiate fully the chastity requirement is a central reason why they have not protected against its ancient strictures.

### A. Types of Rape Shield Laws

In 1974, the first rape shield law in the United States was passed by Michigan. n148 It said:

Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted ... unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

- (a) Evidence of the victim's past sexual conduct with the actor[, or]

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. n149

Forty-eight states and the District of Columbia eventually followed suit and enacted their own rape shield rules of evidence or statutes. n150 These laws divide roughly into four categories, distinguishable by the manner and degree to which they admit evidence of a woman's sexual history: (1) the legislated exceptions category (of which Michigan is an example); (2) the constitutional catch-all category; (3) the judicial discretion category; and (4) the evidentiary purpose category. n151 These categories are both explicitly and implicitly contradictory.

### 1. Legislated Exceptions Laws

Twenty-five of the nation's rape shield laws fall within the legislated exceptions approach. n152 They contain general prohibitions on evidence of prior [\*82] sexual conduct, subject to at least one legislated exception. n153 Twenty-one of the laws in this category, such as the rape shield law in Michigan, contain two or more legislated exceptions. n154 Evidence offered by the defendant that does not fall within a legislated exception ostensibly remains inadmissible. The exceptions various states allow include: the admission of evidence of prior sexual conduct between the complainant and the accused; n155 evidence of an alternative source of semen, pregnancy, or injury; n156 evidence of a pattern [\*83] of prior sexual conduct by the complainant; n157 evidence of bias or motive to fabricate the sexual assault; n158 evidence offered to prove that the accused had a reasonable but mistaken belief in the complainant's consent; n159 and evidence of prior false accusations of sexual assault by the complainant. n160 In a number of cases, courts have strained to find rape shield laws in the legislated exceptions category constitutional while ordering the introduction of evidence that is formally inadmissible by statute. n161

### 2. Constitutional Catch-All Laws

Eleven state rape shield laws and the District of Columbia's law fall within the second category - the constitutional catch-all approach. n162 Laws in this category, modeled after the federal rape shield law, are similar to those in the legislated exceptions category in that they prohibit evidence of prior sexual conduct, subject to at least one legislated exception. The number of exceptions ranges from two to five, and the only new legislated exception is one for evidence of prior prostitution. n163 The unique aspect of laws in this [\*84] category is that each contains an additional, explicit exception based on the Constitution. The constitutional exception states that sexual history evidence will be admitted, even if it does not fall within one of the other legislated exceptions, if a judge determines that its admission is required by the Constitution. n164 Given that the Constitution functions as a mandatory constraint on all acts of Congress, n165 this arguably superfluous provision simply reemphasizes judicial authority to admit evidence of a complainant's prior sexual history when a judge concludes that the Constitution demands it. One scholar has called the constitutional catch-all provision "little more than an unimaginative attempt to avoid constitutional challenges" to rape shield laws. n166

### 3. Judicial Discretion Laws

Nine states have rape shield laws that differ from the legislated exceptions and constitutional catch-all approaches and fall within the third category - the judicial discretion approach. These laws have no legislated exceptions; they simply grant to judges the broad discretion to admit or bar evidence

of a woman's sexual history. n167 In four of these jurisdictions, evidence of prior sexual conduct is admissible - in any form and for any purpose - upon a judicial determination that the proffered evidence is relevant and that its probative value is not outweighed by its prejudicial effect. n168 This discretion is, of course, exactly the discretion granted to judges before rape shield laws came into effect, so these provisions do not function as new shields. n169 In Rhode Island, no specific standard for determining the admissibility of evidence of prior sexual conduct constrains judicial discretion under the rape shield law. n170 A few states admit certain kinds of evidence absolutely [\*85] (regardless of its specific relevance in a case) and ban nothing per se, thereby narrowing a judge's discretion and expanding the admissibility of prior sexual conduct compared to the earlier regime. n171

#### 4. Evidentiary Purpose Laws

The final category of rape shield laws is different from the legislated exceptions, the constitutional catch-all, and the judicial discretion approaches. It is the evidentiary purpose approach. The four states that fall within this category determine the admissibility of a woman's sexual history based on the purpose for which the evidence is offered at trial. n172 In California and Delaware, sexual history offered to prove the complainant's consent to sexual intercourse is prohibited, n173 but sexual history offered to attack her credibility is admissible. n174 In Nevada and Washington, the standard is exactly the opposite: a complainant's sexual history offered to attack her credibility is prohibited, but sexual history offered to prove her consent to sexual intercourse with the defendant is admissible upon a showing of relevance and a determination that relevance is not substantially outweighed by prejudice. n175

Rape shield laws "vary significantly in the degree to which they restrict the admissibility of evidence of a rape complainant's prior sexual conduct." n176 As a whole, the four categories of rape shield laws - legislated exceptions, constitutional catch-all, judicial discretion, and evidentiary purpose - include what appears to be a haphazard set of exceptions to a general prohibition on prior sexual conduct. Because rape shield laws are unmoored by the elements of the crime of rape itself, they tend to drift aimlessly among the possible exceptions.

Moreover, courts have not always applied rape shield laws consistently within the four categories. Judges in jurisdictions in which the rape shield laws constrain their discretion and disallow evidence have often admitted the evidence anyway. n177 Judges have also imposed extra exceptions beyond [\*86] those authorized by statute for circumstances that they concluded must allow for the evidence. n178

#### B. The Sexual Privacy Purpose of Rape Shield Laws

The incoherence of rape shield laws and the jurisprudence that followed their implementation stem, at least in part, from the drafters' goal of protecting women's sexual privacy. Rather than allow substantive notions of nonconsent and the other elements of the crime to guide the contours of rape shield laws, drafters focused on protecting rape victims' private sexual lives from public scrutiny. n179 Drafters concomitantly allowed stereotypes of those women whose sexual lives were not private - promiscuous women or women with bad sexual reputations - to infect their reasoning. n180 To explore this theme, this Section examines the legislative history of the passage of Federal Rule of Evidence 412, the federal rape shield law (which is a model of the constitutional catch-all approach). This legislative history reveals a focus on protecting the rape victim's privacy at trial.

In 1976, Congress followed the lead of nearly thirty states and considered the adoption of a federal rape shield law. n181 The proposed bill excluded [\*87] "reputation or opinion evidence of a person's past sexual behavior" in rape trials. n182 It also excluded "evidence of specific instances of a person's past sexual behavior" subject to two exceptions: (1) the evidence is "offered ... upon the issue of whether the accused was ... the source of pregnancy, disease, semen or injury" or (2) the evidence "is of past sexual behavior with the accused." n183

The Subcommittee on Criminal Justice of the House Judiciary Committee held a "Privacy of Rape Victims" hearing on the bill and twelve witnesses testified. n184 Several overarching themes characterized the arguments made in support of the bill. The most prominent theme was that rape shield laws [\*88] were a mechanism to protect rape complainants' sexual privacy. n185 Supporters of the legislation repeatedly emphasized that rape victims' private sexual lives should remain confidential and should not be subject to the public scrutiny of the courtroom. n186 The bill was said to protect a complainant from "the degradation of irrelevant questions about [her] past private activities," which "only aggravates what must be a most agonizing experience." n187 Victims were said not to come forward to report having been raped because they "feared that their reputations and private lives [would] be unduly exposed to the 'unfeeling scrutiny of the courtroom.'" n188 Rape shield laws were thus said to provide "guarantees against unwarranted intrusion into the private sexual history of the victim." n189 A second and parallel theme the supporters articulated was that rape shield laws were a mechanism to stop the practice of "putting the victim rather than the 'defendant on trial.'" n190 Supporters argued that the legislation would "control the amount of additional post-assault trauma," encourage the reporting and prosecution of rape, and create "a more equal dispensation of justice." n191

Supporters of the bill also argued that an alleged victim's sexual history was irrelevant both to her credibility as a witness and to her consent to sex with the defendant. As Judge Patricia Boyle of the Detroit Reporter's Court stated, no sound argument could be made that "prior sexual experience has anything to do with credibility." n192 Another supporter wondered, since the [\*89] purpose of impeachment was to test the witness's veracity, "what relevance has evidence of chastity to one's veracity?" n193 Supporters argued that past consent to sex was unrelated to future consent. n194 Just because a woman chose to consent to sex before, they argued, does not make her "even marginally more likely to consent to additional sexual affairs." n195 On behalf of the American Bar Association, Judge Sylvia Bacon of the D.C. Superior Court emphasized that, in most cases, the "question of consent should be determined primarily from evidence of the conduct of the parties at the time of the alleged assault." n196

Others who testified, however, were concerned with the breadth of the bill. n197 Roger Pauley of the Department of Justice, for example, testified that blanket prohibitions on "evidence of specific previous acts of sexual behavior of the complainant" would prove "too severe" and would violate defendants' constitutional rights. n198 He offered hypothetical situations in which he felt [\*90] evidence of a woman's past sexual behavior should be admitted. One hypothetical involved a woman who brought a charge against a "young man who met the complainant and allegedly performed the act of forcible intercourse at a fraternity party." n199 Pauley argued that, under the proposed bill:

If it were the fact that four or five other members of the fraternity had had consensual intercourse with the complainant at the same party and in the course of the same evening, the accused would

nevertheless be precluded from offering such evidence at trial, notwithstanding its rather clear relevance to (though admittedly not dispositive of) the issue of consent. n200

Pauley offered another hypothetical situation. n201 He asked Congress to "assume a case in which rape is alleged by a prostitute following her claimed refusal to engage in a particular form of deviate sexual intercourse demanded by the defendant." n202 Pauley contended that the rape shield law would inappropriately exclude evidence of the prostitute having engaged in certain acts with other men, evidence that was "vitally relevant to attack the credibility of the complainant and to the issue of consent." n203 Pauley suggested several amendments to "permit the possibility" that evidence of the prior sexual behavior of prostitutes and women who consort with fraternity brothers could be "received when deemed relevant by a judge to the issue of consent." n204

[\*91] Professor Melvin Lewis of The John Marshall Law School likewise expressed serious concerns about the federal rape shield law. n205 Professor Lewis argued that existing evidentiary rules already granted judges discretion to admit or bar sexual history evidence in rape trials by providing "substantial safeguards against gratuitous character denigration, while assuring that relevant evidence is admitted." n206 Lewis offered an example to illustrate when the prohibition on evidence of sexual history would be "unwise." n207 He recounted the story of a prostitute who accused a clergyman of sexual assault. n208 According to Lewis, "had he been unable to show that his supposed victim was a prostitute, he might well have been convicted for want of a rational explanation as to why she would falsely accuse him." n209 Therefore, [\*92] as demonstrated by Pauley's and Lewis's comments, anxiety about the sexual history of prostitutes and other promiscuous women figured prominently in the opposition to the passage of the federal rape shield law.

Congress chose not to pass the bill in 1976. Two years later, Congress passed the "Privacy Protection for Rape Victims Act," which eventually became Federal Rule of Evidence 412. n210 That Act had one significant change, which may have been inserted as a response to detractors' concerns about women who made claims of rape but had substantial sexual histories. Congress added a constitutional catch-all provision as an additional exception to the general rule of inadmissibility of a complainant's sexual history. n211 Because of this provision, a consensus emerged and the bill was touted as "simple and non-controversial." n212

Again, members of Congress emphasized in 1978 the importance of rape victims' sexual privacy. As stated in the floor debates in the House, the rape shield law's "principle purpose" was to protect rape complainants from "degrading and embarrassing disclosure of intimate details about their private lives" during trial. n213 It would thereby "limit[ ] the vulnerability of rape victims to such humiliating cross-examination of their past sexual experiences and intimate personal histories." n214 These sentiments were echoed in the Senate. n215 Senator Joseph Biden stated, "The enactment of this legislation will eliminate the defense strategy ... of placing the victim and her reputation [\*93] on trial in lieu of the defendant." n216 He hoped that the rape shield law would "end the practice ... wherein rape victims are bullied and cross-examined about their prior sexual experiences," making the "trial almost as degrading as the rape itself." n217 Upon signing the bill into law, President Jimmy Carter also emphasized the federal rape shield law's sexual privacy purpose. n218 The law would "end the public degradation of rape victims" and "prevent a defendant from making the victim's private life the issue in the trial," he stated. n219

The protection rape shield laws ostensibly offered, then, was to defend rape victims against public fishing expeditions into their private sexual pasts. From the legislators who initially proposed a federal rape shield bill in Congress to the final signatory, the President, supporters emphasized repeatedly "the public degradation of rape victims" that occurred when their "private" sexual lives became an issue at trial. n220 This concern was an important and compelling one. Many women do not report having been raped for fear that their private sexual lives will become public. n221 Humiliation at trial when a victim's private sexual life is scrutinized in public often creates significant, secondary trauma for rape victims. n222

An interest in protecting women's sexual privacy, however, was not a rejection of the chastity requirement. The notion of sexual privacy itself implies [\*94] an appropriate sexual modesty and that sex should be kept within the confines of respectability and social civility - that is, behind closed doors. n223 Rather than abandon the chastity requirement, legislators who passed rape shield laws retained central aspects of it. n224 Their focus on sexual privacy was consonant with an insistence that the prior sexual behavior of promiscuous women, such as fraternity partiers and prostitutes, should be admitted at trial.

The passage of rape shield laws was a recognition not that the chastity requirement had outgrown its usefulness as a way of sorting rape victims, but that its contours had simply shifted. The division in the late 1970s was no longer between "women who do" and "women who do not." It had become a division between women who do occasionally in private, and women who do frequently, even in public. Those in the former category deserved to have their past sexual lives shielded from public scrutiny. Those in the latter category deserved no such protection. They had failed the modern chastity requirement, a promiscuity prohibition. It was a somewhat more relaxed standard than its predecessor, but it was nevertheless as unsympathetic and severe toward those who failed it.

Supporters of rape shield laws did not set out to defend the idea that women should be free to engage in whatever kind of consensual sexual behavior they chose, publicly or privately, without having that behavior haunt them if they were raped. n225 It was safer to protect those women who had previously had sex only monogamously with their boyfriends or husbands in private. Instead of championing women's sexual autonomy, drafters concentrated on how degrading and embarrassing it was for women to have to discuss publicly their private sexual affairs. n226 This perspective explains why rape shield laws, as currently written, have been ineffective in protecting against certain aspects of the traditional chastity requirement.

### III. Rape Shield Laws Fail to Defend Against the Chastity Requirement

Since their passage, federal and state rape shield laws have repeatedly failed to deflect the strictures of the chastity requirement in real cases. n227 The cases have often involved prior sexual history similar to that discussed in [\*95] scenarios that opponents of the federal rape shield law posed as problematic, particularly prior acts of promiscuous sexual behavior or prostitution. n228 Other times, the cases have involved evidence of sexual behavior that occurs in public places, which judges justify admitting because rape shield laws were designed only to protect women's private sexual conduct. n229

It is important to note, however, that the cases best suited for scholarly review and criticism - written appellate dispositions - are not representative of all decisions involving the application of rape shield laws. Appellate courts see two types of cases in this area. First, appellate courts review



cases in which the trial judge admitted evidence of a complainant's sexual history despite the rape shield law, the jury nevertheless convicted the defendant, and the defendant claimed on appeal that what happened between the parties cannot be rape as a matter of law. In those cases, the admission of the complainant's sexual history is often not at issue. Second, appellate courts review cases in which the trial judge excluded evidence of a victim's prior sexual conduct under the rape shield law, the jury convicted, and the defendant on appeal challenged the trial judge's exclusion of the victim's prior sexual conduct. That limited slice of cases often forms the basis for a jurisdiction's jurisprudence on rape shield laws.

Because of the usual prohibition on interlocutory appeals from evidentiary rulings in criminal cases n230 and because the state cannot appeal an acquittal, when a judge admits a complainant's sexual history and the defendant is wrongly acquitted, the case is not reviewed by a higher court. n231 The central problem with admitting a complainant's unchaste sexual history is the risk it poses of leading the decision maker to acquit a defendant unjustly, and yet these cases in which such unjust acquittals occur are the most difficult to access and critique. Appellate decisions are limited to those in which the government wins, and this limitation hinders the ability to assess the way rape shield laws work at trial. n232

Most trial court judges do not write decisions on motions to exclude evidence under the rape shield laws, thus scholars do not have easy access to the full rationales behind those trial level decisions. Additionally, the place where stereotypes about race and class might be most operational in the chastity requirement imposed on a female complainant of rape is in the earlier stages of the criminal process - when the complainant faces police who decide how to categorize her claim and whether to investigate it, prosecutors [\*96] who decide whether to prosecute her claim, judges who decide whether to admit her prior sexual conduct, and jurors who decide whether to convict. n233

The cases discussed in Part III, therefore, are not representative of all decisions in the criminal justice process dealing with a rape complainant's prior sexual behavior. They are also not representative of all appellate decisions dealing with a rape complainant's prior sexual behavior. Because rape shield laws are so diverse in the evidence they exclude and admit, for every case that entails a "wrong" decision that I discuss, one could find another case that goes the opposite way on the same issue. n234 The trouble with this area of the law is that it is not directed by a theory that rejects the chastity requirement and the promiscuity prohibition. Thus, courts apply whatever laws their legislatures have codified, without coherent principles to guide them, and with conflicting decisions on identical questions in sister jurisdictions. Judges are left with powerful intuitions to influence outcomes, in an area of the law where powerful intuitions are often biased against women's sexual autonomy. n235

Cases have systematically fallen through the rape shield cracks created by the legislated exceptions to the general prohibition on evidence of a woman's sexual history. n236 Appropriately interpreted, two of the legislated exceptions - those for evidence of an alternative source of semen, pregnancy, disease, or injury, n237 and evidence of bias or motive to fabricate n238 - are supportable. The other legislated exceptions, however - prior pattern sexual conduct with third parties, n239 prior sexual history with third parties to bolster a defendant's claim of a reasonable but mistaken belief that the victim consented, n240 [\*97] prior prostitution with third parties, n241 and prior sexual conduct with the defendant n242 - are unsupported and should be abolished.

Beyond the systematic nature of these legislated exceptions, judges have allowed for other exceptions, frequently employing the flexibility afforded them by the other kinds of rape shield laws

(constitutional catch-all, judicial discretion, or evidentiary purpose). Even in legislated exceptions jurisdictions, courts have found cause for new exceptions that the legislature did not authorize. n243 Frequently, those courts have determined that the Constitution mandates a new exception beyond those authorized by statute. n244 Part III addresses, in turn, the four unsupportable legislated exceptions and two more unsupportable judicially fabricated exceptions.

#### A. Legislated Exceptions

This Section begins by addressing the admission of evidence that may be the most intuitively troubling in a rape case, evidence of the complainant's prior sexual conduct with third parties. It starts with the legislated exception that allows for the admission of evidence of the complainant's pattern of sexual conduct with third parties. Next, it turns to prior sexual conduct with third parties to prove a defendant's reasonable but mistaken belief in consent. It then confronts evidence of the complainant's prior prostitution with third parties. This Section argues that each of these categorical legislated exceptions is inappropriately expansive and should be abolished.

This Section then tackles the admission of evidence that may be the most intuitively appealing in a rape case, evidence of the complainant's prior sexual conduct with the defendant himself. This legislated exception garners the most support among legislatures and judges, as it is a universal exception to general prohibitions on prior sexual conduct in rape shield laws. n245 Despite its near universal appeal, this Section argues that a categorical exception for a complainant's prior sexual conduct with the defendant is also unacceptably expansive and should be abolished.

[\*98]

##### 1. Prior Pattern Sexual Conduct with Third Parties

The legislated exception to the general prohibition on sexual history for a prior pattern of sexual conduct with third parties appears in five state rape shield statutes. n246 Additionally, judges in numerous other jurisdictions have created a prior pattern of sexual conduct exception to their state's rape shield laws, despite the fact that their legislatures did not explicitly authorize it. n247 This exception allows a defendant to claim that the complainant engaged in a pattern of sexual behavior with third parties that supports his defense that she consented to sexual intercourse with him. n248

The reported appellate rape cases that address what courts determine is a pattern of sexual conduct by a complainant tend to focus disparagingly on the complainant's promiscuity, often describing her as a "sexually aggressive" woman who frequents bars, clubs, or parties. n249 For example, *United States v. Kelly* involved a female soldier, Specialist L, who became inebriated with members of her unit "practically every weekend." n250 One evening, after her unit was briefed on its redeployment, Specialist L went dancing and drinking with Kelly and Hubbard, two men in her unit. n251 On the dance floor, Specialist L danced "very closely" with Kelly, rubbed her buttocks against him, and touched him in the genital area. n252 Later, Specialist L returned to her barracks and passed out on her bed, fully clothed. n253 She testified that she awoke to the feeling of Kelly's penis already inside her vagina. n254 She passed in and out of consciousness due to intoxication and tried to roll away to stop [\*99] him. n255 Kelly testified, by contrast, that Specialist L kissed him when she awoke and they engaged in consensual sex. n256

Kelly tried to bolster his consent defense at trial with what he claimed was evidence of Specialist L's prior pattern of sexual conduct with third parties. n257 He sought to testify that over

the past two years he had observed Specialist L "behaving in a sexually aggressive manner when she was intoxicated." n258 He wanted to testify that some time over the past two years he had heard Specialist L announce to a group of male soldiers her interest in having sex, with statements such as "I need to get fucked." n259 He also wanted to testify that he had previously observed her at a party "lying on a bed in plain view" hanging "all over" a third party. n260 Finally, he also wanted Hubbard to testify that, on the night in question, Specialist L had danced lewdly with him as well. n261 However, the trial court applied the military rape shield rule (identical to the federal rape shield law), and excluded the evidence. n262 Kelly was convicted of rape. n263

On appeal, the United States Army Court of Military Review reversed. n264 It noted that the case involved L's prior pattern of sexual conduct. It held that, because Kelly had observed the prior incidents:

Each of the incidents involved [Kelly himself] and was similar to the events that led to the charges against him. The statements about wanting to "get fucked" or to "come downstairs and fuck" tended to show that the prosecutrix sought sex indiscriminately... . The evidence that SPC L was drunk practically every weekend, and behaved in a sexually aggressive manner toward males when drunk was also relevant, material, and probative. The evidence tended to show that she was engaged in a pattern of behavior rather than unrelated incidents. n265

The court's censure of Specialist L's prior sexual decision making reveals how prejudicial the admission of a complainant's prior sexual conduct evidence can be. To categorize Specialist L's behavior as a "pattern" itself is unreasonable. At most, her prior behavior shows that on previous occasions she had been interested in sexualized talk or some kind of sexual conduct with certain people who were not at issue in this case. Specialist L's prior statements, such as "I need to get fucked," even if true expressions of her sexual desire (as opposed to bravado to prove she was "one of the boys"), were temporally and factually unconnected to the instance in question because [\*100] they occurred with third parties on prior occasions. n266 By asserting that the statements tended to prove that Specialist L "sought sex indiscriminately," the court scripted Specialist L's consent to sexual intercourse as continuous and undifferentiated, rather than temporally constrained and nontransferable to others. n267 The court's analysis was also a way of saying that Specialist L failed to conduct herself within the confines of appropriate feminine modesty. She had violated the prohibition on promiscuity.

In an influential article in the Columbia Law Review in 1977, Professor Vivian Berger supported the admission of "evidence of a pattern of sexual conduct so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that she consented to the act or acts charged." n268 Berger explained: "in the absence of clear proof to the contrary, one can presume that a woman will freely choose her partners, picking some and rejecting others, in line with highly personal standards not susceptible of generalization." n269 She argued, however:

Where proof of prior sexual conduct pertains narrowly to acts evincing a pattern of voluntary encounters characterized by distinctive facts similar to the current charges, one cannot cavalierly assume that a woman's behavior on one occasion has no relationship at all to her conduct and state of mind on another. On the contrary, her actions tend "to prove that consent to intercourse for her has lost its unique ... nontransferable character" when these particular conditions obtain. n270

Berger's analysis was a classic articulation of the promiscuity prohibition. To argue that, after a woman has a noted pattern of sexual experience, her consent to sexual intercourse loses "its unique nontransferable character" is another way of saying that, because she has been promiscuous, her pattern of sexual behavior should be admitted. n271 Legally, I argue, consent must be temporally constrained, nontransferable from one party to the next, and specific as to act. If I am right, by definition, consent never loses its "nontransferable character" and must be uniquely obtained by each individual. The argument for the admission of a complainant's pattern of sexual conduct gives insufficient weight to a woman's sexual autonomy and to the unique and time-bound nature of sexual consent.

Additionally, the argument for the admission of a complainant's pattern of sexual conduct assumes that other women, relative to the one in question, are relatively chaste as a point of meaningful comparison, so that consent [\*101] does not lose "its unique nontransferable character" as a matter of course. n272 Young women today, however, are not chaste. They engage in sexual intercourse at an earlier age, they have more sexual experiences, and they have more sexual partners than did their counterparts of thirty years ago. n273 Sixty percent of girls in high school today have engaged in oral sex. n274 Seventy percent of them have manually stimulated a partner's genitals. n275 And half of them have engaged in sexual intercourse. n276 Despite living in the age of [\*102] AIDS, n277 young women and men today engage in significant premarital sexual behavior. n278

Many of them also engage in what can only be called a pattern of sexual behavior. College students, for example, have become expert at the casual "hookup," what researchers define as a sexual encounter, usually lasting only one night, between two people who are strangers or brief acquaintances. n279 In a recent study of 555 undergraduate students at a state college in the northeastern United States, over three-fourths of the respondents had engaged in at least one "hookup." n280 One third of them had engaged in sexual intercourse with someone in a hookup, n281 and the research suggested that "some students are hooking up on a weekly basis." n282 An exception for patterned sexual conduct, therefore, even if limited to actual patterns of behavior rather than applied to sexual adventurism generally, would often swallow the rule of exclusion when applied to young people today.

Nevertheless, a number of scholars have argued that a prior pattern of sexual conduct with third parties has relevant predictive value for the likelihood [\*103] that the complainant consented with the defendant on the instance in question. n283 After all, relevant evidence does not, alone, have to prove an ultimate fact at issue. Relevance, a low threshold, includes "evidence having any tendency to make the existence of any fact that is of consequence ... more probable or less probable than it would be without the evidence." n284 Berger offered the following hypothetical example of a circumstance in which evidence of the complainant's sexual history with third parties would be relevant in this way: "What if the accused were offering to show that the victim habitually goes to bars on Saturday nights, picks up strangers and takes them home to bed with her, and that over the past twelve months she has done so on more than twenty occasions?" n285 If the complainant claimed rape and the defendant claimed that the sex was consensual, her particularly successful strategy for obtaining sex every other weekend should be admitted, Berger concluded, because such evidence would make it more probable that she consented with the defendant on the instance in question n286 (which presumably occurred on a Saturday night, began at a favorite bar, and ended in bed).

As a predictive matter of what is alleged to have occurred, however, a prior pattern of sexual behavior gets low marks. Concededly, a woman's prior pattern of sexual behavior is marginally relevant to her willingness to engage in sexual intercourse generally. A defendant arguing the defense of consent in a rape case, however, is not simply claiming that the complainant consented to sexual intercourse with him. Instead, he is of necessity claiming that she consented to sex with him, but then falsely reported that he raped her to the police, pursued the claim through the investigative process, and then lied under oath about the experience at trial. n287 Prior consensual behavior with third parties, no matter how patterned in nature, is irrelevant as to whether she would consent to sex and then lie about it later. A woman's likelihood of consenting to sexual intercourse with the defendant and then lying about it is the central issue in most acquaintance rape cases. Without a pattern of prior false accusations, a prior pattern of sexual behavior is irrelevant on this crucial question. Evidence that is irrelevant is inadmissible and properly excluded. n288

[\*104] In fact, as a logical matter, a complainant's prior pattern of consensual sexual behavior may cut against the defendant. A pattern of consensual sexual behavior might reveal that the woman has had a considerable amount of sex but has never falsely accused someone of rape. n289 As Professor Leon Letwin of U.C.L.A. explained, "the appropriate question" is "not whether, having consented before, she is likely to have consented again; but rather whether having consented before without falsely charging rape, it is likely she would again consent and then falsely charge rape." n290 Without a pattern of prior false charges, the answer is no. n291 Most patterned prior sexual behavior, therefore, may actually be evidence that logically bolsters the prosecutor's case as much or more than the defendant's. n292

Even if a prior pattern of sexual conduct were helpful to the defendant's case, its relevance would be outweighed by the substantial, unfair prejudice it would bring to the truth-seeking process. The point is not that admitting substantial prior sexual behavior would harm the complainant herself. A rape victim's trauma at discussing her prior sexual behavior in court was the fundamental concern for most legislators who passed rape shield laws. n293 Such trauma, however, although real and often severe, n294 is not the legal prejudice that supports rape shield laws. The prejudice that a complainant's prior pattern of sexual behavior creates is actually to the jury's ability to ferret out truth from a set of facts. It is the truth-seeking process itself that such evidence befuddles.

Psychological and sociological research over the past two decades indicates that promiscuity or perceived promiscuity on the part of a rape complainant biases jurors' decision-making processes. In a 1982 study, mock jurors heard rape scenarios that were identical except that: (1) the victim was promiscuous; or (2) the victim was sexually inexperienced; or (3) the jurors were told nothing about the victim's prior sexual history. n295 Subjects rated the rape as "most serious when the victim's past was not mentioned, less serious if she had limited experience, and least serious when she was promiscuous." n296 In 1983, another study compared conviction rates among mock [\*105] jurors faced with a rape scenario in which the complainant was either virginal or sexually experienced. n297 With all other variables held constant, 81% of jurors voted for conviction when the complainant was a virgin, compared with 60% when the complainant had prior sexual experiences. n298 The study concluded that "information about a rape victim's past sexual conduct does affect perceptions of moral character and judgments of guilt." n299 In a 1989 study with a similar setup, when the victim was a virgin, subjects thought that the rape was more serious, the defendant deserved more punishment, the victim was less to blame for the attack, and she was more "psychologically damaged" by the rape. n300 In 1995, another study indicated that, when presented with evidence that a victim had a promiscuous sexual past and then told that the evidence was

inadmissible and should be ignored, male jurors continued to allow the evidence to influence their assessment of the defendant's guilt. n301

[\*106] In 1997, Professor David Bryden and Sonja Lengnick conducted an extensive literature review summarizing the psychological and sociological research concerning how a victim's sexual history affects rape cases. n302 They concluded that studies of both mock scenarios and actual trials indicated that jurors inappropriately acquit acquaintance rapists when victims are nontraditional or promiscuous by employing the tort doctrines of assumption of the risk n303 and contributory negligence. n304 As Bryden and Lengnick pointed out, however, "contributory negligence, provocation, [and] departure from sex-role norms ... are all invalid defenses to rape." n305

A 2002 study evaluated in detail jury decision-making in rape trials. n306 When explaining the propensity of the juries to acquit, the study noted, "A large body of cognitive research tends to establish that when small groups are instructed or forced to reach consensus, as by a [jury] unanimity requirement, conversation converges on whatever stereotypic-consistent imagery and information is available to them." n307 The stereotypes that were available in the deliberations in rape trials included those that blamed the victim based on the social context of the incident and her sexual past:

This study has provided ample support ... for the idea that victim legitimacy/blameworthiness is part of rape trial deliberations once inclusively defined to include elements in addition to prior relationship. That is, when the entire social context or gestalt - not simply the extent of the parties' relationship - is implicated, juries "think" in terms that include assessments of victim character. n308

The study noted, "Condemnation of the victim's 'promiscuous' sexuality and alcohol use - despite that neither was presented as excessive - constituted 18% of juror ... statements. It is possible that some jurors assigned responsibility to the victim ... from the perspective that her victimization was ... something over which she had relinquished behavioral control." n309

A complainant's prior pattern of sexual conduct with third parties subverts the truth-seeking process by biasing jurors against the woman who has failed to live up to a model of feminine modesty. n310 A woman's failure to [\*107] remain chaste increases the blame people assign to a woman who has been raped and decreases the blame they assign to the defendant. n311

Moreover, cases involving "patterns" of sexual behavior often involve women who frequent bars, parties, or other places where alcohol is served. n312 Psychological research indicates that, all other factors being equal, the presence of alcohol in an alleged rape tends to increase the blameworthiness people assign to the woman, while it decreases the blameworthiness people assign to the man. n313 Those unjustified psychological reactions are operational when people evaluate the blameworthiness of women who routinely engage in significant social activity at bars and who use bars or parties to find potential mates. n314

The fact that sexual mores have shifted significantly in the past thirty years has not appeared to substantially affect the prejudice that a woman's prior sexual behavior continues to bring to the truth-seeking process. n315 The liberalization of sexual behavior has yet to blunt the powerful societal propensity to blame rape victims who have stepped outside of the traditional bounds of feminine sexual modesty. In fact, most of the studies on the ways that prior sexual behavior affects people's perceptions of a rape have been done on undergraduate college students in psychology

classes, a group relatively liberal in its sexual mores. n316 Despite the fact that this nonrepresentative sample is probably more sexually liberal than the average population, these studies continue to show that those respondents assess more blame against a rape complainant for the rape when she has engaged in significant prior sexual behavior. n317

Moreover, most juries are comprised not of relatively permissive college students, but of people who are substantially older than the average rape [\*108] victim. More than 70% of all jurors are older than forty years of age. n318 The average rape victim, however, is only twenty-four years old. n319 The generational disparity between rape jurors and rape victims means that juries are more likely to apply a set of sexual expectations that are unrealistic and out of sync with the reality of young people's lives, which creates even more potential for gender bias against female sexual autonomy.

Despite tenuous arguments for relevance and substantial evidence of prejudice, scholars other than Berger have also supported the admission of patterned sexual conduct evidence. Professor Harriet Galvin, in the *Minnesota Law Review*, defended the pattern exception in "appropriately limited ... circumstances." n320 She argued for admitting evidence of sexual conduct with third parties "if the past conduct is similar to the encounter in question and is either repetitive or unique." n321 As an example, she applauded the case of *State v. Shoffner* and *State v. Summers*, n322 in which the complainant visited the defendants in their apartment and left with them in a car to visit a mutual friend. The complainant testified that the defendants undressed her in the car, forced her into the back seat, and penetrated her against her will as she kicked and fought back. n323 By contrast, Shoffner testified that, although he tried to have sex with the complainant with her consent, he failed, while Summers testified that he had consensual sex with the complainant. n324 The trial court excluded, inter alia, the following three pieces of evidence: (1) a third party had observed the complainant previously many times at a local club, "attracting some of the men,' dancing with them, and getting out of control by 'feeling on them and stuff like that"; (2) approximately a year and a half earlier, the complainant "tried to seduce" Summers's older brother and had sex with him in a car; and (3) a third party had observed the complainant previously "seated on a 'soda crate' in the Circle Inn with two men standing in front of her, one of whom was zipping up his pants." n325

At trial, the defendants and five others testified that, at the defendants' apartment on the date in question, the complainant had "made sexual advances by putting her hand inside defendant Summers's pants and suggested that the parties present have an orgy." n326 The jury nevertheless convicted the defendants of second-degree rape. n327

The North Carolina appellate court reversed. n328 It concluded that the trial court had erred in excluding the three pieces of evidence because they [\*109] were admissible under the rape shield law's exception for a pattern of prior sexual conduct. The court reasoned that the excluded evidence:

Suggests that the prosecuting witness was the initiator, the aggressor, in her sexual encounters. The evidence excluded suggests that the prosecuting witness's modus operandi was to accost men at clubs, parties (public places) and make sexual advances by putting her hands "all over their bodies." Defendants contend that the prosecuting witness's sexual behavior on [the date of the incident in question] - fondling their genitals, trying to get them to engage in an orgy, and telling them where and when to stop the car - was no different from the prosecuting witness's pattern of sexual behavior... If [the pattern exception] is to have any application, it has to be applied in this case. n329

Galvin used this case as an example of how states applied their exceptions for a pattern of sexual conduct "in a common sense manner." n330 She agreed with the court's analysis, saying that the case was not "difficult" because it involved "frequent, repetitive conduct closely resembling the defendant's version of facts at trial." n331

Recall, however, that the prior behavior at issue in Shoffner n332 was that the complainant had fondled other men on the dance floor at a club. n333 She had sex with another man. n334 She had sat on a soda crate in front of two other men when one was pulling up his zipper. n335 This behavior was not "repetitive," n336 nor was it particularly distinctive. Unlike Galvin, the Shoffner appellate court did not see this behavior as "closely resembling the defendant's version of facts at trial." n337 The court clarified, "we do not believe the Rape Victim Shield Statute requires the prior sexual behavior of a complainant to parallel on all fours a defendant's version of the prosecuting witness's sexual behavior at the time in question." n338 It was enough that the "prosecuting witness's sexual behavior on past occasions conformed to their version of what happened" on the instance in question. n339

To require only that a complainant's prior sexual behavior "conform" to the defendant's version of the facts to be admissible under the pattern exception [\*110] is a minimal prerequisite indeed. The Shoffner court's willingness to admit the evidence appears to have been driven by its disdain for the complainant's sexual promiscuity. n340 Like the Kelly court, n341 the Shoffner court disparaged the complainant for having previously been "the initiator, the aggressor, in her sexual encounters." n342 She was promiscuous rather than modest in her prior sexual behavior.

Because evidence of a prior pattern of sexual conduct is prejudicial and ordinarily irrelevant, n343 rape shield laws should not allow for the categorical admission of such evidence. To allow the categorical admission of evidence related to complainants' prior patterns of sexual conduct is simply a way to impose a promiscuity prohibition on rape complainants.

## 2. Prior Sexual Conduct with Third Parties to Prove Reasonable but Mistaken Belief as to Consent

The legislated exception to the general prohibition on evidence of sexual history, for evidence that would prove that the defendant held a reasonable but mistaken belief as to the victim's consent, appears in four state rape shield statutes. n344 Additionally, judges in other jurisdictions have imposed a mistaken belief as to the consent exception to the prohibition on evidence of sexual history, despite the fact that the legislature did not formally authorize it. n345 This defense reasons that, although the victim did not consent, the defendant nonetheless did not have the mens rea for the crime because he operated under the reasonable but mistaken belief that she did consent, n346 and that belief was created by his knowledge of her loose sexual reputation or his knowledge of her prior sexual acts with third parties. n347

In addition to raising a claim about Specialist L's pattern of sexual conduct with third parties, for example, the defendant in *United States v. Kelly* n348 also raised a claim about his reasonable but mistaken belief as to Specialist L's consent to sexual intercourse with him. The reviewing court held that Specialist L's prior statements about sex to her unit buddies were not only relevant to her actual consent to sex with Kelly (and thus should not have been excluded), but "the statements also were relevant to show the reasonableness [\*111] of appellant's belief that the prosecutrix consented to his sexual overtures." n349 Criminal appeals of rape cases often involve multiple arguments for the



admission of excluded evidence, with separate arguments similarly based on the victim's violation of a promiscuity prohibition.

Professor Berger supported the rule to admit prior sexual conduct to prove a mistaken belief as to consent. n350 Her model rape shield statute included the admission of "evidence of prior sexual conduct, known to the defendant at the time of the act or acts charged, tending to prove that he [reasonably] believed that the complainant was consenting to these acts." n351 In support of this model provision, Berger offered the following hypothetical:

Suppose, for example, a man has heard of a young woman with a reputation for being "easy." His friends may have told him of their adventures, real or invented, with this girl; or he may even have known of their conduct at first hand, as by observing her sexual activities with another in the back seat of an automobile in which all three were riding around. Intending to sleep with her himself, he asks her out and, notwithstanding her stated refusal, pins her down and effects intercourse; she then accuses him of rape. n352

Berger argued that the defendant in that case should be entitled "to explain to the jury the cause of his error, even if telling the full story necessarily reveals the victim's sex life." n353 "Evidence that the accused had reason to think her willing because of her prior sexual conduct could be crucial to the defendant's case." n354 Berger concluded, "a wisely drafted statute will not prohibit proof of the woman's sexual history offered to show the defendant's honest (reasonable) belief that she yielded to him voluntarily." n355 Other scholars have agreed. Galvin, for instance, also supported admitting evidence of reputation evidence and prior sexual conduct to prove a reasonable but mistaken belief in consent, arguing that it may be "constitutionally compelled." n356

At this point, one must set aside the difficult but separate question of whether it is a good idea for the law to allow rape defendants to raise a defense of reasonable but mistaken belief as to consent. For these purposes, one should simply assume that the law does allow such a defense. The question here, then, is only whether a man can formulate a reasonable belief in a woman's consent to sexual intercourse with him based on her "reputation for being 'easy,'" his friends' "adventures, real or invented, with this girl," or the fact that he observed her sexual conduct with others "first hand." n357

This question reveals how rape shield laws formulate substantive notions of consent. If Berger is right, and one could reasonably conclude that a woman [\*112] has consented to have sexual intercourse with him because of her sexual reputation or acts with third parties, n358 consent itself would lose its specific, nontransferable nature. The analysis is something like, "He got it. Me, too." If, on the other hand, one cannot reasonably conclude that a woman consents to sexual intercourse based on a woman's sexual reputation or acts with third parties, it is precisely because, as I argue, consent is unique as to person and nontransferable to others.

Moreover, the question, as posed by Berger, is even more stark: whether a man can formulate a reasonable belief in a woman's consent to sexual intercourse with him based on her sexual reputation or acts with third parties in the face of her stated "no." n359 The normative decision is unavoidable: either it is reasonable to believe that a woman has consented to sexual intercourse with one man based on her sexual reputation or acts with third parties "notwithstanding her stated refusal," or it is not. n360 A woman's stated refusal should ordinarily be dispositive on her nonconsent to sexual intercourse with the defendant. Even without a stated refusal, and even if a

woman says nothing at all, her sexual reputation or acts with third parties cannot establish a reasonable but mistaken belief in consent to sexual intercourse with the defendant because consent is nontransferable and unique as to person.

Reasonableness is an objective standard that requires the defendant to have at least a negligent mens rea. n361 It is at least negligent to conclude that a woman consents to sexual intercourse with one person based on her sexual reputation or acts with others. A woman's sexual reputation or acts with third parties do not make it more probable that the defendant had a reasonable but mistaken belief in consent because it is unreasonable to draw conclusions about consent based on a woman's sexual behavior with third parties. n362 The law should not allow juries to decide that doing so is reasonable simply because of a societal bias against promiscuous women. The law must declare that it is "normatively unreasonable" to infer consent based on a woman's prior sexual experiences. n363 A reasonable person "infers consent based on communication from his partner, not from the stereotypical expectation that a sexually experienced woman, or any woman for that matter, is available for his gratification." n364

An exception to a general rule of prohibition on prior sexual history with third parties when a defendant claims a reasonable, but mistaken, belief [\*113] as to consent transforms rape victim's legal shields into sieves. Prior sexual history with third parties gives defendants no legitimate help in their quest to show a reasonable belief as to consent. It does, however, lead to false acquittals. The law has to insist that for a man to rely on a victim's prior sexual history with third parties when assessing her consent to sexual intercourse with him is not reasonable as a matter of law. Prior statements or conduct with third parties cannot create a reasonable belief that a woman has consented to sexual intercourse with a different man. To allow such an exemption in rape shield laws creates a substantial loophole through which evidence that was previously inadmissible becomes admissible, and the old prejudices around women's sexuality again become operational. This categorical exception should be abolished.

### 3. Prior Prostitution with Third Parties

The legislated exception to the general prohibition on prior sexual conduct for convictions for prostitution with third parties shows up explicitly only in one rape shield statute. n365 Judges in numerous other jurisdictions, however, have admitted complainants' prior prostitution convictions, despite the fact that their legislatures did not explicitly authorize such admissions. n366 It is important to note at the outset that rape is not an exceptional experience for women who are prostituted. A study of prostitutes in San Francisco found that 68% of them had been raped while working as prostitutes. n367 Forty-eight percent of those prostitutes who were raped had been raped [\*114] more than five times. n368 It is also important to note that street prostitutes do not have sex under just any circumstances; for their own safety, prostitutes try to screen their patrons. n369

Most cases addressing the potential admissibility of rape complainants' prior prostitution convictions involve men who claim to have hired the women as prostitutes, engaged in consensual sex, but then tricked the women out of money or other compensation. n370 I agree with scholars who have argued that deception vitiates a woman's meaningful consent. n371 If fraudulent inducement were a theory upon which women could claim rape or a lesser sexual assault, each of these cases would involve criminal sexual behavior by the defendants' own admissions. n372 For the purpose of analyzing these cases involving the admission of evidence of a complainant's prior

prostitution, however, one can set aside the possibility that fraudulent inducement makes sexual intercourse a criminal act of some kind.

Galvin argued that, when a defendant defends a charge of rape "on the ground that the incident in question was an act of prostitution rather than rape," evidence of the complainant's prior prostitution with third parties should be admissible. n373 She cited favorably one case that implied that a [\*115] complainant's reputation for prostitution would be admissible where the defendant alleged that what happened between the parties was a consensual act of prostitution. n374 Many courts agree. n375

United States v. Harris, for example, a court-martial appealed to the United States Army Court of Criminal Appeals, involved the question of whether the trial judge had "abused his discretion when he excluded evidence of the victim's prior misdemeanor conviction of solicitation for the purpose of prostitution." n376 The reviewing court did not discuss the facts of the prosecutor's case-in-chief on the rape charge. n377 It did, however, recount the defense theory: The complainant had "agreed to sexual intercourse in expectation of receiving enough money for a bus ticket to Cleveland, Ohio, and was subsequently motivated to retaliate against appellant by falsely alleging rape when he refused to pay her for sexual services and then called her a 'scank bitch.'" n378 The court then held that the woman's seven-year old conviction for misdemeanor prostitution n379 was "relevant because of its strong tendency to prove the appellant's defense of consent" and that the "probative value of the conviction outweighed any danger of unfair prejudice." n380 The court also pointed out in a footnote, "furthermore, the victim had been employed as a topless dancer at the Crazy Horse Saloon in Cleveland since 'approximately' age 19." n381 Because the court's analysis was brief, Harris may seem an easy opinion to find unsatisfactory, but it is no more injudicious than other cases that categorically admit evidence of a rape complainant's prior prostitution. n382

When courts do try to justify further the admission of evidence of a rape complainant's prior prostitution, their analysis usually mirrors the promiscuity prohibition. In Drake v. State, for example, the Supreme Court of Nevada [\*116] explained why it was holding that a complainant's prior prostitution convictions should be admitted. n383 After recounting that the purpose of rape shield laws was "to protect rape victims from degrading and embarrassing disclosure of the intimate details of their private lives," n384 the court said:

When dealing with illegal acts of prostitution, however, the policies behind the rape shield laws largely disappear. Illegal acts of prostitution are not intimate details of private life. They are criminal acts of sexual conduct engaged in, for the most part, with complete strangers. n385

Notice that the analytical work of this passage is the contrast between the "intimate details of private life" and sex "engaged in, for the most part, with complete strangers." n386 Because prostitutes have had sex with complete strangers (violating the promiscuity prohibition), rape shield laws should not protect their sexual lives from public scrutiny.

Other courts disagree and bar evidence of a rape complainant's prior prostitution. n387 In State v. Johnson, n388 for example, the Supreme Court of New Mexico evaluated a case involving a complainant who had prior convictions for prostitution. The woman testified that Johnson enticed her into his car, drove her to a secluded area, and raped her. n389 Another woman testified that, on a different date, Johnson offered her a ride, drove her to a secluded area, and raped her. n390 Johnson, on the other hand, claimed that what occurred with both women was consensual

prostitution. n391 In support of his position, he sought to admit evidence of the complainants' prostitution with third parties. n392

In analyzing this case, the Supreme Court of New Mexico described the impermissible "yes/yes" inference that its rape shield law prohibited defendants from drawing. n393 The "yes/yes" inference was the assumption that, because a woman said yes to certain sexual acts before, she would say yes again. n394 The court explained, "when a defendant characterizes an alleged rape or other criminal sexual conduct as an act of prostitution, evidence of prior acts of prostitution is not necessarily material and probative. A defendant must ... demonstrate how the evidence is truly probative on those issues exclusive of the forbidden 'yes/yes' inference." n395 The court explained, [\*117] "the evidence offered should be relevant to a defense theory other than a theory based on propensity [to prostitute]." n396

According to the court, "a distinctive pattern of past sexual conduct, involving the extortion of money by threat after acts of prostitution" would be relevant to the charges and admissible. n397 Prior false claims or threats of false claims, therefore, would be appropriately admitted. n398 The court held, however, that "simply showing that the victim engaged in an act or acts of prostitution is not sufficient to show motive to fabricate." n399 In applying the law to the facts of the case, the Johnson court decided:

The possibility that [the two victims] had engaged in prostitution either before or after the incidents in question does not support an inference that they had a reason to fabricate an accusation of rape. Defendant sought to introduce testimony that [one victim] had admitted to the police that she had occasionally sold sex for money to pay the rent. Defendant also sought to introduce evidence that [the other victim] had been arrested on a prostitution charge subsequent to his arrest for sexual assault. This evidence does not show that either would retaliate against those who failed to pay her by fabricating false charges. n400

Fabrication is an appropriate theory upon which evidence of prior sexual conduct should be admissible. But prior acts of prostitution that do not involve false charges or threats of false charges are irrelevant on the question of whether the complainant would consent to sexual intercourse with the defendant and then lodge a false charge against him.

The prejudice of evidence of prior acts of prostitution is obvious. n401 Studies confirm that subjects tend to rate prostitutes as more responsible for having been raped than both married and single women. n402 In a 1995 study, researchers interviewed prostitutes about their experiences of violence and rape in prostitution and found that several distinct themes emerged, including the societal beliefs that prostitutes could not be raped, that prostitutes were not harmed even if they were raped, and even that prostitutes deserved to be raped. n403 As Professor Letwin has argued:

There is an obvious danger that the jury will regard the right of a prostitute to sexual autonomy as unentitled to serious respect. Admission of such evidence would tend to ensure the rapist relative [\*118] impunity for an act of rape seen by the jury as "understandable," or in any event "not so serious." Furthermore, such evidence is virtually indistinguishable, in terms of probative value, from prior sexual episodes on the part of a woman who is not a prostitute, which would unequivocally and appropriately be excluded as character evidence. n404

In *Commonwealth v. Houston*, n405 the Supreme Court of Massachusetts recently concurred with Letwin's analysis, in a case with facts similar to those in *Johnson*. It wrote:

Surely, a jury, no matter how much effort the judge makes to purge their mindsets by admonitory instructions, are [sic] more likely to conclude that the impeaching [prostitution] convictions show that the complainant should not be believed, not because she is untruthful, but, because she has been, and thus continues to be, indiscriminate in sexual relations. n406

The prejudice of prior prostitution convictions is high, while its probative value on the issue of false charges is ordinarily nil. To routinely admit evidence of prior prostitution, therefore, is unwise. The supreme courts of New Mexico and Massachusetts thus correctly understood that evidence of prior prostitution with third parties should be admissible if it bolsters a claim of bias or motive to fabricate; however, such evidence should not be admitted categorically.

#### 4. Prior Sexual Conduct with the Defendant

The legislated exception to the general prohibition on prior sexual conduct for behavior with the defendant himself enjoys nearly universal appeal. It is by far the most common, appearing in all rape shield laws in the legislated exceptions and constitutional catch-all categories. n407 In jurisdictions that have not legislated this exception, judges have created it. n408 Therefore, all rape shield laws categorically allow a rape defendant to admit evidence of a woman's prior sexual conduct with him when it is offered to prove consent.

In their treatise on evidence, *Federal Practice and Procedure*, Professors Charles Alan Wright and Kenneth W. Graham argued that the exception to the general rule of exclusion of sexual history for prior sexual conduct with the defendant is narrow. n409 They posited, "this limited exception should not undermine the policy of the rule to encourage the reporting of rapes because the vast majority of all reported rapes are committed by strangers, not by persons who have previously engaged in sexual contact with the victim." n410 [\*119] Because a full two-thirds of all rapes go unreported, n411 however, one should not assume that reported rapes are representative of all rapes that occur. n412 Of all rapes that occur, acquaintance rape actually outpaces stranger rape by four to one. n413 Rape occurs in violent dating, cohabitating, and married relationships. n414 Rape is a serious form of battering in a society in which domestic violence between intimates is widespread. n415 Friends and acquaintances commit 53% of all rapes and sexual assaults. n416 Intimates - husbands, boyfriends, former husbands, and former boyfriends - commit an additional 26% of all rapes and sexual assaults. n417 The categorical admission of prior sexual conduct between the complainant and the defendant is, therefore, not a narrow exception.

Such a rule suggests that rapes that occur after a man and a woman have been previously intimate are less injurious. Many people assume that rape by a steady partner is less psychologically damaging to the victim than is rape by a stranger. n418 People harbor the "assumption that intercourse is normative [\*120] within a close relationship," which "works to mitigate the perceived seriousness of steady date rape." n419 In fact, however, research on the psychological impact of rape indicates that acquaintance rape tends to inflict more psychological damage on a victim than does stranger rape. n420

So why have "even the most ardent reformers" of rape law supported the categorical admission of prior sexual conduct between the complainant and the defendant? n421 Professor Galvin, for

instance, argued that there is a [\*121] "high probative value of past sexual conduct" when it involves the defendant himself. n422 She explained:

Rather than relying on the invidious inference that consent with one implies consent with others, this evidence is probative of the complainant's state of mind toward the particular defendant, permitting an inference that the state of mind continued to the occasion in question. n423

It is true that the admission of prior sexual conduct between the complainant and the defendant does not rely on the invidious common law inference that a woman's consent to sexual intercourse is transferable from one party to another. n424 It does, however, rely on the equally invidious common law inference that a woman's consent to sexual intercourse has no temporal constraints once penetration has been achieved - as Galvin aptly put it, "the complainant's state of mind toward the particular defendant ... continued to the occasion in question." n425 If eliminating the influence of invidious common law inferences behind a complainant's character for chastity were the goal, one should be as suspect about prior sexual conduct with the defendant as one is about prior sexual conduct with third parties.

Professor Berger also supported what she called the "universally recognized" allowance for prior sexual history between the complainant and the defendant. n426 She argued that a "history of intimacies with the accused would ordinarily tend to bolster a claim of consent to yet another sexual encounter." n427 Two weak assumptions underpin this argument. First, the argument assumes that prior sexual intimacies between the defendant and the complainant were consensual. A complaint of rape to authorities, however, may not reflect the first episode of rape in a relationship. Approximately twenty percent of women have been forced to have intercourse against their will at some point in their lives, n428 and 75% of rapes occur between those who are acquaintances or previous intimates. n429 Therefore, it is inappropriate to assume that all prior sexual experiences between the defendant and the complainant have been consensual.

Second, the argument that a history of intimacies with the accused bolsters a claim of consent to another sexual encounter assumes that sex between two people is an interaction that does not meaningfully change character in different contexts: that a second, fifteenth, or eightieth experience [\*122] of sexual intercourse is "yet another" similar sexual encounter. n430 Sexual intercourse, however, can vary dramatically in terms of how it is experienced by the same couple. It can be at one time an expression of intimacy and concern and at another time an expression of dominance and abuse. For those couples engaged in a battering relationship, particularly, violent rape is often a part of the abusive phase in an ongoing cycle of cruelty, while (temporarily) tender sexual intimacy can be part of the reconciliation phase, which is itself simply a precursor to further abusive episodes. n431 It is not obvious, therefore, that even gentle and consensual prior sexual acts between the defendant and the complainant bolster a claim of consent to a later sexual act claimed to be rape.

When evaluating cases involving prior sexual history between the complainant and the defendant, courts often make exactly the faulty assumptions that Berger and Galvin made: that the sexual history between the defendant and the complainant was necessarily consensual, and that sexual interactions between two people do not meaningfully change over time. n432 In *State v. Alston*, n433 the Supreme Court of North Carolina addressed a case that involved an allegation of forced sex between a woman and her former boyfriend. As the court recounted:

The defendant and the prosecuting witness in this case ... had been involved for approximately six months in a consensual sexual relationship. During the six months the two had conflicts at times and [she] would leave the apartment she shared with the defendant to stay with her mother. She testified that she would return to the defendant and the apartment they shared when he called to tell her to return. [She] testified that she and the defendant had sexual relations throughout their relationship. Although she sometimes enjoyed the sexual relations, she often had sex with the defendant just to accommodate him. On those occasions, she would stand still and remain entirely passive while the defendant undressed her and had intercourse with her.

[She] testified that at times their consensual sexual relations involved some violence. The defendant struck her several times [\*123] throughout the relationship when she refused to give him money or refused to do what he wanted. n434

She finally left him. n435 Alston tracked her down at school, grabbed her, threatened to "'fix' her face so that her mother could see he was not playing," n436 and told her to come with him to his apartment because "he had a right to make love to her again." n437 When they got to his apartment, she said "no" and cried but he forced sex on her anyway. n438 She made a complaint to the police on the same day. n439 Some time later, Alston came to her apartment and threatened to kick the door down. n440 She let him in, he carried her to the bedroom and, although she initially resisted, she acquiesced to having sex. n441 Based on the first episode, a jury convicted Alston of first-degree kidnapping and second-degree rape. n442

The Supreme Court of North Carolina reversed both convictions. n443 As to the rape charge, it concluded that, although the complainant did not consent to sexual intercourse, the state failed to offer substantial evidence on the element of force. n444 The court believed that the prior beatings by Alston as well as his threats levied on the day in question "appeared to have been unrelated to the act of sexual intercourse." n445 A number of commentators have criticized Alston for its analysis of the force element. n446 Often overlooked, however, is the fact that the court also overturned the kidnapping conviction, for lack of evidence that, when he forced her to the house, Alston intended to rape the complainant. n447 The court explained:

All of the evidence tended to show that [the complainant's] actions ... were entirely consistent with the well established pattern of the couple's consensual sexual relationship. During that relationship she frequently remained entirely passive while the defendant at times engaged in some violence at the time of sexual intercourse... . [The complainant's conduct] in no way indicated to the defendant that he would have to rape [her] in order to have sexual intercourse with her. n448

The court thereby scripted the prior sexual conduct between Alston and the complainant as consensual, despite the fact that "during that relationship she frequently remained entirely passive while the defendant at times engaged [\*124] in some violence at the time of sexual intercourse." n449 Even though the facts described a cycle of violence in a battering relationship, because there had been prior sexual conduct between the parties in question, the court assumed it was consensual in nature and that the character of the sexual experiences between them did not meaningfully change over time.

The Alston court is not alone in its inability to see a cycle of violence in a battering relationship that involves rape as a tool of dominance. n450 *United States v. Parker* n451 provides another example. Parker also refused to give up a relationship with his former girlfriend, so he harassed KD

and stalked her at her work and home. n452 KD testified that she continued to have sexual relations with Parker during that time because "he had very much power over me." n453 When Parker and KD were alone the next time, however, Parker assaulted KD by pushing her, pulling her hair, and wrestling her to the floor. n454 According to KD, he then penetrated her without her consent. n455 One month later, Parker again assaulted her by pulling her hair, penetrating her anally, pulling her pubic hair, and penetrating her vaginally before she could escape. n456

The trial court convicted Parker of rape and forcible sodomy, but the appellate court reversed. n457 It emphasized that KD had admitted "she continued to have sexual relations with the appellant after the second alleged rape because she was emotionally weak and sexually dependent upon [him]." n458 Rather than seeing KD's emotional weakness and sexual dependence on Parker as evidence of his sexual domination, the court saw it as evidence of her sexual consent. The appellate court concluded that KD's "inconsistent actions, particularly in continuing a consensual sexual relationship with the appellant after he allegedly raped her twice, raise troublesome questions about her claims of rape." n459 Instead of seeing a battering relationship in which Parker abused KD, the Parker court saw "a consensual sexual relationship" n460 in which KD's consent lacked temporal constraints.

In addition to relying on the invidious common law assumption that consent to sexual intercourse is not temporally constrained, the categorical admission of prior sexual conduct between the complainant and the defendant [\*125] also relies on the common law assumption that a woman's sexual consent is not specific as to act. In 1911, the Iowa Supreme Court explained that inference in this way: the complainant's prior "voluntary sexual relations with the defendant[ ] may and should have been considered as substantive proof of the fact that whatever the act done it was with the consent of the prosecutrix." n461 This analysis has been echoed in recent cases, where courts fail to conceptualize sexual consent as act-specific. For example, upon considering Specialist L's sexualized dancing, the reviewing court in *United States v. Kelly* noted the following:

The Court of Military Appeals has previously suggested that the grabbing of genitalia is an implied invitation to have sex... . Likewise, touching the buttocks and genitalia and rubbing up against the genitalia in a provocative manner as SPC L did to [Kelly] and SPC Hubbard, may have been an implied invitation to have sex. The excluded testimony was relevant to show that SPC L was apparently receptive to further sexual advances by SPC Hubbard or [Kelly]. n462

Not only does the notion that fondling implies consent to sexual intercourse give short shrift to women's autonomy, it also fails to square with sexual decision-making today.

In an age of AIDS, people often engage in significant sexual behavior without engaging in intercourse. Young people, for instance, are engaging in more fondling and oral sex as a substitute for intercourse. n463 Experts believe that this trend may actually be a response to current sexual education in schools, where abstinence from sexual intercourse is frequently taught as the only method of preventing pregnancy and sexually transmitted diseases. n464 [\*126] Abstinence-focused education teaches kids to eschew vaginal intercourse in order to maintain virginity and to avoid pregnancy and the transmission of HIV. n465 Young people today often engage in sexual petting, fantasy role-playing, and oral sex under the belief that these practices maintain technical virginity, avoid pregnancy, and constitute safe sex. n466 The more diverse sexual [\*127] experiences people engage in, experiences that deliberately do not include vaginal intercourse, the less relevant those sexual experiences are to proving consent to vaginal penetration. More than it



ever has been, sexual intercourse is a specific act that sexually active people negotiate. n467 Therefore, the law must treat consent as specific for each sexual act, and not assume that prior consent to sexual petting with the defendant, for instance, is "an implied invitation" to have sexual intercourse.

A separate argument that both Berger and Galvin made for the categorical admission of evidence of prior sexual conduct between the complainant and the defendant focused on the potential bias of the complainant. Berger argued, "a prior relationship may support a claim of bias, which courts consider an extremely critical line of attack." n468 A footnote explained the statement: [\*128] "For example, a woman may turn against her erstwhile lover - possibly even accuse him of rape - because he spurned her or treated her shabbily during the affair." n469 Galvin likewise argued:

The fact that the defendant and the victim have previously engaged in sexual relations is likely enough to demonstrate some particular bias of the victim against the defendant, or some particular motive to falsify an accusation or alter or misinterpret the facts of an encounter between them, that evidence of this type of activity ought to be admissible. n470

How most prior sexual acts between a complainant and a defendant reveal the complainant's bias or motive to falsify remains opaque, however. To the extent that evidence of particular prior sexual acts or communication between a complainant and a defendant reveals the complainant's motivation to lie, the evidence is relevant and should be admissible. n471 But a categorical admission of prior sexual conduct between the complainant and the defendant is unacceptably expansive. Not all prior sexual conduct between the complainant and the defendant is relevant to proving bias or motive to lie, and yet the categorical admission of such evidence constitutes the legal expression that it is. Unless it involves prior false claims of rape or a reason to exact revenge, such evidence sheds no light on the central issue of the complainant's willingness to consent to sexual intercourse with the defendant and then lie about it to the police and in court.

The prejudicial effect that prior sexual conduct between the complainant and the defendant will have on the truth-seeking process in a rape trial involving intimates is great. n472 A common bias against women who claim rape by an intimate is evidenced by the marital rape exemption itself, which for generations prevented women from claiming rape by a marital partner. n473 The Model Penal Code still contains a marital rape exemption and has even expanded it to include "persons living as man and wife, regardless of the legal status of their relationship." n474

Psychological research clarifies the reason for a bias against a rape victim who has been previously intimate with the defendant. In a 1992 study, subjects evaluated a rape vignette in which the victim was either previously chaste with the defendant, had previously had sex once with the defendant, or had previously had sex ten times with the defendant. n475 The researchers concluded, "after a woman has had as few as 10 prior consensual sexual [\*129] encounters, she is perceived as having a reduced right to refuse subsequent sex, and the violence [of the rape] is viewed as less serious and harmful." n476 They continued: "If the woman has consented to sex on as few as 10 prior occasions, her protests against further sex are viewed as losing their legitimacy because she 'should' have sex." n477 With all other variables held constant, the more sex a couple had in the past, the less violent subjects rated the sexual assault and the less likely they were to label it as rape. n478

A 1998 study explored how evidence of a prior sexual relationship between the victim and the defendant influenced decision-making processes in a sexual assault trial. n479 Subjects were exposed to a sexual assault case in which the prior sexual history between the victim and defendant was varied to include either sexual intercourse, kissing and petting, or no sexual history information. n480 Subjects in the sexual intercourse condition were more lenient in judging the defendant's guilt, less likely to find the victim credible, and more likely to believe she had consented, as compared with those who heard no sexual history information. n481 The judge gave a group of subjects special jury instructions indicating that the prior sexual information was not to be used to assess the victim's credibility or the likelihood that she consented to sex with the defendant. n482 These limiting instructions did not alleviate subject bias: in fact, they had no impact on the subjects' evaluations of the cases. n483

Overall, the scholarship indicates, "acquaintance rape cases are most difficult to win" under two circumstances: if the victim "violated norms of female propriety," or if she "had engaged in consensual sex with the defendant at some time before the alleged rape." n484 If the defendant and the victim have previously had a sexual relationship, the jury is often unwilling to convict. n485 Prosecutors, for instance, consider a prior sexual relationship between the defendant and the complainant "a 'real trump card for the defense.'" n486 A prior sexual history with the defendant is said to make it "'practically impossible to convince the jury that the incident in question was anything other than one in a long series of consensual acts.'" n487

[\*130] For those women raped by boyfriends and husbands, as well as for those women raped by acquaintances with whom they have been previously intimate, rape shields provide little to no protection because they admit the prior sexual activity between the complainant and the accused. n488 If we want to protect the truth-seeking process from undue prejudice, we should be particularly concerned about this kind of prior sexual history, as it is the kind that inspires deep bias against women who claim rape. n489

Although prior sexual history between the complainant and the defendant should not be a categorical exception to rape shield laws, complaints of rape should not want for meaningful context. A complainant who has been intimate with the defendant cannot pretend to be a stranger to him when she lodges a complaint that he raped her. For the sake of background and perspective, it is appropriate to allow the defendant to discuss general information about the nature of the parties' relationship, such as the fact that the parties were married or lived together, or dated previously. This general information is not covered by rape shield laws and is not the sort of evidence that would be excluded by them. n490 Descriptions of the level of sexual intimacy previously attained or of specific prior sexual acts, however, befuddle the truth-seeking process, so they should ordinarily be inadmissible. n491

Prior negotiations between the complainant and the defendant regarding the specific acts at issue, however, should be admissible. A negotiation might be verbal or involve a custom and practice. As I will discuss in Part V, the probative value of this evidence outweighs its prejudice, because past negotiations establish the expectations that each party had about what the other person consented to when the incident in question began.

## B. Judicial Exceptions

Despite the formal strictures of many rape shield laws, particularly those in the legislated exceptions category, judges have nevertheless found numerous instances in which a woman's prior

sexual conduct should be admitted to [\*131] support a rape defendant's claim of consent, despite its inadmissibility under the rape shield laws. n492 Judges in these cases often conclude that the defendant's rights under the Sixth Amendment to the Constitution demand that this evidence be admitted. n493 I will address the constitutional claims in Part VI of this Article, but for now, I will review just two judicially imposed exceptions: those for sadomasochistic sexual behavior with third parties and those for public sexual behavior with third parties.

### 1. Prior Sadomasochistic Sexual Conduct with Third Parties

Increasingly, courts are facing rape cases in which the defendant claims that what occurred was not rape but consensual sadomasochistic sex. n494 In many of these cases, the defendant seeks to bolster his claim of consent by alleging that the woman had previously engaged in consensual sadomasochism with others. n495 The question of the admissibility of a complainant's prior sexual conduct with third parties when it involves sadomasochistic sexual practices arose in *People v. Jovanovic*. n496 Oliver Jovanovic, a microbiology graduate student at Columbia, and the complainant, an undergraduate student, began their relationship in an Internet chat room in the summer of 1996. n497 They e-mailed each other repeatedly over a period of three months. n498 The e-mails were flirtatious and made reference to both party's interest in sadomasochistic sexual practices. n499 In November of 1996, after watching a movie together in Jovanovic's apartment, he ordered her to undress, tied her arms and legs to a bed, and began to pour hot candle wax on [\*132] her. n500 She asked him not to burn her, demanded that he stop, screamed, and cried. n501 Sexual intercourse ensued, which she claimed was rape and he claimed was consensual sadomasochism. n502

The "vast majority" of the e-mail correspondences between the two parties were admitted at the trial. n503 Four of the e-mail correspondences, however, were partially redacted when the trial judge decided that their prejudicial effect outweighed their probative value and that they were excludable under New York's rape shield statute. n504 The applicable rape shield statute excluded a complainant's prior sexual behavior except, *inter alia*, that with the defendant himself, that regarding the complainant's prior prostitution, and that which the judge determined should be admitted "in the interests of justice." n505

After being convicted of kidnapping and sexual abuse, Jovanovic appealed, claiming that the trial court misapplied the rape shield law and violated his Sixth Amendment rights. n506 The Supreme Court of New York, Appellate Division, agreed with Jovanovic and reversed. n507 It focused on three of the four redacted e-mails and concluded that, with regard to those redactions, the trial court misapplied the rape shield law. n508 The three redacted e-mails upon which the appellate court focused included the following information: (1) the complainant's statement that a third party "seduced" her, came to her apartment, and "then he got me," and the complainant's vivid description of a man sexually assaulting another man; (2) the complainant's statement about meeting a "sadist" and becoming "his slave and its [sic] painful, but the fun of telling my friends 'hey I'm a sadomasochist' more than outweighs the torment"; (3) the complainant's statement, "I'm what those [\*133] happy pain fiends at the Vault call a 'pushy bottom.'" n509 The appellate court said that the admission of this evidence would have "permitted Jovanovic to effectively place the complainant in a somewhat less innocent, and possibly more realistic, light." n510 The court's language here tracked exactly the way that bias erupts against rape victims: As the complainant becomes less sexually "innocent" (and more guilty of promiscuity), the defendant becomes more innocent of the sexual abuse charges.

In analyzing the trial court's decision to redact the e-mails, the appellate court first held that the trial court erred by applying the rape shield law to these e-mail correspondences because they were not themselves prior sexual conduct but were merely statements about prior sexual conduct. n511 The court therefore concluded that, "the Rape Shield Law, by its terms, is inapplicable to the evidence the trial court held to be inadmissible." n512 The court went on to declare that, even if the rape shield law did apply to the redacted statements, they would fall within the exceptions to the law's general policy of exclusion. n513 The court said, "given the highly intimate nature of some of this information, the statements, as a practical matter, should be viewed as the equivalent of 'prior sexual conduct with the accused.'" n514 Thus, the court moved from a characterization of the e-mails as statements - and not conduct - to one in which the e-mails were, hypothetically, not only conduct, but conduct with the defendant.

The court emphasized that the excluded evidence was crucial to the defense, because it conveyed something important to Jovanovic. It stated, "she chose to say these things to Jovanovic in the context of her electronic, on-line conversation with him, so as to convey to him ... her interest in exploring the subject of such activities with him." n515 The court went on to characterize the evidence as "relevant to establish that she purposefully conveyed to Jovanovic an interest in engaging in consensual sadomasochism with him." n516 In addition to communicating actual consent, the court concluded that the redacted e-mail statements were relevant to the issue of Jovanovic's reasonable, but mistaken, belief that the woman consented to have sex with him. n517 The trial court, therefore, "prohibited [Jovanovic] from offering the jury any [\*134] evidence justifying an asserted belief that the complainant had indicated a desire to participate in sadomasochism with him." n518

It is not clear how the redacted e-mail statements communicated consent to engage in specific sexual acts with Jovanovic, or how they could be reasonably misinterpreted by Jovanovic as communicating consent to specific sexual acts with him. One wonders how discussing how a third party seduced her and "got" her communicates consent to have sex with Jovanovic, or how he could reasonably interpret those words as meaning consent. n519 One wonders how claiming that she was someone else's "slave" communicates consent to sex with Jovanovic, or how he could reasonably interpret those words as meaning consent. n520

It is clear that the redacted e-mail statements communicated her general interest in sadomasochistic sexual practices and a flirtation with Jovanovic himself. n521 People engage in sexualized banter, however, with no intention of consenting to sexual intercourse with the object of their current attention. n522 It defies logic to argue that she meant to communicate precise consent to sexual intercourse with Jovanovic by stating her sexual preferences for sadomasochistic sex generally.

The fact that the complainant had fantasies and experiences that included sadomasochistic sexual practices is irrelevant to the issue of whether Jovanovic obtained consent to engage in specific sexual practices with her. n523 The trial court was correct to exclude it. Being attracted to sex in general is not evidence of consent to sex with any particular man; having a prior sexual history with third parties is not evidence of consent to sex with any particular [\*135] man; flirting by making reference to one's sexual proclivities is not evidence of consent to sex with any particular man. Likewise, being attracted to sadomasochism in general is not evidence of consent to engage in sadomasochistic sex with any particular man; having a prior sexual history of sadomasochistic sex with third parties is not evidence of consent to engage in sadomasochistic sex with any particular

man; and flirting by making reference to one's interest in sadomasochism is not evidence of consent to sadomasochism with any particular man. Thus, judges should evaluate prior sadomasochistic sexual activity in the same way that they evaluate the more egalitarian prior sex acts of the complainant.

Those who do not engage in sadomasochism may believe that the sadist ("top") gets to do anything he wants while the masochist ("bottom") suffers anything that the top wants to dish out. n524 Advocates for sadomasochism, by contrast, insist that everything they do is consensual and that negotiating consent is a crucial aspect of their sexual play. n525 Sadomasochists often employ "safewords" for the purposes of negotiating consent. n526 Safewords are signals that partners agree will supplant the meaning of the word no. A common set of safewords is: "yellow," which, in the words of one practitioner, communicates, "something's is too intense; I need you to lighten up," and "red," which communicates, "I'm in trouble and I want everything to stop NOW, no more games, scene over, let me outta here!" n527 Safewords afford people involved in sadomasochism the opportunity to act as if they were struggling [\*136] against being dominated (by pleading that it cease, squirming to get away, saying "no," etc.), while knowing that they have a negotiated safeword that, if uttered, would terminate the domination at any moment. n528 Verbal agreements between individuals beforehand about specific sexual acts or the use of specific safewords are what distinguish consensual sadomasochistic sexual practices from sexual abuse and sexual enslavement. n529 These agreements are crucial, particularly when, for some, losing the appearance of consent is central to their sexual fantasies and desired sexual experiences. n530

When a defendant claims that the sexual intercourse alleged to have been rape was actually consensual sadomasochistic sex, he should not be able to admit all of the woman's sadomasochistic sexual history. Very little of her sadomasochistic sexual history is relevant. Yet all of it is inflammatory and prejudicial to the truth-seeking process. Because sadomasochism flagrantly violates traditional norms of appropriate sexual intimacy, n531 courts should be especially careful when applying rape shield laws to this kind of behavior.

While a claim that the sex alleged to have been rape was consensual sadomasochistic sex cannot suffice to admit all of a woman's sadomasochistic sexual history, negotiations between individuals beforehand about specific sexual acts or the use of safewords should be admitted. Partners may agree that they wish to engage in specific sexual acts. If so, those agreements should be admitted as evidence. Partners may agree that "no" will not mean no when they engage in sadomasochist sex, but that "yellow" and "red" will suffice to communicate the bottom's wish to slow or stop the dominance. If so, those agreements should be admitted as evidence.

The law should assume that "no" means no, unless there is evidence that two people negotiated to substitute a safeword (or other signal) for the meaning of the word no. If someone chooses not to engage in such negotiations about consent, then he assumes the risk that the law will construct the complainant's "no" as no, and that anything he does to her after that point is, legally, against her will. To require such negotiations about consent from those who choose to engage in sex that appears to be nonconsensual is the only legal scheme that makes sense. It allows those who want to engage in sadomasochistic sex to do so only if they obtain verbal consent. Because [\*137] sadomasochists advocate extensive negotiation around consent, n532 such a legal schema puts no meaningful cramp in their sexual freedom.

If a rape defendant, such as Jovanovic, engaged in negotiations with the complainant about safewords or potential sexual interactions between them, then that evidence would be relevant to a

rape charge and hence, appropriately admissible. However, if Jovanovic did not engage in negotiations about consent with her but proceeded to force sexual intercourse in the face of her demand to stop, he would have no business claiming that her "stop" meant anything but stop. He should not be allowed to bolster his claim that she wanted him to ignore her "no" through evidence of her prior sadomasochistic sexual experiences with others or her stated fantasies.

Sadomasochistic sex is at least as prejudicial as the patterns of behavior of "sexually aggressive" women, the public, sexual conduct of women in bars, or prior acts of prostitution. Like that other evidence, it is ordinarily irrelevant on the crucial question of whether the complainant consented to sexual intercourse with the defendant and then lied about it under oath. Evidence of prior sadomasochistic sex will prejudice a trial by allowing jurors to label the complainant as deviant and promiscuous, assuming that she is to blame for the rape. Courts must be circumspect in deciding the admissibility of such evidence because of the risk it poses to the truth-seeking process. For these reasons, the categorical admission of prior sadomasochistic sexual behavior is unwise.

## 2. Prior Public Sexual Conduct with Third Parties

When women engage in significant sexual behavior in public places, such as bars, some courts have been loathe to exclude evidence of their open activities. n533 The apparent logic behind this exception is that a woman's public sexual behavior with third parties suggests consent to sexual intercourse with the defendant and is not excluded by the rape shield laws for the very reason that it occurred in public. n534

In *State v. Colbath*, n535 the New Hampshire Supreme Court faced such a case. In 1985, Richard Colbath and a woman met at the Smokey Lantern Tavern in Farmington, New Hampshire. n536 According to the court, "there was evidence that she directed sexually provocative attention toward several men in the bar, with whom she associated during the ensuing afternoon, the defendant among them." n537 Colbath testified that, at the tavern, he felt the woman's breasts and buttocks, and she rubbed his groin area before they left the bar together. n538 At Colbath's trailer, sexual intercourse ensued. n539 The woman alleged that it was forcible and against her will; Colbath claimed that [\*138] it was voluntary and consensual. n540 Colbath and the woman were then "joined unexpectedly" by Colbath's girlfriend, who saw what was happening and violently assaulted the woman. n541

New Hampshire prosecuted Colbath for rape. n542 The trial judge allowed Colbath to testify about the sexual attention that the woman had paid to him directly at the bar. n543 The judge then had to decide how to address evidence of the sexual attention that the woman had directed at third parties that afternoon. n544 New Hampshire's rape shield law is one of the nation's strictest. It falls into the legislated exceptions category, and the statehouse legislated just one exception. n545 The rape shield law barred evidence of "prior consensual sexual activity between the victim and any person other than" the defendant. n546 Pursuant to the rape shield law, the trial judge instructed the jury that evidence of the woman's behavior with other men at the bar served only to provide "background information" but was "not relevant on the issue of whether or not she gave consent to sexual intercourse" to Colbath. n547 The jury convicted Colbath of rape. n548

Colbath appealed the trial court's jury instruction that "evidence of the complainant's behavior with men other than the defendant in the hours preceding the incident was immaterial, or irrelevant, to the question of the defendant's guilt or innocence." n549 The Supreme Court of New Hampshire

reversed. n550 Justice David Souter, then a justice on the state's highest court, penned the opinion. n551

Souter noted that the arrival of a jealous girlfriend provided a potential explanation for the injuries the complainant sustained and also provided "a reason for the complainant to regret a voluntary liaison" and to "allege rape as a way to ... excuse her undignified predicament." n552 Because Colbath's girlfriend returned to the trailer at an inopportune time, Souter said, "it would, in fact, understate the importance of such [prior sexual behavior] evidence in this case to speak of it merely as relevant." n553

Souter clarified that, "despite the absolute terms of the shield law's prohibition," the shield law was "limited by a defendant's State and national constitutional rights to confront the witnesses against him and to present his own exculpatory evidence." n554 As to the evidence itself, Souter reasoned:

[\*139]

As soon as we address this process of assigning relative weight to prejudicial and probative force [of sexual behavior with other men], it becomes apparent that the public character of the complainant's behavior is significant. On the one hand, describing a complainant's open, sexually suggestive conduct in the presence of patrons of a public bar obviously has far less potential for damaging the sensibilities than revealing what the same person may have done in the company of another behind a closed door. On the other hand, evidence of public displays of general interest in sexual activity can be taken to indicate a contemporaneous receptiveness to sexual advances that cannot be inferred from evidence of private behavior with chosen sex partners. n555

In the instant case, Souter explained, "the jury could have taken the evidence of the complainant's openly sexually provocative behavior toward a group of men as evidence of her probable attitude toward an individual within the group." n556 Souter continued, "evidence that the publicly inviting acts occurred closely in time to the alleged sexual assault by one such man could have been viewed as indicating the complainant's likely attitude at the time of the sexual activity in question." n557 Souter explained, "because little significance can be assigned here either to the privacy interest or to a fear of misleading the jury, the trial court was bound to recognize the defendant's interest in presenting probably crucial evidence of the complainant's behavior closely preceding the alleged rape." n558 He concluded, "the demand of the Constitutions is all the clearer when these activities were carried on in a public setting." n559

As the legislators who passed the federal rape shield law had emphasized, the purpose of rape shield laws was to protect rape victims from the embarrassment of having their private sexual lives exposed in public. n560 Colbath therefore focused on the nature of the sexual acts and concluded that the fact that the sexual acts took place in public made the evidence admissible under the rape shield laws because those laws were designed to shield women from exposure of private sexual acts. n561 Souter contrasted the woman's "open" conduct "in the presence of patrons" in the "public bar," with what she may have done "behind a closed door." n562 He then again contrasted her "public displays" with her "private behavior." n563 Because the woman had not sought to keep her sexual behavior private, she had no right to have it excluded under the New Hampshire rape shield law. n564

[\*140] The court in *United States v. Kelly*, discussed above, cited Colbath in support of its decision:

[Specialist L's] public statements and actions toward other soldiers should not have been excluded by the military judges. As [then] Judge Souter (now Justice Souter) has noted, the public behavior of a prosecutrix is significant in weighing the probative value of particular evidence against the prejudice to her privacy or to rational decision making by the jury. n565

As a rationale for admitting evidence, however, the contrast between public and private sexual behavior is unpersuasive. Today, bars, parties, dance floors, and other public venues are bastions of sexual bravado. They are the place where women and men can "let it all hang out" without implying that they consent to sexual intercourse with anyone in particular, much less with everyone in general. For example, many high schools today are cracking down on students' propensity to dance in sexualized ways at school functions: "Teenagers slip their hands down one another's waistbands. Hips grind together. Guys lie on the floor with girls straddling them. High school students call it dirty dancing, freaking, booty dancing - or just dancing." n566 "It's simulated sex on the dance floor," said Miles Burrell, a school dance chaperone at Norristown Area High School in Pennsylvania. n567 "Anybody with morals, who brings their kids up in any Christian family, would stop that kind of thing." n568 The teens, however, are nonplussed. n569 Sure, it is "grinding, bumping, [and] imitating some sexual behavior," said Emily James, a sophomore at Norristown Area High. She explained, however, "It's not as bad as they make it sound. I don't think it leads to sex. We're just trying to have fun." n570 If Souter is right, James's "openly sexually provocative behavior" on the dance floor indicates her "probable attitude" toward sexual intercourse with any of the boys she dances around. James might respond: (1) sexualized dancing does not imply consent to sexual intercourse (because consent is act-specific); (2) sexualized dancing does not imply consent to sexual intercourse later in time (because consent is temporally constrained); and (3) even if she consented to sexual intercourse with her dance partner, her behavior did not imply consent to sexual intercourse with other boys she danced around (because consent is nontransferable to others).

A woman's public sexualized behavior with others is irrelevant to the question of whether she consents to sexual intercourse with any individual [\*141] man. Public sexual behavior with third parties sheds no light on the complainant's willingness to consent to sex with the defendant. Additionally, the defendant is claiming, not just that she consented, but that she consented and then falsely claimed rape. Public sexual behavior does not make it more likely that she would have consensual sex with someone and then lie about it under oath.

Public, sexualized behavior, however, is highly prejudicial because it implies promiscuity. It plays into a common bias that women are to blame for inviting rape because what they do in public can invite sexual abuse. Similar to a victim's public sexual conduct, recent studies indicate that what a victim wears in public may bias jurors against her. n571 With all other variables being held constant in a rape scenario, college students who viewed the victim in a shorter skirt were more likely to blame her for having been raped, to believe that the rapist was justified, and to label the attack as something other than rape. n572 Engaging in public sexualized behavior is probably more unsettling to conservative sexual sensibilities than is wearing a skirt three inches above the knee. Studies indicate that deviation from norms increases the blame people assign to women who have been raped. n573 Engaging in public sexualized behavior deviates from the feminine norm of sexual modesty, and so will increase the blame that people attribute to the complainant and inappropriately



exonerate the defendant. For this reason, there should be no categorical admission of the complainant's prior public sexual behavior in rape trials.

#### IV. Sexuality License

The chastity requirement and its modern incarnation, the promiscuity prohibition, should be abolished in rape law. In its place, rape law should embrace a sexuality license. A sexuality license would mean that a woman has the prerogative to be promiscuous without becoming open to all sexual advances made toward her. Individuals should have license to have sex with any number of people they do or do not know well. A woman should have the right to dance closely or lewdly with someone without implying that sexual [\*142] intercourse will follow. n574 She should be able to discuss sex or other personal subjects without implying that she is open to sexual advances, despite her objections. n575 She should have the ability to visit with people she is attracted to at odd hours without insinuating that she consents to physical acts of intimacy. n576 She should have the right to be drunk, "hanging all over" a man, and then say "no" to sexual intercourse with him, and have her prior sexual conduct with others not count against her. n577

Rape shield laws based on an appropriate sexuality license would not assume that any prior sexual behavior between the defendant and the complainant was consensual, that previous consent to intercourse with the defendant suggests later consent, or that a woman's extensive sexual past with others is relevant to a currently disputed instance of intercourse with the defendant. A sexuality license would not assume that there was any legal meaning to the fact that someone had, or had not, previously been sexual.

The sexuality license I advocate for women is tied to a substantive vision of consent in rape law. Under a sexuality license, consent would be temporally constrained, specific as to act, and nontransferable to others. In order to ensure that consent is temporally constrained, rape shield laws should exclude the vast majority of prior sexual behavior with the defendant himself. At the altar, no one forsakes the ability to say "no" for the rest of her married life. A girl does not declare herself open to all sexual advances from her boyfriend once she has had sex with him. After a woman consents once to sex, or ten times, her partner must still obtain her consent again. Each act must be renegotiated, and consent is only viable for as long as both parties continue to agree on the instance in question. Sexual behavior between two people before, or after, the instance in question should ordinarily be inadmissible. In short, consent is specific as to act.

Also as a way to ensure that consent is specific as to act, rape shield laws should exclude the vast majority of prior sexual behavior between the complainant and the defendant. Consent to one sexual act does not imply consent to other sexual acts. A woman may choose to engage in oral sex with the defendant and then say "no" to vaginal sex. A couple may choose to be sexually active without intercourse. Therefore, what happened between two people before, or after, the instance in question regarding other sex acts should ordinarily be inadmissible.

Additionally, consent never loses its unique, nontransferable character. In order to ensure that consent between parties remains nontransferable, prior sexual conduct and communication with third parties should be inadmissible except under extraordinary circumstances. Even if a woman routinely chooses to have sex with almost anyone, it does not mean that she consents to sex with everyone. No matter how indiscriminate one's sexual [\*143] behavior might appear to an outsider, consent to third parties does not imply consent with the defendant, and no one can reasonably conclude that a woman consents to sex with him solely based on her sexual behavior with others.

Consent is one possible conclusion in a negotiated process. n578 Ideally, each person in the negotiation has options, and each acts without coercion of any kind and after weighing the opportunity costs involved in such a decision. Given the conditions of sexual inequality that exist between men and women, consent in the real world may not often happen in an ideal way. n579 As Professor Catharine MacKinnon has pointed out, "consent is communication under conditions of inequality." n580 The disparity between men and women is all the more reason to have a legal definition of consent that maximizes women's autonomous decision-making. To maximize women's ability to make autonomous sexual decisions, negative legal consequences should not automatically befall women who have been sexually active.

Increased sexual activity over the past quarter of a century has been a mixed bag for women. Undoubtedly some of it represents a positive development - women's and girls' rejection of the strictures of the chastity requirement. n581 Some women and girls have rejected the social pressure to deny their normal sexual desires; instead, they seek pleasure and the means to obtain it by engaging in more, diverse sexual behavior. n582 This activity represents the genuine expression of female sexual autonomy, as more women honestly access their own sexual desires and act to have them satisfied. n583 To the extent that prior sexual activity represents the authentic sexual aspirations of women and girls, the law should ignore it. n584 This prior sexual activity should not be scrutinized in court and it should not reflect negatively on victims if they are raped and seek prosecution. n585

But not all of the sexual activity that has increased over the past quarter of a century represents the authentic sexual aspirations of women and girls. The Surgeon General indicates that 22% of women have experienced an attempted or completed rape in their lifetimes. n586 For about 8% of women, [\*144] their first experience of intercourse was not voluntary. n587 However, characterizing sexual intercourse "as simply voluntary or involuntary is inadequate." n588 A larger percentage of sexual intercourse is unwanted by the women involved. Consent, itself, is a problematic notion. One quarter of women report that, while their first experience of intercourse was not rape, neither was it wanted. n589 Thirty percent of a sample of college women had previously engaged in unwanted intercourse because they perceived that the cost of refusing sex was higher than cost of submitting to it. n590 Many girls and women, like the complainants in Alston and Parker, feel they have little ability to refuse or assert control when boys or men want to have sexual intercourse with them. n591 They may engage in unwanted sex because of coercion [\*145] from a partner that does not rise to the level of legal "force," or because of the inability to express their own desires and their powerlessness. n592 Whatever the reason, it is clear that these unwanted sexual experiences are not expressions of female sexual autonomy.

Legally, "consent" represents a range of possibilities along the sliding scale of willingness to engage in sexual acts, anything from enthusiastic desire to reluctant acquiescence. n593 The meaning of a woman's prior consent is thus ambiguous. Prior consent should be irrelevant to a currently disputed instance of sex, particularly because its meaning is indeterminate. Because many girls and women engage in significant sexual behavior they do not desire, it is irrational to hold their prior sexual experience against them when they allege rape. Imposing a chastity requirement or promiscuity prohibition on women in these contexts, as in Alston, is unfair. To the extent that prior sexual activity does not represent the authentic sexual aspirations of women and girls, it should not reflect negatively on them if they bring a rape prosecution. Women deserve to have their sexual pasts - involuntary or voluntary, wanted or unwanted - not count against them if they come forward to charge a man with rape.

The legal order has not imposed a chastity requirement on men. On the contrary, at least since the eighteenth century in this country, when boys or young men have become sexually active, they have been informally celebrated in their communities. n594 Boys and men engage in socially acceptable behavior when they collect female sexual partners seriatim. n595 Men already have a sexuality license. n596

Male sexual license in this culture extends to heterosexual conquest and, in an unfortunate but undeniable manner, to engaging in heterosexual behavior that women do not desire. n597 Male sexual license no longer routinely includes the ability to beat a woman, pull a knife on her, or break her bones in order to obtain sex. Physically aggressive strategies, however, are unnecessary. Most women coerced into sex acquiesce long before the first punch. n598 [\*146] Male sexual license authorizes verbal sexual coercion. n599 Men have the license to make irrational assumptions about a woman's consent, bullying women into sexual intercourse, and then later claiming that they held a reasonable mistake as to consent at the time. n600 Men also have a sexual license to have sex with women with whom they have been intimate before, as long as they do not use physical force on the instance in question. n601

Despite the passage of rape shield laws, rape law remains the legal locus of the male sexual license - particularly because of the promiscuity prohibition that it continues to impose on women. Women are subject to a modern chastity requirement, while men are afforded an ancient sexuality license. As the law restricts women's behavior, it precisely expands male sexual license. If a woman has to be chaste before rape law will take her claim of violation seriously, men have sexual license to violate promiscuous women. To the extent that a woman's promiscuity with the defendant is treated as relevant to consent, men also have sexual license to transgress the wills of women with whom they have been previously intimate. n602

Depending on how the law constructs rape shields, either it gives men the license to violate women who are sexually active, or it gives sexually active women the license to say "no" to sex and to have that "no" mean something legally, despite their sexual pasts. Because it is founded in the female chastity requirement, the current male sexual license robs women of legitimate sexual liberty. It is time to rewrite rape shield laws and to curtail the sexual license that men unjustly possess in order to give some of that sexual freedom to women.

To be sure, the law should not subject men to any kind of a chastity requirement or promiscuity prohibition. Men should continue to be allowed to be sexual and not to suffer societal or legal scorn for the consensual sexual activity they enjoy. But the scope of male sexual license can no longer include proceeding to sexual intercourse with a woman when she says "no," [\*147] just because she has engaged in oral sex with him, or married him, or because she has been sexual with others.

Additionally, the law should not afford women the kind of sexual license that men currently retain. What women need is the right to say "yes" to sexual behavior, to say "no" to sexual behavior, to change their minds either way, and to have the law honor each of those decisions, regardless of what has previously transpired in the women's sexual lives. n603

#### V. A New Rape Shield Law Responds to the Sexuality License

In light of the importance of the sexuality license, the legal order needs a New Rape Shield Law. The New Rape Shield Law should not be designed to protect women's sexual privacy. It should be designed to protect women's sexual license: their ability to engage in sexual behavior, whether in

public or private, without having that behavior convict them of promiscuity as it acquits their assailants of rape. The New Rape Shield Law I advocate is as follows:

Evidence of the complainant's sexual conduct and sexual communication with the defendant on the instance in question is admissible. Direct or opinion evidence of the complainant's sexual conduct and sexual communication prior or subsequent to the instance in question is inadmissible, subject to the following three exceptions:

- (1) Evidence of an alternate source for the semen, pregnancy, disease, or injury that the complainant suffered.
- (2) Evidence of negotiations between the complainant and the defendant to convey consent in a specific way or to engage in a specific sexual act at issue.
- (3) Evidence of the complainant's bias or motive to fabricate the charge of rape.

This New Rape Shield Law would help to ensure that consent to sexual intercourse is temporally constrained, specific as to act, and nontransferable to others. The law begins by emphasizing that evidence temporally related to the incident between the complainant and the defendant comes in: "evidence of the complainant's sexual conduct and sexual communication with the defendant on the instance in question is admissible." There is no restriction on the admission of evidence related to the events that occurred between the defendant and the complainant on the instance in question. Under this New Rape Shield Law, however, most evidence of the complainant's sexual conduct and sexual communication before, or after, the instance in question would be inadmissible, which would help temporally constrain the legal conception of consent. Most evidence of the complainant's sexual conduct with the defendant preceding the instance in question would be inadmissible, so that a complainant's consent to sexual intercourse would be specific as to that act. Additionally, most evidence of the complainant's sexual [\*148] conduct and communication with third parties would be inadmissible, which would help ensure that her consent to sexual intercourse is nontransferable to others.

The New Rape Shield Law also contains three exceptions to what would otherwise be a categorical prohibition on the complainant's prior and subsequent sexual conduct and sexual communication. These provisions should not be confused with a random collection of exceptions to a general prohibition. Instead, these three exceptions are grounded in the elements of the crime of rape itself. Rape is ordinarily defined as sexual intercourse that is forced and nonconsensual. n604 Therefore, the elements of the crime are: (1) sexual penetration; (2) force; and (3) nonconsent. n605 The first exception to the rape shield law accounts for evidence that would be relevant to penetration and force. The second and third exceptions account for evidence that would be relevant to nonconsent.

#### A. Exception One

Exception One of the New Rape Shield Law addresses prior sexual conduct that might be relevant to the first two elements of the crime, sexual penetration and force. It states, "evidence of an alternate source for the semen, pregnancy, disease, or injury that the complainant suffered" is admissible. A complainant's prior sexual conduct might provide evidence of an alternate source for those things that prove the element of sexual penetration - semen, pregnancy, or a sexually transmitted disease. For example, a woman might report to an emergency room in a local hospital,

saying that she had been raped. The staff at the hospital might examine her and take samples of semen from her vagina using a rape kit. In response to this physical evidence, the defendant might offer evidence that the woman had sex with her boyfriend two hours before the alleged incident. Despite the fact that the admission of this evidence would reveal the complainant's sexual conduct with a third party on a separate instance, such evidence would be admissible under the New Rape Shield Law. To the extent that the state wants to prove that the defendant left semen in the complainant's vagina in an effort to prove the element of penetration, the defendant should be able to refute that showing, even if it means revealing that the woman's unrelated sexual history. Because the defendant sought to explain the evidence of penetration found at the hospital, the fact that the complainant had sex recently with another man would be admissible.

Likewise, prior sexual conduct that might provide an alternate source for evidence that often proves force - injury - would also be admissible under Exception One of the New Rape Shield Law. For example, a state might argue that the defendant beat a woman and then raped her. To bolster its argument, the state might point to photographs of the complainant's fresh bruises taken at the police station when she reported the crime. The defendant might claim, however, that he never touched the woman. He might seek to admit evidence that the woman was involved in a sexual relationship with [\*149] another man who battered her, as a way to explain the bruises she sustained. n606 Despite the fact that the admission of this evidence might reveal the complainant's sexual conduct with a third party on other occasions, such evidence would be admissible under the New Rape Shield Law. To the extent that the state wants to prove that the defendant caused a physical injury in an effort to prove the element of force, the defendant should be able to refute that showing, even if it means revealing the woman's unrelated sexual history. Because the defendant sought to explain the evidence of force found at the police station, the fact that another intimate partner beat the complainant would be admissible.

#### B. Exception Two

Exception Two of the New Rape Shield Law addresses that kind of prior sexual behavior that might prove the third element of the crime of rape: nonconsent. This provision narrows considerably the sexual history that may be offered under existing rape shield laws to prove nonconsent. No longer will evidence of a prior pattern of sexual conduct with third parties, prior prostitution with third parties, prior public sexual conduct with third parties, or prior sadomasochistic sexual conduct with third parties be admissible to benefit the defendant, willy-nilly. n607 Any prior sexual conduct with third parties offered to prove consent would become inadmissible under this provision. Therefore, the complainants' prior sexual conduct and sexual communication with third parties at issue in Kelly, Harris, Colbath, and Jovanovic, for example, would be inadmissible. n608

Additionally, no longer will prior sexual conduct with the defendant himself be categorically admissible to prove consent to sexual intercourse on the instance in question. In Alston and Parker, evidence that the parties had previously or subsequently engaged in sex would be inadmissible. n609 Instead, the only prior sexual behavior or sexual communication that would be admissible to prove consent is "evidence of negotiations between the complainant and the defendant to convey consent in a specific way or to engage in a specific sexual act at issue." Alston and Parker did not involve negotiations of this kind. n610

Exception Two would cover negotiations between the defendant and the complainant about how they planned to communicate consent between each other. For example, if two people decided that "red" would substitute for the [\*150] word "no" in their sexual interactions and that "yellow" would mean "slow down," their discussions of and agreements about possible methods to communicate consent would be admissible evidence. Exception Two would also cover negotiations or agreements between the defendant and the complainant about the sexual practices they planned to enjoy together. For example, if a woman and man agreed to engage in specific fantasy roles during a sexual interaction later claimed as rape, their discussion and negotiation of those roles and the content of the scene they wanted to enact would be admissible evidence. What would not be admissible, however, is sexual banter that did not constitute negotiations between the defendant and the complainant regarding specific methods of communicating consent or specific acts they planned to engage in together. For example, in *Jovanovic*, evidence that the complainant claimed to be a "slave" to a third party would not constitute a negotiation to engage in sexual acts with *Jovanovic*, n611 and therefore, it would be inadmissible.

Negotiations subject to this provision appropriately establish the sexual expectations between intimate partners over time. If a jurisdiction allows a rape defendant to claim that he held a reasonable but mistaken belief that the complainant consented to sexual intercourse with him, Exception Two would not allow him to admit evidence regarding third parties. For example, *Kelly and Shoffner* could not admit their complainants' prior sexualized dancing with third parties or sexualized pronouncements to third parties in order to bolster their claims of reasonable but mistaken beliefs as to consent. n612 Exception Two, however, makes admissible evidence of negotiations between the complainant and the defendant to convey consent in a specific way or to engage in a specific sexual act at issue. It would, therefore, allow a defendant to admit the kind of evidence upon which it is reasonable to make an assumption that someone consents to a certain sexual act. It is reasonable to assume, all other things being equal, that two people consent to a sexual act when they have negotiated it and agreed to engage in it. It may also be reasonable to assume that one's partner consents when one has negotiated a method of expressing nonconsent that has not been employed during the sexual act. Exception Two, therefore, allows exactly that evidence upon which a reasonable belief in consent might be based.

Would Exception Two impose a contract model on sexual interactions? And would it require sexual partners to engage in verbal negotiations before each separate act of sexual intimacy? No, on both counts. People routinely negotiate sexual consent nonverbally, and this provision would not change that fact. Under the New Rape Shield Law, all verbal and nonverbal communication between the defendant and the complainant on the instance in question would be admissible to suggest the complainant's consent. The defendant maintains the right to discuss the cues he took from the complainant's actions and words on the instance in question and any conclusions he might have drawn based on those cues. What Exception Two restricts is the defendant's reliance on past behavior or past communication to create a reasonable [\*151] belief in the complainant's consent to sexual acts in the future - that is, on the instance in question. n613 If the defendant seeks to rely on the complainant's past communication or conduct to prove consent in the future (on the instance in question), that past communication or conduct must at least constitute some kind of negotiation regarding the sexual acts at issue or how consent is conveyed in order to be admissible.

Can negotiations between two people regarding a sexual act or a method of communicating consent occur nonverbally? Probably yes. Most negotiations regarding specific activities that are to occur in the future happen verbally, of course. Language is ordinarily required to clarify one's

desires and agreements over time. But a custom and practice between two people of engaging in a certain behavior in a certain way repeatedly over time might constitute a kind of negotiation. There are three important distinctions, however, between this aspect of Exception Two and the traditional exception for a prior pattern of sexual conduct that exists in a number of current rape shield laws. Exception Two requires identity of the parties, specificity as to act or method, and mutuality as to negotiation.

First, whereas the exception for a prior pattern of sexual conduct by the complainant involves third parties, Exception Two requires that the custom and practice of behavior be between the complainant and the defendant himself. Therefore, evidence of the pattern of sexually aggressive behavior Specialist L engaged in with other men in the Kelly case would not be admissible under Exception Two because it did not involve Kelly. n614

Second, whereas the exception for a prior pattern of sexual conduct by the complainant requires no tight nexus between the prior pattern and the sexual act engaged in on the instance in question, Exception Two requires that the custom and practice be related to a specific act at issue or a specific method of communicating consent. Therefore, evidence of the complainant's history of being sexually aggressive in the Shoffner case would not be admissible under Exception Two because it was not related to any specific act that occurred between the parties. n615 A prior custom and practice of the complainant having sex in a car with these two defendants together, by contrast, would be admissible evidence under Exception Two.

Third, whereas the exception for a prior pattern of sexual conduct requires no mutuality between the parties, Exception Two requires that the [\*152] custom and practice constitute a negotiation. n616 Take the Alston case, discussed earlier, as an example. n617 It involved a pattern of behavior where:

[The complainant] often had sex with the defendant just to accommodate him. On those occasions, she would stand still and remain entirely passive while the defendant undressed her and had intercourse with her.

...

[She] testified that at times their consensual sexual relations involved some violence. The defendant had struck her several times throughout the relationship when she refused to give him money or refused to do what he wanted. n618

This case involved evidence of a custom and practice, to be sure, but no negotiation, just brute domination by Alston. n619 Evidence of that custom and practice is not admissible under Exception Two. By contrast, a custom and practice of behavior between the defendant and the complainant that constituted a negotiation around the specific act at issue would be admissible under Exception Two. For example, if two people had sex every time the woman came home from work and brought a rose to her husband, and if she claimed that he raped her right after she came home and brought a rose to him, he would be able to admit the custom and practice involving roses as expressions of sexual interest in which they had engaged. If she were entirely passive during the alleged rape and he wanted to claim a reasonable but mistaken belief as to her consent to sexual intercourse with him, he would be able to admit evidence of their rose custom, given that "he may have believed she consented because of signals they traditionally used during their sexual encounters." n620 To allow the defendant to explain the context of the incident in question and to argue a reasonable but

mistaken belief in her consent, a custom and practice of sexual behavior that constitutes a negotiation between the complainant and the defendant, would be admissible under Exception Two.

### C. Exception Three

Exception Three ensures that the defendant has the ability to present "evidence of the complainant's bias or motive to fabricate the charge of rape." n621 Except when the defendant claims that the complainant has made a mistake as to his identity or that he has made a mistake as to her consent, he often must argue that the complainant is lying. Therefore, evidence of her [\*153] bias or motive to fabricate will often constitute the core of his defense. Moreover, as we shall see in Part VI of this Article, the Sixth Amendment mandates such a provision. n622

A complainant's prior false allegations of rape or threats to falsely allege rape would fall within this exception. n623 For instance, assume, as happened in Harris, that a complainant said the defendant raped her but the defendant said that what occurred between them was a consensual act of prostitution, after which he refused to pay her. n624 The defendant claimed that she had a motive to accuse him falsely of rape. n625 If he discovered that she had previously extorted money from other johns by threatening to claim falsely that they raped her, then that evidence would be admissible under Exception Three. The mere fact that the defendant asserted that she had a reason to exact revenge because he refused to pay her for services rendered, however, would not authorize the admission of her prior acts of prostitution that did not involve extortion of money with the threat of falsely claiming rape.

These three exceptions to a general prohibition on the admission of prior sexual conduct and sexual communication - for evidence of another source for penetration or force, evidence of negotiations regarding consent, or evidence of bias - are tied tightly to the elements of the crime, particularly a fair substantive definition of consent as temporally constrained, specific as to act, and nontransferable to others. The New Rape Shield Law no longer allows a rape defendant to have admitted all the promiscuous sexual history he can find to tarnish the complainant in the eyes of the jury. Instead, it allows a rape defendant to defend himself by using the complainant's prior sexual history only when such evidence is relevant to an element of the crime and not prejudicial to the truth-seeking process. The New Rape Shield Law thereby strikes a better balance between the rights of the defendant, the sexual freedom of rape complainants, and the integrity of the judicial quest for truth.

### VI. Constitutionality of a New Rape Shield Law

The Sixth Amendment provides, in relevant part, "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in this favor." n626 The Supreme Court's struggle to interpret the origins of this language led one Justice to write, "the Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into [its] intended scope." n627 Scholarly research suggests that the drafters of the Sixth [\*154] Amendment designed it to coexist with the rules of evidence and to shield a defendant from flagrant abuses of the trial process. n628 Most scholars conclude that the Confrontation Clause was originally a protection against trial by absentee witnesses or anonymous accusers, n629 and the Compulsory Process [\*155] Clause was a "reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all." n630 Today, firmly embedded in the Sixth



Amendment, are defendants' rights to conduct meaningful cross-examinations n631 and to admit into evidence the testimony of compelled witnesses. n632

When evaluating the exclusion of evidence the defendant seeks to proffer under the Sixth Amendment, scholars agree that the defendant has no right to present irrelevant or inordinately prejudicial evidence. n633 If the evidence excluded by a law is irrelevant and inordinately prejudicial, the law is constitutional. n634 A rape shield law that excludes a complainant's prior sexual history amounts to a legislative determination that such evidence is irrelevant or too inordinately prejudicial to be admissible. n635

Traditionally judges determine the relevance and prejudice of evidence on a case-by-case basis. n636 Opponents of categorical exclusions of evidence in rape shield laws have argued that relevant evidence will inevitably be excluded if such a determination is made without taking into account the individual circumstances of a particular case. For this reason, they argue, categorical rape shield laws violate defendants' Sixth Amendment rights. For example, in an early critique of rape shield laws, Professors Alexander Tanford and Anthony Bocchino in the University of Pennsylvania Law Review argued:

Can [evidence of a complainant's sexual history] be probative of any issue material to determining guilt on a rape charge? Intuitively, the answer seems to be that sometimes it is, but often it is not... . The relevance of sexual history evidence should therefore be determined ... by the judge as he sees the issues develop at trial. Even if such evidence is generally irrelevant, a statute that precludes a particular inquiry that is relevant in one case has infringed the rights of the accused to present evidence. n637

[\*156]

In the Ohio State Law Journal, Professor Frank Tuerkheimer likewise condemned categorical exclusions of sexual history evidence because they are "trying to legislate relevance without allowing for the infinite variety of circumstances that can coalesce to form the facts of a particular case." n638

As applied to the New Rape Shield Law, however, these are toothless critiques. The New Rape Shield Law does not contain a categorical exclusion on prior sexual history evidence. It allows for relevant evidence tied to the elements of the crime of rape to be admitted through the three important exceptions it offers to a general presumption of exclusion. The New Rape Shield Law thereby allows for "the infinite variety of circumstances that can coalesce to form the facts of a particular case" to emerge for each of the elements of the crime. Exception One allows the defendant to produce relevant evidence that might go to the issue of force or sexual penetration. Exception Two allows the defendant to produce relevant evidence that might go to the issue of consent, albeit a narrower substantive understanding of consent. Exception Three allows the defendant to produce relevant evidence of bias.

The final exception is consonant with a powerful line of Supreme Court cases that emphasize the constitutional imperative of allowing the defendant to probe for bias of the witness or the complainant. The first case in this line is *Davis v. Alaska*. n639 Accused of grand larceny and burglary, Davis sought to cross-examine the state's primary witness about his probationary status as juvenile delinquent. n640 Two Alaska statutes, designed to protect juveniles from the embarrassment of publicly discussing their delinquency records, prohibited Davis from conducting

this line of cross-examination. n641 In 1974, the Supreme Court held that Alaska's interest in insuring the anonymity of juvenile records was "outweighed by [the defendant's] right to probe into the influence of possible bias in the testimony of a crucial identification witness." n642

Twelve years later, the Court addressed the bias issue again in *Delaware v. Van Arsdall*. n643 On trial for murder, Van Arsdall sought to inquire into the potential bias of a witness who agreed to testify in exchange for the state's dismissal of his public drunkenness charges. n644 The trial court prohibited Van Arsdall from inquiring into the potential motivations of the witness, however. n645 On appeal, the Supreme Court reversed, noting that, although trial [\*157] judges retain "wide latitude" to "impose reasonable limits" on cross-examination, the defendant's right to probe the witness for bias is crucial to the Confrontation Clause. n646 Therefore, the trial judge violated Van Arsdall's Sixth Amendment rights by barring an inquiry into the possibility that the witness was biased. n647

The Supreme Court addressed the same issue of bias in the 1988 rape case of *Olden v. Kentucky*. n648 The complainant, a white woman, met Olden, a black man, at a bar. n649 The two left the bar together and had sexual intercourse. n650 Olden drove her to the home of another black man who was her lover. n651 Her lover saw her exit the vehicle, and she immediately told him that Olden had raped her. n652 At trial, Olden argued that the woman had fabricated the story to protect her relationship with her lover, who was suspicious upon seeing her exit Olden's car. n653 Olden sought to introduce evidence of their cohabitation. n654 The trial court, however, refused to admit such evidence, because, as the intermediate appellate court explained, "there were the undisputed facts of race; [the complainant] was white and [her lover] was black. For the trial court to have admitted into evidence testimony that [they] were living together at the time of trial may have created extreme prejudice against [her]." n655 Citing *Davis* and *Van Arsdall*, the Supreme Court summarily reversed in a per curiam opinion, emphasizing Olden's right to expose a witness's motivation in testifying. n656 The Court wrote: "speculation as to the effect of jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the alleged victim's] testimony." n657 The Court reaffirmed that a "criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." n658

Together, *Davis*, *Van Arsdall*, and *Olden* secure defendants' right to cross-examine witnesses for bias under the Confrontation Clause. Exception [\*158] Three of the New Rape Shield Law permits a defendant to elicit evidence of prior sexual conduct or communication for the purpose of revealing the witness's bias or motivation to fabricate a rape charge. This provision would include prior sexual history with third parties or with the defendant himself. Therefore, the New Rape Shield Law cannot be read to conflict with the Court's decisions in *Davis*, *Van Arsdall*, or *Olden*. n659

Three exceptions to the New Rape Shield Law designate a substantial amount of evidence as admissible. If the remaining evidence of a woman's prior or subsequent sexual conduct or sexual communication that the New [\*159] Rape Shield Law excludes is irrelevant and inordinately prejudicial, defendants have no constitutional right to have that evidence admitted n660 and the statute is constitutional. Even if a woman's other prior sexual conduct or communication may be relevant, however, the New Rape Shield Law is still constitutional because a defendant's Confrontation and Compulsory Clause rights can bow to a legitimate government interest. n661

Galvin has argued that the victim's privacy interest underlying rape shield laws is not important enough to outweigh the defendant's rights under the Sixth Amendment. n662 Tanford and Bocchino have also argued that "sheltering the victim from humiliation and psychological damage, and encouraging the reporting and prosecution of rape," are not important enough governmental interests to outweigh the defendant's rights under the Sixth Amendment, despite being "legitimate and worthwhile interests." n663 It is true that a concern for the privacy of victims or witnesses does not have a distinguished history justifying the exclusion of evidence under the Sixth Amendment. In Davis, for example, the proffered reasons for prohibiting the admission of the juvenile's delinquency record - the child's privacy interests and the embarrassment he might suffer if it were admitted - were insufficient to curtail Davis's right to probe for bias. n664 Likewise, in Coy, a concern for the trauma that childhood sexual abuse complainants might experience testifying motivated Iowa to fashion a rule for placing a screen between the complainant witness and the accused at trial. n665 The Court found this concern constitutionally wanting. n666 To the extent that current rape shield laws' "principle purpose" is to protect rape victims from "degrading and embarrassing disclosure of intimate details about their private lives" at trial, n667 that concern will likely be insufficient, on its own, to justify exclusion of a victim's sexual history evidence under the Constitution.

The governmental interest underlying the New Rape Shield Law, however, is not protecting the sexual privacy of rape victims. It is, instead, furthering the truth-seeking process. n668 The Supreme Court's most recent pronouncement on the Compulsory Process Clause, *United States v. Scheffer*, supports the argument that the New Rape Shield Law serves a legitimate governmental interest. n669 Scheffer, a narcotics informant for the United [\*160] States Air Force, was charged with using methamphetamines. n670 Scheffer sought to introduce the results of a polygraph exam, indicating that he had truthfully denied using drugs since joining the Air Force. n671 The trial judge excluded the evidence, however, because the United States categorically banned polygraph evidence in federal trials, based on its lack of reliability. n672 Scheffer was convicted, and on appeal, the Supreme Court affirmed. n673

The Court began by noting that state and federal rule makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials and that the defendant's interest in presenting relevant evidence may bow to accommodate other legitimate interests in the criminal trial process. n674 It decided that excluding unreliable evidence was a legitimate state interest of the kind to support the categorical exclusion of polygraph evidence. n675 Because of the lack of consensus among the states as to the reliability of polygraph exams, the Court held that a state's categorical ban on polygraph evidence was not an arbitrary or disproportionate means of achieving its interest. n676 Despite the fact that polygraph evidence might in some cases be reliable, n677 the Court held that the ban did not offend Scheffer's [\*161] Compulsory Process Clause rights n678 because categorical rules of evidence need not, in every case, serve the governmental interests underlying them. n679

The government's exclusion of polygraph evidence at issue in *Scheffer* provides an analogy to the exclusion of significant amounts of prior sexual conduct evidence at issue in the New Rape Shield Law. It is important to note, however, that the New Rape Shield Law is not a categorical ban because it provides for three important exceptions, whereas the rule in *Scheffer* was a categorical ban on polygraph evidence. n680 Nevertheless, the analogy can be fruitfully analyzed. Similar to the exclusion of potentially unreliable evidence at issue in *Scheffer*, the exclusion of prejudicial evidence at issue in the New Rape Shield Law also furthers a legitimate state interest. As states diverged in their opinions regarding the reliability of polygraph evidence, states diverge in their

opinions regarding the prejudice of various aspects of a complainant's sexual history, as evidenced by the conflicting shield laws and the multitude of exceptions they codify. For a state to create a presumption that the complainant's prior sexual conduct is inadmissible and to make provisions for the three exceptions outlined in the New Rape Shield Law would not be an arbitrary or disproportionate means of achieving its legitimate interest in excluding prejudicial evidence. The New Rape Shield Law is thus constitutional under both the Supreme Court's view of the Confrontation Clause and the Compulsory Process Clause jurisprudence.

### Conclusion

The law's sordid past of measuring rape victims against a model of sexual propriety must be exposed to public scrutiny and rejected as unethical. We can identify significant deficiency in the chastity requirement and the promiscuity prohibition embedded in rape law simply by noting that those requirements fail to comport with the reality of practiced sexual behavior today. The disparity between that reality and the sexual expectations underlying old rape shield laws may continue to magnify.

[\*162] Research on the sexual practices of adolescents reveals important information if we are to envision the application of rape shield laws in cases over the next twenty-five years. Because our culture increasingly and aggressively celebrates sex, teens and young adults are engaging in more and diverse sexual experiences. Young people reared in this culture are the ones who will face sexual coercion over the span of their lifetimes, if they have not already been subject to it. They are the ones for whom we must rewrite rape shield laws.

Adolescent girls and young women today are not chaste. More often than not, they are sexually experienced. Those among them who engage in promiscuous sexual behavior are at least as vulnerable to rape as are their virginal counterparts, if not more so. n681 Justice demands that their prior sexual lives not operate to obliterate the possibility of obtaining legal redress when they are subjected to sexual violence. A rape shield law that embodies a sexuality license instead of a chastity requirement or a promiscuity prohibition is the only kind that can be fairly applied to current sexual interactions in which rapes are alleged to have occurred.

### FOOTNOTES:

n1. This Article focuses on male rape of women. Men constitute the overwhelming majority of rapists and females constitute the overwhelming majority of rape victims. Lawrence A. Greenfeld, U.S. Dep't of Justice, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* 24 (1997) (stating that 99 out of 100 rapists are male and that 94.5% of victims of imprisoned rape offenders are women).

Men also rape other men. See *The Sexually Abused Male* (Mic Hunter ed., 1990). Scrutiny of prior sexual behavior at trial often comes to haunt male victims of same-sex rape, as defendants seek to delve into their prior homosexual behavior. See generally Elizabeth Kramer, Note, *When Men Are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. Rev. 293 (1998). In some states, rape is defined as forcible sexual intercourse with a female, and rape shield laws are inapplicable when men are sexually assaulted. See, e.g., Ga. Code Ann. 16-6-1(a)(1) (1999) ("A person commits the offense of rape when he has

carnal knowledge of ... [a] female forcibly and against her will ... ."); Idaho Code 18-6101 (Michie Supp. 2001) ("Rape is defined as ... penetration ... accomplished with a female ... .").

n2. As the Illinois Supreme Court explained in 1954, "In order to show the probability of consent, the general reputation of prosecutrix for immorality and unchastity was of extreme importance and may be shown. The underlying thought is that it is more probable that an unchaste woman would assent to such an act than a virtuous woman." *People v. Fryman*, 22 N.E.2d 573, 576 (Ill. 1954).

n3. See *infra* notes 122-126 and accompanying text.

n4. See *infra* notes 122-126 and accompanying text.

n5. Historically, rape victims could potentially be put on trial for crimes of fornication and adultery, so their prior lack of chastity may have itself been criminal and worthy of legal scrutiny. See generally Anne Coughlin, *Sex and Guilt*, 84 Va. L. Rev. 1 (1998).

I mean to distinguish my use of the term "chastity requirement" from the literal requirement of chastity that has been imposed on victims of seduction, statutory rape, or sexual harassment. See, e.g., Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 Wis. L. Rev. 1003, 1025 n.104 (1995) (referring to an early twentieth-century Florida court decision refusing to assume that black adolescent could be chaste for statutory rape purposes); Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 Va. J. Soc. Pol'y & L. 287, 311 n.128 (1997) (referring to chastity requirement of statutory rape law in Florida prior to 1996); Sara McLean, *Confided to His Care or Protection: The Late Nineteenth-Century Crime of Workplace Sexual Harassment*, 9 Colum. J. Gender & L. 47, 62 n.102 (1999) (referring to chastity requirement of statutory rape law in Missouri in the late nineteenth century); Dan Subotnik, *"Sue ME, Sue Me, What Can You Do Me? I Love You" A Disquisition on Law, Sex, and Talk*, 47 Fla. L. Rev. 311, 317 (1995) (referring to chastity requirement imposed by the tort of seduction).

n6. Model Penal Code 213.1, cmt. 8(c).

n7. *Id.* See also Hendrick Hartog, *Man and Wife in America* 306-07 (2000); Nancy Cott, *Public Vows: A History of Marriage and the Nation* 160-61 (2000).

n8. See, e.g., *State v. Haines*, 25 So. 372, 372 (La. 1899) ("If [the husband] were the one who forcibly, and against her consent, performed the sexual act upon her, there was, and could be, no rape. This is so because the husband of a woman cannot himself be guilty of an

actual rape upon his wife, on account of the matrimonial consent which she has given and which she cannot retract.").

n9. See, e.g., *Hickey v. State*, 72 S.W.2d 264, 265-66 (Tex. Crim. App. 1934) ("[The defendant] further expected to prove ... actions on the part of the prosecutrix towards the appellant such as passionate embraces, hugging, kissing, and fondling which would belie the want of consent charged in the indictment ... .").

n10. "Sexual intercourse" is used in this Article the way that it is ordinarily used in the courts; that is, it refers to acts in which a man penetrates a woman with his penis.

n11. *State v. Johnson*, 133 N.W. 115, 116 (Iowa 1911).

n12. *Fraday v. State*, 90 S.E.2d 664, 665 (Ga. 1955) ("[Defense] counsel [will] be permitted to cross-examine her thoroughly as to any prior act of lewdness with the accused and with other men."); *People v. Mangum*, 8 P.2d 207, 210 (Cal. Dist. Ct. App. 1939) (asking complainant about coming home late from bars and in a drunken state). See also *People v. Merrill*, 231 P.2d 573, 578 (Cal. Dist. Ct. App. 1951) (asking complainant about drinking alcohol in bars).

n13. *Satterwhite v. State*, 23 S.W.2d 356, 361 (Tex. Crim. App. 1929) (asking complainant about kissing men and attending parties with alcohol).

n14. *People v. Biescar*, 275 P. 851, 854 (Cal. Dist. Ct. App. 1929) (holding that cross-examination of a complainant about sexual intercourse with other men was appropriate).

n15. See *infra* notes 146-147 and accompanying text.

n16. See, e.g., Md. Code Ann. art. 27, 461A(a)(1) (Michie Supp. 2000) ("Evidence of specific instances of the victim's prior sexual conduct may be admitted ... [if the evidence is evidence of the victim's past sexual conduct with the defendant ... ."); Iowa R. Ct. 412(b)(2)(B) (West 2001) (explaining that evidence of a victim's past sexual behavior is not admissible, unless such evidence is past sexual behavior with the accused).

n17. See, e.g., Fla. Stat. Ann. 794.022(2) (West 2000) ("Such evidence [of prior consensual sexual activity between the victim and any person other than the offender] may be admitted if it ... tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of

consent."); N.C. Gen. Stat. 8C-1, R. 412(b)(3) (1999) ("Sexual behavior of the complainant is irrelevant ... unless such behavior ... is evidence of a pattern of sexual behavior so distinctive or so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented ... .").

n18. Abraham P. Ordovery, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 *Cornell L. Rev.* 90 (1977).

n19. *Id.* at 118.

n20. See *infra* Part III.

n21. Fed. R. Evid. 412(a)(1)-(2).

n22. Fed. R. Evid. 412(b)(1)(A).

n23. Fed. R. Evid. 412(b)(1)(B).

n24. Fed. R. Evid. 412(b)(1)(C).

n25. See *infra* note 606 and accompanying text.

n26. Other scholars have similarly concluded that this exception is particularly important in rape cases. See Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 *Colum. L. Rev.* 1, 58 (1977).

n27. See *infra* note 417 and accompanying text.

n28. See *infra* Part II.B.

N29. See *infra* notes 179-226 and accompanying text.

n30. 124 *Cong. Rec.* 36,256 (1978).

n31. See infra notes 213-219 and accompanying text.

n32. See infra notes 223-226 and accompanying text.

n33. *State v. M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992).

n34. Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of the Law* 283-84 (1998). Schulhofer contends that consent is not "freely given" whenever:

(1) The victim is physically helpless, mentally defective, or mentally incapacitated; or

(2) The victim is at least thirteen years old but less than sixteen years old and the actor is at least four years older than the victim; or

(3) The victim is at least sixteen years old but less than eighteen years old and the actor is a parent, foster parent, guardian, or other person with supervisory or disciplinary authority over the victim; or

(4) The victim is on probation or parole, or is detained in a hospital, prison, or other custodial institution, and the actor has supervisory or disciplinary authority over the victim; or

(5) The actor obtains the victim's consent by threatening to:

(i) Inflict bodily injury on a person other than the victim or commit any other criminal offense; or

(ii) Accuse anyone of a criminal offense; or

(iii) Expose any secret tending to subject any person to hatred, contempt, or ridicule, or to impair the credit or business repute of any person; or

(iv) Take or withhold action as an official or cause an official to take or withhold action; or

(v) Violate any other right of the victim or inflict any other harm that would not benefit the actor; or

(6) The actor is engaged in providing professional treatment, assessment, or counseling of a mental or emotional illness, symptom, or condition of the victim over a period concurrent with or substantially contemporaneous with the time when the act of sexual penetration occurs; or

(7) The actor obtains the victim's consent by representing that the act of sexual penetration is for purposes of medical treatment; or

(8) The actor obtains the victim's consent by leading the victim to believe that he is a person with whom the victim has been sexually intimate, or by representing that the victim is in danger of physical injury or illness.



n35. See Wendy Keller, *The Cult of the Born-Again Virgin: How Single Women Can Reclaim Their Sexual Power* (1999); Donna Williams, *Sensual Celibacy* (1999); see also Wendy Shalit, *A Return to Modesty: Discovering the Lost Virtue* 2-4, 8-9 (1999) (discussing "modestynik" phenomenon among women dissatisfied with sexual revolution).

n36. See *infra* notes 639-659 and accompanying text.

n37. The first five books of the Bible are also known as the Law or the Pentateuch. 11 *New Encyclopedia Britannica* 850 (15th ed. 1998).

n38. Judith Romney Wegner, *Chattel or Person? The Status of Women in the Mishnah* 12 (1988).

n39. See *infra* notes 59-67 and accompanying text.

n40. Deuteronomy 22:23-29. See also 14 *Encyclopedia Judaica* 1207 (Gerald Abraham et al., eds. 1972) ("rape as such is not a criminal offense in Jewish law: the rapist will merely be held liable to pay the girl's father 50 shekels of silver by way of bride price").

By contrast, Islamic law, as embodied in the Holy Qur'an, appears to have been focused on keeping men as chaste as women. "Let those who cannot find a match keep chaste till Allah give them independence by His grace." Qur'an, Surah XXIV:33 (Muhammad M. Pickthall trans., 1977). Islamic law also seems intent on protecting a woman's chaste reputation. "Those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes ... ." *Id.* at Surah XXIV:4. It clarifies that one cannot force women into prostitution: "Force not your slave-girls to whoredom that ye may seek enjoyment of the life of the world ... ." *Id.* at Surah XXIV:33. And the Qur'an indicates that God forgives women who are compelled into prostitution. *Id.*

n41. The text of Deuteronomy made a distinction between the rape of a betrothed virgin and the rape of an un-betrothed virgin. If a man found a betrothed virgin, and "the man force her and lie with her" and she cried out against the violation, he was to be punished by being stoned to death. Deuteronomy 22:23-27. However, "if a man finds a damsel that is a virgin, which is not betrothed, and lay hold on her and lie with her," he had to marry her "because he hath humbled her," and he had to pay her father fifty shekels of silver, which was the bride price. *Id.* at 22:28-29; Wegner, *supra* note 38, at 13. The bride price compensated the father for the loss of his daughter's virginity. *Id.* The only "punishment" for the rape of an un-betrothed virgin (besides paying the usual bride price) was that the man "may not put her away all his days," meaning that he could never divorce her. Deuteronomy 22:29. The punishment of seduction of a "maid that is not betrothed" is also marriage and paying money

to the father. Exodus 22:16-17. The centerpiece of rape law, therefore, was the female's virginity, which was property stolen from her prospective husband when she was betrothed, and which was property stolen from her father when she was un-betrothed. Wegner, *supra* note 38, at 13. The loss of female virginity - owned by fathers or husbands-to-be - was the legal harm of rape. *Id.*

n42. Deuteronomy 22:20-21.

n43. *Id.* at 22:14-21.

n44. *Id.* at 22:20-21.

n45. Wegner, *supra* note 38, at 13-14, 19. Women remained the sexual chattel of their fathers or husbands. *Id.*

n46. *Id.* at 21-23.

n47. *Id.* at 15.

n48. *Id.* at 16. A man who raped a virgin had to pay her father a bride price; and one who raped a nonvirgin did not destroy a daughter's virginity and so did not rape. *Id.* at 23-25.

n49. *Id.* at 25-26. It viewed the rape of a virgin from the father's economic standpoint. *Id.* at 24. The father, not the girl, was the injured party because he lost the bride price, which was the price of sexual access to a chaste female. *Id.* at 27.

n50. *Id.* at 24-25.

n51. See, e.g., Year Books of Edward II: The Eyre of London (14 Edward II A.D. 1321) 87 (Helen M. Cam ed., 1968) (In *Seler v. Limoges*, the court holds that the defendant cannot be convicted of the rape of an eleven-year-old girl who was not a virgin "above all because she could not twice be deprived of one and the same maidenhead.").

n52. Ranulf de Glanvill, *The Treatise on the Laws and Customs of the Realm of England, Commonly Called Glanvill* 175 (G.D.G. Hall ed. & trans., W.W. Gaunt & Sons, Inc. 1983) (1965).

n53. According to Glanvill, the class status of the rapist and the victim's father became increasingly important to the punishment for rape in twelfth-century England (the generally accepted dawn of English common law). *Id.* at 176. As a result, the rapist was no longer allowed to marry the victim. Glanvill noted, "Nor can the wrongdoer escape" the punishment of death or dismemberment "by expressing his willingness, after judgment, to marry the woman he had defiled." *Id.* The rationale behind this legal change centered on the potential class differential between the victim's family and the rapist's family. Glanvill explained, "For if he could [marry her] it would frequently happen as a result of a single defilement that men of servile status disgraced for ever women of good birth, or that men of good birth were disgraced by women of low estate, and thus the fair repute of their families would be unworthily blackened." *Id.*

n54. 1 Owen Ruffhead, *The Statutes at Large From Magna Charta to the End of the Last Parliament, 1761* 45, 101 (London, Mark Basket 1763). See John Marshall Carter, *Rape in Medieval England: A Historical and Sociological Study* 36, 38-40 (1985).

n55. 2 Henrici De Bracton, *De Legibus Et Consuetudinibus Anglaie: Libri Quinque*, In *Varios Tractatus Distincti* 481 (London, Longman & Co. 1879). Despite Glanvill and Bracton's pronouncements that rape was a criminal felony in thirteenth-century England, in practice courts treated it merely as a trespass. There is a discrepancy between what Glanville and Bracton indicated was the appropriate punishment for rape (death and mutilation) and the actual punishment imposed on convicted rapists. Carter, *supra* note 54, at 37-38, 44. Historians who have studied the Yorkshire eyres of 1218-19, for example, reveal that none of the convicted rapists were punished with death or mutilation. *Id.* at 38.

n56. Bracton, *supra* note 55, at 481-83. The treatise notes, "formerly the deflowerers of virgins and of chastity were hanged ... chiefly since virginity and chastity cannot be restored; but in modern times ... for the defilement of a virgin members are lost." *Id.* at 483.

n57. *Id.*

n58. 1 Sir Matthew Hale, *A History of the Pleas of the Crown* 629 (Robert H. Small ed., 1847).

n59. Bracton, *supra* note 55, at 483. While sometimes analogous to Deuteronomy, the law of this time also diverged from religious law. One break with religious law was that any imposed fine went to the victim rather than to her father. *Id.* at 485. Another break with religious law was that the victim had the authority to decide to marry her rapist if she so chose, "for if this were in the discretion of the man, this inconvenience might follow, that a

serf or ignoble man might perpetually defile a noble and gentle woman through the occasion of a single pollution, and make her his wife to the disgrace of her family." *Id.* at 492-93. The text then notes that "whether the man be noble or ignoble, and the woman noble or ignoble, the will and the choice [to marry] will always rest with the woman." *Id.* at 493.

n60. *Id.* at 489-90.

n61. *Id.* at 493.

n62. *Id.*

n63. *The Book of the General Laws and Libertyes Concerning the Inhabitants of the Massachusetts, Collected out of the Records of the General Court in 1649*, in *The Colonial Laws of Massachusetts* 129 (Cambridge, 1889); *The Perpetual Laws of the Commonwealth of Massachusetts, from the Establishment of its Constitution to the First Session of the General Court A.D. 1788*, in *The First Laws of the Commonwealth of Massachusetts* 251 (John D. Cushing ed., 1981); *Acts and Laws of His Majesties Province of the Massachusetts Bay, in New England in 1699*, in *Massachusetts Province Laws 1692-1699* 114 (John D. Cushing, ed., 1977).

n64. *Acts and Laws of His Majesties Colony of Rhode Island and Providence-Plantations in America in 1719*, in *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719* 121 (John D. Cushing ed., 1977); *Laws and Acts of Rhode Island and Providence Plantations Made from the First Settlement in 1636 to 1705*, in *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719* 65 (John D. Cushing ed., 1977); *Proceedings of the First General Assembly or "The Incorporation of Providence Plantations," and the Code of Laws Adopted by that Assembly in 1647*, in *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719* 26 (John D. Cushing ed., 1977);

n65. *New-Haven's Setting in New-England and Some Laws for Government: Published for the Use of that Colony*, in *The Early Laws of New Haven and Connecticut Colonies 1639-1673* 19 (John D. Cushing ed., 1977).

n66. *The Book of the General Laws for the People within the Jurisdiction of Connecticut: Collected Out of the Records of the General Court in 1672*, in *The Early Laws of New Haven and Connecticut Colonies 1639-1673* 83 (John D. Cushing ed., 1977).

n67. Acts and Laws Passed by the General Court or Assembly of the Province of New Hampshire in New-England in 1718, in *Acts and Laws of New Hampshire 1680-1726* 141 (John D. Cushing ed., 1978).

n68. Peggy Reeves Sanday, *A Woman Scorned: Acquaintance Rape on Trial* 59 (1996).

n69. *Id.* In addition to feminine modesty, class status affected the amount of protection afforded a woman under the law in seventeenth-century New England. Masters often raped their servants. John D'Emillio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 12 (1988). Courts frequently heard these kinds of charges of rape. *Id.* In the South, where economics depended on indentured servitude, the sexual exploitation of indentured servants was even more frequent. *Id.* at 12-13. By 1670, slavery replaced indentured servitude in the southern states, *Id.* at 13, and the rape of an enslaved Black woman was not even a crime. Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 *Buff. L. Rev.* 1, 85 (1999). Under slavery, white slave owners expected their female slaves to be available to them sexually. D'Emillio & Freedman, *supra*, at 86. In addition, breeding justified sexual violence against Black women. Bell Hooks, *Ain't I a Woman: Black Women and Feminism* 39 (1981). White masters often coerced Black female slaves to reproduce with threats of violence. *Id.* Because their only legal status was as the property of their masters, Black women could not assert legal claims that they were raped. Sanday, *supra* note 68, at 85. Under this reign of white male patriarchy during slavery, Black women could not seek legal recourse for any such acts of sexual violence perpetrated against them by any man. Hooks, *supra*, at 36. Rape "was something that only happened to white women; "what happened to black women was simply life." Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581, 599 (1990) (discussing dominance theory and conceptualization of white women as all women).

Class or societal status in England, like race in America, affected the way women who claimed rape were viewed under the law. Judges at the time always allowed cross-examination of the complainant's reputation for chastity. Anna Clark, *Women's Silence Men's Violence: Sexual Assault in England 1770-1845* 56 (1987). Working class women drank at pubs with men, and "only intermittently" became married. *Id.* For judges and juries, evidence of this behavior often led to verdicts of not guilty because the victim "did not have chastity worth damaging." *Id.* Men accused of rape did not bother claiming consent explicitly; if she had a reputation for un-chastity, raping her was not a criminal act. *Id.* Those who sought to avoid the charges of rape threatened to accuse the woman of being a prostitute. *Id.* at 48.

n70. Hooks, *supra* note 69, at 30.

n71. *Id.* at 31.

n72. Sanday, *supra* note 68, at 84. See also Cornelia Dayton, *Women Before the Bar: Gender, Law and Society in Connecticut 1639-1789* 246-47 (1995). Prosecutions for immorality diminished as the nation adapted to its newfound independence. Sanday, *supra* note 68, at 84. In such a culture, morality became conceived as a private issue to be cultivated in the private instead of the public sphere. *Id.* The Founding Fathers firmly believed that "self-interest and personal liberty fueled the train of progress." *Id.* The rugged individualism that defined the national character during the Colonial era rested on the notions of self-interest and possession of property. *Id.*

Under the eighteenth-century British judicial system, property was also central to most legal problems. Clark, *supra* note 69, at 46. Sexual assault was rape only when a female was some other man's property (a father's virgin daughter, a husband's wife) and violating her violated the owner of the property. *Id.* at 47. Rape was punished with death because the spoilage of a victim's chastity ruined that which constituted her value as a woman. *Id.*

n73. Libertinism may be defined as "the pursuit of pure [sexual] pleasure unbounded by social responsibilities." D'Emillio & Freedman, *supra* note 69, at 40.

n74. Sanday, *supra* note 68, at 86. Men subscribing to this ideology were "imagined to be free-thinkers who were open to sexual, and literary, experimentation." *Id.* Consistent with this ethos, the role of man as seducer was glorified, and men "talked about sex as a conquest, in which the woman was 'taken' as if she were a piece of property." *Id.* at 87.

n75. Hooks, *supra* note 69, at 31. By removing the negative sexual stereotypes of women they became creatures "worthy of love, consideration, and respect." *Id.* The white woman thereby became "the goddess rather than the sinner." *Id.*

n76. D'Emillio & Freedman, *supra* note 69, at 45. Early Puritan communities in this country influenced how the sexuality of women would be viewed for many of the following centuries. The dichotomy that emerged in later eighteenth century between passionless and licentiousness, for instance, was "archetypically Puritan" and grew out of "the Puritan conscience, straining toward purity, but beset with guilt." Sanday, *supra* note 68, at 80. According to Sanday, in Puritan New England, a woman's testimony was enough to convict a man of rape; because the crime was such a serious offense, no one thought that a woman would lie about having been raped. *Id.* at 74. Men rarely accused women of inviting the attack through their own actions, but instead claimed that the "devil ... had overcome them." *Id.* At trial, a woman did not need to prove that she struggled because it was expected that she would be too paralyzed with fear to resist. *Id.* Neither men nor women were given sexual license in this moral climate, but the "lure" of lust was always considered "more powerful than the rewards of godliness." *Id.* at 80.

The Puritan treatment of rape contrasted with views in England at that time, where the rape of virgins and nonvirgins was again treated disparately. In seventeenth-century England, to "deflower" a "maid or woman child" resulted in imprisonment for five years, and was

known as "forcible marriage" because the rapist could marry the victim to escape punishment. Sir William Blackstone, *Commentaries on the Laws of England: Book IV of Public Wrongs* 1607 (Philadelphia, Rees Welsh & Co. 1897). The rape of a nonvirginal woman was a separate offense and was not as severely punished. *Id.* Unlike a Puritan woman, whose testimony was enough for conviction, in England a woman's credibility and chastity were a focal point of the trial. Sir William Blackstone has been widely credited with linking a woman's reputation for sexual chastity with her ability to tell the truth in a court of law. He explained:

First, the party ravished may give evidence upon oath ... but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: if the witness be of good fame; if she presently discovered the offense, and made search for the offender; if the party accused fled for it, these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive presumption that her testimony is false or feigned.

*Id.* at 1610 (emphasis added). It should be noted that courts in this country were influenced by Blackstone's reasoning. See, e.g., *Camp v. State*, 3 Ga. 417, 421 (Ga. 1847) (citing Blackstone for the proposition that evidence of unchastity may be admitted to impeach the credibility of a complainant); *Coleman v. Commonwealth*, 3 S.E. 878, 881 (Va. 1887) (noting Blackstone for proposition that the testimony of rape complainants "should be received with more than ordinary doubt and suspicion") (citation omitted).

n77. Sanday, *supra* note 68, at 80, 90. During this period, the English held similar beliefs about rape. The ideal woman in England also embodied this ideal of "passionless," so once again, women who were not thought to be chaste had difficulty claiming rape. Juries were loath to punish a defendant with death because a woman who came forward with a rape charge admitted by making the claim that she was unchaste. Clark, *supra* note 69, at 47. In fact, victims found it easier to obtain a conviction for attempted rape because the victim would have fought off her attacker and thus preserved her chastity. *Id.* at 47-48. In practice, British judges and juries almost never regarded the rape of an adult woman a crime. *Id.* at 58. Judges would find defendants not guilty if the victim described the event in detail or used explicit terms. *Id.* at 55. For example, after Mary Hunt, a sexually experienced woman, recounted her rape, the judge commented, "What injury you might receive in those parts would not hurt you know, you had tried that before." *Id.* at 56. The judge refused to believe her story because she was not a virgin and did not suffer serious extrinsic injury. *Id.* He believed that because she had cohabitated with a man, she had no character or credibility, and she could not win a conviction against her assailant. *Id.*

n78. Sanday, *supra* note 68, at 81. See also Hal Goldman, *A Most Detestable Crime: Character, Consent, and Corroboration in Vermont's Rape Law, 1850-1920*, in *Sex Without*

Consent: Rape and Sexual Coercion in America 178 (Merrill D. Smith ed., 2001) ("rape law promoted highly gendered models of proper and improper sexual behavior for men and women. The values both reflected and reinforced a sexual double standard discouraging and even punishing women who transgressed the bounds of female modesty, while excusing or even promoting male sexual promiscuity and aggression.").

n79. Sanday, *supra* note 68, at 93. As a result, the relevance of a woman's verbal consent was obscured in eighteenth-century rape cases, and the lasting ramifications of this treatment reveal themselves in the myth that a woman's "no" to male sexual advances actually means "yes." *Id.* at 99.

n80. *Id.* at 95.

n81. *Id.*

n82. *Id.* at 93.

n83. D'Emillio & Freedman, *supra* note 69, at 86. Newly transplanted white Europeans used racial boundaries to invent their own superiority and distinguish themselves from other races. *Id.* Whites viewed themselves as civilized and intelligent and persons of other races as savage and irrational. *Id.* White superiority manifested in this form led to a heightened fear of interracial union. *Id.* at 94. Maintaining white racial purity meant regulation of the sexuality of white women. *Id.* In stark contrast, white men experienced total sexual license with enslaved Black women. *Id.* This double standard resulted in much racial mixing, as well as exaggerated protections for white women's sexual virtue. *Id.* at 95. This apparent contradiction ensured white superiority, for "a white woman's sexual relations with a Black man challenged the basic hierarchy of southern society." *Id.* Because fear of Black sexuality posed such a threat to the ideological foundations of white society, a Black on white rape situation created a chaotic mix of anxiety and emotion for whites. *Id.*

Although the crime of rape can take numerous forms, Black on white rape receives the most serious treatment in this country. *Id.* The history of "sexualized racism" in America has centered rape jurisprudence upon the rape of a white woman by a Black man. *Id.* Black on white rape became most pronounced between the height of slavery in mid-eighteenth century and post-Reconstruction America, as racial tension reached its zenith. *Id.* Although state legislatures made their rape statutes race-neutral following emancipation, courts treated the crime of rape in much the same, race-conscious way as they had before the Civil War. *Id.* During Reconstruction, whites reacted to their fear of racial equality by transforming sexuality into a "weapon of terror" used to intimidate and further oppress Blacks. *Id.* at 106. Rapes involving Black defendants and white complainants witnessed "heightened virulence which manifested itself in two ways." *Id.* at 107. First, Black defendants accused of raping white women were lynched at a staggering rate at the end of the nineteenth century and well



into the twentieth century. *Id.* Mobs threatened to lynch Black defendants if courts did not issue convictions. *Id.* at 111. Second, courts applied special rules to Black defendants accused of the rape or attempted rape of white women. *Id.* One such rule permitted jurors to take into consideration race of both the defendant and complainant when making factual conclusions as to the defendant's intent. *Id.* As a result of this treatment, Blacks, more often than not, faced execution when found guilty of rape of white women. *Id.* at 112. Although the death penalty can no longer be issued for convicted rapists, *Coker v. Georgia*, 433 U.S. 584, 592, 598-99 (1977), sentencing continues to be applied in disparate ways to Blacks who commit rape. *Id.* According to a study in 1980, "Black men convicted of raping white women receive more serious sanctions than all other sexual assault defendants." Gary LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 *Amer. Soc. Rev.* 842, 852 (1980).

n84. Hooks, *supra* note 69, at 33. Black women were viewed as "the originator of sexual sin: the embodiment of female evil and sexual lust." *Id.* Whites believed that the Black woman was a "sexual savage ... a non-human, an animal" who "cannot be raped." *Id.* at 52.

n85. The sexuality of Black males was also distorted. The history of the sexualization of Black male heterosexuality in America created the myth that Black men are promiscuous, threatening to white women, and possessors of sexual prowess. Hutchinson, *supra* note 69, at 81. The marginalization of Black women and the "negative effects of sexualized racism," both of which have their roots in slavery, persist today. Hooks, *supra* note 69, at 85. The negative sexual imagery consistently used to depict Black women demonstrates an intersection of race and sexually normative behavior for women, norms that are used to distinguish good women from bad. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241, 1271 (1991). Thus, "Black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot." *Id.* As a result of this intersection, the stereotypical sexualization of Black women as "bad" and promiscuous causes doubt as to victim credibility in sexual assault trials, making convictions difficult. Hooks, *supra* note 69, at 85.

n86. The idea of white superiority, established in the seventeenth century and carried over into the eighteenth century, also affected the treatment of Indian women who also became the sexual prey of Europeans during the westward expansion. D'Emillio & Freedman, *supra* note 69, at 92. Native American women's rape was rationalized as part of war. *Id.* As expansion reached California, white men assumed a right to sexual access with Indian women and any sexual relations white men had with them usually consisted of rape. *Id.* An Indian woman's testimony regarding rape meant nothing in a white court of law. *Id.* Her testimony could not convict a white man. White men's knowledge of the rarity of conviction made Indian women "fair game." *Id.* European beliefs of white superiority and the lack of legal repercussions made Indian women easy targets for sexual attack. *Id.*

n87. Sanday, *supra* note 68, at 83. White men rationalized the rape of women of color because they were at the "animal pole of the chain of being." *Id.*

n88. Race and class status continued to affect notions of chastity in nineteenth-century rape law. Black women's sexual exploitation did not end with slavery. Hooks, *supra* note 69, at 54. Wherever Black women went, white men and women directed verbal and physical abuse towards them. *Id.* at 55. The "myth of the bad black woman" who was therefore not worthy of the protection granted to white women persisted. *Id.* at 59. Women of color continued to be considered unchaste by definition. *Id.* Therefore, to rape a woman of color "was not reprehensible and carried with it none of the normal" punishments for the crime. *Id.*

n89. Sanday, *supra* note 68, at 101. A similar ideal of the chaste female also marked the moral climate of England during the nineteenth century. The ideal woman was expected to be "passionless" and so, again, female chastity was a focal point of rape trials. Clark, *supra* note 69, at 59. "The protection of female chastity greatly concerned early nineteenth-century moralists, who extolled the attention paid to female honor as proof of England's high civilization." *Id.* The ideal woman was passionless and this ideal of feminine sexual virtue was supported by numerous religious, medical, and legal texts that defined passionate women as deviant. *Id.* at 59. These experts "claimed a chaste woman should be so modest she could not speak or even know about sexual violence." *Id.* at 59-60. The victim's chastity remained the centerpiece of the courtroom drama. *Id.* at 60.

n90. *Woods v. People*, 55 N.Y. 515, 515 (1874). For almost one hundred years after this court's decision, the "nineteenth century ... archetype of the false accuser was firmly implanted in the American legal procedure and collective imagination." Sanday, *supra* note 68, at 119.

n91. The term "rape cases" refers not only to charges of rape, but also to charges of attempted rape. The term "rape cases" does not include charges for seduction, incest, statutory rape, or the rape of children under the age of consent.

n92. See *infra* notes 94-101 and accompanying text.

n93. See *infra* notes 102-141 and accompanying text.

n94. One could not establish one's own reputation for chastity or lack of chastity. *Burnley v. Commonwealth*, 158 S.E.2d 108, 113 (Va. 1967).

n95. *Story v. State*, 59 So. 480, 482 (Ala. 1912) ("As affecting the credibility of a witness, evidence in chief may be taken of the general character of the witness ... ."); *Herndon v. State*, 56 So. 85, 87 (Ala. 1911) ("In all prosecutions for rape, it is competent to impeach the general character of a prosecutrix for chastity ... ."); *Waller v. State*, 49 So. 2d 232, 234 (Ala. Ct. App. 1950) ("The general character of the prosecutrix for chastity may also be impeached; but this must be done by general evidence, and not by particular instances of unchastity ... ."); *State v. Guerrero*, 120 P.2d 798, 803 (Ariz. 1942) (asking witness "do you know her reputation, that is, what folks say, not what you know of your own knowledge, but what folks say in reference to her reputation for chastity?"); *People v. Battilana*, 126 P.2d 923, 925 (Cal. Dist. Ct. App. 1942) ("The court erred in excluding evidence of the general reputation of the prosecutrix for chastity ... ."); *Nickels v. State*, 106 So. 479, 489 (Fla. 1925) ("Testimony as to the general reputation of the prosecutrix for chastity is material ... ."); *Peterson v. State*, 106 So. 75, 75 (Fla. 1925) (stating that if police captain heard about victim's reputation from others, such evidence would have been sufficient to show lack of chastity); *Teague v. State*, 67 S.E.2d 467, 472 (Ga. 1951) ("Evidence of general reputation for lewdness is admitted ... ."); *Black v. State*, 47 S.E. 370, 371 (Ga. 1904) ("Her lewdness could be shown only by proof of general bad character, and not by specific acts."); *Seals v. State*, 40 S.E. 731, 732 (Ga. 1902) ("One on trial for this crime may bring forward in his defense the bad reputation for chastity (not particular acts) of the complaining witness ... ."); *People v. Fryman*, 122 N.E.2d 573, 576 (Ill. 1954) ("[A] witness may properly testify to another's reputation based on knowledge of such reputation obtained through contact and association with such person's neighbors, friends, or associates."); *People v. Eilers*, 309 N.E.2d 627, (Ill. App. Ct. 1974) ("Reputation testimony [for lack of chastity] is admissible ... ."); *State v. Broussard*, 46 So. 2d 48, 50 (La. 1950) ("Appellant would be allowed to show the general reputation of the prosecutrix for chastity ... ."); *State v. Flaherty*, 146 A. 7, 9 (Me. 1929) ("It is true that evidence to show a reputation for unchastity may be admissible ... ."); *Humphreys v. State*, 175 A.2d 777, 780 (Md. 1961) ("The general character of the prosecutrix as to chastity or unchastity is admissible ... ."); *People v. Ryno*, 111 N.W. 740, 740 (Mich. 1907) (holding that witnesses' responses when asked "do you know her general reputation in the neighborhood in which she lives for chastity?" were sufficient to establish evidence of a general reputation for unchastity); *State v. Wulff*, 260 N.W. 515, 516 (Minn. 1935) ("It does lead us to adopt the general rule that evidence of particular acts as well as evidence of general reputation is admissible to prove lack of chastity."); *Rogers v. State*, 36 So. 2d 155, 156 (Miss. 1948) ("According to the weight of authority the impeachment of the character of the prosecutrix in respect to chastity must be confined to evidence of her general reputation ... ."); *State v. Steele*, 224 A.2d 132, 135 (N.J. Super. Ct. App. Div. 1966) ("But cross-examination upon proper foundation has been permitted with respect to the complaining witness's general reputation for chastity, or lack of it ... ."); *Linder v. State*, 250 S.W. 703, 705 (Tex. Crim. App. 1923) (holding that evidence of complainant kissing two other boys is suggestive of a general reputation for lack of chastity); *Ross v. State*, 132 S.W. 793, 797 (Tex. Crim. App. 1910) ("In prosecutions for rape it is unquestionably competent for the accused to impeach the character of the prosecutrix for chastity ... .") (citation omitted); *Freeman v. State*, 107 S.W. 1127, 1128 (Tex. Crim. App. 1908) ("Evidence impeaching the general reputation of a prosecutrix for chastity is always admissible ... .").

n96. *Stewart v. Commonwealth*, 133 S.W. 202, 203 (Ky. 1911) ("[A] woman may not have a general reputation for unchastity, yet in fact be unchaste."). Evidence that the woman was a prostitute automatically conferred upon her an unchaste reputation. See *State v. Johnson*, 133 N.W. 115, 116 (Iowa 1911). The only limitation courts imposed regarding the admission of unchaste reputation evidence was temporal. For example, knowledge about a woman's unchaste reputation had to have been obtained prior to the alleged rape. *State v. Verto*, 64 S.E. 1025, 1026 (W. Va. 1909) ("We understand the law to be that it is allowable to prove such reputation only before the [rape], not after it."). Additionally, evidence of an unchaste reputation could not be "too remote" in time. *State v. Guerrero*, 120 P.2d 798, 801 (Ariz. 1942) ("It is the general rule in forcible rape cases that prior acts of unchastity of the prosecutrix may be shown if not too remote.").

n97. *People v. Battilana*, 126 P.2d 923, 929 (Cal. Dist. Ct. App. 1942) (holding that testimony about four specific sexual acts was evidence of a general reputation for lack of chastity).

n98. *State v. Bird*, 302 So. 2d. 589, 592 (La. 1974) ("Particular acts of misconduct are not admissible to show reputation.").

n99. *Stone v. State*, 11 So. 2d 386, 388 (Ala. 1943) ("The evidence is usually limited to proof of general character ... not by evidence of particular acts. The basis of such rule, we take it, is the same as in the other cases, the unwisdom of opening the door to collateral issues tending rather to hinder than to promote justice."); *Black v. State*, 47 S.E. 370, 371 (Ga. 1904) ("If proof of specific acts of lewdness were admitted, it would 'not only involve a multitude of collateral issues, but an inquiry into matters as to which the prosecutrix might be wholly unprepared, and so work great injustice.'") (citation omitted); *Lee v. State*, 179 S.W. 145, 146 (Tenn. 1915) ("While a prosecutrix, as a witness in an action of rape alleged to have been committed upon her, was expected to defend her general reputation for chastity, she cannot anticipate the charges of specific acts of illicit intercourse which may be made by men who perhaps have been suborned to testify.") (citation omitted); *Satterwhite v. State*, 23 S.W.2d 356, 358 (Tex. Crim. App. 1929) ("The ruling was based upon the theory that it could not be supposed that the prosecutrix came prepared to defend her character except against a general attack.").

n100. *Waller v. State*, 49 So. 2d 232, 234 (Ala. 1950) ("The general character of the prosecutrix for chastity may also be impeached; but this must be done by general evidence, and not by particular instances of lack of chastity ...") (citation omitted); *Teague v. State*, 67 S.E.2d 467, 472 (Ga. 1951) ("It is clear that this court adopted the foregoing rule ... which permits only the showing of general character for lewdness, and does not allow evidence of specific acts of lewdness with other men or a cross-examination of the female as to such acts."); *Stewart v. Commonwealth*, 133 S.W. 202, 203 (Ky. 1911) ("Appellant offered to prove specific acts of adultery by the prosecutrix with other men. The evidence was rejected

... the general reputation of the victim for unchastity may be shown ... ."); *State v. Flaherty*, 146 A. 7, 9 (Me. 1929) ("It is true that evidence to show a reputation for unchastity may be admissible to impeach the testimony of the prosecuting witness as to the want to consent. Yet the overwhelming weight of authority was that specific acts of lack of chastity, as in the case at bar, are not admissible to prove character."); *Rogers v. State*, 36 So. 2d 155, 156 (Miss. 1948) ("According to the weight of authority the impeachment of the character of prosecutrix in respect to chastity must be confined to evidence of her general reputation, and she cannot be examined as to particular acts of intercourse with other men, or that fact otherwise proven.") (citation omitted).

n101. See, e.g., *Frady v. State*, 90 S.E.2d 664, 665-66 (Ga. 1955) (reversing an earlier decision holding that both specific evidence and general evidence of reputation were admissible towards chastity); *State v. Johnson*, 133 N.W. 115 (Iowa 1911) (holding specific acts of prostitution as well as evidence of bad moral character admissible to establish a lack of chastity); *State v. Wulff*, 260 N.W. 515, 516 (Minn. 1935) ("The question whether evidence of specific acts, unconnected with the crime charged, should be admitted, rather than, or as well as, general reputation evidence, when offered by defendant for the purpose of showing, or tending to show, want of chastity on the part of prosecutrix ... is admissible."); *Lee v. State*, 179 S.W. 145, 145 (Tenn. 1915) (holding both evidence of a general reputation for lack of chastity and specific evidence of sexual intercourse with the defendant and/or other men or boys before the rape constituted admissible evidence of lack of chastity); *State v. Golden*, 111 S.E. 320, 323 (W. Va. 1922) ("The evidence of the reputation for chastity of the prosecutrix, and of the acts of illicit intercourse with other men, was for the purpose of showing that it was not likely that she resisted the defendant ... .").

n102. *Nickels v. State*, 106 So. 479, 489 (Fla. 1925) ("She may be interrogated as to her previous intercourse with the defendant or as to promiscuous intercourse with other men, or common prostitution."); *Frady v. State*, 90 S.E.2d 664, 665 (Ga. 1955) ("[Defense] counsel [will] be permitted to cross-examine her thoroughly as to any prior act of lewdness with the accused and with other men."); *Stewart v. Commonwealth*, 133 S.W. 202, 203 (Ky. 1911) ("It was error for the court to refuse to permit him to prove by third parties, and by the prosecuting witness on cross examination ... acts of a lewd or lascivious character on her part ... ."); *State v. Warford*, 200 N.W.2d 301, 303 (Minn. 1972) ("Evidence of prior specific acts of unchaste behavior is admissible ... ."); *Wilson v. State*, 67 S.W. 106 (Tex. Crim. App. 1902) (holding evidence of victim's confession that she had had carnal intercourse with three different men was admissible); *Kaczmarzyk v. State*, 280 N.W. 362, 362-63 (Wis. 1938) (noting that the victim's admission that she had had relations with other men prior to the night in question was admissible).

n103. *Story v. State*, 59 So. 480, 481 (Ala. 1912) ("Chastity may be impeached; but this is usually done by evidence of her reputation in that respect, and not by proof of particular acts of unchastity."); *Griffin v. State*, 46 So. 481, 482 (Ala. 1908) ("Particular instances of her unchastity cannot be proved for this purpose, except that she can be interrogated as to her

previous intercourse with the prisoner, although not to particular instances with third persons."); *Waller v. State*, 49 So. 2d 232, 234 (Ala. Ct. App. 1950) ("The general character of the prosecutrix for chastity may also be impeached; but this ... must be done by general evidence, and not by particular instances of unchastity ... .") (citations omitted); *Teague v. State*, 67 S.E.2d 467, 468 (Ga. 1951) ("Evidence of specific acts with other men was not admissible, nor can she be cross-examined as such ... ."); *Black v. State*, 47 S.E. 370, 371 (Ga. 1904) ("Her lewdness could be shown only by proof of general bad character and not by specific acts."); *State v. Flaherty*, 146 A. 7, 9 (Me. 1929) ("Specific acts of lack of chastity ... are not admissible."); *Commonwealth v. McKay*, 294 N.E.2d 213, 218 (Mass. 1973) ("Specific instances of intercourse may not be presented by the defence."); *Rogers v. State*, 36 So. 2d 155, 156 (Miss. 1948) ("Character of the prosecutrix in respect to chastity must be confined to evidence of her general reputation, and she cannot be examined as to particular acts of intercourse with other men."); *State v. Grundler*, 111 S.E.2d 1, 11 (N.C. 1959) ("Specific acts of unchastity with persons, other than defendant, are inadmissible in rape cases."); *State v. Pearson*, 143 A. 413, 414 (R.I. 1928) ("Specific acts of lack of chastity with other men than the defendant cannot be shown."); *Burnley v. Commonwealth*, 158 S.E.2d 108, 112-13 (Va. 1967) (holding specific questions about lack of chastity directed towards victim were not admissible).

n104. *Lee v. State*, 179 S.W. 145, 146 (Tenn. 1915) ("Previous acts upon her part testified to [by third parties], if true, should be considered by the jury ... .").

n105. *Stewart v. Commonwealth*, 133 S.W. 202, 203 (Ky. 1911) ("It was error for the court to refuse to permit him to prove by third parties, and by the prosecuting witness on cross examination ... acts of a lewd or lascivious character on her part ... .") (citation omitted); *Wilson v. State*, 67 S.W. 106, 106 (Tex. Crim. App. 1902) (admitting evidence that defendant knew of complainant's carnal intercourse with three different men prior to the rape).

n106. *People v. Pollock*, 77 P.2d 885, 886 (Cal. Dist. Ct. App. 1938) ("[Physician] testified that the hymen showed a fresh rupture which was still bleeding."); *Commonwealth v. McKay*, 294 N.E.2d 213, 217-18 (Mass. 1973) ("The fact that the victim was a virgin, if the jury found, was clearly relevant on the material and important issue whether in the circumstances she would be inclined to consent to the defendant's conduct ... . Courts in other States have held that ... medical evidence tending to show the victim's apparent loss of her virginity is admissible ... . Such evidence may tend to show 'the great unlikelihood of the prosecutrix having given her consent ... .'" (citation omitted); *State v. Dalrymple*, 270 S.W.2d 675, 678 (Mo. 1925) ("The physician, who examined and treated prosecutrix after the alleged assault ... was permitted to testify that [she] was a virgin when he examined her about a month before the alleged assault ... .").

n107. *People v. Biescar*, 275 P. 851, 854 (Cal. Dist. Ct. App. 1929) (holding that cross-examination of a victim about sexual intercourse with other men was appropriate); *Fraday v. State*, 90 S.E. 664, 665 (Ga. 1955) ("[Defense] counsel [will] be permitted to cross-examine her thoroughly as to any prior act of lewdness with the accused and with other men."). See *People v. Byers*, 88 Cal. Rptr. 886, 888 (Dist. Ct. App. 1970) ("The victim when asked whether she had had previous sexual intercourse replied in the affirmative.").

n108. *Griffin v. State*, 46 So. 481, 482 (Ala. 1908) ("Particular instances of her lack of chastity cannot be proved for this purpose, except that she can be interrogated as to her previous intercourse with the prisoner ... ."); *Nickels v. State*, 106 So. 479, 489 (Fla. 1925) ("She may be interrogated as to her previous intercourse with the defendant or as to promiscuous intercourse with other men, or common prostitution."); *Fraday v. State*, 90 S.E. 664, 665 (Ga. 1955) ("[Defense] counsel [will] be permitted to cross-examine her thoroughly as to any prior act of lewdness with the accused and with other men."); *State v. Johnson*, 133 N.W. 115, 116 (Iowa, 1911) ("Prosecutrix's voluntary sexual relations with the defendant, may and should have been considered as substantive proof of the fact that whatever the act done it was with the consent of the prosecutrix."); *State v. Broussard*, 46 So. 2d 48, 50 (La. 1950) ("It has also been generally held that a defendant should be allowed to prove prior acts of sexual intercourse between the victim and himself."); *Ross v. State*, 132 S.W. 793, 797 (Tex. Crim. App. 1910) ("[Admissibility] rule seems to be limited to ... acts of illicit intercourse with the accused alone ... ."); *Freeman v. State*, 107 S.W. 1127, 1128 (Tex. Crim. App. 1908) ("If the reputation of the prosecutrix for chastity was bad, as shown by some of the testimony, and if she had been in the habit of having carnal intercourse with [defendant] ... the jury should have been instructed as to the law applicable to this state.").

n109. *Lee v. State*, 179 S.W. 145, 146 (Tenn. 1915).

n110. *State v. Johnson*, 133 N.W. 115, 116 (Iowa 1911) ("Prosecutrix's voluntary sexual relations with the defendant, may and should have been considered as substantive proof of the fact that whatever the act done it was with the consent of the prosecutrix."); *Lee v. State*, 179 S.W. at 146 ("Acts of sexual intercourse may always be proven between the prosecutrix and the defendant upon a trial for common-law rape prior to the alleged offense for the purpose of raising an implication of consent.").

n111. In most jurisdictions, the mens rea required for rape is the intent to have sex with someone without her consent. Steven B. Katz, *Expectation and Desire in the Law of Rape*, 26 *San Diego L. Rev.* 21, 48 (1989); Sakthi Murthy, *Comment, Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent*, 79 *Calif. L. Rev.* 541, 548 (1991). There is, however, a lack of a clear definition of the mens rea required for rape. *Id.* at 545. One esteemed law professor advocates a mens rea requirement in rape that is at least criminal negligence. Stephen J.

Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of the Law* 284 (1998).

n112. *Freeman v. State*, 107 S.W. 1127, 1129 (Tex. Crim. App. 1908).

n113. Other kinds of evidence of sexual acts have also been deemed relevant. Evidence that a woman gave birth to children out of wedlock, for example, has implied unchastity. *State v. Smith*, 250 So. 2d 724, 725 (La. 1971) ("Cross-examination ... would have revealed that the witness was to bear an illegitimate child and thus would have shown her lack of chastity ...").

n114. *People v. Merrill*, 231 P.2d 573, 578 (Cal. Dist. Ct. App. 1951) ("Mere frequenting of bars does not tend to prove unchastity."); *People v. Mangum*, 88 P.2d 207, 211 (Cal. Dist. Ct. App. 1939) ("The alleged 'lewd act' was drinking intoxicating liquor in a public place... . It must be conceded that habits and social customs have altered since the origin of the rule mentioned, so that ... its application ... would be a grotesque anachronism."); *State v. Brown*, 241 N.W. 591, 592 (Minn. 1932) ("That complainant on some occasions drank liquor, ... smoked a few cigarettes ... is not sufficient [to show lack of chastity]."); *Satterwhite v. State*, 23 S.W.2d 356, 361 (Tex. Crim. App. 1929) ("Appellant wished to ask prosecutrix if she had not gone out to 'drunken parties' with a half dozen named young men.").

n115. *People v. Mangum*, 88 P.2d 207, 211 (Cal. Dist. Ct. App. 1939) ("Defense was allowed to prove, in attacking the moral character of the prosecuting witness, that she chewed tobacco."); *State v. Brown*, 241 N.W. 591, 592 (Minn. 1932) ("That complainant on some occasions drank liquor, ... smoked a few cigarettes ... is not sufficient [to show lack of chastity].").

n116. *Peterson v. State*, 106 So. 75 (Fla. 1925) ("Witness had seen her in bad places and around on the streets at night ..."); *Giles v. State*, 183 A.2d 359, 363 (Md. 1962) (holding that questions about venereal disease and whether complainant's parents allowed her to go out late at night did not reflect her chastity).

n117. *Satterwhite v. State*, 23 S.W.2d 356, 361 (Tex. Crim. App. 1929) ("Appellant desired to ask prosecutrix if she had not gone to dances ... accompanied by girls who were common prostitutes and women of easy virtue. The character of associates of prosecutrix in such case is plainly inadmissible.").

n118. *Jones v. State*, 46 S.W.2d 308, 312 (Tex. Crim. App. 1931) (holding that testimony as to complainant's possession of condoms could only have been offered for the purpose of showing lack of chastity).



n119. See *State v. Bird*, 302 So. 2d 589, 592 (La. 1974), where the court rejected defendant's claim that profane speech showed unchastity. ("In rape cases chastity has a well understood meaning, which does not include habits of speech. Chastity ... should not ... be extended to include other meanings of the word, such as purity in speech and personal integrity.").

n120. *Calhoun v. State*, 214 S.W. 335, 336 (Tex. Crim. App. 1919) (agreeing that complainant's "association constantly with negroes of both sexes, visiting with them in their homes, eating with them at their tables, and treating them on terms of equality both at her house and theirs" contributed to her lack of chastity).

n121. See, e.g., *People v. Mangum*, 88 P.2d 207, 211 (Cal. Dist. Ct. App. 1939) (holding that cross-examination of complainant concerning public intoxication did not "bring out any facts proving ... that the witness had engaged in prior acts of sexual intercourse" and thus was unchaste).

n122. *Nickels v. State*, 106 So. 479, 489 (Fla. 1925) ("The general rule is that, in prosecutions for rape, evidence of the prior lack of chastity of the prosecutrix, as a substantive defense, is not admissible, for rape may be committed upon a woman previously unchaste as well as upon any other female."); *Lake v. Commonwealth*, 104 S.W. 1003, 1006 (Ky. 1907) ("No principle is better settled than that the reputation of the prosecutrix in a case of rape, for virtue or the want of it, is always competent evidence, not to justify the act of rape, if the reputation is good, or to excuse it, if the reputation is bad, but as bearing upon the reasonableness or unreasonableness of her story ... ."); *State v. Flaherty*, 146 A. 7, 9 (Me. 1929) ("Unchastity of the female is no defense to the charge of rape. The crime may be committed upon an unchaste woman, or a prostitute, as well as upon any other woman.") (citations omitted.); *State v. Catron*, 296 S.W. 141, 144 (Mo. 1927) ("Want of chastity ... may not be shown as a defense or in mitigation."); *Kaczmarzyk v. State*, 280 N.W. 362 (Wis. 1938) ("The want of chastity is no defense ... .").

n123. Leon Letwin, "Unchaste Character," Ideology, and the California Rape Evidence Laws, 54 S. Cal. L. Rev. 35, 46 (1980) (noting theory that "a moral flaw in one area of her character (sexual laxity) reflected on other aspects of her character (e.g., honesty) as well"). See also Goldman, *supra* note 78, at 182-186. But see *id.* at 181 (Vermont Supreme Court, ahead of its time in the 1830s, held that sexual reputation of witness or party, including woman's history in prostitution, could not be used to impeach her credibility).

n124. Letwin, *supra* note 123, at 46.

n125. *State v. Sibley*, 33 S.W. 167, 171 (Mo. 1895). See also *Sharon v. Hill*, 26 F. 337, 361 (C.C.D. Cal. 1885) ("Incontinence in a man does not usually imply the moral degradation and insensibility that it does in a woman.").

n126. *Packineau v. United States*, 202 F.2d 681, 685 (8th Cir. 1953).

n127. *People v. Fryman*, 122 N.E.2d 573, 576 (8th Cir. 1954) ("In order to show the probability of consent, the general reputation of prosecutrix for immorality and lack of chastity is of extreme importance and may be shown."); *Stone v. State*, 11 So. 2d 386, 388 (Ala. 1943) ("Unchastity of a prosecuting witness is a circumstance which may be shown by the accused where the issue of consent is presented."); *Story v. State*, 59 So. 480, 482 (Ala. 1912) ("So, the admissibility of the testimony now under consideration is to be referred to its office tending to negative the nonconsent of the woman to meretricious intercourse with the defendant ... and not to an effect reflecting upon her credibility as a witness."); *Herndon v. State*, 56 So. 85, 87 (Ala. Ct. App. 1911) ("That the prosecutrix is unchaste is permitted to be shown, because such evidence bears on the probability or improbability of her consent to the alleged act of intercourse ..."); *Smith v. State*, 233 S.W. 1081, 1082 (Ark. 1921) ("The character for chastity of the injured party may be impeached, not to justify or excuse the offense, but to raise a presumption of her consent."); *Jackson v. State*, 122 S.W. 101 (Ark. 1909) ("Bad reputation of the prosecutrix for chastity ... affects the question of her consent."); *People v. Byers*, 88 Cal. Rptr. 886, 888 (Dist. Ct. App. 1970) ("The relevance of such evidence is that a lack of chastity may have a tendency to prove that the victim was more likely to consent to sexual intercourse than to resist."); *People v. Battilana*, 126 P.2d 923, 929 (Cal. Dist. Ct. App. 1942) ("Evidence of the prosecutrix's want of chastity is admissible, not as a matter of jurisdiction, but to show the probability of consent.") (citation omitted); *People v. Murphy*, 200 P. 484, 488 (Cal. Dist. Ct. App. 1921) ("Evidence of the unchastity of the prosecutrix is admissible as bearing on the question of consent, but evidence of her moral delinquency is inadmissible as affecting her general credibility as a witness."); *State v. Williams*, 80 A. 1004, 1006 (Del. 1911) ("The reputation of the prosecuting witness for immorality and lack of chastity, when proved, is to be considered so far as it may have any bearing upon the question of consent of the prosecuting witness ..."); *Nickels v. State*, 106 So. 479, 489 (Fla. 1925) ("Evidence of the general reputation of prosecutrix for chastity, within recognized limits, is competent evidence as bearing upon the probability of her consent to the act with which the defendant was charged."); *Peterson v. State*, 106 So. 75, 75 (Fla. 1925) ("On a trial for rape, the character of the prosecutrix for chastity, or the want of it, is competent evidence as bearing upon the probability of her consent to the defendant's act ..."); *Seals v. State*, 40 S.E. 731, 732 (Ga. 1902) ("The jury may properly consider evidence of her previous bad character for chastity in determining whether or not she consented to sexual intercourse which she testifies was had against her will ..."); *People v. Gabler*, 249 N.E.2d 340, 343 (Ill. 1969) ("The reputation for chastity in a rape case is only material where the defense is consent."); *People v. Collins*, 186 N.E.2d 30, 33 (Ill. 1962) ("In order to show the probability of consent by the prosecutrix, ... her general reputation [for chastity may] be shown."); *People v. Fryman*, 122 N.E.2d 573, 576 (Ill. 1954) ("The underlying thought is that it is more probable that an unchaste woman would assent to such an act than a virtuous

woman ... ."); *People v. Allen*, 124 N.E. 329, 330 (Ill. 1919) ("Evidence of [the complainant's] bad character for chastity is competent, as bearing on the probability of her consent to the act ... ."); *State v. Johnson*, 133 N.W. 115, 117 (Iowa 1911) ("Proof of prior intercourse is admissible to give rise to a presumption of consent to the act in question."); *Bowman v. Commonwealth*, 143 S.W. 47, 52 (Ky. 1912) ("Evidence of [chastity] is admissible, as tending to show a likelihood of consent or nonconsent ... ."); *Stewart v. Commonwealth*, 133 S.W. 202, 203 (Ky. 1911) ("The general reputation of the victim for lack of chastity may be shown ... to establish ... that she consented or invited the act of which she subsequently complains."); *Lake v. Commonwealth*, 104 S.W. 1003, 1006 (Ky. 1907) ("The character of the victim for virtue ... bears upon the reasonableness or unreasonableness of her story and the probability of whether she did or did not consent to the act."); *State v. Smith*, 250 So. 2d 724, 725 (La. 1971) ("Unless consent is pleaded or put at issue as a defense in a prosecution for aggravated rape, evidence as to the chastity of the prosecuting witness is inadmissible."); *State v. Borde*, 25 So. 2d 736, 738 (La. 1946) ("Evidence as to the chastity of the prosecuting witness in rape cases is never admissible except to impeach her when consent is pleaded as a defense by showing the probability of her consent."); *Humphreys v. State*, 175 A.2d 777, 780 (Md. 1961) ("The general character of the victim as to chastity or lack of chastity is admissible ... in determining whether the act was committed with or without consent ... ."); *Commonwealth v. McKay*, 294 N.E.2d 213, 217 (Mass. 1973) ("The fact that the victim was a virgin, if the jury so found, is clearly relevant on the material and important issue whether in the circumstances she would be inclined to consent to the defendant's conduct."); *People v. Ryno*, 111 N.W. 740, 740 (Mich. 1907) ("The bad reputation of a prosecuting witness above the age of consent for chastity ... to show that the intercourse may have been consented to, is relevant."); *State v. Zaccardi*, 159 N.W.2d 108, 110 (Minn. 1968) ("Evidence tending to show want of chastity was relevant to the question of consent."); *Shay v. State*, 90 So. 2d 209, 211 (Miss. 1956) ("Of course proof of unchastity on the part of a prosecutrix is admissible, where it bears on a material issue. Generally such evidence is admitted on the issue of consent."); *State v. Catron*, 196 S.W. 141, 144 (Mo. 1927) ("Want of chastity may have bearing on the question of consent ... ."); *State v. Lovitt*, 147 S.W. 484, 487 (Mo. 1912) ("Testimony of particular acts of unchastity was admitted, not to impeach the witness, but to prove consent ... ."); *State v. Pearson*, 143 A. 413, 414 (R.I. 1928) ("Evidence of chastity is generally held to be admissible, when the question of consent of the prosecutrix is in issue ... ."); *Lee v. State*, 179 S.W. 145, 146 (Tenn. 1915) ("Any previous acts [of prior sexual behavior by the victim] should be considered by the jury in coming to a conclusion as to whether she consented or not."); *Esquivel v. State*, 506 S.W.2d 613, 616 (Tex. Crim. App. 1974) ("When consent is not an issue, neither evidence of general unchastity on the part of the victim nor evidence of specific instances of unchastity ... is admissible."); *Haynes v. State*, 498 S.W.2d 950, 952 (Tex. Crim. App. 1973) ("When consent is not an issue, evidence bearing on the prosecutrix's general reputation for chastity is not admissible ... ."); *Roper v. State*, 375 S.W.2d 454, 456 (Tex. Crim. App. 1964) ("We agree that when the issue of consent is raised, proof of specific instances of unchastity with appellant may be admissible ... ."); *Satterwhite v. State*, 23 S.W.2d 356, 359 (Tex. Crim. App. 1929) ("It would be absurd, and shock our sense of truth, for any man to affirm that there was not a much greater probability in favor of the proposition that a common prostitute had yielded her assent to sexual intercourse than in the case of the virgin of uncontaminated purity.") (citation omitted); *Ross v. State*, 132 S.W. 793, 797 (Tex. Crim. App. 1910) ("Generally in cases of

rape and assault to rape, it is held competent evidence to prove that the reputation of the prosecutrix for chastity is bad, not as an excuse for the offense or justification for the same, but as raising a presumption that she may have yielded her consent and was not in fact forced."); *Freeman v. State*, 107 S.W. 1127, 1128 (Tex. Crim. App. 1908) ("If the reputation of the prosecutrix for chastity was bad ... all such testimony was admissible for the purpose of showing her consent ... "); *State v. Beeny*, 203 P.2d 397, 398 (Utah 1949) ("[Lack of chastity] constitutes some circumstance which indicates some likelihood that she consented ... ").

n128. *People v. Mangum*, 88 P.2d 207, 211 (Cal. Dist. Ct. App. 1939) ("[Lack of chastity] evidence may be shown for the purpose of disproving the allegation that the act charged against the defendant was perpetrated through the exercise of force, and despite the unwillingness of the prosecutrix.") (citations omitted); *State v. Johnson*, 133 N.W. 115, 116 (Iowa 1911) ("Prosecutrix's general reputation for chastity, as well as her previous voluntary sexual relations with the defendant, may and should have been considered as substantive proof of the fact that whatever the act done it was with the consent of the prosecutrix."); *Ross v. State*, 132 S.W. 793, 797 (Tex. Crim. App. 1910) ("Generally in cases of rape and assault to rape, it is held competent evidence to prove that the reputation of the prosecutrix for chastity is bad, not as an excuse for the offense or justification for the same, but as raising a presumption that she may have yielded her consent and was not in fact forced.").

n129. *State v. Johnson*, 133 N.W. 115, 116 (Iowa 1911).

n130. *Lee v. State*, 179 S.W. 145, 146 (Tenn. 1915).

n131. See, e.g., *Herndon v. State*, 56 So. 85, 87 (Ala. Ct. App. 1911) ("In all prosecutions for rape, it is competent to impeach the general character of a prosecutrix for chastity, and, if she testifies as a witness, her general character for truth may also be impeached."); *Thompson v. State*, 128 S.E. 756, 758 (Ga. 1925) ("Evidence [of unchaste and immoral conduct with men] is admissible to aid the jury in passing upon the question as to the credibility of the prosecuting witness ... "); *Seals v. State*, 40 S.E. 731, 732 (Ga. 1902) ("It is now well settled that in prosecutions for rape the defense may introduce evidence tending to prove the previous unchaste character of the woman, and this evidence is admissible ... to discredit her as a witness ... "); *State v. Johnson*, 133 N.W. 115, 116 (Iowa, 1911) ("That prosecutrix was a common prostitute surely should be considered as bearing upon her credibility as a witness ... "); *Lake v. Commonwealth*, 104 S.W. 1003, 1006 (Ky. 1907) ("No principle is better settled than that the reputation of the prosecutrix in a case of rape, for virtue or want of it, is always competent evidence ... as bearing upon the reasonableness or unreasonableness of her story ... "); *Lee v. State*, 179 S.W. 145, 145 (Tenn. 1915) ("Should you believe that [the complainant] had had sexual intercourse with the defendant or with other men or boys before the time in question ... you may look to said acts of lewdness, if shown in the proof, only for the purpose of shedding light upon her credibility as a witness in this case."); *Holland v. State*

, 131 S.W. 563, 564 (Tex. Crim. App. 1910) ("Evidence is admissible to support the reputation of the prosecutrix for chastity whenever there is an effort on the part of the defendant, even though unsuccessful, to impeach the reputation of said witness"); Freeman v. State, 107 S.W. 1127, 1128-29 (Tex. Crim. App. 1908) ("The evidence of her want of chastity, sexual intercourse with appellant, or her general reputation for want of chastity might be used as a means of impeaching her credibility before the jury ... .").

n132. Calhoun v. State, 214 S.W. 335, 339 (Tex. Crim. App. 1919).

n133. See Story v. State, 59 So. 480, 482 (Ala. 1912) ("So, the admissibility of the testimony now under consideration is to be referred to its office tending to negative the nonconsent of the woman to meretricious intercourse with the defendant ... and not to an effect reflection upon her credibility as a witness."); State v. Lovitt, 147 S.W. 484, 487 (Mo. 1912) ("Testimony of particular acts of unchastity was admitted, not to impeach the witness, but to prove consent ... ."); State v. Pearson, 143 A. 413, 414 (R.I. 1928) ("Evidence of chastity is generally held to be admissible, when the question of consent of the prosecutrix is in issue... . The established practice in this state and in many other states does not permit the introduction of [chastity] evidence to impeach the credibility of a witness."); Jones v. State, 46 S.W.2d 308, 312-13 (Tex. Crim. App. 1931) (holding that chastity does not go to credibility, but rather to consent); Linder v. State, 250 S.W. 703, 705 (Tex. Crim. App. 1923) ("The credibility of a witness cannot be ... attacked [on the character of chastity].").

n134. People v. Murphy, 200 P. 484, 488 (Cal. Dist. Ct. App. 1921).

n135. See State v. Bolden, 241 So. 2d 490, 491 (La. 1970) ("It is well settled that in rape cases the chastity or lack of chastity or bad reputation for chastity of the victim is not admissible for the purpose of impeaching credibility.").

n136. Stone v. State, 11 So. 2d 386, 388 (Ala. 1943) ("Unchastity of a prosecuting witness is a circumstance which may be shown by the accused where the issue of consent is presented."); Patterson v. State, 141 So. 195, 197 (Ala. 1932) ("There was no evidence ... that the defendant had intercourse with the witness by and with her consent; therefore, the question [regarding lack of chastity] elicited immaterial evidence."); People v. Battilana, 126 P.2d 923, 929 (Cal. Dist. Ct. App. 1942) ("Where the defense is not based on any theory of consent to the act, but upon a denial by the defendant that he had ever had any carnal intercourse whatever with the girl, testimony as to unchastity is wholly immaterial."); Nickels v. State, 106 So. 479, 489 (Fla. 1925) ("Chastity is material only when the defense involves a claim of present consent to the act charged in the indictment, because such testimony is admissible only for the purpose of showing a probability of consent to that act."); People v. Gabler, 249 N.E.2d 340, 343 (Ill. App. Ct. 1969) ("The reputation for chastity in a rape case is only material where the defense is consent."); Ford v. Commonwealth, 286 S.W.2d 518, 518 (Ky. 1956) ("Evidence that the victim of the rape was chaste or of good moral character

is not admissible unless ... the defendant ... has relied upon consent as a defense."); *State v. Smith*, 250 So. 2d 724, 725 (La. 1971) ("Unless consent is pleaded or put at issue as a defense in a prosecution for aggravated rape, evidence as to the chastity of the prosecuting witness is inadmissible."); *State v. Broussard*, 46 So. 2d 48, 51 (La. 1950) ("Where consent is a defense, the general reputation of the prosecutrix for unchastity may be shown."); *State v. Borde*, 25 So. 2d 736, 738 (La. 1946) ("Evidence as to the chastity of the prosecuting witness in rape cases is never admissible except to impeach her when consent is pleaded as a defense by showing the probability of her consent."); *Commonwealth v. McKay*, 294 N.E.2d 213, 217 (Mass. 1973) ("If the defense had not been based on consent but had been based on an alibi ... the victim's virginity or lack of it would probably have no bearing on any litigated issue ... ."); *Shay v. State*, 90 So. 2d 209, 211 (Miss. 1956) ("But 'where want of consent is not in issue, as where accused denies the act charged, ... evidence of the female's want of chastity is immaterial and inadmissible.'") (citations omitted); *Esquivel v. State*, 506 S.W.2d 613, 616 (Tex. Crim. App. 1974) ("When consent is not an issue, neither evidence of general unchastity on the part of the prosecutrix nor evidence of specific instances of unchastity ... is admissible."); *Roper v. State*, 375 S.W.2d 454, 456 (Tex. Crim. App. 1964) ("When the offense is rape by force and there is no issue of consent there is no defense that the woman was not a chaste female."); *Jones v. State*, 46 S.W.2d 308, 312-13 (Tex. Crim. App. 1931) (holding that since consent was not a defense, chastity was not at issue); *Linder v. State*, 250 S.W. 703, 705 (Tex. Crim. App. 1923) (holding that since there was no defense of consent, evidence of lack of chastity was not admissible).

n137. *People v. Byers*, 88 Cal. Rptr. 886, 888 (Dist. Ct. App. 1970) ("We hold that the trial court did not abuse its discretion by denying defendant the opportunity to extensively question the victim as to her prior chastity because of the information it possessed at the time of the ruling as to the defendant's probable alibi defense."); *State v. Borde*, 25 So. 2d 736, 738 (La. 1946) ("[Chastity] testimony was wholly irrelevant and immaterial, since the defense was not based upon any theory of consent to the act but on an alibi"); *Commonwealth v. McKay*, 294 N.E.2d 213, 217 (Mass. 1973) ("If the defence had not been based on consent but had been based on an alibi ... the victim's virginity or lack of it would probably have no bearing on any litigated issue").

Additionally, courts began to prohibit the prosecution from introducing evidence of the complainant's chastity unless the defendant had directly challenged it. *Smith v. State*, 233 S.W. 1081, 1082 (Ark. 1921) ("It is only when the accused attacks the chastity of the prosecuting witness by evidence of reputation for unchastity that the prosecution may introduce evidence of her reputation for chastity to discredit such testimony."); *Commonwealth v. Woloszchuk*, 3 A.2d 10, 11-12 (Pa. Super. Ct. 1938) (holding that the chastity of the complainant can not be brought up unless challenged by the defense); *Holland v. State*, 131 S.W. 563, 564 (Tex. Crim. App. 1910) ("It may be stated as a general rule that in the trial of cases of this character the state will not be permitted to bolster up the testimony of the prosecutrix by proving her reputation for virtue and chastity, unless the same is assailed by the defendant's testimony ... .").

n138. *People v. Gabler*, 249 N.E.2d 340, 343 (Ill. 1969) (holding that where complainant bit, kicked, scratched, and hit the defendant, there was clearly no issue of consent and therefore no reason to admit evidence of lack of chastity); *State v. Zaccardi*, 159 N.W.2d 108, 110 (Minn. 1968) (holding that since the "evidence overwhelmingly preponderates against a finding of consent" there was no reason to question the victim about lack of chastity); *Roper v. State*, 375 S.W.2d 454, 456 (Tex. Crim. App. 1964) (holding when there was no given defense of consent, and all of the facts in the case suggest that consent was unrealistic, chastity evidence was inadmissible); *Ross v. State*, 132 S.W. 793, 797 (Tex. Crim. App. 1910) ("There is not a fact or circumstance to indicate the appellant and his codefendants believed or had the right to believe the prosecutrix would consent... . We, therefore, hold ... [evidence of lack of chastity] was not material to any issue developed by the testimony.").

n139. *Ross v. State*, 132 S.W. 793, 794-97 (Tex. Crim. App. 1910) (holding that where witness had been hit more than six times, two of which were direct blows to the face, there was no indication of consent).

n140. See, e.g., *People v. Fryman*, 122 N.E.2d 573 (8th Cir. 1954).

n141. *Infra* Part II.

n142. *Feminism in Our Time: The Essential Writings, World War II to the Present* xii (Miriam Schneir ed., 1994).

n143. *Frontiero v. Richardson*, 411 U.S. 677, 677 (1973).

n144. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 57 (1986).

n145. Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 *Minn. L. Rev.* 763, 764-66 (1986).

n146. *Id.* at 765 n.3.

n147. *Id.*

n148. *Mich. Comp. Laws Ann.* 750.520j (West 1991).

n149. Id.

n150. Only Arizona has not passed a rape shield law of any kind.

n151. Harriet Galvin initially cataloged these in the following way: (1) the Michigan approach; (2) the Texas approach; (3) the federal approach; and (4) the California approach. Galvin, *supra* note 145, at 773.

n152. Ala. R. Evid. 412 (West 2000); Fla. Stat. Ann. 794.022 (West 2000); Ga. Code Ann. 24-2-3 (1995); Ind. Code Ann. 35-37-4-4 (West 1998); Ky. R. Evid. 412 (West 2001); La. Code Evid. Ann. art. 412 (West 1995); Me. R. Evid. 412 (West 2000); Md. Code Ann. art. 27, 461A (Michie Supp. 2000); Mass. Gen. Laws Ann. ch. 233, 21B (West 2000); Mich. Comp. Laws Ann. 750.520j (West 1991); Minn. Stat. Ann. 609.347 (West Supp. 2001); Mo. Ann. Stat. 491.015 (West 1996); Mont. Code Ann. 45-5-511 (1999); Neb. Rev. Stat. 28-321 (1995); N.H. Rev. Stat. Ann. 632-A:6 (Supp. 2000); N.J. Stat. Ann. 2C:14-7 (West 1995); N.C. Gen. Stat. 8C-1, R. 412 (1999); Ohio Rev. Code Ann. 2907.02 (Anderson Supp. 1998); Okla. Stat. Ann. tit. 12, 2412 (West Supp. 2000); 18 Pa. Cons. Stat. Ann. 3104 (West 2000); S.C. Code Ann. 16-3-659.1 (Law. Co-op. 1985 & Supp. 2000); Vt. Stat. Ann. tit. 13, 3255 (1998); Va. Code Ann. 18-2-67.7 (Michie 1996); W. Va. Code 61-8B-11 (2000); Wis. Stat. Ann. 972.11 (West Supp. 2000).

n153. In addition, Florida, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, North Carolina, Oklahoma, Vermont, and Virginia explicitly prohibit either reputation evidence, opinion evidence, or both. See Fla. Stat. Ann. 794.022 (West 2000); Ky. R. Evid. 412 (West 2001); La. Code Evid. Ann. art. 412 (West 1995); Me. R. Evid. 412 (West 2000); Md. Code Ann. art. 27, 461A (Michie Supp. 2000); Mass. Gen. Laws Ann. ch. 233, 21B (West 2000); Mo. Ann. Stat. 491.015 (West 1996); N.C. Gen. Stat. 8C-1, R. 412 (1999); Okla. Stat. Ann. tit. 12, 2412 (West Supp. 2000); Vt. Stat. Ann. tit. 13, 3255 (1998); Va. Code Ann. 18-2-67.7 (Michie 1996).

n154. Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, South Carolina, Vermont, Virginia, and Wisconsin. See Fla. Stat. Ann. 794.022 (West 2000); Ga. Code Ann. 24-2-3 (1995); Ind. Code Ann. 35-37-4-4 (West 1998); Ky. R. Evid. 412 (West 2001); La. Code Evid. Ann. art. 412 (West 1995); Me. R. Evid. 412 (West 2000); Md. Code Ann. art. 27, 461A (Michie Supp. 2000); Mass. Gen. Laws Ann. ch. 233, 21B (West 2000); Mich. Comp. Laws Ann. 750.520j (West 1991); Minn. Stat. Ann. 609.347 (West Supp. 2001); Mo. Ann. Stat. 491.015 (West 1996); Mont. Code Ann. 45-5-511 (1999); Neb. Rev. Stat. 28-321 (1995); N.J. Stat. Ann. 2C:14-7 (West 1995); N.C. Gen. Stat. 8C-1, R. 412 (1999); Ohio Rev. Code Ann. 2907.02 (Anderson Supp. 1998); Okla. Stat. Ann. tit. 12, 2412 (West Supp. 2000); S.C. Code Ann. 16-3-659.1 (Law. Co-op. 1985 & Supp. 2000); Vt.



Stat. Ann. tit. 13, 3255 (1998); Va. Code Ann. 18-2-67.7 (Michie 1996); Wis. Stat. Ann. 972.11 (West Supp. 2000).

n155. Alabama, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, Vermont, Virginia, West Virginia, and Wisconsin. See Ala. R. Evid. 412 (West 2000); Ga. Code Ann. 24-2-3 (1995); Ind. Code Ann. 35-37-4-4 (West 1998); Ky. R. Evid. 412 (West 2001); La. Code Evid. Ann. art. 412 (West 1995); Me. R. Evid. 412 (West 2000); Md. Code Ann. art. 27, 461A (Michie Supp. 2000); Mass. Gen. Laws Ann. ch. 233, 21B (West 2000); Mich. Comp. Laws Ann. 750.520j (West 1991); Minn. Stat. Ann. 609.347 (West Supp. 2001); Mo. Ann. Stat. 491.015 (West 1996); Mont. Code Ann. 45-5-511 (1999); Neb. Rev. Stat. 28-321 (1995); N.H. Rev. Stat. Ann. 632-A:6 (Supp. 2000); N.J. Stat. Ann. 2C:14-7 (West 1995); N.C. Gen. Stat. 8C-1, R. 412 (1999); Ohio Rev. Code Ann. 2907.02 (Anderson Supp. 1998); ); 18 Pa. Cons. Stat. Ann. 3104 (West 2000); S.C. Code Ann. 16-3-659.1 (Law. Co-op. 1985 & Supp. 2000); Vt. Stat. Ann. tit. 13, 3255 (1998); Va. Code Ann. 18-2-67.7 (Michie 1996); W. Va. Code 61-8B-11 (2000); Wis. Stat. Ann. 972.11 (West Supp. 2000).

n156. Florida, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, South Carolina, Vermont, Virginia, and Wisconsin. See Fla. Stat. Ann. 794.022 (West 2000); Ind. Code Ann. 35-37-4-4 (West 1998); Ky. R. Evid. 412 (West 2001); La. Code Evid. Ann. art. 412 (West 1995); Me. R. Evid. 412 (West 2000); Md. Code Ann. art. 27, 461A (Michie Supp. 2000); Mass. Gen. Laws Ann. ch. 233, 21B (West 2000); Mich. Comp. Laws Ann. 750.520j (West 1991); Minn. Stat. Ann. 609.347 (West Supp. 2001); Mo. Ann. Stat. 491.015 (West 1996); Mont. Code Ann. 45-5-511 (1999); Neb. Rev. Stat. 28-321 (1995); N.J. Stat. Ann. 2C:14-7 (West 1995); N.C. Gen. Stat. 8C-1, R. 412 (1999); Ohio Rev. Code Ann. 2907.02 (Anderson Supp. 1998); Okla. Stat. Ann. tit. 12, 2412 (West Supp. 2000); S.C. Code Ann. 16-3-659.1 (Law. Co-op. 1985 & Supp. 2000); Vt. Stat. Ann. tit. 13, 3255 (1998); Va. Code Ann. 18-2-67.7 (Michie 1996); Wis. Stat. Ann. 972.11 (West Supp. 2000).

n157. Florida, Minnesota, Nebraska, and North Carolina. See Fla. Stat. Ann. 794.022 (West 2000); Minn. Stat. Ann. 609.347 (West Supp. 2001); Neb. Rev. Stat. 28-321 (1995); N.C. Gen. Stat. 8C-1, R. 412 (1999).

n158. Maryland and Virginia. See Md. Code Ann. art. 27, 461A (Michie Supp. 2000); Va. Code Ann. 18-2-67.7 (Michie 1996).

n159. Georgia, New Jersey, and North Carolina. See Ga. Code Ann. 24-2-3 (1995); N.J. Stat. Ann. 2C:14-7 (West 1995); N.C. Gen. Stat. 8C-1, R. 412 (1999).

n160. Oklahoma, Vermont, and Wisconsin. See Okla. Stat. Ann. tit. 12, 2412 (West Supp. 2000); Vt. Stat. Ann. tit. 13, 3255 (1998); Wis. Stat. Ann. 972.11 (West Supp. 2000). Seventeen of the jurisdictions in the legislated exceptions category authorize the judge to determine if the evidence offered under an exception is nevertheless irrelevant or if its relevance is outweighed its prejudicial effect: Florida, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, Vermont, Virginia, and West Virginia. See Fla. Stat. Ann. 794.022 (West 2000); Ind. Code Ann. 35-37-4-4 (West 1998); Ky. R. Evid. 412 (West 2001); La. Code Evid. Ann. art. 412 (West 1995); Md. Code Ann. art. 27, 461A (Michie Supp. 2000); Mass. Gen. Laws Ann. ch. 233, 21B (West 2000); Mich. Comp. Laws Ann. 750.520j (West 1991); Minn. Stat. Ann. 609.347 (West Supp. 2001); Mo. Ann. Stat. 491.015 (West 1996); N.J. Stat. Ann. 2C:14-7 (West 1995); N.C. Gen. Stat. 8C-1, R. 412 (1999); Ohio Rev. Code Ann. 2907.02 (Anderson Supp. 1998); 18 Pa. Cons. Stat. Ann. 3104 (West 2000); S.C. Code Ann. 16-3-659.1 (Law. Co-op. 1985 & Supp. 2000); Vt. Stat. Ann. tit. 13, 3255 (1998); Va. Code Ann. 18-2-67.7 (Michie 1996); W. Va. Code 61-8B-11 (2000). The remaining eight jurisdictions do not explicitly call for the judge to balance the relevance of the evidence offered against its prejudicial effect: Alabama, Georgia, Maine, Montana, Nebraska, New Hampshire, Oklahoma, and Wisconsin. See Ala. R. Evid. 412 (West 2000); Ga. Code Ann. 24-2-3 (1995); Me. R. Evid. 412 (West 2000); Mont. Code Ann. 45-5-511 (1999); Neb. Rev. Stat. 28-321 (1995); N.H. Rev. Stat. Ann. 632-A:6 (Supp. 2000); Okla. Stat. Ann. tit. 12, 2412 (West Supp. 2000); Wis. Stat. Ann. 972.11 (West Supp. 2000).

n161. Galvin, *supra* note 145, at 886. One example of this is found in the case of *State v. Colbath*, 540 A.2d 1212, 1214 (N.H. 1988). See *infra* notes 535-564 and accompanying text.

n162. Conn. Gen. Stat. Ann. 54-86F (West 1994); Haw. Rev. Stat. Ann. 626-1, R. 412 (Michie Supp. 2000); 2000 D.C. Stat. 1981 22-3022; 725 Ill. Comp. Stat. Ann. 5/115-7 (West Supp. 2000); Iowa R. Ct. 412 (West 2001); Miss. R. Evid. 412 (West 2000); N.Y. Crim. Proc. Law 60.42 (McKinney 1992); N.D. R. Evid. 412 (West 2001); Or. Rev. Stat. 40.210 (Supp. 1996-1998); Tenn. R. Evid. 412 (West 2000); Tex. R. Evid. 412 (West 2001); Utah R. Evid. 412 (Lexis 2000).

n163. N.Y. Crim. Proc. Law 60.42 (McKinney 1992).

n164. At least one commentator has suggested that these provisions result in broad judicial discretion similar to that found under the judicial discretion approach. Galvin, *supra* note 145, at 888.

n165. Galvin, *supra* note 145, at 886 ("No explicit statutory language is needed to compel trial judges to admit evidence that is 'constitutionally required to be admitted.'").

n166. Id.

n167. Alaska Stat. 12.45.045 (Michie 2000); Ark. Code Ann. 16-42-101 (Michie 1999); Colo. Rev. Stat. 18-3-407 (2000); Idaho Code 18-6105 (Michie 1997); Kan. Stat. Ann. 21-3525 (1995); N.M. R. Evid. 11-413 (Michie 2001); R.I. R. Evid. 412 (Lexis Supp. 2001); S.D. Codified Laws 23A-22-15 (Michie 1998); Wyo. Stat. Ann. 6-2-312 (Michie 2001).

n168. Alaska, Arkansas, New Mexico, and Wyoming. See Alaska Stat. 12.45.045 (Michie 2000); Ark. Code Ann. 16-42-101 (Michie 1999); N.M. R. Evid. 11-413 (Michie 2001); Wyo. Stat. Ann. 6-2-312 (Michie 2001).

n169. In another four jurisdictions, the stated standard for the admission of a woman's prior sexual conduct is mere relevance, without any weighing of the evidence's possible prejudicial effect: Colorado, Idaho, Kansas, and South Dakota. See Colo. Rev. Stat. 18-3-407 (2000); Idaho Code 18-6105 (Michie 1997); Kan. Stat. Ann. 21-3525 (1995); S.D. Codified Laws 23A-22-15 (Michie 1998). This is arguably worse than the discretion given to judges before the passage of the law, where evidence would be excluded if its prejudice outweighed its relevance.

n170. The Rhode Island statute states:

If a defendant who is charged with the crime of sexual assault intends to introduce proof that the complaining witness has engaged in sexual activities with other persons, he or she shall give notice of his or her intention to the court and the attorney for the state. The notice shall be given prior to the introduction of any evidence of such fact; it shall be given orally out of the hearing of spectators and, if the action is being tried by a jury, out of the hearing of the jurors. Upon receiving such notice, the court shall order the defendant to make a specific offer of the proof that he or she intends to introduce in support of this issue. The offer of proof, and all arguments relating to it, shall take place outside the hearing of spectators and jurors. The court shall then rule upon the admissibility of the evidence offered.

R.I. R. Evid. 412 (Lexis Supp. 2001).

n171. Berger, *supra* note 26, at 34.

n172. Cal. Evid. Code 782, 1103 (West Supp. 2001); Del. Code Ann. tit. 11, 3508, 3509 (Michie Supp. 2001); Nev. Rev. Stat. Ann. 48.069, 50.090 (Michie 1996); Wash. Rev. Code Ann. 9A.44.020 (West 2000).

n173. Delaware, however, does admit such evidence if it pertains to prior sexual conduct with the accused. See Del. Code Ann. tit. 11, 3508, 3509 (Michie Supp. 2001).

n174. California and Delaware. See Cal. Evid. Code 782, 1103 (West Supp. 2001); Del. Code Ann. tit. 11, 3508, 3509 (Michie Supp. 2001).

n175. Nevada and Washington. See Nev. Rev. Stat. Ann. 48.069, 50.090 (Michie 1996); Wash. Rev. Code Ann. 9A.44.020 (West 2000).

n176. Galvin, *supra* note 145, at 773.

n177. See, e.g., *infra* notes 535-564 and accompanying text (discussing Colbath).

n178. See, e.g., *infra* notes 496-532 and accompanying text (discussing Javonovic).

n179. See, e.g., *infra* notes 213-296 and accompanying text.

n180. See, e.g., *infra* notes 197-209 and accompanying text.

n181. See generally *Privacy of Rape Victims: Hearing on H.R. 14666 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong. 2 (1976)* [hereinafter *Privacy Hearing*]. Members of the House of Representatives led by Rep. Elizabeth Holtzman introduced eight rape shield bills in the federal system. *Id.* at 1 (statement of Rep. Hungate). The full text of the initial bill is as follows:

#### A BILL

To amend the Federal Rules of Evidence to provide for the protection of the privacy of rape victims. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Privacy Protection for Rape Victims Act of 1976".

Sec. 2. (a) Article IV of the Federal Rules of Evidence is amended by adding at the end thereof the following new rule:

"Rule 412. Rape Cases; Relevance of Victim's Past Behavior

"(a) Notwithstanding any other provision of law, reputation or opinion evidence of a person's past sexual behavior is not admissible in any trial if an issue in such trial is whether such person was raped or assaulted with intent to commit rape.

"(b) Notwithstanding any other provision of law, evidence of specific instances of a person's past sexual behavior is not admissible in any trial if an issue in such trial is whether such person was raped or assaulted with intent to commit rape, except that otherwise admissible evidence of specific instances of such conduct is admissible in such trial -

"(1) if such evidence -

"(A) is evidence of sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of pregnancy, disease, semen or injury; or

"(B) is of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged; and

"(2) if the requirements contained in subsection (c) are satisfied.

"(c) (1) If the person accused of committing rape or assault with intent to commit rape intends to offer under subsection (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence. Any motion made under this paragraph shall be served on all other parties and on the alleged victim if not a party.

"(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subsection (b)(1), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subsection (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

"(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence substantially outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

"(d) For the purposes of this rule, the term 'past sexual behavior' means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

(b) The table of contents for the Federal Rules of Evidence is amended by inserting immediately after the item relating to rule 411 the following new item:

"Rule 412. Rape cases; relevance of victim's past behavior."

Sec. 3. The amendments made by this Act shall apply to trials which begin more than thirty days after the date of enactment of this Act.

H.R. 14666, 94th Cong. (2d Sess. 1976).

n182. Privacy Hearing, *supra* note 181, at 85-86.

n183. *Id.* at 86.

n184. *Id.* at 1-84. The witnesses ranged from Judge Sylvia Bacon of the D.C. Superior Court on behalf of the American Bar Association to Sergeant Deborah Lieberman of the United States Marine Corps, who spoke about her experience with the judicial process after having been raped and having participated in a prosecution of her assailant. *Id.*

n185. See, e.g., *Id.* at 52 (statement of Rep. Harris).

n186. *Id.*

n187. *Id.*

n188. *Id.* at 4 (statement of Roger A. Pauley, United States Department of Justice) (citing Note, *Indicia of Consent? A Proposal for Change to the Common Law Rule Admitting Evidence of a Rape Victim's Character for Chastity*, 7 *Loy. U. Chi. L.J.* 118, 123-24, 128 n.48 (1976)).

n189. *Id.* at 50 (statement of Cheryl Robinson, Volunteer Supervisor, Rape Victim Companion Program, Alexandria, Va.).

n190. *Id.* at 51 (statement of Rep. Harris).

n191. *Id.* at 49 (statement of Cheryl Robinson, Volunteer Supervisor, Rape Victim Companion Program, Alexandria, Va.). Some also felt that an increase in convictions would not happen immediately. *Id.* at 23 (statement of Judge Sylvia Bacon on behalf of the American Bar Association); *Id.* at 30 (statement of Mary Ann Lergen, National Organization for Women); *Id.* at 51 (statement Rep. Harris); *Id.* at 80 (statement of Judge Patricia Boyle, Detroit Recorder's Court) (discussing the need for increased reporting and prosecution of rape).

Testimony in both the House and the Senate underscored the unfair treatment victims felt they suffered during the trial process. *Id.* at 57 (statement of Deborah Lieberman, U.S. Marine Corps) (discussing the embarrassment she felt during questioning and the ways she felt her "privacy was taken" from her); Amendments to Title I (Law Enforcement Assistance Administration) of the Omnibus Crime Control and Safe Streets Act: Hearing Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary, 94th Cong. 479-83 (1976) (statement of Jane Huntington, victim) (discussing feelings of frustration with the judicial process, the poor treatment of victims, and the feeling of being "put on trial").

n192. Privacy Hearing, *supra* note 181, at 79. To Judge Boyle, the question was whether society recognizes "women as fully free adults fully capable of making private sexual choices" without subjecting them to "any social or legal recrimination other than or different than that applied to males as a result of these choices." *Id.* at 80. She testified that the "cutting question" was whether society should "recognize the right of women to make free and private choices about their own sexual lives." *Id.* at 81. The legal system should not perpetuate "judgments about female sexuality" that were "made by male jurists 50 to 100 years ago" or maintain "a view of women as less than fully human in their sexual lives." *Id.* at 81-82.

Some of those supporting the bill further argued that admissibility decisions should not be left within the trial judge's sole discretion. According to Mary Ann Lagen of the National Organization for Women, judges "having been reared in the same socialization process as jurors are subject to the same prejudices and misunderstandings about the nature of rape as is the rest of society." *Id.* at 34. As a result, although judges have had at their discretion the power to exclude this evidence, they have rarely exercised it. *Id.* Explicitly giving the judge a test as provided in the law would "reflect a policy decision that all women, not just virgins, are to be protected by law ... [and] that a victim's rights of privacy must be respected." *Id.* In deciding whether these decisions should be discretionary, Judge Bacon pointed out that judges lean toward admitting evidence due to pressure not to be reversed on appeal. *Id.* at 81. This pressure, she maintained, makes the exclusion of "evidence of sexual history infrequent." *Id.*

Several arguments also countered those made against the bill. First, it was pointed out that every rule of evidence "can at times operate to exclude possibly probative evidence." *Id.* at 54 (statement of Lawrence H. Tribe, Harvard Law Professor). However, we often exclude evidence that is relevant for policy reasons. *Id.* at 79 (statement of Judge Patricia Boyle, Detroit Reporter's Court). In addition, "only the occasional loss of marginally relevant evidence can plausibly be attributed to the amendment." *Id.* at 55 (statement of Lawrence H. Tribe, Harvard Law Professor). Finally, the decision of whether evidence is relevant should not be left up to the judge because they will always err on the side of the defendant for fear of otherwise being overturned. *Id.* at 81 (statement of Judge Patricia Boyle, Detroit Reporter's Court).

The argument for an open, in camera review was also refuted. According to Professor Tribe, "most of the considerations counseling against the allowance of such assaults upon the victim in open court likewise argue against its allowance even in camera." *Id.* at 55. "To say that the victim of an alleged rape may be subjected to virtually limitless personal inquisition

in chambers (even if not in front of a jury) is already to compromise much of the victim's rightful claim to be treated with respect." Id.

n193. Id. at 33 (statement of Mary Ann Lergen, National Organization for Women).

n194. Id.

n195. Id. at 79 (statement of Judge Patricia Boyle, Detroit Reporter's Court). She added: "if the people sitting on juries are still thinking that because a college student has slept with someone then that student is more likely to have been raped then I don't think the law can afford to support that inference. It ought to be eradicated from the law if we cannot eradicate it from people's minds." Id. at 84. Additionally and finally, a woman's previously unchaste behavior did not in any way prove "a character predisposed to consent to intercourse." Id. at 33 (statement of Judge Sylvia Bacon on behalf of the American Bar Association).

n196. Id. at 24.

n197. Id. at 4.

n198. Id. Pauley assured Congress that the Department of Justice was "deeply committed to eradicating the injustices long suffered by female victims of the heinous crime of rape." Id. at 3. The Department of Justice's position on the bill as proposed was that it was "generally ... well drafted" and would have the support of the Department of Justice if certain changes were made. Id. at 4. He envisioned the goals of this legislation to be threefold: (1) to create constitutionally valid standards for fair and effective prosecution of sex offenses; (2) protection of the dignity and privacy of victims of sexual assaults; and (3) an end to discriminatory and invidious rules of evidence that diminish rather than in enhance the quest for the truth." Id. at 3. The Department of Justice also applauded the in camera review outlined in section (c). Id. at 6. Dovey Roundtree of the American Civil Liberties Union staked out a similar position, stating: "there is in many cases a potential conflict between the right of the defendant to a fair trial and the complainant's right to have his or her claim to protection of the law vindicated without undue invasion of sexual privacy. In many cases, this conflict may be irresolvable, and when that is the case the right to a fair trial should not be qualified, no matter how compelling the countervailing concerns." Id. at 67. Roundtree also argued that reputation and opinion evidence of a person's sexual history should be excluded generally. Id. at 63. Additionally, Roundtree felt that evidence of "unchaste character" was in no way related to the issue of consent. Id. She explained that "recognizing that the victims of most rapes are women, evidence predicated merely upon the assumption that a woman who chooses to have sexual relations with some man or men is 'more likely to consent again' is as misleading in a trial concerned with establishing the truth as it is blatantly sexist." Id. She also added that prior sexual history should only be allowed where it has been shown that "in the



individual case that specific instances of the person's prior sexual conduct have a bearing on the facts of the instant case." Id. Roundtree argued, however, that the provisions that indicated the circumstances in which prior sexual behavior would be admitted could not cover "the variety of factual situations which the courts may encounter in dealing with the relevancy of past sexual history." Id. at 63.

n199. Id. at 5.

n200. Id.

n201. Id.

n202. Id.

n203. Id. Despite assuring the committee that prostitutes are as "deserving of the law's protection...as any other victim," Pauley felt that evidence of a prostitute's sexual history would be crucial to demonstrate her lack of credibility as a witness. Id.

n204. Id. at 5. Pauley also felt the critical phrase "past sexual behavior" was ambiguous. Id. at 6. He felt that the rule was too restrictive in allowing evidence of the victim's past sexual behavior and that if the prosecution is allowed to demonstrate the victim was previously "chaste" then the defense should be allowed to counter that evidence if it is introduced. Id. He recommended that the corroboration requirement be explicitly removed because it implied that "the complainant in such an offense is less worthy of belief than the victims of other crimes." Id. at 7. In addition, one final recommendation was made that the word "substantial" be stricken from the test the judge would use to decide the admissibility of the evidence under subsection (c)(3). Id. at 6. Pauley testified that the proffered standard was a "drastic departure from the ordinary criterion applied by judges to test the admissibility of evidence." Id. Generally, the test used favors the presumption that "all relevant evidence should come to the trier of facts in order to facilitate the search for the truth." Id. He disagreed with the fact that the standard as proposed "would give primacy to the danger of unfair prejudices." Id. He felt that it went too far because in situations where the judge found that the evidence was relevant and outweighed the danger of unfair prejudice, but did not "substantially" outweigh it, she would be required to exclude it. Id.

n205. Id. at 52. In a letter written to Elizabeth Holtzman, the chief proponent of the bill, Lewis stated that rape is an "aggravated form of battery" and, therefore, should be treated as any other battery under the Federal Rules of Evidence. Id.

n206. Id. Lewis went on to explain that these rules were no less effective in the case of rape and did not require alteration with a rape shield law. Id. He argued that a rape shield law would "seriously weaken the right of confrontation" and would create a "special anomaly" in the law because rape defendants would not be afforded the protection they received under traditional evidence rules. Id. at 53. Lewis felt that if, under Rule 404(b), patterns of behavior could be used at trial to establish the "modus operandi" of the defendant, then similar evidence concerning the victim should be allowed. Id. In these cases, if the prosecution's evidence establishing this modus operandi were not allowed, the victim's case might seem implausible. For example, Mr. Lewis cited a case in which a physician was accused of giving his patient anesthetic and raping her. Id. This otherwise implausible story was given credibility when evidence was introduced that the accused had done this on six previous occasions. Id. (citing *People v. Middleton*, 38 Ill. App. 3d 984, 988 (1976)). Lewis felt that if such evidence was admissible against the defendant, then similar evidence concerning the victim should also be relevant. Id.

n207. Id. at 52-53.

n208. Id.

n209. Id. at 53. Lewis contended, however, that prostitutes are no less entitled to the protection of the law, nor are they any less victims when they are raped, thereby making a blanket rule on prostitutes "equally unwise." Id. The thrust of the rest of Lewis's argument centered on the fact that it is a "common misperception" that the alleged victim in a rape case "subjects her entire sexual history to exposure." Id. He argued that such evidence is only admitted in cases where it is relevant. Id. He stated that judges no longer ascribe to the "superficial" belief that simply because a "girl" had "enjoyed sexual relations" with one person this made her "promiscuous" and increased the probability that she would likely consent in the future. Id. Upon close examination, Lewis also predicted that trial abuses would turn out to be the "product of substantial exaggeration" or "to have occurred in cases in which it would have been fundamentally unjust to forbid the defendant from showing the character of his accuser." Id.

n210. 124 Cong. Rec. 36,257 (1978). In 1978, the legislation passed both the House and the Senate without the kind of debate it saw in 1976. See id. at 36,255, 34,912. No Senators objected during the discussion preceding its passage. Id. at 36,255. Representatives in the House made only minor objections. Id. at 34,913. Representative Wiggins of California was concerned that Rule 412 "adopts a per se rule with respect to opinion and reputation evidence." Id. He felt that the admissibility of opinion and reputation evidence might better be determined by judges after in camera hearings, but concluded that his objections were "not so fundamental as would lead me to oppose the bill." Id.

n211. Fed. R. Evid. 412 (1994). Congress intended this provision to give judges the flexibility to admit evidence if they felt the Constitution demanded it. 124 Cong. Rec. 34,912 (1978).

n212. 124 Cong. Rec. 36,256 (1978).

n213. Id. at 34,913. Congress again asserted that evidence of a rape complainant's past sexual behavior was, in most cases, irrelevant to the determination of whether a rape has occurred and that current trial practices often had the undesired effect of shifting the focus of the trial toward the complainant and away from the guilt or innocence of the accused. Id. at 36,256. Evidence of a woman's sexual history "often served no real purpose and only resulted in embarrassment to the rape victim and unwarranted public intrusion into her private life." Id. at 34,912. As a result, victims were frequently unwilling to prosecute for fear that once they took the witness stand they would be subjected to an "inquisition into [their] morality" and "bullied and cross-examined about their prior sexual experiences." Id. at 34,913. Supporters asserted that this type of treatment made the "trial often as degrading as the rape." Id. (statement of Rep. Holtzman). According to Rep. Holtzman, the law was intended to forbid "brutal cross-examination" about complainant's "past sexual histories." Id.

n214. Id. at 34,913. The law was designed to balance three interests: (1) the interest of the complainant in protecting her "private life from unwarranted public exposure;" (2) the right of the defendant to be able to "adequately present a defense;" and (3) "society's interest in a fair trial" where "unduly prejudicial evidence is not permitted." Id.

n215. Senator Bayh commented that the legislation's purpose was to "make the prosecution of Federal rape cases more effective and equitable for rape victims" and to "serve as a model statute for State laws." Id. at 36,256.

n216. Id.

n217. Id.

n218. Statement on Signing H.R. 4727 into Law, 14 Weekly Comp. Pres. Doc. 1902 (Oct. 30, 1978).

n219. Id. He also urged other jurisdictions that had not taken similar measures already to "follow the Federal example in providing this essential protection for women." Id. Since its adoption in 1978, Rule 412 has been amended several times. Fed. R. Evid. Serv. 412 art. IV 26 (West 2001). First, minor alterations were made in November 1988. Id. These

modifications removed the word "rape" from the text and inserted the words "sex offense" in its place. *Id.* Substantial changes were then made in the rule in December 1994. *Id.* at 27-31. This amendment expanded the protections of the rule and was intended to decrease confusion concerning certain sections of the rule. *Id.* at 27. After this amendment, the protection now extends to all criminal cases where a person is alleged to be the victim of a sexual crime regardless of the charges that are actually brought. *Id.* at 29. The evidentiary protection was also extended to civil cases involving sexual misconduct. *Id.* at 30. In order to clarify the rule, language was deleted which appeared to give the trial judge the power to exclude evidence of prior sexual conduct with the defendant if the judge believed that these events did not really take place. *Id.* at 31. This raised constitutional issues concerning the defendant's Sixth and Seventh Amendment rights to a jury trial. *Id.* at 31.

The Judicial Conference submitted the 1994 amendments to the Supreme Court for approval, but the Court rejected part of the proposed amendments. Weisenberger's *Federal Evidence* 412.1 (3d ed. 1998). Chief Justice Rehnquist stated that several Justices felt that the proposed revisions would violate the Rules Enabling Act by excluding evidence of "'sexually provocative speech or dress,' which may be relevant in workplace harassment cases." *Id.* The revisions the Supreme Court felt were appropriate were then sent to Congress in an order from the Court dated April 29, 1994. *Id.* Congress was not receptive to the Supreme Court's removal of an extension of Rule 412 to civil cases, but still passed the amendments without the exception. *Id.*

n220. See *supra* note 219 and accompanying text.

n221. See Lee Madigan & Nancy Gamble, *The Second Rape: Society's Continued Betrayal of the Victim* 1-4 (1991).

n222. *Id.* at 7.

n223. It also implies that the circumstances of the private realm are autonomous and consented to. Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 96 (1987) ("The idea of privacy ... embodies, I think, a tension between the preclusion of public exposure or governmental intrusion, on the one hand, and autonomy in the sense of protecting personal self-action on the other."). See also *id.* at 100 ("In private, consent tends to be presumed.").

n224. See, e.g., *infra* notes 535-564 and accompanying text.

n225. Professor Andy Taslitz identifies the problem similarly when he argues that the culture of courtroom discourse regarding a rape victim suggests her propensity to behave promiscuously. Andrew E. Taslitz, *Rape and the Culture of the Courtroom* 10 (1999) ("Rape

law reform, despite some modest successes, has largely failed ... because the reformers did not appreciate the storied, linguistic nature of the problem.").

n226. See supra notes 213-219 and accompanying text.

n227. For a fascinating account of how lawyers manage to circumvent rape shield laws, see Taslitz, supra note 225, at 82-88.

n228. See infra notes 249-267, 322-339, 376-406 and accompanying text.

n229. See infra notes 535-564 and accompanying text.

n230. But see *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981) (holding that appellate court has jurisdiction to hear complainant's appeal from district court's order concerning the admissibility of complainant's past sexual behavior).

n231. David P. Bryden & Sonja Lengnick, Rape in the Criminal Justice System, 87 J. Crim. L. & Criminology 1194, 1294 (1997) (stating "one of the most basic rules of criminal procedure: the state cannot appeal from an acquittal").

n232. *Id.* (noting that "this greatly affects the impression created by the cases, because it means that the court never looks more pro-prosecution than the jury").

n233. Michelle J. Anderson, Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine, 46 Vill. L. Rev. 907, 928-34 (2001).

n234. I discuss some of the "right" cases briefly in the text of this Article; often, I relegate those cases to footnotes.

n235. See supra Part I for the evolution and entrenchment of this bias against women's sexual autonomy.

n236. *Infra* Part III.A.

n237. Florida, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma,

South Carolina, Vermont, Virginia, and Wisconsin. See Fla. Stat. Ann. 794.022 (West 2000); Ind. Code Ann. 35-37-4-4 (West 1998); Ky. R. Evid. 412 (West 2001); La. Code Evid. Ann. art. 412 (West 1995); Me. R. Evid. 412 (West 2000); Md. Code Ann. art. 27, 461A (Michie Supp. 2000); Mass. Gen. Laws Ann. ch. 233, 21B (West 2000); Mich. Comp. Laws Ann. 750.520j (West 1991); Minn. Stat. Ann. 609.347 (West Supp. 2001); Mo. Ann. Stat. 491.015 (West 1996); Mont. Code Ann. 45-5-511 (1999); Neb. Rev. Stat. 28-321 (1995); N.J. Stat. Ann. 2C:14-7 (West 1995); N.C. Gen. Stat. 8C-1, R. 412 (1999); Ohio Rev. Code Ann. 2907.02 (Anderson Supp. 1998); Okla. Stat. Ann. tit. 12, 2412 (West Supp. 2000); S.C. Code Ann. 16-3-659.1 (Law. Co-op. 1985 & Supp. 2000); Vt. Stat. Ann. tit. 13, 3255 (1998); Va. Code Ann. 18-2-67.7 (Michie 1996); Wis. Stat. Ann. 972.11 (West Supp. 2000).

n238. Maryland and Virginia. See Md. Code Ann. art. 27, 461A (Michie Supp. 2000); Va. Code Ann. 18-2-67.7 (Michie 1996).

n239. Florida, Minnesota, and North Carolina. See Fla. Stat. Ann. 794.022 (West 2000); Minn. Stat. Ann. 609.347 (West Supp. 2001); N.C. Gen. Stat. 8C-1, R. 412 (1999).

n240. Georgia, New Jersey, and North Carolina. See Ga. Code Ann. 24-2-3 (1995); N.J. Stat. Ann. 2C:14-7 (West 1995); N.C. Gen. Stat. 8C-1, R. 412 (1999).

n241. New York. See N.Y. Crim. Proc. Law 60.42 (McKinney 1992).

n242. Alabama, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, Vermont, Virginia, West Virginia, and Wisconsin. See Ala. R. Evid. 412 (West 2000); Ga. Code Ann. 24-2-3 (1995); Ind. Code Ann. 35-37-4-4 (West 1998); Ky. R. Evid. 412 (West 2001); La. Code Evid. Ann. art. 412 (West 1995); Me. R. Evid. 412 (West 2000); Md. Code Ann. art. 27, 461A (Michie Supp. 2000); Mass. Gen. Laws Ann. ch. 233, 21B (West 2000); Mich. Comp. Laws Ann. 750.520j (West 1991); Minn. Stat. Ann. 609.347 (West Supp. 2001); Mo. Ann. Stat. 491.015 (West 1996); Mont. Code Ann. 45-5-511 (1999); Neb. Rev. Stat. 28-321 (1995); N.H. Rev. Stat. Ann. 632-A:6 (Supp. 2000); N.J. Stat. Ann. 2C:14-7 (West 1995); N.C. Gen. Stat. 8C-1, R. 412 (1999); Ohio Rev. Code Ann. 2907.02 (Anderson Supp. 1998); 18 Pa. Cons. Stat. Ann. 3104 (West 2000); S.C. Code Ann. 16-3-659.1 (Law. Co-op. 1985 & Supp. 2000); Vt. Stat. Ann. tit. 13, 3255 (1998); Va. Code Ann. 18-2-67.7 (Michie 1996); W. Va. Code 61-8B-11 (2000); Wis. Stat. Ann. 972.11 (West Supp. 2000).

n243. See *infra* notes 492-573 and accompanying text.

n244. See *infra* notes 492-573 and accompanying text.

n245. See *infra* notes 407-408 and accompanying text.

n246. Florida, Minnesota, Nebraska, North Carolina and Tennessee. See Fla. Stat. Ann. 794.022 (West 2000); Minn. Stat. Ann. 609.347 (West Supp. 2001); Neb. Rev. Stat. 28-321 (1995); N.C. Gen. Stat. 8C-1, R. 412 (1999); Tenn. R. Evid. 412 (West 2000).

n247. See, e.g., *United States v. Kelly*, 33 M.J. 878, 882 (A.C.M.R. 1991) (holding that evidence of a pattern of behavior with third parties may be admitted to prove consent even though such an exception is not found in the rape-shield statute); *State v. Gonzalez*, 757 P.2d 925 (Wash. 1988) (same); *Hardy v. State*, 285 S.E.2d 547, 549, 551 (C.A. Ga. 1981) (same).

n248. See, e.g., *Kelly*, 33 M.J. at 882 ("The evidence that SPC L was drunk practically every weekend, and behaved in a sexually aggressive manner toward males when drunk was ... relevant, material, and probative... . The evidence tended to show that she was engaged in a pattern of behavior rather than unrelated incidents."); *State v. Gonzalez*, 757 P.2d 925, 929 (Wash. 1988) ("In the extreme case of the indiscriminately promiscuous woman ... evidence of prior consensual sexual relations could be probative ... .") (citations omitted); *Hardy v. State*, 285 S.E.2d 547, 549, 551 (Ga. Ct. App. 1981) ("[Defendants] testified that the prosecutrix was known to be sexually active with a predilection for football players... . The jury was allowed to scrutinize in intimate detail not just the matter of the previous sexual intercourse on the part of the prosecutrix, but her use of birth control, her past dates and boyfriends, and the number and circumstances of her prior sexual experiences.").

n249. See, e.g., *State v. Shoffner*, 302 S.E.2d 830, 832-33 (N.C. Ct. App. 1983) ("The testimony ... suggests that the prosecuting witness was the initiator, the aggressor, in her sexual encounters. The evidence excluded suggests that the prosecuting witness's modus operandi was to accost men at clubs, parties (public places) and make sexual advances by putting her hands 'all over their bodies.'").

n250. *Kelly*, 33 M.J. at 879.

n251. *Id.* at 880.

n252. *Id.*

n253. *Id.* at 881.

n254. Id.

n255. Id.

n256. Id. at 880-81.

n257. Id. at 879.

n258. Id.

n259. Id.

n260. Id.

n261. Id.

n262. Id. at 878.

n263. Id. Kelly was not sentenced to prison for his conviction. Id.

n264. Id. at 883.

n265. Id. at 882 (citations omitted).

n266. Id. at 879.

n267. Id. at 882.

n268. Berger, *supra* note 26, at 98. Berger argued that a defendant had the constitutional right to admit evidence of a complainant's prior sexual history with third parties when it constituted a pattern of sexual behavior. Id. at 60-61.

n269. Id. at 56.



n270. Id. at 60 (ellipses in original) (citations omitted).

n271. See also *State v. Vaughn*, 448 So. 2d 1260, 1262 (La. 1983) (holding that evidence that "would have tended to show that [the complainant's] sexual intercourse with [the defendant] was part of this same pattern and was committed in furtherance of her running away from home" was inappropriately excluded).

n272. Berger, *supra* note 26, at 60.

n273. Martin S. Weinberg et al., Social Class Background, Sexual Attitudes, and Sexual Behavior in a Heterosexual Undergraduate Sample, 26 Arch. Sexual Behav. 625, 638 (1997). Researchers have consistently found a difference in sexual attitudes between younger and older generations of women, with older women tending to be more conservative in their sexual attitudes and practices, and younger women tending to be more liberal and adventurous. Frances E. Purifoy et al., The Relationship of Sexual Daydreaming to Sexual Activity, Sexual Drive, and Sexual Attitudes for Women Across the Life-Span, 21 Arch. Sexual Behav. 369, 371, 381 (1992). Older generations' notions of sexuality do not hold sway over the young. Shari Thurer, a psychologist who teaches at Boston University, writes, "What was deviant for middle-agers has become mainstream for their offspring. Phone sex, casual transvestitism, computer sex - it's all OK." Shari Thurer, Gen X's Change of Head: To the Women Who Came of Age in the '60s, Oral Sex Was an Act of Great Intimacy; to Their Daughters, It's About as Intimate as Shaking Hands, at 1 (July 21, 1999), at [http://www.salon.com/mwt/feature/1999/07/21/oral\\_sex/index.html](http://www.salon.com/mwt/feature/1999/07/21/oral_sex/index.html). The fact that older women "hold more false beliefs about rape yet also report a higher incidence of negative dating experiences has alarming implications." Michelle Kalra et al., Exploring Negative Dating Experiences and Beliefs About Rape Among Younger and Older Women, 27 Arch. Sexual Behav. 145, 152 (1998).

n274. Jennifer C. Jones & David H. Barlow, Self-Reported Frequency of Sexual Urges, Fantasies, and Masturbatory Fantasies in Heterosexual Males and Females, 19 Arch. Sexual Behav. 269, 273 (1990). According to this study, 90% of high school students have engaged in "sex play." Id.

n275. Id. Between 1988 and 1995, the proportion of males who have been masturbated by a female increased from 40% to 53%. Gary J. Gates & Freya L. Sonenstein, Heterosexual Genital Sexual Activity Among Adolescent Males: 1988 and 1995, 32 Fam. Plan. Persp. 295 (2000). Today, most young women masturbate. Jones & Barlow, *supra* note 274, at 275. Most young women have sexual thoughts that produce sexual arousal twice a week or more. Id. at 274. Most young women also sexually fantasize on a regular basis. Donald Strassberg & Lisa Lockerd, Force in Women's Sexual Fantasies, 27 Arch. Sexual Behav. 403, 403 (1998). This

study also notably found that, while many women occasionally entertain a sexual fantasy that includes being the target of some attractive man's "force" or "coercion," that fantasy script ranks near the least common of all sexual fantasies. *Id.* at 411. The study also emphasized, "these force fantasies are qualitatively different from images of true assault and in no way suggest that women voluntarily fantasize about truly being raped." *Id.* at 413.

n276. Jones & Barlow, *supra* note 274, at 273. See also Charles Warren et al., Sexual Behavior Among U.S. High School Students, 1990-1995, 30 *Fam. Plan. Persp.* 170, 172, 200 (1998) (finding that a "very high percentage" of high school students remain at risk for unintended pregnancy and STDs, including AIDS). About 40% of all fifteen-to nineteen-year-olds had sexual intercourse in the last three months. Susheela Singh & Jacqueline Darroch, Trends in Sexual Activity Among Adolescent American Women: 1982-1995, 31 *Fam. Plan. Persp.* 212 (1999). One study indicates that, of those college students who are sexually active, 23% have engaged in anal intercourse without a condom. Janice Baldwin & John Baldwin, Heterosexual Anal Intercourse: An Understudied, High-Risk Sexual Behavior, 29 *Arch. Sexual Behav.* 357, 369 (2000) (noting that those who reported engaging in anal sex "displayed an astonishing lack of concern for the transmission of HIV via anal interactions, judging by the small percentage of time they used condoms during anal intercourse").

It is important to note that the percentages of high school students who have engaged in sexual intercourse declined slightly over the last decade. The Henry J. Kaiser Family Found., Teen Sexual Activity, Fact Sheet 1 (Aug. 2000). That percentage, however, has still increased significantly in the past thirty years. Susheela Singh & Jacqueline Darroch, Trends in Sexual Activity Among Adolescent American Women: 1982-1995, 31 *Fam. Plan. Persp.* 212, 212 (1999). The recent decrease in sexual intercourse and the increased use of condoms has resulted in a dropping teen pregnancy rate in the past ten years. Teen Sexual Activity, *supra*, at 1. See also Singh & Darroch, *supra*, at 212.

n277. In 1969, studies indicated that there were significant differences in sexual practices between women from economically advantaged and disadvantaged backgrounds: women from lower socio-economic classes tended to engage in sexual intercourse and oral sex at an earlier age and they had a greater number of sexual experiences than did their more economically advantaged counterparts. Weinberg, *supra* note 273, at 627. Today, however, there is no significant difference in terms of the number of sexual partners or the incidence of various sexual activities between women of different socio-economic classes. *Id.* at 636. In fact, one of the only significant differences between women of different social classes today in terms of their sexual practices is that women of a high socio-economic status masturbate more than their less well off counterparts. *Id.* College students now follow sexual norms that in the past were associated with lesser-educated individuals. *Id.* at 635. They have "cast aside a script that restricts premarital coitus" and choose to engage in it on a routine basis. *Id.* at 640.

There are very few differences in sexual practices attributable to ethnicity. David Quadagno et al., Ethnic Differences in Sexual Decisions and Sexual Behavior, 27 *Arch. Sexual Behav.* 57, 57 (1998). Regression analysis that accounted for marital status and

education "reveals no significant independent effect of ethnicity on the reporting of oral and anal sex and multiple partners." *Id.* at 73. But see Dawn Upchurch et al., *Gender and Ethnic Differences in the Timing of First Sexual Intercourse*, 30 *Fam. Plan. Persp.* 121, 121 (1998) ("Socioeconomic conditions account for ethnic differences among females in the age of first sex, and cultural influences may contribute to the difference between Hispanic males and females; explanation for black males, however, remains elusive.").

n278. Weinberg, *supra* note 273, at 639. Many couples live together before they get married, if they get married. *Id.* The United States Census Bureau also indicates that nuclear families have dropped below 25% of all households and that diverse family forms are now the rule in American society, not the exception. Eric Schmitt, *For First Time, Nuclear Families Drop Below 25% of Households*, *N.Y. Times*, May 15, 2001, at A1.

n279. Elizabeth L. Paul et al., "Hookups": Characteristics and Correlates of College Students' Spontaneous and Anonymous Sexual Experiences, 37 *J. Sex Res.* 76, 76 (2000).

n280. *Id.* at 80.

n281. *Id.*

n282. *Id.* at 84.

n283. See, e.g., Berger, *supra* note 26, at 59-60.

n284. *Fed. R. Evid.* 401 (1975).

n285. Berger, *supra* note 26, at 59-60.

n286. *Id.* at 60. In a footnote, Berger suggests, *inter alia*, that the reader see generally the film, *Looking For Mr. Goodbar* (Freddie Fields, 1977), *id.* n.348, in which a female character visits bars frequently and has casual sex with recent male acquaintances. The film is a surprisingly inapposite citation for the argument that the prior sexual history of a woman who makes a pattern of picking up men in bars should be admitted to show consent because the film is about how a man actually rapes (and kills) the female protagonist. Her prior sexual history of cruising singles bars and having sex with recent acquaintances does not prove that she consented. The evidence is particularly irrelevant to the charges against that rapist.

n287. Letwin, *supra* note 123, at 59-60 ("In virtually every rape prosecution one is confronted not only with the fact of the complainant's previous sexual activity but with a critically important additional fact as well - the complainant has taken the extraordinary step of lodging an official complaint and thereby inviting painful public scrutiny into the charge of rape.").

n288. Fed. R. Evid. 402.

n289. See, e.g., David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 Minn. L. Rev. 529, 570 (1994) ("Evidence of her promiscuity - even if extreme - tends to support both accounts of the incident. On the one hand, it tends to show, however slightly, that she is the sort of person who might have consented to casual sex. On the other hand, her failure to accuse her other lovers of rape tends to show, however slightly, that she does not readily make rape accusations in a fit of pique or because of pathological delusions.").

n290. Letwin, *supra* note 123, at 60.

n291. *Id.*

n292. *Id.*

n293. See *supra* notes 213-222 and accompanying text. See also Letwin, *supra* note 123, at 54 (stating that "admitting evidence of 'unchastity' invades the complainant's privacy interest in her intimate sexual life [and] contributes to her 'second rape' at trial through harassing and embarrassing cross-examination").

n294. Anderson, *supra* note 233, at 922-923.

n295. Bryden & Lengnick, *supra* note 231, at 1205 n.68 (citing K. L'Armand & A. Pepitone, Judgments of Rape: A Study of Victim-Rapist Relationship and Victim Sexual History, 8 Pers. & Soc. Psychol. Bull. 134, 135 (1982)).

n296. Bryden & Lengnick, *supra* note 231, at 1272 (citing L'Armand & Pepitone, *supra* note 295, at 135). The victim's sexual past may have less of an effect in stranger rapes. In one study examining stranger rape, defendant's who raped virgins were assigned nearly the same sentence as those who raped women who were experienced. *Id.* at 1272 n.487 (citing Hubert S. Field, Rape Trials and Jurors' Decisions: A Psycholegal Analysis of the Effects of Victim,

Defendant and Case Characteristics, 3 *L. & Hum. Behav.* 261, 271 (1979)). See also, James D. Johnson, The Effect of Rape Type & Information Admissibility on Perceptions of Rape Victims, 30 *Sex Roles* 781, 790 (1994) (concluding that evidence that the victim has a "promiscuous sexual history" would tend to extract more "negative perceptions" of the victim and that once the jurors are exposed to sexual history evidence and then told that it is inadmissible, the evidence is still "likely to have an effect on the perceptions of victim enjoyment" which tends to "be a predominant factor in final decision making").

n297. M.D. Pugh, *Contributory Fault and Rape Convictions: Loglinear Models for Blaming the Victim*, 46 *Soc. Psychol. Q.* 233, 236-37 (1983).

n298. Paul Poullard, *Judgments About Victims and Attackers in Depicted Rapes: A Review*, 31 *Brit. J. Soc. Psychol.* 307, 310 (1992) (citing M.D. Pugh, *Contributory Fault and Rape Convictions: Loglinear Models for Blaming the Victim*, 46 *Soc. Psychol. Q.* 233, 233-42 (1983)). Pugh also found that jurors who attributed "high fault" to the victim were less likely to find the defendant guilty than those who attributed "low fault" to the victim. Pugh, *supra* note 297, at 238. Pugh found that 58% of jurors who attributed high fault to the victim thought that the defendant was guilty, while 86% of those that attributed low fault to the victim thought that the defendant was guilty. *Id.*

n299. Pugh, *supra* note 297, at 239. Poullard also reviewed several studies that reached similar conclusions regarding the victim's past sexual history and blameworthiness. The first study reviewed demonstrated that exposure to information about the victim's prior sexual history increased blame to the victim. Poullard, *supra* note 298, at 309 (citing E. Borgida & P. White, *Social Perceptions of Rape Victims: The Impact of Legal Reform*, 2 *L. & Hum. Behav.* 339-50 (1978)). It also found a relationship between juror judgments of guilt and past sexual history. *Id.* at 310. Although Poullard found an effect of past sexual history on jurors' perceptions of the victim, one study provided evidence to the contrary. *Id.* Poullard stated that although Cann, Calhoun and Selby found an effect when the victim refused to reveal her sexual history, they found no difference between "revealing high and low previous sexual activity." *Id.* (citing Arnie Cann, Lawrence G. Calhoun, & James W. Selby, *Attributing Responsibility to the Victim of Rape: Influence of Information Regarding Past Sexual Experience*, 32 *Hum. Rel.* 56, 57-67 (1979)).

n300. Bryden & Lengnick, *supra* note 231 at 1272 n.487 (citing C. Neil MacRae & John W. Shepherd, *Sex Differences in the Perceptions of Rape Victims*, 4 *J. Interpers. Violence* 278, 284 (1989)).

n301. James D. Johnson et al., *Differential Male and Female Responses to Inadmissible Sexual History Information Regarding a Rape Victim*, 16 *Basic & Applied Soc. Psychol.* 503, 511 (1995). This study also asked whether exposure to inadmissible past sexual history information would change juror perceptions of rape victims even when jurors were told to

disregard the information after hearing it. *Id.* Evidence that the victim had a "promiscuous sexual history" tended to extract more "negative perceptions" of the victim. *Id.*

n302. Bryden & Lengnick, *supra* note 231.

n303. *Id.* at 1257-58 (reviewing studies).

n304. *Id.* at 1258, 1262-70 (reviewing studies).

n305. *Id.* at 1262 (noting studies).

n306. Douglas D. Koski, *Jury Decisionmaking in Rape Trials: A Review & Empirical Assessment*, 38 *Crim. L. Bull.* 21 (2002).

n307. *Id.* at 128 (citing numerous studies).

n308. *Id.*

n309. *Id.* at 136 n.214.

n310. In 1994, Congress added Federal Rule of Evidence 413, which allows prior acts of sexual assault by the defendant to be admissible. In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant. Fed. R. Evid. 413(a). This rule admits too much of the prior sexual history of the defendant and may subvert the truth seeking process as well. For a full analysis of Federal Rule of Evidence 413(a), see Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law* 110 *Harv. L. Rev.* 563, 590 (1997) ("Admitting prior act evidence may increase the chance of conviction, but such admissions will increase the risk that a jury will punish the defendant for acts other than those for which he is on trial.").

n311. Alan C. Arcock & Nancy K. Ireland, *Attribution of Blame in Rape Cases: The Impact of Norm Violation, Gender, and Sex Role Attitude*, 9 *Sex Roles* 179, 187 (1983).

n312. See, e.g., *State v. Hudlow*, 659 P.2d 514, 520 (Wash. 1983) (en banc) ("If a complaining witness frequently engages in sexual intercourse with men shortly after meeting them in bars, this would have some relevancy if the defendant claims she consented to sexual intercourse with him under similar circumstances... . Such a particularized factual showing ... would have the necessary predictive value required [by the rules of evidence].").

n313. See, e.g., Regina Schuller & Anne-Marie Wall, *The Effects of Defendant and Complainant Intoxication on Mock Jurors' Judgments of Sexual Assault* 555 (1997); Antonia Abbey et al., *Sexual Assault Perpetration by College Men: The Role of Alcohol, Misperception of Sexual Intent, and Sexual Beliefs and Experiences*, 17 *J. Soc. & Clinical Psychol.* 167, 187 (1998); Jeanette Norris & Lisa Cubbins, *Dating, Drinking, and Rape: Effects of Victim's and Assailant's Alcohol Consumption on Judgments of Their Behavior and Traits*, 16 *Psychol. of Women Q.* 179 (1992); Karla J. Stormo et al., *Attributions About Acquaintance Rape: The Role of Alcohol and Individual Differences*, 27 *J. Applied Soc. Psychol.* 279, 292 (1997).

n314. In addition to socializing with men, women report that they frequent bars in order to socialize with women, to reduce stress, to validate themselves, and to divert their attention from the pressure of their daily lives. Kathleen A. Parks et al., *Women's Descriptions of Drinking in Bars: Reasons and Risks*, 38 *Sex Roles* 701, 707-09 (1998).

n315. See *supra* notes 295-311 and accompanying text.

n316. See, e.g., Poullard, *supra* note 298, at 321.

n317. *Id.*

n318. Daniel P. Omeara, *Protecting the Growing Number of Older Workers: The Age Discrimination in Employment Act* 109 (1989).

n319. Nancy Wilmsen Thornhill & Randy Thornhill, *An Evolutionary Analysis of the Psychological Pain Following Human (Homo sapiens) Rape: IV. The Effect of the Nature of Sexual Assault*, 105 *J. Comp. Psychol.* 243, 246 (1991).

n320. Galvin, *supra* note 145, at 848.

n321. *Id.*

n322. Id. at 841-842. (citing *State v. Shoffner*, 302 S.E.2d 830, 831 (N.C. Ct. App. 1983)).

n323. *Shoffner*, 302 S.E.2d at 831.

n324. Id.

n325. Id. at 832.

n326. Id.

n327. Id. at 831.

n328. Id. at 833-34.

n329. Id. at 832-33.

n330. Galvin, *supra* note 145, at 840.

n331. Id. at 843.

n332. The North Carolina appellate court's use of *modus operandi* in *Shoffner* was inapposite because the *modus operandi* doctrine is used to identify the assailant in signature crimes, not to suggest propensity to engage in like acts. Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* 114 (2d ed. 1994). Here we know that the complainant was involved in the alleged rape; she made the claim. *Shoffner*, 302 S.E.2d at 831. The pattern evidence of her previous sexual behavior was presented solely to suggest propensity to act in conformity with her sexually aggressive character, which is an invidious use of the evidence. Id. at 833.

n333. *Shoffner*, 302 S.E.2d at 832.

n334. Id.

n335. Id.



n336. Galvin, *supra* note 145, at 843.

n337. *Id.*

n338. Shoffner, 302 S.E.2d at 833.

n339. *Id.*

n340. See *supra* notes 328-331 and accompanying text.

n341. *United States v. Kelly*, 33 M.J. 878, 882 (A.C.M.R. 1991).

n342. Shoffner, 302 S.E.2d at 832-33.

n343. See *supra* notes 287-339 and accompanying text.

n344. Georgia, New Jersey, North Carolina, Tennessee. See Ga. Code Ann. 24-2-3 (1995); N.J. Stat. Ann. 2C:14-7 (West 1995); N.C. Gen. Stat. 8C-1, R. 412 (1999); Tenn. R. Evid. 412 (West 2000).

n345. See, e.g., *Kelly*, 33 M.J. at 882-83 (holding that evidence pertaining to reasonable, mistaken belief of consent by defendant is admissible when the complainant's conduct occurs in public).

n346. The majority of jurisdictions require both honest and reasonable mistaken belief in consent. Murthy, *supra* note 111, at 549. See also Rosanna Cavallaro, A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape, 86 J. Crim. L. & Criminology 815, 817-19 (1996) (examining the mistake of fact defense in the rape context). I will set aside those jurisdictions that allow an unreasonable mistaken belief as to consent because such a defense is beyond the scope of this paper.

n347. See, e.g., *Kelly*, 33 M.J. at 882.

n348. *Id.* at 882-883.

n349. Id. at 882.

n350. Berger, supra note 26, at 98.

n351. Id.

n352. Id. at 62.

n353. Id.

n354. Id. at 63.

n355. Id. (citations omitted).

n356. Galvin, supra note 145, at 852.

n357. Berger, supra note 26, at 62.

n358. Id.

n359. Id.

n360. Id. (emphasis added).

n361. Schulhofer, supra note 111, at 284.

n362. Murthy, supra note 111, at 565-70. Specifically, Murthy stated: "[a] reasonable person must ascertain whether his would-be sexual partner is willing to be touched a certain way at a certain time before he takes affirmative steps toward physically touching her. Reliance on the woman's reputation for past sexual behavior, or on third party's opinion as to the woman's sexual experience, without more ... cannot be attributed to the reasonable person." Id. at 570.

n363. *Id.* at 544. One way to accomplish this goal would be for the law of intent regarding rapes to deny explicitly a defense of mistaken belief about a victim's consent based on her prior sexual history.

n364. *Id.* at 564.

n365. See N.Y. Crim. Proc. Law 60.42 (McKinney 1992). Additionally, a number of rape shield statutes allow for the introduction of a victim's prior criminal convictions when they involve moral turpitude, which would likely include prior convictions for prostitution. See, e.g., Tex. R. Evid. 412 (West 2001).

n366. See, e.g., *United States v. Harris*, 41 M.J. 890, 894 (A. Ct. Crim. App. 1995) (holding that evidence of prior prostitution may be admitted to prove consent); *United States v. Collins*, 17 M.J. 345, 345 (C.M.A. 1984) (summary disposition) (same); *People v. Varona*, 143 192 Cal. Rptr. 44, 46 (App. 1983) (same); *Commonwealth v. Houston*, 722 N.E.2d 942, 948 (Mass. 2000) (same); *People v. Slovinski*, 420 N.W.2d 145, 155 (Mich. Ct. App. 1988) (same); *Winfield v. Commonwealth*, 301 S.E.2d 15, 21 (Va. 1983) (same).

n367. Melissa Farley & Howard Barkan, *Prostitution, Violence, and Posttraumatic Stress Disorder*, 27 *Women & Health* 37, 41 (1998). Forty-six percent of those who report having been raped were raped by their customers. *Id.* See also Mimi H. Silbert & Ayala A. Pines, *Victimization of Street Prostitutes*, 7 *Victimology* 122, 125-32 (1982) (finding that nearly 75% of street prostitutes participating in a study had been raped since entering prostitution and that despite the violence associated with these rapes, very few were reported to the police). The Farley/Barkan study also indicates that 57% of prostitutes participating in their study were sexually assaulted as children, 84% are or have been homeless, 83% have been threatened with a weapon while working as prostitutes, and 82% have been physically assaulted while working as prostitutes. Farley & Barkan, *supra*, at 40-41. Another study indicates 70% of prostitutes were victimized by customer rape or clients similarly going beyond the work contract an average of 31.3 times. Mimi Silbert, *Sexual Assault of Prostitutes*, 1980 Nat'l Ctr. For the Prevention and Control of Rape, Nat'l Inst. of Mental Health 60 (1980). Seventy-three percent of those subjects were raped totally unrelated to their work as prostitutes. *Id.* at 61. Nineteen percent of those who were raped while in prostitution told the police. *Id.* at 65. Of those who reported to the police, 28% perceived the police as responding positively to their report, while 72% perceived the police as indifferent (23%) or negative (49%) toward their report. *Id.* at 67. Many chose not to report to police for fear that police would be biased against them. *Id.* at 68.

n368. Farley & Barkan, *supra* note 367, at 41. A similar study of prostitutes in five countries (South Africa, Thailand, Turkey, United States, and Zambia) found that 62% of them had been raped since entering prostitution. Melissa Farley et al., *Prostitution in Five Countries: Violence and Posttraumatic Stress Disorder*, 8 *Feminism & Psychol.* 405, 414

(1988). Forty-six percent of those who were raped had been raped more than five times. *Id.* at 414. Unfortunately, most of the psychological and medical data on prostitution has focused on the transmission of HIV by prostitutes rather than the harm caused by being in prostitution itself. Melissa Farley & Vanessa Kelly, *Prostitution: A Critical Review of the Medical and Social Science Literature*, 8 *Women & Crim. Just.* 29, 30 (2000).

n369. Jody Miller & Martin D. Schwartz, *Rape Myths and Violence Against Street Prostitutes*, 16 *Deviant Behav.* 1, 17 (1995).

n370. See, e.g., *United States v. Harris*, 41 M.J. 890, 894 (A. Ct. Crim. App. 1995) (finding that "Ms. S agreed to sexual intercourse in expectation of receiving enough money for a bus ticket to Cleveland, Ohio, and was subsequently motivated to retaliate against the appellant by falsely alleging rape when he refused to pay her for sexual services and then called her a 'skank bitch.'"); *People v. Varona*, 192 Cal. Rptr. 44, 45 (Ct. App. 1983) (claiming that "the woman had solicited [defendants] to engage in acts of prostitution, had gone voluntarily to the house and voluntarily engaged in the alleged conduct, but had become enraged when she discovered the defendants had no money"); *Shaffer v. State*, 443 N.E.2d 838, 839 (Ind. 1983) (claiming that alleged victim charged him with rape because he refused to pay her for an act of prostitution); *Commonwealth v. Houston*, 722 N.E.2d 942, 948 (Mass. 2000) (claiming that, after sex, "[defendant] pretended to give her \$ 30, but in fact gave her only three dollars"); *People v. Slovinski*, 420 N.W.2d 145, 146 (Mich. 1988) (claiming that "after the sex acts were over, defendant refused to pay her 'because she wasn't no good'"); *Winfield v. Commonwealth*, 301 S.E.2d 15, 17 (Va. 1983) (claiming that the alleged victim "agreed to have sexual intercourse with him on the condition he pay her twenty dollars; that he had sexual intercourse with [her]; that he did not pay her the twenty dollars ... [and] that [she] has a reputation in the community for being unchaste and immoral").

n371. See, e.g., Schulhofer, *supra* note 111, at 152-59; Susan Estrich, *Rape*, 95 *Yale L.J.* 1087, 1125-26 (1986).

n372. Estrich, *supra* note 371, at 1115-21. In California, a "person who induces any other person to engage in sexual intercourse ... when his or her consent is procured by false or fraudulent representation" may be punished for up to a year in prison. Cal. Penal Code 266c (West 1999 & Supp. 2001).

n373. Galvin, *supra* note 145, at 840.

n374. *Id.* at 839 (citing *State v. Gardner*, 59 Ohio St. 2d 14, 18 (1979)).

n375. Michelle J. Anderson, *Prostitution and Trauma in the Law of Rape*, 2 J. Trauma Prac. (forthcoming 2003). There are three major ways courts deal with the admissibility of evidence of a complainant's prior prostitution. First, some courts have held that, when a rape defendant alleges that what happened on the instance in question was an act of prostitution, evidence of the complainant's prior prostitution is relevant and admissible. Second, and by contrast, other courts have held that, when a rape defendant alleges that what happened on the instance in question was an act of prostitution, evidence of the complainant's prior prostitution is inadmissible unless such evidence provides a basis for proving the complainant's bias or motive to fabricate, such as an allegation that the complainant falsely claimed she was raped in order to avoid an arrest for prostitution. Third, other courts have agreed that evidence of the complainant's prior prostitution is admissible evidence when it provides a basis for proving the complainant's bias or motive to fabricate; however, they have held that such evidence must involve prior extortionate threats to report a false rape or to take other revenge against a customer for failure to pay. *Id.*

n376. *United States v. Harris*, 41 M.J. 890, 892 (A. Ct. Crim. App. 1995).

n377. See generally *id.*

n378. *Id.* at 894.

n379. A footnote explains that the prior conviction for solicitation occurred when she was eighteen years old and the trial took place when she was twenty-five years old. *Id.* at 894 n.4.

n380. *Id.* at 893-94.

n381. *Id.* at 894 n.4.

n382. See Anderson, *supra* note 375. See also *People v. Doe*, 651 N.Y.S.2d 1012, 1013-14 (Sup. Ct. 1996) (holding evidence of prior prostitution was admissible simply because defendants claimed that what happened on the instance in question was consensual prostitution).

n383. *Drake v. State*, 836 P.2d 52, 54 (Nev. 1992).

n384. *Id.* at 54-55.

n385. Id. at 55.

n386. Id.

n387. See, e.g., *Williams v. State*, 681 N.E.2d 195 (Ind. 1997) (holding prior prostitution in exchange for money or drugs was inadmissible under rape shield rule, despite claim that complainant consented to sex in exchange for drugs).

n388. *State v. Johnson*, 944 P.2d 869 (N.M. 1997)

n389. Id. at 871.

n390. Id.

n391. Id.

n392. Id.

n393. Id. at 879.

n394. *State v. Johnson*, 944 P.2d at 869.

n395. Id.

n396. Id.

n397. Id.

n398. See *id.*

n399. Id.

n400. *State v. Johnson*, 944 P.2d at 880.

n401. Anderson, *supra* note 375. Although the rape of prostitutes is more violent and result in more physical injuries, prostitutes are not any more likely to report their rape to the police than women in the general population. *Id.*

n402. Bryden & Lengnick, *supra* note 231, at 1206 n.67 (citing Shirley Feldman-Summers & Karen Lindner, Perceptions of Victims and Defendants in Criminal Assault Cases, 3 *Crim. Just. & Behav.* 135, 141 (1976)).

n403. Jody Miller & Martin D. Schwartz, Rape Myths and Violence Against Street Prostitutes, 16 *Deviant Behav.* 1, 1 (1995).

n404. Letwin, *supra* note 123, at 76.

n405. *Commonwealth v. Houston*, 722 N.E.2d 942 (Mass. 2000).

n406. *Id.* at 948.

n407. *Supra* Part II.A.

n408. *Id.*

n409. Charles Alan Wright & Kenneth W. Graham, 23 *Federal Practice and Procedure* 5389, at 599-600 (1980) (citations omitted).

n410. *Id.*

n411. Lawrence A. Greenfeld, U.S. Dep't of Justice, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault 2* (1997).

n412. Moreover, even if we did not know how many rapes were committed by acquaintances overall, as a logical matter, if strangers commit most of the rapes that are reported to the police, it still does not follow that strangers, therefore, commit most of all the rapes that occur (especially if victims frequently decide not to report those committed by people they know). Anderson, *supra* note 375.

n413. Ronet Bachman & Linda Saltzman, U.S. Dep't of Justice, *Violence Against Women: Estimates from the Redesigned Survey* 6 (1995).

n414. Twenty-five percent of surveyed women have been raped and/or physically assaulted by a current or former spouse, cohabitating partner, or date in their lifetime. *Id.* at 2, 6. Many women also experience stalking from intimates. *Id.* at 2, 10. Using a definition of stalking that requires victims to feel a high level of fear, 8% of surveyed women have experienced stalking at some point in their lives. Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* 2, 8 (1998). Fifty-nine percent of these women are stalked by intimate partners. *Id.* at 6, 7. Another 19% are stalked by acquaintances. *Id.* at 6. There is a "strong link between stalking and other forms of violence in intimate relationships." *Id.* at 2. Eighty-one percent of women who were stalked by an intimate were also physically assaulted by him and 31% were sexually assaulted by him. *Id.* at 2, 8. Husbands or partners who stalk their partners are four times more likely to physically assault them and six times more likely to sexually assault them. *Id.* at 8.

n415. Tjaden & Thoennes, *supra* note 414, at 6-7. Twenty-two percent of women have been physically assaulted by an intimate partner in their lifetime. *Id.* at 7. Of the women who reported being raped and/or physically assaulted since age eighteen, 76% were victimized by a current or former husband, cohabitating partner, or boyfriend. *Id.* at 12. Using a definition of rape that includes forced vaginal, oral or anal sex, one in six women surveyed (18% specifically) has experienced a completed or attempted rape at some point in their lives. *Id.* at 2, 3. Further, 22% of surveyed women had been "forced to do something sexual" at some time in their lives. *Id.* at 4.

n416. Bachman & Saltzman, *supra* note 413, at 3, 6. Acquaintances are defined as: friends or former friends, roommates or boarders, schoolmates, neighbors, coworkers, or some other known nonrelative. *Id.* Sexual assault is defined as unwanted sexual contact that may or may not involve force; including grabbing or fondling. *Id.* at 7.

n417. *Id.* at 3, 6. Acquaintances and relatives commit 32% of all homicides committed on women. *Id.* Intimates commit an additional 28% of them. *Id.* Strangers account for only 8.6% of them. *Id.*

n418. Judith S. Bridges, *Perceptions of Date and Stranger Rape*, 24 *Sex Roles* 291, 305 (1991). See also Candice M. Monson, Jennifer Langhinrichsen-Rohling, & Tisha Binderup, *Does "No" Really Mean "No" After You Say "Yes": Attributions About Date & Marital Rape*, 15 *J. Interpers. Violence* 1156 (2000).

n419. Bridges, *supra* note 418 at 305.



n420. Contrary to popular opinion, acquaintance rape victims actually suffer more psychological damage than do stranger rape victims because self-blame is higher when a woman is raped by an acquaintance. See Bonnie L. Katz & Martha R. Burt, *Self Blame in Recovery from Rape*, in *Rape & Sexual Assault II* 162 (Ann Wolbert Burgess ed., 1988) (describing differences in reported self-blame from women raped by strangers and nonstrangers). As one study put it, "women raped by men they knew attribute more blame for the rape to themselves, see themselves in a less positive light, and tend to have higher levels of psychological distress." Bonnie L. Katz, *The Psychological Impact of Stranger Versus Nonstranger Rape on Victims' Recovery*, in *Acquaintance Rape: The Hidden Crime* 267 (Andrea Parrot & Laurie Bechhofer eds., 1991). The study also said, "Women raped by strangers also appear to feel recovered sooner than women raped by nonstrangers." *Id.* Self-blame decreases the speed with which a woman recovers from rape. See Katz & Burt, *supra*, at 151 (noting decrease in recovery). See also Julia Schwendinger & Herman Schwendinger, *Rape Victims and the False Sense of Guilt*, 15 *Crime & Soc. Just.* 4, 5 (1980) (examining difficulty in recovery for women with self-blame about rape); David P. Valentiner et al., *Coping Strategies and Posttraumatic Stress Disorder in Female Victims of Sexual and Nonsexual Assault*, 105 *J. Abnormal Psychol.* 455, 458 (1996) (explaining that coping through self-blame impedes recovery). This self-blame has severe psychological and somatic consequences. Self-blame decreases the chance that a woman victimized by rape or attempted rape will tell someone about the attack, report the rape to the police, or obtain necessary psychological support. See Robin Warshaw, *I Never Called It Rape* 56 (1988) (describing lack of self-help by women with greater amounts of self-blame). When women do not obtain psychological support, they do not hear people telling them they are not to blame. See Katz & Burt, *supra*, at 165 (reporting that guilt hampers quick recovery and that 65% of women said that the most helpful thing rape crisis counselor said was "you are not to blame"). Self-blame is strongly correlated with fear, anxiety and depression, see *id.* at 166 (stating that "higher levels of initial self-blame were significantly associated with the presence of more negative symptomatology such as fear, anxiety, and depression"), as well as posttraumatic stress disorder. See Valentiner, *supra*, at 457-58 (describing correlation of self-blame with symptoms of posttraumatic stress disorder). This negative symptomatology can have dire consequences: "The more women blamed themselves for the rape, the more suicidal they had been since the rape, the greater the likelihood that they had been psychiatrically hospitalized, and the lower their self-esteem." See Katz & Burt, *supra*, at 166. "The more women felt that they had blamed themselves for the rape, the higher their current levels of psychological distress as measured by negative symptomatology ... . Higher levels of self-blame were also associated with more hours of counseling since the rape ... and with the length of time women felt it took (or would take) them to be 'recovered.'" *Id.* at 162-63 (statistics omitted). In total, nearly one-third of rape victims develop posttraumatic stress disorder, and 13% of rape victims attempt suicide. See Nat'l Victim Ctr., *Rape-Related Post-traumatic Stress Disorder 2* (1992) (discussing incidence of posttraumatic stress disorder in rape victims). Rape victims are 4.1 times more likely than noncrime victims to contemplate suicide. See *id.*

n421. Galvin, *supra* note 145, at 807. In 1977, Professor Abraham P. Ordovery wrote that sexual history between the defendant and the complainant may "support an inference of

consent, even if the past conduct is dissimilar to that at issue in the case." Ordovery, *supra* note 18, at 117. He also argued that in some circumstances, it would be properly excluded. *Id.*

n422. Galvin, *supra* note 145, at 807.

n423. *Id.* at 815.

n424. *Id.*

n425. *Id.* Galvin further supports this exception because courts tend to admit evidence of a defendant's previous sexual crimes committed against the present complainant. *Id.* at 815-16.

n426. Berger, *supra* note 26, at 58.

n427. *Id.* See also Letwin, *supra* note 123, at 72 (arguing that prior sexual behavior between the defendant and the complainant would serve "the goal of rationally untangling what happened between the two persons on the charged occasion").

n428. Joyce C. Abma, U.S. Dep't of Health & Hum. Servs., *Fertility, Family Planning, & Women's Health: New Data from the 1995 National Survey of Family Growth 5* (1997). About 35% of divorced or separated women have been forced to have intercourse against their will at some point in their lives. *Id.* at 5.

n429. Bachman & Saltzman, *supra* note 413, at 3, 6.

n430. Berger, *supra* note 26, at 58.

n431. Lenore Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* 42-45 (1989). Beyond intimacy and concern, of course, a woman can consent to sex out of boredom, a reluctance to fight about it, or any number of other reasons. See Joshua Dressler, *Cases and Materials on Criminal Law* 384-385 (2d ed. 1999). This fact also undermines another argument that Berger makes in the footnotes of her article: that consensual intercourse between the defendant and the complainant after the alleged rape "would certainly undermine the woman's story that she had been forced to yield the first time." Berger, *supra* note 26, at 18 n.113. Importantly, a husband's physical violence is predictive of greater sexual activity in a relationship, as well as predictive of a wife's

corresponding sense of depression and powerlessness. See Alfred DeMaris, Elevated Sexual Activity in Violent Marriages: Hypersexuality or Sexual Extortion?, 34 J. Sex Research 361 (1997). Not that all greater sexual activity is wanted or consensual.

n432. See supra notes 268-271, 320-331 and accompanying text.

n433. State v. Alston, 312 S.E.2d 470 (N.C. 1984).

n434. Id. at 471.

n435. Id.

n436. Id. at 472-73.

n437. Id.

n438. Id.

n439. Id. at 473.

n440. Id.

n441. Id.

n442. Id. at 471.

n443. Id. at 476.

n444. Id.

n445. Id. at 476.

n446. See, e.g., Estrich, supra note 371, at 1108-12.

n447. Alston, 312 S.E.2d at 474.

n448. Id. at 474.

n449. Id.

n450. For another case that involves a possible prior rape admitted as consensual, see *United States v. Jensen*, 25 M.J. 284, 287 (C.M.A. 1987) (prior sex between deaf-mute Korean complainant and defendant and another soldier presumed to be "voluntary" and admissible in gang rape case).

n451. *United States v. Parker*, 54 M.J. 700 (A. Ct. Crim. App. 2001).

n452. Id. at 704.

n453. Id. at 704-05.

n454. Id. at 705.

n455. Id.

n456. Id.

n457. Id. at 716-17.

n458. Id. at 706.

n459. Id. at 708. KD testified, "I really don't know ... there's many things I've done in this time, while I was with him, that I don't understand." Id. The court seemed baffled by KD's behavior, wondering aloud why KD would "willingly allow herself to be alone in her apartment with a man who had previously raped her." Id.

n460. Id.

n461. *State v. Johnson*, 133 N.W. 115, 116 (Iowa 1911).

n462. *United States v. Kelly*, 33 M.J. 878, 882-83 (A.C.M.R. 1991) (citation omitted).

n463. Israel M. Schwartz, *Sexual Activity Prior To Coital Initiation: A Comparison Between Males and Females*, 28 *Arch. Sexual Behav.* 63, 68 (1999). See also Gwen Florio, *Kids and Sex*, *Phila. Inq.*, Aug. 8, 1999, at G1.

To refer to what is going on broadly as "oral sex," however, is inaccurate. The type of oral sex that young people engage in is overwhelmingly fellatio, not cunnilingus. Lisa Remez, *Oral Sex Among Adolescents: Is It Sex or Is It Abstinence?*, 32 *Fam. Plan. Persp.* 298, 299 (2000). One expert puts it bluntly: "girls are not having orgasms." Amy Benfer, *A Teen Sex Guru Speaks: Kids - and Their Parents - Need to Tackle Taboos, Says Psychologist Lynn Ponton* (Jan. 10, 2001), at [http://www.salon.com/mwt/feature/2001/01/10/teen\\_sex/index.html](http://www.salon.com/mwt/feature/2001/01/10/teen_sex/index.html). She notes that the focus is exclusively on servicing boys' sexual pleasure. "Girls are really educated about what's involved in boys' sexual pleasure - not in class, but by their peers. They spend hours devoted to how to give a good blow job. And they talk about technique. I don't want to go into it in great detail, but there's a lot of discussion about it. In my entire existence - some twenty years of listening to kids talk about sex - I have never, ever heard a group of boys discussing how to give girls good" oral sex. *Id.* Shari Thurer argues that girls are servicing boys "in a misguided attempt to appear liberated" and that the sexual activity engaged in is "unilateral, usually in service of the male's orgasm." Thurer, *supra* note 273, at 2. Ponton concurs: "What seems to be happening is that girls are still being pressured to serve boys - and that's what I hear about, you know, all the boys now expect oral sex, that the boys ... are intent on getting it. It's put more pressure on girls in this area." Benfer, *supra*, at 3. She re-emphasizes that girls "don't see the service aspect to all of this ... [but] I don't think that it brings them a good deal of pleasure." *Id.* at 3-4.

n464. Virtually all public schools include some sexual education in the curriculum. Tina Hoff & Liberty Greene, *Sex Education in America: A Series of National Surveys of Students, Parents, Teachers, and Principals*, 2 (The Henry J. Kaiser Family Found. 2000). For most students, sexual education lasts only one to three periods of class in a health class. *Id.* at 14, 26. Forty-eight states use federal funds for abstinence only education - programs that teach abstinence from sexual activity outside of marriage. Benfer, *supra* note 463, at 5. To receive federal funds means that the sexual education program is regulated; "for the states using large amounts of abstinence-only money, there is a board that reviews the program and can cite or remove teachers who are too open. There are also sanctions involved with abstinence-only money that many parents are not aware of." *Id.*

One-third of schools nationwide maintain a sexual education curriculum that is "abstinence-only," and those schools with "comprehensive" sexual education still focus their message on sexual abstinence. Hoff & Greene, *supra*, at 14. See also David J. Landry et al., *Abstinence Promotion and the Provision of Information About Contraception in Public*

School District Sexuality Education Policies, 31 Fam. Plan. Persp. 280, 283 (1999). In 1999, 23% of sexual education teachers taught abstinence as the only method of preventing pregnancy and STDs, compared with only 2% who did so in 1988. Jacqueline E. Darroch et al., Changing Emphases in Sexuality Education in U.S. Public Secondary Schools, 1998-1999, 32 Fam. Plan. Persp. 204, 209 (2000). Moreover, the decade between 1988 and 1999 saw a "steep decline" in the number of sexual education teachers who supported discussing topics such as homosexuality, abortion, and birth control. Id. Importantly, however, parents want schools to teach students about a wider range of sexual education topics. Hoff & Greene, *supra*, at 4. Students also want more information specifically about rape, birth control, sexual orientation, and abortion. Id. at 5.

In spite of school programs that teach an abstinence-only or an abstinence-focused agenda, young people in the United States today live in a broader culture that aggressively celebrates sex. Weinberg, *supra* note 273, at 641 ("The role of mass media in childhood and adolescent socialization has become extremely important."). Kids watch MTV, read Maxim, and download images on their computers. The Henry J. Kaiser Family Found., Kids & Media: The New Millennium 20 (1999) [hereinafter Kids & Media]. Young adolescents spend an average of six and three-quarter hours a day using media - watching TV, reading magazines, surfing the net, etc. - which adds up to more than a full-time work week. Id. In 1970, the percentage of sixth graders who had a television in their bedrooms was six. Id. at 21. Today, 77% of sixth graders have a television in their bedrooms. Id. Moreover, the popular media kids consume have become increasingly fixated on sexuality. Weinberg, *supra* note 273, at 626. Sixty-eight percent of the shows on television today include sexual content; 75% of prime-time shows include sexual content. Kids & Media, *supra*, at 2 (reporting on the 1999-2000 television season). These figures are up significantly from the 1997-1998 television season. Id. As one researcher put it:

Not only do young people today have more access to information about sex, but the entire youth culture forms itself around sexual images. Media images of sexual activity no longer apply only to prostitutes and "naughty girls"; images of big city lawyers and Beverly Hills high school students give middle-class adolescents sexually active role models with whom, for the first time, they can identify.

Weinberg, *supra* note 273, at 641.

n465. Remez, *supra* note 463, at 300. The "Catch-22" is that "adolescents cannot practice abstinence until they know what abstinence is, but in order to teach them what abstinence is, they have to be taught what sex is," which many abstinence-only sex education programs are unwilling to do. Id. at 302. Almost one in five students says that sexual education in their school presents sexual intercourse as "something to fear and avoid." Hoff & Greene, *supra* note 464, at 19. About 20% of sexual education classes teach that abortion, homosexuality, and masturbation are "immoral or wrong." Id. at 20.

n466. Remez, *supra* note 463, at 298 ("There is growing evidence, although still anecdotal and amassed largely by journalists, not researchers, that adolescents might be turning to

behaviors that avoid pregnancy risk but leave them vulnerable to acquisition of many STDs, including HIV."); Weinberg, *supra* note 273, at 641. See also Quadagno, *supra* note 277, at 74 ("Oral sex may be perceived to be less risky than vaginal sex because the typical message portrays unprotected vaginal intercourse as extremely risky behavior. Oral sex is not discussed as often in prevention messages, and this difference may account for its prevalence in [younger] women."); Remez, *supra* note 463, at 303 ("many young people consider oral sex itself to be a form of risk reduction"); Thurer, *supra* note 273, at 2 ("Undoubtedly, a number of young women engage in fellatio rather than intercourse in order to maintain 'technical virginity' or in the mistaken belief that they are practicing safe sex."). In fact, oral sex is less risky as far as the transmission of the HIV virus. "According to Penelope Hitchcock, chief of the Sexually Transmitted Diseases Branch of the National Institute of Allergy and Infectious Diseases, saliva tends to inactivate the HIV virus, so while transmission through oral intercourse is not impossible, it is relatively rare." Remez, *supra* note 463, at 299. Lynn Ponton argues, "one of the negatives to abstinence-only education is that within many of those programs, maintaining virginity is the top priority. So it's to girls' advantage to view oral sex, or even anal sex, as not being 'sex.'" Benfer, *supra* note 463, at 3. It is important for researchers to begin to look beyond the vaginal sex/nonvaginal sex divide as well. Daniel J. Whitaker et al., *Reconceptualizing Adolescent Sexual Behavior: Beyond Did They or Didn't They?*, 32 *Fam. Plan. Persp.* 111 (2000) ("The traditional sex-no sex dichotomy obscures differences among sexually inexperienced teenagers and among adolescents who have had sex. Prevention efforts must be tailored to the specific needs of teenagers with differing sexual experiences and expectations, and must address the social and psychological context in which sexual experiences occur.").

Abstinence-only sex education appears to influence not only high school students' sexual practices, but also middle-school students' sexual practices. Recently, the Washington Post reported "a disturbing pattern of middle-schoolers' adopting an 'anything but intercourse' approach to sex. Eager to avoid pregnancy and hold on to virginity, an increasing number of teenagers are engaging in oral sex, according to school and health officials." Laura Sessions Steg, *Unsettling Fad Alarms Parents: Middle School Oral Sex*, *Wash. Post*, July 8, 1999, at A1. Newspaper articles report anecdotal evidence of increased oral sex among seventh and eighth graders, who perceive the practice as less emotionally intimate and risky than vaginal intercourse. Thurer, *supra* note 273, at 1 ("Among young people, fellatio is notably banal."). This attitude indicates a significant shift in a sense of the relative intimacy of oral sex. Remez, *supra* note 463, at 300. According to Susan Rosenthal, a professor of pediatrics and a pediatric psychologist at Cincinnati Children's Hospital Medical Center, "if you were to query older women, oral sex might be perceived as something more intimate or equally intimate to vaginal sex (and which frequently happened later on in a relationship); for teens, oral sex appears to be much less intimate or serious than vaginal intercourse." *Id.*

n467. Choosing to engage in sexual penetration is not something that simply comes with the territory of being sexually active. As one high school student put it, "intercourse is, for some people, a huge leap from oral sex. Intercourse is something that is carefully thought through." Karen Peterson, *Sex, Not Sex: For Many Teens Oral Doesn't Count*, *USA Today*, Nov. 16, 2000, at D1 (quoting a high school student).

n468. Berger, *supra* note 26, at 59.

n469. *Id.* at 59 n.344.

n470. Galvin, *supra* note 145, at 816 (citing North Carolina legislature).

n471. See *infra* Part V.

n472. See Bryden & Lengnick, *supra* note 231, at 1224 (noting scholarly recognition of "societal and official skepticism toward victims of acquaintance rape").

n473. Model Penal Code 213(3), 213.1(1), 213.1(2), 213.3(1), 213.4, 213.5 (1981).

n474. Model Penal Code 213.6(2) (1981). The reason the Code excludes rape by a husband or even cohabitant is that people consider the punishment for rape too severe for intimates. *Id.* at 213.1 cmt. 8(c) ("If [the husband compels her to submit] by force ... he may be guilty of assault and subject to a range of penalties ... . Liability for rape is another matter.").

n475. R. Lance Shotland & Lynne Goodstein, *Sexual Precedence Reduces the Perceived Legitimacy of Sexual Refusal: An Examination of Attributions Concerning Date Rape and Consensual Sex*, 18 *Pers. & Soc. Psychol. Bull.* 756, 760 (1992).

n476. *Id.* at 760.

n477. *Id.*

n478. *Id.* at 759.

n479. Patricia Hastings, *The Impact of Complainant Sexual History Evidence on Jurors' Decision Processes in a Sexual Assault Trial*, 59 *Dissertation Abstracts Int'l* 2484 (1998).

n480. *Id.*



n481. Id.

n482. Id.

n483. Id.

n484. Bryden & Lengnick, *supra* note 231, at 1205 (reviewing studies).

n485. Id. at 1201 (citing Suzanna Adler, *Rape on Trial* 89-93 (1987)). Researchers propose that this bias could be because people are biased against sex outside of marriage or because they believe that the previous relationship provides strong evidence that subsequent sex was consensual rather than forced. Id. Regardless of the reason, however, the evidence is prejudicial. Research shows that it causes jurors to favor acquittal or leniency for the defendant and bias against the complainant. Id.

n486. Bryden & Lengnick, *supra* note 231, at 1205 n.65 (citing Suzanna Adler, *Rape on Trial* 53 (1987)).

n487. Id. See also id. at 1205 n.65 (citing Kathleen L'Armand & Albert Pepitone, *Judgments of Rape: A Study of Victim-Rapist Relationship and Victim Sexual History*, 8 *Pers. & Soc. Psychol. Bull.* 134, 135 (1982)). Study participants rated the victim most to blame for the rape in the prior consensual sex condition, less to blame when she had dated the defendant with no prior sex, and least to blame when the defendant was a stranger. Id.

n488. See *supra* notes 407-431 and accompanying text.

n489. See *supra* notes 475-488 and accompanying text. But cf. Galvin, *supra* note 145, at 816 (arguing that a prior sexual history with the defendant himself is "less likely to create the kind of prejudice which sexual behavior of a more general nature might create.").

n490. Admittedly, even general statements about the prior intimate relationship between the complainant and the defendant may also befuddle the truth-seeking process. Defendants have the right to provide some context for the instance in question, however, and the state should not be allowed to leave the misimpression with the jury that the complainant and the defendant were strangers. Allowable context should not include specific descriptions of prior sexual behavior, but it should only include general information.

n491. Of course, if the prosecutor opens the door to evidence of prior specific acts, then other details of the relationship become fair game for the defense. See generally, Michael H. Graham, *Handbook of Federal Evidence* 103.4, *Error in Admitting: Waiver of Right to Object by Other Than Failure to Make; Door Opening* (5th ed. 2001). Likewise, if a complainant testified that she "never consents to sexual intercourse with anyone but her boyfriend," the prosecutor would have opened the door to the defense exploration of the truth of that statement. *Id.*

n492. Galvin, *supra* note 145, at 773 ("In a significant number of cases, appellate courts have strained to uphold the validity of these statutes while at the same time ordering the introduction of relevant sexual conduct evidence. This result has been achieved by circumventing the explicit statutory prohibitions and by relying instead on legislative history and underlying policy considerations.").

n493. *Infra* Part VI.

n494. See, e.g., *United States v. Arab*, 55 M.J. 508 (A. Ct. Crim. App. 2001); *People v. Murphy*, 899 P.2d 294 (Colo. Ct. App. 1994); *State v. Collier*, 913 P.2d 597 (Kan. 1996); *People v. Jovanovic*, 700 N.Y.S.2d 156 (App. Div. 1999); *State v. Earl*, No. 91902, 1998 WL 474193 (Ohio Ct. App. Aug. 10, 1998); *Ewing v. State*, Nos. F94-30670-K, F94-30671-K, 1997 WL 488614 (Tex. Crim. App. Aug 22, 1997); *State v. Guinn*, 105 Wash. App. 1030 (Ct. App. 2001).

n495. Sadomasochism can be defined as sexual practices of dominance and submission designed to stimulate sexual excitement from the power disparity between the parties involved. Rob Jellinghaus, *What do B&D, S&M, D&S, "Top," and "Bottom," Mean?*, at <http://www.unrealities.com/adult/ssbb/a.htm> (last modified July 31, 1997). In these practices, there are usually defined roles: a "top" who dominates and a "bottom" who is dominated. *Id.* Usually the "top" and the "bottom" enact mutually desired and planned sexual "scenes" that involve fantasy dominance and submission. *Id.* Females within the sadomasochistic subculture prefer oral sex and fantasy role-playing that involves bondage, spanking, and enacting scripts of master-slave relationships. Eugene E. Lewitt et al., *The Prevalence and Some Attributes of Females in the Sadomasochistic Subculture: A Second Report*, 23 *Arch. Sexual Behav.* 465, 471-72 (1994). "Fantasy is a crucial component in sexual bondage, and the partners often agree on fantasy scenarios before they are acted out." Kurt Ernulf & Sune Innala, *Sexual Bondage: A Review and Unobtrusive Investigation*, 24(6) *Arch. Sexual Behav.* 631, 638 (1995).

n496. *People v. Jovanovic*, 700 N.Y.S.2d 156 (App. Div. 1999).

n497. Laura Mansnerus & Katherine Finkelstein, Questions Hover in Internet Sex Abuse Case, N.Y. Times, May 18, 2001, at A1.

n498. Jovanovic, 700 N.Y.S.2d at 159.

n499. Id. at 159-61.

n500. Id. at 162.

n501. Id.

n502. Id. at

n503. Id. at 160-61.

n504. Id. at 163-64.

n505. "Evidence of a victim's sexual conduct shall not be admissible in a prosecution for [a sex] offense or an attempt to commit [a sex] offense ... unless such evidence:

1. proves or tends to prove specific instances of victim's prior sexual conduct with the accused; or

2. proves or tends to prove that the victim has been convicted of [prostitution] ... within three years prior to the sex offense which is the subject of the prosecution; or

3. rebuts evidence introduced by the people of the victim's failure to engage in sexual intercourse, deviate sexual intercourse or sexual contact during a given period of time; or

4. rebuts evidence introduced by the people which proves or tends to prove that the accused is the cause of pregnancy disease of the victim, or the source of semen found in the victim; or

5. is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination to be relevant and admissible in the interests of justice."

N.Y. Crim. Proc. Law 60.42 (West 1992).

n506. Jovanovic, 700 N.Y.S.2d at 159.

n507. Id.

n508. Id.

n509. Id. at 163-64.

n510. Id. at 171.

n511. Id. at 165-66.

n512. Id. at 165. This argument is unconvincing because the statements are about prior sexual acts with third parties, exactly the type of evidence that should be inadmissible under rape shield laws.

n513. Id. at 167-88. The court additionally decided that Jovanovic should have been given the opportunity to pursue the theory that her boyfriend may have caused the physical injuries she sustained. Id. at 168. The source of injury exception to the prohibition on rape shield evidence is appropriate, so I will not discuss the court's analysis of this matter in text.

n514. Id. at 167.

n515. Id. at 166.

n516. Id. at 168 (emphasis added). The court later characterized the e-mail statements as the complainant's indication of "an interest in participating in sadomasochism with Jovanovic." Id.

n517. The e-mails, the court said, "could illuminate Jovanovic's understanding and beliefs as to the complainant's willingness to participate in sadomasochism with him and, as such, are also relevant to Jovanovic's state of mind." Id. at 169 (citations omitted).

n518. Id. at 171. The appellate court believed that this sexual history was not offered "to undermine the complainant's character by demonstrating that she was unchaste. Rather, it was to highlight both the complainant's state of mind on the issue of consent, and his own state of mind regarding his own reasonable beliefs as to the complainant's intentions." Id. at 159. In

other words, the sexual history was not offered to decrease the complainant's credibility, but to reveal her actual consent and Jovanovic's reasonable mistake as to her consent.

On remand, the judge dismissed all charges against Jovanovic because the complainant did not feel that she could undergo cross-examination in a second trial. Jane Fritsch & Katherine E. Finkelstein, All Charges Are Dismissed in Columbia Sexual Torture Case, N.Y. Times, Nov. 2, 2001, at D1.

n519. In terms of the first redacted e-mail, one wonders, as well, how a description of a man's sexual assault communicates consent to sadomasochistic sex with Jovanovic, or how he could reasonably interpret those words as meaning consent. See Jovanovic, 700 N.Y.S.2d at 164.

n520. One wonders how calling oneself a "pushy bottom," which is someone "who is not really submitting, but just trying to turn the situation around to the way they want it to go," communicates consent to sex with Jovanovic, or how he could reasonably interpret those words as meaning consent. Rob Jellinghaus, How Can I Learn to Be a Good Bottom?, at <http://www.unrealities.com/adult/ssbb/h.htm> (last modified Aug. 10, 1995). But see Jovanovic, 700 N.Y.S.2d at 164 n.4 (Jovanovic's attorney, Jack Littman, argued that "a 'pushy bottom' is a submissive partner who pushes the dominant partner to inflict greater pain").

n521. See Jovanovic, 700 N.Y.S.2d at 163-64.

n522. Additionally, the Internet, with its anonymity, allows an online self-presentation that may be more sexually adventurous than one would convey for one's in-person presentation.

n523. Professor Vivian Berger disagreed. She said that the Jovanovic ruling was legally sound and that that jury members "should have heard [the redacted e-mail statements] and been allowed to sort them out themselves." David Rhode, Order for New Sex-Abuse Trial Criticized, N.Y. Times, Dec. 23, 1999, at B3.

n524. Scholarship analyzing Internet chat rooms devoted to sexual bondage suggests the contrary. Chat room participants frequently comment on the balance of power between the top and the bottom. A typical comment was: "Often the top does exactly what the bottom wants done. The bottom is usually the one in control, since it is the bottom that sets the pacing, and the limits of how far to go." Kurt E. Ernulf & Sune M. Innala, Sexual Bondage: A Review and Unobtrusive Investigation, 24 Arch. Sexual Behav. 631, 644 (1995). People involved in the sadomasochistic subculture often discuss what makes a good top, noting that their desirable characteristics are: "prudence, responsibility, and caring." Id.

n525. William Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* 261, 269 (1990). See also Charles Moser & J.J. Madson, *Bound to Be Free: The SM Experience* 67-71 (1996); Cheryl Hanna, *Sex Is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. Rev. 239, 247 (2001) ("Within the S/M context, consent is not merely the absence of 'no,' but a far more qualitative conversation that involves negotiation, the sharing of fantasies and the setting of limits."); Rob Jellinghaus, *What Do B&D, S&M, D&S, "Top" and "Bottom" Mean?*, at <http://www.unrealities.com/adult/ssbb/a.htm> (last modified Aug. 10, 1995) ("NONE OF THIS MATERIAL ADVOCATES ANY KIND OF NONCONSENSUAL BEHAVIOR. What I am describing here is a variety of ways for lovers to enjoy one another, if and only if they both want to, and both give their consent."). Those who practice sadomasochism emphasize the importance of communication and negotiation to clarify what each partner wishes to engage in when they decide to do a scene. Rob Jellinghaus, *What Is a "Scene," and What Is "Negotiation"?*, at <http://www.unrealities.com/adult/ssbb/b.htm> (last modified Aug. 10, 1995).

n526. Ernulf, *supra* note 524, at 650. See also, Rob Jellinghaus, *What Is a "Safeword"?*, at <http://www.unrealities.com/adult/ssbb/c.htm> (last modified Aug. 10, 1995). Safewords are communication tools that bottoms use during scenes to curtail or stop the dominance that the top is administering. *Id.* See also Eskridge, *supra* note 525, at 261 ("Procedurally, the SM encounter is supposed to be prefaced by a discussion of what is enjoyable and what is unwelcome for each party. The participants agree upon a 'safeword' that stops the action when it has gone too far for either one.").

n527. Rob Jellinghaus, *What Is a "Safeword"?*, at <http://www.unrealities.com/adult/ssbb/c.htm> (last modified Aug. 10, 1995).

n528. Des de Moor, *A Word in Your Ear*, at <http://www.queernet.org/LeatherOnline/LO007Safeword.html> (last visited July 31, 2001). As sadomasochists put it, "safewords are an important way of managing consent: the bottom is assumed to be consenting so long as the signal has not been given." *Id.* See also Eskridge, *supra* note 525, at 261.

n529. Charles Moser & J.J. Madson, *Bound to Be Free: The SM Experience* 71 (1996) ("Clear, informed and verbalized consent is a moral dividing line between brutality and SM; partners must voluntarily and knowingly give full consent to SM activity before it begins."). *Id.* at 195 ("Once again, the equation is simple: SM is consensual, violence is not.").

n530. Rob Jellinghaus, *What Is a "Safeword"?*, at <http://www.unrealities.com/adult/ssbb/c.htm> (last modified Aug. 10, 1995).

n531. See, e.g., Allyson Smith & Peter LaBarbera, Concerned Women of America, CWA of Illinois Urges Ramada to Cancel Sadistic 'Vicious Valentine' Event, at <http://cultureandfamily.org/report/2002-02-07/1il.shtml>.

n532. Eskridge, *supra* note 525, at 260; Moser & Madeson, *supra* note 529, at 67-71; John K. Noyes, *Mastery of Submission: Inventions of Masochism* 202 (1997).

n533. See *infra* notes 535-564 and accompanying text.

n534. See *infra* notes 554-564 and accompanying text.

n535. *State v. Colbath*, 540 A.2d 1212 (N.H. 1988).

n536. *Id.* at 1212.

n537. *Id.*

n538. *Id.*

n539. *Id.*

n540. *Id.*

n541. *Id.*

n542. *Id.* at 1213.

n543. *Id.* at 1212.

n544. *Id.* at 1213.

n545. N.H. Rev. Stat. Ann. 632-A:6 (Lexis Supp. 2000).

n546. Id.

n547. Colbath, 540 A.2d at 1215.

n548. Id. at 1213.

n549. Id. at 1214.

n550. Id. at 1217.

n551. Id. at 1212. He first decided that the jury instruction was "equivalent to an order striking the testimony about the complainant's openly observed behavior with other men during the course of the afternoon." Id. at 1215.

n552. Id. at 1217.

n553. Id.

n554. Id. at 1216.

n555. Id.

n556. Id. at 1217.

n557. Id.

n558. Id.

n559. Id.

n560. See supra notes 213-219 and accompanying text. Berger called this sexual embarrassment the "exposure of intimate facts in a public courtroom." Berger, supra note 26, at 44.



n561. Colbath, 540 A.2d at 1216-1217.

n562. Id. at 1216.

n563. Id.

n564. Not all courts that face the question of public sexual behavior with third parties go the way of the Colbath case. In *People v. Wilhelm*, 476 N.W.2d 753, 760 (Mich. Ct. App. 1991), for instance, the Michigan Court of Appeals concluded that public sexual behavior with third parties was irrelevant to consent.

n565. *United States v. Kelly*, 33 M.J. 878, 883 (A.C.M.R. 1991).

n566. Jennifer Brown, *Suburban Schools Crack Down on "Dirty Dancing,"* *Detroit Free Press*, May 2, 2001, available at <http://www.freep.com/news/latestnews/pm298720010502.htm> (last visited August 13, 2001).

n567. Id.

n568. Id.

n569. Id.

n570. Id. Kirk Berry, senior class president at Norristown, pointed out that he and his friends learned these movements from MTV: "we didn't create this style of dance; we're just following." Id.

n571. In a 1999 study, a sample of college students read a rape scenario accompanied by a photograph of a female in a skirt that was either three inches below the knee, at the knee, or three inches above the knee. Jane E. Workman & Elizabeth W. Freeburg, *An Examination of Date Rape, Victim Dress, and Perceiver Variables Within the Context of Attribution Theory*, 41 *Sex Roles* 261, 261 (1999). The same effect of victim attire was also observed among adolescents. Roslyn Heights et al., *The Influence of Victim's Attire on the Adolescent's Judgments of Date Rape*, 30 *Adolescence* 319, 319 (1995). Compared with students who viewed a conservatively dressed victim and those who viewed no photo of a victim, high school students who viewed a provocatively dressed victim were more likely to believe that

she was responsible for the rape, that his behavior was justified, and that what occurred was not rape. *Id.*

n572. Workman & Freeburg, *supra* note 571 at 272. A 1991 survey of 500 Americans indicated that 53% of adults over fifty years old and 31% of adults between thirty-five and forty years old believe that a woman is to blame for a rape if she dresses provocatively. Helen Benedict, *Virgin or Vamp: How the Press Covers Sex Crimes* 13 (1992) (discussing Time magazine survey).

n573. Alan C. Arcock & Nancy K. Ireland, *Attribution of Blame in Rape Cases: The Impact of Norm Violation, Gender, and Sex Role Attitude*, 9 *Sex Roles* 179, 179 (1983).

n574. But see, e.g., *United States v. Parker*; 54 M.J. 700, 705 (A. Ct. Crim. App. 2001); *United States v. Kelly*, 33 M.J. 878, 880 (A.C.M.R. 1991); *State v. Colbath*, 540 A.2d 1212, 1212 (N.H. 1988) .

n575. But see, e.g., *Parker*, 54 M.J. at 705; *Rusk v. State*, 406 A.2d 624, 625-26 (Md. Ct. Spec. App. 1979); *People v. Jovanovic*, 700 N.Y.S.2d 156, 159 (App. Div. 1999).

n576. But see, e.g., *Colbath*, 540 A.2d at 1212; *Jovanovic*, 700 N.Y.S.2d at 161.

n577. But see, e.g., *Kelly*, 33 M.J. at 879-81; *Colbath*, 540 A.2d at 1213.

n578. David Quadagno et al., *Ethnic Differences in Sexual Decisions and Sexual Behavior*, 27 *Arch. Sexual Behav.* 57, 59 (1998) ("Sex is a negotiated act that involves verbal and nonverbal communication.").

n579. See Catharine MacKinnon, *Sex Equality* 187 (Robert C. Clark et al. eds., 2001). "Consent is supposed to be women's form of control over intercourse, different from but equal to the custom of male initiative. Man proposes, woman disposes. Even the ideal it is not mutual." Catharine A. MacKinnon, *Toward A Feminist Theory of the State* 174 (1989).

n580. MacKinnon, *Feminist Theory*, *supra* note 579, at 182.

n581. Katherine M. Franke, *Theorizing Yes*, 101 *Colum. L. Rev.* 181, 182 (2001).

n582. Id.

n583. Id. As Professor Katherine Franke has noted, "the female body" is "a site of pleasure, intimacy, and erotic possibility." Franke, *supra* note 581, at 182.

n584. By ignoring it in this circumstance, the law protects females' ability to pursue pleasure. Id. at 183 (asking "Can law protect pleasure? Should it?").

n585. The deterrence effect on females' willingness to pursue their own sexual pleasure is one reason why the chastity requirement is wrong. Girls and women have a right to enjoy their own bodies. See id. at 200-01.

n586. See David Satcher, U.S. Dep't of Health & Hum. Servs., *The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior* 4 (2001). See also Patricia Tjaden & Nancy Thoennes, U. S. Dep't of Just., *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the Nat'l Violence Against Women Survey, Research in Brief 13* (1998) (stating that 17.6% of women experience attempted or completed rape in their lifetimes); S. Rep. No. 101-545, at 43 (1990) (citing testimony by Dr. Mary Koss before the Senate Judiciary Committee, Aug. 29, 1990, stating, "[One hundred twenty-five thousand] college women can expect to be raped during this - or any - year."). Catharine MacKinnon has pointed out, "rape is indigenous, not exceptional, to women's social condition." Mackinnon, *Feminist Theory*, *supra* note 579, at 172. She says, "forced sex is paradigmatic." Id. at 173.

Eighty-four percent of women who are raped do not report the experience to the police. Med. Univ. of S.C. Dep't of Psychol. & Behav. Sci., Nat'l Ctr. for Victims of Crime, *Rape in America: Report to the Nation* 6 (1992).

n587. Joyce Abma et al., U.S. Dep't of Health & Hum. Servs., *Fertility, Family Planning, and Women's Health: New Data from the 1995 Nat'l Data Survey of Family Growth* 6 (1997). Eight percent of U.S. women aged fifteen to twenty-four had involuntary sexual intercourse their first time. Id. at 6. Another study found that 9% of all first intercourse experiences involved threatened or used physical force against girls. Harold Leitenberg & Heidi Saltzman, *A Statewide Survey of Age at First Intercourse for Adolescent Females and Age of Their Male Partners: Relation to Other Risk Behaviors and Statutory Rape Implications*, 29 *Arch. Sexual Behav.* 203, 207 (2000). One result of early first intercourse is a higher frequency of subsequent adolescent sexual activity and a greater number of partners. Joyce Abma et al., *Young Women's Degree of Control over First Intercourse: An Exploratory Analysis*, 30 *Fam. Plan. Persp.* 13 (1998) (reviewing studies). A history of sexual abuse increases the odds of sexual coercion in high school. Id. The younger a girl is at the age of her first experience of sexual intercourse, the greater her risk that the intercourse will be rape. Id. at 16. One quarter of girls who were thirteen years old or younger at the time of their first intercourse were raped

at that time. *Id.* at 14. This figure compares with the fact that 10% of those who were aged nineteen to twenty-four at first intercourse were forced. *Id.*

n588. Abma, *Young Women's Degree of Control*, *supra* note 587 at 12.

n589. Edward Laumann, *Early Sexual Experiences: How Voluntary? How Violent?*, *Sexuality and American Social Policy* 11 (Smith et al. eds., 1996). See also Kristen Anderson Moore, *Nonvoluntary Sexual Activity Among Adolescents*, 21 *Fam. Plan. Persp.* 110, 111 (1989). The physical pleasure of the first experience of intercourse varies widely by sex, as well. Seventy-one percent of men experience orgasm at their first time, whereas only 7% of women do. Susan Sprecher et al., "Was It Good for You, Too?": Gender Differences in First Sexual Intercourse Experiences, 32 *J. Sex Research* 3, 9 (1995).

n590. Miriam Lewis, *Unwanted Intercourse: The Difficulty of Saying No*, 9 *Psychol. Women Q.* 184, 184 (1985).

n591. Abma, *Young Women's Degree of Control*, *supra* note 587 at 12 ("Much of the pertinent research on young women's initiation of sexual activity assumes that the decision to have sex is a choice that young women make after weighing the opportunity costs involved in such a situation. Analyses of young women's first intercourse rarely take into account the degree of control that they have, or perceive themselves as having, over timing and circumstances of this event.").

n592. See MacKinnon, *Feminist Theory*, *supra* note 579, at 177.

n593. By contrast, nonconsent is that small slice at the far end of the sliding scale. It represents the only area that the law is willing to criminalize, and perhaps the only area that it should, given the obvious epistemological difficulties that would arise with the microregulation of sex. Legally, nonconsent usually requires communication that one objects to further penetration.

n594. See *supra* notes 73-75 and accompanying text (discussing libertinism).

n595. Helen Benedict, *Virgin or Vamp: How the Press Covers Sex Crimes* 13 (1992). See also Franke, *supra* note 581, at 205 ("Men have almost entirely colonized the domain of sexuality that is the excess over reproduction as for them and about them.").

n596. Many men may experience this sexuality license as a sexuality requirement, one which requires them to engage in heterosexual sex to prove their manhood. See generally Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *Powers of Desire: The Politics of Sexuality* 177 (Ann Snitow et al. eds., 1983). In this way, men have not been free to access their authentic desires and they have often had sex when they did not want to do so.

n597. Schulhofer, *supra* note 111, at 277 (discussing rape law's "excessive obeisance to the supposed right of constant, unrestricted heterosexual exploration, and the corresponding failure to ensure meaningful freedom to refuse a sexual advance").

n598. The vast majority of rape victims suffer little or no physical injury extrinsic to the rape itself, having conceded their autonomy to avoid what they perceive might become a more serious physical altercation. Susan B. Sorenson & Judith M. Siegel, *Gender, Ethnicity, and Sexual Assault: Findings from a Los Angeles Study*, 48 *J. Soc. Issues* 93, 97 (1992). Only about 10% of rape victims suffer extrinsic physical injury. *Id.*

n599. Mary E. Craig et al., *Verbal Coercive Sexual Behavior Among College Students*, 18 *Arch. Sexual Behav.* 421, 421 (1989) (noting that 42% of men in one study had engaged in verbal sexual coercion).

n600. See, e.g., *United States v. Kelly*, 33 M.J. 878, 879 (A.C.M.R. 1991).

n601. See, e.g., *United States v. Parker*, 54 M.J. 700, 705 (A. Ct. Crim. App. 2001); *State v. Alston*, 312 S.E.2d 470, 471 (N.C. 1984). They also have the license to swindle their way into women's bodies without sexual mutuality or reciprocity. See, e.g., *Boro v. Superior Court*, 210 Cal. Rptr. 122, 125 (1985) (discussing rape by fraudulent inducement); *Goldberg v. State*, 395 A.2d 1213, 1215 (Md. Ct. Spec. App. 1979). About one in four college males admits to having lied or made false promises to obtain sex. Gloria J. Fischer, *Deceptive, Verbally Coercive College Males: Attitudinal Predictors and Lies Told*, 25 *Arch. Sexual Behav.* 527, 529 (1996).

n602. Without an appropriate sexual license for women, the culture places girls in an unfair position. Popular media images are inundated with references to sexual conduct. The Henry J. Kaiser Family Found., *Sex on TV Executive Summary* 3-5 (2001). The sexual freedom that popular culture seems to offer is illusory because once a girl becomes sexually active, men can force her into sexual intercourse and the law will construct consent from her prior sexual history. See, e.g., Jane Harris Aiken, *Intimate Violence and the Problem of Consent (An Essay)*, 48 *S.C. L. Rev.* 615 (1996).

n603. Franke has challenged feminist legal theorists to engage in the project of "theorizing yes" so as to protect female sexual pleasure legally. Franke, *supra* note 581, at 207-08. The sexuality license I describe attempts to protect female sexual pleasure legally.

n604. See Dressler, *supra* note 431, at 353-434.

n605. *Id.*

n606. A number of other scholars have supported this position. Galvin, *supra* note 145, at 818-19. Galvin's proposal would permit a defendant to admit evidence prior sexual conduct with third parties to prove an alternative source of the "physical consequences of the alleged rape." *Id.* at 819. Berger's proposed statute would allow a defendant to admit "evidence of specific instances of sexual conduct tending to prove that a person other than the defendant committed the act or acts charged or caused the complainant's physical condition allegedly arising from" the rape. Berger, *supra* note 26, at 98.

n607. See *supra* notes 245-491 and accompanying text.

n608. See *supra* notes 250-267, 376-386, 535-564, 496-532 and accompanying text.

n609. Of course, if the state admits evidence of prior or subsequent sexual conduct between the parties, it has opened the door to the defendant discussing the same matters. See, e.g., *supra* notes 433-461 and accompanying text.

n610. See *supra* notes 433-461 and accompanying text.

n611. See *supra* notes 496-532 and accompanying text.

n612. See *supra* notes 250-267, 322-331 and accompanying text.

n613. Assume X does not know much about sadomasochism. Y says she likes it. X tries to "take her" by forcing sex on her, thinking that she wants to be taken, and Y charges rape. Would X be able to admit Y's prior sexual history with sadomasochism to prove his mistaken belief as to consent? No, because X had no reasonable basis to assume that Y consented to being "taken" by him, and the parties had not negotiated a method for Y to retract her consent through the use of a safeword.

n614. See supra notes 250-267 and accompanying text.

n615. See supra notes 322-331 and accompanying text.

n616. Schulhofer notes that sexual autonomy "is two-sided, involving both the right to refuse intimacy and the right to seek intimacy with partners who may be willing." Schulhofer, supra note 111, at 276. It is this kind of autonomy that Exception Two to the New Rape Shield law seeks to protect.

n617. *State v. Alston*, 312 S.E.2d 470 (N.C. 1984).

n618. *Id.* at 471.

n619. See *id.*

n620. *Murthy*, supra note 111, at 572.

n621. A number of other scholars have supported such an exception. Galvin, supra note 145, at 825. Galvin's proposal would allow a defendant to admit evidence of prior sexual conduct tending to prove bias or motive to fabricate. Berger, supra note 26, at 98.

n622. See infra notes 626-680 and accompanying text.

n623. Galvin argues that, where a defendant seeks to introduce evidence of prior sexual conduct to prove the falsity of a prior allegation of forcible rape, the evidence should be admitted because of its high probative value. Galvin, supra note 145, at 858-59.

n624. See supra notes 376-382 and accompanying text.

n625. See *id.*

n626. U.S. Const. amend. VI.

n627. *California v. Green*, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring). Justice Harlan researched the history of the Sixth Amendment and was unable to determine the

meaning of the Confrontation Clause. See Graham C. Lilly, Notes on the Confrontation Clause and *Ohio v. Roberts*, 36 U. Fla. L. Rev. 207, 208 (1984). Interpreting the Confrontation Clause is difficult both because there is little historical evidence about why it was adopted and because the first case that went to the Supreme Court involving the clause arrived "a century after the Sixth Amendment was adopted." See Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 *Crim. L. Bull.* 99, 104 (1972).

Additionally, the Confrontation Clause was not declared applicable to the states through the Fourteenth Amendment until 1965. See *id.* at 109. It was incorporated in *Pointer v. Texas*, 380 U.S. 400 (1965).

n628. Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 *Mich. L. Rev.* 1063, 1110-20 (1999).

n629. See *California v. Green*, 399 U.S. 149, 156 (1970) (Harlan, J., concurring); *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring); *Mattox v. United States*, 156 U.S. 237, 242 (1895). The most common theory of origin of the Sixth Amendment is that the Framers of the Constitution drafted it to prevent abuses of the trial process similar to those that occurred in the trial of Sir Walter Raleigh. See Lilly, *supra* note 627 at 208. The evidence convicting Raleigh consisted of hearsay accusations (the out of court statement of his alleged co-conspirator as told by the case investigator and another witness who testified in front of the court). *Id.* The evidence used against Raleigh was hearsay, leading many to conclude that the Sixth Amendment prevents only the use of hearsay evidence that falls outside the scope of the exceptions to the hearsay rule. See *id.* at 209-10.

Other scholars have advanced alternative historical bases for the Sixth Amendment. *Id.* at 210. For instance, there was a provision similar to the Sixth Amendment in the Virginia Declaration of Rights. See *id.* at 210 n.17 ("The Virginia provision stated, 'that in all capital or criminal prosecutions a man hath a right ... to be confronted with the accusers and witnesses.'") (quoting 6 *Am. Arch.* 1561 (P. Force ed., 4th series 1846)). Professor Lilly concludes that the Virginia Declaration of Rights is "clearly" the source of the "framework" of the Sixth Amendment. See *id.* at 210 n.18. George Mason drafted that provision, possibly in response to the British practice of trying colonists in criminal courts with weaker procedural protections than those in England. *Id.* The vice-admiralty courts in the Colonies, in contrast to English vice-admiralty courts, sat without a jury and used civil procedural laws. See *id.* at 211.

Mason expressed disdain for this unequal treatment of American colonists. See *id.* Some scholars argue, therefore, that the Sixth Amendment was designed "to prevent the perceived abuses of the civil law procedure" and "to insure adherence to the common law adversarial system." *Id.* at 211-12 (stating that among these civil law abuses was the practice of "examining witnesses in closed chambers"). In addition to insuring that American courts would employ the common law system, the Confrontation Clause also "may have given constitutional status to the common law right of confrontation recognized in England and



America. This was the right of the accused to confront any witness against him whom the prosecutor could reasonably produce." *Id.* at 213 (citations omitted).

Kenneth Graham agrees that the Confrontation Clause was probably a reaction to the colonial vice-admiralty courts employment of civil law procedures. Graham, *supra* note 627, at 104 n.23 ("Research not yet completed leads me to the tentative conclusion that the Sixth Amendment was a reaction to the then-recent form of trial in the vice-admiralty courts, rather than the fate of Raleigh or the supposed abuses of Star Chamber."). Perhaps, as Graham suggests, a historical approach allows too much wiggle room for judges and legislators. *Id.* at 103. Graham advocates a combination of a historical approach, a functional approach, and a conceptual approach. *Id.* at 106. Despite the evidence supporting this theory, Graham adopts the more commonly held belief that the Raleigh trial was the source of the doctrine embodied in the Sixth Amendment. *Id.* Graham rejects the proposition advanced by Wigmore that the Confrontation Clause protects only the right to cross-examine witnesses presented at trial by the prosecution. *Id.* at 104 n.24 ("The cases he cites in support of this conclusion either rest on the assumption that the drafters intended to adopt some English common-law notion of confrontation or are based on Wigmore himself."). Graham concludes that it is not necessary to accept one historical basis of the Sixth Amendment, but argues that accepting the Raleigh trial as the basis for the Sixth Amendment leads to the conclusion that "the true function of the confrontation clause is the control of extrajudicial distortion of the facts." *Id.* at 106.

n630. *Washington v. Texas*, 388 U.S. 14, 19 (1967) (citing 3 Story, *Commentaries on the Constitution of the United States 1786-1788* (n.p., 1833)).

n631. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

n632. *Washington*, 388 U.S. at 22-23.

n633. Galvin, *supra* note 145, at 806 ("It is beyond dispute that a criminal defendant has no constitutional right to present irrelevant, prejudicial evidence in his or her behalf.").

n634. *Id.*

n635. Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 *Ohio St. L.J.* 1245, 1251 (1989).

n636. *Fed R. Evid.* 403.

n637. J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 *U. Pa. L. Rev.* 544, 578 (1980). For example, Tanford and Bocchino

would subject evidence of a complainant's prior habit or pattern of sexual behavior (e.g., "the complainant ... goes to a bar almost every weekend, meets a stranger, and returns to her apartment and has sexual intercourse with him") to case-by-case judicial determinations of relevance. *Id.* at 586-89.

n638. Tuerkheimer, *supra* note 635, at 1251.

n639. *Davis v. Alaska*, 415 U.S. 308, 309 (1974).

n640. *Id.* at 310-311.

n641. *Id.* at 311-312 (citing Alaska R. Children's Proc. 23 and Alaska Stat. 47.10.080(g) (Michie 1971)).

n642. *Id.* at 319. Tuerkheimer, *supra* note 635, at 1263 ("[A] rape shield law not allowing for proof of prior sexual conduct on the motivation of the complainant, where that motivation is an important issue in the case, is too narrow and will always fail when subjected to the constitutional requirements of *Davis v. Alaska*.").

n643. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

n644. *Id.* at 676.

n645. The trial court barred any cross-examination concerning a deal the witness had struck. *Id.* Criminal charges against the witness for being drunk on a highway were dropped after the witness had agreed to testify about the murder. *Id.* The trial court refused to allow cross-examination about this possible motivation for the witness' testimony citing Delaware Rule of Evidence 403. *Id.* The Delaware Rule stated: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." *Id.* at n.2.

n646. *Id.* at 679 (stating that limits based on a court's concern about, *inter alia*, prejudice, confusion of the issues, or cross-examination that is only "marginally relevant").

n647. *Id.*

n648. *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam).

n649. *Id.* at 228.

n650. *Id.*

n651. *Id.*

n652. *Id.* at 229.

n653. *Id.* at 230.

n654. *Id.*

n655. *Id.* at 231.

n656. *Id.* at 231-32.

n657. *Id.* at 232.

n658. *Id.* at 231 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974))).

n659. Under the Confrontation Clause, the Supreme Court has also addressed the constitutionality of literal restrictions on defendants' right to face their accusers. In *Coy v. Iowa*, 487 U.S. 1012, 1014 (1988), Coy was charged with sexually abusing two thirteen-year-old girls. An Iowa statute, designed to protect child victims from experiencing unnecessary trauma on the witness stand, allowed the state to place a screen between Coy and his accusers when they testified. *Id.* The statute read, in part, "The court may require a party be confined [sic] to an adjacent room or behind a screen ... that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party." *Id.* (citing Iowa Code 910A.14 (1987) (repealed 1998)). Coy was convicted and appealed, claiming that his Confrontation Clause rights had been violated. *Id.* The Supreme Court agreed, holding that Iowa's categorical rule was constitutionally infirm because it implicated the "irreducible literal meaning of the Clause: 'a right to meet face to face all those who appear and give evidence at trial.'" *Id.* at 1021 (citing *California v. Green*, 399 U.S. 149, 175 (1970)). The

Court acknowledged that it had "in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests." *Id.* at 1020. The Court noted, however, that those cases did not involve "the right narrowly and explicitly set forth in the Clause." *Id.* at 1020. The New Rape Shield Law likewise does not involve the right narrowly and explicitly set forth in the Confrontation Clause, that is, the right to face-to-face confrontation with one's accusers. Although the New Law provides a metaphorical shield, it does not literally screen the accuser from the accused in any way.

In *State v. Craig*, 544 A.2d 784, 788 (Md. Ct. Spec. App. 1988), vacated sub nom *Maryland v. Craig*, 497 U.S. 836 (1990), the trial judge invoked a Maryland rule permitting the use of live television to receive the testimony of an alleged victim of sexual abuse. In contrast to *Coy*, the trial court in *Craig* made its ruling only after a specific determination that the victim in this instance was deserving of the protective procedure. *Id.* at 796. Confronted with this variation on *Coy*, the Supreme Court concluded in *Maryland v. Craig* that where the prosecution makes an adequate, individualized showing of potential trauma to the victim, limitations on a defendant's right to face-to-face confrontation are "consonant with the Confrontation Clause." *Craig*, 497 U.S. at 838.

The Court also addressed limitations on the scope of a defendant's right of cross-examination in *Michigan v. Lucas*, 500 U.S. 145 (1991), albeit without the realm of physical confrontation. At the time, Michigan's rape shield statute permitted a defendant to introduce evidence of prior sexual conduct with an alleged victim, provided that the defendant gave notice of this intention within ten days after arraignment. *Id.* at 147. The notice requirement was included by the state to protect against surprise, harassment, and undue delay. *Id.* at 150. Citing a failure to comply with a notice requirement contained in the statute, the trial court in *Lucas* refused to admit evidence offered by the defendant of prior sexual conduct with the victim. *Id.* at 148. The Michigan Court of Appeals reversed, thus in effect establishing a categorical rule of admission for this type of evidence in cases where the notice requirement was not met. *Id.* at 148-49. The Supreme Court reversed, holding that the legitimate interests of the notice requirement may in some instances, upon case specific findings that exclusion would further the state's interests, outweigh a defendant's Confrontation Clause right to introduce the evidence. *Lucas*, 500 U.S. at 152-53. Unlike in *Coy*, however, the Court gave no suggestion as to whether the failure of a defendant to satisfy the notice requirement might result in exclusion even where a trial court does not make a case specific finding of necessity. See *id.*

n660. Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible.").

n661. See *United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Maryland v. Craig*, 497 U.S. 836, 848-49 (1990), *Chambers v. Mississippi*, 410 U.S. 284, 295 (1987).

n662. Galvin, *supra* note 145, at 806-07.

n663. Tanford & Bocchino, *supra* note 637, at 566-68.

n664. *Davis v. Alaska*, 415 U.S. 308, 319 (1974).

n665. *Coy v. Iowa*, 487 U.S. 1012, 1014 (1988).

n666. *Id.* at 1022.

n667. 124 Cong. Rec. 34,913 (1978).

n668. Galvin acknowledges, "the application of *Davis* to rape-shield legislation is limited, however, by a critical distinction between the two types of shield laws. In addition to furthering goals unrelated to assessing truth, rape-shield legislation generally promotes accurate fact-finding." Galvin, *supra* note 145, at 806.

n669. *United States v. Scheffer*, 523 U.S. 303 (1998). The Supreme Court established a framework for Compulsory Process Clause analysis in *Washington v. Texas*, 388 U.S. 14 (1967). Washington was charged with murdering his girlfriend's new beau. *Id.* at 15. He sought to offer the testimony of another man, present on the evening in question, who might confess to the killing. *Id.* Because two Texas statutes categorically prohibited a defendant from calling a co-participant as a witness, the trial court excluded this testimony. *Id.* at 16. On appeal, the Supreme Court ruled that the statutes violated Washington's Compulsory Process Clause rights. *Id.* at 23. The Court held that Washington "was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness." *Id.* Six years later, in *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Supreme Court again addressed the application of the Compulsory Process Clause to restrictions on a defendant's ability to obtain evidence in his favor. Charged with murdering a policeman, Chambers sought to exonerate himself by presenting hearsay evidence that another individual had repeatedly confessed to the crime. *Id.* at 292. The trial court excluded the evidence, however, because Mississippi did not recognize the traditional exception to the hearsay rule for declarations against penal interest. *Id.* On appeal, the Supreme Court reversed. It decided that, because the confessions were "unquestionably against interest," they were particularly reliable. *Id.* at 301. Therefore, Mississippi's categorical exclusion of the evidence was arbitrary and violated Chambers' rights secured by the Compulsory Process Clause of the Sixth Amendment. *Id.* at 300-03.

Nearly fifteen years after *Chambers*, the Supreme Court again faced a challenge under the Compulsory Process Clause in *Rock v. Arkansas*, 483 U.S. 44 (1987). Accused of shooting her husband, Rock sought to admit her own hypnotically refreshed testimony, which indicated that her finger was not in a position to fire the gun that killed him. *Id.* at 47. On appeal, the Arkansas Supreme Court established a categorical ban on hypnotically refreshed testimony. *Id.* at 48. The Supreme Court reversed. *Id.* at 62. Based on a divergence of opinion as to the reliability of hypnotically refreshed testimony, the Court concluded that such

evidence may, in some instances, be reliable. *Id.* As such, the categorical exclusion of Rock's hypnotically refreshed testimony was held to be arbitrary and in violation of her rights under the Compulsory Process Clause. *Id.*

n670. *Scheffer*, 523 U.S. at 306.

n671. *Id.*

n672. *Id.* See also *United States v. Scheffer*, 41 M.J. 683, 686 (A.F. Ct. Crim. App. 1995). The court stated that, according to its drafters, the Rule was justified, *inter alia*, by concerns about the reliability of polygraph evidence and confusion of the issues. *Id.*

n673. *Scheffer*, 523 U.S. at 307-308.

n674. *Id.* at 308.

n675. *Id.* at 309.

n676. *Id.* at 309-12.

n677. *Id.* at 312. The Court in *Scheffer* distinguished *Rock*, *Chambers*, and *Washington* because each implicated "fundamental elements of the defendant's defense." *Id.* at 315 (citing *Rock v. Arkansas*, 483 U.S. 44 (1987), *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Washington v. Texas*, 388 U.S. 14 (1967)). The New Rape Shield Law, by contrast, does not implicate any of the "fundamental elements of the defendant's defense" because it excludes only evidence of the complainant's prior or subsequent sexual conduct and does not exclude anything related to the instance in question. Unlike the rule at issue in *Washington*, for example, the New Rape Shield Law allows defendants to call any and all witnesses to the alleged crime itself. See *Washington*, 388 U.S. at 16-17. Unlike the rule at issue in *Chambers*, the New Rape Shield Law does not exclude any evidence regarding the possibility that another person committed the crime, as it admits evidence that would reveal an alternate source for semen, pregnancy, disease, or injury. See *Chambers*, 410 U.S. at 302. Unlike the rule in *Rock*, the New Rape Shield Law does not deprive the jury of the "testimony of the only witness who was at the scene and had firsthand knowledge of the facts." *Rock*, 483 U.S. at 57. Anyone who was "at the scene" can testify in whatever way that the local rules allow because the New Rape Shield Law does not restrict testimony about the instance in question.

n678. Scheffer, 523 U.S. at 317. Richard Nagareda dismisses the possibility that Scheffer was an "inartful application" of the Court's arbitrary standard, but rather a likely indicator of future Compulsory Clause jurisprudence." Nagareda, *supra* note 628, at 1098.

n679. Scheffer, 523 U.S. at 312.

n680. See *supra* notes 669-679 and accompanying text.

n681. For example, there is a strong associational relationship between the experience of childhood sexual abuse and a woman's risk for both promiscuity and later sexual abuse. As one study puts it: "Among the possible consequences of childhood sexual abuse are promiscuity and the self-perception of being promiscuous, being the victim of coercive sex later in life, and poor self concept, low self-esteem and decreased locus of control." Jacqueline Stock et al., *Adolescent Pregnancy and Sexual Risk-Taking Among Sexually Abused Girls*, 29 *Fam. Plan. Persp.* 200 (1997). See also Susan Hills et al., *Adverse Childhood Experiences and Sexual Risk Behaviors in Women: A Retrospective Cohort Study*, 33 *Fam. Plan. Persp.* 206 (2001). Another study suggests that promiscuity and current sexual abuse may themselves be related: "Past and current victims of sexual abuse had had more sexual partners during the past year than their peers who had never been sexually abused." Tom Luster & Stephen Small, *Sexual Abuse History and Number of Sex Partners Among Female Adolescents*, 29 *Fam. Plan. Persp.* 204 (1997).