

Understanding Rape Shield Laws

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Rape law has been a site for the moral condemnation of women who have not led sexually chaste lives. 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. A chaste woman was considered more likely to have resisted the defendant's sexual advances and to have lodged a legitimate claim of rape. 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. 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. 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).

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. In the late 1970s and early 1980s, almost all jurisdictions in the United States adopted some form of rape shield statute. Legislators concluded that it was illogical to assume that the complainant consented to sexual intercourse with the defendant, or was more likely to lie under oath, simply because she had previously consented to sexual intercourse with someone else.

Despite the progress represented by the passage of rape shield laws, they were riddled with holes. All rape shield laws admitted evidence of the sexual history between the complainant and the defendant himself. Many of them admitted evidence of the sexual history between the complainant and third parties as well. 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.

Although most rape shield laws 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, 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," (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," or (3) when the exclusion of the evidence "would violate the constitutional rights of the defendant." The first, narrow exception is appropriate, especially when misidentification of the perpetrator is a common evidentiary issue in stranger and inter-racial rape cases.

The second and third exceptions to the federal shield (and to analogous state shields), however, render the armor defective. The second exception—the admission of sexual history with the defendant—cracks the shield because 62 percent of adult rapes are committed by prior intimates—spouses, ex-spouses, boyfriends, or ex-boyfriends. 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.

Types of Rape Shield Laws

In 1974, Michigan passed the first rape shield law in the United States. 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, (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

Forty-eight states and the District of Columbia eventually followed suit and enacted their own rape shield rules of evidence or statutes. 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. Legislated Exceptions Laws

Twenty-five of the nation's rape shield laws fall within the legislated exceptions approach. They contain general prohibitions on evidence of prior sexual conduct, subject to at least one legislated exception. 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; evidence of an alternative source of semen, pregnancy, or injury; evidence of a pattern of prior sexual conduct by the complainant; evidence of bias or motive to fabricate the sexual assault; evidence offered to prove that the accused had a reasonable but mistaken belief in the complainant's consent; and evidence of prior false accusations of sexual assault by the complainant.

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. 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 unique aspect of laws in this category is that each contains an additional, explicit exception based on the Constitution. The constitutional exception states that sexual history evidence will be admitted if a judge determines that its admission is required by the Constitution.

3. Judicial Discretion Laws

Nine states have rape shield laws 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. 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.

4. Evidentiary Purpose Laws

The final category 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. In California and Delaware, sexual history offered to prove the complainant's consent to sexual intercourse is prohibited, but sexual history offered to attack her credibility is admissible. 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.

Rape Shield Laws Fail to Defend Victims

Since their passage, federal and state rape shield laws have repeatedly failed to protect victims in many real cases. 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. Appropriately interpreted, two of the legislated exceptions—those for evidence of an alternative source of semen, pregnancy, disease, or injury, and evidence of bias or motive to fabricate—are supportable. The other legislated exceptions, however—prior pattern sexual conduct with third parties, prior sexual history with third parties to bolster a defendant's claim of a reasonable but mistaken belief that the victim consented, prior prostitution with third parties, and prior sexual conduct with the defendant—are unsupportable 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. Frequently, those courts have determined that the Constitution mandates a new exception beyond those authorized by statute.

A. 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, Florida, Minnesota, Nebraska, North Carolina and Tennessee. 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.

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. For example, *United States v. Kelly* involved a female soldier, Specialist L, who became inebriated with members of her unit "practically every weekend." 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. On the dance floor, Specialist L danced “very closely” with Kelly, rubbed her buttocks against him, and touched him in the genital area. Later, Specialist L returned to her barracks and passed out on her bed, fully clothed. She testified that she awoke to the feeling of Kelly’s penis already inside her vagina. She passed in and out of consciousness due to intoxication and tried to roll away to stop him. Kelly testified, by contrast, that Specialist L kissed him when she awoke and they engaged in consensual sex.

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. 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.” 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.” 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. Finally, he also wanted Hubbard to testify that, on the night in question, Specialist L had danced lewdly with him as well. However, the trial court applied the military rape shield rule (identical to the federal rape shield law), and excluded the evidence. Kelly was convicted of rape.

On appeal, the United States Army Court of Military Review reversed. 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.

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 they occurred with third parties on prior occasions. 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. 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.

Young women today 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. Sixty percent of girls in high school today have engaged in oral sex. Seventy percent of them have manually stimulated a partner's genitals. And half of them have engaged in sexual intercourse. Despite living in the age of AIDS, young women and men today engage in significant premarital sexual behavior.

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. 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." One third of them had engaged in sexual intercourse with someone in a hookup, and the research suggested that "some students are hooking up on a weekly basis." 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.

As a predictive matter of what is alleged to have occurred, 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. 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.

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. 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." Without a pattern of prior false charges, the answer is no. 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.

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. Such trauma, however, although real and often severe, 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. A 2002 study evaluated in detail jury decision-making in rape trials. 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." 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.

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."

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. A woman's failure to remain chaste increases the blame people assign to a woman who has been raped and decreases the blame they assign to the defendant.

Moreover, cases involving "patterns" of sexual behavior often involve women who frequent bars, parties, or other places where alcohol is served. 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. 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.

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. 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. 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.

Moreover, most juries are comprised not of relatively permissive college students, but of people who are substantially older than the average rape victim. More than 70% of all jurors are older than forty years of age. The average rape victim, however, is only twenty-four years old. 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. Because evidence of a prior pattern of sexual conduct is prejudicial and ordinarily irrelevant, rape shield laws should not allow for the categorical admission of such evidence.

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. 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. 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, and that belief was created by his knowledge of her loose sexual reputation or his knowledge of her prior sexual acts with third parties.

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* 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 of appellant's belief that the prosecutrix consented to his sexual overtures." 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.

Reasonableness is an objective standard that requires the defendant to be at least negligent. 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. 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. 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.”

An exception to a general rule of prohibition on prior sexual history with third parties when a defendant claims a reasonable, but mistaken, belief 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. Judges in numerous other jurisdictions, however, have admitted complainants’ prior prostitution convictions, despite the fact that their legislatures did not explicitly authorize such admissions. 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. Forty-eight percent of those prostitutes who were raped had been raped more than five times. 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.

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. I agree with scholars who have argued that deception vitiates a woman’s meaningful consent. 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. 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.

Many courts agree that evidence of the complainant’s prior prostitution with third parties should be admissible. *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.” The reviewing court did not discuss the facts of the prosecutor’s case-in-chief on the rape charge. 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.” The court then held that the woman’s seven-year old conviction for misdemeanor prostitution 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.” 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.” 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.

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 explained why it was holding that a complainant’s prior prostitution convictions should be admitted. 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,” 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.

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.” 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. In *State v. Johnson*, 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. Another woman testified that, on a different date, Johnson offered her a ride, drove her to a secluded area, and raped her. Johnson, on the other hand, claimed that what occurred with both women was consensual prostitution. In support of his position, he sought to admit evidence of the complainants’ prostitution with third parties.

According to the Supreme Court of New Mexico, “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. Prior false claims or threats of false claims, therefore, would be appropriately admitted. 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.”

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. In jurisdictions that have not legislated this exception, judges have created it. 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. 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." Because a full two-thirds of all rapes go unreported, however, one should not assume that reported rapes are representative of all rapes that occur. Of all rapes that occur, acquaintance rape actually outpaces stranger rape by four to one. Rape occurs in violent dating, cohabitating, and married relationships. Rape is a serious form of battering in a society in which domestic violence between intimates is widespread. Friends and acquaintances commit 53% of all rapes and sexual assaults. Intimates—husbands, boyfriends, former husbands, and former boyfriends—commit an additional 26% of all rapes and sexual assaults. 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. People harbor the "assumption that intercourse is normative within a close relationship," which "works to mitigate the perceived seriousness of steady date rape." 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.

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. 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 one scholar aptly put it, "the complainant's state of mind toward the particular defendant ... continued to the occasion in question." 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.

Another scholar also supported what she called the "universally recognized" allowance for prior sexual history between the complainant and the defendant. She argued that a "history of intimacies with the accused would ordinarily tend to bolster a claim of consent to yet another sexual encounter." 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, and 75% of rapes occur between those who are acquaintances or previous intimates. 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 of sexual intercourse is “yet another” similar sexual encounter. 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. 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 these scholars 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. In *State v. Alston*, 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 throughout the relationship when she refused to give him money or refused to do what he wanted.

She finally left him. Alston tracked her down at school, grabbed her, threatened to “‘fix’ her face so that her mother could see he was not playing,” and told her to come with him to his apartment because “he had a right to make love to her again.” When they got to his apartment, she said “no” and cried but he forced sex on her anyway. She made a complaint to the police on the same day. Some time later, Alston came to her apartment and threatened to kick the door down. She let him in, he carried her to the bedroom and,

although she initially resisted, she acquiesced to having sex. Based on the first episode, a jury convicted Alston of first-degree kidnapping and second-degree rape.

The Supreme Court of North Carolina reversed both convictions. 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. 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.” A number of commentators have criticized Alston for its analysis of the force element. 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. 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.

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 in some violence at the time of sexual intercourse.” 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.

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. 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. Abstinence-focused education teaches kids to eschew vaginal intercourse in order to maintain virginity and to avoid pregnancy and the transmission of HIV. 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. The more diverse sexual 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. 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 scholars have 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.

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. 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. 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. 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."

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. The researchers concluded, "after a woman has had as few as 10 prior consensual sexual 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." 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." 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.

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. 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. 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. 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. These limiting instructions did not alleviate subject bias: in fact, they had no impact on the subjects' evaluations of the cases.

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." If the defendant and the victim have previously had a sexual relationship, the jury

is often unwilling to convict. Prosecutors, for instance, consider a prior sexual relationship between the defendant and the complainant “a ‘real trump card for the defense.’” 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.’”

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. 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.

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. 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.

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 support a rape defendant’s claim of consent, despite its inadmissibility under the rape shield laws. Judges in these cases often conclude that the defendant’s rights under the Sixth Amendment to the Constitution demand that this evidence be admitted. Two judicially imposed exceptions are 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. 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. 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*. 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. They e-mailed each other repeatedly over a period of three months. The e-mails were flirtatious and made reference to both party's interest in sadomasochistic sexual practices. 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 her. She asked him not to burn her, demanded that he stop, screamed, and cried. Sexual intercourse ensued, which she claimed was rape and he claimed was consensual sadomasochism.

The "vast majority" of the e-mail correspondences between the two parties were admitted at the trial. 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. 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."

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. The Supreme Court of New York, Appellate Division, agreed with Jovanovic and reversed. 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. 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." 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.

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. 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 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.

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, 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 sadomasochists advocate extensive negotiation around consent, 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. 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.

In *State v. Colbath*, 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. 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.” 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. At Colbath’s trailer, sexual intercourse ensued. The woman alleged that it was forcible and against her will; Colbath claimed that it was voluntary and consensual. Colbath and the woman were then “joined unexpectedly” by Colbath’s girlfriend, who saw what was happening and violently assaulted the woman.

New Hampshire prosecuted Colbath for rape. The trial judge allowed Colbath to testify about the sexual attention that the woman had paid to him directly at the bar. The judge then had to decide how to address evidence of the sexual attention that the woman had directed at third parties that afternoon. 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. The rape shield law barred evidence of “prior consensual sexual activity between the victim and any person other than” the defendant. 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. The jury convicted Colbath of rape.

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.” The Supreme Court of New Hampshire reversed. Justice David Souter, then a justice on the state’s highest court, penned the opinion.

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.” 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.”

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.” As to the evidence itself, Souter reasoned:

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.

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.” 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.” 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.” He concluded, “the demand of the Constitutions is all the clearer when these activities were carried on in a public setting.”

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. 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. 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.” He then again contrasted her “public displays” with her “private behavior.” 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.

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.

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.” “It’s simulated sex on the dance floor,” said Miles Burrell, a school dance chaperone at Norristown Area High School in Pennsylvania. “Anybody with morals, who brings their kids up in any Christian family, would stop that kind of thing.” The teens, however, are nonplussed. 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.” 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 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. 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. 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. 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.

Model

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 intercourse will follow. She should be able to discuss sex or other personal subjects without implying that she is open to sexual advances, despite her objections. 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. 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.

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 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. 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. As Professor Catharine MacKinnon has pointed out, "consent is communication under conditions of inequality." 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. 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. 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. To the extent that prior sexual activity represents the authentic sexual aspirations of women and girls, the law should ignore it. 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.

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. For about 8% of women, their first experience of intercourse was not voluntary. However, characterizing sexual intercourse “as simply voluntary or involuntary is inadequate.” 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. 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. n68 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. They may engage in unwanted sex because of coercion 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. 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. 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. Boys and men engage in socially acceptable behavior when they collect female sexual partners seriatim. Men already have a sexuality license.

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. 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. Male sexual license authorizes verbal sexual coercion. 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. 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.

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.

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,” 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.

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 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. Therefore, the elements of the crime are: (1) sexual penetration; (2) force; and (3) nonconsent. 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 another man who battered her, as a way to explain the bruises she sustained. 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. 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.

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. 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.

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 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*, 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. 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 belief in the complainant’s consent to sexual acts in the future—that is, on the instance in question. 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.

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. 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 custom and practice constitute a negotiation. Take the Alston case, discussed earlier, as an example. 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.

This case involved evidence of a custom and practice, to be sure, but no negotiation, just brute domination by Alston. 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.” 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.” 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 bias or motive to fabricate will often constitute the core of his defense.

A complainant’s prior false allegations of rape or threats to falsely allege rape would fall within this exception. 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. The defendant claimed that she had a motive to accuse him falsely of rape. 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.

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.

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. 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.