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Real Women, Real Rape

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ABSTRACT

There are several reasons to find rape shield laws troubling. From the point of view of many defense lawyers and civil libertarians, rape shield laws, by curtailing a defendant's ability to offer evidence of an accuser's prior sexual conduct, unfairly circumscribe a defendant's right to confront witnesses and present relevant evidence in his defense. By contrast, rape shield proponents argue that rape shield laws are too weak and are so riddled with exceptions that they amount to little more than sieves. This Article calls attention to two other problems with rape shield laws—problems that can be traced to the very enactment of rape shield laws but that for the most part have remained hidden, unnoticed, and unremarked on. The first problem concerns the expressive message implicitly communicated by rape shield laws: that jurors should assume the complainant is a virgin, or at least notionally a good girl, and thus deserving of the law's protection. Because of rape shield laws, any suggestion that women may lead healthy sexual lives is quietly pushed to the side and corseted. In short, the concern is that in pushing for rape shield laws feminists, victim rights advocates, and prosecutors have reinscribed the very chastity requirement they hoped to abolish. The second problem is what I term expressive message failure, which occurs when a rape shield's message conflicts with preexisting rape scripts: those assumptions we have about what rapists look like, what constitutes rape, and most importantly here, what rape victims look like. The Article sketches out solutions to these specific problems and gestures toward a broader solution to tackle other flaws with rape shield laws.

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TABLE OF CONTENTS

INTRODUCTION

There are several reasons to find rape shield laws troubling. From the point of view of many defense attorneys and civil libertarians, rape shield laws, by curtailing a defendant's ability to offer evidence of a victim's prior sexual conduct, unfairly circumscribe a defendant's Sixth Amendment right to confront witnesses and present relevant evidence in his defense.[1] To make matters worse, many jurisdictions have now coupled rape shield laws with what amounts to rape sword laws—laws that specifically allow the prosecution to introduce evidence of a defendant's sexual history as proof of his[2] character or propensity.[3] Defense attorneys and civil libertarians would argue that these rules not only tip the scales against innocence. They also frustrate the truth-finding process, undermine the notion of innocent until proven guilty, and result in miscarriages of justice.

For entirely different reasons, rape shield proponents have also found rape shield laws wanting. Despite the best intentions of feminist scholars, victim rights advocates, and prosecutors, rape shield laws have failed to protect the privacy of women, put an end to what historically amounted to a chastity requirement, and level the playing field at trial.[4] From their perspective, the rape shield laws are so riddled with exceptions that they amount to sieves.[5]

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1. *See, e.g.*, David S. Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1, 14–46 (1976); J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980); *see also* Frederick Eisenbud, Note, *Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflection of Reality or Denial of Due Process?*, 3 HOFSTRA L. REV. 403, 419–25 (1975).
2. This Article focuses, at least initially, on cases involving male defendants and female complainants. This is not to suggest that male-on-male rape is not significant. As I have argued elsewhere, once we include prison populations, the frequency of male victim rape is staggering and deserves much more attention. *See* Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259 (2011). Female perpetrator–male victim rape is also a problem. In fact, a significant portion of child sexual abuse victims identify their abusers as female. Moreover, as the recent prosecution of female officer Lynndie England in connection with abuse at Abu Ghraib should make clear, women are not above sexually abusing adult men. For a discussion of female perpetrator–male victim rape, see the chapter "Female Perpetrators; Male Victims" in Joanna Bourke's *Rape*. JOANNA BOURKE, RAPE: SEX, VIOLENCE, HISTORY 204–37 (2007).
3. *See, e.g.*, FED. R. EVID. 413.
4. *See, e.g.*, BOURKE, *supra* note 2, at 404 ("Rape shield laws are a good example of a reform that has had less impact in practice than hoped."); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1199 (1997) (concluding that rape law reforms have "generally had little or no effect on the outcomes of rape cases"); *see also* Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 134 (1996) (observing that rape shield laws "have been notably unsuccessful in achieving their aims").
5. Rape shield laws have been applied haphazardly and incoherently. As Michelle Anderson observed a decade ago, "Cases managed to slip past rape shields when they involved women previously in-

Nearly thirty-five years after passage of the federal rape shield law and a host of state cognates, these problems alone should be enough to raise questions about the continuing viability of rape shield laws. This Article calls attention to two other problems. Though the issues raised here can be traced to the very enactment of rape shield laws, for the most part they have remained hidden, unnoticed, and unremarked on. The first problem concerns the expressive message communicated by rape shield laws. Though rarely made explicit, the message to jurors sitting on rape trials is that they should assume that the complainant is a virgin, or if not a virgin, at least notionally a good girl, and thus deserving of the law's protection. Because of our rape shield laws, any suggestion that women may lead healthy sexual lives is quietly pushed to the side and corseted. More problematic, any suggestion that all women deserve the law's protection, including women who are sexually active, is suppressed. Instead, women are conscripted as idealized women—as cardboard cutout women—chaste and pure and simple. As such, the first problem is not that rape shields do not work. The first problem is the effects that attend rape shields when they succeed.[6]

The second problem with rape shield laws stems from the first but, because it results from what I call *expressive message failure*, tugs in a different direction. While the normative message of rape shield laws is that rape victims are good girls and thus deserving of the law's protection, this message can fail if it conflicts with preexisting rape scripts: those assumptions we hold about what rapists look like, what constitutes rape, and most important here, what rape victims look like. If the supposedly ideal rapist remains a male stranger who jumps out of the bushes, preferably black and wielding a knife,[7] there is also a supposedly ideal

timate with the defendant, women who frequented bars to attract new sexual partners, prostitutes, or other women deemed similarly promiscuous." Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 55 (2002). Beyond these problems, rape remains perhaps the most underreported crime, and conviction rates, whether by plea or following trial, remain abysmally low. *See* Bryden & Lengnick, *supra* note 4, at 1210, 1220.

6. While rape shield rules, because of their exceptions, have proved more porous than their sponsors initially expected, this is not to suggest that the shield never applies. More to the point, studies show that when shields are applied, they have been extremely effective at excluding evidence of a complainant's sexual history. *See* CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 129–30 (1992).

7. *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 600 (1990); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 365 (1993); *see also* I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345 (2010); Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 865 (2002) ("The traditional paradigm of rape remains that of the stranger attack, of a

rape victim: young, attractive, white, female, and chaste.[8] In practice, this means that while some women might ostensibly benefit[9] from rape shield law's expressive message, this advantage does not extend to other women who, because of race or class or some other trait, do not fit the ideal victim script. In these cases, when a rape shield law conceals evidence of a complainant's sexual history, jurors may fall back on default assumptions diametrically at odds with the rape shield law's expressive message. In short, if the question is, "Are rape shields good for all women?" the answer seems to be a resounding no.

This Article's argument is unconventional, to be sure. Feminist legal scholars writing about rape tend to argue that rape shields need to be strengthened and loopholes closed.[10] Michelle Anderson argues that the rape shield exception for prior sexual activity between the accuser and the accused should be eliminated.[11] In a similar vein, Deborah Tuerkheimer is critical of the exception that many courts allow for so-called pattern evidence, which permits defendants to introduce evidence of a complainant's sexual history in cases in which that history suggests a pattern of promiscuous behavior.[12] These suggestions are not wrong by any means. But they do fall short, if only for the reason that they sidestep the more fundamental question about whether rape shields are good for women in the first place. They certainly sidestep the issue of how rape shields might affect real women.

This Article proceeds as follows. Part I provides a brief overview of rape law and the evidentiary rules that worked in tandem with rape law prior to the

man lurking in the dark . . . who grabs an unsuspecting female, takes her to a remote location, and violently attacks her . . . .").

8. *See, e.g.*, Capers, *supra* note 2, at 1306; Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 587 (2009) ("[T]he law [in the late-nineteenth to early-twentieth century] required 'true' victims to be ultimately innocent ladies who would rather fight to the death than give up their virginity."); Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1587 (2007) ("Traditionally, successful rape allegations involved a virtuous, ideally virginal woman, who is attacked by a creepy stranger."); *cf.* Nils Christie, *The Ideal Victim*, *in* FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM 17 (Ezzat A. Fattah ed., 1986).

9. Of course, any supposed benefit is not cost free. The cost to the complainant is that she must adhere to a gendered, good-girl script to secure a conviction. The cost to women in general is the continued privileging of modesty.

10. *See, e.g.*, Cassia Spohn & Julie Horney, *"The Law's the Law, but Fair Is Fair:" Rape Shield Laws and Officials' Assessments of Sexual History Evidence*, 29 CRIMINOLOGY 137, 156 (1991) (surveying an array of shields and noting the "importance of passing strong rape shield laws if victims are to be afforded any protection").

11. Anderson, *supra* note 5, at 118–30; *see also* Michelle J. Anderson, *Time to Reform Rape Shield Laws: Kobe Bryant Case Highlights Holes in the Armor*, CRIM. JUST., Summer 2004, at 14.

12. Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461 (2012).

1970s to impose, in effect, a "chastity requirement."[13] To enforce this requirement, courts allowed defendants to cross-examine a rape complainant about her prior sexual history, to introduce testimony about her reputation for chastity, and in some cases, to prove her sexual history by calling her prior sexual partners as witnesses. In fact, these rules functioned as a juridical finger on the scale, tipping the scale toward innocence. Part I then traces the agitation for change that began in the 1970s and set the stage for the widespread enactment of rape shield laws.

Part II examines the most well-known rape shield law, Federal Rule of Evidence 412.[14] Part II also examines Federal Rule of Evidence 413, a rape sword rule, which further shifts the balance in rape cases by expressly permitting evidence of a defendant's sexual history. Part II then turns to several cases that illustrate how Rules 412 and 413, and their state cognates,[15] operate in practice to cast complainants as invariably good and to cast defendants as intrinsically and indelibly bad.

This turn of events—from the framing of trials as pitting bad women against good men, to the current framing of trials as pitting good women against bad men—is the subject of Part III. This turn is bad not only for defendants accused of rape. It is also bad for most rape victims and for the very law of rape itself.[16] As rape scholars have observed, the success of rape prosecutions often

13. Anderson, *supra* note 5, *passim*.

14. Although federal courts have jurisdiction over only a small fraction of rape cases, this Article focuses on the federal rule for two reasons. First, it is the most well-known rape shield rule. Second, its basic parameters share similarities with state rape shield rules. Indeed, all rape shield rules share Rule 412's basic assumption that a rape complainant's sexual history is generally irrelevant and unduly prejudicial in determining whether a defendant is guilty or not guilty. *See* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 773 (1986) (observing that state rape shield statutes, notwithstanding their variety in scope and procedural detail, share as a "single common feature . . . a rejection of the previous automatic admissibility of proof of unchastity").

15. Every state now has some version of a rape shield. By contrast, only a handful of states have cognates to Rule 413, the rape sword. *See* ALASKA R. EVID. 404(b)(2)–(3); ARIZ. REV. STAT. ANN. § 13-1420 (2010); ARK. CODE ANN. § 16-42-103 (2011); CAL. EVID. CODE § 1108 (West 2009); 725 ILL. COMP. STAT. ANN. 5/115-7.3 (West Supp. 2012); LA. CODE EVID. ANN. art. 412.2 (2006).

16. To be clear, I do not mean to suggest that rape shields made things worse. My point is that rape shields came with very real costs, and the consequences are far more complex than a simple determination of "better" or "worse." What is clear is this: Rather than subverting the chastity requirement, rape shields reinforced it. Rather than benefiting all victims, rape shields primarily benefited women who, but for their sexual history, already fit the ideal-victim script. Rather than benefiting all women, or real women, rape shields further entrenched a hierarchy of women. Rather than protecting all women, rape shields merely moved the virtual dividing line between good women and bad women, allowing more women, through the concealment of their sexual activity, to appear on the good women side of the divide.

depends on how closely an alleged rape hews to certain accepted rape narratives. While in theory rape shield rules facilitate these narratives for all women, in fact only a fraction of women likely benefit. Moreover, rape shield rules facilitate these narratives at the cost of reinscribing a type of chastity requirement that harms all women.

The Article concludes, in Part IV, by suggesting reforms that would mitigate the pitfalls of our current rape shield and rape sword rules while also calling for a wholesale reexamination of those rules. I conclude with some reflections on the dismissal of the recent high-profile sexual assault case against the former head of the International Monetary Fund, Dominique Strauss-Kahn.

Ultimately, my argument has implications that extend beyond rape shield rules to criminal law and evidentiary rules in general, and to the broader feminist agenda of reform. For starters, it calls into question the advisability of creating evidentiary rules that are specific to rape and sexual assault cases.[17] Just consider: No other crime has its own set of evidentiary rules. Of course, many feminists would argue that such rules are necessary because "rape is different,"[18] but that argument, standing alone, cannot possibly justify different rules. To be sure, rape is different, but so is terrorism, so is espionage, so is blackmail, so is insider trading, and so is jaywalking. More to the point, to create special rules for rape reifies gender inequality rather than combating it.

But that is a larger argument. For now, in this Article, my immediate contention is that rape shield laws are bad for women. Although they may appear to benefit all women, in fact they benefit only some—women who because of age and race and class can easily pass as chaste and worthy of the law's protections.[19] But beyond this is another more fundamental problem: When rape shields do work, they do so at extraordinary cost, reinscribing the very chastity requirement that they were intended to abolish.

17. In fact, special rules have always existed for rape cases. The common law applied a certain set of rules in rape cases to benefit certain men, some of which were codified in the original Federal Rules of Evidence in 1975. *See, e.g.*, FED. R. EVID. 404(a)(2). The rape shield and rape sword rules, in turn, were created to benefit women. While the effect of rules has changed, what has been consistent is the existence of special rules. For a critique of the notion that rape victims need a special legal regime, see Tracey A. Berry, *Prior Untruthful Allegations Under Wisconsin's Rape Shield Law: Will Those Words Come Back to Haunt You?*, 2002 WIS. L. REV. 1237.

18. *E.g.*, Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 7–10 (1977) (discussing how rape is "different").

19. To a large extent, this argument dovetails the work of feminist theorists who have noted that reforms undertaken to benefit all women sometimes reflect only the experience of white, middle-class women and ignore intersections of race, class, and gender. *See, e.g.*, ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989); Harris, *supra* note 7.

Allow me to put this differently. When I began this project, what immediately stood out was that rape shield laws have not equally benefited black and Hispanic and Asian women, and in fact may leave them in a worse position than they would be without rape shield laws. The more I considered the impact of rape shield laws, the more it became obvious that rape shield laws are bad for all rape victims. And they are bad for the rest of us, too.

I. BEFORE THE REVOLUTION

To fully understand the story of the law of rape in this country, one must understand not only the black letter law of rape (which, prior to the 1970s, was deceptively simple) and its application (which, prior to the 1970s, was anything but simple). One must also understand how evidentiary rules worked in tandem with the law of rape to tilt the scales against complainants, casting complainants as bad women and defendants as good men, at least in intraracial rape cases.[20] This Part accordingly begins with an overview of the black letter law of rape, and the evidentiary rules that worked in tandem with that law, prior to the advent of rape shield laws in the 1970s. It then describes the agitation for change that led to the widespread passage of rape shield laws.

A. Bad Women, Good Men

The black letter law of rape has always been deceptively simple.[21] At English common law, rape was defined as "carnal knowledge of a woman forcibly and against her will,"[22] and included three basic elements: vaginal intercourse, force, and nonconsent.[23] American jurisdictions adopted these basic elements, and even today, most rape statutes have these elements as their foundation.[24]

But even this early substantive law—at least as interpreted by courts at the time—weighed in favor of defendants. Courts interpreted the force element as requiring more than just proof that the defendant used force to obtain sex.

20. As Anderson has observed, rape jurisprudence in the nineteenth century reflected two major goals: "to continue to protect white female chastity when a rape complainant embodied it; otherwise, to protect men from false accusers." Anderson, *supra* note 5, at 69 (footnote omitted). The scales were, of course, tipped the other way in cases in which the defendant was black, and the complainant white. *See generally* Capers, *supra* note 7.

21. Although the definition of rape has been relatively simple, the definition "really explains very little." JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 897 (5th ed. 2004).

22. 4 WILLIAM BLACKSTONE, COMMENTARIES *210.

23. *See* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 318 (7th ed. 2001).

24. *Id.*

Courts also required proof that the complainant responded to his force with force of her own. As such, rape was one of the few crimes for which the actions of the defendant alone were insufficient to satisfy the elements of the crime. His force might render him guilty of assault or battery, but it would not render him guilty of rape unless there was also a specified reaction from the victim: utmost resistance.[25] Both the quantity and the quality of her response were put on trial, deliberated over, and adjudicated. Indeed, proof of her response was necessary for two elements: to prove that the defendant's force was really force and to prove that the victim's nonconsent, no matter how many times expressed verbally, was really nonconsent.[26] As one court put it, "Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated."[27] Or as another court put it in explaining the utmost resistance requirement, "[I]f a woman, aware that it will be done unless she does resist, does not resist to the extent of her ability on the occasion, must it not be that she is not entirely reluctant?"[28] In short, early rape law allowed men something akin to a "woman's failure of actus reus defense."[29]

While courts viewed this resistance requirement as necessary to determine whether, in fact, a forcible rape had occurred, something else was also at stake. Although never stated as such, at least not explicitly, the resistance requirement also served a gatekeeping function: It distinguished supposedly good women from supposedly bad women. The assumption, after all, was that since rape was a fate worse than death,[30] good women would "follow the natural instinct of every proud female"[31] to physically resist her attacker "until exhausted or overpowered"[32] or, as another court put it, "resist[] the attack in every way possible . . .

25. *See* KAPLAN ET AL., *supra* note 21, at 904.
26. Throughout the nineteenth century, many scholars believed that a resisting woman could not be raped by a single man, or as it was often put colloquially, that it was "impossible to sheath a sword into a vibrating scabbard." BOURKE, *supra* note 2, at 24. These beliefs persisted throughout the twentieth century, though they appeared less frequently. For a discussion of these beliefs, see *id.* at 24–28.
27. Brown v. State, 106 N.W. 536, 538 (Wis. 1906).
28. People v. Dohring, 59 N.Y. 374, 384 (1874).
29. Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 36 (1998).
30. *See, e.g.*, Corey Rayburn, *Better Dead Than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119 (2004).
31. State v. Rusk, 424 A.2d 720, 733 (Md. 1981) (Cole, J., dissenting).
32. *Dohring*, 59 N.Y. at 386.

until she was overcome by force, was insensible through fright, or ceased resistance from exhaustion, fear of death or great bodily harm."[33]

But it was not just the substantive elements, and the way courts interpreted them, that tipped the scales in favor of defendants. It was also evidentiary rules that courts applied.[34] Several states penalized women who did not complain promptly and required independent corroboration of a complainant's account.[35] Indeed, the prompt complaint and independent corroboration requirements were viewed as so necessary for protecting defendants against unfounded accusations that the drafters of the Model Penal Code, considered quite progressive at the time,[36] included both requirements in their sexual assault provisions.[37]

Most importantly, the common law allowed defendants to cross-examine a complainant about her sexual history, to introduce testimony regarding the complainant's reputation for chastity, and in some cases, even to call a complainant's prior sexual partners as witnesses.[38] In effect, these common law evidentiary rules allowed defendants to turn the tables. No longer was the defendant the only one on trial. Also on trial was the complainant, to determine whether she was the type of woman who consents, the type of woman to lie about it, and hence the type of woman who should not be protected by the law,[39] at least not at the expense of a presumptively good man. These rules, which harken back to Biblical distinctions between the rape of a virgin and the rape of a nonvirgin, served to put the complainant on trial.[40]

33. King v. State, 357 S.W.2d 42, 45 (Tenn. 1962).
34. *See* Hunter, *supra* note 4, at 155 ("[P]olicymakers and judges developed special evidentiary rules, such as corroboration requirements, cautionary instructions, and the prompt complaint doctrine, to guard against the possibility that an innocent man would be convicted on the word of a vindictive, lying woman." (footnote omitted)); *see also* LISA M. CUKLANZ, RAPE ON TRIAL: HOW THE MASS MEDIA CONSTRUCT LEGAL REFORM AND SOCIAL CHANGE 18 (1996) ("Although the defendant was presumed innocent until proven guilty, the victim's claim was under suspicion until she was proven to have the narrowly defined characteristics of chastity and virtue that could then establish her as a 'legitimate victim' of rape.").
35. *See generally* Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972).
36. *See* MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 6–22 (2002).
37. *See* MODEL PENAL CODE § 213.6(4)–(5) (1985).
38. *See* Anderson, *supra* note 5, at 69.
39. Although the cases framed the issue as one of legal relevance—to the existence of consent and to the issue of veracity—the normative message was clear. As Michelle Anderson put it, "Women heard the rules: If you want the criminal law to vindicate you if you are raped, you better have led an unsullied sexual life." *Id.* at 54.
40. Deuteronomy, for example, treats the rape of a virgin as a civil offense allowing recompense to the virgin's father. No such penalty accompanies rape of a nonvirgin. *See Deuteronomy* 22:23–29. For more on the Judeo-Christian origins of the chastity requirement in American rape law, see Anderson, *supra* note 5, at 61–69.

The stated rationale for allowing evidence of a complainant's sexual history was twofold. One, courts allowed such evidence on the theory that a woman who had consented to sex once possessed a "character for unchastity"[41] and thus was more likely to have consented to sex on the occasion in question.[42] Put differently, prior sexual activity was probative of consent.[43] In fact, not only was she more likely to consent again, but she was more likely to have consented with the defendant, notwithstanding her claim to the contrary. As an oft-cited early-nineteenth-century case put it,

> In [a rape] case the material issue is on the willingness or reluctance of the prosecutrix . . . . [N]o court can overrule the law of human nature, which declares that one who has already started on the road of prostitution, would be less reluctant to pursue her way, than another who yet remains at her home of innocence, and looks upon such a [pursuit] with horror. . . . [W]ill you not more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretia?[44]

Though other cases were less colorful in their language, their reasoning was the same. For example, in *State v. Johnson*,[45] the court stated, "In determining [the question of consent], . . . it is important to ascertain whether her consent would, from her previous habits, be the natural result of her mind, or whether it would be inconsistent with her previous life, and repugnant to all her moral feelings."[46] The court in *People v. Johnson*[47] offered a similar justification:

41. 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 924–924a, at 458–60 (3d ed. 1940); *see also* State v. Wood, 122 P.2d 416, 418 (Ariz. 1942).

42. *See* Anderson, *supra* note 5, at 54. As Anderson observes,

> Consent was . . . , in practice and effect, transferable to other parties: if a woman consented to sexual intercourse with men to whom she was not married, she was deemed indiscriminate in her sexual life. As a result, her sexual consent lost its differentiated and unique nature and she was considered to have functionally consented to sex with others.

Id. (emphasis omitted).

43. *See* Galvin, *supra* note 14, at 783; *see also* FED. R. EVID. 404(a)(2) & advisory committee's note; 3 WIGMORE, *supra* note 41, § 924a, at 459.

44. People v. Abbot, 19 Wend. 192, 194–96 (N.Y. Sup. Ct. 1838). Although the court refers to the prosecutrix as being on the "road to prostitution," the court may have simply viewed this as the likely fate of any woman who engaged in sex outside of marriage. This reading is consistent with the court's later statement: "[A]n isolated instance of criminal connection [i.e., fornication] does not make a common prostitute. . . . [I]t only makes a prostitute." *Id.* at 196.

45. 28 Vt. 512 (1856).

46. *Id.* at 514.

47. 39 P. 622 (1895).

> This class of evidence is admissible for the purpose of tending to show the nonprobability of resistance upon the part of the prosecutrix; for it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed.[48]

Thus, even in a stranger rape case, a complainant could be subjected to questions about whether she had had intercourse before, how many times, how old she was when she had intercourse for the first time, and with how many men.[49] Defense lawyers relied on this common law rule to also question complainants about their use of contraceptives, whether they frequented bars or nightclubs, and even their association with blacks.[50]

The second rationale for allowing evidence of a complainant's prior sexual conduct was to cast doubt on her veracity as a witness.[51] As one scholar noted, the assumption was that "promiscuity imports dishonesty."[52] A woman's lack of chastity (in many states enough to make her guilty of the crime of fornication)[53] was probative of untruthfulness—not because an unchaste woman was more likely to lie to conceal her lack of chastity, but because lack of chastity was lower on the scale of depravity than untruthfulness. As an early court put it, a woman "could not have ruthlessly destroyed that quality [of chastity] upon which most other good qualities are dependent, and for which, above all others, a woman is reverenced and respected, and yet retain her credit for truthfulness unsmirched."[54] Courts allowed defendants to cross-examine complainants about

48. *Id.* at 623.
49. *See, e.g.*, People v. Walker, 310 P.2d 110, 114 (1957) (holding that these questions were proper and should have been allowed).
50. *See* Berger, *supra* note 18, at 14–15 nn.90 & 92.
51. *See, e.g.*, Frank v. State, 150 Neb. 745, 753 (1949); 3 WIGMORE, *supra* note 41, § 924a, at 459; *see also* Anderson, *supra* note 5, at 88–89; Galvin, *supra* note 14, at 787; Leon Letwin, *"Unchaste Character," Ideology, and the California Rape Evidence Laws*, 54 S. CAL. L. REV. 35, 46 (1980) (observing that sexual laxity was viewed as indicative of other character traits such as lack of honesty). Of course, disentangling the issue of consent from the issue of a witness's credibility about consent is notoriously difficult, as several scholars have observed. Galvin put it nicely: "Evidence that establishes consent by the complainant will simultaneously impeach her credibility, and evidence that impeaches her credibility will raise the likelihood of consent." Galvin, *supra* note 14, at 775–76.
52. Berger, *supra* note 18, at 16.
53. *See generally* Coughlin, *supra* note 29.
54. State v. Coella, 28 P. 28, 29 (Wash. 1891). For a persuasive argument that the linkage between a woman's chastity and her truthfulness is traceable to historical assumptions about honor—a woman's honor depended on her chastity, while a man's honor depended on his being true to his word—that first developed outside of rape law, see Julia Simon-Kerr, Note, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854 (2008).

their prior sexual activity as probative of the issue of credibility, much as Rule 608(b) of the current Federal Rules of Evidence would allow a defendant to attack a witness's character for truthfulness by cross-examining her about specific instances of conduct that are "probative of the character for truthfulness or untruthfulness."[55] Tellingly, the assumption that lack of chastity was probative of mendacity was gender-specific; no such assumption applied to male witnesses. The Missouri Supreme Court explained the distinction this way: "It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman."[56] The belief in a connection between chastity and veracity in women continued well into the twentieth century. Even John Henry Wigmore, the esteemed jurist, assumed a connection. According to Wigmore, there is "at least one situation in which chastity may have a direct connection with veracity, viz. when a woman or young girl testifies as a complainant against a man charged with a sexual crime."[57]

At the same time that evidentiary rules enabled defendants to cast their accusers as bad women, or at least narrow the law's protection to virginal and hence deserving women, the generally applicable rules against character evidence typically allowed defendants to present themselves to factfinders as good men, notwithstanding actual evidence to the contrary. While the complainant's sexual history was fodder for defense lawyers, the defendant's sexual history was generally off limits.[58] At least when it came to white men, conviction was nearly impossible unless the men were obviously "despicable cads, unfit for citi-

55. FED. R. EVID. 608(b).

56. State v. Sibley, 33 S.W. 167, 171 (Mo. 1895). In explaining why the chastity–truthfulness connection did not apply to men, the court observed: "Adultery has been committed openly by distinguished and otherwise honorable members [of the bar] as well in Great Britain as in our own country, yet the offending party has not been supposed to destroy the force of the obligation which they feel from the oath of office." *Id.* (alteration in original) (quoting Bank v. Stryker, 1 Wheeler Crim. Cas. 332). A California court made a similar distinction, observing that "the sin of [being unchaste] in a man is compatible with the virtue of veracity, while in the case of a woman, common opinion is otherwise." Sharon v. Hill, 26 F. 337, 360 (C.C.D. Cal. 1885). For an excellent discussion of *State v. Sibley*, see Simon-Kerr, *supra* note 54, at 1881–83.

57. 3 WIGMORE, *supra* note 41, § 924a, at 459. For a critique of Wigmore's views, see Leigh B. Bienen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence*, 19 CAL. W. L. REV. 235 (1983).

58. *See, e.g.*, State v. Kirsch, 662 A.2d 937, 941–44 (N.H. 1995); *see also* United States v. Mound, 157 F.3d 1153, 1153 (8th Cir. 1998) (Arnold, J., dissenting) (noting in a sexual assault case the "centuries-old legal tradition that views propensity evidence [against defendants] with a particularly skeptical eye").

zenship."[59] Even if the defendant had been accused of rape or sexual assault before, this information was deemed unduly prejudicial.[60]

All this served to frame rape trials as pitting bad women against good men.[61] All this served to tip the scales in a way that benefited these men to the detriment of women.

B. Agitation for Change

Feminists responded to these weighted scales by pushing for legal reforms.[62] The result was nothing short of a full-scale revision of existing rape law. Many of these changes were substantive,[63] but feminists also secured evidentiary changes as well, such as the elimination of the requirement that a complainant's testimony be corroborated.[64] Even more important, however, was the enactment of rape shield laws.

The story of rape shield laws' passage has been told before.[65] What has been glossed over, however, is the speed at which such laws were passed and the urgency with which feminists pressed for passage and warned against long deliberation. In Michigan for example, the Michigan Women's Task Force on Rape

59. PEGGY REEVES SANDAY, A WOMAN SCORNED: ACQUAINTANCE RAPE ON TRIAL 93 (1996) (discussing, in particular, rape in the eighteenth century). For example, a nationwide study of nonaggravated acquaintance rape cases between 1954 and 1958 found that jurors returned convictions in just 7 percent of the cases. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 249–55 (Legal Classics Library 1993) (1966). For a discussion of similar findings in nonnationwide studies, see Bryden & Lengnick, *supra* note 4, at 1251.

60. *See, e.g.*, Alford v. State, 266 S.W.2d 804 (Ark. 1954) (reversing trial court's admission of complainant's testimony that defendant had tried to rape her before); Harris v. State, 204 P.2d 305 (Okla. 1949) (holding it error to admit evidence of defendant's attempted rape of another woman); Thompson v. State, 327 S.W.2d 745 (Tex. 1959) (holding it reversible error to admit evidence that defendant previously attempted to rape another woman).

61. Of course, if a woman was able to meet this image of chastity, then the exclusion of evidence to the contrary could work to her benefit. *Cf.* Packineau v. United States, 202 F.2d 681, 685 (8th Cir. 1953) (finding that the defendant had been unfairly disadvantaged by the exclusion of evidence about the complainant's sexual history, since its absence likely misled the jury in a case in which the complainant gave the impression of being "a very refined girl").

62. *See generally* SPOHN & HORNEY, *supra* note 6, at 20–21 (describing the role feminists groups, including the National Organization for Women, played in lobbying state legislatures to reform rape law).

63. For example, various jurisdictions limited or abolished the resistance requirement, redefined rape in gender-neutral terms, abolished the marital immunity rules, and added degrees to the offense of sexual assault. *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 618, 632–33 (4th ed. 2006).

64. For a discussion of this requirement, see Armand Arabian, *The Cautionary Instruction in Sex Cases: A Lingering Insult*, 10 SW. U. L. REV. 585 (1978).

65. *See, e.g.*, Anderson, *supra* note 5; *see also* SUSAN CARINGELLA, ADDRESSING RAPE REFORM IN LAW AND PRACTICE (2009); SPOHN & HORNEY, *supra* note 6.

played a critical role in securing quick passage of a rape shield law and other rape reforms.[66] Its call for action bears repeating:

> The problem of rape is rapidly approaching epidemic proportions. Michigan legislators have a unique opportunity and a pressing responsibility; immediate legal reform [is necessary] to prevent the rape epidemic before it happens . . . . This must be done without delay and ahead of any comprehensive criminal code reform. Without prompt action on this crisis, hundreds of people will be assaulted while the assaulters continue to virtually go free from any threat of conviction. This certainty far outweighs the uncertain benefits of more years of deliberation.[67]

Heeding the Task Force's call to forgo real deliberation, the Michigan legislature passed the country's first rape shield law,[68] which in turn served as a model for other states.[69] Within two years, more than half the states had adopted some type of rape shield.[70]

Three other aspects of the quick passage of rape shield laws merit discussion. First, in pushing for rape reforms, feminists allied themselves not only with the state but with the state's coercive power and, in doing so, played a role in the ratcheting up of criminal laws and harsher punishments. In pushing for

66. *See, e.g.*, Jan BenDor, *Justice After Rape: Legal Reform in Michigan*, *in* SEXUAL ASSAULT: THE VICTIM AND THE RAPIST 149, 149–51 (Marcia J. Walker & Stanley L. Brodsky eds., 1976). According to BenDor's account, the Michigan Women's Task Force began with a meeting of nonlawyer women in June 1973. The women reached out to Virginia Nordby, then a part-time instructor at Michigan Law School, for help, and Nordby in turn enlisted several of her students to help draft a proposed law. Within six months, the Michigan Women's Task Force had a preliminary statute in draft form, which was adopted as a proposed bill in February 1974. *Id.* Although there is no legislative history of the various discussions, *see* Cristina Carmody Tilley, *A Feminist Repudiation of the Rape Shield Laws*, 51 DRAKE L. REV. 45, 55 (2002), it is known that the proposed reforms were approved by the legislature on July 13, 1974, near the end of its session. BenDor, *supra*, at 149.

67. MICH. WOMEN'S TASK FORCE ON RAPE, BACKGROUND MATERIAL FOR A PROPOSAL FOR CRIMINAL CODE REFORM TO RESPOND TO MICHIGAN'S RAPE CRISIS 1 (1973).

68. It provided, in relevant part, the following:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted . . . unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor, [or]
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

MICH. COMP. LAWS ANN. § 750.520j(1) (West 1991).

69. *See* CUKLANZ, *supra* note 34, at 3.

70. Galvin, *supra* note 14, at 765 n.3. For a list of these state reform laws, see Berger, *supra* note 18, at 32 n.196.

reforms that would make prosecuting rape cases easier, feminist reformers found ready allies in police departments and district attorneys' offices.[71] To borrow from Aya Gruber, "As the United States became more and more punitive, feminists hopped on the bandwagon by vigorously advocating reforms to strengthen the operation of criminal law to combat gendered crimes."[72]

Second, feminists joined this alliance at a time when rape law, which surely disadvantaged female complainants,[73] also disadvantaged nonwhite men.[74] Between 1930 and 1967, 89 percent of all of the men *officially* executed for rape in the United States were black.[75] Even more telling, the overwhelming majority of these executions—85 percent—involved a particular dyad, black male defendants and white female victims.[76] Indeed, a black man found guilty of raping a white woman was eighteen times more likely to receive a death sentence than an offender in any other offender–victim dyad.[77] In their effort to

71. SPOHN & HORNEY, *supra* note 6, at 20 (noting that feminists "were joined in their efforts by crime-control advocates, notably police and prosecutors" and that together "these groups formed a powerful, although perhaps ill-matched, coalition for change").

72. Gruber, *supra* note 8, at 583. For additional critique of this alliance and the "subsumption of the feminist movement into the state's goal of managing undesirables," see Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 825 (2007). *See also* Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 412 (1998) ("Many feminists . . . have allied themselves with political conservatives. . . . Strange bedfellows like this can produce unwanted offspring."); Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 340–42 (2006); Dianne L. Martin, Commentary, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 OSGOODE HALL L.J. 151, 158–59 (1998).

73. Even this disadvantage must be qualified. While most rape complainants were disadvantaged as women, they were also advantaged as white. "Even as a female perspective on rape was validated in legal statutes, it continued to favor the dominant white culture through preferential treatment of European-American defendants and a disproportionate disregard for the word of African-American victims." CUKLANZ, *supra* note 34, at 30; *see also* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 216 (1975) (discussing a study showing that whites accused of raping black women received relatively mild sentences, while blacks accused of raping white women received the harshest sentences).

74. Indeed, it was concern about the racialized use of rape laws, especially in the South, that led the Model Penal Code's drafters to include provisions that would tip the scales in favor of defendants. *See* Gruber, *supra* note 8, at 588.

75. *See* Marvin E. Wolfgang, *Racial Discrimination in the Death Sentence for Rape*, *in* EXECUTIONS IN AMERICA 109, 114 (William J. Bowers ed., 1974).

76. U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 205455, CRIMINAL VICTIMIZATION, 2003, at 7 (2004).

77. Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 130 (1973); *see also* Marvin E. Wolfgang & Marc Riedel, *Rape, Racial Discrimination and the Death Penalty*, *in* CAPITAL PUNISHMENT IN THE UNITED STATES 99, 111–12 (Hugo Adam Bedau & Chester M. Pierce eds., 1976). The racial

redress the imbalance in favor of defendants that historically existed in intraracial cases, feminists failed to concern themselves with how their reforms would exacerbate the imbalance that existed in interracial cases, namely those involving nonwhite defendants and white women.[78]

The third aspect, which is discussed more fully in Part III, is that in pushing for reforms, feminist groups paid little attention to how such reforms might impact rape victims who did not fit the white, middle-class mold of their constituents.[79] It was not just nonwhite defendants who became a collateral consequence of feminist reforms. Women of color also suffered by omission.[80] The rape reforms pressed by feminists, after all, did nothing to address the fact that judges were imposing more lenient sentences for rape when the victim was black.[81] Nor did feminists seem concerned with studies that showed the differential in police decisions to charge for rape "resulted primarily from lack of confidence in the veracity of black complainants and a belief in the myth of black promiscuity."[82]

In fact, as I demonstrate in Part III, on a certain level the rape shield laws enacted in the 1970s have harmed all women. Far from liberating women from our long history of measuring their worth against a chastity yardstick, rape shield rules have in fact reinstantiated chastity norms. Instead of subverting the chastity requirement, rape shield laws buy into them, allowing, in theory at least, any complainant in a rape trial to wipe her sexual history clean, to become a good

disparity in such executions likely played a role in the U.S. Supreme Court's decision in *Coker v. Georgia*, 433 U.S. 584 (1977), abolishing the death penalty as a punishment for rape.

78. It should be noted that this lack of concern about the disparate impact of rape shield laws was not inevitable. In fact, it stood in stark contrast with the concerns raised by women's groups, just a few years earlier, about the use of the death penalty as a punishment for rape and the disproportionate use of this penalty on black men. *See* Brief for ACLU et al. as Amici Curiae at 16, *Coker*, 433 U.S. 584 (No. 75-5444), 1976 WL 181482.

79. The myopia of the Michigan Women's Task Force on Rape is evident from the language used in its background materials urging reform. For example, the materials state, "Women are the victims of rape because American society portrays women as passive [and] weak." MICH. WOMEN'S TASK FORCE ON RAPE, *supra* note 67, at 8. While this assumption was routinely applied to white women, different assumptions often attached to women of color. For a discus-sion of how lawmakers and even the Supreme Court have conflated "women" with "white wo-men," see I. Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9, 16–18 (2006).

80. As critical race scholar Mari Matsuda has observed, change that benefits everyone is best effected by looking to the bottom—that is, looking to those most affected by discrimination—as a starting point. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987). This was not done in the case of rape reform.

81. *See* Jennifer Wriggins, Note, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 118–22 (1983).

82. Comment, *Police Discretion and the Judgment That a Crime Has Been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277, 304 (1968).

girl again, to be brought back into the fold, and thus receive the protection of the law. This is what rape shield laws do.

II. THE REVOLUTION

Building on their success in securing a rape shield law in Michigan, feminist advocates turned their attention to passing similar rape shield laws in other states and in the federal system. This Part accordingly begins with an overview of that effort and the resulting federal rape shield rule, Rule 412. I then turn to Rule 412's companion rule, Rule 413, which functions as a rape sword. This Part concludes with an exploration of some of the troubling consequences of these rules.

A. Federal Rules of Evidence 412 and 413

Within two years of securing passage of a rape shield law in Michigan, feminist advocates were able to secure similar rape shield laws in more than half the states and had begun the process of securing passage of a rape shield law in the federal system. To a large extent, the state-by-state effort, and then the federal effort, followed a similar playbook to the Michigan effort. Indeed, advocates provided a "legislative fact sheet" to Congress that borrowed heavily from the "background material" the Michigan Women's Task Force on Rape had circulated to Michigan legislators just a few years earlier.[83] In addition, Judge Patricia Boyle of the Michigan Women's Task Force on Rape testified before the House Judiciary Committee.[84] Again, little attention was paid to how such reforms would operate in cases involving nonwhite victims or to how such reforms might reinscribe the chastity requirement.[85]

The result was Federal Rule of Evidence 412, which was signed into law on October 28, 1978, as the centerpiece of the Privacy Protection for Rape Victims Act of 1978.[86] The bill's principal sponsor, Representative Elizabeth Holtzman, captured the sentiments of feminist reformers in urging passage.

83. The "legislative fact sheet" is quoted in Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 571–72 (1980).

84. *See Privacy of Rape Victims: Hearings on H.R. 14666 and Other Bills Before the Subcomm. on Crim. Justice of the H. Comm. on the Judiciary*, 94th Cong. 77 (1976) [hereinafter *Privacy of Rape Victims*] (statement of Judge Patricia Boyle). For a more complete discussion of the legislative history leading to passage of Rule 412, see Tilley, *supra* note 66, at 53–60.

85. *See Privacy of Rape Victims*, *supra* note 84.

86. Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046 (1978).

> Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime. It is estimated that as few as one in ten rapes is ever reported.
>
> . . . [I]n federal courts, . . . it is permissible still to subject rape victims to brutal cross-examination about their past sexual histories. H.R. 4727 would rectify this problem in Federal courts and I hope, also serve as a model to suggest to the remaining states that reform of existing rape laws is important to the equity of our criminal justice system.[87]

Then-Senator Joe Biden added the following:

> The enactment of this legislation will eliminate the traditional defense strategy . . . of placing the victim and her reputation on trial in lieu of the defendant [and] end the practice . . . wherein rape victims are bullied and cross-examined about their prior sexual experiences[, making] the trial almost as degrading as the rape itself.[88]

The resulting rule, Rule 412, declares evidence of a victim's past sexual behavior or sexual predisposition inadmissible in any civil or criminal proceeding involving alleged sexual misconduct, unless one of three exceptions applies.[89] One, such evidence may be admitted when offered "to prove that someone other than the defendant was the source of semen, injury, or other physical evidence."[90] Two, such evidence may be admitted if it consists of "specific

87. 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman).

88. *Id.* at 36,256 (statement of Sen. Biden).

89. FED. R. EVID. 412(a). For example, the rape shield rule has resulted in the exclusion of the following evidence at trial: (1) the alleged victim's "general reputation in and around the Army post"; (2) the victim's "habit of calling out to the barracks to speak to various and sundry soldiers"; (3) the victim's "habit of coming to the post to meet people and of her habit for being at the barracks at the snack bar"; (4) evidence from the alleged victim's former landlord regarding his experience with her promiscuity; and (5) a social worker's opinion of the alleged victim. Doe v. United States, 666 F.2d 43, 47 (4th Cir. 1981) (quoting district court opinion) (internal quotation marks omitted).

90. FED. R. EVID. 412(b)(1)(A). For example, in a rape trial in which the prosecution sought to introduce evidence that a rape kit examination following the alleged incident revealed the presence of semen, the defense would be permitted to introduce evidence that the semen originated from another person. This exception is sometimes referred to as the "Scottsboro rebuttal," based on the case in which nine black youths were accused of raping two white women on a freight train. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5388 (Supp. 2012). In its case in chief, the prosecution offered medical testimony to establish the presence of semen. In response, the defense was eventually allowed to

instances of a victim's sexual behavior with respect to the person accused" and is offered by the defense to prove consent or by the prosecution.[91] Three, such evidence is admissible if the exclusion of such evidence "would violate the defendant's constitutional rights."[92]

More than a decade later, feminist reformers secured a companion rule to Rule 412.[93] Again aligning themselves with police and prosecutors, feminists[94] argued that further reforms were necessary to obtain convictions in sexual assault cases and to "protect the public from crimes of sexual violence."[95] The principal House sponsor, Representative Susan Molinari, argued that "sexual assault cases are distinctive," warranting distinctive rules concerning the ad-

introduce (1) evidence that the women, who were both prostitutes, had had intercourse with two other men the night before; and (2) medical testimony both that the small amount of semen found was inconsistent with the gang rape allegation and that the semen was nonmotile, indicating it had been present at least twelve hours prior to the women boarding the train. DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 81–84, 213, 229–30 (1969). Notwithstanding the paucity of the evidence and the fact that one of the women recanted and testified for the defense, the nine youths were repeatedly convicted. JAMES GOODMAN, STORIES OF SCOTTSBORO 393–95 (1994).

91. FED. R. EVID. 412(b)(1)(B). Thus, where the defense is consent, the rape shield rule would not prohibit the defendant from introducing evidence, through cross-examination or otherwise, that he had previously engaged in consensual sexual activity with his accuser. For example, in *People v. Jovanovic*, 700 N.Y.S.2d 156, 167 (App. Div. 1999), the court ruled that emails in which the accuser described herself as enjoying sadomasochistic sex and enjoying being a "slave" were admissible as conduct with the accused. *Id.* at 164–67. It should be noted that this exception, rather than changing the common law, is consistent with the common law.

92. FED. R. EVID. 412(b)(1)(C). This exception has been described as a catch basin because it allows courts wide discretion in determining when a state's interest in excluding sexual history must give way to a defendant's right to confront witnesses or present a defense. *See* Galvin, *supra* note 14, at 775. This exception has been read as allowing the admission of sexual history evidence to show bias, *see* Olden v. Kentucky, 488 U.S. 227, 233 (1988), to show evidence of prior sexual abuse, *see* LaJoie v. Thompson, 217 F.3d 663, 673 (9th Cir. 2000), and to show prior false accusations, *see* Redmond v. Kingston, 240 F.3d 590, 592 (7th Cir. 2001).

93. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.).

94. Not all feminists supported the passage of Rule 413. Notably, the National Organization of Women's Legal Defense Fund opposed the rule out of concern that it would diminish basic safeguards accorded criminal defendants. *See* 140 CONG. REC. 15,210 (1994) (statement of Rep. Schumer) (expressing the concerns of various groups); *see also* Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 569 n.24 (1997). Indeed, the push for Rule 413 by Rep. Susan Molinari and Sen. Bob Dole, both Republicans, was viewed by some feminists as politically motivated: By supporting Rule 413, the Republican Party could position themselves as committed to women's issues. Telephone Interview with Lynn Hecht Schafran, Dir. of the Nat'l Judicial Educ. Program of Legal Momentum, Women's Legal Def. & Educ. Fund (Nov. 16, 2012). For more on the legislative history and politics behind Rule 413, see Michael S. Ellis, Comment, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961 (1998).

95. 140 CONG. REC. 20,602 (1994).

missibility of propensity evidence against defendants.[96] Specifically, Molinari argued that because adult-victim sexual assault cases often turn on credibility determinations, informing jurors of a defendant's past sexual conduct could be critical in "accurately deciding cases that would otherwise become unresolvable swearing matches."[97] The result was Rule 413, a rape sword.[98] Enacted as part of the Violence Against Women Act, Rule 413 has rightfully been described as effecting "a breathtaking change in a long-established principle of Anglo-American law,"[99] as marking "a sea change,"[100] and as running "counter to a centuries-old legal tradition that views propensity evidence with a particularly skeptical eye."[101] In a complete reversal of the prohibition, codified in Rule 404, against the admission of character or propensity evidence to prove action in conformity therewith, Rule 413 permits the government to introduce evidence of a defendant's relevant prior sexual conduct for precisely that purpose,[102] regardless of whether such conduct resulted in charges or a conviction.[103] As Katherine Baker observed, Rule 413 "now singles out sexual assault as the only crime to which the general prior act rule does not apply."[104]

In short, through Rules 412 and 413 feminist reformers secured a complete reversal of the common law approach to rape cases. Whereas once a complainant's sexual past was fair game at rape trials[105] and a defendant's sexual past was generally off limits,[106] these new rules, at least notionally, cloak a

96. *Id.* at 23,603.
97. *Id.*
98. As part of the Violence Against Women Act of 1994, Congress also passed Rule 414, which allows propensity evidence to be admitted against defendants in child sexual assault cases, and Rule 415, which allows propensity evidence in civil cases involving a claim of sexual assault. All three rules—Rules 413, 414, and 415—became effective on July 9, 1995. *See* FED. R. EVID. 413–415.
99. PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 10.05, at 155 (3d ed. 2009).
100. United States v. Guardia, 135 F.3d 1326, 1330 (10th Cir. 1998) (observing that Rule 413 "marks a sea change in the federal rules' approach to character evidence").
101. United States v. Mound, 157 F.3d 1153, 1153 (8th Cir. 1998) (Arnold, J., dissenting from denial of rehearing en banc). For a discussion of the historical origins of the rule that character evidence is inadmissible to show propensity, see Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).
102. FED. R. EVID. 413; *see also* 140 CONG. REC. 23,603 (1994) (explaining that Rule 413 "will supersede in sex offense cases the restrictive aspects of Federal rule of evidence 404(b)[, which generally prohibits] evidence of character or propensity").
103. 140 CONG. REC. 23,603 ("Evidence of offenses for which the defendant has not previously been prosecuted or convicted will be admissible, as well as evidence of prior convictions.").
104. Baker, *supra* note 94, at 569.
105. *See supra* notes 38–40 and accompanying text.
106. *See, e.g.*, Lannan v. State, 600 N.E.2d 1334 (Ind. 1992) (rejecting the use of propensity evidence against a defendant in a sexual assault case); State v. Kirsch, 662 A.2d 937 (N.H. 1995).

complainant in a presumption of chastity and render a defendant's sexual history fair game. I explore the implications of this reversal below.

B. Good Women, Bad Men

Using an array of cases, this Subpart explores three troubling consequences of rape shield and rape sword laws. First, the cases demonstrate that the primary argument in support of rape shield rules—that a victim's sexual history is completely irrelevant—cannot be squared with the routine admission of other seemingly irrelevant information. Second, the cases reveal that rape shield rules are internally inconsistent. Third, and perhaps most importantly, the cases point to one of the overarching consequences of rape shield and rape sword rules: that complainants, in theory at least, are now cast as invariably good, while rape defendants are cast as intrinsically and indelibly bad.

1. The Irrelevance Fallacy

Beyond tipping the scales, case law reveals a fallacy in the arguments used to support the rape shield and the rape sword. The primary argument in support of both rules is one based on relevance. Feminist scholars argue vociferously that a woman's sexual history simply has no bearing on whether or not she consented to sex on the occasion in question, let alone whether she is credible.[107] Put differently, feminists argue that consent to sex is not transferable and that consent to sex on a prior occasion cannot possibly evidence "consent always."[108] For starters, this argument misses a crucial distinction. While consent to sex is not probative of "consent always," it is slightly probative of consent in the future, and that is the critical issue for assessing relevance in a given case. But more importantly here, the routine admission of other seemingly irrelevant information in criminal trials, including rape prosecutions, belies the irrelevance argument.

Consider *People v. Jovanovic*,[109] which involved the application of rape shield laws and which appears in several criminal law casebooks[110] and evidence

107. *See, e.g.*, Tuerkheimer, *supra* note 12, at 1467–68 ("Regardless of normative assessments of its worth, sexual history is not probative of consent.").

108. *See, e.g.*, Hunter, *supra* note 4, at 131; *see also* Berger, *supra* note 18, at 55–56; Galvin, *supra* note 14, at 799 ("[T]he mere fact that the complainant has previously engaged in consensual sexual activity affords no basis for inferring consent on a later occasion.").

109. 700 N.Y.S.2d 156 (App. Div. 1999).

110. *See, e.g.*, MARKUS D. DUBBER & MARK G. KELMAN, AMERICAN CRIMINAL LAW: CASES, STATUTES AND COMMENTS 797 (2d ed. 2009).

casebooks.[111] Oliver Jovanovic was convicted of kidnapping, sexual abuse, and assault based on evidence that, after inviting a young woman he met online to his room, he tied her to his bed and, over the course of twenty hours, dropped hot candle wax on her skin, bit her nipples, and molested her with a baton.[112] Relying on a rape shield rule, the trial court barred several pieces of evidence from the jury.[113] For example, the jury was never made aware of email correspondence between the complainant and Jovanovic in which she described her prior involvement with a "heroin addicted, bisexual atheist[;] . . . [m]y kinda comrad [sic]" who "got me" and introduced her to sadomasochism.[114] Nor was the jury made aware of her boast to Jovanovic that, "I'm what those happy pain fiends at the Vault [a New York S&M club] call a 'pushy bottom.'"[115]

My point here is not to weigh in on the correct application of the rape shield in this case. In fact, the *Jovanovic* appellate court reversed on the ground that the conduct fell within the "prior conduct with the accused" and the "interest of justice" exceptions.[116] Rather, the point here is that the case shows how weak the standard irrelevance argument really is. The standard argument of rape shield proponents is that a victim's prior sexual conduct has little if any probative value with respect to the twin issues of consent and a defendant's reasonable belief in the existence of consent.[117] Here, the evidence of the complainant's discussions of sadomasochism with Jovanovic was clearly relevant to both issues.[118] After all, Rule 401 is to be construed liberally, defining as "relevant" evidence having "*any* tendency to make a fact more or less probable than it would be without the evidence."[119] Indeed, as George Fisher has observed, it "would be hard to devise a more lenient test of probativeness than Rule 401's 'any tendency' standard."[120]

But the greater problem is that the standard relevancy argument cannot be squared with the routine admission of so much other background evidence. For example, in *Jovanovic*, the jury learned that the complainant was a "Barnard undergraduate" who was from "Salamanca, a small town in upstate New York," and

111. *See, e.g.*, GEORGE FISHER, EVIDENCE 319 (2d ed. 2008).
112. *Jovanovic*, 700 N.Y.S.2d at 161–62.
113. *Id.* at 163.
114. *Id.*
115. *Id.* at 164.
116. *Id.* at 166–68.
117. *See* Berger, *supra* note 18; Tuerkheimer, *supra* note 12, at 1470.
118. By contrast, as I argue below, evidence of a complainant's past enjoyment of sadomasochism would normally be completely irrelevant, and hence inadmissible, in a stranger rape case or even an acquaintance rape case in which the accused had no knowledge of the complainant's sexual history. *See infra* notes 255–260 and accompanying text.
119. FED. R. EVID. 401 & advisory committee's notes (emphasis added).
120. FISHER, *supra* note 111, at 19.

that she initially entered an online chat room hoping to find "other Columbia students."[121] The jury learned that Jovanovic was studying molecular genetics and computational biology at Columbia, and that he ran a small multimedia design firm with his brother.[122] The jury also learned that Jovanovic was a fan of the photographer Joel-Peter Witkin, whom he described as a creator of photographs using corpses,[123] and that when the complainant went to Jovanovic's room, they watched "Meet the Feebles," a video in which "Muppet-like characters engage in sexual or violent behavior."[124] Can one really say that such background information, which is routinely admitted in criminal trials,[125] meets the threshold of relevance, but that a complainant's sexual history normally does not?[126]

2. Internal Inconsistency

The flaw in the standard irrelevance argument is compounded when one considers one of the three exceptions to the rape shield bar—namely, the allowance of evidence of sexual history between the complainant and the accused.[127] If one accepts the notion that an individual always has the right to withhold con-

121. *Jovanovic*, 700 N.Y.S.2d at 159.
122. *Id.* at 160.
123. *Id.*
124. *Id.* at 161. The admission of such background evidence is not atypical. Consider *State v. Rusk*, 424 A.2d 720 (Md. 1981), another rape case that appears in many criminal law casebooks. In *Rusk*, the jurors learned that the complainant was twenty-one years old, that she had just attended a high school alumnae meeting, that she and a friend then went out for drinks where she met that defendant, and that before going out for drinks, she telephoned her mother, who was babysitting for her two-year old son. *Id.* at 721.
125. *See* 1 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 9, at 658–61 (Peter Tillers rev. ed., Little, Brown and Co. 1983); Arthur H. Travers, Jr., *An Essay on the Determination of Relevancy Under the Federal Rules of Evidence*, 1977 ARIZ. ST. L.J. 327, 345–47 & nn.35–36 (discussing whether reference to background facts in the Advisory Committee's Note to Rule 401 creates a separate and distinct basis for the admission of background evidence). One of the leading books on trial techniques specifically encourages lawyers to begin direct examination with such background questions. *See* THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES § 4.2 (3d ed. 1992).
126. Of course, there is the alternative argument that sexual history evidence should be excluded because jurors may give it undue weight and allow it to bear too strongly on their determination of the facts. While this argument was particularly strong when rape shields swept the country, shifting mores suggest the argument is far weaker now and is likely to continue to weaken in the foreseeable future. *See infra* notes 261–289 and accompanying text. More to the point, this is precisely the type of balancing analysis that judges are equipped to handle.
127. *See* FED. R. EVID. 412. The allowance of sexual history evidence between the complainant and the defendant existed at common law and was justified on the ground that such evidence was probative of "an emotion towards the particular defendant tending to allow him to repeat the liberty." 3 WIGMORE, *supra* note 41, § 200, at 688.

sent, whether the person seeking consent is her husband,[128] her boyfriend, or a stranger, then allowing an exception to the rape shield in these cases is difficult to justify. For example, the link between acts of domestic violence and rape is well known. Under the standard rape shield rule, if a man beats a woman, threatening to "fix her face," and then rapes her, as was the case in *State v. Alston*,[129] the rape shield rule provides no bar to his introducing her history of consenting to sex, so long as the woman is his girlfriend or wife and the prior consenting occasions were with him. This exception is particularly problematic since it seems to be a vestige of the common law marital rape exemption,[130] when women were considered the property of their husbands[131] or as having granted consent in perpetuity as part of their wedding vows.[132] New York State adds an even more troubling exception. New York exempts evidence of a complainant's past conviction of prostitution from its general ban on sexual history evidence[133] But again, this begs the question. If prior sexual history is generally irrelevant, then why should it be relevant in the case of sex workers?[134]

Further inconsistencies become apparent when one examines non-heartland cases. One such inconsistency is in the primary justification for rape shields: that

128. For a discussion of the demise of marital immunity for rape, see Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000).

129. 312 S.E.2d 470, 472 (N.C. 1984). For an interesting discussion of the case, see Camille A. Nelson, *Consistently Revealing the Inconsistencies: The Construction of Fear in Criminal Law*, 48 ST. LOUIS U. L.J. 1261, 1277 & n.88, 1278 (2004).

130. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 628–29 (Robert H. Small 1847) (1736). *See generally* DIANA E.H. RUSSELL, RAPE IN MARRIAGE (rev. ed. 1990); Hasday, *supra* note 128.

131. 1 WILLIAM BLACKSTONE, COMMENTARIES *444. As the evolutionary psychologist Steven Pinker pithily put it,

> "Thou shalt not rape" is not one of the Ten Commandments, though the tenth one does reveal the status of a woman in that world: she is enumerated in a list of her husband's chattels, after his house and before his servants and livestock.

STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 395 (2011). The woman-as-property trope may no longer exist as a matter of law, but remnants exist in practice. "Women, but not men, wear engagement rings to signal they are 'taken,' and many are still 'given away' at their weddings by their fathers to their husbands, whereupon they change their surname accordingly." *Id.* at 397.

132. Sir Matthew Hale put it more delicately: "[B]y their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." HALE, *supra* note 130, at 628.

133. *See, e.g.*, N.Y. CRIM. PROC. LAW § 60.42(2) (McKinney 2004) ("Evidence of a victim's sexual conduct shall not be admissible in a prosecution for [rape] unless such evidence . . . proves or tends to prove that the victim has been convicted of [prostitution] within three years prior to the sex offense which is the subject of the prosecution . . . .").

134. For a critique of this exception, see Karin S. Portlock, Note, *Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence Under State Rape Shield Legislation*, 107 COLUM. L. REV. 1404 (2007).

sexual history is irrelevant. If a complainant's sexual history is generally irrelevant to the issue of consent, then it should also be irrelevant when the complainant herself seeks to introduce such evidence. However, courts responding to requests by complainants to introduce evidence of their prior chastity have allowed such evidence.[135] Similarly, at least one court has allowed a complainant to introduce evidence that she identified as a lesbian to buttress her claim that sex with the male defendant was nonconsensual.[136] In same-sex rape cases, at least one court has allowed a defendant to introduce evidence of the same-sex preference of his accuser as probative of consent.[137] That sexual history is deemed relevant and admissible in these cases—when offered by the complainant or when offered by defendants in same-sex rape cases—shows the inconsistency in the irrelevancy argument put forward by rape shield supporters.

Lastly, to the extent that supporters of the rape shield rule rely on the alternative argument of prejudice, that argument is also problematic.[138] At the time rape shield laws swept the nation, there was still shame attached to the notion of premarital sex.[139] But mores have changed dramatically in the past several years; much prejudice that existed in the early 1970s is all but absent now.[140]

135. *See, e.g.*, People v. Prentiss, 172 P.3d 917 (Colo. App. 2006); State v. Preston, 427 A.2d 32 (N.H. 1981); State v. Gavigan, 330 N.W.2d 571 (Wis. 1983); *see also* Commonwealth v. McKay, 294 N.E.2d 213 (Mass. 1973) (concluding that virginity has probative value on the issue of consent but that lack of virginity does not).

136. *See, e.g.*, Meaders v. United States, 519 A.2d 1248, 1256–57 (D.C. 1986) (Gallagher, J., concurring in part and dissenting in part) ("It is almost too obvious to mention that—where consent is the issue (as here)—if the complaining witness offers on direct examination, among other things, that she is a lesbian, this may seriously impair a defense of consent to the charged rape."); State v. Lessley, 601 N.W.2d 521, 526–28 (Neb. 1999); State v. Williams, 477 N.E.2d 221, 228 (Ohio Ct. App. 1984).

137. State v. Rodgers, No. 01-C-01-9011-CR-00312, 1991 Tenn. Crim. App. LEXIS 648 (Aug. 16, 1991). In another case, the court allowed such evidence to counter the impression the complainant gave that he was heterosexual. People v. Murphy, 899 P.2d 294, 296–97 (Colo. App. 1994). For a fuller discussion of rape shield laws in male-victim rape cases, see Elizabeth J. Kramer, Note, *When Men Are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. REV. 293 (1998).

138. Rule 412 is really a specialized application of Rules 401 and 403. At bottom, supporters of Rule 412 were "loath to leave determinations of general 'relevancy' to judges who are too frequently male and too frequently imbued with unreal and insensitive attitudes toward women's sexual attitudes and experiences." BARBARA ALLEN BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 843 (1975).

139. *See infra* notes 276–289 and accompanying text.

140. The push for rape shield laws also coincided with a period in which women were still excused from jury service. *See* I. Bennett Capers, *Blind Justice*, 24 YALE J.L. & HUMAN. 179, 183 (2012). The increased representation of women on juries further militates against the concern for prejudice. *See* Tilley, *supra* note 66, at 66–73.

With respect to Rule 413, the rape sword rule, supporters' arguments in support likewise fail.[141] In support of Rule 413, proponents in effect did an about-face, arguing that "sexual assault cases are distinctive" and that when it comes to defendants, "a history of similar acts tends to be exceptionally probative."[142] While there is empirical support for the notion that one who commits a sexual offense is more likely to be a repeat offender, empirical evidence makes clear that the recidivism rates for sexual offenders are actually lower than for many other categories of crimes for which the normal ban against propensity evidence continues to apply.[143] Not surprisingly, the Advisory Committee on Evidence Rules, after seeking public input and considering eighty-four written comments, opposed the addition of Rule 413.[144] Their opposition was unanimous except for a dissenting vote from the Department of Justice.[145] In

141. Tellingly, Rule 413 was passed in the absence of any evidence to support proponents' claims that sex offenses are distinctive and that evidence of past sexual behavior, when applied to defendants, is "typically relevant and probative." *See* 140 CONG. REC. 23,602–03 (1994) (statement of Rep. Susan Molinari).

142. *Id.* at 23,603. This about-face has been noted by other scholars. Orenstein notes, "There is an apparent inconsistency in feminists' insisting on a rape shield, which limits 'character evidence' of the woman, yet simultaneously calling for expansion of the character evidence against defendants in sexual crimes." Aviva Orenstein, *Feminism and Evidence*, *in* CRITICAL ESSAYS, RESEARCH AGENDA, AND BIBLIOGRAPHY 507, 520 (Betty Taylor et al. eds., 1997). That said, Rule 413 does not stand in complete opposition to Rule 412. Rule 413 does not permit evidence of a defendant's consensual sexual behavior—the type of evidence once admissible against complainants—but only evidence of a defendant's past assaultive or nonconsensual sexual behavior. On the false symmetry of Rules 412 and 413, see Debra Sherman Tedeschi, Comment, *Federal Rule of Evidence 413: Redistributing "The Credibility Quotient,"* 57 U. PITT. L. REV. 107, 116–18 (1995).

143. Baker, *supra* note 94, at 578; *see also* Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 149–50 (1993). Of course, determining recidivism rates for rapists is complicated by the fact that the vast majority of rapes go unreported. It should be noted that when offenders are interviewed about their conduct and granted assurances of confidentiality, their self-reported recidivism rates are quite high. For example, in one study of 126 rapists, the mean number of self-reported rapes was seven. *See* Gene G. Abel et al., *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. INTERPERSONAL VIOLENCE 3, 16 (1987); *see also* David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 74 (2002).

144. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), *reprinted in* 159 F.R.D. 51, 52–53 (1995).

145. *Id.* Indeed, the Report itself emphasizes this point. The Report concludes, "It is important to note the highly unusual unanimity of the members of the Standing and Advisory Committees, composed of over 40 judges, practicing lawyers, and academicians, in taking the view that Rule[] 413 [is] undesirable. Indeed, the only supporters of the Rules were representatives of the Department of Justice." *Id.* at 53. The limited scholarship focusing on Rule 413 has also been critical. *See, e.g.*, James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 108–10 (1994); James S. Liebman, *Proposed Evidence Rules 413 to 415—Some Problems and Recommendations*, 20 U.

short, if the rationale for the rape sword rule is that the sexual history of defendants is probative of propensity, then past acts should also be admissible against defendants charged with other types of crime. They are not.

3. Good Women: You've Come a Long Way, Baby[146]

Lastly, there is a larger consequence to these reforms. It is not just that rape reforms have tipped the scales in favor of guilt. Nor is it that rape reforms in fact tip the scales twice, first in favor of complainants with Rule 412, then against defendants with Rule 413. It is that the entire trial process has been reframed. No longer are rape trials framed as pitting bad women against good men. Now, the revised frame is one that purports to pit good women against bad men.[147]

Evidence of a complainant's sexual background—once admissible to show consent or impugn her credibility—is, for the most parts, off limits. Conversely, the cloak of innocence that defendants once enjoyed—a byproduct of the general ban on propensity or character evidence to show bad character—is now a transparent cloak when it comes to defendants accused of sexual assault;

DAYTON L. REV. 753, 755–57 (1995); Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57 (1995); Erik D. Ojala, Note, *Propensity Evidence Under Rule 413: The Need for Balance*, 77 WASH. U. L.Q. 947 (1999); *see also* Edward J. Imwinkelried, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1146–47 (1993); Symposium, *Perspectives on Proposed Federal Rules of Evidence 413–415*, 22 FORDHAM URB. L.J. 265 (1995).

146. "You've Come a Long Way, Baby" was both an advertising slogan and a frequent refrain of the early feminist movement. *See* Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 STAN. L. REV. 1871, 1872 (2006) (discussing the phrase).

147. Aviva Orenstein makes a related point, suggesting that feminists should be wary of reforms that patronize "women by providing them increased 'protection.'" Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 692–95 (1998). Orenstein further suggests that Rule 413 "may be more paternalistic than feminist." *Id.* at 695. An additional critique is that Rule 413, which is predicated on the notion that rapists are recidivists, reinforces the myth of the crazed rapist and as such might ultimately undermine efforts to call attention to nonrepeat acquaintance rape. For more on this argument, see Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 173–80 (2001).

their sexual history, however unproven,[148] is admissible to show propensity and bad character.[149]

This transformation clearly disadvantages male defendants vis-à-vis female complainants. But this transformation also disadvantages women, as I explain in Part III.

III. REAL VICTIMS

The problems discussed so far, while consequential, are at bottom problems at the margins. Far more troubling are two other problems. The first concerns the expressive message Rule 412 communicates, which is one that privileges, of all things, chastity. The second concerns what happens when rape victims do not fit the traditional rape script, that set of ideas we have about what rape looks like, what rapists look like, and most importantly here, what rape victims look like. In other words, what happens when there is expressive message failure. Both these concerns are addressed below.

A. The Rape Shield's Expressive Message

The first problem with rape shield laws has existed since these laws were enacted but has gone unnoticed and unremarked on: In pushing for rape shield laws, rape shield proponents have in fact reinscribed the very chastity requirement they hoped to abolish. This becomes readily apparent when one considers the expressive message communicated by rape shield laws.

148. Under the *Huddleston* standard, such evidence would be admissible so long as the judge concludes that there is sufficient evidence to support a jury finding by the preponderance of the evidence that the defendant committed the prior act. *See* Huddleston v. United States, 485 U.S. 681 (1988); *see also* FED. R. EVID. 104(b).

149. This change is particularly troubling in stranger rape cases in which identity is at issue. In fact, the issue of misidentification is particularly acute in sexual assault cases, where about 84 percent of exonerees convicted based on misidentification were convicted of rape. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 51 (2011). In the absence of DNA evidence, such cases usually begin with the police showing the victim photo arrays of potential perpetrators—that is, of men who have prior arrests for sexual assault crimes. The victim who identifies one of these men will likely find that her chances of securing a conviction at trial have been enhanced, even if the defendant in fact is the wrong man. This is because in a jurisdiction applying a rape sword rule, his prior arrests will be admissible, in effect recasting him as guilty enough to be the right man in the eyes of the jurors. In other words, jurors who are reluctant to convict when presented with an eyewitness identification, and identification is contested, will be more likely to convict when the eyewitness identification is coupled with information that the suspect has a prior sexual history. At least one other scholar has raised similar concerns. *See* Duane, *supra* note 145.

Scholars have long stressed the importance of attending to law's expressive message.[150] As Lawrence Lessig observed more than a decade ago, laws are anything but value neutral.[151] They prescribe what behavior is inappropriate, what behavior is orthodox, and what behavior should be rewarded.[152] More importantly, law informs and shapes social mores in ways that are often subtle. This is especially true when it comes to criminal laws.[153] As I have noted in another context:

> The criminal law expressively communicates which homes are appropriate. Stable, monogamous, heterosexual, married homes exist not outside of the criminal law, but under the aegis of it. The criminal law shapes norms. It marks illicit conduct of which it disapproves. It also indirectly marks other conduct as licit. For example, a law that criminalizes same-sex sex almost by definition gives its imprimatur to heterosexual sex, contributing to what Adrienne Rich long ago termed "compulsory heterosexuality." A law that penalizes adultery not only condemns sex outside of marriage, but concomitantly privileges sexual fidelity within marriage. A rule that protects marital communications and insulates spouses from compelled testimony in criminal cases by definition deems other intimate relationships as less worthy of societal protection. In short, the criminal law has always played favorites, both outside of the home and inside the home.[154]

Let me add that while laws, especially those relating to criminal law, are necessarily expressive and value laden, the social meaning expressed by any particular law is not necessarily static.[155]

Now consider two expressive messages communicated by rape shield laws. On one level, rape shield laws communicate that a complainant's sexual history

150. *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43 (2009); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Richard H. McAdams & Janice Nadler, *Coordinating in the Shadow of the Law: Two Contextualized Tests of the Focal Point Theory of Legal Compliance*, 42 LAW & SOC'Y REV. 865 (2008); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

151. *See* Lessig, *supra* note 150, at 957, 1044.

152. *See id.* at 946–47.

153. *See, e.g.*, Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 419 (1999).

154. I. Bennett Capers, *Home Is Where the Crime Is*, 109 MICH. L. REV. 979, 988 (2011) (footnotes omitted) (reviewing JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY (2009)).

155. A law's expressive meaning can change and can be multivalent. Most importantly, it can be contingent.

with other individuals is irrelevant to the issue presented in a standard rape trial—that is, whether she consented on this occasion. On this level, rape shield laws communicate that sex does not matter, a sentiment that many advocates of rape shield laws would support. But rape shield laws also communicate the opposite. At the same time that rape shield laws purport to communicate that sexual history does not matter, such laws also communicate that sexual history *does* matter. In fact, rape shield laws communicate that sexual history matters so much that it must be concealed, corseted, and locked away. Put differently, removing sexual history from the courtroom does more than simply render sexual history irrelevant. It privileges chastity, or something like chastity. Indeed, by pushing for rape shield laws, feminists have inadvertently legitimized the very chastity requirement they found so troubling.

To be clear, my concern is not with the expressive message communicated to defendants, or to prosecutors and defenses lawyers, or even to victims, though how they receive this message is important. Rather, my more pressing concern is with the expressive message sent to jurors. The message to jurors sitting on rape trials is that they should assume that the complainant is a virgin, or if not a virgin, at least a good girl deserving of the law's protection.

To make my point clearer, a thought exercise may be useful. Imagine a jury in a sexual assault case. Imagine too that the complainant is a young, attractive, white woman. She is solidly middle class, well educated, and articulate. In short, she is presentable to the jury.[156] During the course of the trial, the jurors will be inundated with information and, when the complainant testifies, they will likely learn her approximate age, whether she attended college, what she does for a living, and other background information[157] By virtue of the rape shield, however, there will be no mention of her sexual experience, whether that experience is nil, includes one partner, or includes hundreds. In the absence of this information, the jury is likely to assume that this apparently ideal victim is, sexually speaking, a good girl. Indeed, jurors may even contrast her with other rape victims they have heard about on the news who seem sexually immoderate and whose accusations did not result in convictions.[158] They may contrast her with

156. This description of an ideal juror comes in part from Tuerkheimer, *supra* note 12, at 1463 n.6. It is also consistent with the factors Bryden and Lengnick have compiled regarding when rape reports are pursued to indictment and conviction. *See* Bryden & Lengnick, *supra* note 4, at 1237–41.

157. MAUET, *supra* note 125, at 96–97.

158. For example, they may think of the accuser of in the Kobe Bryant case. Shortly after her accusation, an image appeared in *The Globe* of the accuser provocatively dressed, and Bryant's attorneys made known the complainant's sexual relationships with two witnesses. *See Kobe Bryant's Accuser: Did She Really Say No?*, GLOBE, Oct. 31, 2003, at 1; Dahlia Lithwick, *The Shield That Failed*, N.Y. TIMES, Aug. 8, 2004, http://www.nytimes.com/2004/08/08/opinion/08lithwick.

someone who is not middle class or who is supposedly less presentable.[159] In other words, when jurors are told nothing, they do not assume "nothing."[160] Instead, they use the information they are provided, as well as the surface appearance of the complainant—does she look like a good girl or a bad girl?—to fill in the blank.[161]

All this comes with a perverse result. Rather than disrupting the chastity requirement, rape shield laws in fact codify the requirement, entrenching it further, and without any diminution in the costs.[162] All this plays into antiquated

html. Or they may think of the accuser in the Duke Lacrosse case, who worked as a stripper and whose accusations did not result in a conviction. *See* Susan Hanely Kosse, *Race, Riches & Reporters—Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 S. ILL. U. L.J. 243 (2007).

159. Our history of thinking that women of lower classes are more sexual and thus less likely to be real victims of rape is a long one. In the nineteenth century, it was not uncommon to assume that girls and women of the working classes were, because of their environment, "thoroughly conversant with the sexual life in its most bestial manifestations," and as such were fully capable of defending themselves. WILLIAM ADRIAN BONGER, CRIMINALITY AND ECONOMIC CONDITIONS 618 (Henry P. Horton trans., Agathon Press 1967) (1916). As Joanna Bourke has observed, "Since it was impossible for one man to rape a (working-class) woman, any women from the lower classes who dared claim to have been assaulted was patently lying." BOURKE, *supra* note 2, at 27. It is telling that in the high-profile rape cases, the attacks on complainants include class elements. In the Kobe Bryant rape case, a commentator referred to his accuser as no more than a "mountain trash slut." *See* Andrew Billen, *The Savage Voice of an Angry America*, TIMES (T2) (London), Sept. 2, 2003, http://www.thetimes.co.uk/tto/life/article1717623.ece (describing conservative radio host Michael Savage's characterization of the complainant and his admonition to his six million listeners to refer to her as "Rocky Mountain Trash"). The complainant in the Duke Lacrosse case became a low-class "ho" and "crypto-hooker." Kosse, *supra* note 158, at 259, 268–70, 272; Transcript of "The Situation With Tucker Carlson" for April 11, 2006, MSNBC (Apr. 12, 2006, 11:54 AM), http://www.msnbc.msn.com/id/12285620/ns/msnbc-the_ed_show/t/situation-tucker-carlson-april (quoting Tucker Carlson).

160. Ronald Allen and Larry Laudan make an analogous observation about the exclusion of criminal history evidence in criminal cases. Normally, courts exclude evidence of a defendant's criminal history. It appears that when this information is withheld from jurors, however, they fill in the blank, assuming that certain defendants have a criminal history and that other defendants do not. *See* Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 508–11 (2011). Although Allen and Laudan did not examine what role the race of the defendant played in jurors' assumptions about which defendants in fact had criminal histories, given the implicit biases most individuals have about race and criminality, it seems likely that one factor jurors consider is race. *See* Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Non Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 204 (2010). Sociologist Devah Pager's work using testers to measure employment discrimination is useful here, since her work suggests that employers often use race as a proxy for criminality. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 93–96 (2007). In other words, jurors may engage in a type of racial profiling.

161. For a discussion of how individuals use surface appearances, see I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1, 11 (2008).

162. Even the rape shield law's exception for sexual history evidence between the complainant and the accused buys into this good girl trope. Because the exception is so limited, any sexual history evi-

notions that a woman who is not a virgin or who has had sex outside of marriage is damaged goods and is less worthy of the law's protection. Rape shield law's contribution to the feminist agenda is not the subversion of the law's preference for good girls but rather a sleight of hand that unilaterally transforms all women, in theory at least, into virgins (or at least good girls). The complainant, by virtue of the rape shield laws, becomes a woman without a sexual past—a virtual virgin, a virgin anew, or at least a good girl anew.

Put differently, prior to the widespread passage of rape shield laws in the late 1970s, a combination of substantive law requirements and evidentiary rules effectively limited rape law's protection to women who were demonstrably good. As such, only a subset of women was protected. Rather than challenging this privileging of chastity, the primary effect of rape shield laws has been to allow more women to pass as good women. Instead of women being divided into good women and bad women, the rape shield laws allow all women, at least in theory, to seem facially good and thus deserving of the law's protection.

But this shift is not cost free. Even assuming that concealing sexual history benefits rape victims in toto—an assumption I call into question below—feminists should be deeply troubled by a message that, in effect if not intent, reinscribes the chastity requirement. As Anita Allen observed in critiquing traditional expectations about appropriate female behavior, "Conventions of female chastity and modesty have shielded women in a mantle of privacy at a high cost to sexual choice and self-expression."[163] If the goal is gender equality and sexual autonomy, then we must recognize that rape shield laws have the perverse effect of frustrating this goal by indirectly privileging female chastity.[164] We must recognize too that rather than furthering sexual liberty, rape shield laws, through their expressive message and concealment of consensual sex, contribute to what scholars have identified as a "sex-negative" regulatory regime.[165] Michelle Anderson put it this way:

dence is at least consistent with monogamy. The message to jurors, even under this exception, is that they should assume the defendant is the only person the accused has had sex with.

163. Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 471 (1987).

164. Aya Gruber and Cristina Tilley have made similar points. *See* Gruber, *supra* note 8, at 637 ("Such a [prejudiced] justification [for rape shield laws] supports rather than counters the view that female sexuality should be kept secret and even condemned."); Tilley, *supra* note 66, at 77–80.

165. For a discussion of the "sex-negative landscape" that currently exists in American law and the argument that the state should "independently protect both intimate relationships and sexual interactions because sex can constitute a vital part of individual identity and self-expression even when not channeled into intimacy," see Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809, 811 (2010). For additional arguments in support of reclaiming a right to sexual liberty, see Melissa Murray, *Marriage as Punishment*, 112 COLUM.

> Supporters of rape shield laws did not set out to defend the idea that women should be free to engage in whatever kind of consensual sexual behavior they chose, publicly or privately, without having that behavior haunt them if they were raped. It was safer to protect those women who had previously had sex only monogamously with their boyfriends or husbands in private. Instead of championing women's sexual autonomy, drafters concentrated on how degrading and embarrassing it was for women to have to discuss publicly their private sexual affairs.[166]

We are living with that choice now. That is one problem. Another is the loss of real women. Instead of trials with real women, rape shield rules dictate trials with cardboard cutouts of women—trials in which women are in effect required to hide their sexual selves and don a cloak of chastity, or something like it. None of this can be good for those of us who care about female agency or about articulating the subject position of women. And none of this can be good for addressing the real problem of rape.

B. Expressive Message Failure

There is a related problem with rape shield laws. However, this problem tugs in the opposite direction and occurs when there is expressive message failure. Put differently, the problem here is when jurors reject the good girl message communicated by rape shield laws.[167] While one normative message of rape shield laws is that all rape victims should be treated as good girls and thus deserving of the law's protection, jurors are likely to reject this message if it conflicts with our implicit biases[168] and preexisting rape scripts. To better un-

L. REV. 1, 62–64 (2012). Several scholars, from the perspective of gay rights, have also argued for more sexual liberty. *See, e.g.*, Libby Adler, *The Dignity of Sex*, 17 UCLA WOMEN'S L.J. 1, 16–19 (2008); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1400–04 (2004); *cf.* I. Bennett Capers, *Enron, DOMA, and Spousal Privileges: Rethinking the Marriage Plot*, 81 FORDHAM L. REV. 715 (2012); Bernard E. Harcourt, *Foreword: "You Are Entering a Gay and Lesbian Free Zone": On the Radical Dissent of Justice Scalia and Other (Post-) Queers [Raising Questions About* Lawrence*, Sex Wars, and the Criminal Law]*, 94 J. CRIM. L. & CRIMINOLOGY 503 (2004).

166. Anderson, *supra* note 5, at 94 (footnote omitted).

167. For a discussion of how the cultural background and assumptions of jurors have a stronger effect than legal definitions in rape cases, see generally Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729 (2010). Aviva Orenstein makes a similar point. *See* Orenstein, *supra* note 8, at 1590 ("[C]ultural prejudices concerning the nature of rape, the rapist, and his rape victim are inescapable at trial.").

168. Using implicit association tests (IATs), which measure the speed with which an individual associates a categorical status with a characteristic, social-cognition researchers have shown that implicit biases are common. The legal literature on implicit biases is rich. *See generally* Samuel

derstand this point, some discussion of narrative theory in juror decisionmaking in general, and rape trials in particular, is useful.[169] Also useful is some discussion of how black women have historically fitted, or rather not fitted, into the general rape script, and the recent phenomenon of Slutwalks.

1. Narrative Theory and Rape Scripts

While the general view is that jurors and other factfinders decide what really happened by considering all the evidence, engaging in deductive reasoning, and making probability assessments,[170] more recent scholarship makes clear that this rationalist perspective of factfinding is incomplete.[171] In fact, experiential research makes clear that factfinders only partially weigh probabilities when deciding what really happened.[172] Even more critical to factfinders is whether the information they are provided can be assembled into a plausible, teleological narrative.[173] In Andrew Taslitz's discussion of narratives in the courtroom, he observed:

> [J]ury reasoning is story-based. Juries convert evidence into familiar stories, filling in gaps in the evidence where needed to craft a coher-

R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006) (arguing for a structural approach to employment discrimination law to resolve unconscious bias and its resulting inequalities in the workplace); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (using a scientific approach to analyze the implicit bias in the courtroom of a criminal trial and a civil trial); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (exploring scientific findings that most people have implicit biases against racial minorities and examining the origins of these biases); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011) (arguing that in the context of the Fourth Amendment, courts should embrace a behavioral realistic framework to reconsider their assumptions about police decisionmaking in stop-and-frisk situations).

169. Although the discussion focuses on juror decisionmaking at trial, narrative theory applies equally, albeit with some modification, to all decisionmakers: from police officers deciding whether to declare a rape allegation founded or unfounded, to prosecutors determining what if any charges to file, to judges' decisions about appropriate punishment. For examples of how narratives about race may play into prosecutors' decisionmaking, see generally Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998).

170. *See, e.g.*, 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 17 (1827) ("If there be one business that belongs to a jury . . . , it is, one should think, the judging of the probability of evidence . . . ."); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366 (1978) (discussing rationality as a basis of decisionmaking); George F. James, *Relevancy, Probability, and the Law*, 29 CALIF. L. REV. 689 (1941).

171. *See, e.g.*, Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281 (2013).

172. *Id.* at 294; *see also* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 513 (2004) ("[T]here are deep incompatibilities between actual legal decision making and the primarily Rationalist assumptions on which trials are designed.").

173. Griffin, *supra* note 171, at 293; *cf.* Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491 (2001).

> ent tale. Whom jurors believe turns on the consistency of each witness's testimony with the plausible stories that juries create based upon their preexisting stock. These stock stories come from experience and culture, tales learned from the Bible, children's tales, television, radio, books, magazines, and movies. Stories create our world of meaning; they are the lens through which we view all of life's events.[174]

For example, it is a fundamental precept of playwriting, courtesy of Anton Chekhov, that if a gun appears in Act One, it must be fired by Act Three to satisfy theater-goers' expectations.[175] Similar expectations exist at trial. Indeed, the Supreme Court acknowledged this very point in the seminal evidence case *Old Chief v. United States*.[176] Using an example that recalls Chekhov's admonishment, the Court stated the following:

> [T]here lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. Some such demands they bring with them to the courthouse, assuming, for example that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about.[177]

This linkage between trials and storytelling, particularly in the form of theater, is not a new one.[178] And indeed it makes sense. To a large extent, the witnesses, the judge, and the lawyers are all performers in the drama. Corey Rayburn Yung has observed that witnesses in particular must perform, even if the range of prewritten cultural scripts available to them is limited.[179] It also makes sense to view jurors in particular as a type of audience. How they receive the performance is important,[180] but they judge it based on how they relate to it.

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174. ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 7–8 (1999); *see also* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

175. Y. Sobolev, *Tchekhov's Creative Method*, *in* ANTON TCHEKHOV: LITERARY AND THEATRICAL REMINISCENCES 3, 23 (S.S. Koteliansky ed. & trans., 1965); *see also* Alan M. Dershowitz, *Life Is Not a Dramatic Narrative*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 99, 99–100 (Peter Brooks & Paul Gewirtz eds., 1996) (demonstrating how Chekhov's precept could affect a jury in a hypothetical murder trial).

176. 519 U.S. 172 (1997).

177. *Id.* at 188.

178. *See, e.g.*, Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81 (1975).

179. Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 437–38 (2006).

180. Indeed, reception theory has particular importance here. On reception theory, see generally STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 14 (1980) (exploring how the communities to which one belongs and interacts can affect how one interprets a text).

Did they believe the witness's performance? Did they judge the witness's story plausible? How do the stories told by the various witnesses cohere?

Narrative theory has particular salience for rape cases. For starters, often the only witnesses to the actual event are the accuser and the accused, allowing jurors more leeway to view the testimony against their preconceived scripts. As Kalven and Zeisel observed nearly half a century ago in their oft-cited *The American Jury*,[181] it is precisely in the hard cases with ambiguous evidence that jurors feel "liberated" from the constraints of evidence.[182] Indeed, studies show that jurors rely on rape scripts in assessing witness credibility and determining "the truth,"[183] and that jurors converge "on whatever stereotypic-consistent imagery and information is available to them."[184] This happens even in the face of jury instructions to consider only the admitted evidence. "Even when the court fully shields the jury from particular evidence that the victim is 'loose' or lying, stereotypes and heuristics continue to operate. Looking at it hermeneutically, the rape trial proceeds on a backdrop of narratives surrounding all the players involved—from police, to defendants, to victims."[185]

Narrative theory also has salience precisely because it explains why rapes that fail to fit the perceived real-rape script remain difficult to prosecute, notwithstanding the numerous reforms to rape law.[186] Patriarchal stories continue to inform "when and why [rape] happens, and to and by whom."[187] For example, because of this country's particular racialized history, in which black men were stereotyped as perpetual sexual threats to white women, the imagined ideal rapist continues to be black, and the ideal rape victim is white and demure.[188] Factfinders are much more likely to find that a rape occurred when this particular black–white dyad is present, even when controlling for all other

181. KALVEN & ZEISEL, *supra* note 59.
182. *Id.* at 165.
183. *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 204 (1986) (finding that jurors incorporate the public's myths about rape).
184. Douglas D. Koski, *Jury Decisionmaking in Rape Trials: A Review & Empirical Assessment*, 38 CRIM. L. BULL. 21, 128 (2002).
185. Gruber, *supra* note 8, at 647 (footnote omitted); *see also* Ann Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, 25 LOY. L.A. L. REV. 757, 764 (1992) (concluding that even when rape shield laws are applied, gendered narratives can enter the trial); Rayburn, *supra* note 179, at 460–65 (discussing the important language and presentation choices that the accuser must make while taking into consideration jurors' narratives in order to meet the burden of performance).
186. SPOHN & HORNEY, *supra* note 6, at 155 ("[T]he benefits of rape law reform may have accrued primarily to victims of 'stranger' rapes.").
187. TASLITZ, *supra* note 174, at 8. On the media's role in perpetuating patriarchal and racialized narratives, see Joanne Ardovini-Brooker & Susan Caringella-MacDonald, *Media Attributions of Blame and Sympathy in Ten Rape Cases*, 15 JUST. PROF. 3 (2002), and Kosse, *supra* note 159.
188. *See* sources cited *supra* note 7.

variables.[189] Even the popular "Model Mugging" self-defense programs of the 1970s and 1980s carried this undercurrent, encouraging their students, who were predominantly white, middle-class women, to be "immediately suspicious when they encounter a male of color on the street but not when they enter a fraternity party at a private university."[190] Because it does not fit as easily into an immediate rape script, factfinders are less likely to find that a rape occurred when the accuser and accused are both white and middle class.

Patriarchal stories also shape assumptions "about the sexes' similarities and differences, motivations and needs, strengths and weaknesses."[191] Summoning preexisting rape scripts, jurors are less likely to find that a rape occurred when the accuser's behavior does not comport with their understanding of what they believe rape victims do. For example, notwithstanding the relaxation and even elimination of the resistance requirement in many states, jurors continue to be skeptical in cases in which the accuser did not resist to their satisfaction.[192] Decisionmakers also continue to be skeptical in cases in which there has not been prompt complaint.[193] One way of understanding these acquittals is that jurors are relying on their understanding of how they believe people act, which in turn reflects their story-based ideas.[194]

Most importantly, preexisting scripts about what rape victims look like may conflict with rape shield messages and thus result in factfinders applying a different default assumption in cases involving victims who do not fit the script.[195] While young, demure, white women may fit easily into the stock type

189. Capers, *supra* note 7, at 1360–62 (discussing multiple studies that demonstrate a large racial disparity in conviction and sentencing in rape cases).

190. Shannon Jackson, *Representing Rape: Model Mugging's Discursive and Embodied Performance*, 37 DRAMA REV. 110, 126 (1993).

191. TASLITZ, *supra* note 174, at 8.

192. *See generally* KADISH & SCHULHOFER, *supra* note 23, at 329 (noting that many courts and states still expect resistance). For a discussion of resistance's continued salience to decisionmakers, see Victoria Nourse, *The "Normal" Successes and Failures of Feminism and the Criminal Law*, 75 CHI-KENT L. REV. 951, 956–57 (2000).

193. Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 937 (2001).

194. There is also the separate issue of the mode of storytelling in court, which may disadvantage women in general. *See* Kim Lane Scheppele, *Just the Facts Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123 (1992).

195. A similar phenomenon occurred before the advent of rape shield laws. As Kalven and Zeisel noted in their study of jury behavior, jurors routinely "penalized" complainants who did not fit the stereotype of the good woman. KALVEN & ZEISEL, *supra* note 59, at 251. They concluded that jurors, in effect, "rewrit[e] the law of rape" when they believe the accuser is undeserving of the law's protection. *Id.*

of the victim, the damsel in distress, or the good girl,[196] and thus receive some[197] benefit from rape shield's protections,[198] women who do not fit this description are likely to find jurors applying different default assumptions. In short, the stock characters are different. While this is true for a variety of women—jurors in a case involving an Asian complainant may view her as "exotically sexual [and] willingly submissive,"[199] while jurors in a case involving a Hispanic woman may view her as hot blooded, "wanton and promiscuous"[200]—I discuss black women at length because our law's history of treating black women as negligible is so long.[201] There is another reason why the situation of black women merits particular discussion. Notwithstanding their near invisibility in public imag-

196. *See supra* note 8; *see also* BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 31 (1981) (describing how men in the nineteenth century imposed a "glorified de-sexualized identity" on white women in contrast to the previous perception of white women as sinners consumed by sexuality).

197. Even this benefit is compromised. As demonstrated in Part III.A, rape shields require women to downplay and even conceal their sexuality. Rape shields also convey a message that is sex negative rather than sex positive, or even sex neutral. To illustrate what I mean by this, imagine a conversation between a prosecutor and a rape victim who does not fit the ideal victim script. Imagine, for example, that the complainant arrives for trial preparation at the prosecutor's office dressed in "tight blue jeans. Very tight. With a see-through blouse on top. Very revealing." SUSAN ESTRICH, REAL RAPE 9 (1987). This is in fact the description Susan Estrich uses for a bad victim. *Id.* The conversation may very well go like this:

> PROSECUTOR: So don't take this the wrong way, but I'd like you to wear something more conservative for trial.
> COMPLAINANT: Why? This is how I dress.
> PROSECUTOR: Because. And another thing. Don't mention that you live with your boyfriend.
> COMPLAINANT: But he's a part of my life.
> PROSECUTOR: Or that you occasionally stop at a bar on Friday nights.
> COMPLAINANT: What? Am I supposed to act like I stay at home all the time?
> PROSECUTOR: It depends. Do you want this guy to pay for what he did to you or not?

As a former prosecutor for nearly decade, I can attest to the lengths to which prosecutors go to present their witnesses in the most positive light. In short, prosecutors often pigeonhole rape victims into a perceived acceptable type and require them to perform. Several scholars have commented on this phenomenon. *See, e.g.*, Capers, *supra* note 161, at 12; Amanda Konradi, *Too Little, Too Late: Prosecutors' Pre-court Preparation of Rape Survivors*, 22 LAW & SOC. INQUIRY 1, 27–28 (1997); Rayburn, *supra* note 179.

198. *See, e.g.*, Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1041 ("White women have been deemed good women as long as they stay within the prescribed limits of their proper roles.").

199. Lisa C. Ikemoto, *Male Fraud*, 3 J. GENDER RACE & JUST. 511, 518–19 (2000). For more on the enduring image of the servile, sexually available Asian woman, see EDWARD W. SAID, ORIENTALISM 180–90 (1978).

200. Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-racist Politics*, 47 BUFF. L. REV. 1, 89 (1999); *see also* Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 820 (1993).

201. *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1266–69 (1991); Harris, *supra* note 7, at 598–99; Roberts, *supra* note 7, at 364–69; Wriggins, *supra* note 81; Gail Elizabeth Wyatt, *The Sociocultural Context of African American and White American Women's Rape*, 48 J. SOC. ISSUES 77 (1992).

ination about rape,[202] black women in fact face higher rape victimization rates than white women.[203]

2. Rape Scripts, Black Women, and Slutwalks

The association of black women with sexual accessibility has a long history, from the assumption of twelfth-century travelers to Africa that nakedness signified concupiscence,[204] to the legally sanctioned accessibility to black women during American slavery,[205] to the ostensibly scientific belief common during the 1800s that black women possessed a primitive sexual appetite and primitive genitalia.[206] In short, black women were marked as naturally promiscuous,[207] having less need or desire for foreplay than white women, and generally less discriminating in their choice of sexual partners.[208]

202. The Central Park jogger case, which involved a white victim, is but one example. The case dominated the media for months. In fact, there were 3,254 other reported rapes that year, "including one the following week involving the near decapitation of a black woman in Fort Tryon Park and one two weeks later involving a black woman in Brooklyn who was robbed, raped, sodomized, and thrown down an air shaft of a four-story building." JOAN DIDION, AFTER HENRY 255 (1992). These rapes of women of color, however, were simply not newsworthy. As I wrote several years ago, it is relatively easy to summon the images of white female victims. I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 855–56 (2008). And I noted then, "It is perhaps telling that the black females who come to mind are Tawana Brawley and the accuser in the Duke Lacrosse team rape case, both famously discredited as non-victims." *Id.* at 856 n.115. Now, another supposed nonvictim could be added to the list: the accuser in the Dominique Strauss-Kahn case. *See infra* notes 292–306.

203. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 235508, CRIMINAL VICTIMIZATION, 2010, at 11 (2011).

204. *See, e.g.*, THE ITINERARY OF BENJAMIN OF TUDELA 68 (Marcus Nathan Adler ed. & trans., 1907).

205. It was understood, for example, that the laws against rape did not prohibit the rape of black slaves, or for that matter, slave children. *See* Capers, *supra* note 7, at 1357; *see also* Sharon Block, *Lines of Color, Sex, and Service: Comparative Sexual Coercion in Early America*, *in* SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY 141, 141 (Martha Hodes ed., 1999); Catherine Clinton, *"With a Whip in His Hand": Rape, Memory, and African-American Women*, *in* HISTORY AND MEMORY IN AFRICAN-AMERICAN CULTURE 205, 206–07 (Geneviève Fabre & Robert O'Meally eds., 1994).

206. Sander L. Gilman, *Black Bodies, White Bodies: Toward an Iconography of Female Sexuality in Late Nineteenth-Century Art, Medicine, and Literature*, *in* "RACE," WRITING, AND DIFFERENCE 223, 231–38 (Henry Louis Gates, Jr. ed., 1986).

207. *See, e.g.*, Adele Logan Alexander, *"She's No Lady, She's a Nigger": Abuses, Stereotypes, and Realities From the Middle Passage to Capitol (and Anita) Hill*, *in* RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS 3, 7 (Anita Faye Hill & Emma Coleman Jordan eds., 1995); *see also* A. Leon Higginbotham, Jr., *The Hill-Thomas Hearings—What Took Place and What Happened: White Male Domination, Black Male Domination, and the Denigration of Black Women*, *in* RACE, GENDER, AND POWER IN AMERICA, *supra*, at 26, 32 (noting that in the 1800s, black female slaves were presumed to lack "moral virtue" and thus "it was not within their nature to be raped").

208. *See* William H. George & Lorraine J. Martínez, *Victim Blaming in Rape: Effects of Victim and Perpetrator Race, Type of Rape, and Participant Racism*, 26 PSYCHOL. WOMEN Q. 110, 110 (2002).

All this has had consequences when it comes to the sexual victimization of black women. Notwithstanding the black letter law that, after the Reconstruction Amendments, notionally treated all rape victims equally, a type of "white letter law of rape"[209] remained that categorized black women as presumptively unchaste.[210] Thus, in 1918, the Florida Supreme Court could remark with confidence that

> [w]hat has been said by some courts about an unchaste female . . . being a comparatively rare exception is no doubt true where the population is composed largely of the Caucasian race, but we would blind ourselves to actual conditions if we adopted this rule where another race that is largely unmoral constitutes an appreciable part of the population.[211]

Since lack of chastity also signified untrustworthiness, black women were also deemed less credible than white women.[212] As a result, black women were often viewed as "unrapeable"[213] or responsible for their own rapes.[214]

While much more empirical work needs to be done on the continuing salience of these assumptions, the studies that do exist suggest that stereotypes about black women and their sexuality continue to affect juror decisionmaking. Consider Gary LaFree's oft-cited study of juror attitudes.[215] Controlling for other

209. I first introduced the concept "white letter law" in two earlier articles. *See* Capers, *supra* note 79, at 19; I. Bennett Capers, *The Trial of Bigger Thomas: Race, Gender, and Trespass*, 31 N.Y.U. REV. L. & SOC. CHANGE 1, 7–8 (2006). Unlike black letter law, which brings to mind statutory law, written law, and the easily discernible law set forth as black letters on a white page, "white letter law" suggests societal and normative laws that stand side by side with and often undergird black letter law but, as if inscribed in white ink on white paper, remain invisible to the naked eye.

210. Anderson, *supra* note 5, at 66–68; Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 950 (1997); Joan R. Tarpley, *Blackwomen, Sexual Myth, and Jurisprudence*, 69 TEMP. L. REV. 1343, 1365 (1996); Sarah Gill, Essay, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA WOMEN'S L.J. 27, 36–37 (1996).

211. Dallas v. State, 79 So. 690, 691 (Fla. 1918).

212. *See* Hutchinson, *supra* note 200, at 85 ("[T]he construction of black women as promiscuous causes jurors in sexual assault prosecutions to doubt black women's credibility."); *see also* Gill, *supra* note 210, at 36. For more on this phenomenon, see Marilyn Yarbrough with Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625 (2000).

213. *See* Capers, *supra* note 7, at 1368; *see also* CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 229 (2000); Sharon Angella Allard, Essay, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 196 & n.16, 199, 201–02 (1991); Darci E. Burrell, Recent Developments, *Myth, Stereotype, and the Rape of Black Women*, 4 UCLA WOMEN'S L.J. 87, 89 (1993).

214. Paula Giddings, *The Last Taboo*, *in* WORDS OF FIRE: AN ANTHOLOGY OF AFRICAN-AMERICAN FEMINIST THOUGHT 414, 415 (Beverly Guy-Sheftall ed., 1995).

215. Gary D. LaFree et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389 (1985).

factors, LaFree concluded that jurors were less likely to render a guilty verdict when the accuser was a black woman.[216] Discussing the results, LaFree speculated that perhaps "jurors were influenced by stereotypes of black women as more likely to consent to sex or as more sexually experienced and, hence, less harmed by an assault."[217] As a juror in one case put it, a "girl her age from 'that kind of neighborhood' probably wasn't a virgin anyway."[218] Other studies have found similar results.[219]

A survey taken in response to the case of Joan Little, a black female prisoner who was prosecuted for killing her jailer, is likewise informative. Little claimed that she killed the jailer to defend herself from rape.[220] In connection with her defense, social scientists conducted a survey of racial and gender attitudes in the county where she was scheduled to be tried. In an attempt to gauge how jurors would respond to her rape allegation, the survey asked, "Do you believe that black women have lower morals than white women?" Sixty-three percent of the individuals surveyed answered yes.[221]

These assumptions about black women and lack of chastity even make appearances in popular culture. Lyrics from the Rolling Stones song "Some Girls" are but one example:

> White girls they're pretty funny
> Sometimes they drive me mad,

216. *Id.* at 397.
217. *Id.* at 401–02.
218. *Id.* at 402 n.22.
219. A study of the treatment of female victims of sexual assault in Australia, with a particular focus on the subset of cases involving black and Aboriginal women, reached a similar finding. Anne Cossins, *Saints, Sluts and Sexual Assault: Rethinking the Relationship Between Sex, Race and Gender*, 12 SOC. & LEGAL STUD. 77 (2003). Another scholar observes, "Racialized and marginalized women, who are less valued and less credible in a society characterized by racism, are, by definition, less readily identified as 'ideal victims' and more easily stigmatized as 'bad' or 'undeserving' victims (if their victim claims are heard at all)." Melanie Randall, *Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming*, 22 CAN. J. WOMEN & L. 397, 410 (2010). The race of the victim also appears to play a role in prosecutorial decisions about whether even to pursue charges. *See, e.g.*, Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48 SOC. PROBS. 206, 226 (2001) ("[P]rosecutors rejected charges more often if the victim was a racial minority . . . ."); *see also* Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 671 (2001) (finding that "prosecutors were 4 ½ times more likely to file charges if the victim was white" than if the victim was black). For a discussion of these and similar studies, see Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 37–43 (2006).
220. *See* W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 180 (1981).
221. *Id.*

> Black girls just want to get fucked all night
> I just don't have that much jam.[222]

All this suggests that rape shield's claimed benefit may vary depending on the race of the complainant and that women of color are less likely than white women to benefit from rape shield laws.

Again, a thought exercise may be useful. Imagine a jury in a sexual assault case. This complainant, however, is a black woman. During the course of the trial, the jurors will be inundated with information, and they will likely learn where she lives (which, statistically speaking, is likely to be a majority black neighborhood),[223] whether she attended college (which, statistically speaking, is unlikely),[224] and what she does for a living (which, statically speaking, is likely to be a low-wage job).[225] By virtue of the rape shield, jurors will learn nothing about her sexual experience. But again, jurors who are told nothing do not assume nothing. Instead, jurors are more apt to conclude that the complainant is sexually active and that she may even be a bad girl (sexually indiscriminate and sexually immoderate). Indeed, because of the continued salience of race in this country, jurors may reach this conclusion even when presented with a black complainant who is solidly middle-class, articulate, and fully presentable to the jury.

All this should suggest that the push for rape shield laws in the 1970s warrants further scrutiny. Agitators for change were largely monolithic,[226] and they achieved a result that disproportionately benefits white women.[227] Moreover,

222. ROLLING STONES, SOME GIRLS (Rolling Stone Records 1978).

223. JOHN ICELAND ET AL., U.S. CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980–2000, at 4 (2002); *see also* Ilyce Glink, *U.S. Housing Market Remains Deeply Segregated*, CBSNEWS.COM (June 20, 2012, 7:10 AM), http://www.cbsnews.com/8301-505145_162-57443862/u.s-housing-market-remains-deeply-segregated.

224. *See* U.S. DEP'T OF LABOR, THE AFRICAN-AMERICAN LABOR FORCE IN THE RECOVERY 1 (2012), http://www.dol.gov/_sec/media/reports/BlackLaborForce/BlackLaborForce.pdf.

225. *Id.* at 1–2.

226. For a discussion of the lack of diversity in most second-wave feminist groups and the failure of antirape activists to address racial issues, see ANGELA Y. DAVIS, WOMEN, RACE AND CLASS (First Vintage Books 1983) (1981), and HOOKS, *supra* note 196. For a more in-depth discussion exploring the inclusion of black women in antirape campaigns in some cities, such as Washington, D.C., but their exclusion elsewhere, see Maria Bevacqua, *Anti-rape Coalitions: Radical, Liberal, Black, and White Feminists Challenging Boundaries*, *in* FORGING RADICAL ALLIANCES ACROSS DIFFERENCE: COALITION POLITICS FOR THE NEW MILLENNIUM 163 (Jill M. Bystydzienski & Steven P. Schacht eds., 2001).

227. As Lynn Hecht Schafran observes in her discussion of task force reports of gender, racial, and ethnic bias in the judicial system, "whatever the problems are for white women and for men of color, they are worse and more complex for women of color." *See* Lynn Hecht Schafran, *Women of Color in the Courts*, TRIAL, Aug. 1999, at 21. For an extended critique of feminist reforms to rape law as benefiting white women and leaving black women "more endangered than ever," see

there is nothing in the history to suggest that reformers gave any consideration to how rape shield laws might or might not benefit women of color.[228] Rather, the push for rape shield laws, and indeed rape reform in general, betrays what Adrienne Rich refers to as "white solipsism"[229]—that tendency to see whiteness as the norm.[230] The same year feminists agitated for rape shield laws, a study of rape attitudes of thirty-eight judges in Philadelphia revealed that several judges equated the category of "vindictive women" with black women.[231] Another judge stated, "With the Negro community, you really have to redefine the term rape. You never know about them."[232] It is likely that none of this factored into the push for rape shield laws. The result was rape shield laws that, in hindsight at least, are racially contingent in effect.

Indeed, when one considers expressive message failure, the inadequacy of rape shield laws becomes inescapable. In theory, the effect of rape shield laws has been to allow all female rape victims, rather than just a small subset of victims, to present themselves as good. If, as Kimberlé Crenshaw argues, accusers are pigeonholed into a limited number of categories such as "the whore, the tease, the vengeful liar, the mentally or emotionally unstable, or . . . the madonna,"[233] rape shield laws, by shielding sexual history, in theory allow all rape victims to don the guise of the madonna.

But in reality, the transformation is aspirational at best. Conceptually, and despite the rise in nontraditional casting, it is still difficult to envision a black madonna[234] (or for that matter an Asian or Hispanic one). It does not comport with our stock types. The virginal black woman—who in theory should

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Erin Edmonds, *Mapping the Terrain of Our Resistance: A White Feminist Perspective on the Enforcement of Rape Law*, 9 HARV. BLACKLETTER J. 43, 47 (1992).

228. *See supra* note 79 and accompany text.

229. ADRIENNE RICH, *Disloyal to Civilization: Feminism, Racism, Gynephobia (1978)*, *in* ON LIES, SECRETS, AND SILENCE: SELECTED PROSE 1966–1978, at 275, 299 (1979).

230. As one commentator has observed in discussing the rules of evidence in rape cases, "At all levels, African American women fare particularly badly, and feminist-inspired reforms have failed to address their particular experiences of stereotyping and disqualification." Hunter, *supra* note 4, at 166.

231. Carol Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 JUDICATURE 303, 307 (1974).

232. *Id.* (internal quotation marks omitted).

233. *See* Kimberlé Crenshaw, *Whose Story Is It, Anyway?: Feminist and Antiracist Appropriations of Anita Hill*, *in* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 402, 409 (Toni Morrison ed., 1992).

234. Kimberlé Crenshaw has made a similar point in her analysis of Justice Clarence Thomas's confirmation hearings, which included accusations that he had repeatedly engaged in acts of sexual harassment, including against his black employee Anita Hill. Observed Crenshaw, "For black women the issue is not the precariousness of holding on to the protection that the madonna image provides . . . . Instead, it is the denial of the presumption of 'madonna-hood' that shapes responses to black women's sexual victimization." *Id.* at 414.

be a deserving victim—is instead assumed to be a Jezebel.[235] Finally, the continued linkage of black women and concupiscence also explains the need many black women have felt to respond to the recent phenomenon of SlutWalks, the international grassroots movement "challenging rape culture, victim-blaming and slut-shaming."[236] In an open letter from black women to the SlutWalk organizers,[237] black women expressed solidarity with the organizers' efforts to end the shaming and blaming of sexual assault victims but noted that the luxury of self-identifying as a slut is a racialized one.

> As Black women, we do not have the privilege or the space to call ourselves "slut" without validating the already historically entrenched ideology and recurring messages about what and who the Black woman is. We don't have the privilege to play on destructive representations burned in our collective minds, on our bodies and souls for generations. . . . It is tied to institutionalized ideology about our bodies as sexualized objects of property, as spectacles of sexuality and deviant sexual desire.[238]

In a way, the response of black women to SlutWalk speaks volumes about how rape shield laws likely operate in practice. A white woman can participate in a SlutWalk without losing the presumption of being a good girl when she enters the courtroom. A black woman does not enjoy that presumption because the default assumption that likely applies to her is quite different, notwithstanding rape shield rules.[239]

235. On the associations of black women stereotypes, see sources cited *supra* note 201; *see also* MELISSA V. HARRIS-PERRY, SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA (2011).

236. *Frequently Asked Questions*, SlutWalk NYC, http://slutwalknyc.tumblr.com/faq (last visited Mar. 15, 2013). For an overview of the phenomenon, see Rebecca Traister, *Ladies, We Have a Problem*, N.Y. TIMES, July 20, 2011, http://www.nytimes.com/2011/07/24/magazine/clumsy-young-feminists.html. For an interesting discussion of using SlutWalks as a means of rethinking sexual agency, and in doing so recasting the law of rape, see Deborah Tuerkheimer, Slutwalking in the Shadow of the Law (Feb. 22, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009541.

237. *An Open Letter From Black Women to the Slutwalk*, BLACK WOMEN'S BLUEPRINT (Sept. 23, 2011), http://www.blackwomensblueprint.org/2011/09/23/an-open-letter-from-black-women-to-the-slutwalk.

238. *Id.*

239. Over a decade ago, Regina Austin and Liz Schneider made a similar point about the linkage between black women and sexual availability and the resulting bind faced by black feminists, who as a result tended to "emphasize the restrictive, repressive, and dangerous aspect of sexuality rather than its association with black women's own pleasure and agency." *See* Regina Austin & Elizabeth M. Schneider, *Mary Jo Frug's* Postmodern Feminist Legal Manifesto *Ten Years Later: Reflections on the State of Feminism Today*, 36 NEW ENG. L. REV. 1, 21 (2001).

But here is the larger issue. While my focus has been black women vis-à-vis white women, in fact the expressive message of rape shield laws is likely ineffective when it comes to other victims as well: older women, single women, overweight women, poor women, working women, unattractive women, gay or transgender women, and even male victims. For example, when confronted with an older victim, jurors may fall back on the default stock character of the "disappointed old maid" who secretly wanted sex.[240] When confronted with a homely woman, jurors may apply a different default assumption, casting her as a vindictive, spurned woman.[241] In short, rape shield laws might be good for cardboard cutout women, ideal women, imaginary women, and women who can play the part, but not for the rest of us. In short, rape shield laws are not good for other, real victims of rape.

IV. RETHINKING RAPE SHIELD LAWS

In the preceding Parts, I have made the case that rape shield laws should trouble us all, focusing in particular on two problems. The first is the expressive message rape shield laws communicate, a message that, on a certain level, reinstantiates the very chastity requirement feminists hoped to eradicate.[242] The second problem is the unequal outcomes that result when there is expressive message failure: decisionmakers rejecting messages of chastity and relying instead on default assumptions about women who, because of race or class or some other trait, do not fit the script of ideal rape victims.[243] This part, concededly in broad strokes, begins the process of sketching a solution.

A. Two Modest Proposals

As noted above, one of the expressive messages communicated by rape shield laws is that sexual history *does* matter. The message to jurors is that they should assume the complainant is a virgin, or at least a good girl, and thus deserving of the law's protection. In other words, rather than subverting the

240. *See, e.g.*, Hans von Hentig, *Remarks on the Interaction of Perpetrator and Victim*, 31 J. CRIM. L. & CRIM. BEHAV. 303 (1940).

241. *See* Marsha B. Jacobson & Paula M. Popovich, *Victim Attractiveness and Perceptions of Responsibility in an Ambiguous Rape Case*, 8 PSYCHOL. WOMEN Q. 100, 103 (1983) ("[I]f the woman is unattractive, she may be less likely to be believed (i.e., 'Who'd want to rape *you*?') and so less likely to obtain a conviction against her attacker."); *cf.* THOMAS W. MCCAHILL ET AL., THE AFTERMATH OF RAPE 116 (1979) (noting that 53.3 percent of rape reports by obese women were declined for prosecution, versus a 14.2 percent declination rate for nonobese complainants).

242. *See supra* notes 150–166 and accompanying text.

243. *See supra* notes 167–240 and accompanying text.

common law's chastity requirement, rape shield laws reify the requirement in another form. This is all the more troubling once one recognizes the role courts and jury instructions play in educating the public. As Justice Brandeis observed in a different context, "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."[244] There is at least one way, however, to begin to counter this message, at least in the courtroom. Specifically, courts could provide jurors with an instruction similar to the following:

> I give this instruction in all cases because it applies to all rape cases. Everyone deserves to have the criminal law vindicate them when they have been raped, regardless of their sexual history. Engaging in sexual behavior, whether it be once or innumerable times, does not render a person outside of the law's protection. Everyone is entitled to sexual autonomy, and no one, by merely engaging in sex, assumes the risk of subsequent rape. Put differently, before the law, it does not matter whether a complainant is a virgin or sexually active. Before the law, everyone is entitled to legal respect, regardless of his or her sexual past. Accordingly, bear in mind that in this case and in all rape cases, all rape victims are entitled to the law's protection.[245]

To be sure, this proposed jury instruction may not completely undo rape law's chastity message. But if delivered at the start of trial[246] and repeated throughout, such a jury instruction can make a critical difference in the message jurors are

244. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

245. This instruction borrows heavily from Michelle Anderson's normative vision of rape law. *See* Anderson, *supra* note 5, at 57. It should be noted that as of 2010, judges in Britain have been encouraged to provide jurors instructions to counter biases they may have based on a complainant's manner of dress or other stereotypes about perceived real rape victims. For example, one sample instruction, provided in the *Crown Court Bench Book* published in 2010, provides the following:

> Illustration—avoiding judgments based on stereotypes: it would be understandable if one or more of you came to this trial with assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be a rapist, or what a person who is being, or has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways.

See Lynn Hecht Schafran, *Innovative Approaches to Rape Education: New Judicial Instructions in the UK and Public Education in Scotland and Australia*, SEXUAL ASSAULT REP., Nov./Dec. 2010, at 23 (quoting the *Crown Court Bench Book: Directing the Jury* (2010)).

246. *See* Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681 (2000) (citing evidence that instructions given at the beginning of the trial help jurors distinguish relevant evidence).

left with when they deliberate.[247] More importantly for purposes of this Article, it can make a difference in the message jurors take with them when they leave the courthouse.[248]

The second modest proposal addresses expressive message failure, those situations in which jurors reject the message communicated by rape shield laws and instead rely on default assumptions about sexuality for complainants who do not fit the ideal rape victim script. The key here is that such default assumptions are not ineradicable.[249] As I have explored elsewhere by building on the work of Cynthia Lee,[250] one way to override default assumptions or implicit biases is by encouraging decisionmakers to engage in switching exercises—or "imaginative acts of cross gender/race/class/status dressing."[251] In other words, jurors would be encouraged to "cross dress" the complainant.[252] For example, jurors would ask themselves if they would reach the same conclusion about the

247. Although "[t]he predominant view of scholars, both law professors and psychologists, is that evidentiary instructions are exercises in futility," this view is in fact belied by much evidence. *See* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. (forthcoming 2013) (manuscript at 4). Instructions are not perfect; nor are they cure-alls. But they do work under the right conditions, especially when those instructions are coherent and explained. *Id.* For example, instructions often deter jurors from making arguments during deliberations that are directly contrary to the instructions. *See* MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT (1997). Daniel Capra adds, "The juror in her own mind may disregard an instruction, but she would not indicate such a blatant disregard in discussions with other jurors, and so her arguments would be limited by the appropriately admitted evidence." Daniel J. Capra, *Out-of-Court Accusations Offered for "Background": A Measured Response From the Federal Courts*, 55 U. MIAMI L. REV. 803, 815–16 (2001).

248. This accords with de Tocqueville's assessment of the jury, which he described as "one of the most efficacious means for the education of the people which society can employ." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 306 (Henry Reeve trans., D. Appleton & Co. 1899) (1835); *cf.* John Leubsdorf, *Evidence Law as a System of Incentives*, 95 IOWA L. REV. 1621, 1658–61 (2010) (discussing how evidentiary rules can influence conduct "in the real world").

249. For evidence that making individuals aware of their biases facilitates the process of overriding them, see Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 157 (2004). *See also* Kang et al., *supra* note 168, at 1169–86.

250. Cynthia Lee introduced the concept of switching exercises to help jurors override inappropriate biases in self-defense and provocation cases. *See* CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 203–25 (2003). My work extends the concept to all decisionmakers, such as police, prosecutors, and judges. It also extends the concept to all criminal cases. *See, e.g.*, Capers, *supra* note 161 (proposing and exploring the benefits of decisionmakers engaging in a switching, or cross-dressing, exercise); Capers, *supra* note 150, at 74–76 (discussing benefits to police by reducing racial profiling); Capers, *supra* note 2, at 1298–1301 (discussing benefits of cross dressing in prosecuting male victim rape cases); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011) (discussing benefits to courts reviewing racial profiling claims).

251. Capers, *supra* note 161, at 24.

252. Again, this could be accomplished through the use of jury instructions. On the effectiveness of instructions to debias jurors, see Sklansky, *supra* note 247.

presence or nonpresence of consent if the complainant were imaginatively "cross dressed" as white instead of Latina or as middle-class instead of poor. Would they apply the court's instruction about all rape victims being entitled to the law's protection, regardless of their sexual history, in the same way? Jurors reaching the same conclusion would know that their decisions are not the product of bias or their reliance on default assumptions about complainants who do not fit the ideal rape victim script. By contrast, jurors who reach a different decision would be encouraged then to determine for themselves whether their different decision can be justified—for example, whether race, class, or some other difference should matter in a particular case. Using such a cross-dressing exercise can prompt jurors to acknowledge their own biases and to override those biases to apply the rape shield rule equally to all complainants.[253]

Neither of these modest proposals completely solves the problem of rape shield laws. But they are a start. More importantly, they begin a conversation about addressing the twin problems of rape shields' troubling expressive message and the harm that occurs when there is expressive message failure.

B. Beyond Rape Shield Laws

The final argument I want to make goes beyond rape shield's problems of troubling expressive message and expressive message failure. The problem of rape shield laws—not to mention rape sword laws—is far deeper. If common law evidentiary rules framed trials as pitting bad women against good men, rape shield and rape sword rules purport to reframe trials as pitting good women against bad men.[254] In doing so, rape shield rules have not just tipped the scales. They have tipped them too far.

In short, the broader and admittedly far more difficult argument I want to make is that, thirty-five years after Congress enacted Rule 412, it is time, indeed past time, to critically reexamine rape shield rules in toto and to determine whether their advantages in fact outweigh their disadvantages. The same is true of Rule 413 and state rape sword rules. What is required is an acknowledgement that rape shield and rape sword rules were rushed through legislatures with little deliberation and with little attention to how such rules would play out in

253. *See* Capers, *supra* note 161, at 25. At least one court has given a similar cross-dressing or switching instruction. In a case in Alaska involving a black teenage defendant being tried as an adult for striking a white student, the court instructed the jurors to essentially engage in a race-switching exercise "to test whether stereotypes have affected [their] evaluation of the case." LEE, *supra* note 250, at 257–58 (discussing the case and quoting the jury instruction).

254. *See supra* notes 105–106 and accompanying text.

cases beyond those involving the subset of white, middle-class feminists who pushed for their passage.[255] There also needs to be an acknowledgement and discussion of the role both rules play in strengthening the state vis-à-vis the individual[256] and in contributing to what I have elsewhere termed our incarcertory state.[257] Above all else, what is necessary is an acknowledgment that rape shield and rape sword laws were passed without empirical support or any attempt at proof.[258] Given that we are discussing the rules of evidence, those of us who call ourselves feminists or progressives cannot shirk the need for proof.

It is entirely possible that upon critical examination, we will discover that rape shield and rape sword rules do more harm than good. If nothing else, we may find that, notwithstanding their initial merit, they have run their course and are no longer necessary. We may find that we have reached the point at which, instead of a prohibition with a finite number of exceptions, what we need is a return to basics—an approach in which judges can consider, on a case-by-case basis, the probative value of the proffered evidence to the issue sought to be established. The issue in a particular case might be consent, or it might be whether the defendant was reasonably mistaken as to the existence of consent—an issue that was rarely litigated at the time Congress passed Rule 412[259] but which has come to be the core issue in acquaintance rape cases. For example, returning relevancy and undue prejudice determinations to judges could result in a general consensus that prior sexual history is never relevant in stranger forcible rape cases. By contrast, prior sexual conduct may have some evidentiary value in another case, for example, one in which the defendant makes a prima facie showing that he reasonably believed consent existed based on his knowledge of the complainant's prior response to sexual advances.[260]

Short of placing a moratorium on rape shield rules, there is also Harriet Galvin's proposal. More than twenty years ago, Galvin proposed modifying the rape shield rule so that it would simply bar evidence of sexual history or conduct to prove propensity or to support the inference that the accuser is less worthy of belief. Under her proposal, evidence of sexual conduct on the part of the victim

255. *See supra* notes 79–82 and accompanying text.
256. *See, e.g.*, Gruber, *supra* note 72, at 825.
257. *See* I. Bennett Capers, *Defending Life*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 167 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).
258. *See supra* notes 66–70, 142–143 and accompanying text.
259. Dressler, *supra* note 72, at 431 ("Before rape law reform, the issue of *mens rea* rarely arose in rape trials.").
260. For example, such information was excluded in *United States v. Knox*, No. ACM 28628, 1992 WL 97157 (A.F. Ct. Mil. Rev. 1992), *aff'd*, 41 M.J. 28 (Ct. Mil. App. 1994).

could, however, be admissible for other purposes.[261] It may be time to reexamine her proposal and to examine the empirical evidence supporting or not supporting rape shield rules, and to start again. That is one beauty of the law. We may not be able to escape history. But the law itself—the law can always be a tabula rasa.

One can imagine two counterarguments to this broad proposal: (1) Judges will apply antiquated ideas about sexuality to the detriment of women, returning rape cases to their pre-shield days of complainants being victimized twice, first by the rapist and then by the trial system; and (2) society is not ready. These counterarguments are weighty, but neither should discourage reexamination of rape shield laws. At the time that feminists pushed legislatures to adopt rape shield laws, they were right to express skepticism that a primarily male judiciary could fairly judge the relevance and prejudice of prior sexual conduct absent strictures in the form of rape shield laws.[262] But we have come a long way since then. The federal judiciary is now about 30 percent female.[263] Some states fare even better. Recently, women made up eight of thirteen chief justices in southern states.[264] Across the nation, women held twenty of the chief justice positions.[265] While much work still needs to be done to obtain gender parity, this is not our mothers' judiciary but rather one that has far more gender parity than when Congress enacted rape shields.

The second counterargument is that society is not ready. But again, we have come a long way. Rape shield laws were very much a product of their time and a response to the stigma that existed then for women engaging in sexual activity outside marriage. Consider the times now and how much has changed. When rape shield laws swept the country, society's attitudes about sex and sexuality were a far cry from what they are now. In 1977, 73 percent of surveyed Americans believed that extramarital sex was always wrong, and another 13.6 percent believed it was almost always wrong.[266] We also frowned on premarital sex, with 29.3 percent of respondents believing that premarital sex was always

261. Galvin, *supra* note 14, at 809–10. For example, under Galvin's proposal, sexual history evidence might be admissible to prove bias or to support a mistake of fact defense.

262. *See* Galvin, *supra* note 14, at 812 n.239; *see also* BABCOCK ET AL., *supra* note 138, at 843 ("We are . . . loath to leave determinations of general 'relevancy' to judges who are too frequently male and too frequently imbued with unreal and insensitive attitudes toward women's sexual attitudes and experiences.").

263. *See Women in the Federal Judiciary: Still a Long Way to Go*, NAT'L WOMEN'S L. CTR. (Mar. 1, 2013), http://www.nwlc.org/resource/women-federal-judiciary-still-long-way-go-1.

264. Mark Curriden, *Tipping the Scales*, 96 A.B.A. J. 37, 37 (2010).

265. *Id.* at 38.

266. Norval D. Glenn & Charles N. Weaver, *Attitudes Toward Premarital, Extramarital, and Homosexual Relations in the U.S. in the 1970s*, 15 J. SEX RES. 108, 113 (1979).

wrong, and another 11.7 percent believing that it was almost always wrong. Now consider attitudes today. Premarital sex and cohabitation before or in lieu of marriage is now an accepted part of the way we live.[267] As Deborah Tuerkheimer has recently pointed out, "women's sexuality and our sense of its dimensions have continued to evolve."[268] But even this is an understatement. Not only are the overwhelming majority of women (98 percent between the ages of twenty-five and forty-four) sexually active.[269] They are also becoming sexually active at an earlier age (30 percent of girls between the ages of fourteen and seventeen report engaging in vaginal sex,[270] and over 50 percent of teenage girls between the ages of fifteen and nineteen report vaginal intercourse[271]). And they are engaging in a wider array of sexual practices (for example, of women between the ages of twenty and forty-nine, most have engaged in oral sex, and at least 40 percent report engaging in anal sex).[272] Mary Fan makes a similar point: We are now a culture in which sex outside relationships or in concurrent relationships is the new normal and in which new acronyms to describe those relationships, such as NSA[273] and FWB,[274] have entered the general lexicon.[275]

More importantly, much of the stigma that once attached to sex outside marriage is a thing of the past. Just consider the following: When Prince Charles announced his engagement to Princess Diana in 1981, the public demanded evidence of her virginity, which her uncle publicly provided.[276] There was no such demand in 2011 when Prince William married Kate Middleton after the two of them had been living together for years.[277] As one Brit pithily put it, "We live in a modern age and people do all sorts of things before they settle

267. *See, e.g.*, NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 33 (2010).
268. Tuerkheimer, *supra* note 12, at 1464.
269. WILLIAM D. MOSHER ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, SEXUAL BEHAVIORS AND SELECTED HEALTH MEASURES: MEN AND WOMEN 15–44 YEARS OF AGE, UNITED STATES, 2002, at 51 (2005).
270. J. Dennis Fortenberry et al., *Sexual Behaviors and Condom Use at Last Vaginal Intercourse: A National Sample of Adolescents Ages 14 to 17 Years*, 7 J. SEXUAL MED. 305, 309–10 (2010).
271. *Id.*
272. *See* Tuerkheimer, *supra* note 12, at 1464.
273. "NSA" is an acronym for "No Strings Attached."
274. "FWB" is an acronym for "Friends with Benefits."
275. *See* Mary D. Fan, *Sex, Privacy, and Public Health in a Casual Encounters Culture*, 45 U.C. DAVIS L. REV. 531, 537–43 (2011).
276. *See* Gregory Katz, *Royal Bride's Virginity No Longer an Issue for Brits*, HUFFINGTON POST (Apr. 8, 2011, 9:41 AM), http://www.huffingtonpost.com/2011/04/08/royal-bride-kate-middleton-virginity_n_846626.html.
277. *Id.*

down."[278] At the time rape shield laws swept the country, there was public outcry when Olivia Newton-John's pop song "Physical" was played on the radio, with several radio stations and the state of Utah banning it.[279] Its most risqué lyric was "I wanna get physical, let's go get physical/Let me hear your body talk, your body talk."[280] Today, raising hardly an eyebrow, pop star Rihanna sings about being excited by "whips and chains"[281] and asking her lover, "Come here, rude boy, boy; can you get it up?/Come here rude boy, boy; is you big enough?/Take it, take it baby, baby/Take it, take it."[282] The prim Mary Tyler Moore of the 1970s was long ago replaced by women negotiating *Sex in the City*. We are at a point at which women have made *Fifty Shades of Grey*, a book about sado-masochism, one of the best-selling books of 2012;[283] at which the release of sex tapes by female celebrities such as Paris Hilton and Kim Kardashian seems passé;[284] and at which the only people we seem to frown on for sexting are politicians.[285] A female student at Georgetown Law School can testify before a Democratic panel in support of insurance plans that provide contraceptives for women, and when conservative talk show host Rush Limbaugh calls her a "slut" and a "prostitute," he is roundly criticized and ostracized by advertisers,[286] while she receives a call of support from the president.[287] And when a candidate for

278. *Id.* (internal quotation marks omitted).

279. *See* Bob Cannon, *Olivia Gets Physical*, ENT. WKLY., Nov. 19, 1993, http://www.ew.com/ew/article/0,,308706,00.html; *see also* Soraya Roberts, *Olivia Newton-John Tried to Stop 'Physical' Music Video From Being Released in 1981*, N.Y. DAILY NEWS (Apr. 20, 2010, 10:28 AM), http://www.nydailynews.com/entertainment/music-arts/olivia-newton-john-stop-physical-music-video-released-1981-article-1.168007.

280. OLIVIA NEWTON-JOHN, PHYSICAL (MCA Records 1981); *see Physical*, METROLYRICS, http://www.metrolyrics.com/physical-lyrics-olivia-newtonjohn.html (last visited Mar. 15, 2013).

281. RIHANNA, S&M (Def Jam Recordings 2010).

282. RIHANNA, Rude Boy (Def Jam Recordings 2009).

283. *See* Julie Bosman, *Discreetly Digital, Erotic Novel Sets American Women Abuzz*, N.Y. TIMES, Mar. 9, 2012, http://www.nytimes.com/2012/03/10/business/media/an-erotic-novel-50-shades-of-grey-goes-viral-with-women.html; Gabe Habash, *The Bestselling Books of 2012*, PUBLISHER'S WKLY. (Jan. 4, 2013), http://www.publishersweekly.com/pw/by-topic/industry-news/bookselling/article/55383-the-bestselling-books-of-2012.html.

284. Lola Ogunnaike, *Sex, Lawsuits and Celebrities Caught on Tape*, N.Y. TIMES, Mar. 19, 2006, http://query.nytimes.com/gst/fullpage.html?res=9C07E6DB1E31F93AA25750C0A9609C8B63.

285. *The Weiner War*, ECONOMIST, June 9, 2011, http://www.economist.com/node/18805960; Tara Parker-Pope, *Digital Flirting—Easy to Do and Easy to Get Caught*, N.Y. TIMES WELL BLOG (June 13, 2011, 1:47 PM), http://well.blogs.nytimes.com/2011/06/13/digital-flirting-easy-to-do-and-to-get-caught.

286. Brian Stelter, *Limbaugh Advertisers Flee Show Amid Storm*, N.Y. TIMES, Mar. 4, 2012, http://www.nytimes.com/2012/03/05/business/media/limbaugh-advertisers-flee-show-amid-storm.html.

287. Jonathan Weisman, *Obama Backs Student in Furor With Limbaugh on Birth Control*, N.Y. TIMES CAUCUS BLOG (Mar. 2, 2012, 12:55 PM), http://thecaucus.blogs.nytimes.com/2012/03/02/boehner-condemns-limbaughs-comments.

the Senate suggests that "legitimate" rape victims cannot become pregnant from rape, his own party asks him to withdraw from the race.[288] We have reached the point at which men, especially younger men, get it: "No" really means "no."[289] And quite possibly we have reached the point at which most jurors can consider prior sexual history for its probative value without the risk of unfair prejudice.

Still, I can imagine the hesitation about "taking a break"[290] from rape shield laws.[291] While collectively we have come a long way, there are still those out there who will view a complainant's sexual history as proof positive of consent in perpetuity. While that is true, so is this: Rape shields are an increasingly imperfect solution. Maybe tomorrow is too soon to put a moratorium on rape shield laws. But it is not too soon to reexamine them and begin thinking ahead.

CONCLUSION

For a while, it appeared as if the improbable would happen. On May 14, 2011, shortly before he was about to board a plane to France, Dominique Strauss-Kahn was arrested and charged with forcibly raping a maid at the New York hotel where he had stayed.[292] This was improbable because Strauss-Kahn, as managing director of the International Monetary Fund and leading contender to replace French President Nicolas Sarkozy, was a man of incredible wealth and power. It was improbable because his accuser, Nafissatou Diallo, was a heavyset, immigrant woman from Guinea, and as a hotel maid she was decidedly underclass. He was white. She was black.

288. John Eligon & Michael Schwirtz, *Senate Candidate Provokes Ire With 'Legitimate Rape' Comment*, N.Y. TIMES, Aug. 19, 2012, http://www.nytimes.com/2012/08/20/us/politics/todd-akin-provokes-ire-with-legitimate-rape-comment.html; Jonathan Weisman & John Eligon, *G.O.P. Trying to Oust Akin From Race for Rape Remarks*, N.Y. TIMES, Aug. 20, 2012, http://www.nytimes.com/2012/08/21/us/politics/republicans-decry-todd-akins-rape-remarks.html.

289. *Cf.* Kahan, *supra* note 167, at 777.

290. This is a play on Janet Halley's manifesto. *See* JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006).

291. I can even imagine a third counterargument: Strict rape shield laws are necessary to encourage victims to come forward and report their victimization. In other words, because many victims are reluctant to have their sexual history discussed, they decline to report rapes, which means many rapists go unpunished; rape shields, by protecting sexual history, make coming forward easier. While this argument has some intuitive appeal, unfortunately, rape shields have not increased reporting. *See* Anderson, *supra* note 193, at 937. While it is true that some women may not want to discuss their sexual history, this does not seem to be the deciding factor in whether to report their victimization. At least so long as other barriers to reporting remain, the evidence suggests that the presence of rape shield laws will not be a deciding factor in whether rape victims report their victimization.

292. John Eligon, *Judge Denies Bail to I.M.F. Chief in Sexual Assault Case*, N.Y. TIMES, May 16, 2011, http://www.nytimes.com/2011/05/17/nyregion/imf-chief-is-held-without-bail.html.

It was not improbable because such rapes do not happen. Indeed, there is a long history of masters raping their servants, even temporary servants.[293] Rather, it was improbable because such rapes are rarely prosecuted.[294] Notwithstanding the fact that this too was a familiar rape script, such rapes were also nonrapes. The servant knew that if she complained she could be quietly dismissed with little or no recourse. She knew that in the battle of "she said, he said," her word was less likely to be credited than his. After all, he was a man of means with some position in society. He could have anyone. Why would he rape her? And she knew that if she complained, they would say it was money—she was just after money.

All these dynamics played out in the Dominique Strauss-Kahn case, and in August 2011, the district attorney for Manhattan did something that was similarly improbable (simply because in numbers it happens so rarely) and yet not unexpected: He dismissed the charges against Strauss-Kahn.[295] Of course, there were other dynamics at play. Strauss-Kahn, relying on his wealth, had assembled a team of high-powered lawyers and investigators.[296] The housekeeper admitted that she had made false statements to the district attorney's office, including the lie that she had been gang raped in her home country.[297] And she had suggested, in a conversation with a friend that happened to be recorded, that her claim against Strauss-Kahn would be resolved with money.[298] In short, as a rape claimant, she came with baggage. At the end, it mattered little that she had bruises on her body,[299] or that the results of the prompt medical examination provided unambiguous evidence of a sexual encounter,[300] or that there was evidence that Strauss-Kahn had engaged in similar conduct before.[301]

293. *See* BOURKE, *supra* note 2, at 130–56.
294. *Id.* at 389.
295. John Eligon, *Strauss-Kahn Drama Ends With Short Final Scene*, N.Y. TIMES, Aug. 23, 2011, http://www.nytimes.com/2011/08/24/nyregion/charges-against-strauss-kahn-dismissed.html.
296. John Eligon & Joseph Goldstein, *The Strauss-Kahn Case: Sizing Up a Legal Clash's Many Facets*, N.Y. TIMES, June 5, 2011, http://www.nytimes.com/2011/06/06/nyregion/the-strauss-kahn-case-sizing-up-a-legal-clashs-many-facets.html.
297. Jim Dwyer, *With False Tale About Gang Rape, Strauss-Kahn Case Crumbles*, N.Y. TIMES, Aug. 23, 2011, http://www.nytimes.com/2011/08/24/nyregion/housekeepers-false-tale-undid-strauss-kahn-case.html.
298. William K. Rashbaum et al., *Strauss-Kahn Case Is Said to Be Set for Dismissal*, N.Y. TIMES, Aug. 22, 2011, http://www.nytimes.com/2011/08/22/nyregion/strauss-kahn-prosecution-said-to-be-ending.html.
299. John Eligon, *Strauss-Kahn Is Released as Case Teeters*, N.Y. TIMES, July 1, 2011, http://www.nytimes.com/2011/07/02/nyregion/new-yorkers-and-french-await-latest-dominique-strauss-kahn-legal-turn.html.
300. *Id.*
301. Steven Erlanger, *Strauss-Kahn to Face New Sex Complaint in France*, N.Y. TIMES, July 4, 2011, http://www.nytimes.com/2011/07/05/world/europe/05france.html.

We will likely never know what happened between Strauss-Kahn and his accuser. She still maintains that she was raped.[302] And interestingly, the district attorney has never disagreed. Rather, the basis for dismissing was his belief that he could not prove beyond a reasonable doubt that she was raped.[303] And while I have no doubt that his conclusion was a rational one,[304] I also wonder if he reached his conclusion after realizing how difficult it would be to tell a stock story about the case that would resonate with jurors. While the government could invoke the master–servant rape script, such scripts rarely involve prosecution, let alone guilty verdicts. I wonder too if he worried about the efficacy of the rape shield. Because her prior false rape allegation did not involve sexual conduct, it would likely not be barred by New York's rape shield[305] and instead would be admissible as prior conduct probative of truthfulness or untruthfulness.[306]

But beyond that, what would the jurors think of her prior sexual history? Even with a rape shield, jurors would see a heavy-set black woman before them claiming that she was raped. Even with a rape shield, jurors might rely on default assumptions to assume that as a black woman, she was likely sexually active and less discriminating in her choice of partners. Because she was an immigrant, they might even assume that sex is more casual in her culture. Because she was heavy set and plain, they might assume that she would welcome Strauss-Kahn's advances. In any event, she certainly would not fit their

302. Eligon, *supra* note 295.

303. *See* William K. Rashbaum & John Eligon, *District Attorney Asks Judge to Drop Strauss-Kahn Case*, N.Y. TIMES, Aug. 22, 2011, http://www.nytimes.com/2011/08/23/nyregion/strauss-kahn-case-should-be-dropped-prosecutors-say.html.

304. On the one hand, Diallo's allegations were supported by DNA evidence, a medical examination, and her consistent statements to superiors at the hotel and to medical staff. These statements should have been admissible at trial under New York's analogues to Federal Rule of Evidence § 801(d)(1)(B), which permits prior consistent statements to rebut a claim of recent fabrication; Federal Rule of Evidence § 803(4), which permits statements made for the purpose of seeking medical treatment; and under New York's fresh complaint rule. *See* Dawn M. DuBois, Note, *A Matter of Time: Evidence of a Victim's Prompt Complaint in New York*, 53 BROOK. L. REV. 1087 (1988). On the other hand, and as noted above, Diallo had repeatedly lied to prosecutors about a prior gang rape and had made statements to a friend that could be used by the defense to argue that she had fabricated the incident to wrest money from Strauss-Kahn. She also made statements to the grand jury concerning her actions immediately after the alleged incident, which turned out to be false. Most damning, her lies to prosecutors had been convincing.

305. *See* N.Y. CRIM. PROC. LAW § 60.42 (McKinney 2004); People v. Hunter, 838 N.Y.S.2d 221, 223–24 (App. Div. 2007). A similar result would follow under Federal Rule of Evidence § 412. *See* FED. R. EVID. 412 & advisory committee's note to the 1994 amendment ("Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412.").

306. *Hunter*, 838 N.Y.S.2d at 224; *see also* Denise R. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus?*, 7 YALE J.L. & FEMINISM 243 (1995); *cf.* Redmond v. Kingston, 240 F.3d 590, 592 (7th Cir. 2001); State v. Smith, 743 So. 2d 199, 202–03 (La. 1999).

image of an ideal rape victim. She was not petite or feminine. She was not white. She did not look like a good girl.

Part of my solution to the problem of rape shield laws—my modest proposals of instructing jurors that all rape victims, whatever their sexual history, are entitled to the protection of the law, and of encouraging jurors to engage in cross-dressing exercises—mitigates this problem somewhat. But maybe the not-so-modest proposal I make about rethinking rape shield laws entirely is the real solution. I do not profess to have an answer. The goal of this Article has been to begin a conversation about rape shield laws, not to end one. What I do know is that rape shield laws are only part of the problem. Rape shield laws or not, decisionmakers who matter—police officers, prosecutors, jurors, judges, and even rapists and rape victims—have preconceptions about what constitutes real rape, what real rapists look like, and what real victims look like. Rape shield laws or not, decisionmakers still look at cases and wonder why the victim did not fight back more or why there was not more vaginal bruising if she did not want it. They will still look at cases and wonder why it does not fit their rape script. I have said that we cannot escape history. But neither can we escape our own expectations, including our expectations about what real rape looks like.

Perhaps the real task is not one of law or of gentle nudges[307] but of changing the culture. Whatever it is, we need to do something. This Article, hopefully, makes a start.

307. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).